

Exclusion List those non-U.S.-licensed space stations approved to serve the U.S. market pursuant to the DISCO II procedures. As part of this change, the Bureau will create a webpage that provides access to the space stations approved pursuant to the DISCO II procedures in one central location. Specifically, on the Bureau's web page, the Bureau plans to insert a link entitled *Space Stations Approved for U.S. Market Access*. Once users click on that link, they will be taken to a page with that same title that provides users a way to determine which space stations have been granted market access to the United States pursuant to the DISCO II procedures. The web page will include links to other lists already maintained for DISCO II purposes, such as the Permitted Space Station List and the I-SAT List, as well as entries for non-U.S.-licensed space stations approved for U.S. market access through other procedural means. The Bureau expects that centralizing this information on a web page will facilitate access to such information by common carriers and should address Inmarsat's concern about burdening carriers with the need to review multiple Commission orders in order to determine whether they may access a particular space station. In addition, the non-U.S. space station operator must inform customers that communication with its space station is subject to the conditions and technical requirements specified in the document approving its entry into the U.S. market in addition to the technical requirements in the Commission's rules.

Ordering Clauses

It is ordered that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), and Section 0.261 of the Commission's rules, 47 CFR 0.261, this Order *is adopted*.

It is further ordered that this Order *shall be effective* September 13, 2011.

Petitions for reconsideration under Section 1.106 of the Commission's rules, 47 CFR 1.106, may be filed within 30 days from the date of public notice of this Order.

Federal Communications Commission.

Mindel De La Torre,

Chief, International Bureau.

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 633

[Docket No. FTA-2009-0030]

RIN 2132-AA92

Capital Project Management

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: This proposal would transform the current FTA rule for project management oversight into a discrete set of managerial principles for sponsors of major capital projects; enable FTA to more clearly identify the necessary management capacity and capability of a sponsor of a major capital project; spell out the many facets of project management that must be addressed by a sponsor of a major capital project in a project management plan; change the scope and applicability of the rule; tailor the level of FTA oversight to the costs, complexities, and risks of a major capital project; set forth the means and objectives of FTA risk assessments; and articulate the roles and responsibilities of FTA's project management oversight contractors.

DATES: Comments must be received on or before November 14, 2011. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments identified by the docket number (FTA-2009-0030) by any of the following methods:

Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

U.S. Mail: U.S. Department of Transportation, Docket Operations, West Building, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

Hand Delivery: U.S. Department of Transportation, Docket Operations, West Building, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. *Fax:* (202) 493-2251.

Instructions: You must include the agency name (Federal Transit Administration) and docket number (FTA-2009-0030) or Regulatory Identification Number (RIN 2132-AA92) for this rulemaking at the beginning of your comments. All comments received will be posted, without change and including any personal information

provided, to <http://www.regulations.gov>, where they will be available to internet users. *Please see*, the Privacy Act.

You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed, stamped postcard. Due to security procedures in effect since October 2001 regarding mail deliveries, mail received through the U.S. Postal Service may be subject to delays. Parties submitting comments may wish to consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand.

FOR FURTHER INFORMATION CONTACT: For program matters, please contact Aaron C. James, Sr. at (202) 493-0107 or aaron.james@dot.gov, or Carlos M. Garay at (202) 366-6471 or carlos.garay@dot.gov. For legal matters, please contact Scott A. Biehl at (202) 366-0826 or scott.biehl@dot.gov, or Jayme L. Blakesley at (202) 366-0304 or jayme.blakesley@dot.gov. FTA is headquartered at 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

FTA is authorized by 49 U.S.C. 5327 to conduct oversight of major capital projects, and to promulgate a rule for that purpose. The statute also obliges FTA to codify a definition of *major capital project* to delineate the types of projects governed by the rule. Further, the statute authorizes FTA to obtain the services of Project Management Oversight Contractors (PMOCs) to assist the agency in overseeing the expenditure of Federal financial assistance for major capital projects—both under the discretionary Major Capital Investment (“New Starts”) program and the formula Fixed Guideway Modernization (“FGM”) program authorized by 49 U.S.C. 5309.

FTA's predecessor agency, the Urban Mass Transportation Administration (UMTA), issued the original rule for oversight of major capital projects on September 1, 1989, at 49 CFR part 633 (54 FR 36708). At the time, UMTA's capital programs were comparatively small—the agency's annual capital grants totaled a little more than \$2 billion—and there were a mere 25 task orders in effect for the services of PMOCs. Even then, however, the Congress recognized a compelling need to strengthen the agency's management and oversight of major capital projects.

Thus, in 1987, the Surface Transportation and Uniform Relocation Assistance Act (STURAA) (Pub. L. 100–17, Sec. 324, 101 Stat. 132, 235) both directed a rulemaking for oversight of major capital projects and established a “take down” of up to one-half of one percent from the annual New Starts and FGM funding levels to finance the retention of PMOC services. Given its relative inexperience in the oversight of major capital projects, and its use of PMOCs for that purpose, UMTA chose to promulgate a limited rule that imposed only a very general requirement that the sponsor of a major capital project develop a project management plan for that project, and a very general framework for the responsibilities of UMTA’s PMOCs. That original rule is still in effect.

Today, however, the annual dollar value of the Federal transit capital programs is nearly five times the level authorized under the STURAA in 1987. The number of active PMOC task orders is more than double the number during STURAA. The number of sponsors of New Starts across the United States—many of which are new to the transit industry—has increased exponentially. There is a compelling need for stronger management of fixed guideway modernization projects to help restore rail transit infrastructure to a state of good repair. FTA is participating in a larger number of “mega projects”—projects costing one billion dollars or more—which entail significant oversight challenges to the agency as the steward of Federal tax dollars. Moreover, FTA has become much more knowledgeable about the risks inherent in major capital projects, having conducted its own risk assessments since 2005, having studied the reasons for cost and schedule changes on a good many major capital projects, and having witnessed project sponsors’ lack of management capacity and capability, and appropriate project controls, as discussed below.

The rule that FTA is proposing today follows the Advance Notice of Proposed Rulemaking (ANPRM) the agency published on September 10, 2009, at 74 FR 46515–21. This proposed rule would transform the current, narrow rule for project management oversight to a discrete set of managerial principles for sponsors of major capital projects; enable FTA to more clearly identify the necessary management capacity and capability of a sponsor of a major capital project; spell out the many facets of project management that must be addressed in a Project Management Plan; change the applicability of the rule from one based primarily on total

project costs to one based primarily on the amount of Federal financial assistance for a project; tailor the level of FTA oversight to the costs, complexities, and risks of a major capital project; set forth the means and objectives of FTA risk assessments; and more clearly articulate the roles and responsibilities of PMOCs. What follows is a discussion of the comments on the ANPRM, FTA’s responses to those comments, and a section-by-section description of the proposed rule and what FTA expects to accomplish through each section.

Comments Received on the ANPRM and FTA Responses

FTA received comments from twenty-one (21) entities, including seventeen (17) transit agencies, one (1) project management oversight contractor, and three (3) private not-for-profit organizations. FTA will address the comments in groups, by subject matter.

Shift from ‘Project Oversight Only’ to ‘Project Management and Oversight’.

Comments: In FTA’s proposal to shift the focus of its Project Management Oversight (PMO) rule from “project oversight only” to “project management and oversight,” many commenters stated that project management is not an appropriate Federal role. They stated that the shift would require more resources for FTA and that the overlay of the FTA project management processes may complicate project delivery and costs. Commenters also asserted that experienced sponsors already use the project management strategies proposed in the ANPRM. One commenter questioned whether FTA has the data and authority to support extending these requirements beyond inexperienced sponsors. Another commenter countered with the view that some sponsors have long shown problems with management capability and project controls and that even those that develop good Project Management Plans (PMPs) often fail to follow those plans. One commenter questioned whether the statute allows FTA to specify project management requirements.

FTA Response: FTA has no role whatsoever in a sponsor’s hands-on management of a project. Rather, the FTA role is to oversee the *effectiveness* of a sponsor’s project management. As the steward of the Federal funds that help finance these major capital projects, FTA is obliged to protect the taxpayer. The regulations FTA is proposing today are designed to ensure that sponsors of major capital projects possess resources and attributes

necessary to successfully manage their major capital projects; that FTA has the means necessary to oversee the Federal investment in those projects; and that there are clear expectations of the PMOCs. Over the past several years, FTA has observed a number of characteristics of successful project management and is using this rule to establish them as minimum expectations for sponsors of major capital projects. Also, FTA has ample data to support the need for this rule. The types of problems the rule is meant to address are described in detail, below.

The plain text of 49 U.S.C. 5327(e) authorizes FTA to conduct oversight of major capital projects, and to promulgate regulations for that purpose. Further, the statute obliges FTA to codify a definition of “major capital project,” and 49 U.S.C. 5327(c) enables FTA to obtain the services of Project Management Oversight Contractors (PMOCs) to assist the agency in overseeing the expenditure of Federal financial assistance for major capital projects—both under the discretionary Major Capital Investment (“New Starts”) program and the formula Fixed Guideway Modernization (“FGM”) program authorized by 49 U.S.C. 5309.

Clearly, in authorizing FTA to approve or disapprove Project Management Plans, per 49 U.S.C. 5327(a) and (b), the Congress expects FTA to make judgments about the merits of those plans. Congress does not expect FTA to approve or disapprove plans arbitrarily or to reduce the qualitative assessment of Project Management Plans to mere checklists. In this proposed rule, FTA is making explicit and transparent the criteria by which FTA will determine whether a Project Management Plan merits approval. FTA expects this proposed rule to assist sponsors in developing and executing Project Management Plans of high quality. To the extent that some sponsors already use the project management strategies FTA looks for, the proposed rule will not be burdensome for them; indeed, their current practices attest to the validity of the proposed regulations.

Fixed Guideway Capital Projects Versus Major Capital Projects

Comments: In the ANPRM, FTA proposed to apply this rule to two categories of projects—fixed guideway capital projects and major capital projects—with greater oversight being applied to major capital projects. Many commenters perceived this as an attempt by FTA to extend the reach of its oversight and to take more control of

local project management processes, leading to increased project costs and delays. Some questioned whether the statute allows FTA to specify project management requirements for non-major capital projects. Others suggested that FTA grandfather any project, already underway, which did not meet the definition of a major capital project, such that it would be exempt from the regulations. One commenter said no distinction should be made between types of projects or past experience of a project sponsor; rather, sound project management practices are good for all projects and all project sponsors.

FTA Response: These proposed regulations will apply only to projects designated as “major capital projects” under the proposed definition. Therefore, the proposed rule will not apply to fixed guideway capital projects unless they fall within the definition of major capital projects. Nonetheless, the project management principles identified by this NPRM reflect good practices that are germane to all capital projects, large and small; therefore, FTA encourages all FTA grant recipients to follow these principles in managing their capital projects.

Note: The current regulation at 49 CFR part 633 uses the term “recipient” to connote a recipient of FTA grant funds for a major capital project. In this preamble FTA is using a broader term, “sponsor,” to encompass not only grant recipients but those project sponsors that seek or intend to seek FTA grant funds but have yet to receive any FTA grant funds. Moreover, the *de facto* sponsor of a major capital project and the recipient of an FTA grant for a project are not always one and the same. Nonetheless, it is only a “recipient” which enters into a grant agreement with FTA, thus, the text of the proposed rule uses the term “recipient.” As a practical matter, the terms are interchangeable.

The proposed regulations, together with other steps FTA is taking, are intended to reduce or eliminate delays in project development that have occurred in connection with some aspects of project risk assessments. From FTA’s vantage, the most serious delays are attributable to sponsors’ lack of understanding of the risk assessment process, incomplete submittals, or poor quality submittals. The proposed regulations, technical assistance provided at FTA’s Annual New Starts Engineering Workshop, and a new guidance document called *A Grantee’s Guide to FTA’s Risk Assessment Process*, which FTA plans to issue in the near future, will provide every project sponsor with opportunities to thoroughly understand FTA’s risk assessment process and better prepare to participate in the process. Moreover,

FTA expects the risk assessments to occur concurrently with a sponsor’s project development, thus, they should not lengthen the schedule or delay the Federal financing for a major capital project.

