

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to congressional review requirements in 5 U.S.C. 801-808.

List of Subjects in 21 CFR Part 524

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 524 is amended as follows:

PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 524 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 2. In § 524.1193, revise the section heading, and paragraphs (b) and (e)(2) to read as follows:

§ 524.1193 Ivermectin topical solution.

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(b) *Sponsors.* See Nos. 050604, 051311, 054925, 055529, 058829, 059130, and 066916 in § 510.600(c) of this chapter for use as in paragraph (e) of this section.

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(e) * * *

(2) *Indications for use in cattle.* For the treatment and control of: Gastrointestinal roundworms (adults and fourth-stage larvae) *Ostertagia ostertagi* (including inhibited stage), *Haemonchus placei*, *Trichostrongylus axei*, *T. colubriformis*, *Cooperia oncophora*, *C. punctata*, *C. surnabada*, *Oesophagostomum radiatum*; (adults) *Strongyloides papillosus*, *Trichuris* spp.; lungworms (adults and fourth-stage larvae) *Dictyocaulus viviparus*; cattle grubs (parasitic stages) *Hypoderma bovis*, *H. lineatum*; mites *Sarcoptes scabiei* var. *bovis*; lice *Linognathus vituli*, *Haematopinus eurysternus*, *Damalinea bovis*, *Solenoptes capillatus*; and horn flies *Haematobia irritans*. It controls infections and prevents reinfection with *O. radiatum* and *D. viviparus* for 28 days after treatment, *C. punctata* and *T. axei* for 21 days after treatment, *H. placei*, *C. oncophora*, and *C. surnabada* for 14 days after treatment, and *D. bovis* for 56 days after treatment.

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Dated: February 2, 2007.

Steven D. Vaughn,

Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 773

[FHWA Docket No. FHWA-05-22707]

RIN 2125-AF13

Surface Transportation Project Delivery Pilot Program

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) established a pilot program to allow the Secretary of Transportation to assign, and the State to assume, the Secretary's responsibilities under the National Environmental Policy Act (NEPA) for one or more highway projects. The Secretary may permit not more than five States (including the States of Alaska, California, Ohio, Oklahoma, and Texas) to participate in the program. Upon assigning NEPA responsibilities, the Secretary may further assign to the State all or part of the Secretary's responsibilities for environmental review, consultation or other action required under any Federal environmental law pertaining to the review of a specific project. In order to be selected for the pilot program a State must submit an application to the Secretary. Section 6005 requires the Secretary to promulgate rules that establish requirements relating to information required to be contained in an application by a State to participate in the pilot program. This final rule establishes these application requirements.

DATES: Effective March 14, 2007.

FOR FURTHER INFORMATION CONTACT: Ms. Ruth Rentch, Office of Project Development and Environmental Review, HEPE, 202-366-2034 or Mr. Michael Harkins, Office of the Chief Counsel, 202-366-4928, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

Internet users may access this document, the notice of proposed rulemaking (NPRM), and all comments received by the U.S. DOT by using the universal resource locator (URL) <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: <http://www.archives.gov> or the Government Printing Office's Web page at <http://www.gpoaccess.gov/nara>.

Background

Section 6005 of SAFETEA-LU (Pub. L. 109-59, 119 Stat. 1144), codified at 23 U.S.C. 327, established a pilot program that allows the Secretary of Transportation (Secretary) to assign up to five States, including Alaska, California, Oklahoma, Ohio, and Texas, the responsibilities of the Secretary for implementation of the National Environmental Policy Act (NEPA)(42 U.S.C. 4321-4347) for one or more highway projects. Upon assumption of NEPA responsibilities, a State may also be assigned all or part of the Secretary's responsibilities for environmental review, consultation or other action required under any Federal environmental law pertaining to the review or approval of highway projects. Whenever a State assumes the Secretary's responsibilities under this program, the State becomes solely responsible and solely liable for carrying out, in lieu of the Secretary, the responsibilities it has assumed, including coordination and resolution of issues with Federal environmental resource and regulatory agencies and responding to litigation. The Secretary's NEPA and other environmental responsibilities pertaining to the review and approval of highway projects, as well as the administration and implementation of this pilot program, has been delegated to the FHWA pursuant to 49 CFR 1.48.

In order to participate in this pilot program, a State must submit an application. Section 327(b)(2) of title 23, United States Code, requires the Secretary to promulgate regulations that establish requirements relating to the information that States must submit as part of their applications to participate in this pilot program. This final rule establishes these requirements.

Discussion of Comments Received to the Notice of Proposed Rulemaking (NPRM)

The FHWA published its NPRM on April 5, 2006, at 71 FR 17040. In response to the NPRM, the FHWA received 10 comments. The commenters include two Federal agencies, three State departments of transportation (State DOT), one public interest group, two associations, and a consolidated group of comments from each of the State DOTs designated by the statute as pilot program participants (Designated Pilot States). One State DOT, the Alaska Department of Transportation and Public Facilities (ADOT&PF), submitted two comments. The FHWA considered each of these comments in adopting this final rule.

The majority of the comments addressed several common issues. These issues are identified and addressed under the appropriate section below.

