

In order to allow FTA to compute aggregate program performance measures as required by the President's Management Agenda, FTA requests that all recipients of funding for capital projects under the ATPPL program submit the following information annually:

- Annual visitation to the land unit;
- Annual number of persons who use the alternative transportation system (ridership/usage);
- An estimate of the number of vehicle trips mitigated based on alternative transportation system usage and the typical number of passengers per vehicle;
- Cost per passenger; and,
- A note of any special services offered for those systems with higher costs per passenger but more amenities.

State and local government entities should submit this information as part of their fourth quarter report through FTA's TEAM grants management system.

Federal land management agencies should also send this information as part of their fourth quarter report (preferably by e-mail), to Henrika Buchanan-Smith, FTA, *Henrika.Buchanan-Smith@dot.gov*; 202-366-5080; 400 7th St., SW.; Room 9315; Washington, DC 20590. Examples can be found on the program Web site at <http://www.fta.dot.gov/atppl>.

#### Oversight

Recipients of FY 2006 ATPPL funds will be required to certify that they will comply with all applicable Federal and FTA programmatic requirements. FTA direct grantees will complete this certification as part of the annual Certification and Assurances package, and Federal Land Management Agency recipients will complete the certification by signing the interagency agreement. This certification is the basis for oversight reviews conducted by FTA.

The Secretary of Transportation and FTA have elected not to apply the triennial review requirements of 49 U.S.C. 5307(h)(2) to ATPPL recipients that are other Federal agencies. Instead, working with the existing oversight systems at the Federal Land Management Agencies, FTA will perform periodic reviews of specific projects funded by the ATPPL program. These reviews will ensure that projects meet the basic statutory, administrative, and regulatory requirements as stipulated by this notice and the certification. To the extent possible, these reviews will be coordinated with other reviews of the project. FTA direct grantees of ATPPL funds (State, local

and tribal government entities) will be subject to all applicable triennial, State management, civil rights, and other reviews.

Issued in Washington, DC, this 5th day of September, 2006.

**James S. Simpson,**  
*Administrator.*

#### Appendix A—FTA Regional Offices

##### Region I

Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Richard Doyle, FTA Regional Administrator, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142-1093, (617) 494-2055.

##### Region II

New Jersey, New York, and Virgin Islands. Letitia Thompson, FTA Regional Administrator, One Bowling Green, Room 429, New York, NY 10004-1415, (212) 668-2170.

##### Region III

Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia. Susan Borinsky, FTA Regional Administrator, 1760 Market Street, Suite 500, Philadelphia, PA 19103-4124, (215) 656-7100.

##### Region IV

Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, and Tennessee. Yvette Taylor, FTA Regional Administrator, 61 Forsyth Street, SW., Suite 17T50, Atlanta, GA 30303, (404) 562-3500.

##### Region V

Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. Marisol Simon, FTA Regional Administrator, 200 West Adams Street, Suite 320, Chicago, IL 60606-5232, (312) 353-2789.

##### Region VI

Arkansas, Louisiana, New Mexico, Oklahoma, and Texas. Robert Patrick, FTA Regional Administrator, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, (817) 978-0550.

##### Region VII

Iowa, Kansas, Missouri, and Nebraska. Mokhtee Ahmad, FTA Regional Administrator, 901 Locust Street, Suite 404, Kansas City, MO 64106, (816) 329-3920.

##### Region VIII

Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. Lee Waddleton, FTA Regional Administrator, 12300 West Dakota, Suite 310, Lakewood, CO 80228-2583, (720) 963-3300.

##### Region IX

American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands. Leslie Rogers, FTA Regional Administrator, 201 Mission Street, Suite 2210, San Francisco, CA 94105-1839, (415) 744-3133.

#### Region X

Alaska, Idaho, Oregon, and Washington. Richard F. Krochalis, FTA Regional Administrator, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174-1002, (206) 220-7954.

[FR Doc. E6-15095 Filed 9-11-06; 8:45 am]  
BILLING CODE 4910-57-P

#### DEPARTMENT OF TRANSPORTATION

##### Federal Transit Administration

[Docket No: FTA-2006-23511]

#### Notice of Proposed Agency Guidance and Request for Comments on the Eligibility of Joint Development Improvements Under Federal Transit Law

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of proposed guidance with request for comment.

**SUMMARY:** The Federal Transit Administration (FTA) seeks public comment on the following proposed guidance on joint development capital projects funded by the Federal Transit Administration. The Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA-LU) enacted certain amendments to the definition of the term "capital project" as used in 49 U.S.C. 5302(a)(1)(G) relating to "joint development" activities by recipients of Federal funds under 49 U.S.C. 5301 *et seq.* (Federal Transit Law). The Federal Transit Administration (FTA) proposes to adopt the following guidance in accordance with the procedures for notice and an opportunity for the public to comment set forth at 49 U.S.C. 5334(l) and FTA's Notice of Final Policy Statement for Implementation of Notice and Comment Procedures for Documents Imposing "Binding Obligations," as published in the **Federal Register** on June 5, 2006. The following proposed guidance seeks to ensure maximum benefit to the people who ride public transportation, to FTA grantees that choose to sponsor joint development improvements (the project sponsor), and to their joint development partners by (i) Affording FTA grantees maximum flexibility within the law to work with the private sector and others for purposes of joint development, (ii) generally deferring to the decisions of the project sponsor, negotiating and contracting at arm's length with third parties, to utilize Federal Transit funds and program income for joint development purposes, and (iii) promoting transit-oriented

development, subject to the broad parameters set forth herein.