It is FTA’s tentative view that the project management rule should not allow for a project to be grandfathered from the rule. FTA has every confidence, however, that the promulgation of a final rule will not impede either a New Starts or Fixed Guideway Modernization project already underway when the rule is promulgated.

Readers may be interested in a September 2010 report on FTA’s project management oversight program by the United States Government Accountability Office (GAO), which examines the benefits of FTA’s approach to project management oversight, challenges FTA faces in conducting that oversight, and FTA’s use of both PMOCs and Financial Management Oversight Contractors to help the agency meet its oversight responsibilities. *GAO-10-909, Public Transportation, “Use of Contractors is Generally Enhancing Transit Project Oversight, and FTA is Taking Actions to Address Some Stakeholder Concerns.”* Among other matters, the GAO report notes recent PMOC contributions to ensuring that PMPs are accurate, and complete; also, that the PMOCs’ participation in risk assessments has helped identify risks that threatened the budgets of major capital projects.

Major Capital Project (Definition)

Comments: FTA presented three categories of major capital projects in the ANPRM, essentially: (1) New Starts projects; (2) Fixed Guideway Modernization projects costing \$100 million or more; and (3) projects designated as major capital projects at the discretion of the Administrator. FTA also presented an expanded list of circumstances under which the Administrator could designate a project a “major capital project.” Many commenters disagreed with the precepts by which the Administrator might deem a capital project “major.” Some objected that the proposed criteria are ambiguous and subjective, giving FTA too much latitude to designate projects as “major.” Conversely, one commenter suggested that FTA omit the dollar threshold and use only the proposed criteria to which others objected. Some commenters objected to the use of any fixed dollar threshold. One commenter also suggested that FTA should focus this proposed rule on projects that expand a sponsor’s fixed guideway

system. Commenters further recommended that FTA use a risk-based approach to defining a major capital project; escalate the \$100 million cost threshold for identifying a major capital project; and base FTA’s level of oversight on the proportion Federal funding bears to the total project costs. Another commenter recommended that the project management regime discussed in the ANPRM should be extended to all capital projects, regardless of size or complexity.

FTA Response: FTA considered all of these recommendations. Today, the agency is proposing that a “major capital project” be defined as a project that meets either of two conditions:

- (i) Any capital project for which the sponsor seeks \$100 million or more in Federal financial assistance under either the Major Capital Investment or Fixed Guideway Modernization programs authorized by 49 U.S.C. 5309. (Note that in the current rule, the threshold is \$100 million in total project cost.)
- (ii) Any capital project the Administrator finds would benefit from the FTA project management program, given the size or complexity of the project, the uniqueness of the technology, the previous project management experience of the sponsor, or any other risks inherent in the project. (Note: This definition does not include routine acquisition, maintenance, or rehabilitation of rolling stock as specified both in statute and in the current rule.)

Technical Capacity and Capability

Comments: FTA stated in the ANPRM its minimum expectations for a sponsor to demonstrate technical capacity and capability. Commenters strongly supported the idea that sponsors must have “core competencies.” Several commenters suggested that a requirement for demonstrating technical capacity and capability through a PMP should not apply to Fixed Guideway Modernization projects, however. Some suggested that FTA consider a sponsor’s experience and size, among other things, in determining the level of oversight of technical capacity and capability required for a major capital project. Others argued that the submittal of a staffing plan to FTA or simply self-certification of technical capacity should suffice.

FTA Response: In rule proposed today, FTA would explicitly require a sponsor to demonstrate that it possesses the management capacity and capability to successfully implement its proposed project. It must be emphasized, the proposed requirement for *management capacity and capability* is broader than

the requirement that a recipient possess the *technical* capacity and capability necessary to carry out the scope of work under an FTA grant, which applies to any type of grant under the Federal Transit programs authorized by 49 USC Chapter 53.

Moreover, the argument that self-certification and FTA's ordinary progress reviews would suffice as evidence of a sponsor's *technical* capacity and capability inappropriately discounts the seriousness and consequences of the schedule delays and cost overruns that have occurred on past projects for which grant recipients self-certified. Experience has shown that those practices do not provide sufficient protection for the Federal funds invested in major capital projects. Certainly, FTA acknowledges that there are opportunities to tailor, and in some cases streamline, its oversight process to the size and complexity of a major capital project, as well as to a sponsor's past performance. However, as with any financial investment, a sponsor's past performance is not a guarantee of future results. The persons, processes, or even the organizational elements responsible for past successes may be gone.

Moreover, as one commenter noted, a sponsor may possess the requisite expertise, but may not assign the individuals having it to the major capital project in question or may spread those individuals too thinly over too many projects. Likewise, a sponsor's successful experience with one particular approach to project development does not guarantee success under a different development approach. If a sponsor still has the capabilities and resources responsible for past success on a similar project and will devote them to the major capital project in question, FTA's review will be faster and easier. Before awarding Federal funding for the development of a major capital project, however, FTA must determine that the sponsor has sufficient capacity and capability to manage the scope of work for a Fixed Guideway Modernization or the appropriate phase of a New Starts project. While all organizations possess some degree of management capacity and capability, a given organization may need to enhance its management capacity and capability to meet the thresholds for a major capital project, given the constraints and risks of that particular project.

Project Management Plan (PMP)

Comments: In the ANPRM, FTA suggested that a sponsor be required to submit a formal and documented Project Management Plan (PMP) setting forth its

policies, practices, and procedures; to secure FTA's approval, the PMP would have to explain in sufficient detail the sponsor's plan for developing and implementing the project, including the monitoring that will take place to ensure that each major phase or stage in the project development process will be duly executed.

Several of the commenters suggested that a PMP be scaled based on project size and type. One commenter liked the idea of an integrated PMP that is modular, but believed it necessary for major capital projects, only. Some thought PMPs unnecessary for *state of good repair* projects regardless of size or complexity. Some commenters requested that FTA provide better guidelines for the development of PMPs. Others stated that the current rule does not and need not allude to sub plans under the PMPs. Another commenter strongly supported FTA's proposed emphasis on the PMP, while recommending that all sub plans be consolidated, the process be simplified, and FTA should act to ensure that a sponsor adheres to its PMP.

FTA Response: The proposed rule provides that PMPs will be required only for major capital projects as defined in this rule. Furthermore, PMPs will be scaled, based on project size and complexity. It is clear, however, that PMPs are effective management tools for any capital project. A PMP should provide for a series of project-specific performance measures that a sponsor can report against. This NPRM specifies a set of core contents for PMPs plus other requirements that are project-specific. Sub Plans are defined in the proposed rule to mean a document either within or related to a Project Management Plan which addresses a specific discipline or managerial practice for the purposes of planning and managing a major capital project.

Project Implementation Checklist

Comments: In the ANPRM, FTA noted the agency has developed checklists that sponsors of New Starts projects can use as quick reference guides to evaluate and monitor their readiness to be approved into the next phase of the New Starts project development process. FTA proposed to create new checklists for all major capital projects as guides to project implementation. Many commenters disagreed that checklists are helpful and suggested, instead, that FTA formulate standard formats and data requirements to be filled out by transit agencies sponsoring major capital projects. These commenters also stated that the readiness evaluation process slows sponsors' receipt of

Federal funds, and noted that only New Starts and Small Starts have a structured series of FTA approvals specified in law. Conversely, another commenter thought consolidation and simplification of the checklist would be very helpful. One commenter thought checklists are useful for high-risk projects, and that the checklists should be as demanding as possible but sufficiently flexible to prevent a project from stalling over an unnecessary detail.

FTA Response: This proposed rule limits application of the readiness evaluation criteria to enter a subsequent phase in project development to New Starts and Small Starts projects. FTA intends to work with New Starts and Small Starts sponsors early in project development to make the readiness evaluation criteria very clear to the sponsors, and to speed up the approval process.

Reporting

Comments: In the ANPRM, FTA proposed specific reporting requirements for sponsors of Federal funding for major capital projects, including, but not limited to, value engineering reports, safety and security management reports, monthly progress reports, and cost updates for FTA's cost databases. Some commenters requested clarification of these proposed requirements, and some suggested that FTA's TEAM grants management system be used for reporting. Another commenter thought that TEAM would not be optimal because milestones and details should be more integrated with the existing system of periodic reports and go deeper into detail than the level of reporting in TEAM.

FTA Response: This proposed rule clarifies the content of a PMP and its specific Sub-Plans for addressing critical aspects of project implementation. The NPRM further specifies monthly reporting requirements. In the near future, FTA will issue an update of its Project and Construction Management Guidelines, as well as its project management oversight procedures, which contain information on most of the requirements pertaining to oversight and project management.

Consideration of Past Performance

Comments: In the ANPRM, FTA raised the possibility of relaxing requirements for sponsors who have successfully completed other major capital projects within the past seven to ten years. To illustrate, if a sponsor could demonstrate that it has retained its most critical resources, such as the project manager; that the sponsor

organization's business processes and procedures have not been significantly altered; and that the project involves the same or similar technology, FTA could relax the requirements accordingly. The majority of commenters agreed with this approach and also suggested that the risk of the project be considered in determining the level of FTA oversight. A handful of commenters expressed a concern that this approach may not be consistently applied across projects and FTA Regional Offices, and that past performance does not guarantee future success. One commenter opposed the proposed approach, arguing that practices seven to ten years old are obsolete, and that all recipients should be held accountable to a consistent set of standards.

FTA Response: The proposed rule would make project risk one of the factors considered in determining the level of oversight required of a project. FTA will make every effort to ensure that the criteria to assess past performance are fair and consistent. Past performance will include making sure that previously implemented projects and any new project are similar in nature and that key personnel and practices are still available to manage the new project. FTA will consider, specifically, the level of complexity of the project, the amount of Federal financial assistance the sponsor seeks for the project, and the sponsor's past performance in managing its major capital projects.

Oversight of Major Capital Projects

Comments: In the ANPRM, FTA stated that the need for oversight has increased even faster than the available Federal funding because the growth in FTA's programs has generated both higher demand and more complex projects. Some commenters expressed concern that an expansion of the FTA oversight role would be inconsistent with FTA's intention to streamline project development under the New Starts program. Some expressed concern whether enhanced oversight would strain FTA's scarce resources. Some suggested that FTA's level of oversight should be based on the proportion of Federal investment, project complexity, or technical expertise of the project sponsor. Some commenters also said they would welcome early PMOC involvement in major capital projects, but noted that some of the PMOCs are not very experienced, and there remains a lack of consistency in the PMOC process. Also, some commenters asserted that FTA oversight activities are too detailed, and duplicative, in some cases, if one considers triennial

reviews, annual and biennial certifications, and other FTA program reviews.

FTA response: FTA works continually to improve its oversight processes. Expanding FTA oversight in the ways FTA proposes need not slow the development of major capital projects or compromise efficiency, nor is it inconsistent with FTA's goal of streamlining the New Starts process. As mentioned above, a recent report by the GAO identifies a number of actions FTA has taken to improve its project and financial management oversight of New Starts projects. Both the GAO and the U.S. Department of Transportation's Office of Inspector General have identified challenges FTA faces in providing effective oversight of particularly large and complex major capital projects. Furthermore, FTA has initiated a top-to-bottom review of its oversight policies, procedures, and management practices to further improve its oversight programs. This includes, specifically, enhancing FTA's risk-informed PMO program to ensure robust oversight and monitoring of complex capital projects requiring a significant amount of Federal funding or having inexperienced project sponsors, while at the same time seeking opportunities to streamline the oversight of less costly projects being undertaken by experienced sponsors, and making all oversight more efficient and consistent. FTA has already started working with sponsors to ensure early involvement and will assign PMOCs to match the project complexity and its challenges. Also, FTA emphasizes that the definition of major capital projects in this proposed rule would be based principally on the amount of Federal funding a sponsor seeks for its project.

Risk-Informed Project Management Oversight Approach

Comments: In the ANPRM, FTA observed that, over the past several years, the agency has increased its use of risk assessments, risk-informed management, and risk mitigation strategies to ensure that major capital projects are constructed on time and within budget, while delivering the promised project benefits. FTA relies on a portfolio of risk management tools to prevent project costs from escalating. In general, the comments on the ANPRM suggested that risk assessment should be more in the form of technical assistance designed to enable project sponsors to take greater "ownership" of the process. Some commenters argue that risk reviews should be relaxed for those project sponsors capable of performing their own assessments. Others believed

that PMPs should be developed much earlier in the life of a project, and that risk assessments preceding preliminary engineering on New Starts projects should concentrate on identifying potential risks for that type of project, developing possible mitigation strategies, and determining key project milestones. One commenter urged that FTA not overemphasize risk to the exclusion of other relevant project management and oversight criteria.

