2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Thielert Aircraft Engines GmbH: Docket No. FAA–2009–0753; Directorate Identifier 2009–NE–31–AD.

Comments Due Date

(a) We must receive comments by October 19, 2009.

Affected Airworthiness Directives (ADs)

(b) None.

Applicability

(c) This AD applies to Thielert Aircraft Engines GmbH (TAE) model TAE 125–01 reciprocating engines, excluding engines that have been modified to TAE Design Modification No. 2007–001. These engines are installed in, but not limited to, Diamond Aircraft Industries Model DA42, Piper PA–28–61 (Supplemental Type Certificate (STC) No. SA03303AT), Cessna 172F, 172G, 172H, 172I, 172K, 172L, 172M, 172N, 172P, 172R, 172S, F172F, F172G, F172H, F172K, F172L, F172M, F172N, and F172P (STC No. SA01303WI) airplanes.

Reason

(d) This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

In-flight engine shutdown incidents were reported on aircraft equipped with TAE–125–01 engines. This was found to be mainly the result of operation over a long time period with broken piston cooling oil nozzles which caused thermal overload of the piston.

We are issuing this AD to prevent engine in-flight shutdown, possibly resulting in reduced control of the aircraft.

Actions and Compliance

(e) Unless already done, do the following actions:

(1) Within the next 110 flight hours, or during the next scheduled maintenance, whichever occurs first after the effective date of this AD, inspect the engine and engine oil for any evidence or pieces of broken piston cooling nozzles.

(2) Use the inspection instructions in Thielert Service Bulletin No. TM TAE 125–0017, Revision 2, dated February 22, 2008, to perform the inspection.

(3) Thereafter, repetitively inspect the engine and engine oil for any evidence or pieces of broken piston cooling nozzles, within every additional 100 flight hours.

(4) If any evidence of a failed cooling nozzle is found, remove the engine from service before further flight.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(g) Refer to European Aviation Safety Agency AD 2008–0016 R1, dated February 22, 2008, and Thielert Aircraft Engines GmbH, Platanenstrasse 14 D–09350, Lichtenstein, Germany, telephone: +49–37204–696–0; fax: +49–37204–696–55; e-mail: *info@centurion-engines.com*, for related information.

(h) Contact Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *jason.yang@faa.gov*; telephone (781) 238–7747; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on September 10, 2009.

Peter A. White,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E9–22314 Filed 9–16–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 772

[FHWA Docket No. FHWA–2008–0114]

RIN 2125–AF26

Procedures for Abatement of Highway Traffic Noise and Construction Noise

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: This document proposes to revise the Federal regulations on the Procedures for Abatement of Highway Traffic Noise and Construction Noise. The FHWA seeks to clarify certain definitions, the applicability of this regulation, certain analysis requirements, and the use of Federal funds for noise abatement measures. In addition, the proposed regulation would include a screening tool and the latest state of the practice on addressing highway traffic noise.

DATES: Comments must be received by November 16, 2009.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL–401, 1200 New Jersey Avenue, SE., Washington, DC 20590 or fax comments to (202) 493–2251. Alternatively, comments may be submitted via the Federal eRulemaking Portal at *http://www.regulations.gov*. All comments must include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. 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 19477–78).

FOR FURTHER INFORMATION CONTACT: Mr. Mark Ferroni, Office of Natural and Human Environment, (202) 366–3233, or Mr. Robert Black, Office of the Chief Counsel, (202) 366–1359, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded by using a computer, modem, and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may also reach the Office of the Federal Register's home page at: *http://www.archives.gov* and the

Government Printing Office's Web page at: *http://www.access.gpo.gov/nara*.

Background

The FHWA developed the noise regulation as required by section 136 of the Federal-Aid Highway Act of 1970 (codified at 23 U.S.C. 109(i)). The regulation applies to highway construction projects where a State department of transportation has requested Federal funding for participation in the project. The FHWA noise regulation, found at 23 CFR 772, requires a highway agency to investigate traffic noise impacts in areas adjacent to federally-funded highways for the proposed construction of a highway on a new location or the reconstruction of an existing highway that either significantly changes the horizontal or vertical alignment or increases the number of through-traffic lanes. If the highway agency identifies impacts, it must consider abatement. The highway agency must incorporate all feasible and reasonable noise abatement into the project design.

The FHWA published the ''Highway Traffic Noise Analysis and Abatement Policy and Guidance'' (''Policy and Guidance''), dated June 1995, (available at *http://www.fhwa.dot.gov/environment/noise/polguide/polguid.pdf*) which provides guidance and policy on highway traffic and construction noise abatement procedures for Federal-aid projects. While updating the 1995 Policy and Guidance, the FHWA determined that certain changes to the noise regulations were necessary. As a result, the FHWA developed this NPRM to propose those changes.

This NPRM proposes to amend all of the sections in Part 772, except for sections 772.1 and 772.3. A highway agency would be required to submit its revised noise policy, meeting the requirements of the final rule, to FHWA for approval within 6 months of the publication date of the final rule. The FHWA would review the highway agency's revised noise policy for conformance to the final rule and uniform and consistent application nationwide. The highway agency would provide FHWA for approval a review schedule that does not to exceed 3 months from the highway agency's submission of the revised noise policy. FHWA would require at least 14 business days to conduct an initial and a subsequent review of a revised noise policy. Failure to submit a revised noise policy in accordance with the final rule could result in a delay in FHWA's approval of Federal-aid highway projects. The highway agency would be required to implement the new standard on the date that the FHWA approved the highway agency's revised policy. For Federal-aid highway projects for which the noise analysis has already begun, the FHWA Division Office would determine which of those projects, if any, should be completed under their previous approved noise policy. Commenters are encouraged to comment on the feasibility of this timeline. This NPRM also recommends changes to Table 1—Noise Abatement Criteria and the removal of Appendix A—National Reference Energy Mean Emission Levels as a Function of Speed. In addition to these proposed changes, the FHWA is proposing various minor changes to sections throughout the NPRM to institute a more logical order in the regulation. These proposed minor changes would not change the meaning of the regulation and would not be substantive in nature.

Although the FHWA is soliciting comments on all the proposed changes within the NPRM, there are three additions to the regulation for which the FHWA specifically seeks comment. The first, contained in section 772.9(c)(5)(ii)(b), allows highway agencies to determine the allowable cost of noise abatement. The second, contained in section 772.9(d), provides a change from past FHWA guidance regarding when it is appropriate for third parties to contribute additional funds to a noise abatement measure or aesthetic treatments. This NPRM would allow third party contributions only after the highway agency has determined that the noise abatement measure is feasible and reasonable. The third, contained in section 772.13(e), would require each highway agency to maintain an inventory of all constructed noise abatement measures, which FHWA currently requests from highway agencies during the triennial noise barrier inventory. Additional information on the proposed changes follows.

Proposed Changes

The FHWA proposes updates to section 772.5 Definitions, section 772.7 Applicability, section 772.9 Analysis of traffic noise impacts and abatement measures, section 772.11 Noise abatement, section 772.13 Federal participation, section 772.15 Information for local officials, and section 772.17 Traffic noise prediction, Table 1—Noise Abatement Criteria; ministerial changes to section 772.19 Construction Noise; and, the removal of Appendix A—National Reference Energy Mean Emission Levels as a Function of Speed.

Section 772.5, as proposed, would add, modify, or combine definitions, as well as reorganize the order in which they appear in the regulation. Section 772.5(a), as proposed, would expand the definition of a Type I project as provided in the FHWA memorandum dated October 20, 1998 (available at *http://www.fhwa.dot.gov/environment/noise/type1mem.htm*) and in accordance with common industry practices. Section 772.5(a)(1), as proposed, would expand the definition of a highway on new location to include the addition of new interchanges or ramps to complete an existing partial interchange. Section 772.5(a)(2), as proposed, would require a highway agency to define the significant change in the horizontal or vertical alignment. Although these definitions, as proposed, would allow the highway agency to determine a significant change in the horizontal or vertical alignment, it would be required to consider, as a factor, a 3 dB(A) increase in the noise environment at the receptor when comparing the existing condition to the future build condition.