**DATES:** Comments must be received by October 12, 2006. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** To ensure your comments are not entered more than once into the DOT Docket, please identify your submissions by the following docket number: FTA-2006-23511. Please make your submissions by only one of the following means:

- *Web site:* <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- *Web Site:* <http://dms.dot.gov>.

Follow the online instructions for making submissions to the DOT electronic docket site.

- *Fax:* 1-202-493-2478.

• *U.S. Post or Express Mail:* Docket Management System, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-001.

• *Hand Delivery:* To the Docket Management System; Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

*Instructions:* All submissions must make reference to the "Federal Transit Administration" and include the docket number for this notice set forth above. 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 making submissions responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any personal information therein, will be posted without change or alteration to <http://dms.dot.gov>.

*Docket:* For access to the DOT docket to read materials relating to this notice, please go to <http://dms.dot.gov> at any time or to the Docket Management System.

**FOR FURTHER INFORMATION CONTACT:** For program questions, please contact Robert Tuccillo at (202) 366-4050. For legal questions, please contact Jayme Blakesley at (202) 366-0304. The principal office of FTA is located at 400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 8:30 a.m. to 6 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

### Statement of Policy

Through this guidance, FTA interprets the definition and operation of the term "capital project" as defined at 49 U.S.C. 5302(a)(1)(G), and as amended by Section 3003(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"). This amendment permits FTA to issue public transportation grants "for the construction, renovation, and improvement of intercity bus and intercity rail stations and terminals," including the construction, renovation, and improvement of commercial revenue-producing intercity bus stations or terminals. In doing so, it modifies the underlying policy of joint development improvements, and therefore enhances the ability of FTA grantees to work with the private sector and others for purposes of joint development. To ensure maximum benefit to the people who ride public transportation, to FTA grantees that choose to sponsor joint development improvements (the "project sponsor"), and to their joint development partners, the following guidance (i) seeks to afford FTA grantees maximum flexibility within the law to work with the private sector and others for purposes of joint development, (ii) generally will defer to the decisions of the project sponsor, negotiating and contracting at arm's length with third parties, to utilize Federal transit funds and program income for joint development purposes, and (iii) aims to promote transit-oriented development, subject to the broad parameters set forth herein.

### Proposed Guidance Text

#### I. Eligibility Criteria

##### a. Definition of "Capital Project"

Federal Transit Law defines a "capital project" for joint development as follows:

A public transportation improvement that enhances economic development or incorporates private investment, including commercial and residential development, pedestrian and bicycle access to a public transportation facility, construction, renovation, and improvement of intercity bus and intercity rail stations and terminals, and the renovation and improvement of historic transportation facilities, because the improvement enhances the effectiveness of a public transportation project and is related physically or functionally to that public transportation project, or establishes new or enhanced coordination between public transportation and other transportation, and provides a fair share of revenue for public transportation that will be used for public transportation.

49 U.S.C. 5302(a)(1)(G).

This definition establishes the following criteria for determining whether a joint development improvement is eligible for funding pursuant to a program established under 49 U.S.C. 5301 *et seq.* (the "Federal Transit Law"): The public transportation improvement must (i) Enhance economic development or incorporate private investment; (ii)(a) Enhance the effectiveness of a public transportation project and relates physically or functionally to that public transportation project, or (b) establish new or enhanced coordination between public transportation and other transportation; and (iii) provide a fair share of revenue for public transportation that will be used for public transportation. In addition, a person making an agreement to occupy space in a facility under this subparagraph shall pay a reasonable share of the costs of the facility through rental payments and other means. 49 U.S.C. 5302(a)(1)(G)(i).

Joint development improvements will be eligible for FTA funding only if they satisfy the criteria set forth above, and do not fall within the exclusion detailed at 49 U.S.C. 5302(a)(1)(G)(ii), which excludes the construction of a commercial revenue-producing facility (other than an intercity bus station or terminal) or a part of a public facility not related to public transportation.

##### b. "Enhances Economic Development or Incorporates Private Investment"

As noted above, it is a threshold requirement for Federal funding of a public transportation improvement as joint development that such improvement either (i) Enhance economic development or (ii) incorporate private investment.<sup>1</sup>

##### i. "Enhances Economic Development"

This criterion requires that a joint development improvement enhance economic development. A grantee may satisfy this criterion by demonstrating that the joint development improvement will add value to privately-or publicly-funded economic development activity occurring in close proximity to a public transportation facility.