FTA response: FTA does not see technical assistance as a sufficient substitute for the risk assessment and risk management approach set forth in this proposed rule. Obviously, it is desirable for the agency to provide some form of technical assistance in conjunction with risk assessments and risk reviews. This may take the form of suggestions or recommendations for ways to overcome deficiencies disclosed by an assessment or review. FTA already does this as resources and time permit. Certainly, FTA agrees that a PMP early in the life of a project would be useful to local management of the project development process. FTA also agrees with the suggested scope of risk assessments preceding preliminary engineering on New Starts projects, which is consistent with current practice in the New Starts program. Indeed, over the past several years, FTA has gained a great deal of experience in risk assessment, such that the agency is better able to perform a risk assessment at a level commensurate with the nature and characteristics of a major capital project. This experience now provides the means for explicit project execution planning, tools for risk mitigation and management, and allocation of costs and schedule contingencies, as appropriate. FTA's basic methodology for conducting risk assessments, whether done by FTA or the project sponsor, is set forth in the Appendix to the proposed rule.

Procurement of PMOC Services

Comment: One commenter argued that FTA should use only a qualification-based selection process for obtaining PMOC services.

FTA response: The procurement methods FTA uses to retain services from PMOCs are outside the scope of this rulemaking.

Structure of the Proposed Rule

FTA is proposing a significant revision and restructuring of the rule at 49 CFR Part 633. Under the proposed rule, there would be three subparts and a single appendix. Subpart A ("General Provisions") would address the purpose of the rule, the definitions of certain terms, the applicability of the rule, and

FTA's rights of access to information. Subpart B ("Recipients' Responsibilities for Project Management") would set a number of fundamental requirements for establishing a sponsor's management capacity and capability; specify the subjects that must be addressed in a sponsor's Project Management Plan; establish special requirements for certain projects based on cost, complexity, or risk; and spell out a sponsor's obligations to carry out all the particulars of its project management plan, report current data on budget and schedule, and meet with FTA and FTA's PMOCs on a quarterly basis. Subpart C ("FTA Project Management Oversight") would present the principles of FTA project management oversight, describe the various uses of PMOC services, delineate the roles and responsibilities of PMOCs, address FTA's requirement for risk assessments, and specify the circumstances in which FTA may increase its oversight of a major capital project, based on the cost, complexity, or risks of that project. Additionally, in an Appendix to this proposed rule, FTA would set forth the basic methodology used for conducting risk assessments on major capital projects as it deems necessary or prudent.

The following is a section-by-section analysis of each proposed rule:

Section-by-Section Analysis

Section 633.1 Purpose.

This section explains the mandate of 49 USC 5327(e) to perform oversight to both the Major Capital Investment and the Fixed Guideway Modernization programs authorized by 49 USC 5309.

Section 633.3 Definitions.

This section sets forth the definitions of some key terms applicable to this rule. This section would establish new definitions in the rule for "Project Management Oversight Contractor," "risk," "sub plan," and "management capacity and capability." Also, this section would amend the current definitions for "major capital project," "project management oversight," and "project management plan."

By definition, a "major capital project" will be a project using \$100 million or more in Federal financial assistance under either the Major Capital Investment or Fixed Guideway Modernization programs authorized by 49 U.S.C. 5309, or any capital project the Administrator finds would benefit from the FTA project management program. Thus, the proposed change to the definition of "major capital project" entails a fundamental shift, as follows: The current definition at 49 CFR 633.5

is based on total project costs of \$100 million or more, but the proposed definition would be based on a total amount of Federal funding of \$100 million or more from programs under 49 U.S.C. 5309. FTA believes it more appropriate to apply the rule to any given project based on the level of Federal investment in that project, as opposed to the total costs of the project.

The proposed changes to the definitions of "project management oversight" and "project management plan" are simply for clarity.

Insofar as "project management oversight," however, readers should be aware that FTA uses the term to connote the activities of both the agency and its PMOCs in all of the following: First, the activity of continuously assessing a project to evaluate its readiness for further project development, up through the point where FTA determines whether the project is ready for a grant award, based on sufficient confidence that the scope, costs, benefits, and impacts are firm and final. Second, the activity of making ongoing determinations whether the sponsor has the management capacity and capability necessary to carry out a project efficiently, and effectively; the effectiveness of the sponsor's project delivery; and whether the project is on time, within budget, and built to approved plans and specification, consistent with all applicable Federal requirements. Third, the activity of ensuring that a sponsor's management processes are based on sound decision making, driven by a thorough understanding and implementation of well documented, risk-informed project management practices.

Since the original rule was issued more than 20 years ago, a number of disciplines have developed as best practices in the transit industry, including risk and contingency and rail fleet management plans. Other disciplines are now required by law, including, notably, safety and security management plans. Thus, instead of requiring an all-inclusive project management plan, FTA proposes to institutionalize its practice of permitting sponsors to address these different disciplines in "sub plans." The proposed definition of "sub plan" reflects the use of that term throughout the industry.

FTA framed the proposed definition for "risk" based upon the agency's experience in conducting various types of risk assessments for major capital projects over the last several years, including the Lower Manhattan Recovery projects and several New Starts projects entailing tunneling with geotechnical risks. The proposed

definition is also consistent with the approaches to "risk assessment" taken by other governmental agencies in the fields of human health, nuclear power, defense, security, and other forms of public works. The study of risk is a broad subject. It can be applied to a sponsor's entire organization, or the many functions and levels of an organization, or specific functions, projects and activities. *See, e.g.,* International Organization for Standardization (ISO), ISO/FDIS 31000:2009, Introduction. As a Federal grant agency making investments of taxpayer funds, FTA must examine a sponsor's management capacity and capability at all these levels in assessing risk.

For that very purpose, FTA is proposing a definition of "management capacity and capability" to capture the point that while every sponsor must have the underlying technical capacity and capability to carry out a project, for a major capital project, the sponsor's ability to deliver the project on time and within budget is driven by the robustness of both (a) its "management capacity," which consists of the authority and resources of the project team, and (b) its "management capability," which reflects the additional authority and resources the sponsor is able to call upon as necessary to deliver the project. These points are discussed further below.

Section 633.5 Applicability.

This section would amend the current rule at 49 CFR 633.11 ("Covered projects") by omitting the obsolete legal citations in the current section 633.11, and extending the rule to all major capital projects funded from any source under 49 USC Chapter 53, including those major capital projects using Chapter 53 funds that originate under the Surface Transportation Program (STP) or the Congestion Mitigation and Air Quality Program ("CMAQ") authorized by the Federal-aid highway statutes.

Readers should note, moreover, that in his or her discretion, the Administrator could designate a Small Starts project as a major capital project subject to these requirements.

Section 633.7 Access to Information.

This section would make a minor change to the current rule at 49 CFR 633.15, but it would also recognize a preferred practice among FTA and many sponsors of major capital projects regarding the custody and control of documents and data that sponsors may wish to withhold from disclosure to third parties. Specifically, this section

would allow FTA and its PMOCs to decline custody or control of documents which are or may be at issue in litigation between project sponsors and third parties.

Section 633.9 Project Management Capacity and Capability.

All organizations that sponsor transit projects are capable of carrying out their projects with some degree of efficiency and effectiveness. To some degree, all of them are capable of managing risk. There is a fundamental linkage, however, between the experience of a sponsor's project "team" and the risks of a project. The experience level of a project team can increase or mitigate the risks of a project. Changes in the membership of a project team or the competency levels of acquired team members can precipitate changes to the schedule for a project, or the duration or particular project activities. *See, e.g., Project Management Institute, Body of Knowledge (2004), Ch. 11.*

This NPRM would establish an explicit link between the organizational performance of a project sponsor and the management capacity that is necessary to complete project activities. FTA is convinced that deficits in management capacity impair organizational performance and expose a major capital project to increased risk of negative consequences for costs and schedule. Clearly, a sponsor's project team requires certain minimum skills and competencies, delegated authorities, explicit accountabilities, and assigned resources to accomplish a project, which can be defined as "management capacity."

Experience demonstrates, moreover, that the successful completion of a major capital project requires more than a minimum management capacity; it requires that the sponsor organization have the ability to both oversee the project team and provide additional support and resources, as necessary, to address emerging problems, or issues not identified in the original constraints or assumptions. FTA characterizes this as "management capability." This NPRM would require the sponsor of a major capital project to possess both *management capacity and management capability*.

The greater the risks associated with the constraints or assumptions of a project, the greater the demand for management capacity and capability, and the higher the thresholds for managing the project and mitigating risk. At each stage of the process of project development—and prior to awarding a grant of Federal funds—FTA must determine whether a sponsor

possesses the necessary management capacity and capability to accomplish that phase of the project or the purpose of that grant. If FTA finds that a gap exists in a sponsor's management capacity and capability, the sponsor must demonstrate, with documentation, an approach to acquiring the means to close the gap within an acceptable timeframe.

Likewise, from the earliest moments of developing a major capital project, a sponsor must balance the authority and resources allocated to that project against any competing priorities, and retain the ability to mobilize additional resources, as necessary. Specifically, the project team must have the sufficient delegated authority and resources to manage the activities to be accomplished at each successive phase of the project. Yet the project team must be explicitly accountable to the sponsor for its exercise of delegated authority and its use of allotted resources. The project team must also be responsible for reporting and elevating issues to higher management of the sponsor's organization—such as a chief executive officer and board of directors—in a manner that is both professional and ethical.

Many readers will be familiar with the term "technical capacity," or "technical capacity and capability"—which is a subset of management capacity and capability. By law, a recipient of a grant under any of the FTA programs authorized by 49 U.S.C. Chapter 53 must have the legal, financial, and *technical capacity* to carry out the project that is the subject of that grant. In itself, of course, the absence of any key technical skill or the inadequacy of a technical process could lead to significant cost overruns and schedule delays. For example, the lack of geotechnical expertise for a tunnel project, or lack of real estate savvy on a project requiring large amounts of real estate acquisition could seriously jeopardize a project's budget or schedule, or both. And the requisite technical capacity and capability might differ in some aspects from project-to-project or even phase-to-phase within the same project. For example, some of the expertise required to successfully manage a light rail project will not be required for bus rapid transit. Similarly, some of the skills necessary for the construction phase of a project will differ from those needed for the earlier design phase of that same project. Nonetheless, good management is an underlying necessity regardless of the mode of transit, or phase of development, or the technical capacity a sponsor may possess. From the very

beginning of a project, a sponsor must develop and maintain the expertise, processes, and procedures necessary to successfully implement and manage the project at each stage of planning, engineering, design, and construction.

In summary: Unlike the current rule at 49 CFR part 633, this NPRM would clearly establish FTA's expectations for management capacity and capability of sponsors of major capital projects. In effect, FTA would codify the skills and practices a sponsor must acquire and maintain to successfully deliver a major capital project. While the proposed rule would cover major capital projects, only, FTA is convinced the requirements of proposed section 633.9 are germane to any capital project, and encourages sponsors to follow these principles in managing all their capital projects.

Section 633.11 Project Management Plan: Contents

The Project Management Plan (PMP) is altogether critical to successful management of any major capital project, throughout the development and implementation of that project. The PMP and its sub plans further enable the sponsor's staff to effectively manage the scope, budget, schedule, and quality of the project through a set of common objectives, while managing the safety and security of the public.

The proposed rule would provide for the scaling of the PMP to match the nature and characteristics of the project. It identifies core PMP requirements and states that depending on the characteristics of the project, additional requirements may apply. For example, the management of any major capital project benefits from the establishment of comprehensive and critical path-driven project schedules, as well as strong document control procedures and procedures for managing contractor performance. The proposed regulatory text would institutionalize FTA's risk-informed project management oversight process, and addresses risk and contingency management sub plans as core PMP requirements. On the other hand, real estate management sub plans would be required only when the acquisition of real estate is necessary to implement a project.

