

Dated: October 16, 2008.

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[FR Doc. E8-25471 Filed 10-23-08; 8:45 am]

BILLING CODE 4160-01-S

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### 23 CFR Part 505

[Docket No. FHWA-05-23393]

RIN 2125-AF08

#### Projects of National and Regional Significance Evaluation and Rating

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Final rule.

**SUMMARY:** Section 1301 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59; 119 Stat. 1144) established a program to provide grants to States for Projects of National and Regional Significance (PNRS) to improve the safe, secure, and efficient movement of people and goods throughout the United States and to improve the health and welfare of the national economy. Section 1301 requires the Secretary of Transportation (Secretary) to establish regulations on the manner in which the proposed projects will be evaluated and rated, in order to determine which projects shall receive grant funding. This rule establishes the required evaluation and rating guidelines for proposed projects. Under this rule, a proposed project would be eligible for funding under the PNRS Program (Program) only if the Secretary finds that the project meets the eligibility requirements of the rule. The Secretary will then evaluate and rate each project as "highly recommended," "recommended," or "not recommended" based on the results of preliminary engineering, the project justification criteria, and the degree of non-Federal financial commitment.

All funds authorized by section 1101(a)(15) of SAFETEA-LU for the Program are fully designated to the 25 projects listed in section 1301(m) of SAFETEA-LU. For the duration of SAFETEA-LU there are no additional funds available for distribution beyond those already designated, and there are no assurances that any additional funds will become available. Funding in future highway reauthorization bills is at the discretion of Congress.

**DATES:** *Effective Date:* This rule is effective November 24, 2008.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward Strocko, Office of Freight Management and Operations, HOFM-1, (202) 366-2997, or Ms. Alla Shaw, Office of the Chief Counsel, (202) 366-1042, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. 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

You may retrieve a copy of the NPRM, comments submitted to the docket, and a copy of this final rule online through the Federal eRulemaking portal at: [www.regulations.gov](http://www.regulations.gov). The Web site is available 24 hours each day, 365 days each year. Electronic 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> and the Government Printing Office's Web page at: <http://www.gpoaccess.gov/nara>.

##### Background

Section 1301 of SAFETEA-LU establishes a program to finance critical, high-cost transportation infrastructure facilities that address critical national economic and transportation needs. These projects often involve multiple levels of government, agencies, modes of transportation, and transportation goals and planning processes that are not easily addressed or funded within existing surface transportation program categories. Projects of National and Regional Significance would have national and regional benefits, including improving economic productivity by facilitating international trade, relieving congestion, and improving transportation safety by facilitating passenger and freight movement. Additionally, this Program would further the goals of the Secretary's National Strategy to Reduce Congestion on America's Transportation Network (Congestion Initiative).<sup>1</sup>

The benefits of PNRS would accrue beyond local areas and States, to the Nation as a whole. A program dedicated

to constructing PNRS would improve the safe, secure, and efficient movement of people and goods throughout the United States as well as improve the health and welfare of the national economy.

Under these regulations, a State seeking a grant for a proposed PNRS would submit to the Secretary an application that demonstrates the ability of the proposed project to enhance the national transportation system, generate national or regional economic benefits, reduce congestion, improve transportation safety, and attract non-Federal investment.

The Secretary shall evaluate and rate each proposed project as "highly recommended," "recommended," or "not recommended" based on the results of preliminary engineering, the project criteria set forth in the regulations, and degree of non-Federal financial commitments. If the Secretary finds that the proposed project meets the requirements of the regulations, and there is a reasonable likelihood that the project will continue to meet such requirements, the Secretary may issue a letter of intent to obligate funds from future available budget authority specified in law or execute a full funding grant agreement with a State. A full funding grant agreement (FFGA) would establish the terms of Federal participation in the project, maximum amount of Federal financial assistance, cover the period of time for completing the project, and address the timely and efficient management of the project in accordance with applicable Federal statutes, regulations, and policy, including oversight roles and responsibilities, and other terms and conditions.

The designated projects in section 1301(m) of SAFETEA-LU are not subject to the criteria established in this part, and the projects will not be subject to the evaluation and rating as proposed in this part in order to receive the SAFETEA-LU authorized funding. However, projects currently designated under SAFETEA-LU section 1301(m) would be required to compete in the evaluation and rating process should any new or additional funding be authorized for this Program.

#### Notice of Proposed Rulemaking

On July 24, 2006, FHWA published in the **Federal Register** at 71 FR 41748 a notice of proposed rulemaking (NPRM) to establish regulations on the manner in which the proposed projects under the Projects of National and Regional Significance Program will be evaluated and rated, in order to determine which projects shall receive grant funding. The

<sup>1</sup> Speaking before the National Retail Foundation's annual conference on May 16, 2006, in Washington, DC, U.S. Transportation Secretary Norman Mineta unveiled a new plan to reduce congestion plaguing America's roads, rail and airports. The National Strategy to Reduce Congestion on America's Transportation Network includes a number of initiatives designed to reduce transportation congestion and is available at the following URL: <http://fightgridlocknow.com>.

FHWA was looking for specific and detailed comments that would assist in defining grant criteria, project eligibility, project ratings, and the nature and form of full funding grant agreements. The FHWA specifically solicited comments that would contribute to an understanding and a quantification of criteria related to congestion, system throughput, safety, technology, private contributions and national and/or regional economic benefits.

The first comment period for the NPRM closed on September 22, 2006. The FHWA recognized that additional time would allow interested parties a broader and more comprehensive review and discussion of the proposed regulations and would allow the development and submission of complete responses to the docket. To allow time for interested parties to submit more comprehensive comments, FHWA reopened the comment period with a notice published in the **Federal Register** on December 28, 2006. This extended comment period closed on February 9, 2007.

#### Discussion of Comments Received

The FHWA received 22 documents representing over 230 comments on the rulemaking. Of these comments, most (163) were received during the second comment period, and more organizations (12 out of 22) submitted documents during the second comment period. The majority of the comments (13) came from associations that are organized for the purposes of representing a particular set of interests within transportation, and many of these associations represent freight interests. State departments of transportation (7) were the second most common submitters of comments. The FHWA received one document from a citizen and one from a company.

The types of comments submitted can be separated into three broad categories. The first are comments that agreed with the language of the rulemaking and did not propose any changes to the NPRM. These comments are not addressed in the section-by-section discussion below. The second set of comments contains suggestions that would require changes to SAFETEA-LU, Title 23, United States Code, or other Federal statutes. Many of these suggestions appeared useful; however, they simply could not be incorporated into the rule because they directly contradict current Federal law. The third category of comments contained suggestions that could be implemented at the discretion of FHWA. The FHWA was open to all suggestions in this category and

exercised careful thought and discretion regarding the incorporation of these comments in the final rule.

#### Section-by-Section Discussion

This section discusses comments submitted on each section of the rule along with an explanation of any changes that have been made from the NPRM to the final rule. All references to revisions or changes are to changes in language that was originally proposed in the NPRM.