<sup>1</sup> In accordance with the statute's use of the disjunctive "or," rather than the conjunctive "and," FTA shall determine that a transportation improvement satisfies the threshold requirement for funding as joint development if the transportation improvement either (i) Enhances economic development or (ii) incorporates private investment (the disjunctive), and shall not require that the transportation improvement satisfy each of (i) and (ii) (the conjunctive).

ii. "Incorporates Private Investment"

Any joint development improvement that incorporates private investment will satisfy this criterion. Private investment need not be monetary; it may take the form of cash, real property, or other benefit to be generated initially or over the life of the joint development improvements. FTA will not set a monetary threshold. The amount and form of private investment shall be negotiated by the parties to the joint development improvement.

c. "Enhances the Effectiveness of a Public Transportation Project"

Any reasonable forecast of joint development impacts that enhance the effectiveness of a public transportation project will satisfy this criterion. These impacts may include, but are not limited to, any of the following: increased ridership, shortened travel times, and lessened or deferred transit operating or capital costs.

d. "Related Physically or Functionally"

The disjunctive requirement of physical "or" functional relationship provides that a joint development improvement may be built separately from, but in functional relationship to, a public transportation project. Therefore, a joint development improvement satisfies this element if it is related physically or functionally to a public transportation project.

i. "Physically Related"

A joint development improvement is "physically related" to a public transportation project if it provides a direct physical connection to public transportation services or facilities. Illustrative, but not exhaustive, examples of physical relationships include (i) projects built within or adjacent to public transportation facilities and (ii) projects using air rights over public transportation facilities.

ii. "Functionally Related"

A joint development improvement is "functionally related" to a public transportation project if by activity and use, with or without a direct physical connection, it (i) enhances the use of, connectivity with or access to public transportation; or (ii) provides a transportation-related service (such as, but not limited to, remote baggage handling or shared ticketing) or community services (such as daycare or health care) to the public. Considerations include a reduction in travel time between the joint development project and the public transportation facility, reasonable access between the joint development project

and the public transportation facility, and increased trip generation rates resulting from the relationship between the joint development project and the public transportation facility.

While the functional relationship test of activity and use permits the use of FTA funds for joint development improvements located outside the structural envelope of a public transportation project, and may extend across an intervening street, major thoroughfare or unrelated property, functional relationships should not extend beyond the distance most people can be expected to safely and conveniently walk to use the transit service (in certain cases, for example, within a radius of 1,500 feet around the center of the public transportation project).

e. "Establishes New or Enhanced Coordination Between Public Transportation and Other Transportation"<sup>2</sup>

Any reasonable forecast of joint development impacts that establish new or enhanced coordination between public transportation and other transportation will satisfy this criterion. FTA will accept any reasonably supported judgment of new or enhanced coordination from the project sponsor.

i. "New or Enhanced Coordination"

To establish new or enhanced coordination, a joint development improvement must create or enhance the physical or functional connections between public transportation and other transportation.<sup>3</sup>

Examples of physical connections that establish new or enhanced coordination include, but are not limited to, proximate or shared ticket counters, termini, park-and-ride lots, taxicab bays, passenger drop-off points, waiting areas, bicycle paths and sidewalks connecting public transportation to non-transportation facilities. Projects that shorten the distance between public

<sup>2</sup> Subsection (e), "New or Enhanced Coordination," explains the second method for complying with a disjunctive requirement. As explained in section (f)(d) of this document, a joint development improvement may satisfy this requirement by (i) Relating physically or functionally to a public transportation project or (ii) establishing new or enhanced coordination between public transportation and other transportation.

<sup>3</sup> This requirement is similar to, but not the same as, the requirement of physical or functional relationship described at subsection (d)(i) and (ii). The two are distinct, disjunctive requirements, but they share common criteria. A project could satisfy both requirements, but need only satisfy one to qualify for funding as a joint development improvement. Visualized as such, the disjunctive requirement would appear as a Venn diagram—separate requirements with overlapping criteria.

transportation termini and other transportation shall be presumed to enhance coordination.

Examples of functional connections that establish new or enhanced coordination include, but are not limited to, shared or coordinated signage, schedules, and ticketing.

ii. "Public Transportation"

Section 5307(a)(7) of Title 49 defines "public transportation" as

"transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include schoolbus, charter, or intercity bus transportation or intercity passenger rail transportation provided by the entity described in chapter 243<sup>4</sup> (or a successor to such entity)."

iii. "Other Transportation"

FTA interprets the term "other transportation," as used in 49 U.S.C. 5307(a)(1)(G), to mean all forms of transportation that are not public transportation, including, but not limited to, airplane, school bus, charter bus, sightseeing vehicle, intercity bus and rail, automobile, taxicab, bicycle and pedestrian transportation.

f. "Provides a Fair Share of Revenue for Public Transportation That Will Be Used for Public Transportation"

The third criterion for determining whether a joint development improvement is eligible for funding pursuant to a program established under the Federal Transit Law is that the improvement "provides a fair share of revenue for public transportation that will be used for public transportation."<sup>5</sup> 49 U.S.C. 5302(a)(1)(G). FTA will not define the term "fair share of revenue," nor will it set a monetary threshold. What is a fair share of revenue, and what form it should take,<sup>6</sup> shall be negotiated between the parties involved in the joint development improvement. The only requirements are (i) That the

<sup>4</sup> National Railroad Passenger Corporation ("Amtrak")

<sup>5</sup> This criterion should not be confused with the requirement of 49 U.S.C. 5302(a)(1)(G)(ii) that "a person making an agreement to occupy space in a facility under this subparagraph shall pay a reasonable share of the costs of the facility through rental payments and other means."