Section-by-Section Discussion of Changes

Section 773.103 Definitions

Federal Environmental Law

There were several comments on the definition of "Federal environmental law." First, the Designated Pilot States and the Texas Department of Transportation (TxDOT) commented that the regulation or the preamble should acknowledge that State DOTs already perform much of the work needed to comply with many environmental laws, and that the preamble should make clear that the key change under this pilot program is the transfer of specific decisionmaking and consulting responsibilities. The FHWA acknowledges that, pursuant to 23 CFR 771.109(c)(1), the State DOTs may currently prepare the environmental impact statement (EIS) and other environmental documents with the FHWA's guidance, participation, and independent evaluation of such documents. The FHWA further acknowledges that this pilot program will involve the transfer of decisionmaking and consulting responsibilities. As provided at 23 U.S.C. 327(e), upon assuming responsibility under this pilot program, the State shall be solely responsible and solely liable for carrying out such responsibilities until the pilot program is terminated.

Second, the Designated Pilot States commented that compliance with Executive Orders should be included in the regulation itself and not just in Appendix A. The FHWA agrees with

this comment and has revised the definition of "Federal environmental law" to include Executive Orders. It is important to note, however, that Executive Orders are intended only to improve the internal management and administration of the Executive Branch of the Federal Government and do not create any legally enforceable rights. Nothing in this rulemaking is intended to change the legal force and effect of any Federal statute, regulation, or Executive Order cited herein. As provided at 23 U.S.C. 327(a)(2)(C), a State DOT's assumption of any responsibility under this pilot program is subject to the same procedural and substantive requirements that apply to the Secretary.

Third, the American Road and Transportation Builders Association (ARTBA) commented that the State DOTs should be delegated the FHWA's responsibility for making transportation conformity determinations. However, 23 U.S.C. 327(a)(2)(B)(ii)(I) expressly prevents the FHWA from delegating these responsibilities. Thus, the FHWA declines to make this change.

Lastly, the Environmental Protection Agency (EPA) commented that the rule should provide clarification on how all environmental regulations will be followed if all of the FHWA's environmental responsibilities are not assumed by a State DOT. The FHWA is aware of the procedural difficulties that may be caused by only a partial assumption of the FHWA's environmental responsibilities. Should a State DOT wish to exclude some of the FHWA's environmental responsibilities under the pilot program, and if satisfactory alternate procedures cannot be developed in the formal Memorandum of Understanding (MOU), then the FHWA may either choose to not assign the responsibilities to the State DOT or withdraw the affected projects from the pilot program. Under any scenario, the FHWA believes that this issue is more appropriate for the formal Memorandum of Understanding (MOU) between the FHWA and the State DOT rather than this rule. The FHWA is committed to ensuring full compliance with all environmental regulations.

Highway Project

There were several comments on the definition of "highway project." First, the Designated Pilot States, TxDOT, ADOT&PF, ARTBA, and EPA all commented on the proposed exclusion of undertakings that are planned as multi-modal. Designated Pilot States, TxDOT, ADOT&PF, and ARTBA each commented that this exclusion is overly

broad. Designated Pilot States and TxDOT both commented that the exclusion would prevent the States from assuming highway projects that include common multi-modal elements such as express bus service, pedestrian and bicycle paths, and park-and-ride lots. Designated Pilot States and TxDOT both commented that excluding projects that are funded under chapter 53 of title 49, United States Code, or that require the approval of the Federal Transit Administration (FTA) is sufficient to prevent the program from applying to projects that do not fit within the common meaning of the term "highway project." The ADOT&PF wants to ensure that the definition does not exclude projects on the Alaska Marine Highway System, which occasionally involve funds from both FHWA and FTA. The EPA was concerned that the exclusion of multi-modal projects would limit the range of reasonable alternatives that may be considered for a project.

The FHWA agrees with each of the comments made by Designated Pilot States, TxDOT, ARTBA, and EPA and has revised the definition of "highway project" to remove the exclusion of multi-modal projects. The intent behind the proposed exclusion of multi-modal projects from the definition of highway project was not to be overly restrictive in the types of projects that States may assume, but rather to ensure that only actual highway projects are assumed. Also, the FHWA included express language at the end of the definition to further clarify that a State may include and consider alternatives that are excluded from this definition in the range of reasonable alternatives for a highway project.

However, with respect to the comment from ADOT&PF, the FHWA does not believe that it is appropriate to include projects that are funded under chapter 53 of title 49, United States Code. Projects funded under chapter 53 of title 49, United States Code, are transit projects that are administered and approved by the FTA. While no changes have been made concerning the source of funding under chapter 53 of title 49, United States Code, the FHWA notes that section 1108 of SAFETEA-LU provides flexibility to the States to transfer any funds made available for highway projects under chapter 53 of title 49, United States Code, to title 23, United States Code. Once transferred, these projects would no longer be excluded. Moreover, improvements to ferry boats and terminal facilities are eligible for assistance under title 23, United States Code. Thus, the FHWA believes it is appropriate for improvements to ferry terminal facilities

to be considered highway projects under the definition of this rule.

Second, the Designated Pilot States, ARTBA, California Department of Transportation (Caltrans), EPA, and Save Our Springs Alliance (SOS) all commented on the proposed exclusion of projects for which a draft environmental impact statement (DEIS) has already been issued by FHWA. The EPA and SOS were supportive of this exclusion in order to minimize changes of authority in the middle of project development. The Designated Pilot States, ARTBA, and Caltrans were opposed to this exclusion. Designated Pilot States stated that, given the short term of the pilot program, which is only six years after the date of enactment of SAFETEA-LU (August 10, 2005), it may not be possible for the State DOTs to carry-out many projects requiring an EIS all the way through the NEPA process.