##### Section 505.1 Purpose

The agency received no comments regarding this section and made no changes to the final rule.

##### Section 505.3 Policy

The FHWA received five comments on section 505.3. Commenters suggested the concept of "economic sustainability" be introduced in describing the public interest in assuring on-going benefits from the PNRS projects and that the expected congestion relief should be "long-term." Both of these suggestions were adopted and the final rule was revised to reflect this broader policy statement. The final rule now reads "A Project of National and Regional Significance should quantitatively improve the throughput or provide long-term congestion relief for passenger or freight movement for a part of the transportation network and clearly connect this improvement to sustainable economic productivity for the Nation or the region in which it is located."

One commenter proposed that national security should be an essential element of the policy underlying this Program. The DOT recognizes the importance of national security and providing resiliency for the Nation's transportation infrastructure. The FHWA is committed to improving our Nation's ability to manage emergencies that take place within the transportation network infrastructure or affect it in some way. However, FHWA believes the primary focus of the PNRS program is to provide improved throughput or long-term congestion relief for passenger or freight movements. Therefore, an amplification of national security in the program's policy statement has not been added to the final rule.

##### Section 505.5 Definitions

The FHWA received more than 40 comments on section 505.5. Most of the comments concerned the definitions of the terms "applicant," "eligible projects," "eligible project costs," and "full funding grant agreements."

"Applicant"—Several commenters noted that large projects, or "mega-projects," frequently involve and require cooperation between adjacent States, and recommended that multistate applications be permitted. After further consideration of the types of projects that would be national or regionally significant, FHWA has amended the definition of "applicant" to include multiple State departments of transportation; however, one State agency must serve as the lead for the application.

Several commenters suggested entities other than States, such as major cities, transit agencies, metropolitan planning organizations, or other regional organizations, should be permitted to submit proposals for PNRS. The FHWA encourages strong local and regional interagency coordination on PNRS. However, we could not adopt this suggestion because the authorizing statute specifically provides that grants are to be made to States and that the "State" is to have the same meaning as is contained in 23 U.S.C. 101(a). In 23 U.S.C. 101(a), "State" is defined as any of the 50 States, the District of Columbia, or Puerto Rico.

"Eligible project"—The proposed rule defined "eligible projects" in a flexible manner. The FHWA received 13 comments regarding this definition. At one end of the spectrum, a commenter proposed to include "transit-only" projects, while at the other end, a commenter suggested restricting grants under this program to the highway portions of these projects only.

In crafting this definition, FHWA is mindful of the intent of the authorizing legislation which permits PNRS to consist of multiple modes of transportation, which are not easily addressed within existing categorical surface transportation programs. However, FHWA must respect the constraints present in the legislation that projects eligible for assistance under this Program must be eligible for assistance under Title 23 of the United States Code.

In light of these two principles, the final rule reiterates a flexible definition of "eligible projects," which encompasses multimodal approaches to projects that address major bottlenecks, chokepoints, gateways, hubs, surface transportation system corridors, and, in the context of a multimodal approach, allows the use of PNRS funds on non-highway facilities provided they are eligible under Title 23, United States Code. Examples of Title 23 programs under which non-highway facilities are eligible include the Transportation Infrastructure Finance and Innovation

Act (TIFIA) Program and the Congestion Mitigation and Air Quality (CMAQ) Program. Under the CMAQ program, construction of intermodal freight facilities is eligible as long as the project is beneficial to the region meeting its air quality conformity goals. Under the TIFIA program, public or private rail facilities providing benefits to highway users are eligible, as are surface transportation infrastructure modifications to facilitate intermodal interchange, transfer, and access into and out of ports.

A number of commenters suggested that a program of integrated or related projects could be considered as a single project for purposes of satisfying eligibility under the authorizing statute for the PNRS. This would allow funding for projects where multiple or different private, as well as public, partners may be involved in collaborative relationships in different phases of the project. The FHWA has considered the types of projects that may be submitted under this Program and agrees with these comments. The FHWA has revised the final rule to reflect this interpretation that an eligible project means any surface transportation project or set of integrated surface transportation projects closely related in the function they perform and that are eligible for Federal assistance under Title 23, United States Code. Applicants will need to demonstrate that the program of related projects provides benefits that could not be realized if they were considered as stand alone or independent projects.

*“Eligible project costs”*—Comments received on this definition addressed the mode or type of facility eligible as well as the type of activities that would be eligible. Several commenters suggested distinctions between highway and non-highway costs be eliminated, while others suggested eligible costs only apply to the highway portion of projects. As noted above, the use of PNRS funds on non-highway facilities are eligible project costs when such costs are related to and are part of the project. This is consistent with the statute, which permits any eligible activity under a Title 23 program to be funded under this Program. The FHWA clarified the definition of “eligible project costs” in the final rule to be explicit regarding costs associated with eligible projects.

The comments on this definition related to types of activities were divided about whether preliminary engineering (PE) and/or environmental planning costs that preceded the application for funding under this Program should be considered an

“eligible project cost.” Some of the commenters argued that the use of PNRS grants should be limited to the construction phase only, while others were in favor of the language in the NPRM. There is a general recognition in the comments that some level of environmental analysis and project engineering should be undertaken, prior to the application, in order to establish that the project for which funding is sought is practicable and feasible. The final rule retains the language in the NPRM that would allow PE and design work, environmental reviews, and other planning and preconstruction activities to be considered eligible project costs reimbursable after a project is funded with a FFGA. In order for these costs to be eligible, they must be appropriate and authorized prior to being incurred, pursuant to Title 23, United States Code. A State may request the use of Advanced Construction funds for the project and subsequently convert those funds to an eligible Federal-aid funding category or to PNRS funding as part of the FFGA.

Commenters also suggested allowing bond financing costs to be included in the definition of eligible costs. The FHWA has reviewed other statutory language and has included language in this rule to allow debt-financing costs to be included in the definition of eligible costs, provided that such financing costs are appropriate and authorized, pursuant to Title 23, United States Code.

*“Full funding grant agreement”*—Some substantive comments were received concerning this definition and the types of funding mechanisms that could be offered by the Program. The authorizing statute provides that a project financed under this Program shall be carried out through a FFGA. In this regard, the mechanism for funding is modeled after the New Starts Program administered by the Federal Transit Administration, and similar procedures are applicable. The FHWA has clarified the final rule to make it clear that a FFGA will define the scope of the project, establish the amount of funding, cover the period of time for the project's completion, and, as in the case in the New Starts program, facilitate project management, consistent with applicable Federal law, including oversight roles and responsibilities and other terms and conditions. The FHWA recognizes that a PNRS FFGA may only be a piece of the Federal funding for a project, and applicants may wish to pursue other Federal grant or loan vehicles. Such additional funding sources will not become part of the PNRS FFGA. However, FHWA will work with

applicants to coordinate the application for, and administration of, other Federal funding.