<sup>6</sup> For example, "fair share of revenue" need not be a direct payment of revenue by an intercity bus provider to a transit agency but may take the form of an increase in revenues received by a transit agency, whether in its capacity as landlord or otherwise, as a result of enhanced passenger traffic created by the service of a jointly developed facility by an intercity bus provider, provided that the transit agency and intercity bus provider together designate and report to FTA the source of such "fair share of revenue." FTA grantees shall expend the "fair share of revenue" in accordance with the common grant rule of 49 CFR 18.1-18.52.

public transportation provider receives a fair share of revenue, (ii) that such revenue be used for public transportation, and (iii) that the project sponsor obtain a written opinion of counsel or other advisor (or FTA's agreement) that the share of revenue to public transportation is fair. This allows a public transportation provider to negotiate for financial benefits in exchange for the benefits it will convey through the joint development improvement.

g. "Reasonable Share of the Costs of the Facility"

While not a criterion to determine eligibility, as noted above, it is nonetheless required that any "person making an agreement to occupy space in a facility under [49 U.S.C. 5302(a)(1)(G)] shall pay a reasonable share of the costs of the facility through rental payments and other means." FTA shall not require a specific valuation methodology and shall accept any reasonable valuation methodology used by the grantee to determine a reasonable share of the costs of the facility.

## II. Eligible Activities

Subject to the eligibility criteria detailed at section (II) above, joint development improvements expressly include the following:

- Commercial and residential development;
- Pedestrian and bicycle access to a public transportation facility;
- Construction, renovation, and improvement of intercity bus and intercity rail stations and terminals; and
- Renovation and improvement of historic transportation facilities.

49 U.S.C. 5302(a)(1)(G). These and other joint development improvements will be eligible for FTA funding if they satisfy the criteria set forth above, and do not fall within the exclusion detailed at 49 U.S.C. 5302(a)(1)(G)(ii), which excludes the construction of a commercial revenue-producing facility (other than an intercity bus station or terminal) or a part of a public facility not related to public transportation.<sup>7</sup>

<sup>7</sup> Many aspects of commercial and residential development will be excluded by 49 U.S.C. 5302(a)(1)(G)(ii), which makes ineligible for FTA financial assistance the "construction of a commercial revenue-producing facility (other than an intercity bus station or terminal) or a part of a public facility not related to public transportation." It is important to note, however, that commercial and residential development is not excluded wholesale. For example, space in an FTA-funded facility may be made available for commercial revenue-producing activities and for connections to revenue producing activities. Similarly, non-commercial, non-revenue-producing aspects of commercial and residential developments may be eligible for FTA financial assistance, subject to the criteria detailed at section (II).

Costs related to a joint development improvement are only eligible for Federal Transit funding pursuant to a budget contained in an approved grant. FTA cannot approve funding for costs associated with a joint development improvement that are not contained in an approved grant budget. FTA Regional Administrators approve joint development proposals as part of the grant approval process.

Eligible costs for joint development improvements include, but are not limited to, the following:

- a. *Real Estate Acquisition*, including the acquisition of real property and structures thereon;<sup>8</sup>
- b. *Demolition of Existing Structures*;
- c. *Site Preparation*;
- d. *Building Foundations*, including substructure improvements for buildings constructed over transit facilities;
- e. *Utilities*, including utility relocation and construction;
- f. *Walkways*, including bicycle lanes and pedestrian connections and access links between public transportation services and related development;
- g. *Open Space*, including site amenities and related streetscape improvements such as street furniture and landscaping;
- h. *Safety and Security Equipment and Facilities*, including lighting, surveillance and related intelligent transportation applications;
- i. *Construction, renovation, and improvement of bus and intercity rail stations and terminals*;
- j. *Facilities that Incorporate Community Services* such as daycare or health care;
- k. *Capital Project, and Equipment, for an Intermodal Transfer Facility or Transportation Mall*, including acquisition of facilities and equipment, roadbeds, tracks and bus ramps, pedestrian concourses, loading shelters, parking facilities, park-and-ride services, improvements of existing bus or rail transit terminals, stations, major transfer points, and shelters as well as other facilities directly related to the linking of public transportation facilities with other modes of transportation;
- l. *Furniture, Fixtures and Equipment (FFE)*: Transportation-related FFE are eligible costs in all cases. However, due to the exclusion of commercial revenue-producing facilities (other than an intercity bus station or terminal) and public facilities not related to public transportation at 49 U.S.C.

<sup>8</sup> Note that certain costs in connection with real estate acquisition (such as costs associated with eminent domain and relocation assistance) shall be eligible, as provided by the respective statutes and regulations.