Section 772.5(a)(3), as proposed, would include the discussion of through-traffic lanes as provided in the FHWA memorandum dated October 20, 1998 (available at *http://www.fhwa.dot.gov/environment/noise/type1mem.htm*). This memorandum references High-Occupancy-Vehicle (HOV) lanes and truck-climbing lanes; however, we propose including High-Occupancy-Toll lanes as a Type I project.

Section 772.5(a)(4), as proposed, would include a discussion of auxiliary lanes. The October 20, 1998, memorandum (available at *http://www.fhwa.dot.gov/environment/noise/type1mem.htm*) also discusses when an auxiliary lane shall be determined a Type I project. This memorandum refers to an auxiliary lane increasing capacity, being a minimum of 1.5 miles long, added between interchanges to improve operational efficiency and functioning as a through-traffic lane. These four references corresponded to sections 772.5(a)(4)(i)–(iv), respectively. We would also, as proposed in section 772.5(a)(4)(v), classify an auxiliary lane as a Type I project if the auxiliary lane significantly alters the horizontal or vertical alignment. Section 772.5(b), as proposed, would clarify the definition of a Type II project. The first sentence will remain the same as currently written in the regulation. A second sentence would be added to clarify that in order for a highway agency to receive Federal-aid highway funds for a Type II project, the highway agency must

develop and implement a Type II program in accordance with section 772.7(c)(2). The development and implementation of a Type II program has been supported by the FHWA since June 1995 with the release of the Policy and Guidance document, which is available at *http://www.fhwa.dot.gov/environment/noise/polguide/polguid.pdf*).

Section 772.5(c), as proposed, would define a Type III project. This new project type is necessary to categorize projects that do not satisfy the definition of a Type I or a Type II project. For example, roadway reconstruction or in-kind bridge replacements do not meet the definitions of a Type I project or a Type II project. The lack of categorization for these projects would be problematic as highway agencies prepare environmental clearance documentation because there is no succinct way to discuss the noise analysis requirements of the project. This new Type III project category would enable highway agencies to categorize all projects.

Section 772.5(d), as proposed, would define the term ''residence.'' The term residence would appear throughout the regulation including Activity Category B within Table I of the Noise Abatement Criteria. According to the June 19, 1995, distribution memorandum (available at *http://www.fhwa.dot.gov/environment/noise/polpap_m.htm*) for the 1995 Policy and Guidance document, ''the method used to count residences should include all dwelling units, *e.g.,* owner-occupied, rental units, mobile homes * * *.'' The proposed definition would ensure proper application of the term when determining noise impacts. References to a benefited receiver would be found in proposed sections 772.5, 772.9 and Table 1 of this NPRM.

Section 772.5(e), as proposed, would add a definition for the term ''special land use facilities.'' This would include picnic areas, recreation areas, playgrounds, active sport areas, parks, motels, hotels, schools, places of worship, libraries, hospitals, cemeteries, campgrounds, trails, and trail crossings. Special land use facilities often require a different process to identify the number of impacted and benefited receivers it contains than that of a residence. In proposed section 772.9, we would define impact/impacted and benefited/benefiting receivers.

Section 772.5(f), as proposed, would define the term ''multifamily dwelling,'' and would require the State agency to count each residence in a multifamily structure as one receiver. The proposed definition would allow highway agencies to assess the total number of impacted and benefited receivers. Proposed section 772.9 of this NPRM would refer to multifamily dwellings.

In section 772.5(g), as proposed, would define the term ''planned, designed, and programmed'' as a definite commitment to develop land with an approved specific design of land use activities. The term is currently referenced in the regulation under existing section 772.9, but is not defined.

Section 772.5(h), as proposed, would define the term ''date of public knowledge.'' According to the 1995 Policy and Guidance document, highway agencies ''must identify when the public is officially notified of the adoption of the location of a proposed highway project.'' The date of public knowledge establishes when the Federal/State governments are no longer responsible for providing noise abatement for new development, which occurs adjacent to the proposed highway project. The 1995 Policy and Guidance document indicates that the date of public knowledge cannot precede the date of approval of a Categorical Exclusion (CE), Finding of No Significant Impact (FONSI), or Record of Decision (ROD). The addition of this definition allows for the connection of planned, designed, and programmed with the date of public knowledge within the regulation.

Section 772.5(j), as proposed, would modify the definition of ''traffic noise impacts'' to include minor editorial and clarification changes.

Section 772.5(k), as proposed, would modify the definition of ''design year.'' Highway agencies define the design year as a part of their project development. Under the proposed definition, the design year established for the Federal-aid highway project would be the year used for the noise analysis.

Section 772.5(l), as proposed, would define the term ''impacted receiver.'' There are references throughout the current regulation about determining traffic noise impacts. This definition would clarify that traffic noise impacts can occur two ways, either by approaching or exceeding an absolute noise level, called the Noise Abatement Criteria (NAC) or by a noise level substantially increasing over the existing sound level. Impacted receiver would be referenced in proposed sections 772.9 and 772.11 of this NPRM.

Section 772.5(m), as proposed, would define the term ''benefited receiver.'' A benefited receiver would not also have to be an impacted receiver. Benefited receiver would be referenced in proposed section 772.9 of this NPRM.

Section 772.5(n), as proposed, would define the term ''feasibility.'' The current regulation makes references to feasibility, and it is defined in the 1995 Policy and Guidance document; however, it is not defined in the current regulation. Proposed section 772.9 of this NPRM refers to feasibility.

Section 772.5(o), as proposed, would define the term ''reasonableness.'' Reasonableness would be determined by considering several factors. The current regulation makes references to reasonableness and it is defined in the 1995 Policy and Guidance document; however, it is not defined in the current regulation. Sections 772.9, 772.11 and 772.15 of this NPRM refer to reasonableness.

Section 772.5(p), as proposed, would define the term ''common noise environment'' and provide clarification to proposed section 772.9(e), concerning the concept of averaging the cost of noise abatement among benefited receivers within a common noise environment.

Section 772.5(q), as proposed, would define the term ''property owner,'' which is referred to proposed sections 772.9, and 772.11 of this NPRM.

Section 772.5(r), as proposed, would define the term ''substantial construction'' as the granting of a building permit, the filing of a plat plan, or the occurrence of a similar action prior to right-of-way acquisition or construction approval for the original highway.

Section 772.5(s), as proposed, would define the term ''severe noise impact.'' The regulation currently references severe noise impacts in section 772.13(d) but does not define the term. Severe noise impacts would be referenced in proposed section 772.13 of this NPRM.

Section 772.5(t), as proposed, would combine the definitions of ''L10'' and ''L10(h)'' into one definition of L10, since it is unnecessary to have two definitions for L10. L10(h) would be referenced in proposed Table I of this NPRM.

Section 772.5(u), as proposed, would combine the definitions of ''Leq'' and ''Leq(h)'' into one definition of Leq since it is unnecessary to have two definitions for Leq. Leq(h) would be referenced in proposed Table I of this NPRM.

Section 772.7(a), as proposed, would make this regulation applicable to all Federal lands and Federal-aid projects authorized under Title 23.

Section 772.7(b), as proposed, would emphasize that this regulation would be applied uniformly and consistently statewide. The principles of applying

this regulation uniformly and consistently have been common practice, as supported by the 1995 Policy and Guidance document.

Section 772.7(c), as proposed, would combine sections 772.7(a) and 772.7(b) in the current regulation and would include recommendations on a Type II program and Type III projects. The current section applies to all Type I projects unless the regulation specifically indicates that a section applies only to a Type II project. This section would refer to Type III projects as a new project category.

The language in current section 772.7(b) would now be found, in part, in proposed section 772.7(c)(1). We propose to remove the reference to when a Type II project is proposed for Federal-aid highway participation at the option of the highway agency (the proposed provisions of sections 772.9(c), 772.13, and 772.19) because it is redundant. Section 772.7(c), as proposed, would state that there are specific sections of the regulation that only apply to a Type II project.