Note that many disciplines can be addressed in separate sub plans, as discussed above. FTA recognizes that some project sponsors have in-house project management tools, so the proposed rule would allow for the sponsor to incorporate by reference its plans, programs, and procedures already in existence which address the various PMP requirements.

Section 633.13 Special Requirements Based on Project Cost, Complexity, or Risk

Over the years the industry has forcefully asserted that not all sponsors are alike, nor are all projects alike, thus, FTA should take individual circumstances into account when applying its requirements for project management. FTA agrees. This section is proposed in direct recognition of that approach. Simply put, while Section 633.11 already recognizes that the PMP for any project has certain core components, there are other components that only apply in certain circumstances. The Administrator will review the sponsor's management capacity and capability, the complexity and risk of the project, the sponsor's experience implementing similar types of projects, and, based on that review, can impose additional requirements the sponsor must address in its PMP. The Administrator may then require the sponsor to report its progress in meeting those special requirements as well as to forecast whether the project will stay on schedule and on budget. This would be a targeted approach, based on individual circumstances, after a careful analysis. It is not and would not be the normal practice. Thus, while the proposed rule requires every sponsor to have in place basic management systems, it also recognizes that in certain circumstances, because of the nature of the investment or the sponsor's own experience level, additional management capacity and capability may need to be put in place to ensure that a project is delivered on time and on budget.

More important, these additional requirements are intended to be developed early enough that they can make a difference in how well the project is managed. These are not "cookie cutter" solutions; rather, they will be specific to the sponsor's structure and project approach. These requirements will also help the sponsor ensure that decisions about the project will be made based on the best information available at the time; in an open, transparent, informed manner; at the appropriate management level; and documented in a manner that can be reconstructed by third parties.

This particular provision in the NPRM reflects two corollary lessons learned by FTA in the 22 years since the agency issued the current regulation. First, any problems in implementing a project must be recognized and addressed as early as possible. The proposed rule would oblige a sponsor to anticipate a problem and have a

solution already in place should the problem arise. Second, the proposed rule recognizes that if projects experience significant problems, unless the problems are recognized and addressed promptly by the sponsor, the range of options for solving the problems narrows rapidly, and may disappear altogether. Therefore, this proposed rule focuses on the need for the sponsor to track and forecast whether the project is, and is expected to stay, on schedule and within budget, to identify and develop immediate and effective solutions to remediate problems related to schedule and budget, and to report this information to FTA with the understanding that FTA will use this information in making funding decisions, even with respect to approving an annual increment of committed New Starts funds. At heart, these proposed requirements are intended to help FTA and project sponsors meet their stewardship responsibilities to guard against waste and misuse of taxpayer funds.

The fundamental basis for these requirements is substantiated by research. In 2005, an FTA-sponsored study on cost overruns on transit projects, primarily light rail new starts projects (*Analysis of Capital Cost Elements and Their Effect on Operating Costs*, NTIS report no. FTA-NY-26-7000), <http://www.utrc2.org/research/assets/107/utrc-2005-fta1.pdf>, noted in its introduction that cost overruns are a common phenomenon because "[a]s projects are developed, costs rise as projects become more complex, unforeseen conditions are encountered, and delays erode the real value of the original budget." The study concluded in Section 2.1 that several factors contributed to overruns, including "[s]ystematic underestimation, including the failure to adequately assess risks, foreseeable adverse conditions, and the full range of project cost components." An internal FTA study on risk management performance included an evaluation of forecasted versus actual performance for several projects and concluded that approximately 50 percent of the cost overruns in selected projects were related to poorly managed risk. Finally, in 2006, a TRB report (TCRP Project G-07—Managing Capital Costs of Major Federally Funded Public Transportation) http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_w31.pdf, identified a number of possible causes, which are described in the examples below, for the industry's inability to accurately estimate, manage, and control project costs. These three

studies came to similar conclusions and reflect FTA's experience over the last twenty years of investing in major capital projects. Significant risks to major capital projects include:

Unforeseen engineering and construction complexities: Constructing transit projects in dense, older, urban cores may mean rebuilding infrastructure over 100 years old. A recent New Starts project was constructed above older masonry sewers. The sponsor did not realize the contractor would use mass excavation equipment in the street, and the heavy equipment collapsed the fragile, underlying utilities. On another project, the sponsor assumed that the existing utilities could be easily relocated with existing methods for temporary support of older cast iron pipe. That assumption was inaccurate. Correcting the consequences sharply increased the costs of the project. Another project sponsor replacing older storm sewer planned to add tunnel discharge to the waste water flow. The sewer had settled, which required extensive relaying to handle the planned discharge, all of which added to the project costs. Examples abound of problems stemming from construction complexity, but one in particular stands out: A tunnel portal was fully engineered and reviewed for constructability, but the engineers missed the detail that the portal was located in the middle of a municipal corporation yard resulting in significant delay and a substantial increase in cost. All of these risks were foreseeable, and avoidable.

Relevant costs not included in early estimates: In the early implementation of FTA's risk review process there were "mechanical inaccuracies" in estimates and frequent problems in the integration of cost data; this has improved in recent years, however. Another problem had to do with escalation in that, as a project advanced, portions of the cost estimate remained in earlier year base dollars. Most recently, one of FTA's major capital projects went through a protracted process towards an amendment of the Full Funding Grant Agreement. About a third of the overrun on that project was due to problems in the base estimate with earlier data that was not updated as part of the on-going budget process. A similar example has to do with indirect costs for construction; most sponsors still budget construction indirects on a percentage or "parametric" basis, even though they often develop extensive Division 1 specifications in terms of services, reports and personnel. Another problem has been under-budgeting of contractor design costs in design/build contracts.

Organizational and technical capacity to undertake the project: There are two recent examples where a transit agency that had successfully executed a number of light rail projects stumbled in building a commuter rail project. In a third instance, a transit agency that had successfully delivered a project using a traditional sealed bid approach ran into cost problems when it attempted a design/build project delivery.

Changes in project scope: For a New Starts project, FTA's expectation is that coming out of Final Design, the project scope will be well defined and experience relatively few changes thereafter. Recent experience has shown that this is not always the case. A number of New Starts projects have changed or reconfigured almost half of the construction scope before the projects were halfway bid. Often this was due to changing market conditions, but, in retrospect, the benefits that sponsors received for assuming such risk have been low, at best. At worst, not only have there been no benefits, but costs have actually increased. A less frequent, but still costly, factor is where the physical characteristics of the project have changed. This has happened because of problems identified during geotechnical exploration, and actual changes in the physical configuration of the project made to accommodate stakeholder demands or changes in underlying assumptions.

Geotechnical: The inability of a sponsor to deal with geotechnical issues up front has been shown to increase total geotechnical costs by as much as 40 percent and cause months of delays. For example, of seven recent projects with a planned total of eleven underground transit stations, four stations were moved after entry into Final Design and two were moved during construction. These moves were due to issues identified when better geotechnical information became available from more detailed soil borings during Final Design, which led to both additional redesign costs as increased costs from delays to the schedules. In one instance, a station had to be moved 90 feet deeper to avoid encountering an existing water tunnel. In another instance, the sponsor had to lower the tunnel to achieve the necessary rock cover.

Ability to Define Physical Configuration of a Project: This occurs most frequently when a project sponsor determines during Final Design or construction that a previously relied upon design standard or requirement is no longer valid. In one such instance, a sponsor had managed the design of the

project based on an assumption that critical features of the storage yard and its connections with the mainline were determined by the morning peak load. Subsequent to entry into Final Design, the sponsor discovered that constrained yard movements and a new bridge were needed to accommodate evening peak load, which added 30% to the contract package costs and delayed the package design by an additional eighteen months.

Section 633.15 Project Management Plans: Implementation

FTA's review and approval of a PMP seeks to verify that a sponsor has all the relevant capabilities and resources in place to ensure successful management of the project using available best practices. It also verifies the sponsor's readiness to move a New Starts project from one phase of development to the next, and for other major capital projects, the receipt of Federal grant funds. A PMP is a dynamic management tool that requires periodic updates as a project transitions from one phase to another or as a result of other changes, such as turnover in personnel.

This proposed rule would continue the requirement for monthly reporting and clarify other requirements aimed at improving the management of a major capital project. Specifically, the proposed rule would document the need to report and manage the project, based on a risk-informed management process. This would include tracking and reporting on cost and schedule contingencies along with known risks to the budget and schedule, as well as ongoing or planned efforts to mitigate those risks.

Further, the proposed rule would codify FTA's long-standing practice of convening quarterly meetings with major capital project sponsors, as deemed necessary. These quarterly meetings—typically attended by FTA, its PMOC, and local agency management and technical staff—are opportune occasions to analyze the progress of a project and identify issues that threaten timely and cost-effective delivery, and develop remedies and alternatives to maintain cost and schedule. Moreover, in its effort to ensure the implementation of safe rail systems, FTA has recently begun to encourage a project's prospective state safety oversight agency representative to attend these quarterly meetings.

Section 633.17 FTA Project Management Oversight Principles

The basic oversight framework at 49 CFR part 633 has served FTA well, focusing on the assignment of to oversee

major capital projects and requiring a project sponsor to develop a comprehensive PMP to guide the planning and implementation of its major capital project. The current rule has helped to protect taxpayer funds and to ensure the efficient, effective design, construction, and opening of transit projects to revenue service.

Today, however, FTA is investing in larger and more complex capital projects, as compared to those in years past. These more recent projects entail greater challenges to the agency as the steward of Federal tax dollars. They require further improvements in the ways sponsors manage their projects and the FTA program for oversight of major capital projects.

The proposed rule is designed to tailor the FTA oversight process for factors such as project complexity, the amount of Federal investment, and the experience level of the project sponsor. FTA has already started working with sponsors earlier in the project development process, and will assign PMOCs to match project complexities and challenges. The proposed rule sets forth the principles for FTA's project management oversight. It specifically establishes and documents FTA's risk assessment practices, the review of project management capacity and capability, and the review of project readiness. These reviews would "raise the bar" as compared to the minimal requirements in the current rule, which are limited, essentially, to review of the PMP and its implementation.

Section 633.19 FTA Use of Oversight Services

While FTA's capital programs have grown significantly since 1989, its staff size has stayed essentially the same for the past 30 years. FTA's PMOCs help fill the gaps between staff resources and both the number of major capital projects and the levels of Federal funding for those projects. Further, of course, the PMOCs provide specialized expertise for the challenges that confront a good many projects. Currently, the decision to assign PMOCs to projects is made based on the relative complexities of the major capital projects underway, as well as the experience level of the project sponsors. This proposed rule acknowledges conditions under which FTA may scale its provision of oversight services to the risks (or lack thereof) inherent in a project or to the experience level of its sponsor.

Each PMOC firm assigned to a major capital project is a team of experienced professionals who collectively possess expertise on all aspects of the

development, construction, start-up, and overall management of transit capital projects, including major capital projects. All PMOCs serve as FTA's eyes and ears on-site; monitor and report on a project's development and implementation; and verify whether the management of a project is consistent with the approved project management plan and accepted engineering and project management practices. The PMOCs submit periodic reports to FTA, documenting project status, activities, and open issues.

In this proposed rule, additional project elements such as safety and security have been included as requiring PMOC oversight. These PMOC efforts keep FTA informed of a project's status and the adequacy of a sponsor's project management. They also help support FTA's decision whether to advance a New Starts project to the next phase of development, recommend a New Starts project for a Full Funding Grant Agreement, or provide a large grant to a sponsor of a Fixed Guideway Modernization.

Section 633.21 Roles and Responsibilities of Project Management Oversight Contractors

As discussed previously, a PMOC's primary role is to support FTA in the oversight of a major capital project by reporting and making recommendations to FTA on the sponsor's management of the project. Acknowledging their professional expertise, this section of the proposed rule sets forth the explicit roles and responsibilities of the PMOCs. It also provides for related services that PMOCs may provide to FTA's oversight program. These may take the form of specialized assistance to FTA, for example, in developing oversight procedures, preparing reports on best practices, sharing of lessons learned, conducting independent reviews of capital cost estimates, and other efforts that help FTA improve its transit capital investment programs.