After considering these comments, the FHWA has decided to remove this exclusion from the definition of "highway project." The pilot program is only authorized for six years from the date of enactment of SAFETEA-LU. One year has already elapsed in developing these regulations and more time must still be spent in developing the application, giving public notice, considering the application, consulting with affected Federal agencies, and executing a memorandum of understanding. More time is also needed by States for obtaining legislative authority to consent to exclusive Federal court jurisdiction with respect to the responsibilities to be assumed. The FHWA's concern regarding the public frustration over changing the entity responsible for completing the EIS in the middle of a project will be minimized through the public notice requirement for the State DOTs' applications. To ensure that the public is given adequate notice of all projects for which a DEIS has already been issued, the FHWA has added a requirement at section 773.106(b)(1) to require each State DOT to specifically identify each project for which a DEIS has already been issued in its application. Additionally, the FHWA is also concerned about how to measure the State DOTs' success under the pilot program whenever a substantial amount of FHWA involvement has already occurred. Thus, in order to ensure that this pilot program allows for the greatest flexibility in the delegation of projects, the FHWA has eliminated this exclusion. While the FHWA does not believe that there is any specific threshold that is appropriate for this regulation, the decision about whether any project may be assumed is

discretionary and will be made by the FHWA on a case-by-case basis.

Third, the Designated Pilot States, Caltrans, and EPA all commented on the proposed exclusion of projects listed on Executive Order (E.O.) 13274. The Designated Pilot States and Caltrans both urged the FHWA not to adopt an across-the-board rule excluding all E.O. 13274 projects, but to use discretion in determining which projects may be assumed on a case-by-case basis. The EPA asked the FHWA to clarify whether this exclusion applies only to E.O. 13274's priority list or to both the priority list and the transition list. After considering these comments, the FHWA has decided not to eliminate this exclusion. The projects designated under E.O. 13274 are high priority projects that have been designated by the Secretary as having national or regional significance. Moreover, the E.O. 13274 process itself involves high-level involvement of DOT and other Federal departments and agencies, which must collaborate and work together to expedite the environmental review of these projects. As a result, these projects require direct DOT involvement to not only ensure that special attention is given to these projects throughout the Federal Government, but also because these interactions require policy-making authority. With respect to EPA's comment concerning the scope of this exclusion, it is the FHWA's intent to exclude projects on both the priority list and the transition list. However, we do not believe that an amendment to the regulations is necessary to clarify this point.

Fourth, the Designated Pilot States and ADOT&PF commented on the proposed exclusion of Federal lands highway projects. The Designated Pilot States urge the FHWA to reassess this exclusion in light of ADOT&PF's comments on this issue and state that the exclusion, if any, should only apply to projects funded with funds under the Federal Lands Highway Program. The ADOT&PF states that this exclusion should be modified because it designs and constructs projects across Federal lands funded under the Federal Lands Highway Program. The FHWA agrees with these comments and has modified the exclusion to permit the State DOTs to assume environmental responsibilities for Federal lands projects that are funded under the Federal Lands Highway Program and both designed and constructed by the State.

Fifth, the EPA commented on the FHWA's intent to allow States to assume reevaluations. The EPA is concerned about the effects of changes

of authority in the mid-course of project development. The FHWA does not believe that the issue of mid-course changes of authority in project development is significant in the context of a reevaluation. Reevaluations are separate and independent determinations concerning whether a specific NEPA determination is still valid. Unlike the issue concerning a DEIS, the State DOT will conduct a reevaluation from the beginning of this process. Additionally, due to the limited duration of this pilot program, the State DOTs' assumption of reevaluations will provide some data on the State DOTs' ability to assume the FHWA's environmental responsibilities.

Lastly, the EPA asked the FHWA to clarify whether a State can assume a Tier 2 project for which a Tier 1 determination has already been made. It is the FHWA's intent to allow States to assume Tier 2 projects for which a Tier 1 determination has already been made. However, we do not believe that an amendment to the regulations is necessary for this clarification.

Section 773.105 Statements of Interest

The American Association of State Highway and Transportation Officials (AASHTO) commented on the importance of ensuring that all five openings in the pilot program be filled. AASHTO suggested including a provision in the regulations that requires each designated pilot State (Alaska, California, Ohio, Oklahoma, and Texas) to submit a statement of interest within 60 days of the issuance of the final rule. The statement of interest would hold the designated pilot State's place in the program while that State develops its application. If the State declines to submit a statement of interest, then other States would have an opportunity to participate in the program. The FHWA agrees with this comment and has inserted a requirement at section 773.105 to require that each designated pilot State submit a statement of interest within 60 days after the effective date of these regulations. The FHWA has also inserted a requirement that each State actively work to develop and submit its application and meet all applicable program criteria, including the enactment of necessary State legal authority after a statement of interest is submitted. The FHWA further notes that, while SAFETEA-LU requires the FHWA to give priority to Alaska, California, Ohio, Oklahoma, and Texas, any State may submit an application to the FHWA at any time to participate in this pilot program. Should any of these five designated States decide not to

participate or fail to meet the eligibility criteria, the FHWA will consider another State's application.