5302(a)(1)(G)(ii), FFE related to commercial revenue-producing facilities (other than an intercity bus station or terminal) or public facilities not related to public transportation are considered ineligible;

m. *Parking*, including parking improvements with a public transportation justification and use or an intercity bus or intercity rail justification and use in connection with joint development; and

n. *Project Development Activities*, including design, engineering, construction cost estimating, environmental analysis, real estate packaging and financial projections (operating income and expenses, debt service and cash flow analysis), and negotiations to secure financing and tenants;

o. *Professional Services*, including reasonable and necessary costs incurred to hire professionals to prepare or perform items a through n above, or to assist the grantee in reviewing the same.

## III. Ineligible Activities

### a. Construction of a Commercial Revenue-Producing Facility

Eligible costs do not include construction of commercial revenue producing facilities (other than an intercity bus station or terminal) or part of a public facility not related to public transportation.

## IV. Federal Requirements

FTA's Master Agreement contains the standard terms and conditions governing the administration of a project supported with Federal assistance awarded by FTA through a grant agreement or cooperative agreement with the recipient, or supported by FTA through a Transportation Infrastructure (TIFIA) Loan, loan guarantee, or line of credit with the recipient. Not every provision of the Master Agreement will apply to every project for which FTA provides Federal assistance through a grant agreement or cooperative agreement. The type of project, the Federal laws and regulations authorizing Federal assistance for the project, and the legal status of the recipient as a State or local government, private non profit entity, or private for profit entity will determine which Federal laws, regulations, and directives apply. Federal laws, regulations, and directives that do not apply will not be enforced. The recipient shall comply with all applicable Federal laws, regulations, and directives, except to the extent that FTA determines otherwise in writing. Any violation of a Federal law,

regulation, or directive applicable to the recipient or its project may result in penalties to the violating party.

Applicable crosscutting requirements likely to apply to joint development improvements include, but are not limited to, the following:

a. Ground Lease or Transfer of Federally Assisted Real Estate

If the joint development improvement involves a ground lease or transfer of federally-funded real estate and there is no Federal assistance for new improvements, then the following requirements apply to the lessee or transferee and must be incorporated into the lease or the conveyance instrument:

- i. Language found at 49 CFR 26.7 binding the lessee or transferee not to discriminate based on race, color, national origin, or sex;
- ii. Language found at 49 CFR 27.7; 27.9(b) and 37 binding the lessee or transferee not to discriminate based on disability and binding the same to compliance with the Americans with Disabilities Act with regard to any improvements constructed; and
- iii. Language contained in FTA's Master Agreement, updated annually in October, particularly relating to conflicts of interest and debarment and suspension.

b. Federally Assisted Construction of Joint Development Improvements

If the construction of improvements is also federally assisted, then the following requirements will apply and must be incorporated into the lease or the conveyance or encumbrance instrument:

- i. Buy America—language making it clear that the steel, iron, and manufactured goods used in the joint development project are produced in the United States, as described in 49 U.S.C. 5323(j) and 49 CFR part 661;
- ii. Planning and Environmental Analysis—language making it clear that the grantee must comply with, and the joint development project is subject to the requirements of:

A. The FHWA/FTA metropolitan and statewide planning regulations at 23 CFR part 450;

B. The National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 *et seq.*;

C. Executive Order No. 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 59 FR 7629, Feb. 16, 1994;

D. FTA statutory requirements on environmental matters at 49 U.S.C. 5324(b); Council on Environmental

Quality regulations on compliance with the NEPA, 40 CFR part 1500 *et seq.*;

E. FHWA/FTA regulations, "Environmental Impact and Related Procedures," 23 CFR part 771;

F. Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, involving historic and archaeological preservation; Advisory Council on Historic Preservation regulations on compliance with Sec. 106, "Protection of Historic and Cultural Properties," 36 CFR part 800; and

G. restrictions on the use of certain publicly owned lands and historic resources unless the FTA makes the specific findings required by 49 U.S.C. 303.

iii. Cargo Preference—language making it clear that items imported from abroad and used in the joint development were shipped predominantly on U.S.-flag ships and that the project complies with 46 CFR part 381, to the extent these regulations apply to the joint development;

iv. Seismic Safety—language certifying that a structure conforms to seismic safety standards, as contained in 49 CFR part 41;

v. Energy Assessments—Language making it clear that the transferee(s) or joint developer agrees to perform a mandatory, energy assessment as prescribed by 23 CFR part 771 and 42 U.S.C. 8373(b)(1) for any buildings constructed, reconstructed or modified with FTA assistance. The assessment shall be incorporated into the Environmental Impact Statement or Environmental Assessment, if the project has one; otherwise the assessment shall be provided with the application for FTA assistance;

vi. Lobbying—49 CFR part 20;