Section 772.7(c)(2), as proposed, would require highway agencies choosing to participate in a Type II program to develop a priority system, based on a variety of factors, and rank the projects. The FHWA then must approve a highway agency's priority system before Federal-aid funds can be used. The parameters for the development of a priority system for a State highway agency's Type II program are currently contained in the 1995 Policy and Guidance document and help ensure equitable application of this optional program across social, economical and environmental factors.

With the addition of a Type III project in proposed section 772.7(c)(3), a highway agency would not be required to complete a noise analysis or consider abatement measures for Type III projects. Section 772.9(b)(2), as proposed, would require a highway agency to complete a traffic noise analysis of each Activity Category listed in Table 1 that is present in the project study area. The current regulation does not provide this direct link between the noise analysis and Table 1. Additional clarification and connection to the NAC listed in Table 1, as proposed, would be provided in proposed sections 772.9(b)(2)(i)–(v).

Section 772.9(b)(2)(i), would require highway agencies to submit justification to the FHWA on a case-by-case basis for approval of an Activity Category A designation. Activity Category A designations are extremely rare due to the difficulty in meeting these requirements; therefore, approval by the FHWA would be required to ensure the property meets the requirements and that the designation would be uniformly and consistently applied.

Section 772.9(b)(2)(ii), as proposed, would divide Activity Category B into residences, both single-family and multifamily, and special land use facilities. The definition of a special land use facility would be found in proposed section 772.5(e) of this NPRM. Highway agencies would be required to adopt a standard practice for analyzing these special land use facilities, which would allow the highway agency to uniformly and consistently apply the regulation when a project area contained a special land use facility. A highway agency could categorize the standard practice for special land use facilities by context and intensity, i.e., land use type, usage, project level, etc. Section 772.9(b)(2)(iii), as proposed, would restate Activity Category C, which Table 1 lists as ''Developed lands, properties, or activities not included in Categories A or B above.'' It is the FHWA's position that this is comprised of both commercial and industrial land uses. These land uses are the only developed land use types not already listed in Categories A or B.

Section 772.9(b)(2)(iv)(A), as proposed, would require a highway agency to determine if undeveloped land is planned, designed, and programmed for development. Planned, designed, and programmed is listed in the current regulation in section 772.9(b)(1), and would be defined in proposed section 772.5(g). The 1995 Policy and Guidance document provided guidance on the exact date that undeveloped land could be determined planned, designed, and programmed. This section, as proposed, would require the highway agency to identify the milestones or activities and associated dates for acknowledging when undeveloped land is considered planned, designed, and programmed, choose the milestone or activity that best fulfills its requirements and apply them consistently and uniformly statewide.

Section 772.9(b)(2)(iv)(B), as proposed, would require a highway agency to determine future noise levels when undeveloped land is planned, designed, and programmed and, where appropriate, to consider abatement measures. This would clarify current section 772.9(b)(1), which requires a highway agency to complete a noise analysis for undeveloped lands for which development is planned, designed, and programmed.

Section 772.9(b)(2)(iv)(C), as proposed, would recommend methods to assess noise levels for undeveloped lands that are not planned, designed, and programmed for development. If undeveloped land is not planned, designed, and programmed by the date of public knowledge, the highway agency would be required to determine noise levels and document the results in the project's environmental clearance documents and noise analysis documents. Lands that are not planned, designed, and programmed by the date of public knowledge would not be eligible for consideration for Federal participation for noise abatement measures. The date of public knowledge would be defined in proposed section 772.5(h) of this NRPM. The 1995 Policy and Guidance document states that the date of public knowledge is the date when the Federal government is no longer responsible for providing noise abatement for new development that occurs adjacent to the proposed highway project. The date of public knowledge could not precede the date of approval of CEs, FONSIs, or RODs.

Section 772.9(b)(2)(v), as proposed, would require a highway agency to only conduct an indoor analysis for Activity Category E, which proposed Table 1 lists as the interior of residences, motels, hotels, public meeting rooms, schools, places of worship, libraries, hospitals, and auditoriums, after completing an analysis of the outdoor activity areas. A highway agency would be required to exhaust all outdoor analysis options before performing an indoor analysis.

Section 772.9(b)(3), as proposed, would require, for a Type I project, the traffic noise analysis study area to extend at least 500 feet from the project of the build alternative(s) as the minimum area; however, highway agencies could choose to routinely analyze at distances greater than 500 feet. A highway agency would be required to analyze any area beyond the minimum distance if the highway agency believed that traffic noise impacts could occur. These minimum areas for analyzing traffic noise impacts would ensure that the highway agency identified all potentially impacted receivers. If impacts were determined beyond the minimum area of analysis, a highway agency would be required to include those impacts in the consideration of feasible and reasonable noise abatement measures.

Section 772.9(c)(3)(i), as proposed, would require highway agencies to establish an ''approach'' level for determining a traffic noise impact as at least 1 dB(A) less than the NAC. This is consistent with the 1995 Policy and Guidance document.

Section 772.9(c)(3)(ii), as proposed, would require highway agencies to define the term ''substantial noise increase.'' The 1995 Policy and Guidance document makes reference to a 10 dB(A) and a 15 dB(A) substantial increase criteria but then indicates that the FHWA will ''accept a well-reasoned definition that is uniformly and consistently applied.'' Since 1995, it has become common practice for a highway agency to define a substantial increase as a design year noise increase over existing noise levels of between 10 dB(A) to 15 dB(A). Therefore, the FHWA is proposing to require a State highway agency to define a substantial noise increase criterion between 10 dB(A) to 15 dB(A). The second sentence in section 772.9(c)(3)(ii), as proposed, is consistent with the 1995 Policy and Guidance document, which states, ''A traffic noise impact occurs when the predicted levels approach or exceed the NAC or when predicted traffic noise levels substantially exceed the existing noise level, even though the predicted levels may not exceed the NAC.'' Therefore, we propose no lower dB(A) limit when considering a substantial noise increase.

Section 772.9(c)(4), as proposed, would require a traffic noise analysis to include an assessment of impacted and benefited receivers, which are defined in these proposed sections 772.5(l) and 772.5(m), respectively. We also propose in this section that a ''highway agency shall define the threshold for the noise reduction which determines a benefited receiver as at least 5 dB(A).'' It is the FHWA's position that, since it requires a 5 dB(A) noise reduction for a noise abatment measure to be deemed acoustically feasible, the same principle should be required for a receiver to be classified as benefiting from the noise abatement measure.

Section 772.9(c)(5), as proposed, would require a traffic noise analysis to include an examination and evaluation of feasible and reasonable noise abatement measures for reducing traffic noise impacts. The regulation would not specify what to include in determining that a noise abatement measure is feasible and/or reasonable; however, the 1995 Policy and Guidance document indicates that both feasibility and reasonableness should include several factors and provides several examples. As a result, we propose each highway agency develop feasibility and reasonableness factors for FHWA approval. The factors in proposed sections 772.9(c)(5)(i)–(ii) are the minimum factors a highway agency would be required to include in its feasibility and reasonableness factors.

Section 772.9(c)(5)(i)(A), as proposed, would require feasibility factors to include an ''achievement of at least a 5 dB(A) highway traffic noise reduction at the majority of the impacted receivers * * *.'' The 5 dB(A) reduction in noise is supported by the 1995 Policy and Guidance document, and ''majority'' would be required to mean at least one percentage point over 50 percent.

Section 772.9(c)(5)(i)(B), as proposed, would require that, for a noise abatement measure to be feasible, a highway agency must determine that ''it is possible to design and construct a safe noise abatement measure.'' This requirement would reiterate safety as a key concern of both the FHWA and State highway agencies.

Section 772.9(c)(5)(ii)(A), as proposed, would require that reasonableness include ''consideration of the desires of the property owners of the impacted receivers.'' Section 772.11(f), as proposed, describes how that would be determined.