Section 773.106 Application Requirements for Participation in the Program

There were several comments on the proposed application requirements. First, Designated Pilot States and TxDOT commented on the manner in which classes of projects must be identified in the application. Designated Pilot States and TxDOT felt that there was an inconsistency between the proposed regulations and the preamble of the NPRM, which implied that the State DOTs must individually identify each project in its application. In drafting the preamble to the NPRM, the FHWA did not intend to adopt this narrow approach. Rather, the FHWA intended for a flexible approach to identifying the classes of projects. State DOTs applying to this pilot program may choose to either identify individual projects or identify a class of projects by using a qualitative description of the projects. With the exception of specifically identifying each project for which a DEIS has already been issued, as discussed above, there are no limits intended to be placed on how the States identify the projects other than a requirement to identify the projects in sufficient terms so as to enable the FHWA, other agencies, and the public to reasonably know what projects the State DOT is intending to assume.

Second, TxDOT, ADOT&PF, Designated Pilot States, and SOS all commented on the requirement for the State DOT to include a philosophical/policy statement of the State DOT's goals and guiding principles in making environmental decisions. TxDOT commented that it is unclear what would constitute an appropriate philosophical/policy statement and how the statement would be evaluated by the FHWA in considering the application. ADOT&PF commented that the purpose of the philosophical/policy statement is unclear and it should be sufficient for the State DOTs to simply follow the policies and procedural requirements applicable to the FHWA. Designated Pilot States commented that the statement itself could be viewed as a regulatory requirement and that the State DOTs should simply be required to comply with the procedural and substantive requirements applicable to the FHWA. SOS commented that the philosophical/policy statement is meaningless unless it is made binding and enforceable.

Since there appears to be substantial confusion over the purpose and utility

of the philosophical/policy statement, the FHWA has eliminated this requirement. The purpose of the philosophical/policy statement was not to create a binding, enforceable standard against which the State DOTs' environmental decisions would be judged. Rather, the FHWA was looking for a statement of the State DOTs' commitment to good environmental stewardship, legal compliance, public involvement, and cooperation and consultation with Federal agencies, State and local officials, and Indian tribes. Even though this requirement has been eliminated, the FHWA notes that 23 U.S.C. 327(a)(2)(C) provides that the States participating in the pilot program are subject to the same procedural and substantive requirements as the FHWA under this pilot program, which includes the policies contained in 42 U.S.C. 4331 and 23 CFR 771.105.

Third, ADOT&PF commented that the purpose behind the requirement to identify existing environmental and managerial expertise is unclear and should be revised to only require the State DOTs to identify the staff, management, and procedures that will be used to administer the responsibilities the State DOT assumes. The FHWA agrees with this comment and has eliminated this requirement. Even without this requirement, the regulations require sufficient information be submitted concerning the State DOT's personnel to be used in administering the FHWA's environmental responsibilities. However, in order to ensure that the State DOT identifies the relevant management, the FHWA amended section 773.106(b)(4)(i) to require the State DOT to describe the management positions in addition to the staff positions.

Fourth, ADOT&PF commented on the requirement for the State DOTs to describe how they will identify and address the projects that would normally require FHWA headquarters prior concurrence under 23 CFR 771.125(c). Specifically, ADOT&PF commented that the final rule should waive the applicability of 23 CFR 771.125(c) to the State DOTs participating in this pilot program. The FHWA disagrees with this comment. While this requirement is an internal FHWA processing requirement, the FHWA feels that it is important for the State DOTs to develop processes that would centralize their decisionmaking processes for the types of projects listed at 23 CFR 771.125(c).

Fifth, Designated Pilot States, TxDOT, and EPA all commented on the budget requirements that the State DOTs must

submit as part of their applications. Designated Pilot States commented that it is virtually impossible to develop a meaningful litigation budget because these costs are highly unpredictable and that the State DOTs should simply be required to demonstrate that funding would be reasonably available. TxDOT commented that it was concerned about providing a budget for things that may or may not happen, such as litigation costs, and that the State DOT should be required only to demonstrate that funding is reasonably available. TxDOT further commented that it considered it to be sufficient to simply state in its application that TxDOT has a \$2.6 billion construction letting budget and a total agency disbursements of \$7.5 billion. EPA commented that it would be very difficult for a State DOT to show that it has all the financing for a project in place before the project is undertaken. EPA stated that the State DOTs should be given the flexibility to provide satisfactory evidence that financing will be made available.

The FHWA agrees with these comments and has revised section 773.106(b)(5) to require the State DOTs to submit a summary of financial resources, as opposed to a budget, showing the anticipated financial resources that will be available to carry out the responsibilities and projects assumed under this pilot program. The FHWA recognizes that some costs may be difficult to ascertain and that the State DOTs' funding is contingent on its appropriations processes. Thus, a summary of financial resources that identifies anticipated financial resources and the expected allocation of those resources, as opposed to a budget, will be sufficient. However, while the FHWA does not intend to require a budget of future financial resource, the FHWA notes that the State DOTs must be able to show that they expect to be able to meet the extra needs identified in sections 773.106(b)(3) and (4). The FHWA does not believe that the broad, general assertion by TxDOT stating that the State DOT has a \$2.6 billion construction letting budget and a total agency disbursements of \$7.5 billion will be sufficient verification of financial resources. Instead, the State DOT must reasonably show how much financial resources are expected to be allocated to carrying out the environmental responsibilities it has assumed.

Sixth, SOS commented on the certification required to be made by the State Attorney General or other State official legally empowered by State law. SOS commented that the certification should be only from the Attorney

General and not some other State official because it is unclear who might actually be legally empowered to make these certifications. The FHWA shares this concern. Only a State official that has authority to consent to Federal court jurisdiction and has the ability to make legal conclusions should make this certification. However, since each State has its own unique laws and departmental structures, the FHWA believes that it is appropriate to leave some flexibility in the regulation as to which official would actually make this certification. In most cases, the State's Attorney General would most likely be the appropriate State official. In other cases, the most appropriate State official could be the chief legal official of the State DOT. Whenever an official other than the State's Attorney General makes these required certifications, the State DOT must show the FHWA that the official is legally empowered under State law to make the certification.