vii. Labor Protection—Language making it clear that the transferee or joint developer will adhere to labor protection requirements applying to Federal projects, such as Davis-Bacon—49 U.S.C. 5333(a) and 40 U.S.C. 3141 *et seq.*, and 29 CFR part 5; Copeland "Anti-Kickback" Act as amended, 18 U.S.C. 874 and 29 CFR part 3; and Contract Work Hours and Safety Standards Act, 40 U.S.C. 3701 *et seq.*, and 29 CFR part 5 and at 40 U.S.C. 3704; as well as 49 U.S.C. 5333(b) concerning protection of transit employees;

viii. Civil Rights Requirements—49 U.S.C. 5332 and DOT implementing regulations at 49 CFR part 21 (effecting Title VI of the Civil Rights Act of 1964), 49 CFR 26 (participation by Disadvantaged Business Enterprises in DOT financial assistance programs) and 49 CFR parts 27 and 37 (respectively, nondiscrimination on the basis of

disability in programs or activities receiving Federal financial assistance and transportation services for individuals with disabilities);

ix. Program Fraud—grantees agree to comply with Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. 3801 *et seq.* and 49 CFR part 31. Penalties may apply for noncompliance;

x. Language making it clear that the level of Federal participation in the joint development provides no U.S. Government obligation to third parties in the project; and

xi. Uniform Relocation—If the federally-funded site to be improved is occupied by other than the grantee and the occupant is displaced, the transferee(s) or joint developer must comply with 42 U.S.C. 4601 *et seq.* and the regulations at 49 CFR part 24.

c. National Environmental Policy Act (NEPA)

In any instance in which FTA determines that NEPA applies to the joint development, the level of environmental analysis will depend upon the complexity of the project and its likely impacts. In some instances, minimal review will be necessary, in which case FTA may issue a Categorical Exclusion. Generally, however, joint development activities that portend significant environmental impacts will necessitate the preparation of an Environmental Assessment or an Environmental Impact Statement. FTA is available to provide guidance on the environmental review process. See generally the FTA Environmental Impact and Related Procedures at 23 CFR part 771.

V. Eligibility Procedures

Before becoming eligible for FTA funding, a joint development improvement must be approved by the FTA Regional Administrator, or his designee, responsible for the project sponsor's locality. Only FTA grantees may sponsor a joint development improvement. The project sponsor may submit a joint development proposal at any time. FTA approval shall be contingent upon the project sponsor certifying that the joint development improvement conforms to the criteria set forth above and that the project conforms to the requirements of the common grant rule found at 49 CFR 18.31. In the event that the project does not conform to 49 CFR 18.31, FTA may approve the project if the project sponsor submits an alternative certification explaining compliance with 49 U.S.C. 5302(a)(1)(G) and 49 CFR 18.25(g)(4) and (5) together with supporting documentation, in each case

in form and substance satisfactory to FTA in its reasonable discretion. The FTA Regional Administrator, or his designee, shall approve all proposals that meet the criteria described herein. Like all projects funded by FTA, joint development improvements are subject to the applicable crosscutting requirements.

There are two methods for seeking approval for a joint development project. In all cases, the project sponsor must submit a completed Joint Development Checklist and proposed Joint Development Agreement. By submitting a completed Joint Development Checklist, the project sponsor shall certify that the proposed joint development improvement conforms to the criteria of 49 U.S.C. 5302(a)(1)(G) as outlined above.

For an expedited review, the joint development proposal shall include a signed Certificate of Compliance. By signing the Certificate of Compliance, the project sponsor shall certify, among other things, that the proposed joint development improvement conforms to the requirements of 49 CFR 18.31.

If a project sponsor seeks a more individualized review of the project, a joint development proposal shall include an explanation of compliance with 49 U.S.C. 5302(a)(1)(G) and 49 CFR 18.25(g)(4) and (5) (the "alternative certification") with supporting documentation.

The Joint Development Checklist and Certificate of Compliance are attached hereto.

#### VI. Real Property

Real property acquired by a grantee or subgrantee pursuant to 49 U.S.C. 5302(a)(1)(G) shall be governed by 49 U.S.C. 5334(h) as amended, and subject to the obligations and conditions set forth in 49 CFR 18.31 as amended, which require the grantee or subgrantee to request disposition instructions from FTA whenever real property is no longer needed for the originally authorized purpose.<sup>9</sup>

<sup>9</sup> FTA shall rely on the parties to joint development transactions, including, notably, transit agencies, to determine the appropriate use and disposition of real property used on joint development improvements, so long as such disposition and use complies with applicable statutes and duly promulgated regulations of FTA. For example, FTA shall no longer apply, and shall

#### VII. Applicability of Third Party Contracting Requirements

FTA's third party contracting requirements, which appear in FTA Circular 4220.1E, have limited applicability to joint development projects. As described on page 12 of Circular 4220.1E, the third-party contracting requirements must apply to the federally funded construction aspects of joint development. With regard to revenue contracts as defined in the Circular, FTA will work with grantees on a case-by-case basis to craft approaches that satisfy the statutory and regulatory requirements while preserving the benefits of this innovative contracting strategy to the maximum possible extent.