#### *Section 505.7 Eligibility*

Comments received for section 505.7 expressed particular concern regarding how the statute's eligibility requirements might be applied in the case of multistate projects. The legislation that authorized the PNRS Program does not seem to contemplate such projects, although, as discussed above, many of the significant projects will involve more than a single State. The FHWA will accommodate these circumstances, by allowing a multistate project to be eligible, if it has costs that equal or exceed the lesser of \$500 million or 75 percent of the Federal highway apportionment to the State in which the project is located that has the largest apportionment. This principle has been incorporated in the final rule, and the eligibility presentation has been clarified in an amended format.

Other commenters suggested eligibility for projects already underway, the costs of which might not meet the statutory threshold, urged eligibility for smaller projects, or recommended an increase in the threshold to \$1 billion. In light of the eligibility requirements and constraints of the authorizing statute, FHWA cannot change the threshold levels in the final rule. In determining the cost threshold for a project currently underway or a multiphase or multipart project, the applicant will need to define the functional relationship and demonstrate how the components are comprehensively linked together in a plan or program that is being undertaken in a near term and contiguous timeframe. Applicants will need to demonstrate that the program of related projects provides benefits that could not be realized if they were considered as stand alone or independent projects. Additionally, projects that are currently listed in section 1301(m) of SAFETEA-LU will not be treated any differently than any other submissions. They will have to compete with all other applicants for any new discretionary funding that becomes available to the program in future authorization or appropriations acts.

#### *Section 505.9 Criteria for Grants*

The FHWA received 120 comments on section 505.9. This represents approximately one half of all comments received to the docket. In the final rule, FHWA has reordered some sub-sections under section 505.9 to provide the

reader with a clearer presentation of the criteria.

#### *General Criteria*

The FHWA received 15 comments regarding section 505.9 that referred to general criteria for the PNRS Program rather than the specific criteria outlined in the rulemaking. Some of these comments focused on the modal intentions of the Program while others suggested the use of additional or different criteria.

Comments focused on the modal intentions of the Program noted a perceived highway bias and lack of criteria regarding multimodalism. Although the rulemaking does not include multimodalism specifically as part of the criteria, FHWA believes it is clear from the law and from the discussion of section 505.5 above, that multimodal projects are eligible for this Program as long as they are Title 23 eligible. There is no intended bias toward highways that should be discerned in the rulemaking. There are also no criteria targeted toward multimodalism because there is no indication of the need for such criteria in the legislative language.

Comments relating to the imposition of additional criteria on potential projects focused on political, institutional, and technical feasibility of a project. Under the suggested institutional and political feasibility criteria, whether the project is likely to move forward based on political and institutional factors, was proposed as a relevant test. The FHWA agrees that institutional feasibility is an important element for successfully undertaking projects of national and regional significance. However, independent criteria specifically measuring political or institutional feasibility analysis are not required because a State DOT is unlikely to be able to complete PE, secure matching funds, and propose a project of the magnitude contemplated under this Program without strong political support. The FHWA determined that institutional feasibility can be demonstrated through a combination of other criteria and identification that the project emerged from the metropolitan and statewide planning process. In consideration of this comment and other comments relating to financial feasibility, FHWA has added section 505.9(a)(3) to the final rule that states a proposed project must emerge from the metropolitan and statewide planning process. This addition is intended to clearly indicate that proposed projects need to go through the transportation planning and programming processes as required by

Federal regulations. These processes, including long-range plans and transportation improvement programs, provide a level of assurance that there is institutional support and financial stability for the project. As an additional check, regardless of a project's rating, a FFGA will be entered into only after the project has commitments for non-Federal funding in place and all other requirements are met. Regarding technical feasibility, the FHWA believes technical feasibility can be demonstrated through analysis of other criteria and does not require a stand-alone criterion.

Commenters also suggested that the PNRS should follow different selection criteria than those proposed in the rule. In particular, it was recommended that FHWA use selection criteria from the Corridors of the Future Program and the Executive Order on Environmental Stewardship and Transportation Project Process Review (Executive Order 13274). In related suggestions, commenters recommended the PNRS Program be used to implement projects identified under these programs. The Corridors of the Future Program and Executive Order on Environmental Stewardship and Transportation Project Process Review use a separate selection process with review of the projects based on a different set of established criteria and therefore cannot be used as the criteria for PNRS project selection.

#### *Section 505.9(a)(1)*

Commenters expressed that the requirement for PE to be completed prior to applying for a grant was too heavy a burden and could exclude some worthwhile projects. However, another commenter agreed with the PE requirement on the grounds that it provides sufficient evidence for FHWA to properly review the project. The FHWA cannot change this requirement to evaluate PE results because it is required by the PNRS statute. Nonetheless, PE is just one evaluation criterion, and this language does not preclude from consideration proposals for projects that have not performed PE. In response to these suggestions, FHWA has added language to the final rule under section 505.11 to provide States with additional flexibility in submitting proposals for consideration while preserving the statutorily specified PE criteria. Further, as mentioned above in the discussion regarding section 505.5, PE costs may be reimbursed once a project is funded with a FFGA if the cost is appropriate and authorized prior to being incurred, pursuant to Title 23, United States Code.

#### *Section 505.9(a)(2)*

The FHWA received a few comments on section 505.9(a)(2). One commenter expressed support for including evidence of the stability of any potential funding sources, which was proposed in the NPRM. After reviewing this comment and other comments pertaining to institutional feasibility, FHWA determined that clarifying language relating to the need for all projects to emerge from the metropolitan and statewide planning processes as required by Federal law and regulation should be added to the rule text. This was added under section 505.9(a)(3). In addition, commenters suggested allocation of public and private costs in accordance with risk and benefit should be a potential evaluation criterion. The FHWA agrees with the concept of delineating the allocation of public and private costs and benefits derived from a project. In response, FHWA has adopted these comments in section 505.9(a)(4)(ii) of the final rule.

To provide for a more coherent presentation in the final rule, FHWA has consolidated the proposed rule's section 505.9(c), factors in evaluating a non-Federal financial contribution, into this section. The FHWA received several comments on the proposed rule's section 505.9(c), mostly requesting additional information, about the contingency amounts required to cover unanticipated cost increases on a project. The FHWA plans to follow industry and agency standards with respect to these issues.

#### *Section 505.9(a)(3)*

This is a new subsection the FHWA added to provide additional emphasis and clarity relating to the point at which PNRS projects must emerge from the metropolitan and statewide planning processes, consistent with 23 CFR Part 450. As discussed previously, this subsection was added in response to comments relating to political, institutional, and financial feasibility as well as stability of funding.