Seventh, Designated Pilot States and TxDOT commented on the public review and comment requirements. Designated Pilot States and TxDOT were concerned that section 773.106(b)(8) could be construed to require a State DOT to publish the entire application in every newspaper in the State. Designated Pilot States and TxDOT state that the size of the application will make this requirement impracticable and wasteful. In developing the NPRM, the FHWA did not intend to prescribe the manner in which the State DOTs publish their applications for public comment. Rather, the FHWA intended for the publication requirement to be determined in accordance with State law, as provided at 23 U.S.C. 327(b)(3). Moreover, the FHWA believes that the intent of the publication requirement of 23 U.S.C. 327(b)(3) is simply to notify the public that the complete application is reasonably available for public review and inspection. Additionally, the access to the complete application provided to the public must enable them to timely review and comment on the application. Thus, the requirements of 23 U.S.C. 327(b)(3) are met if it is sufficient under State law to provide notice and solicit public comment on a document by publishing a notice of the document's availability. The FHWA has added clarifying language in section 773.106(b)(8) to this effect.

Lastly, ACHP and SOS both commented on the public review and comment requirements. ACHP commented that the State DOTs should be required to provide evidence that they have notified and provided an opportunity to comment to Indian tribes and State Historic Preservation Officers

(SHPO). The FHWA agrees that the State DOTs should ensure that Indian tribes, SHPOs, and other stakeholders are provided notice and an opportunity to comment on their applications. Moreover, the State DOTs should be mindful that their applications will not only be reviewed by the FHWA, but also other affected Federal agencies, including the ACHP, before their applications are approved. Evidence of adequate public notice and a meaningful opportunity to submit comments will be considered in approving any application. However, the FHWA does not believe that an amendment to the regulations is necessary to ensure that any specific group or stakeholder receives notice and is provided an opportunity to comment.

Also, SOS commented that they have little confidence in the requirement to seek public comment solely in accordance with the public notice law of the State, and that the regulations should be amended to require public outreach and education. However, 23 U.S.C. 327(b)(3) provides that the public notice requirement be determined under the appropriate public notice law of the State. Thus, the method of public notice and solicitation of comments is to be determined by the State DOTs following State law.

Section 773.108 Application Amendments

The ACHP, similar to its comments on the public notice and comment process, commented that the State DOT should be required to notify affected Indian tribes and SHPOs of its intent to amend its application. As stated above in response to the ACHP's comments on the public notice and comment process, the FHWA agrees that the State DOTs should ensure that Indian tribes, SHPOs, and other stakeholders are provided notice and an opportunity to comment on amendments to their applications involving requests for additional projects or responsibilities. However, the FHWA does not believe that an amendment to the regulations is necessary to ensure that any specific group or stakeholder receives notice and is provided an opportunity to comment.

Also, the FHWA amended section 773.108 to clarify that the State DOT does not need to provide notice and solicit public comments for amendment not involving requests to assume additional highway projects, classes of highway projects, or more environmental responsibilities.

Appendix A

There were several comments on Appendix A. First, ADOT&PF, ACHP,

Designated Pilot States, and TxDOT commented on the government-to-government tribal consultation responsibilities. ADOT&PF commented that the FHWA should reevaluate its proposal in the NPRM to exclude government-to-government consultations with the Indian tribes. The ACHP commented that it agreed that government-to-government tribal consultation responsibilities should only be administered by the State DOT if the Tribe consents through a formally signed consultation agreement. The Designated Pilot States commented that they were concerned that each State DOT would be required to negotiate agreements with dozens or hundreds of separate Indian tribes simply to permit a State DOT to continue its current practice of handling consultation with tribes except in cases where a tribe requests direct FHWA involvement. TxDOT commented that it is appropriate for FHWA to be involved when a tribe requests FHWA involvement.

While the statute does not specifically prohibit the FHWA from assigning its government-to-government consultation responsibilities, the FHWA does not believe that the agency can, or should try to, require a sovereign Indian tribe to consult with the State DOT without a clear Congressional mandate to do so. Additionally, the FHWA is aware that requiring the State DOT to negotiate individual agreements with every Indian tribe could be time consuming and very burdensome administratively. Since the FHWA is not assigning any government-to-government consultation activities, there should be no change in the existing relationships between the State DOTs and the Indian tribes. Thus, the FHWA is deleting this requirement from Appendix A. However, the FHWA notes that some State DOTs currently have executed agreements with the Indian tribes within their borders to coordinate and resolve issues relating to highway projects as part of the FHWA's tribal consultation process. These agreements have generally worked well and the State DOTs are encouraged to follow this practice under this pilot program.

Second, Designated Pilot States and TxDOT commented that the regulation should clarify that, with regard to the laws listed in Appendix A, the FHWA would be assigning only those responsibilities that are carried out as part of the NEPA analysis. TxDOT specifically commented that E.O. 13287 and E.O. 11514 should be deleted from Appendix A because they do not require any consideration in the NEPA process. The FHWA has decided to remove

E.O.'s 11514, 11593, 13007, 13175, and 13287, and 23 U.S.C. 319 to indicate that the FHWA would retain responsibility for implementation of these laws either because they apply only to properties owned and managed by the Federal Government, involve policy decisions, or do not otherwise appear to require the FHWA to undertake any environmental review, consultation, or other action pertaining to the review or approval of highway projects. Also, the FHWA has modified the reference to the Rivers and Harbors Act of 1899 in Appendix A to include only section 10 because the other sections of the Act do not appear to be inherently environmental.