FTA must emphasize, however, that a PMOC has no authority to make decisions for FTA or to act on behalf of FTA in making any findings or judgments regarding a sponsor's compliance with Federal statutes, regulations, or administrative requirements. As explained herein, a PMOC does not and should not interfere with the project sponsor's responsibilities. A PMOC does not sign drawings, for example, nor does it perform field tests, conduct materials testing, or inspect work site conditions, so forth.

To protect all parties that are or may be involved in a major capital project,

this NPRM reaffirms that a PMOC performs its services under strict privity of contract with FTA. Regrettably, on a few occasions, PMOC's have been subpoenaed for testimony or production of documents in third party law suits, or even sued in tort, in attempts to blame them for accidents, incidents or injuries related to the project, or to find them liable for errors and omissions associated with the design and construction of the project. FTA's PMOCs bear no such responsibility, of course, and this proposed rule memorializes that point.

Section 633.23 FTA Risk Assessments

FTA's risk assessment of major capital projects has evolved over the years, partly in response to the increasing complexity of projects, but certainly as the result of FTA's growing experience in the oversight of major capital project management. Since 2003, FTA has completed over 40 assessments of the risks associated with New Starts and other major capital projects. During this time, the risk assessment has transitioned from a stand-alone "bottom-up" risk analysis to an integrated "top-down" risk analysis, and FTA has employed a number of approaches to identify project risk.

The first approach was to identify "sources of risk" which are categories of possible risk events (e.g., stakeholder actions, unreliable estimates, team turnover) that could affect the project for better or worse. This approach attempted to compile an estimate of total project risk exposure, which would then be used to determine budget adjustments or requirements for additional contingency. This process resulted in a project level estimate of risk from very detailed estimates but without tracking the estimate to specific contract packages or budget line items. This was characterized as a "bottoms up" approach. FTA's experience with the "bottoms up" approach was unsatisfactory.

Subsequently, FTA identified common characteristics of satisfactory risk assessments and realized that an evaluation of project deliverables and quality of management planning products tied to individual contract packages or budget line items consistently led to more accurate projections. This became known as the "top down" approach. A number of advantages materialized as a result of transitioning to the "top down" approach. Most significantly, FTA was able to bring to any individual project assessment a standardized risk classification system, as well as a risk framework to facilitate management

planning. In the several years of implementing this "top down" approach, FTA has had considerable success in forecasting project risk, and has presented this information at various international forums. Indeed, this new approach has contributed to improvements in project management not only in terms of the tracking of risk, mitigation efforts, and available contingencies, but also in reporting on the risk response and effective contingency management. FTA has been continuously working with the PMOC community to document emerging lessons learned, which will serve as a guide to improving the risk models as well as developing new tools to improve the process.

FTA has also initiated risk assessments prior to entry into Preliminary Engineering for those New Starts projects that have shown signs of potential high risks. This enables the early identification of some critical project risk items and as a result the early development of mitigation strategies. Details of FTA's risk assessment methodology are set forth in Appendix A.

Section 633.25 Increased Oversight Based on Project Cost, Complexity, or Risk

This proposed rule is the counterpart to Section 633.17 in Subpart B, which allows the Administrator to impose additional requirements for certain projects, based on the experience level of the sponsor and the nature of the project, and requires the sponsor to report on its progress. The proposed rule recognizes that, in appropriate circumstances, FTA will provide an increased level of analysis and oversight, again tailored to the specific circumstances of the project, to determine the adequacy of the sponsor's management of project activities, both pre-contract award and post-contract award; the reliability of the sponsor's current and forecast estimates of project costs, and the revenue service date; and the additional actions the sponsor needs to take to maintain that cost and schedule.

This section also provides for FTA to use analytical tools to assess the sufficiency of the sponsor's existing PMP to address the particular project and sponsor characteristics that could oblige the Administrator to call for additional requirements. Because these characteristics are specific to the sponsor and the project, there are no set, generic requirements that will be imposed. When FTA identifies areas that need improvement, the sponsor will be expected to tailor its response to

its own organizational structure and project approaches. Through its analysis, FTA and its PMOC will develop an oversight approach that is specific to the situation. While FTA will provide additional guidance and, if requested, examples of how other sponsors have addressed an issue, there is no “cookie cutter” approach that a sponsor will be expected to use in responding to the situation, nor will those examples from other sponsors be used to determine whether a particular sponsor is in conformance with a specific requirement.

As part of its analysis and oversight, FTA will determine the most effective frequency and content of sponsor reporting necessary for it to conclude whether the sponsor is doing everything required to keep the project on budget and schedule. Monthly or quarterly reviews, or both, which are required under proposed Section 663.15, may be used as the forum for FTA to perform this additional oversight.

Many of the requirements directed by FTA in the past have focused on having an open, informed, transparent decision-making process where decisions are made at the appropriate level within the sponsor's organization and are appropriately documented, based on the best information available at the time, and are able to be reconstructed by third parties. These processes and tools need to be tailored to the project's specific stage of development.

In particular, in the development of the procurement documents, a sponsor may be able to include mechanisms, such as options, that allow it to retain the ability to mitigate cost increases at a later date. However, if the design is not done at the beginning to allow for this possibility, the cost and time of redoing the design at a later date becomes prohibitive. With good preplanning, a sponsor may negotiate a unit cost for unforeseen site conditions so that if they do occur, the need to negotiate with the contractor at that stage will be limited to agreeing on the amount of the change that has occurred, not how it should be priced.

It is imperative that a sponsor have an acknowledged process, as cost and schedule problems crop up, for projecting the results of those remedial actions on its ability to maintain the overall costs and schedule. An unacknowledged problem cannot be solved. Unsolved problems drive negative variances to costs and schedules. The forecast process should clearly explain when cost or delay will be recognized. Without a forecast, it is too easy to assume that a problem will

be solved while the ability to actually find a solution slips further and further away.

Rulemaking Analyses and Notices

All comments received on or before the close of business on the comment closing date above indicated will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FTA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period.

Executive Order 12866 (Regulatory Planning and Review), EO 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

FTA has determined preliminarily that this action, although not economically significant, would be a significant regulatory action within the meaning of Executive Order 12866 and would be significant within the meaning of Department of Transportation regulatory policies and procedures because of substantial congressional, State and local government, and public interest. Those interests include the receipt of Federal financial support for transportation investments, appropriate compliance with statutory requirements, and balancing of transportation mobility and environmental goals. We anticipate that the direct economic impact of this rulemaking would be minimal. FTA evaluated the industry costs and benefits of this NPRM and has determined that it is not an economically significant rule under E.O. 12866. The proposals contained in this NPRM will not result in an impact on the economy of \$100 million or more (adjusted annually for inflation).

As authorized by 49 U.S.C. 5327, this NPRM updates and clarifies FTA's existing oversight principles, tailors them to known risk factors, and redefines major capital project so that projects subject to FTA's project management oversight would change. The rule under this NPRM only imposes regulatory requirements upon applicants requesting funding under the program. The project management plans and their major elements that are the subject of this NPRM are Congressionally-mandated.

We consider this proposal a means to clarify and realign the existing regulatory requirements. Those proposed changes would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

FTA has also considered the industry-wide costs and benefits of this NPRM. First, thanks to the practices adopted in the 1990s and 2000s under the current rule, the best of which are codified in the proposed NPRM, the typical (50th percentile) final costs of major capital projects have been kept within 22 percent of original estimates, compared to 51 percent in the years 1969 to 1987.¹ Further improvement is expected should the proposed NPRM become final. Given the scale and complexity of major capital projects and a history of cost overruns on such projects, these cost savings have been in the hundreds of millions of dollars. The proposed rule would standardize the best of these practices and refine the requirements of the current rule. Secondly, because project management oversight has evolved to incorporate the oversight principles set out in this NPRM (as reflected in the aforementioned cost control), significant increased costs borne by sponsors from the rule, per se, would be exceptional. For example, Project Management Plans and Risk Assessments are the norm in major capital projects. Because this proposed rule would apply on the basis of Federal funds rather than total project costs, as is the case with the current rule, fewer projects may be subject to FTA project management oversight. Also, because the level of oversight would be tailored to the costs, complexities and risks of a project, the rule is likely to reduce overall FTA oversight. Moreover, by their own initiative to reduce risk factors, project sponsors can reduce the level of FTA oversight under this proposed rule.

This proposed rule would apply FTA project management oversight to Fixed Guideway Modernization projects, but only such projects receiving \$100 million or more in Federal financial assistance under 49 U.S.C. 5309 or those FTA designates as major capital projects. Sponsors of Fixed Guideway Modernization projects with the most effective track records would receive the least FTA oversight. Those sponsors with less effective track records can

¹ FTA, *The Predicted and Actual Impacts of New Starts Projects—2007*, p. 13.

improve, with the assistance of the PMOCs employed by FTA. Sponsors that prepare Project Management Plans and Risk Assessments now would be able to prepare those required under the proposed NPRM for roughly the same cost or less, given the guidance provided concerning their contents. Finally, nearly all the other foreseeable incremental costs would be borne by PMOCs that are paid by FTA from a fixed portion of FTA capital program funds.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) FTA has evaluated the effects of this proposed action on small entities and has determined that the proposed action would not have a significant economic impact on a substantial number of small entities. For this reason, FTA 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 proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$120.7 million or more in any one year (2 U.S.C. 1532).

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria established by Executive Order 13132, and FTA has determined that this proposed action would not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. FTA has also determined that this proposed action would not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions. Consistent with Executive Order 13131, FTA examined the direct compliance costs of the NPRM on state and local governments, and determined that the collection and analysis of the data is eligible for Federal funding as part of the overall project costs. Representatives of state and local governments were invited to participate in the Webinars and submit formal comments to the docket on the ANPRM. Furthermore, the preparation of Project Management Plans by project sponsors would not preempt any state law or regulation or limit States'

abilities to discharge traditional state governmental functions.

Executive Order 12372 (Intergovernmental Review)

The regulations effectuating Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to these programs and were carried out in the development of this rule. FTA conducted two public meetings via webinar following publication of the ANPRM, in which representatives of state and local governments were able to participate. Also, FTA extended the comment period on the ANPRM for an additional thirty days, receiving twenty-one comments, seventeen of which were submitted by transit agencies representing units of state and local governments. FTA solicits comments on this subject.

Paperwork Reduction Act

In compliance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) and the Office of Management and Budget (OMB) implementing regulation at 5 CFR 1320.8(d), FTA is seeking approval from OMB for the Information Collection Request abstracted below. FTA acknowledges that this NPRM entails project-specific information collections to facilitate project oversight for major FTA capital projects, including an effective Project Management Plan and accompanying risk assessments. Therefore, FTA is seeking comment whether the information collected will have practical utility; whether its estimation of the burden of the proposed information collection is accurate; whether the burden can be minimized through the use of automated collection techniques or other forms of information technology; and for ways in which the quality, utility, and clarity of the information can be enhanced.

Readers should note that the information collection will be specific to each project, to facilitate and record the project sponsor's exercise of project management and the PMOC's exercise of FTA-assigned oversight duties. The paperwork burden for each project will be proportionate to the level of oversight that, in turn, is governed by the project's scale, complexity, and risks. Moreover, the labor-burden of reporting requirements such as Risk Assessments and project milestone reports are largely borne by the PMOC, employed and paid for by FTA from program (not project) funds. Please refer to proposed Sections 633.11 and 633.13 for the content of the PMP. Proposed Section 633.23 provides

a description of the risk assessment process, and refers to the appendix to the proposed rule, which provides additional information on the risk assessment process.

Type of Review: OMB Clearance. New information collection request.

Respondents: There are approximately 77 possible major capital project sponsors, of which 55 presently are implementing major capital projects. Of those projects in the New Starts program, FTA anticipates six (6) Preliminary Engineering (PE) requests, six (6) Final Design (FD) requests and four (4) Full Funding Grant Agreements (FFGAs) per year. In addition, FTA anticipates five (5) major Fixed Guideway Modernization projects per year. The PRA estimate was based on a total of 21 PMPs. This includes 6 projects entering PE, 6 entering FD, 4 entering into FFGAs and 5 Fixed Guideway Modernization projects. Insofar as risk assessments, the PRA estimate is based on 16 risk assessments for New Start projects.

Frequency: Information will be collected periodically whenever a respondent sponsoring a New Starts project enters into a new project management stage (*i.e.*, Preliminary Engineering, Final Design, or Full Funding Grant Agreement), and once for a respondent sponsoring a Fixed Guideway Modernization project.