Section 772.9(c)(5)(ii)(B), as proposed, would deviate from current practice provided in the 1995 Policy and Guidance document. Highway agencies currently determine a cost per square foot of their noise abatement measures based on their own criteria and then choose from a range of $15,000 to $50,000 per benefited receiver, as allowed by the 1995 Policy and Guidance document. The highway agency then multiplies the square footage of the noise abatement measure by the cost per square foot to get the total cost of the noise abatement measure. Once the total cost of the noise abatement measure is determined, the highway agency divides this total cost by the number of benefited receivers. Instead of dividing by a cost/benefited receiver, some highway agencies divide by a cost/benefited receiver/dB(A). In this section, we propose to allow each highway agency to determine, with FHWA approval, the allowable cost of abatement by determining a baseline cost reasonableness value. This determination could include the actual construction cost of noise abatement, cost per square foot of abatement, and either the cost/benefited receiver or cost/benefited receiver/dB(A).

Section 772.9(c)(5)(ii)(B), as proposed, would require a highway agency to re-analyze the allowable cost for abatement at regular intervals, not to exceed 5 years. This would ensure that the cost of a noise abatement measure is reassessed for inflation of construction costs. Section 772.9(c)(5)(ii)(B), as proposed, would also give a highway agency the option of justifying, for FHWA approval, different cost allowances for a particular geographic area(s) within the State. This proposed change would provide flexibility to the highway agency when developing its allowable cost of abatement. If the highway agency develops different cost allowances for particular geographic areas, the highway agency would be required to consistently apply these methodologies as would be required by proposed section 772.7(b).

Section 772.9(c)(5)(iii), as proposed, would allow a highway agency to consider other reasonableness factors, including the date of development, length of exposure to highway traffic noise impacts, exposure to higher absolute highway traffic noise levels, changes between existing verses future build conditions, mixed zoning development, and implementation of noise compatible planning concepts. Only the reasonableness factors listed in proposed section 772.9(c)(5) would be allowed on Federal-aid highway projects.

Section 772.9(d), as proposed, would deviate from the 1995 Policy and Guidance document regarding third party funding for noise abatement. The 1995 Policy and Guidance document allows third party funding to pay for the difference between the actual cost of a noise abatement measure and the reasonable cost, as long as it is done in a nondiscriminatory manner. It is the FHWA's position that, in order to comply with the requirements of Title IV and the Executive Order on Environmental Justice (E.O. 12898), it is only acceptable to permit a third party funding on a Type I or Type II Federal-aid highway project if the noise abatement measure would be considered feasible and/or reasonable without the additional funding. The determination of feasibility and reasonableness to fund the construction of a noise abatement measure would be based solely on the highway agency's requirements for determining feasibility and reasonableness. However, it would be acceptable for a Federal-aid highway project, either Type I or Type II, to allow a third party to contribute funds to make functional (e.g., absorptive treatment, access doors) or aesthetic enhancements to a noise abatement measure already determined feasible and reasonable.

Section 772.9(e), as proposed, would allow a highway agency to average the cost of noise abatement measures among benefited receivers within a common noise environment for both Type I and Type II projects, and average the cost of noise abatement measures. Some highway agencies currently use cost-averaging practices. This proposed language would provide a parameter for

this practice to allow uniform and consistent application. This parameter would include ''within a common noise environment.'' A common noise environment would be defined in proposed section 772.5(p) of this NPRM.

Section 772.11(c), as proposed, would modify the current regulation by requiring a highway agency to consider abatement measures for an identified noise impact. The abatement measures listed in section 772.13(c) would be eligible for Federal funding and, at a minimum, the highway agency would be required to consider noise abatement in the form of a noise barrier. The noise abatement measures listed in section 772.13(c), as proposed, would be eligible for Federal-aid funding but a highway agency would not be required to consider each noise abatement measure listed in proposed section 772.13(c). The only noise abatement measure a highway agency would be required to consider would be a noise barrier.

Section 772.11(d), as proposed, would clarify the meaning of ''substantial noise reductions'' by adding ''which at a minimum, shall be at least 5 dB(A) for the majority of the impacted receivers.'' Impacted receivers would be defined in section 772.5(l), as proposed, and the definition of majority would be included in proposed section 772.9(c)(5)(i)(A).

Section 772.11(e), as proposed, would remove the phrase ''final environmental impact statement'' and add the full range of environmental documentation to include ''Categorical Exclusion, Finding of No Significant Impact and Record of Decision.'' Section 772.11(e)(1), as proposed, would switch the order of ''reasonable and feasible'' to ''feasible and reasonable.'' In the process of assessing a noise abatement measure, it is not logical to consider cost or views of the impacted receivers if the noise abatement measure has not been first assessed to determine if it is feasible, as defined in section 772.9(c)(5)(i), as proposed. Section 772.11(e)(2), as proposed, would remove ''no apparent solution'' and replace it with ''no noise abatement measures are feasible and reasonable.''

Section 772.11(f), as proposed, would clarify methods for soliciting the viewpoints of the benefited property owners by requiring a highway agency to solicit the viewpoints from all and receive responses from a majority of the benefited property owners. It is the FHWA's position that highway agencies should make good-faith efforts to solicit the viewpoints of all benefited property owners, since it relates to the reasonableness determination of noise abatement measures. Majority would mean at least one percentage point over 50 percent. This section also would require a highway agency to solicit only the viewpoints of the property owner(s) of a benefited receiver when determining reasonableness of a noise abatement measure. A highway agency would not consider the viewpoints of other entities to determine reasonableness unless explicitly authorized by the property owner(s). It is the position of FHWA that only the owners of the impacted property should have a deciding viewpoint on the reasonableness of a noise abatement measure, since owners have vested financial interests in the property.

Section 772.11(h), as proposed, would clarify the FHWA's position on noise analyses prepared for design-build projects. The stated goal of 23 CFR 636 is to ensure an objective National Environmental Policy Act (NEPA) process. The regulation is clear that final design cannot occur until NEPA is complete. The NEPA process includes the technical studies the NEPA decisionmakers rely on to develop the NEPA document and the NEPA decision document. This proposed provision would ensure an objective NEPA process by preventing the contractor from making NEPA decisions based solely on cost, which could potentially violate the conflict of interest requirements in 40 CFR 1506(c). The design-build regulation at 23 CFR 636.109(b) states that the design-build contract must include appropriate provisions ensuring that all environmental and mitigation measures identified in the NEPA document will be implemented and that the design-builder must not prepare the NEPA document or have any decision making responsibility with respect to the NEPA process. In order to comply with these provisions, a highway agency would be required to complete a technical noise analysis and abatement design as part of NEPA and the preliminary design. This is necessary to avoid a minimalist approach to noise abatement where the abatement measure is designed to the NAC or feasibility criterion, rather than to achieve a substantial reduction in accordance with the 1995 Policy and Guidance and to satisfy section 772.11(c), as proposed.

Section 772.13(a), as proposed, would clarify that the requirements of proposed sections 772.13(a)(1)–(2) would be required for both Type I and Type II projects. Section 772.13(a)(2), as proposed, would combine sections 772.13(a)(2)–(3) in the current regulation to state ''[a]batement measures have been determined to be feasible and reasonable per § 772.9(c)(5) of this chapter.'' By changing this sentence to include feasible and reasonable we would incorporate the intent in sections 772.13(a)(2)–(3).

Section 772.13(c), as proposed, would rename the subsection as ''Noise Abatement Measures'' to delineate clearly the purpose of the proposed section. Section 772.13(c), as proposed, lists the five noise abatement measures available for Federal-aid funding. The current regulation contains six noise abatement measures. We propose combining current sections 772.13(c)(3) and 772.13(c)(4), which deal with noise barriers as noise abatement measures. We propose to list noise barriers as the first noise abatement measure. Noise barriers currently are listed in sections 772.13(c)(3) and 772.13(c)(4), and we propose to list them in section 772.13(c)(1) solely because they are the most frequently used form of noise mitigation. The remaining noise abatement measures provided in the current regulation are listed in sequential order in this proposed section.

Section 772.13(c)(1), as proposed, would clarify the FHWA's position on Federal-aid funding for landscaping. This proposed language would replace section 772.13(c)(3) while retaining the intent of the current regulation. Section 772.13(c)(5), as proposed, would clarify that noise insulation of public use or nonprofit institutional structures would be eligible for Federal funding.