The FHWA notes that the mere inclusion of a law on the list in Appendix A does not mean that the law will be automatically assigned. The laws that are assigned will only be those laws approved by the FHWA and specifically reflected in the MOU between the FHWA and the State DOT. Moreover, the list in Appendix A is not meant to be an exhaustive list, but rather a list of laws the FHWA has predetermined to be inherently environmental. The FHWA further notes that the State DOTs participating in the pilot program must comply with the substantive requirements of all applicable laws regardless of these laws' inclusion or exclusion in an application or MOU.

Other

The EPA commented that the rulemaking should clarify that the review and coordination responsibilities assumed by the State DOTs will not affect or diminish their obligations to other Federal agencies. The EPA also commented that the States should be required to acknowledge their commitment to cooperate with other Federal agencies. While we do not agree that it is necessary to add a regulation to this effect, we agree with the EPA's comment that the State DOTs must cooperate with other Federal agencies in administering the FHWA's responsibilities under this program. These obligations will be made part of the formal MOUs between the FHWA and the State DOTs. In developing their applications, the State DOTs should be mindful that the FHWA is required to consult with other Federal agencies before approving their applications. Demonstrating their commitment to cooperate with other Federal agencies in their applications may help expedite the approval of their applications.

Finally, Designated Pilot States and TxDOT commented that the FHWA should use an acronym other than "STD" whenever referring to a State

transportation department. The FHWA used the acronym "STD" since 23 U.S.C. 101(a)(34) uses the words "State transportation department" in referring to the State department charged with the responsibility for highway construction. However, the FHWA agrees that the term "State DOT" in an acceptable replacement for the previously used acronym and accordingly, the FHWA has accepted this comment.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action would be a significant rulemaking action within the meaning of Executive Order 12866 and would be significant within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. This rulemaking proposes application requirements for the Surface Transportation Project Delivery Program as mandated in section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59; 119 Stat. 1144; 23 U.S.C. 327).

This action is considered significant because of the substantial public interest in environmental concerns associated with highway projects. The program to which this proposed application corresponds allows States to assume the Secretary of Transportation's responsibilities under the National Environmental Policy Act of 1969, and for environmental reviews, consultations, and compliance with other Federal environmental laws. This action involves important DOT policy in that it allows participating States to assume limited DOT responsibilities.

These changes are not anticipated to adversely affect, in a material way, any sector of the economy. This rulemaking sets forth application requirements for the Surface Transportation Project Delivery Pilot Program, which will result in only minimal costs to program applicants. In addition, these changes do not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612) we have evaluated the effects of this proposed action on small entities and have determined that this action

would not have a significant economic impact on a substantial number of small entities.

This rule addresses application requirements for States wishing to participate in the Surface Transportation Project Delivery Program. As such, it affects only States and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, the Regulatory Flexibility Act does not apply, and the FHWA certifies that this action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$128.1 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector. Additionally, the definition of "Federal Mandate" in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has determined that this action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on

Federal programs and activities apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this action does not contain collection of information requirements for the purposes of the PRA. The FHWA does not anticipate receiving applications from ten or more States because participation in the Surface Transportation Project Delivery Pilot Program has been limited to five, expressly named States in 23 U.S.C. 327.

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) and has determined that the establishment of the application requirements for participation in the Surface Transportation Project Delivery Pilot Program, as required by Congress in 23 U.S.C. 327(b)(2) and the subsequent delegation of responsibilities, would not have any effect on the quality of the environment. Section 327 expressly provides that a State's assumption of the Secretary's responsibilities under this program shall be "subject to the same procedural and substantive requirements as would apply if that responsibility were carried out by the Secretary." 23 U.S.C. 327(a)(2)(C). In addition, this State assumption of responsibility does not preempt or interfere "with any power, jurisdiction, responsibility, or authority of an agency, other than the Department of Transportation, under applicable law (including regulations) with respect to a project." 23 U.S.C. 327(a)(2)(E). Finally, the Secretary is authorized to terminate the participation of any State in this program if the Secretary determines "that the State is not adequately carrying out the responsibilities assigned to the State." 23 U.S.C. 327(i)(2)(A).

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this rule under Executive Order 12630, Governmental Actions and Interface with Constitutionally Protected Property Rights. The FHWA does not believe that this action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this action would not cause any environmental risk to health or safety that might disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that this action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. The proposed rulemaking addresses application requirements for the Surface Transportation Project Delivery Program and would not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use dated May 18, 2001. We have determined that it is not a significant energy action under that order since it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 773

Environmental protection, Highway project, Highways and roads.

Issued on: February 6, 2007.

J. Richard Capka,

Federal Highway Administrator.

■ In consideration of the foregoing, the FHWA adds a new part 773 to title 23, Code of Federal Regulations to read as follows:

PART 773—SURFACE TRANSPORTATION PROJECT DELIVERY PILOT PROGRAM

Sec.

773.101 Purpose.

773.102 Applicability.

773.103 Definitions.

773.104 Eligibility.

773.105 Statements of Interest.

773.106 Application requirements for participation in the program.

773.107 Application approval.

773.108 Application amendments.

Appendix A to Part 773: FHWA Environmental Responsibilities that may be Assigned Under Section 6005.