Estimated Total Annual Burden Hours: 57,973. This has been estimated as follows: This represents the burden to the project sponsor (recipient) and includes 23,925 hours for preparation and support the review of the PMPs, 9,408 to support the risk assessments and 24,640 hours to report to FTA and hold quarterly meetings.

Additional documentation detailing FTA's Paperwork Reduction Act Information Collection Request, including FTA's Justification Statement, may be accessed from OMB's Web site at <http://www.reginfo.gov/public/do/PRASearch>. OMB is required to file comments or make a decision concerning the proposed information collections contained in this proposed rule within 60 days after receiving the information collection request submission from FTA. FTA will summarize and respond to any comments on the proposed information collection request from OMB and the public in its Final Rule.

National Environmental Policy Act

This proposed action would not have any effect on the quality of the environment under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and is categorically

excluded under 23 CFR 771.117(c)(20)), which covers the promulgation of rules, regulations and directives.

Executive Order 12630 (Taking of Private Property)

FTA has analyzed this proposed rule under Executive Order 12630, Government Actions and Interface with Constitutionally Protected Property Rights. The agency does not anticipate that this proposed rule would effect 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)

FTA has analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. FTA certifies that this proposed rule is not an economically significant rule and would not cause an environmental risk to health or safety that may disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

FTA has analyzed this proposed rule under Executive Order 13175 (Nov. 6, 2000), and believes that the proposed 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 obligations of Federal funds to States and local public transportation agencies for major capital transit projects and would not impose any direct compliance requirements on Indian tribal governments, nor would the proposed rule impose any new consultation requirements on tribal governments. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

FTA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). FTA has determined that it is not a significant energy action under that order since, although it is a significant

regulatory action under Executive Order 12866, 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.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–8).

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 set forth in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 633

Transportation, Mass transportation, Project management oversight, Major capital projects, Fixed guideway projects, Risk assessment, Project management plans.

Issued on: September 7, 2011.

Peter Rogoff,
Administrator.

For the reasons set forth in the preamble, and under the authority of 49 U.S.C. 5309 and 5327, and the delegations of authority at 49 CFR 1.48(b) and 1.51, FTA proposes to amend Chapter VI of Title 49, Code of Federal Regulations, by revising Part 633 to read as follows:

PART 633—CAPITAL PROJECT MANAGEMENT

Subpart A—General Provisions

Sec.

- 633.1 Purpose.
- 633.3 Definitions.
- 633.5 Applicability.
- 633.7 Access to information.

Subpart B—Recipients' Responsibilities for Project Management

- 633.9 Project management capacity and capability.
- 633.11 Project management plan: contents.
- 633.13 Special requirements based on project cost, complexity, or risk.
- 633.15 Project management plan: implementation.

Subpart C—FTA Project Management Oversight

- 633.17 Project management oversight principles.
- 633.19 FTA use of oversight services.
- 633.21 Roles and responsibilities of project management oversight contractors.
- 633.23 FTA risk-informed project management oversight.
- 633.25 Increased oversight based on project cost, complexity, or risk.

Appendix A to Part 633—The Use of Risk Assessment in FTA's Risk-Informed Project Management Oversight

Authority: 49 U.S.C. 5301(e), 5309, and 5327; 49 CFR 1.48(b) and 1.51.

Subpart A—General Provisions

§ 633.1 Purpose.

This part carries out the mandate of 49 U.S.C. 5327(e) for project management oversight as applied to both the Major Capital Investment and the Fixed Guideway Modernization programs authorized by 49 U.S.C. 5309.

§ 633.3 Definitions.

As used in this part:

Administrator means the Federal Transit Administrator or the Administrator's designee.

Fixed guideway means any public transportation facility using and occupying a separate right-of-way or rail for the exclusive use of public transportation and other high occupancy vehicles or using a fixed catenary system and a right-of-way usable by other forms of transportation. *Fixed guideway* includes but is not limited to rapid rail, light rail, commuter rail, ferry boat service, automated guideway transit, people movers, and exclusive facilities for buses and other high occupancy vehicles.

FTA means the Federal Transit Administration.

Major capital project means any project for which the Recipient seeks \$100 million or more in Federal financial assistance under either the Major Capital Investment (New Starts) or Fixed Guideway Modernization programs authorized by 49 U.S.C. 5309 or any capital project the Administrator finds would benefit from the FTA project management program, given the size or complexity of the project, the uniqueness of the technology, the limited experience of the recipient sponsoring the project, or any other risks inherent in the project. This definition does not include routine acquisition, maintenance, or rehabilitation of rolling stock.

Management Capacity and Capability means, at any point in time, the ability

of the recipient's organization to demonstrate or be likely to demonstrate that it can deliver the project within the recipient's budget and schedule, employing the competencies of the recipient organization and third party contractors, in conjunction with the available authorities, accountabilities, and assigned resources. In principle, *management capacity* connotes the ability of the recipient's project team to complete the project within the recipient's budget and schedule by engaging other stakeholders or resolving issues within defined constraints and assumptions; *management capability* connotes the ability of the recipient's project organization to implement an effective set of internal controls and develop or implement additional competencies, authorities, or resources to minimize risk or negative consequences.

New Starts project means any project for which the sponsor is seeking Federal financial assistance under the discretionary Major Capital Investment program authorized by 49 U.S.C. 5309.

Project Management Oversight (PMO) means the activities of FTA and its Project Management Oversight Contractor in monitoring both the effectiveness of the recipient's project delivery and whether a major capital project is on time, within budget, and built to approved plans and specifications, consistent with all applicable Federal requirements, and using information about the project in making decisions about the award of Federal financial assistance.

Project Management Oversight Contractor (PMOC) means a contractor retained by FTA to assist FTA performing oversight functions for the New Starts and Fixed Guideway Modernization programs.

Project Management Plan (PMP) means a written document prepared and used by a recipient organization, inclusive of its project office and stakeholders, which explicitly and adequately identifies the technical approach, responsible parties and entities, and tasks, budgets and schedules necessary to define, design, construct and startup a major capital project and commence revenue service within defined constraints and assumptions. A PMP may be a single document or a series of documents or sub plans integrated with one another into the PMP either directly or by reference for the purpose of defining how the recipient will effectively manage, monitor, and control the project.

Recipient means a direct recipient of Federal financial assistance from FTA;

an entity that intends to apply for Federal financial assistance from FTA; or the sponsor of a major capital project that will receive Federal financial assistance from FTA.

Risk means a measure of the potential inability to achieve project objectives within defined scope, cost, and schedule constraints and assumptions, based on several components: The probability of failing to achieve a particular outcome, the consequences or effects of failing to achieve that outcome, and the root cause or causes which, if eliminated or corrected, would prevent the potential consequences from occurring.

Sub Plan means a document which supplements the PMP by addressing a specific discipline or managerial practice for the purposes of developing and executing a major capital project. A sub plan may be incorporated into the PMP or referenced and configuration controlled by the PMP.

§ 633.5 Applicability.

This part applies to any major capital project that will be assisted with funding under 49 USC Chapter 53, including funding that originates under the Surface Transportation Program or the Congestion Mitigation Air Quality program authorized by Title 23 of United States Code.

§ 633.7 Access to information.

As reasonably necessary in FTA's judgment, a recipient shall give FTA and its PMOCs timely access to construction sites and all records, data and information pertinent to the use of Federal financial assistance for a major capital project. As appropriate, FTA and its PMOCs may decline custody or control of records, data and information pertinent to the use of Federal financial assistance for a major capital project.

Subpart B—Recipients' Responsibilities for Project Management

§ 633.9 Project management capacity and capability.

Before awarding Federal financial assistance for the development of a major capital project, FTA must determine that the recipient has or will have sufficient management capacity and capability to complete the project within the constraints of cost, scope and schedule under the Federal grant award. As part of this determination, FTA will assess the recipient's Project Management Plan to establish whether the recipient has, and will maintain, sufficient staff, financial resources, and processes to:

(a) Continuously manage the project through each sequential phase of project development, including the transition into revenue operations;

(b) Comply with applicable statutes, regulations, circulars, and technical standards;

(c) Ensure the compliance of its staff, contractors and subcontractors with applicable statutes, regulations, technical standards, third party contracts, and inter-agency agreements;

(d) Address all technical aspects of the project, including but not limited to engineering, design, construction, and operations.

(e) Maintain the project schedule and all milestones within that schedule;

(f) Carry out all environmental mitigation required by the environmental record for the project;

(g) Develop and follow a realistic financial plan and keep expenditures within the project budget;

(h) Solicit, award, and manage third party contracts consistent with the recipient's preferred means of project delivery;

(i) Conduct adequate quality assurance and control of all project activities;

(j) Engage project stakeholders in a timely manner to maintain scope, cost and schedule at approved performance levels;

(k) Obtain the proper information to ensure that decisions are made at the appropriate times, based on the best information available, and given the known uncertainties;

(l) Identify, analyze, and mitigate project risks on a continuous basis;

(m) Design and build the project in accordance with applicable safety and security requirements; and

(n) Protect against waste, fraud, or abuse of project funds.

§ 633.11 Project Management Plan: contents.

(a) A Project Management Plan (PMP) must be tailored to the type, costs, and complexity of the major capital project to which it pertains and the recipient's management capacity and capability. A PMP must be revised at the beginning of each project phase (e.g., preliminary engineering, final design, construction), and at other times as necessary and appropriate, throughout the execution of the project. These revisions will enable the recipient to make the necessary adjustments and improvements relative to the phase upon which the recipient's project is about to enter to ensure that the necessary staff and processes are in place to control the scope, budget, schedule, and quality of the project, while managing the safety and security

of all persons. At a minimum, a PMP must address the following in a sufficient level of detail to enable FTA to assess the adequacy of the recipient's plan:

(1) The recipient's staff organization and structure, including, specifically, well-defined functional responsibilities, internal controls, reporting relationships, job descriptions, job qualifications, and the staffing levels required at each successive phase of project development;

(2) The budget for the project, including, specifically, the amounts budgeted for project management, contractors and consultants, property acquisition, utility relocation, systems demonstration, audits, contingencies, and all other necessary costs of the project;

(3) The master schedule for engineering, design and construction, including all items on the critical path for project development, displayed in a format that makes clear the effects of changes or delays on the project schedule;

(4) The document control procedure and recordkeeping system;

(5) The change order procedure, including, specifically, the recipient's policy and procedure for managing change order requests and actual change orders for design, construction and capital acquisition;

(6) Quality control and quality assurance, including, specifically, the functions and procedures associated with project design, procurement, construction, system installation, and integration of system components;

(7) Internal reporting within the recipient's organization, including, specifically, the procedures for reporting all matters affecting costs and schedules;

(8) The criteria and procedures for testing operational systems and their major components;

(9) The procedures for carrying out the environmental mitigation required for the project;

(10) Community and Public Relations; (11) Management of contractor performance;

(12) Management of the recipient's vehicle fleets;

(13) Management of risks, contingencies, and insurance;

(14) A series of project-specific performance measures against which the recipient will report to FTA (see paragraph (d) of this section); and

(15) Management of safety and security.

(b) Where needed, depending on the type and characteristics of the project (e.g., a project involving right-of-way

acquisition must address real estate), the recipient must also address the following in its PMP:

(1) Force Account work that will be performed by the recipient's own staff, and how the cost of that work is calculated;

(2) Operations and Maintenance (O&M), including both the effects of O&M on design and construction and acceptance of project work by the recipient's management responsible for O&M;

(3) Real Estate, including compliance with the requirements of the Uniform Relocation Assistance and Real Property Acquisitions Policy Act;

(4) Alternative Project Delivery methods;

(5) Agreements with utilities, railroads, and other third parties, and inter-agency agreements necessary to project completion; or

(6) Other facets of planning, designing, and constructing a major capital project.

(c) As appropriate, the documentation of a recipient's current plans, programs, and procedures may be incorporated by reference in a PMP rather than set forth in full in the PMP.

(d) As required by paragraph (a) of this section, the PMP must include a series of project-specific performance measures against which the project sponsor will report. This must include at minimum target revenue service date, interim milestones, contingency levels as identified in the risk contingency management plan, and "check points" at which the adequacy of contingency levels and risk mitigation will be evaluated.