Section 772.13(d), as proposed, would require highway agencies to define severe noise impacts in accordance with proposed section 772.5(s). The proposed changes to this section would clarify the FHWA's position on the process required for a severe noise impact on a Federal-aid highway project. A noise analysis considers the worst-case noise environment for the design year of the Federal-aid highway project; therefore, it is the FHWA's position that the severe noise impact would be derived from the ''future build condition''; not the existing condition. We also propose that the highway agency first determine if the abatement measures listed in paragraph (c) of this section provide feasible and reasonable exterior noise abatement for severe noise impacts. If exterior noise abatement is not achievable, the highway agency may consider the following options; however, they shall be considered in sequence and submitted for FHWA approval, on a case-by-case basis. These options are listed in proposed sections 772.13(d)(1) and 772.13(d)(2), respectively. It is the FHWA's position to first allow highway agencies to

exceed their allowable cost of abatement. While the 1995 Policy and Guidance document does not mention exceeding the highway agency's allowable cost of abatement as an option, it is the FHWA's position that this is the first logical option to consider. If this were not a viable option due to excessive cost, then the highway agency would have the option of noise insulating a privately owned structure. Typically, noise insulating refers to providing additional wall insulation or replacement windows. The 1995 Policy and Guidance document refers to noise insulating privately owned structures as an abatement option for severe noise impacts. These proposed changes would maintain the intent of the current regulation on severe impacts, while providing clarification and flexibility to highway agencies seeking additional abatement options for severe impacts.

Section 772.13(e), as proposed, would be renamed ''Abatement Measure Reporting'' to delineate clearly that this section would require each highway agency to report all constructed noise abatement measures. The FHWA had requested the information proposed in this paragraph from highway agencies up to December 31, 2007, in the form of a noise barrier inventory. This information is helpful in providing a national inventory of noise barrier location, cost, materials and size. The information reported by highway agencies up to and including 2004 may currently be found at: *http://www.fhwa.dot.gov/environment/ab_noise.htm*.

Section 772.15(a)(i), as proposed, would require a highway agency to inform local officials of ''noise compatible planning concepts.'' The FHWA has supported the concepts surrounding noise compatible planning since the early 1970s, starting with the publication of ''The Audible Landscape: A Manual for Highway Noise and Land Use'' (*http://www.fhwa.dot.gov/environment/audible/index.htm*). Noise compatible planning encourages the location of less noise-sensitive land uses near highways, promotes the use of open space separating roads from developments, and suggests special construction techniques that minimize the impact of noise from highway traffic.

Section 772.15(a)(ii), as proposed, would clarify section 772.15(a) of the current regulation while retaining the intent of the current regulation, which is to provide estimates of future noise levels at various distances from the highway project. The proposed language would specify that the distance from the highway would be from the edge of the near travel lane to the point highway agency's ''approach'' criteria. This clarification would apply only within the project area.

Section 772.15(b), as proposed, would require a highway agency choosing to use the date of development as one of the factors in determining the reasonableness of a noise abatement measure to have a statewide outreach program to inform local officials and the public on the items in sections 772.15(a)(i)–(iv), as proposed. As discussed above, the FHWA has promoted noise compatible planning since the 1970s. Although land use control is a responsibility of local governments, it is the FHWA's position that, if a highway agency chooses to use the ''date of development'' as a reasonableness factor, it should be required to promote the concepts of noise compatible planning through an outreach program. This outreach program would allow all local jurisdictions and the public within the State the opportunity to be informed on the concepts of noise compatible planning, possibly giving way to these concepts being implemented and therefore avoiding, or at least lessening, the number of traffic noise impacts near highways.

Section 772.17(a), as proposed, would make two editorial changes. In May 2007, the FHWA moved to 1200 New Jersey Avenue, SE., Washington, DC 20590. Additionally, the Internet site www.trafficnoisemodel.org no longer exists. All information regarding the FHWA Traffic Noise Model (TNM) may be found at *http://www.fhwa.dot.gov/environment/noise/index.htm.*

Section 772.17(b), as proposed, would allow highway agencies the option to use the FHWA TNM Look-up Program (FHWA TNM Look-up) as a screening tool to determine the absence of potential noise impacts or if a more detailed analysis is needed with the FHWA TNM. The additional items that would be required to be adhered to are contained in proposed sections 772.17(b)(1)–(2).

Section 772.17(b)(1), as proposed, would prohibit a highway agency using the FHWA TNM Look-up, in addition to the limitations as indicated in Report No. FHWA–HEP–05–008, from using the FHWA TNM Look-up for roadways with more than 2 travel lanes, with total paved widths greater than 24 feet including shoulders and median, or containing intersections.

Section 772.17(b)(2), as proposed, would require that, if a highway agency chooses to use the FHWA TNM Look-up program, the results must be evaluated with at least a 5 dB(A) safety factor. This requirement would result from the FHWA TNM Look-up program's simple highway geometries and resulting limitations. Section 772.17(b)(2)(ii), as proposed, also recommends that, if the output from the FHWA TNM Look-up is greater than 5 dB(A) from the NAC and/or the comparison between the existing condition to future build conditions is less than the highway agency's definition of substantial noise increase, the highway agency should document the results indicating no impacts for the project. These requirements would ensure the proper assessment of traffic noise impacts.

Section 772.17(b)(3), as proposed, would prohibit a highway agency from using the FHWA TNM Look-up to determine feasible and reasonable noise abatement. It is not the intent of the FHWA TNM Look-up program to determine feasible and reasonable noise abatement, nor is it capable to assist in such a determination.

Section 772.17(c), as proposed, would include a new sentence that would permit a highway agency to use noise contour lines for land use planning but not to determine traffic noise impacts. Noise contours are appropriate to use as a tool to graphically educate local governments and the public about the existing and future noise conditions in a project area, but not to determine traffic noise impacts. Traffic noise impacts should be determined in accordance with proposed section 772.17(a).

In Table 1 of Part 772 –NAC, as proposed, the format and column headings as well as the ''Activity Description'' for both Activity Category B and E would be changed. The first column of Table 1, however, would remain unchanged. The proposed language would retain the second and third columns' existing titles, ''Leq(h)'' and L10(h)'', but incorporate them into a broader column heading entitled ''Activity Criteria.'' The proposed changes would also remove the ''(Exterior)'' and ''(Interior)'' clarifiers within the ''Leq(h)'' and L10(h)'' columns and add them to a new column labeled ''Evaluation Location.'' Further, proposed language would rename the heading of the last column as ''Activity Description.'' For Activity Category B and E, as proposed, ''churches'' would be ''places of worship,'' as not all religions worship in a ''church.'' Finally, Table 1, as proposed, would include ''cemeteries, campgrounds, trails, and trail crossings'' in Activity Category B. The inclusion of these activities is supported by a June 16, 1995, FHWA memo (*http://www.fhwa.dot.gov/environment/noise/*

cemetery.pdf) indicating these activities should be considered an Activity Category B land use. These activities should be assessed in the same manner as the other special land use facilities in the description of proposed section 772.5(e).

In Table 1, as proposed, a second footnote would be added. This footnote is associated with the ''Activity Criteria'' and would state that ''[t]he Leq(h) and L10(h) Activity Criteria values are for impact determination only, and are not design standards for noise abatement measures.'' This is supported by the 1995 Policy and Guidance document which states ''[t]raffic noise impacts can occur below the NAC. The NAC should not be viewed as Federal standards or desirable noise levels; they should not be used as design goals for noise barrier construction.''

In Appendix A to Part 772—National Reference Energy Mean Emission Levels as a Function of Speed, as proposed, would be removed. A previous NPRM on 23 CFR 772 (FHWA Docket No. FHWA–2004–018309) stated that the vehicle emission levels as graphically shown in Appendix A are no longer needed ''since this technology has now been well established and documented for more than two decades, the FHWA noise regulation no longer needs to include any reference to a measurement report or to vehicle emission levels. Therefore, the FHWA proposes to remove these references from the regulation.'' While this previous proposal was discussed in the ''Background'' section of the NPRM, FHWA's intent was to remove both the references to Appendix A as well as Appendix A. Therefore, we propose removing Appendix A.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above 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, but the FHWA may issue a final rule at any time after the close of the comment period. In addition to late comments, the FHWA 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.