#### *Section 505.9(a)(4)(i)*

This is a renumbered section 505.9(a)(3)(i) from the proposed rule. The FHWA received a number of comments regarding the economic benefits, jobs, and business opportunities that could be used to justify a PNRS project. The FHWA interprets the consideration of economic benefits in the project justification criteria as pertaining to those benefits realized from solving current transportation problems through

increased throughput that is derived from completing the PNRS project. This is in contrast to economic benefits associated with the actual construction of the project or for projects whose primary purpose is to serve as a tool to create new areas of economic development rather than to solve an existing transportation problem. The FHWA has incorporated this clarification in the final rule.

One idea echoed by two commenters was that both regional and national economic benefits must exist, rather than one or the other. The FHWA supports this concept and hopes that projects will create both types of benefits, but recognizes the wide range of potential projects and the need to provide flexibility to States when analyzing the benefits. As a point of clarification regarding the definition of a region, for the purpose of evaluating a project proposal's economic impacts, FHWA interprets a region to be based upon the: (1) Origin and destination patterns of traffic using the facility, (2) geography of the areas served by freight and passenger movement that use the facility or are affected by this facility, and (3) other facilities directly affected by the project.

Another commenter emphasized the idea that projects under this Program should be targeted toward existing, rather than generating, economic value. The law is very specific that projects are to be justified on the basis of their ability to generate economic benefits. However, it is likely that any such project would also have substantial existing economic value. With respect to job creation, commenters expressed that sustaining existing jobs is as important as creating new ones and this should be reflected in the rule. Although this is a useful distinction, it is not a distinction made in the law. Commenters provided a number of specific measures relating to business opportunities, including costs, productivity and impacts to American made goods. The FHWA believes these themes are currently captured in the economic benefit and congestion reduction criteria, and the listing of specific measures should not be made in the rule. However, FHWA does believe that the rule should provide additional specificity and clarity for the economic benefit criteria based on these comments. The FHWA has added additional specificity to the criteria in section 505.9(a)(4)(i) of the final rule that incorporates the amount of demographic and economic activity of the area served by a given project. A commenter indicated the need to be able to compare the impacts of not constructing the project versus

constructing a project. In response, section 505.9(d) was added to the final rule to address the requirement for information to include projections for both the build and no-build scenarios.

Several commenters expressed a general concern about the subjectivity, comparability and cost involved in undertaking a full cost-benefit analysis, and indicated a preference for the use of other measures. In reviewing these comments, FHWA has determined that it will not prescribe a specific cost-benefit analysis methodology, but will allow the applicant to determine how to apply such an analysis in presenting information about the project. However, with this cost-benefit flexibility and concerns raised about subjectivity of economic analysis, FHWA has determined that all information submitted as part of or in support of an application shall use publicly available data or data that can be made public and methodologies that are accepted by industry practice and standards. This has been reflected in language added to section 505.9(c) in the final rule.

Additionally, in response to these comments and related comments submitted on other sections of the rule, FHWA has added criteria to the final rule that requires the application to show a clear allocation of public and private costs commensurate with the share of public and private benefits and risks for the project. This is reflected in section 505.9(a)(4)(ii).

Many comments addressed the idea that the level of freight volumes carried is of prime importance when assessing whether a project is justified, and that ports, international gateways and intermodal facilities deserve similar emphasis. Other related comments discussed national transportation system function. The FHWA believes that effective freight movement is vital for economic activity and is an extremely important component of the goals of the PNRS Program. The facilitation of freight and passenger movement is highlighted in the law and mentioned in a number of comments. In response to these comments, FHWA has included language in the final rule creating specific evaluation criteria in this section focused on the amount and importance of freight and passenger travel served.

#### *Section 505.9(a)(4)(ii)*

As mentioned above, in response to comments on section 505.9(a)(4)(i) (proposed section 505.9(a)(3)(i)) and related comments submitted on other sections of the rule, FHWA has added this subsection to the final rule as a criterion that requires the application to

show a clear allocation of public and private costs commensurate with the share of public and private benefits and risks for the project.

#### *Section 505.9(a)(4)(iii)*

This is a renumbered section 505.9(a)(3)(ii) from the proposed rule. Several commenters applauded the use of congestion as a necessary criterion and suggested additional ways to emphasize it in the final rule. These suggestions included condition and performance of the gateway, hub or corridor, impact on freight mobility, as well as distinguishing local and national congestion. Reducing congestion is an important criterion for eligibility and FHWA included language in the final rule to reflect the additional emphasis and focus suggested in the comments. The new language calls particular attention to delays and consequences, as well as the efficiency and effectiveness, of congestion mitigation.

#### *Section 505.9(a)(4)(iv)*

This is a renumbered section 505.9(a)(3)(iii) from the proposed rule. One commenter suggested that larger trucks are unsafe and should not be permitted on highways. This is out of the scope of this rulemaking. However, FHWA believes additional clarifying language should be included in the final rule with regard to the specific criteria for this section. The FHWA included language specifying that the evaluation criteria would include number, rate and consequences of crashes, injuries and fatalities in the affected region and corridor. The FHWA believes proposed projects need to take a comprehensive approach to safety and evaluate safety impacts on a regional basis. Information on how the proposed project will improve transportation safety should be consistent with the State Strategic Highway Safety Plan or Regional Safety Plan.

#### *Section 505.9(a)(4)(v)*

This is a renumbered section 505.9(a)(3)(iv) from the proposed rule. The FHWA received several comments about what it means to enhance the national transportation system and how qualitative criteria will be evaluated. Suggestions included projects that are critical for evacuation, cross multiple State boundaries, connect corridors or hubs, and/or link across natural barriers. These are all suggestions that may be considered enhancements of the national transportation system. However, the merit of each specific enhancement is largely dependent on the context and specifics of the individual project as well as the needs

of the national transportation system at the time of project solicitation. The FHWA believes States should be given flexibility to develop a specific justification for how a proposed project enhances the national transportation system. Further, due to the continuously evolving needs of the Nation's transportation system, FHWA believes a project solicitation is the appropriate place to provide specific focus areas related to the current needs of the national transportation system and measures to rate enhancements to the system. In consideration of these comments, FHWA did provide a clarification in the final rule that indicates criterion of enhancements to the national transportation system relates to the concept of improving throughput.

#### *Section 505.9(a)(4)(vi)*

This is a renumbered section 505.9(a)(3)(v) from the proposed rule. Comments relating to the topic are discussed above in the discussion of section 505.9(a)(2).

#### *Section 505.9(b)(1)*

Several commenters suggested that public-private partnerships (PPPs) are unnecessary or irrelevant for inclusion as a criterion in this rule. PPP is a required evaluation criterion in the authorizing statute. PPPs encompass a wide variety of arrangements, and the FHWA believes they can provide the support necessary for a successful project and can leverage Federal investments. The level to which PPP involvement will factor into the selection process will be determined through the solicitation process, not through this rule.