§ 633.13 Special requirements based on project cost, complexity, or risk.

Based on the size, cost or complexity of a major capital project, the uniqueness of the technology, the experience of the recipient, the chosen method for project delivery, or any other risks, the Administrator, in his or her discretion, may require a recipient to:

(a) Meet discrete, specific targets on a scheduled basis for enhancing or maintaining its management capacity and capability, and incorporate those improvements into its Project Management Plan (PMP);

(b) Make changes in the recipient's managerial plans, practices, internal controls, or governance; develop formal procedures for revising a recipient's PMP and sub-plans; conduct analyses for other process improvements; or develop project-specific performance measures, such as contingency reporting or forecasting, incorporation of lessons

learned, and evaluations of project protocols and activities;

(c) Report to FTA, as requested, the recipient's progress in achieving the special requirements of its PMP, as established and managed both at the project level and by contract package; and

(d) Report to FTA, as requested, the recipient's projection of current estimates of project costs, in the form of "estimates at completion," schedule data, and the revenue service date, with basis documentation sufficiently reliable to support those projections and the award of additional Federal financial assistance for the project.

§ 633.15 Project Management Plan: implementation.

(a) Any grant application for Federal financial assistance for a major capital project must include the current iteration of a recipient's Project Management Plan.

(b) Any request for FTA approval to enter into a particular phase of the New Starts process must include the current iteration of a recipient's PMP.

(c) At all times, a recipient shall fully carry out its PMP and take every reasonable action to maintain its capacity and capability for project management; keep the project on schedule and within budget, in accordance with all milestones; and continuously monitor the project for risks to budget and schedule, and mitigate those risks, as necessary and appropriate to maintain approved budget and schedule levels.

(d) If at any time a recipient must revise a PMP, the recipient shall submit its proposed changes to its PMP to FTA, together with a detailed explanation of the need for those revisions.

(e) On a monthly basis, a recipient must submit to FTA the current data on the budget and schedule for the project, arrayed in accordance with FTA's budget and schedule reporting requirements, including, specifically, the current levels of contingency, both allocated and unallocated, and the float or slippage in meeting each milestone on the critical path for project completion. With each monthly submittal the recipient must also report any risks to the project budget and schedule and its efforts to mitigate those risks.

(f) In his or her discretion, the Administrator may require a recipient to hold quarterly meetings with FTA and its PMOC on the progress of a major capital project. These meetings shall provide a means for briefing senior FTA management on the project, transmitting status and progress reports, identifying

current and systemic issues, and opportunities for site inspection. These meetings will be in addition to the monthly reporting required by paragraph (e) of this section.

Subpart C—FTA Project Management Oversight

§ 633.17 FTA project management oversight principles.

The FTA oversight of a major capital project is a due diligence process of periodic reviews and evaluations designed to facilitate agency stewardship of taxpayer funds and to help ensure the efficient and effective design, construction and revenue service opening of a project. Throughout the oversight process, FTA is charged to:

(a) Approve the recipient's Project Management Plan and any revisions to the PMP;

(b) Evaluate the management capacity and capability of the recipient to manage the major capital project within scope, cost and schedule constraints;

(c) Verify the recipient's compliance with all applicable Federal requirements;

(d) Assess the risks of a project, and the readiness of that project to advance through the New Starts process or receive Federal financial assistance for fixed guideway modernization; and

(e) Assess whether the project is being executed in accordance with the recipient's approved Project Management Plan, and in accordance with the approved budget and schedule.

§ 633.19 FTA use of oversight services.

FTA may retain the services of Project Management Oversight Contractors (PMOCs) to assist FTA in determining whether a major capital project is on time and within budget, built to approved plans and specifications, and consistent with all applicable Federal requirements. The scope and level of FTA oversight will be based, in part, on the recipient's experience, resources, and past performance of major capital projects, and the cost, complexity, or risks inherent in a project. The following tenets guide FTA's use of the services of PMOCs:

(a) FTA may deploy the services of a PMOC at any point during the planning, design, construction, and startup of a major capital project, to maximize transportation benefits and constrain costs. To conserve resources, however, FTA will generally defer the use of PMOCs on New Starts projects until those projects have requested FTA approval for entry into preliminary engineering.

(b) FTA will give highest priority in its use of its PMOC resources to major

capital projects of highest cost, complexity, or risk.

(c) To the extent practicable, FTA will match the special expertise and experience of a PMOC to the inherent complexity and risk of a major capital project, and the management capacity and capability of the recipient.

§ 633.21 Roles and responsibilities of project management oversight contractors.

The roles and responsibilities of a PMOC on a major capital project are as follows:

(a) A PMOC provides consulting expertise to FTA, alone, in engineering and engineering management on all phases of a major capital project, principally in the areas of design, construction, acquisition of facilities, equipment, rolling stock and real estate, and startup activities.

(b) The primary role and responsibility of a PMOC is to assist FTA in the evaluation of: a PMP and supporting documents, a recipient's management capacity and capability, the risks inherent in a project, a recipient's readiness to use federal funds or to advance in the project development process, and the recipient's on-going management of the major capital project. At the request of FTA, a PMOC may perform additional services or deliver products to FTA for purposes other than the oversight of a particular major capital project.

(c) In the course of providing its services and products, a PMOC may render advice, opinions, observations, and recommendations to the Administrator or FTA staff regarding the progress of a major capital project and the management capacity and capability of a recipient. A PMOC has no authority to make decisions for FTA. A PMOC has no authority to act on behalf of FTA in making any findings or judgments regarding a recipient's compliance with Federal statutes, regulations, or administrative requirements.

(d) A PMOC performs its services to FTA under strict privity of contract with FTA. The products and services rendered under a contract between FTA and a PMOC are for the sole benefit and use of FTA and may not be relied upon by any third party for any purpose. The products and services rendered under a contract between FTA and a PMOC create no liability or responsibility whatsoever to any third party.

(e) A PMOC has no role or responsibility whatsoever for establishing or approving the design, construction, operation, or safety of a major capital project. A PMOC has no control whatsoever over selecting or approving the means, methods,

precautions, sequences, or techniques a recipient uses in constructing a major capital project, which are solely the right, responsibility, and choice of the recipient sponsoring that project. A PMOC has no role or responsibility whatsoever for the formal inspection of a major capital project or a recipient's acceptance of construction work or project facilities, equipment, or rolling stock.

§ 633.23 FTA risk-informed project management oversight.

(a) At any time, FTA may, in its discretion, and in consultation with the recipient, perform or allow a recipient to perform a risk assessment at a level commensurate with the size, cost, or complexity of a major capital project. A risk assessment will reflect the capital cost estimates, project schedules, and analyses of contingencies, resulting in an estimate of the total risk exposure for the project given the recipient's defined constraints and assumptions. A risk assessment will entail the identification, analysis, and mitigation of critical geotechnical, market, design, procurement, construction, managerial, organizational, and stakeholder risks to increase the probability of meeting cost, schedule, and performance objectives. FTA and the recipient will use this estimate of total risk exposure to establish the budget and schedule for the project, recognizing that not all risk can or should be funded.

(b) As part of the process of establishing the funded and unfunded portions of the total risk exposure for the project, tradeoffs may be made among needs for additional funding for the project, timeliness of implementation of additional management capacity and capability, and mitigation of specific risks.

(c) To address unfunded risk, FTA may require a recipient to develop explicit plans and tools for risk and contingency mitigation, measures for additional management capacity and capability, or financial mechanisms to accommodate the unfunded risks.

(c) FTA's basic methodology for conducting risk assessments is currently set forth in the Appendix to this rule.

§ 633.25 Increased oversight based on project cost, complexity, or risk.

Based on the size, cost or complexity of a major capital project, the uniqueness of the technology, the limited experience of the recipient, the chosen method for project delivery, or any other risks, the Administrator, in his or her discretion, may perform additional analyses and oversight as a condition precedent to an award of

Federal financial assistance for the project, either at the project level or by contract package, or both. These additional analyses and oversight will assist the recipient in developing a framework to maintain its cost and schedule, consistent with the requirements of § 633.13, and may include, specifically, an FTA assessment of the:

(a) Adequacy of the recipient's management of project activities, both pre-award and post-award, of particular cost, complexity or risk; and

(b) Reliability of the recipient's current and forecast estimates of project costs and the revenue service date.

Appendix A to Part 633—The Use of Risk Assessment in FTA's Risk-Informed Project Management Oversight

Introduction

As a steward of taxpayer funds, and the Federal agency that awards grants-in-aid for transit across the United States, FTA has every interest in ensuring that its grant recipients deliver projects that are meritorious and add value. By law, FTA is obliged to oversee sponsors' management of their major capital projects from inception through implementation. This entails, most notably, the obligation to determine the likelihood a given project can be delivered within an approved budget and schedule.

To perform its oversight of major capital projects, FTA has developed a risk assessment process that enables both the Federal government and a project sponsor to determine how much of the total risk exposure for the project will be funded in an approved budget and schedule with an appropriate contingency. FTA and the sponsor must then agree on how the non-funded risk portion of the total risk exposure can potentially be mitigated through specific actions, increased management capacity and capability, or additional means for funding. This Appendix describes these processes and their underlying steps.

Project Management Context

An assessment of a sponsor's ability to conduct project management is a major part of these processes. Project management is generally defined as the application of knowledge, skills, tools, and techniques to project activities to meet project requirements. Insofar as major capital projects, in particular, FTA expects the sponsors, through competent, accountable personnel, operating within their delegated authority, to make decisions and allocate resources, consistent with the terms of their agreements with FTA and within clear constraints and assumptions.

To determine whether a project can be delivered within its stated constraints and assumptions, the FTA risk assessment process examines whether the sponsor's project team has:

(1) Selected appropriate project management processes;

(2) Used documented approaches to define project deliverables that meet project requirements;

(3) Complied with the requirements of the FTA grant, and met the needs and expectations of other stakeholders; and

(4) Balanced the competing demands of scope, time, cost, quality, resources, and risk.

The Role of Good Practices in Project Management and Risk Assessments

The determination whether a sponsor has selected appropriate management processes will take into account whether the sponsor is using good practices. The Project Management Institute (PMI), in its *Body of Knowledge* ("BoK") document, and FTA, in its *Project and Construction Management Guidelines*, have identified those project management processes—inclusive of critical knowledge and lessons learned—which have been recognized as good practice. For FTA's purposes, current good practice means there is general agreement that the application of specific project management processes have been shown through documented analyses or engineering assessments to enhance the chances of success in delivering a project within constraints and assumptions.

Over the past decade FTA has had extensive experience in establishing the capacity of good practices to mitigate cost and schedule risk in terms of recommendations for cost contingency. Also, FTA has had experience in identifying certain risks, such as geotechnical risks, that are not amenable to mitigation within known good practices; these types of risk require development of specific management capacities to successfully mitigate.

For the purposes of FTA's risk assessment process, risk can be rewritten as a function of good practices by stating that risk is a measure of the potential inability [*of the sponsor*] to achieve project objectives [*using good practices*] within defined scope, cost, and schedule constraints and assumptions. The risk assessment itself then becomes a management process for evaluating the selected good practices and trend data to determine whether the appropriate or optimal management processes have been selected, and assessing whether any necessary waivers, deviations or non-conformances to these practices—real or potential—have been identified. When combined, this information allows for a characterization of the resulting risks to the project.

FTA's Risk Assessment Process

In its discretion, FTA may perform a risk assessment, working closely with a sponsor of a major capital project. Or FTA may, in its discretion, determine that certain project sponsors are likely to be capable of delivering external risk assessment products and materials that meet FTA's standards and principles for risk assessments. In the latter instance, FTA will work with an interested sponsor to facilitate external risk assessments, in whole or in part, as described in the sponsor's Project Management Plan (PMP) and the material in the risk management section. The PMP must assure FTA of a timely delivery of risk assessment

products. The sponsor will be responsible for the initial evaluation and documentation of conformity to FTA standards and policies for quality and reliability, as well as the project-specific performance standards in the sponsor's PMP. The PMP approach must recognize FTA's inherent governmental function to agree to a final cost and schedule. If the sponsor's PMP demonstrates a technical approach and the management capability and capacity to deliver risk assessments satisfactory for FTA's purposes, the PMP will be approved.