Authority: 23 U.S.C. 315 and 327; 49 CFR 1.48.

§ 773.101 Purpose.

The purpose of this part is to establish the requirements, as directed by 23 U.S.C. 327(b)(2), relating to the information which must be contained in an application by a State to participate in the program allowing the Secretary to assign, and a State Department of Transportation (State DOT) to assume, responsibilities for compliance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4347) and other Federal environmental laws pertaining to the review or approval of a highway project(s).

§ 773.102 Applicability.

This part applies to any State DOT eligible under the provisions of 23 U.S.C. 327 that submits an application for participation in the program.

§ 773.103 Definitions.

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this part. As used in this part:

Classes of highway projects means either a defined group of highway projects or all highway projects to which Federal environmental laws apply.

Federal environmental law means any Federal law or Executive Order (EO) under which the Secretary of the United States Department of Transportation has responsibilities for environmental review, consultation, or other action with respect to the review or approval of highway projects. A list of the Federal environmental laws for which a State

DOT may assume the responsibilities of the Secretary under this pilot program include, but are not limited to, the list of laws contained in Appendix A to this Part. But, under 23 U.S.C. 327(a)(2)(B), the Secretary's responsibility for conformity determinations required under section 176 of the Clean Air Act (42 U.S.C. 7506) and the responsibility imposed on the Secretary under 23 U.S.C. 134 and 135 are not included in the program. Also, Federal environmental law includes only laws that are inherently environmental and does not include responsibilities such as Interstate access approvals (23 U.S.C. 111).

Highway project means any undertaking to construct (including initial construction, reconstruction, replacement, rehabilitation, restoration, or other improvements) a highway, bridge, or tunnel, or any portion thereof, including environmental mitigation activities, which is eligible for assistance under title 23 of the United States Code. A highway project may include an undertaking that involves a series of contracts or phases, such as a corridor, and also may include anything that may be constructed in connection with a highway, bridge, or tunnel. However, the term highway project does not include any of the priority projects designated under Executive Order 13274; does not include any Federal Lands Highway project unless such project is to be designed and constructed by the State DOT; and does not include projects that are funded under chapter 53 of title 49, United States Code. Nothing in this part is intended to limit the consideration of any alternative in conducting an environmental analysis under any Federal environmental law, even if the particular alternative would provide for a project that is excluded under this section and may consider and include that alternative within the range of alternatives for a highway project.

Program means the "Surface Transportation Project Delivery Program" established under 23 U.S.C. 327, which allows up to five State DOTs to assume all or part of the responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of one or more highway projects.

§ 773.104 Eligibility.

- (a) Only a State DOT of a State is eligible to participate in the program.
- (b) The program is limited to a maximum five State DOTs, including the State DOTs of Alaska, California,

Ohio, Oklahoma and Texas as the five participant States. Should any of these five State DOTs choose not to apply, have its participation terminated, or withdraw from the pilot program, another State DOT may be selected.

§ 773.105 Statements of Interest.

(a) The State DOTs of Alaska, California, Ohio, Oklahoma and Texas are given priority for participation in the program.

(b) Within sixty days of March 14, 2007, the State DOTs of Alaska, California, Ohio, Oklahoma and Texas shall submit a statement of interest to participate in the program. The statement of interest shall declare that the State DOT intends to submit an application to participate in the pilot program.

(c) Should any of the State DOTs of Alaska, California, Ohio, Oklahoma and Texas fail to submit a statement of interest by May 14, 2007 or decline participation in the pilot program, such State DOT shall no longer be given priority consideration for selection in the program and its application will be selected in competition with other State DOTs.

(d) Should any of the State DOTs of Alaska, California, Ohio, Oklahoma and Texas submit a statement of interest declaring their intent to participate in the program, the State shall actively work to develop and submit its application and meet all applicable program criteria (including the enactment of necessary State legal authority).

§ 773.106 Application requirements for participation in the program.

(a) Each State DOT wishing to participate in the program must submit an application to the FHWA.

(b) Each application submitted to the FHWA must contain the following information:

(1) The highway project(s) or classes of highway projects for which the State is requesting to assume FHWA's responsibilities under NEPA. The State DOT must specifically identify, in its application, each project for which a draft environmental impact statement has been issued prior to the submission of its application to the FHWA;

(2) The specific responsibilities for the environmental review, consultation, or other action required under other Federal environmental laws, if any, pertaining to the review or approval of a highway project, or classes of highway projects, that the State DOT wishes to assume under this program. The State DOT must also indicate whether it

proposes to phase-in the assumption of these responsibilities;

(3) For each responsibility requested in paragraphs (b)(1) and (b)(2) of this section, the State DOT shall submit a description in the application detailing how it intends to carry out these responsibilities. The description shall include:

(i) A summary of State procedures currently in place to guide the development of documents, analyses and consultations required to fulfill the environmental responsibilities requested. The actual procedures should be submitted with the application, or if available electronically, the Web link must be provided;

(ii) Any changes that have been or will be made in the management of the environmental program to provide the additional staff and training necessary for quality control and assurance, appropriate levels of analysis, adequate expertise in areas where responsibilities have been requested, and expertise in management of the NEPA process;

(iii) A discussion of how the State DOT will verify legal sufficiency for the environmental document it produces; and

(iv) A discussion of how the State DOT will identify and address those projects that would normally require FHWA headquarters prior concurrence of the FEIS under 23 CFR 771.125(c).