There were several comments raised with respect to measuring contributions. One question raised by a commenter is whether private activity bonds (PABs) or TIFIA contributions to a project would be considered as part of the "non-Federal" contribution. Other commenters questioned how FHWA would define a "non-Federal" contribution and suggested that Federal investment programs from other Federal agencies should count as leveraging investment. Under general appropriations principles, a grantee may not use funds provided under another Federal program as a non-Federal match unless specifically authorized by law. However, this rule does not apply to Federal loans. Loans, unlike grants, are expected to be repaid by the recipient using its own funds. As a clarification, funds from State and local governments and proceeds from Federal loans count toward the non-Federal share, and these

are certainly encouraged. Thus, PABs or TIFIA contributions to a project would be considered part of the "non-Federal" contribution. However, FHWA cannot accommodate the comments requesting that other Federal grant programs be considered part of the non-Federal contribution in the final rule because, as noted above, a grantee may not use funds provided under another Federal program as a non-Federal match unless specifically authorized by law. Finally, one commenter suggested that the ability of a project to attract outside funding should not be part of the criteria at all. The law is clear about outside funding being part of the rule, as the idea is to encourage as much non-Federal investment as possible. Therefore, the final rule was not changed in this regard.

One commenter expressed concern that private companies will not agree to PPPs if funding is not provided for an entire program of integrated or related sub-projects of a given proposal. There is nothing in the final rule that prevents funding for a full program for eligible projects.

Two commenters suggested that the non-Federal contributions to the project should be allowed on a "pay-as-you-go" basis. The FHWA will permit this method as long as the constrained long-range transportation plan for the region shows concrete evidence of stable and dependable funding sources for the entire project.

#### *Section 505.9(b)(2)*

The agency received no comments regarding this section and made no changes to the final rule.

#### *Section 505.9(b)(3)*

One commenter suggested that the PNRS evaluation criteria should include whether a project both improves and protects the environment, instead of one or the other. This is a subtle distinction given that the legislative language simply requires consideration of the extent to which the project helps maintain or protect the environment and a project could theoretically be approved even if it fails to do either. Although the idea that the project should aim to do both is a very reasonable one, the law uses the word "or" and therefore it will not be changed in the final rule.

There were several suggestions in the comments for additional and more specific environmental criteria to clarify the meaning of "maintaining or improving" the environment including air quality, energy use, water quality, and environmental streamlining. The FHWA believes these are more measures

than criteria and thinks it best that States should be given the flexibility to quantify how the projects maintain or improve the environment. Examples of how different parameters could be quantified can be included in project solicitations or guidance documents.

#### *Section 505.9(b)(4)*

A commenter suggested that a proposed project should demonstrate the need for Federal support and participation because multiple jurisdictions or the private sector are affected and there are no non-Federal mechanisms to implement the project. The FHWA agrees with this suggestion and believes that a project should demonstrate why it requires Federal support beyond apportioned Federal-aid funding. The FHWA has added this concept to the list of factors to consider when evaluating a proposed project.

#### *Section 505.9(c)*

To provide for a more coherent presentation in the final rule, FHWA has consolidated the proposed rule's section 505.9(c) into section 505.9(a)(2) as discussed above. The FHWA replaced the text of section 505.9(c) in the final rule with language regarding the use of publicly available data or data that can be made public and methodologies that are accepted by industry practice and standards. This was added to the final rule in response to comments regarding the PNRS criteria and the FHWA's belief that additional guidance and clarification was required.

#### *Section 505.9(d)*

The FHWA added this subsection which requires that measures for the selection criteria include projections for build and no-build scenarios. This was added in response to comments regarding the criteria and FHWA's belief that additional guidance and clarification was required. A commenter questioned if a build/no build scenario could be undertaken when the PNRS project involves replacement or major upgrade of an existing facility. The FHWA believes that an applicant can undertake this type of analysis by comparing the impacts of not undertaking the project with the impacts of undertaking the project.

#### *Section 505.9(e)*

This section clarifies elements of the PNRS solicitation process. This section was added by FHWA in response to comments suggesting the identification of specific measures and weighting for the criteria. The FHWA believes these issues are most appropriately handled through the solicitation process or

guidance documents rather than rulemaking. The FHWA intends to use guidance documents or solicitations to provide applicants with additional specific information related to the use of the evaluation criteria identified in the rule.

#### *Section 505.9(f)*

The FHWA received comments that all projects under this Program should comply with section 1904 of SAFETEA-LU which requires a financial and management plan for all projects. The FHWA agrees and has included language in the final rule under this section to clarify that all proposed PNRS projects are required to follow the FHWA's Major Project Guidance regardless of whether they meet project cost thresholds for classification as a major project.

#### *Section 505.11 Project Evaluation and Rating*

The FHWA received 15 comments on section 505.11. One commenter suggested that a new category should be included that covers projects that are not yet ready for recommendation. The law clearly delineates the required categories leaving the agency no discretion to create additional ones. However, the FHWA will notify every State applicant of the rating for its application. This will permit a State to withdraw any applications which are not strong candidates for funding under this Program. The ratings will remain in effect until FHWA issues a new project solicitation. At the time of a new solicitation, an applicant may choose to submit a new or revised application, or choose to submit a letter to FHWA indicating that the current application should again be considered.

Two commenters suggested the use of a point system, or weighting various criteria, to provide greater clarity in FFGA ratings. Other commenters proposed factors that must be demonstrated to achieve a highly recommended rating for the various criteria and suggested a two-tiered rating process. The FHWA has determined that a point system determination and weighting of criteria are most appropriately handled through a PNRS project solicitation or guidance documents rather than in a rulemaking. The PNRS solicitation or guidance documents are the appropriate vehicles to provide additional information on the weights and points assigned to the various criteria and measures.

One commenter suggested that FHWA could recommend projects which are highly rated under the PNRS for funding in other discretionary programs. Each

FHWA discretionary program has statutorily defined criteria. Thus, a project that satisfies the PNRS criteria may not automatically satisfy the criteria for another discretionary program. Therefore, the final rule cannot accommodate language that would automatically qualify PNRS projects for another discretionary program. However, FHWA will work with applicants to coordinate applications for, and the administration of, other Federal programs.

Several commenters addressed the idea of how to choose between qualified projects. One suggestion was to fund a limited number of projects nationally from this Program. The number of projects funded ultimately depends on the overall amount of funding available for this Program, which at this point is unknown. The FHWA plans to recommend funding the highest rated projects based on the outlined criteria, and those projects will be recommended for FFGAs. Another commenter suggested FHWA configure a protocol for deciding between projects ranked in the "Highly Recommended" category, in case there are too many projects in that category. The FHWA does not anticipate providing rankings within rating categories. However, as with the points and weight discussion above, if necessary, the PNRS solicitation or guidance documents will provide additional information on this topic.

There were several comments regarding ongoing projects, including a suggestion that a constant process of evaluation and selection would be useful. The FHWA has added language to the final rule that clarifies that any rating or evaluation is good until the next evaluation is performed.