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

The FHWA has determined that this proposed rule would not be a significant regulatory action within the meaning of Executive Order 12866 and would not be significant within the meaning of the U.S. Department of Transportation regulatory policies and procedures.

The proposed amendments revise requirements for traffic noise prediction on Federal-aid highway projects to be consistent with the current state-of-the-art technology for traffic noise prediction. It is anticipated that the economic impact of this rulemaking would be minimal; therefore, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (RFA) (Pub. L. 96–354, 5 U.S.C. 601–612), the FHWA has evaluated the effects of this proposed rule on small entities and anticipates that this action would not have a significant economic impact on a substantial number of small entities. The proposed amendment addresses traffic noise prediction on certain State highway projects. As such, it affects only States, and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, the RFA does not apply, and the FHWA certifies that the proposed action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This NPRM 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). The actions proposed in this NPRM would not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $121.8 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the affects on State, local, and tribal governments and the private sector. Additionally, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal government. The Federal-aid highway program permits this type of flexibility.

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and it has been determined that this proposed action does not have a substantial direct effect or sufficient federalism implications on States that would limit the policymaking discretion of the States. Nothing in this proposed rule directly preempts any State law or regulation or affects the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

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

National Environmental Policy Act

The FHWA has analyzed this proposed action for the purpose of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and anticipates that this action would not have any effect on the quality of the human and natural environment, since it proposes to update the specific reference to acceptable highway traffic noise prediction methodology and remove unneeded references to a specific noise measurement report and vehicle noise emission levels.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. FHWA determined that this NPRM would affect a currently approved information collection for OMB Control Number 2125–0622, titled ''Noise Barrier Inventory Request.'' OMB approved this information collection on July 30, 2008, at a total of 416 burden hours, with an expiration date of July 31, 2011.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this proposed action under Executive Order 13175, dated November 6, 2000, and believes that this 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 law. This proposed rulemaking primarily applies to noise prediction on State highway projects and would not impose any direct compliance requirements on Indian tribal governments nor would it have any economic or other impacts on the viability of Indian tribes. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this proposed action under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use. We have determined that this proposed action would not be a significant energy action under that order because any action contemplated would not be likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, the FHWA certifies that a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12630 (Taking of Private Property)

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

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

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

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

List of Subjects in 23 CFR Part 772

Highways and roads, Noise control.

Issued on: August 21, 2009.

Victor M. Mendez,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA proposes to revise part 772 of title 23, Code of Federal Regulations, as follows:

PART 772—PROCEDURES FOR ABATEMENT OF HIGHWAY TRAFFIC NOISE AND CONSTRUCTION NOISE

Sec.

Authority: 23 U.S.C. 109(h) and (i); 42 U.S.C. 4331, 4332; sec. 339(b), Pub. L. 104–59, 109 Stat. 568, 605; 49 CFR 1.48(b).

§ 772.1 Purpose.

To provide procedures for noise studies and noise abatement measures to help protect the public health and welfare, to supply noise abatement criteria, and to establish requirements for information to be given to local officials for use in the planning and design of highways approved pursuant to title 23 U.S.C.

§ 772.3 Noise Standards.

The highway traffic noise prediction requirements, noise analyses, noise abatement criteria, and requirements for informing local officials in this regulation constitute the noise standards mandated by 23 U.S.C. 109(1). All highway projects which are developed in conformance with this regulation shall be deemed to be in accordance with the FHWA noise standards.

§ 772.5 Definitions.

(a) Type I Project.

(1) The construction of a highway on new location, the addition of new interchanges or ramps added to a quadrant to complete an existing partial interchange;

(2) The physical alteration of an existing highway which significantly changes either the horizontal or vertical alignment. The physical alteration of an existing highway which the highway agency has determined significantly changes either the horizontal or vertical alignment. A factor for determining a significant change shall be a 3 dB(A) increase in the noise environment when comparing the existing condition to the future build condition;

(3) The addition of a through-traffic lane(s). This includes the addition of a through-traffic lane that functions as a HOV lane, High-Occupancy Toll (HOT) lane or truck climbing lane; or,

(4) The addition of an auxiliary lane, when the auxiliary lane:

(i) Increases capacity;

(ii) Is, at a minimum, 1.5 miles long;

(iii) Is added between interchanges to improve operational efficiency;

(iv) Functions as a through-traffic lane, regardless of length; or

(v) Significantly alters the horizontal or vertical alignment.

(b) Type II Project. A Federal or Federal-aid highway project for noise abatement on an existing highway. For a Type II project to be eligible for Federal-aid, the highway agency must develop and implement a Type II program in accordance with section 772.7(c)(2).

(c) Type III Project. A Federal or Federal-aid highway project that does not meet the classifications of a Type I or Type II project.

(d) Residence. A dwelling unit. Either a single family residence or each dwelling unit in a multifamily dwelling.

(e) Special Land Use Facilities. All land uses listed in Table 1, Noise Abatement Criteria (NAC), Activity Category B, except for residences shall be considered ''special use facilities'' due to the difficulty in determining the number of receivers.

(f) Multifamily Dwelling. A residential structure containing more than one residence. Each residence in a multifamily structure shall be counted as one receiver.

(g) Planned, Designed, and Programmed. A definite commitment to develop land with an approved specific design of land use activities.

(h) Date of Public Knowledge. The date of approval of the CE, the Finding of No Significant Impact FONSI, or the ROD.

(i) Existing noise levels. The noise resulting from the natural and mechanical sources and human activity usually present in a particular area.

(j) Traffic noise impacts. Highway traffic noise levels that approach or exceed the NAC listed in Table 1 for the future build condition; or future build condition noise levels that create a substantial noise increase over existing noise levels.

(k) Design year. The future year used to estimate the probable traffic volume for which a highway is designed.

(l) Impacted Receiver. The recipient of future build condition traffic noise levels that either approach or exceed the NAC or future build condition traffic noise level that substantially exceed the existing traffic noise levels.

(m) Benefited Receiver. The recipient of an abatement measure that provides at least a 5 d(B)A noise reduction for a receiver.

(n) Feasibility. The combination of acoustical and engineering factors of a noise abatement measure.

(o) Reasonableness. The combination of social, economic and environmental factors of a noise abatement measure.

(p) Common Noise Environment. A group of receivers exposed to similar noise sources and levels; traffic volumes, traffic mix, and speed; and topographic features. Generally, common noise environments occur between two secondary noise sources, such as interchanges, intersections, or cross-roads.

(q) Property Owner. An individual or group of individuals that own property or a residence.

(r) Substantial Construction. The granting of building permit, the filing of a plat plan, or the occurrence of a similar action prior to right-of-way acquisition or construction approval for the original highway.

(s) Severe Noise Impact. An absolute noise level in the future build condition that is between 10 and 20 dB(A) Leq(h) over the NAC, or a noise level increase between 30 and 40 dB(A) over the existing noise levels.

(t) L10. The sound level that is exceeded 10 percent of the time (the 90th percentile) for the period under consideration, with L10(h) being the hourly value of L10.

(u) Leq. The equivalent steady-state sound level which in a stated period of time contains the same acoustic energy as the time-varying sound level during the same time period, with Leq(h) being the hourly value of Leq.

§ 772.7 Applicability.

(a) This regulation applies to all Federal or Federal-aid Highway Projects authorized under title 23, United States Code. Therefore, this regulation applies to any highway project or multimodal project that:

(1) Requires FHWA approval regardless of funding sources, or

(2) Is funded with Federal-aid highway funds.

(b) This regulation shall be applied uniformly and consistently statewide.

(c) This regulation applies to all Type I projects unless the regulation specifically indicates that a section only applies to Type II or Type III projects.

(1) The development and implementation of Type II projects are not mandatory requirements of section 109(i) of title 23, United States Code.

(2) If a highway agency chooses to participate in a Type II program, the highway agency shall develop a priority system, based on a variety of factors, to rank the projects in the program. This priority system shall be submitted to and approved by FHWA before the highway agency is allowed to use Federal-aid funds for a project in the program.

(3) For a Type III project, a highway agency is not required to complete a noise analysis or consider abatement measures.