Background and Underlying Principles

For FTA's purposes, risk assessment is not a single, fixed method of analysis. Rather, it is a formal, systematic approach to organizing, documenting, and analyzing project-specific recipient information, and comparing that information to previous FTA program experience, to identify what risks which might degrade a sponsor's ability to deliver the project within constraints and assumptions. These include specific geotechnical, market, design, procurement, construction, managerial, organizational, and stakeholder risks, as well as non-conforming inputs or outputs to the budget and schedule, or any other potential inability to deliver the required results. A monetary range is assigned to each budget line item based on an assessment of the sponsor's ability to mitigate these risks through selected actions or increased management capacity and capability. The result is an initial estimate of lower and upper bounds for total risk exposure, creating a risk range for purposes of communication and discussions between FTA and the sponsor, leading to an agreement on which portion of the risk will be funded.

There has been a steady increase of sophistication over the last twenty years in the field of risk assessment for transit investments. Likewise, there is a wealth of information available on the Internet. Lessons learned from this experience are that risk assessors must have the ability to recognize and address fully such cross-cutting issues as uncertainty, variability, aggregation and continuity. These lessons learned have directly influenced a number of changes to FTA's own risk assessment process. Consequently, FTA now applies the following principles in the agency's process for risk assessment:

(1) FTA has learned that approximately 50% of the cost drivers for increased budgets on major capital projects were attributable to fundamental problems in the underlying budget and schedule ("project deliverables"). Typically, the root causes were non-conformance with either with the sponsor's own PMP or current good practices. Using this knowledge, FTA now uses a trend analysis on the budget, and tests for consistence between the project level budget and package level submittals of design/construction estimates as they were developed over time. FTA then tests the consistence and support in the indirect cost estimates. Based on the results, FTA makes a quantifiable assessment of the quality and completeness of the sponsor's detailed cost and schedule, and recommends adjustments.

(2) To improve the reliability of any model for forecasting risk, FTA realized that the agency needed to develop an understanding of the strengths and weaknesses of different modeling approaches and assess any bias or incompleteness in these forecasts. This meant developing modeling approaches that minimized inherent bias by combining FTA's previous experience—including the experience documented in studies both by FTA and the Transportation Research Board (TRB)—with the sponsor's project-specific data. One aspect of this was the development of specific contingency recommendations in published TRB research. Another was the development of a mitigation sequence for project cost risk. The key principle is that risk decomposes through mitigation actions in a sequence from requirements risk through design solution into the project delivery method, then into post award specific risks the sponsor retains through its contract documentation or commercial terms. Knowing this, FTA assigns more likelihood of success to those mitigation actions that can be applied earlier in the process.

(3) FTA has long recognized that a project work breakdown structure (WBS) offers a comprehensive look at a major capital project, and forms the basis of sound control systems. Specifically, FTA has learned that the WBS provides more accurate information, and a better way to mitigate risk, than the industry practice of developing "catalogs of risk," "sources of risk," or "risk registers." The WBS approach to risk modeling allows FTA to standardize the model and its parameters, which is a major strength in the context of FTA's obligation to evaluate the reliability of a sponsor's cost estimates and schedules. FTA prefers the use of WBS as the basis for assigning risks.

(4) FTA has learned how to use several models to assess project level cost risk, such as range models [AACE Curran Range model, USAF Space command Range model, FTA Beta model], actuarial models that estimate maximum and minimum credible risk and sources of risk models [PMI and Golder]. Also, FTA has learned how to assess the quality of the forecasting, such as diagnostic evaluations of Monte Carlo simulations, and the adequacy of such forecasts to reliably establish estimates of total risk exposure. Because this is an area still under development, FTA has not developed an explicit choice among modeling methods, nor does FTA rely on a single model for risk assessment.

(5) FTA has learned over a number of projects that for a sponsor to maintain the necessary management capacity and capability, there must be continuity in risk mitigation over extended periods of time. One obstacle to this has been that managerial attitudes toward risk have affected both the accuracy of the perception of risk and the ways in which an organization responds. In sum, FTA recognizes that risk responses reflect a sponsor organization's perceived balance between risk-taking and risk-avoidance. Another obstacle, of course, is that technical approaches for mitigating risk are not explicit. As a result, FTA requires a consistent approach to risk assessment throughout project delivery, which

establishes its usefulness as a management tool and demonstrates that the sponsor is controlling cost and schedule, thus ensuring reliability in the forecasts for budget and revenue service date.

FTA Risk Assessment Standards

These principles have given FTA a number of ways to reliably model risk under various mitigation and sponsor management capacity and capability scenarios. The following standards, however, ensure that the risk assessment products and information, whether internally or externally generated, are sufficient to support FTA's decision making on sponsors' grant applications:

(1) Sufficient, reliable, relevant, and useful sponsor or third party data and information is available to perform risk assessment services, deliver risk products and outcomes that meet or exceed FTA's requirements for accuracy, completeness and reliability.

(2) Material errors in third party information and data elements affecting end product data quality are identified and disclosed in the associated risk assessment deliverable.

(3) Risk assessment deliverables are presented within a substantively complete and appropriate engineering or project management context.

(4) Risk assessment deliverables are adequately quantified, fully integrated, traceable and consistent, and compatible with findings or stated fact.

(5) Risk assessment deliverables contain analytic and opinion components that are unqualified or properly qualified, properly structured, and clearly identified with respect to authorship.

(6) Material analytic results of risk assessments are capable of independent analysis or reproduction using disclosed methods and assumptions generating similar analytic results within an acceptable degree of imprecision or error.

(7) FTA is able to assess for itself whether it is appropriate to question the adequacy, accuracy or completeness of the third party data, information, modeling or analysis.

Risk Assessment Steps

FTA has identified a few basic steps that it uses to plan and execute risk assessments which meet the above principles and standards. It is the agency's intent to adequately access cost and schedule risk as appropriate for the complexity and timing of the review. The references to "risk assessors," below, apply equally to internal and external assessments. The steps below would be modified to accommodate specific cost or schedule risk issues:

(1) The first step is to scrutinize the status and soundness of the project's definition of basic—and known—project elements (*e.g.*, requirements, scope, design quality, cost estimates, and schedules), which serve as the starting points for identifying cost and schedule risks and opportunities. This includes a detailed review of all documents that describe project goals and third-party requirements; site evaluations; project plans, estimates and schedules; progress reports; project management documents; and other necessary supporting documents. In this step, the risk assessor works closely with the

project team to understand their data, underlying constraints, and assumptions, then makes an independent assessment of the reliability and accuracy of that data, makes adjustments to budget and schedule (hard "bump to the base"), and determines how such information and data are to be integrated into the internal or external risk assessment products and services.

(2) To avoid double counting, since contingencies are a legitimate way to account for risk, project estimates and schedules must clearly identify and quantify contingency amounts. This includes cost and schedule contingencies that are applied or allocated to individual line items or activities—some of which may be "hidden"—as well as unallocated contingencies that are often derived as percentages of grouped items. The risk assessor reduces the budget by these amounts to arrive at a revised budget amount as a starting point for risk identification.

(3) Next, risk identification "surfaces" risks before they can become problems or adversely affect a major capital project. FTA's definition of risk identification includes examining the elements of project definition and management processes to "surface" the associated risks and their root causes that may prevent the project from being delivered within the constraints of minimum scope, schedule and cost, given the particular sponsor's management capacity and capability. As a management process, however, it does not suffice merely to identify risks; the risk assessment must also deliver value throughout project implementation. To achieve the principle of continuity, risk assessors, through their risk identification activities, must facilitate management planning for the sponsor organization through analyses which allows the conversion of "surfaced" risk data into risk decision-making information that provides the basis for the sponsor to prioritize and address project risks. It is at this point that the risk assessor develops initial estimates of the cost and schedule risk ranges inclusive of total cost risk exposure, and sets baselines for management capacity and capability.

(4) Risk mitigation is a process that identifies, evaluates, selects, and implements options to set risk at acceptable levels, given project constraints and objectives. This includes the specifics on what should be done, when it should be accomplished, who is responsible, and the associated cost. The mitigation options available can include risk control, risk avoidance, risk assumption, and risk transfer. Risk assessors determine the most appropriate strategy or strategies for risks or groups of actions from these options.

(5) The next step is to identify additional management capacity and capability enhancements that would increase the sponsor's ability to mitigate risks; produce a set of alternative funding and management capacity and capability scenarios (ranging from low to medium to high) for discussion between FTA and the sponsor; and use those scenarios to determine what are often a target grant budget and schedule, as well as an explicit plan and tools for risk mitigation, including management capacity and capability enhancement, and management

and allocation of current and future contingencies.

(6) Subsequent to establishing these targets, the risk assessor will evaluate the efficiency and effectiveness of the sponsor organization in mitigating risk, enhancing management capacity and capability, and managing contingency. Risk assessors will also evaluate realized risks to determine if they were contemplated within the original cost and schedule baselines or were unanticipated, and to trend such experience.

(7) Prior to an award of an FTA grant, the risk assessor will reevaluate the baseline risk mitigation assumptions for cost and schedule to determine the on-going validity of the baseline risk mitigation and management capacity assumptions based upon adequate forecast and trend data.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R1-ES-2011-0065; MO 92210-0-0008 B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Franklin's Bumble Bee as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Franklin's bumble bee (*Bombus franklini*) as endangered and to designate critical habitat under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that the petition presents substantial scientific or commercial information indicating that listing this species may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing the Franklin's bumble bee is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding this species. Based on the status review, we will issue a 12-month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act. **DATES:** To allow us adequate time to conduct this review, we request that we receive information on or before November 14, 2011. The deadline for

submitting an electronic comment using the Federal eRulemaking Portal (see **ADDRESSES**, below) is 11:59 p.m. Eastern Time on this date. After November 14, 2011, you must submit information directly to the Field Office (see **FOR FURTHER INFORMATION CONTACT**, below). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

ADDRESSES: You may submit information by one of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>. Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Enter Keyword or ID box, enter FWS-R1-ES-2011-0065, which is the docket number for this rulemaking. Then, in the Search panel at the top of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on "Submit a Comment." Please ensure that you have found the correct rulemaking before submitting your comment.

(2) *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R1-ES-2011-0065; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

We will post all information we receive on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Request for Information section below for more details).

FOR FURTHER INFORMATION CONTACT: Paul Henson, State Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Ave., Suite 100, Portland, OR 97266, by telephone 503-231-6179, or by facsimile 503-231-6195. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Request for Information

When we make a finding that a petition presents substantial information indicating listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the Franklin's bumble bee throughout its range, which includes parts of Douglas, Jackson, and Josephine counties in Oregon, and Siskiyou and

Trinity counties in California, from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

- (1) The species' biology, range, and population trends, including:
 - (a) Habitat requirements for feeding, breeding, and sheltering;
 - (b) Genetics and taxonomy;
 - (c) Historical and current range including distribution patterns;
 - (d) Historical and current population levels, and current and projected trends; and
 - (e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

- (a) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (b) Overutilization for commercial, recreational, scientific, or educational purposes;
- (c) Disease or predation;
- (d) The inadequacy of existing regulatory mechanisms; or
- (e) Other natural or manmade factors affecting its continued existence.

(3) Information on pathogens and parasites within and near the range of the Franklin's bumble bee and potential pathways for introductions, including:

- (a) Historical and recent records of *Nosema bombi*, *Crithidia bombi*, *Apicystis bombi*, *Locustacarus buchneri*, deformed wing virus and other bee pathogens and parasites within parts of Douglas, Jackson, and Josephine counties in Oregon and Siskiyou and Trinity counties in California, and recent studies about known or potential bumble bee pathogens and their effects on bumble bees; and

(b) The transport and use of commercial honey bees or bumble bees including species, year(s) of use, type(s) of use (e.g., greenhouse or open field pollination) and any associated State or Federal quarantine, inspection, permit, compliance, and enforcement action records related to the import and transport of bees in and around parts of Douglas, Jackson, and Josephine counties in Oregon and Siskiyou and Trinity counties in California;

(3) Information on environmental changes that have occurred within the range of the Franklin's bumble bee that may be associated with climate change or other factors.

If, after the status review, we determine that listing the Franklin's bumble bee is warranted, we will