Several comments also addressed the issue of the current projects under the Program, and whether these projects will need to be evaluated. As discussed in the summary and background sections, the funding currently authorized in SAFETEA-LU section 1301 for the 25 projects designated in subsection (m) of section 1301 is not subject to the criteria established in this part, and these projects will not be subject to the evaluation and rating as proposed in this part in order to receive the SAFETEA-LU authorized funding. However, projects currently designated under SAFETEA-LU section 1301(m) will be required to compete in the evaluation and rating process for any new or additional discretionary funding that is authorized for this Program.

A suggestion was made that States should be able to submit projects for evaluation after completion of a draft environmental impact statement. The

FHWA has modified the language of the final rule to allow flexibility on when applications can receive a rating, allowing non-binding ratings and evaluations any time in the project development process after the project's concept plan is developed. These non-binding preliminary ratings and evaluations will be reported in the appendix of the Secretary's Annual Report on PNRS. Any project that has completed PE would be subject to a complete and final evaluation. At that time, a rating and evaluation will be considered complete and listed in the Secretary's Annual Report on PNRS along with a recommendation on funding.

#### *Section 505.13 Federal Government's Share of Project Cost*

The FHWA received 10 comments on section 505.13. One commenter suggested that the Federal Government should be responsible for cost escalations that are caused by Federal processes. The FHWA does not believe that complying with Federal laws and regulations should be considered a cost escalation for a project. As such, the final rule does not address this comment.

Comments in this section again addressed the issue of Federal funding for PE. As is the case for similar Federal grant programs, this program will be able to reimburse PE work for those projects receiving a FFGA, or those projects can use the non-Federal funds spent on PE toward the State's matching share. The FHWA has added clarifying language relating to this issue in section 505.15.

Another comment specific to this section suggested that financing costs associated with assistance of bonds be included in the FFGA. As mentioned previously in the discussion of the comments under section 505.5, the final rule has been amended to make it clear that debt expenses covered under Title 23 are eligible to be included in the FFGA.

In general, several comments expressed appreciation for this Program and the fact that it will advance large nationally significant projects that might otherwise be impossible to undertake from a financial perspective.

#### *Section 505.15 Full Funding Grant Agreement*

The FHWA received nine comments relating to section 505.15. General comments on this section and others included the suggestion that only highway projects should be eligible for an FFGA under this Program. This would be incompatible with Title 23



eligibility, which is what is prescribed in the law. In fact, the interpretation of eligibility is intended to be as broad as possible rather than excluding any particular mode. As such, FHWA did not make this change to the final rule.

One commenter suggested that something other than an FFGA should be used for projects where less than 25 percent of the cost is provided by the Program. The idea would be to use a simplified grant vehicle with a provision to prevent cost overruns that make FHWA responsible for unexpected costs. The FFGA is required by the authorizing statute to be used as the funding mechanism for this Program. Additionally, FHWA believes there is sufficient flexibility in the FFGA mechanism to appropriately scale the agreement to a project's complexity, size, funding situation, and percentage of the total costs that will be covered. Therefore, FHWA has not changed the language in the final rule.

Two commenters suggested that projects in this Program be automatically included in the Special Experimental Program No. 15 (SEP-15) for PPPs, or the Executive Order on Environmental Stewardship and Transportation Project Process Review (Executive Order 13274). After a review of these programs, FHWA determined that automatic inclusion in either program is not possible or desirable, as projects must be evaluated on a case-by-case basis through a process specified for each program. The SEP-15 program is designed for use on a project-by-project basis to experiment with solutions to impediments in Title 23, the regulations under Title 23, and FHWA policy, to the use of PPPs and innovative project delivery techniques. However, a given project may not wish to employ any experimental features. The FHWA could provide priority to PNRS projects, but since SEP-15 has no predetermined limitations on numbers of projects, priority, as such, is not an issue. The Executive Order on Environmental Stewardship and Transportation Project Process Review uses a separate selection process with review of the project based on a different set of established criteria. Therefore, FHWA did not include language that provides automatic inclusion in the SEP-15 or Executive Order programs. The FHWA encourages applicants to consider applying to the SEP-15 program if the project could utilize techniques that provide solutions to impediments to the use of PPPs and innovative project delivery. The FHWA will work with applicants to coordinate the application for, and administration of, other Federal programs.

One commenter suggested that FHWA commit to providing recommended projects priority consideration under innovative financing programs such as TIFIA. Since one of the TIFIA program's eight statutory selection criteria requires an assessment of a project's national or regional significance, any project selected under PNRS would meet at least partially the objectives of TIFIA, which provides credit assistance up to 33 percent of a project's eligible costs. Because a TIFIA loan application must meet additional requirements (such as creditworthiness) not considered under PNRS, such priority consideration may not be appropriate. Accordingly, FHWA did not add language to the final rule providing priority consideration under the TIFIA program. However, FHWA will work with applicants to identify opportunities to pursue TIFIA and other innovative Federal financial assistance, ensuring that a TIFIA application, if forthcoming, would be coordinated within the agency.

One commenter expressed concern that it is unrealistic to expect that all funding could be guaranteed by non-Federal sources prior to implementation. Although the difficulty of such an expectation is understood, it is nonetheless important that commitments from other sources be in place before FHWA commits to an FFGA. The rule has been modified to clarify this point.

The rule also adds language in response to comments concerning the reimbursement of expenses as mentioned in the section 505.13 discussion. Specifically, language was added that clarifies that the use of Advance Construction can be requested and then converted to PNRS funding, or other eligible Federal-aid funding, as part of an FFGA. Advanced Construction approval does not constitute a commitment that future Federal funds will be approved for the project, and all Federal requirements must be met prior to incurring costs in order to retain eligibility for future FHWA grant assistance.

#### *Section 505.17 Applicability of Title 23, U.S. Code*

The FHWA received two comments on section 505.17. One commenter encouraged DOT and the Surface Transportation Policy and Revenue Study Commission to advocate wider eligibility for this Program as we move toward the next statutory reauthorization. This suggestion is not directly relevant to this rulemaking, and FHWA did not make any changes to the final rule.

The other comment on this section suggested removing the prohibition on allowing funds to be transferred to other agencies because this may impair multimodal projects. The possibility of impairment notwithstanding, this prohibition is specifically stated in the authorizing statute and cannot be removed through a regulatory process. The FHWA recognizes the importance of involving other DOT agencies during the evaluation and administration of certain multimodal projects. To the extent practicable, FHWA will engage other DOT modal agencies in the evaluation and administration of multimodal projects in this program.

#### **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 establishes evaluation and rating procedures for Projects of National and Regional Significance as mandated in section 1301 of SAFETEA-LU.

The Projects of National and Regional Significance program is a newly created and complex program, receiving substantial Federal funding. This action is considered significant because of the substantial State and local government, and public interest in the administration of this newly created program. Because this program is dedicated to constructing critical high-cost transportation infrastructure facilities that address critical national economic and transportation needs, it is essential for FHWA to develop evaluations and rating criteria to ensure that selected projects will further the goals of the program.