(4) A verification of the personnel necessary to carry out the authority that may be granted under the program. The verification shall contain the following information:

(i) A description of the staff positions, including management, that will be dedicated to providing the additional functions needed to accept the delegated responsibilities;

(ii) A description of any changes to the State DOT's organizational structure that are deemed necessary to provide for efficient administration of the responsibilities assumed; and

(iii) A discussion of personnel needs that may be met by the State DOTs use of outside consultants, including legal counsel provided by the State Attorney General or private counsel;

(5) A summary of financial resources showing the anticipated financial resources available to meet the activities and staffing needs identified in (b)(3) and (b)(4) of this part, and a commitment to make adequate financial resources available to meet these needs;

(6) Certification and explanation by State's Attorney General, or other State official legally empowered by State law, that the State DOT can and will assume the responsibilities of the Secretary for the Federal environmental laws and

projects requested and that the State DOT will consent to exclusive Federal court jurisdiction with respect to the responsibilities being assumed. Such consent must be broad enough to include future changes in relevant Federal policies and procedures to which FHWA would be subject or such consent would be amended to include such future changes;

(7) Certification by the State's Attorney General, or other State official legally empowered by State law, that the State has laws that are comparable to the Federal Freedom of Information Act (5 U.S.C. 552), including laws that allow for any decision regarding the public availability of a document under those laws to be reviewed by a court of competent jurisdiction; and

(8) Evidence that the required notice and solicitation of public comment by the State DOT relating to participation in the program has taken place. Requirements for notice and solicitation of public comments are as follows:

(i) not later than 30 days prior to submitting its application, a State must give notice that the State intends to participate in the program and solicit public comment by publishing the complete application of the State in accordance with the appropriate public notice law of the State. If allowed under State law, publishing a notice of availability of the application rather than the application itself may satisfy the requirements of this subparagraph so long as the complete application is made reasonably available to the public for inspection and copying, and

(ii) copies of all comments received shall be submitted with the application. The State should summarize the comments received, and note changes, if any, that were made in the application in response to public comments.

(c) The application shall be signed by the Governor or the head of the State agency having primary jurisdiction over highway matters. The application must also identify a point of contact for questions regarding the application. Applications may be submitted in electronic format.

§ 773.107 Application approval.

If a State DOT's application is approved, then the State DOT will be invited to enter into a written Memorandum of Understanding (MOU) with the FHWA, as provided in 23 U.S.C. 327. None of FHWA's responsibilities under NEPA or other environmental laws may be assumed by the State DOT prior to execution of the MOU.

§ 773.108 Application amendments.

(a) After a State DOT submits its application to the FHWA, but prior to the execution of a MOU, the State DOT may amend its application at any time to request additional highway projects, classes of highway projects, or more environmental responsibilities. However, prior to making any such amendments, the State DOT must provide notice and solicit public comments with respect to the intended amendments. In submitting the amendment to the FHWA, the State DOT must provide copies of all comments received and note the changes, if any, that were made in response to the comments.

(b) A State DOT may amend its application no earlier than one year after a MOU has been executed to request additional highway projects, classes of highway projects, or more environmental responsibilities. However, prior to making any such amendments, the State DOT must provide notice and solicit public comments with respect to the intended amendments. In submitting the amendment to the FHWA, the State DOT must provide copies of all comments received and note the changes, if any, that were made in response to the comments.

Appendix A to Part 773

FHWA Environmental Responsibilities that may be assigned under section 6005

Federal Procedures

National Environmental Policy Act (NEPA), 42 U.S.C. 4321–43351.
FHWA Environmental Regulations at 23 CFR Part 771, 772 and 777
CEQ Regulations at 40 CFR 1500–1508
Clean Air Act, 42 U.S.C. 7401–7671(q). *Any determinations that do not involve conformity.*

Noise

Compliance with the noise regulations at 23 CFR part 772

Wildlife

Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531–1544, and Section 1536
Marine Mammal Protection Act, 16 U.S.C. 1361
Anadromous Fish Conservation Act, 16 U.S.C. 757(a)–757(g)
Fish and Wildlife Coordination Act, 16 U.S.C. 661–667(d)
Migratory Bird Treaty Act, 16 U.S.C. 703–712
Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801 *et seq.*

Historic and Cultural Resources

Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470(f) *et seq.*

Archeological Resources Protection Act of 1977, 16 U.S.C. 470(aa)–11
Archeological and Historic Preservation Act, 16 U.S.C. 469–469(c)
Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001–3013

Social and Economic Impacts

American Indian Religious Freedom Act, 42 U.S.C. 1996
Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201–4209

Water Resources and Wetlands

Clean Water Act, 33 U.S.C. 1251–1377
Section 404
Section 401
Section 319
Coastal Barrier Resources Act, 16 U.S.C. 3501–3510
Coastal Zone Management Act, 16 U.S.C. 1451–1465
Safe Drinking Water Act (SDWA), 42 U.S.C. 300(f)–300(j)(6)
Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403
Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287
Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931
TEA–21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(11)
Flood Disaster Protection Act, 42 U.S.C. 4001–4128

Parklands

Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303
Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601–4604

Hazardous Materials

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675
Superfund Amendments and Reauthorization Act of 1986 (SARA)
Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992(k)

Executive Orders Relating to Highway Projects

E.O. 11990 Protection of Wetlands
E.O. 11988 Floodplain Management
E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
E.O. 13112 Invasive Species
[FR Doc. E7–2375 Filed 2–9–07; 8:45 am]

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