§ 772.9 Analysis of traffic noise impacts and abatement measures.

(a) The highway agency shall determine and analyze expected traffic noise impacts and alternative noise abatement measures to mitigate these impacts by giving weight to the benefits and costs of abatement and the overall social, economic, and environmental effects through feasible and reasonable noise abatement measures.

(b) A traffic noise analysis shall be completed for:

(1) Each alternative under detailed study;

(2) Each Activity Category of the NAC listed in Table 1 that is present in the study area;

(i) Activity Category A. This activity category includes lands on which serenity and quiet are of extraordinary significance and serve an important public need, and where the preservation of those qualities is essential for the area to continue to serve its intended purpose. Highway agencies shall submit justifications to the FHWA on a case-by-case basis for approval of an Activity Category A designation.

(ii) Activity Category B. This activity category includes single-family and multifamily residences, as well as a variety of special land use facilities. Each highway agency shall adopt a standard practice for analyzing these special land use facilities that is consistent and uniformly applied statewide.

(iii) Activity Category C. This activity category is comprised of commercial and industrial land use facilities.

(iv) Activity Category D. This activity includes undeveloped lands.

(A) A highway agency shall determine if undeveloped land is planned, designed, and programmed for development. A milestone or activity and its associated date for acknowledging when undeveloped land is considered planned, designed, and programmed shall be the date of issuance of a building permit, the date of final approval of the development plan, the date of recording of the plat plan, or any other date that demonstrates a local commitment for a specific design of land use activities intended for development on the property.

(B) If undeveloped land is determined to be planned, designed, and programmed, then the highway agency must determine noise impacts and, if impacts are determined, must consider abatement measures.

(C) If undeveloped land is not planned, designed, and programmed for development by the date of public knowledge, the highway agency shall determine noise levels and document the results in the project's environmental clearance documents and noise analysis documents. Federal participation in noise abatement measures will not be considered for lands that are not planned, designed, and programmed by the date of public knowledge.

(v) Activity Category E. A highway agency should only conduct an indoor analysis after fully completing an analysis of any existing outdoor activity area(s).

(3) For a Type I project:

(i) At least 500 feet from all termini of the build alternative(s);

(ii) At least 500 feet from the edge of the near travel lane;

(iii) For additional travel lanes and new roadways, for both sides of the road; and

(iv) For ramps and interchanges, within at least a 500-foot line of the near travel lane for the project.

(c) The traffic noise analysis shall include a(n):

(1) Identification of existing activities, developed lands, and undeveloped lands, which may be affected by noise from the highway;

(2) Determination and prediction of existing traffic noise levels; and

(3) Determination of traffic noise impacts for the design year;

(i) Highway agencies shall establish an approach level to be used when determining a traffic noise impact as at least 1 dB(A) less than the Noise Abatement Criteria listed in Table 1;

(ii) Highway agencies shall define substantial noise increase between 10 dB(A) to 15 dB(A) over existing noise levels. There is no lower threshold limit associated with a substantial noise increase, which is the difference between the existing and future noise levels.

(4) Assessment of Impacted and Benefited Receivers. Each highway agency shall define the threshold for the noise reduction which determines a benefited receiver as at least 5 dB(A).

(5) Examination and evaluation of feasible and reasonable noise abatement measures for reducing the traffic noise impacts. Each highway agency, with FHWA approval, shall develop feasibility and reasonableness factors. These factors, at a minimum, shall include the following:

(i) Feasibility:

(A) Achievement of at least a 5 dB(A) highway traffic noise reduction at the majority of the impacted receivers; and

(B) Determination that it is possible to design and construct a safe noise abatement measure.

(ii) Reasonableness:

(A) Consideration of the desires of the property owners of the impacted receivers; and

(B) Cost of the highway traffic noise abatement measures. Each highway agency shall determine, and receive FHWA approval for, the allowable cost of abatement by determining a baseline cost reasonableness value. This determination may include the actual construction cost of noise abatement, cost per square foot of abatement, and either the cost/benefited receiver or cost/benefited receiver/dB(A). The highway agency shall re-analyze the allowable cost for abatement on a regular interval, not to exceed 5 years. A highway agency has the option of justifying, for FHWA approval, different cost allowances for a particular geographic area(s) within the State.

(iii) In addition to the required reasonableness factors listed in § 772.9(c)(5)(ii), a highway agency may also include the following reasonableness factors: date of development, length of exposure to highway traffic noise impacts, exposure to higher absolute highway traffic noise levels, changes between existing and future build conditions, mixed zoning development, and noise compatible planning concepts. No single reasonableness factor should be used as the sole basis in determining reasonableness.

(d) On a Type I or Type II project, a highway agency shall only allow a third party to contribute additional funds towards the construction of a noise abatement measure or aesthetic treatments after the highway agency has determined that the noise abatement measure is feasible and reasonable.

(e) On a Type I and Type II project, a highway agency may average the cost of noise abatement among benefited receivers within a common noise environment.

(f) A highway agency proposing to use Federal-aid highway funds for a Type II project shall perform a noise analysis in accordance with § 772.9 of this part in order to provide information needed to make the determination required by § 772.11(a) of this part.

§ 772.11 Noise abatement.

(a) In determining and abating traffic noise impacts, a highway agency shall give primary consideration to exterior areas. Abatement will usually be necessary only where frequent human use occurs and a lowered noise level would be of benefit.

(b) In situations where no exterior activities are to be affected by the traffic noise, or where the exterior activities are far from or physically shielded from the roadway in a manner that prevents an impact on exterior activities, a highway agency shall use Activity Category E as the basis of determining noise impacts.

(c) If a noise impact is identified, a highway agency shall consider abatement measures. The abatement measures listed in § 772.13(c) of this chapter are eligible for Federal funding. At a minimum, the highway agency shall consider noise abatement in the form of a noise barrier.

(d) When noise abatement measure(s) are being considered, a highway agency shall make every reasonable effort to obtain substantial noise reductions which, at a minimum, shall be at least 5 dB(A) for the majority of the impacted receivers.

(e) Before adoption of a CE, FONSI, or ROD, the highway agency shall identify:

(1) Noise abatement measures which are feasible and reasonable, and which are likely to be incorporated in the project; and

(2) Noise impacts for which no noise abatement measures are feasible and reasonable.

(f) A highway agency must solicit the viewpoints from all of the benefited property owners, and receive responses from a majority of those solicited. The highway agency shall only solicit the viewpoints of the property owner(s) of a benefited receiver when determining reasonableness of a noise abatement measure. The highway agency shall not consider the viewpoints of other entities to determine reasonableness, unless explicitly authorized by the benefited property owner(s).

(g) The FHWA will not approve project plans and specifications unless feasible and reasonable noise abatement measures are incorporated into the plans and specifications to reduce the noise impact on existing activities, developed lands or undeveloped lands for which development is planned, designed, and programmed.

(h) For design build projects, the preliminary technical noise study shall document all considered and proposed noise abatement measures for inclusion in the NEPA document. Final design of design-build noise abatement measures shall be based on the preliminary noise abatement design developed in the technical noise analysis. Noise abatement measures shall be considered, developed, and constructed in accordance with this standard and in conformance with the provisions of 40 CFR 1506(c) and 23 CFR 636.109.

§ 772.13 Federal participation.

(a) Type I and Type II projects. Federal funds may be used for noise abatement measures when:

(1) Traffic noise impacts have been identified; and

(2) Abatement measures have been determined to be feasible and reasonable pursuant to § 772.9(c)(5) of this chapter.

(b) For Type II projects.

(1) Federal funds may be used for noise abatement measures, only if the funds:

(i) Were approved by FHWA before November 28, 1995; or

(ii) Were proposed along lands where land development or substantial construction predated the existence of any highway.

(2) FHWA will not approve noise abatement measures for locations where such measures were previously determined not to be reasonable and feasible for a Type I project.

(c) Noise Abatement Measures. The following noise abatement measures may be considered for incorporation into a Type I or Type II project to reduce traffic noise impacts. The costs of such measures may be included in Federal-aid participating project costs with the Federal share being the same as that for the system on which the project is located.