This rule is not anticipated to adversely affect, in a material way, any sector of the economy. This rulemaking sets forth evaluation and ratings criteria for project proposals in the Projects of National and Regional Significance Program, which will result in only minimal cost to program applicants. In addition, this rule would 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 action on small entities and have determined that the action will not have a significant economic impact on a substantial number of small entities.

The rule addresses evaluation and rating procedures for States wishing to submit project proposals for Projects of National and Regional Significance. 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 \$136.1 million or more in any one year (2 U.S.C. 1532). 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. (2 U.S.C. 658, 1502). The Federal-aid highway program permits this type of flexibility.

### Executive Order 13132 (Federalism Assessment)

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 proposal does not contain collection of information requirements for the purposes of the PRA. The FHWA does not anticipate receiving project proposals from ten or more States in any given year because of the nature of the projects eligible under the PNRS program. These projects are critical, high-cost transportation infrastructure facilities that often include multiple levels of government, agencies, modes of transportation, and transportation goals and planning processes that are not easily addressed or funded within existing surface transportation program categories. In fact, the Congress has identified only 25 such projects for funding over the 5-year authorization period currently established for this program.

### National Environmental Policy Act

The agency has analyzed this proposed 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 evaluation and rating procedures for proposed Projects of National and Regional Significance, as required by the Congress in SAFETEA–LU, would not have any effect on the quality of the environment.

### 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 505

Grant programs—transportation, Highways and roads, Intermodal transportation.

Issued on: October 15, 2008.

**Thomas J. Madison,**  
*Federal Highway Administrator.*

■ In consideration of the foregoing, the FHWA adds new part 505 to title 23, Code of Federal Regulations, to read as follows:

### PART 505—PROJECTS OF NATIONAL AND REGIONAL SIGNIFICANCE EVALUATION AND RATING

Sec.

- 505.1 Purpose.
- 505.3 Policy.
- 505.5 Definitions.
- 505.7 Eligibility.
- 505.9 Criteria for grants.
- 505.11 Project evaluation and rating.
- 505.13 Federal Government’s share of project cost.
- 505.15 Full funding grant agreement.
- 505.17 Applicability of Title 23, U.S. Code.

**Authority:** Section 1301 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109–59; 119 Stat. 1144); 23 U.S.C. 315; 49 CFR 1.48.

#### § 505.1 Purpose.

The purpose of this part is to establish evaluation, rating, and selection guidelines for funding proposed Projects of National and Regional Significance (PNRS).

#### § 505.3 Policy.

A Project of National and Regional Significance should quantitatively improve the throughput or provide long term congestion relief for passenger or freight movement for a part of the transportation network and clearly connect this improvement to sustainable economic productivity for the nation or the region in which it is located.

#### § 505.5 Definitions.

Unless otherwise specified in this part, the definitions contained in 23 U.S.C. 101(a) are applicable to this part. In addition, the following definitions apply:

*Applicant* means either:

- (1) A State Transportation Department, or
- (2) A group of State Transportation Departments, with one State acting as the project lead.

*Eligible Project* means any surface transportation project or set of integrated surface transportation projects closely related in the function they perform eligible for Federal assistance under title 23, United States Code, including public or private rail facilities providing benefits to highway users, surface transportation infrastructure modifications to facilitate intermodal interchange, transfer, and access into and out of ports and other activities eligible under such title.

*Eligible Project Costs* means the costs pertaining to an eligible project for:

- (1) Development phase activities, including planning, feasibility analysis, revenue forecasting, environmental review, preliminary engineering and

design work, and other preconstruction activities;

(2) Construction, reconstruction, rehabilitation, and acquisition of real property (including land related to the project and improvements to land), environmental mitigation, construction contingencies, acquisition of equipment, and operational improvements; and

(3) all debt financing costs authorized by 23 U.S.C. 122.

*Full Funding Grant Agreement (FFGA)* means the agreement used to provide Federal financial assistance under title 23, United States Code, for Projects of National and Regional Significance. An FFGA defines the scope of the project, establishes the maximum amount of Government financial assistance for the project, covers the period of time for completion of the project, facilitates the efficient management of the project in accordance with applicable Federal statutes, regulations, and policy, including oversight roles and responsibilities, and other terms and conditions.

#### **§ 505.7 Eligibility.**

To be eligible for assistance under this program:

(a) A project meeting the definition of an eligible project under 505.5 of this section located fully within one State shall have eligible project costs that are quantified in the project proposal as equal to or exceeding the lesser of:

(1) \$500,000,000; or

(2) 75 percent of the amount of Federal highway assistance funds apportioned for the most recently completed fiscal year to the State in which the project is located.

(b) A multi-State project meeting the definition of an eligible project under 505.5 of this section shall have eligible project costs that are quantified in the project proposal as equal to or exceeding the lesser of:

(1) \$500,000,000; or

(2) 75 percent of the amount of Federal highway assistance funds apportioned for the most recently completed fiscal year to the State in which the project is located that has the largest apportionment.

#### **§ 505.9 Criteria for grants.**

(a) The Secretary will approve a grant for a Project of National and Regional Significance project only if the Secretary determines, based upon information submitted by the applicant, that the project:

(1) Is based on the results of preliminary engineering;

(2) Is supported by an acceptable degree of non-Federal financial

commitments, including evidence of stable and dependable financing sources to construct, maintain, and operate the infrastructure facility. In evaluating a non-Federal financial commitment, the Secretary shall require that:

(i) The proposed project plan provides for the availability of contingency amounts that the Secretary determines to be reasonable to cover unanticipated cost increases; and

(ii) Each proposed non-Federal source of capital and operating financing is stable, reliable, and available within the proposed project timetable. In assessing the stability, reliability, and availability of proposed sources of non-Federal financing, the Secretary will consider:

(A) Existing financial commitments;

(B) The degree to which financing sources are dedicated to the purposes proposed;

(C) Any debt obligation that exists or is proposed by the recipient for the proposed project; and

(D) The extent to which the project has a non-Federal financial commitment that exceeds the required non-Federal share of the cost of the project.

(3) Emerges from the metropolitan and Statewide planning process, consistent with 23 CFR Part 450;

(4) Is justified based on the ability of the project:

(i) To generate national and/or regional economic benefits, as evidenced by, but not limited to:

(A) The creation of jobs, expansion of business opportunities, and impacts to the gross domestic product due to quantitatively increased throughput;

(B) The amount and importance of freight and passenger travel served; and

(C) The demographic and economic characteristics of the area served.

(ii) To allocate public and private costs commensurate with the share of public and private benefits and risks;

(iii) To generate long-term congestion relief that impacts the State, the region, and the Nation, as evidenced by, but not limited to:

(A) Congestion levels, delay and consequences of delay;

(B) Efficiency and effectiveness of congestion mitigation; and

(C) Travel time reliability.