If a contract between a grantee and a third party involving a joint development project is not a construction contract or a revenue contract as defined by Circular 4220.1E, then such contract is not covered by FTA's third party contracting requirements. Paragraph 7.n. of Circular 4220.1E defines "revenue contracts" as "those third party contracts whose primary purpose is to either generate revenues in connection with a transit related activity or to create business opportunities utilizing an FTA funded asset."

Revenue contracts in joint development projects that do not meet this primary purpose test are not covered by the third party contracting requirements. For example, third party contracts to manage, operate, and/or maintain intercity bus or intercity rail terminals that are part of FTA-funded joint development projects or tenancy agreements with third party intercity bus or intercity rail operators are not covered revenue contracts. The primary purpose of such contracts is to carry out the congressional intent to give grantees the flexibility to integrate intercity rail and intercity bus terminals and their

not require it grantees to apply, its administratively-derived test of "highest and best transit use" (or any other tests) for determining the value of real property used in FTA-funded joint developments, including the disposition of real property connected to a joint development improvement. In the past, FTA relied on 49 CFR 18.25(g) as its authority for requiring (and determining in its discretion) the "highest and best transit use" of such property. No such requirement is expressly authorized or required by 49 CFR 18.25(g), however.

related services into FTA-funded joint development projects.

Even in situations not covered by the third party contracting requirements, FTA generally favors full and open competition. However, where the third party contracting requirements are not involved, FTA will leave it to the full discretion of the grantees to determine the appropriate extent and nature of competition, if any, for such contracts. For example, in cases involving management of intercity bus or rail terminals or tenancy agreements in those terminals, FTA recognizes that given the unique nature of the national intercity rail and bus systems, a competitive procurement process for such contracts may not be appropriate.

#### VII. Certificate of Compliance

To ensure compliance with 49 CFR 18.31 and other Federal requirements related to joint development improvements, and the acquisition, use and disposition of real property for such improvements, FTA shall require project sponsors to sign a Certificate of Compliance or, in lieu of such certificate, an alternative certification explaining compliance with 49 U.S.C. 5302(a)(1)(G) and 49 CFR 18.25(g)(4) and (5) with supporting documentation. By signing the Certificate of Compliance, the project sponsor shall certify, among other things, that the proposed joint development improvement conforms to the requirements of 49 CFR 18.31.

#### IX. Satisfactory Continuing Control

For purposes of this guidance and the Certificate of Compliance, "satisfactory continuing control" shall not mean complete operating or managerial control of a joint development facility. In determining whether "satisfactory continuing control" with respect to a joint development capital project is maintained, the project sponsor and FTA shall consider, as a primary factor, whether the project sponsor has the right and power to direct that such project shall be used for activities eligible for funding under Federal Transit Law (49 U.S.C. 53).

#### Appendix A—Proposed Joint Development Checklist

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### Joint Development Checklist

<b>I. PROJECT DESCRIPTION</b>		
<b>Project Sponsor:</b>	<b>Date Submitted:</b>	<b>FTA Project Number (if known):</b>
<b>Project Title:</b>		
<b>Project Location (Include City and Street Address):</b>		
<b>Name of Project Contact:</b>	<b>Phone:</b>	<b>E-mail Address (if available):</b>
<b>Type of Project:</b> <input type="checkbox"/> Commercial development <input type="checkbox"/> Residential development <input type="checkbox"/> Pedestrian or bicycle access to public transportation facility <input type="checkbox"/> Construction, renovation, or improvement of intercity bus or intercity rail station or terminal <input type="checkbox"/> Renovation or improvement of historic transportation facility <input type="checkbox"/> Other		
<b>Description of Project:</b>		

<b>II. MATERIALS SUBMITTED</b>
<input type="checkbox"/> Joint Development Checklist
<input type="checkbox"/> Joint Development Agreement
<input type="checkbox"/> Certification of Compliance <b>or</b>
<input type="checkbox"/> Alternative Certification (with written explanation)

<b>III. APPLICATION OF STATUTORY CRITERIA</b>	
<b>Requirement</b>	<b>Description</b>
<b>Economic Link</b> (check (1) or (2)): <input type="checkbox"/> (1) Enhances economic development <b>or</b> <input type="checkbox"/> (2) Incorporates private investment	
<b>Public Transportation Benefit</b> (check (3) & (4), or (5)): <input type="checkbox"/> (3) Enhances the effectiveness of a public transportation project <b>and</b> <input type="checkbox"/> (4) Relates physically or functionally  <b>or</b> <input type="checkbox"/> (5) Establishes New or Enhanced Coordination Between Public Transportation and other Transportation	
<b>Revenue for Public Transportation</b> (check (6)): <input type="checkbox"/> (6) Provides a Fair Share of Revenue for Public Transportation that will Be Used for Public Transportation	
<b>Reasonable Share of Costs</b> (check (7) if applicable): <input type="checkbox"/> (7) Occupants to pay a reasonable share of the costs of the facility through rental payments and other means	

**Appendix B—Proposed Certificate of Compliance**

**Certificate of Compliance**

Effective as of the date hereof, the undersigned hereby certifies and covenants to the Federal Transit Administration (“FTA”) as follows:

1. *Title.* Subject to the obligations and conditions set forth in 49 CFR 18.31, as amended, title to real property acquired under a grant or subgrant for FTA Project Number \_\_\_\_\_, [insert project title here] (the “Project”), shall vest in the undersigned or subgrantee thereof (collectively or individually, as the case may be, the “Grantee”).