(1) Construction of noise barriers, including acquisition of property rights, either within or outside the highway right-of-way. Landscaping is not a viable noise abatement measure for Federal-aid funding; however, landscaping may be included into the highway design for aesthetic purposes.

(2) Traffic management measures including, but not limited to, traffic control devices and signing for prohibition of certain vehicle types, time-use restrictions for certain vehicle types, modified speed limits, and exclusive lane designations.

(3) Alteration of horizontal and vertical alignments.

(4) Acquisition of real property or interests therein (predominantly unimproved property) to serve as a buffer zone to preempt development which would be adversely impacted by traffic noise. This measure may be included in Type I projects only.

(5) Noise insulation of public use or nonprofit institutional structures.

Maintenance costs for noise insulation are not eligible for Federal-aid funding.

(d) Severe Noise Impact: Highway agencies shall define a severe noise impact. If a severe traffic noise impact is expected in the future build condition, the highway agency shall first determine if the abatement measures listed in paragraph (c) provide feasible and reasonable exterior noise abatement. If this is not achievable, the highway agency may consider the following options in the order in which they appear, and may recommend the option to FHWA for approval on a case-by-case basis.

(1) Exceed the allowable cost of abatement for the construction of feasible and reasonable exterior noise abatement, or

(2) Consider interior noise insulation of privately owned structures. Maintenance costs for noise insulation are not eligible for Federal-aid funding.

(e) Abatement Measure Reporting: Each highway agency shall maintain an inventory of all constructed noise abatement measures. The inventory shall include such parameters as abatement type, location, material, cost, noise reduction, and other parameters as deemed appropriate by FHWA. The FHWA will collect this information, in accordance with OMB's Information Collection requirements.

§ 772.15 Information for local officials.

(a) To minimize future traffic noise impacts on currently undeveloped lands, a highway agency shall inform local officials within whose jurisdiction the highway project is located of:

(i) Noise compatible planning concepts;

(ii) The best estimation of the distances from the edge of the travel lane of the highway improvement where the future noise levels meet the highway agency's definition of ''approach'' for developed and undeveloped lands or properties within the project limits;

(iii) Information that may be useful to local communities to protect future land development from becoming incompatible with anticipated highway noise levels; and

(iv) Non-eligibility for Federal-aid participation for a Type II project as described in § 772.11(b).

(b) A highway agency that chooses to use the date of development as one of the factors in determining the reasonableness of a noise abatement measure must have a statewide outreach program to inform local officials and the public of the items in § 772.15(a)(i)–(iv).

§ 772.17 Traffic noise prediction.

(a) Any analysis required by this subpart must use the FHWA FHWA TNM, which is described in ''FHWA Traffic Noise Model'' Report No. FHWA–PD–96–010, including Revision No. 1, dated April 14, 2004, or any other model determined by the FHWA to be consistent with the methodology of the FHWA TNM. These publications are incorporated by reference in accordance with section 552(a) of title 5, U.S.C. and part 51 of title 1, CFR, and are on file at the National Archives and Record Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* These documents are available for copying and inspection at the Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, as provided in part 7 of title 49, CFR. These documents are also available on the FHWA's Traffic Noise Model Web site at the following URL: *http://www.fhwa.dot.gov/environment/noise/index.htm.*

(b) In lieu of the requirement in section 772.17(a), a highway agency may choose to use the FHWA TNM Look-up, which is described in ''FHWA Traffic Noise Model Version 2.5 Look-up Tables User's Guide'' Report No. FHWA–HEP–05–008 as a screening tool to determine that traffic noise impacts do not exist. The FHWA TNM Look-up provides a reference of pre-calculated FHWA TNM results for simple highway geometries and, therefore, has limitations associated with it as described in Report No. FHWA–HEP–05–008. If a highway agency chooses to utilize the FHWA TNM Look-up, the Federal-aid highway project shall be within these limitations:

(1) The FHWA TNM Look-up shall not be used for roadways with more than two travel lanes, with total paved widths greater than 24 feet including shoulders and median, or containing intersections.

(2) The FHWA TNM Look-up results shall be evaluated with at least a 5 dB(A) safety factor, where:

(i) The output from the FHWA TNM Look-up is 5 dB(A) or less from the NAC, then the highway agency must develop a project model in accordance with § 772.17(a).

(ii) The output from the FHWA TNM Look-up is greater than 5 dB(A) from the NAC and/or the comparison between the existing condition to future build conditions is less than the highway agency's definition of substantial noise increase, then the highway agency may document that there are no impacts associated with the project.

(3) The FHWA TNM Look-up shall not be used to determine feasible and reasonable noise abatement measures.

(c) Noise contour lines may be used for land use planning but shall not be used for determining highway traffic noise impacts.

(d) In predicting noise levels and assessing noise impacts, traffic characteristics that would yield the worst traffic noise impact for the design year shall be used.

§ 772.19 Construction noise.

For all Type I and II projects, a highway agency shall:

(a) Identify land uses or activities that may be affected by noise from construction of the project. The identification is to be performed during the project development studies.

(b) Determine the measures that are needed in the plans and specifications to minimize or eliminate adverse construction noise impacts to the community. This determination shall include a weighing of the benefits achieved and the overall adverse social, economic, and environmental effects and costs of the abatement measures.

(c) Incorporate the needed abatement measures in the plans and specifications.

TABLE 1 TO PART 772—NOISE ABATEMENT CRITERIA

[Hourly A-weighted sound level decibels (dBA) [1]]

Activity category	Activity criteria [2]		Evaluation location	Activity description
	Leq(h)	L10(h)		
A	57	60	Exterior	Lands on which serenity and quiet are of extraordinary significance and serve an important public need and where the preservation of those qualities is essential if the area is to continue to serve its intended purpose.
B	67	70	Exterior	Picnic areas, recreation areas, playgrounds, active sport areas, parks, residences, motels, hotels, schools, places of worship, libraries, hospitals, cemeteries, campgrounds, trails, and trail crossings.
C	72	75	Exterior	Developed lands, properties, or activities not included in Categories A or B above.
D				Undeveloped lands.
E	52	55	Interior	Residences, motels, hotels, public meeting rooms, schools, places of worship, libraries, hospitals, and auditoriums.

[1] Either Leq(h) or L10(h) (but not both) may be used on a project.
[2] The Leq(h) and L10(h) Activity Criteria values are for impact determination only, and are not design standards for noise abatement measures.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[EPA–HQ–OAR–2004–0488; FRL–8956–5]

Protection of the Stratospheric Ozone: Alternatives for the Motor Vehicle Air Conditioning Sector Under the Significant New Alternatives Policy (SNAP) Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Data availability.

SUMMARY: Under section 612 of the Clean Air Act, the Environmental Protection Agency (EPA) reviews and lists as acceptable alternatives to ozone-depleting substances (ODS). In 2006, EPA proposed to list R–744 (CO_2) as ''acceptable with use conditions'' as a substitute for CFC–12 in the motor vehicle air conditioning (MVAC) end-use within the refrigeration and air-conditioning sector. When using CO_2 as a refrigerant, MVAC systems would be required to use the refrigerant according to those legally enforceable conditions. EPA proposed use conditions because of the potential risk of exposure to elevated concentrations of CO_2 within the passenger compartment if there was a leak of the MVAC system. Elevated CO_2 levels could cause passengers, and of particular concern, the driver, to become drowsy. Since the time of the proposed rule, additional information regarding the effects of short-term CO_2 exposures has become available and EPA is now making that information available to the public. As noted in the proposed rule, EPA is considering whether to establish a breathing zone ceiling and this short-term exposure information is relevant to EPA's decision on this issue. In addition, EPA is providing the public with opportunity to respond to an issue raised in a public comment on the proposed rule.

DATES: Comments must be received on or before November 16, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0488, by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-Docket@epa.gov*.
- *Fax:* 202–566–1741.
- *Mail:* EPA Docket Center (EPA/DC), Mailcode 6102T, Attention Docket ID No. EPA–HQ–OAR–2004–0488, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery:* Public Reading Room, Room 3334, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2004–0488. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Melissa Fiffer, Stratospheric Protection Division, Office of Atmospheric