(iv) To improve transportation safety, including reducing transportation accidents, injuries, and fatalities, as evidenced by, but not limited to, number, rate and consequences of crashes, injuries and fatalities in the affected region and corridor;

(v) To otherwise enhance the national transportation system by improving throughput; and

(vi) To garner support for non-Federal financial commitments and provide

evidence of stable and dependable financing sources to construct, maintain, and operate the infrastructure facility.

(b) In selecting projects under this section, the Secretary will consider the extent to which the project:

(1) Leverages Federal investment by encouraging non-Federal contributions to the project, including contributions from public-private partnerships;

(2) Uses new technologies, including intelligent transportation systems, that enhance the efficiency of the project;

(3) Helps maintain or protect the environment; and

(4) Demonstrates that the proposed project cannot be readily and efficiently realized without Federal support and participation.

(c) All information submitted as part of or in support of an application shall use publicly available data or data that can be made public and methodologies that are accepted by industry practice and standards.

(d) Measures for the selection criteria shall include projections for both the build and no-build scenarios.

(e) PNRS solicitations or guidance documents will contain, as needed, additional specific information regarding measures, weighting, and use of these criteria.

(f) All proposed PNRS projects are required to comply with the requirements of 23 U.S.C. 106(h) regardless of whether the project meets project cost threshold for classification as a major project.

#### **§ 505.11 Project evaluation and rating.**

(a) The Secretary shall evaluate and rate each proposed project as “highly recommended,” “recommended,” or “not recommended” based on the criteria in section 505.9 of this part. Individual ratings of “highly recommended,” “recommended,” or “not recommended” will be conducted for each of the selection criteria.

(b) In response to a PNRS project solicitation a State may submit a project for a non-binding preliminary rating and evaluation at any point in the project development after the project’s concept plan is developed.

(c) Non-binding preliminary rating and evaluation will be reported in the appendix of the Secretary’s Annual Report on PNRS.

(d) A rating and evaluation will be considered complete and listed in the Secretary’s Annual Report on PNRS only after preliminary engineering is completed.

(e) The rating and evaluation for a proposed project will remain valid until the closing date of the next PNRS solicitation.

**§ 505.13 Federal Government's share of project cost.**

(a) Based on engineering studies, studies of economic feasibility, and information on the expected use of equipment or facilities, the Secretary shall estimate the project's eligible costs.

(b) A FFGA for the project shall not exceed 80 percent of the eligible project cost. A refund or reduction of the remainder may only be made if a refund of a proportional amount of the grant of the Federal Government is made at the same time.

**§ 505.15 Full funding grant agreement.**

(a) A proposed project may not be funded under this program unless the Secretary finds that the project meets the requirements of this part and there is a reasonable likelihood that the project will continue to meet such requirements.

(b) A project financed under this section shall be carried out through a FFGA. The Secretary shall enter into a FFGA based on the evaluations and ratings required herein, and in accordance with the terms specified in section 1301(g)(2) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, (Pub. L. 109–59; 119 Stat. 1144).

(c) A FFGA will be entered into only after the project has commitments for non-Federal funding in place and all other requirements are met.

(d) A State may request the use of Advanced Construction for the project and subsequently convert those funds to an eligible Federal-aid funding category or to PNRS funding as part of the FFGA.

**§ 505.17 Applicability of Title 23, U.S. Code.**

Funds made available to carry out this section shall be available for obligation in the same manner as if such funds were apportioned under chapter 1 of title 23, United States Code; except that such funds shall not be transferable to other agencies and shall remain available until expended and the Federal share of the cost of a Project of National and Regional Significance shall be as provided in section 505.13.

[FR Doc. E8–25382 Filed 10–23–08; 8:45 am]

BILLING CODE 4910–22–P

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[TD 9429]

RIN 1545–BF87

**Treatment of Payments in Lieu of Taxes Under Section 141**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations which modify the standards for treating certain payments in lieu of taxes or other tax equivalency payments (PILOTs) as generally applicable taxes for purposes of the private security or payment test under section 141 of the Internal Revenue Code (Code). This action is being taken in order to provide issuers of tax-exempt bonds with guidance on whether PILOTs are eligible to be treated as generally applicable taxes for this purpose. The regulations affect State and local governmental issuers of tax-exempt bonds.

**DATES:** *Effective Date:* These regulations are effective on October 24, 2008.

*Applicability Dates:* For dates of applicability, see § 1.141–15(k).

**FOR FURTHER INFORMATION CONTACT:** Carla Young at (202) 622–3980 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:****Background**

This document amends the Income Tax Regulations (26 CFR part 1) under section 141 to modify and clarify the standards for treating PILOTs as generally applicable taxes for purposes of the private security or payment test under section 141.

Final regulations under section 141 were published in the **Federal Register** on January 16, 1997 (62 FR 2275) (1997 Regulations), to provide comprehensive guidance on most aspects of the private activity bond restrictions. On October 19, 2006, the IRS published a notice of proposed rulemaking in the **Federal Register** (71 FR 61693) (Proposed Regulations) regarding the standards for treating PILOTs as generally applicable taxes for purposes of the private security or payment test under section 141. In the Proposed Regulations, the Treasury Department and the IRS solicited public comments and invited interested parties to a public hearing scheduled for February 13, 2007. On January 30, 2007, the Treasury Department and the IRS cancelled the public hearing because no

requests to speak at the hearing were received, and published a notice of such cancellation in the **Federal Register** (72 FR 4220).

The Treasury Department and the IRS received a number of written comments on the Proposed Regulations. After consideration of the written comments, the Proposed Regulations are adopted, with revisions, as final regulations by this Treasury decision (Final Regulations). The revisions are discussed in the preamble.

**Explanation of Provisions****I. Introduction**

In general, interest on State and local governmental bonds is excludable from gross income under section 103 of the Code. Interest on a private activity bond, other than a qualified bond under section 141(e), is not excludable from gross income. Section 141(a) classifies a bond as a private activity bond if it is part of an issue that meets both the private business use test under section 141(b)(1) (private business use test) and the private security or payment test under section 141(b)(2) (private payment test). In addition, section 141(a) independently treats a bond as a private activity bond if it is part of an issue that meets the private loan test under section 141(c).

Section 141(b)(2) provides generally that an issue meets the private payment test if the payment of the debt service on more than 10 percent of the proceeds of such issue is (under the terms of such issue or any underlying arrangement) directly or indirectly (1) secured by any interest in property used or to be used for a private business use, or payments in respect of such property, or (2) to be derived from payments (whether or not to the issuer) in respect of property, or borrowed money, used or to be used for a private business use.

**II. Private Payment Test in General**

Sections 1.141–4(c) and 1.141–4(d) of the 1997 Regulations provide general rules for purposes of application of the private payment test. Private payments generally include any payments made, directly or indirectly, by any nongovernmental person that is a private business user of proceeds during a period of private business use and any payments made with respect to property financed with proceeds of an issue during a period of private business use, whether or not made by a private business user. In addition, private payments include property and payments in respect of property that are used or to be used for private business use to the extent that any interest in that