2. *Use.* Except as otherwise provided by Federal statutes, real property shall only be used for the originally authorized purposes (which may include Joint Development purposes that generate program income, both during and after the award period and used to support public transportation activities) as long as needed for such purposes, and that the Grantee shall not dispose of or encumber its title or other interests.

3. *Disposition.* When real property acquired with funds provided by FTA for the Project is no longer needed for the purpose originally authorized by FTA, the Grantee shall request disposition instructions from FTA and shall agree that, unless otherwise authorized by FTA, such disposition shall be made in accordance with applicable law, including without limitation 49 U.S.C. 5334(h) and 49 CFR 18.31.

4. *Federal Interest.* The Federal Government retains a Federal interest in any real property, equipment, and supplies financed with Federal assistance (“Project Property”) until, and to the extent that, the Federal Government relinquishes its Federal interest in such Project Property.

5. *Incidental Use.* Any incidental use of Project Property, as determined by FTA, shall not exceed that permitted under applicable Federal laws, regulations, and directives, including the requirements of FTA’s Master Agreement.

6. *Encumbrance of Project Property.* The Grantee covenants to FTA as follows:

a. *Written Transactions.* The Grantee agrees that it will not execute any transfer of title to the Project Property or enter into an instrument legally binding on the Grantee that would encumber Federal Interest in the Project Property.

b. *Oral Transactions.* The Grantee agrees that it will not obligate itself in any manner to any third party with respect to Project Property.

7. *Notice to Joint Development Partner.* The undersigned has delivered to the Joint Development Partner a duly executed copy of

this certificate, dated as of the date hereof, receipt of which has been acknowledged by the Joint Development Partner in writing to the undersigned on or before the date of execution of the Joint Development Agreement.

8. *Other Actions.* The Grantee (a) agrees that it will not take any action that encumbers the Federal Interest in the Project Property and (b) hereby affirms that each of its representations and warranties set forth in the Master Agreement is true and correct in all material respects as of the date hereof. The Grantee agrees that nothing herein shall supersede, amend, modify or otherwise affect the provisions, terms or conditions set forth in the Master Agreement.

9. *Definitions.*

a. “FTA” shall have the meaning provided in the preamble of this certificate.

b. “Grantee” shall have the meaning provided in section (2) of this certificate.

c. “Joint Development” shall mean a capital project as defined by 49 U.S.C. 5302(a)(1)(G) that is eligible for funding pursuant to the terms and conditions set forth in [insert new Joint Development circular number].

d. “Joint Development Partner” shall mean [insert definition].

e. “Master Agreement” shall mean that certain Master Agreement by and between FTA and the Grantee, as authorized by 49 U.S.C. 53, Title 23, United States Code (Highways), the National Capital Transportation Act of 1969, as amended, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, the Transportation Equity Act for the 21st Century, as amended, or other Federal laws that FTA administers, as the same may be lawfully revised, superseded or supplemented from time to time.

f. “Project” shall have the meaning provided in section (1) of this certificate.

g. “Project Property” shall have the meaning provided in section (4) of this certificate.

10. *No Estoppel.* The undersigned agrees that acceptance of this Certificate of Compliance by FTA shall not estop the Federal government from initiating or conducting, and shall not be used as a defense for, any investigation, audit or inquiry by the Federal government following approval by FTA of the project.

Issued on the 5th day of September, 2006.

**James S. Simpson,**  
*Administrator.*

[FR Doc. E6–15022 Filed 9–11–06; 8:45 am]

**BILLING CODE 4910–57–P**

**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration Office of Hazardous Materials Safety**

**Notice of Delays in Processing of Special Permit Applications**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration, DOT.

**ACTION:** List of application delayed more than 180 days.

**SUMMARY:** In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

**FOR FURTHER INFORMATION CONTACT:** Ann Mazzullo, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001, (202) 366–4535.

**Key to “Reason for Delay”**

1. Awaiting additional information from applicant.
2. Extensive public comment under review.
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.
4. Staff review delayed by other priority issues or volume of special permit applications.

**Meaning of Application Number Suffixes**

- N—New application.
- M—Modification request.
- X—renewal.
- PM—Party to application with modification request.

Issued in Washington, DC, on September 6, 2006.

**R. Ryan Posten,**

*Chief, Special Permits Program, Office of Hazardous Materials Safety, Special Permits & Approvals.*

**NEW SPECIAL PERMIT APPLICATIONS**

Application No.	Applicant	Reason for delay	Estimated date of completion
13563–N .....	Applied Companies, Valencia, CA .....	1	09–30–2006
14229–N .....	Senex Explosives, Inc., Cuddy, PA .....	4	09–30–2006
14232–N .....	Luxfer Gas Cylinders—Composite Cylinder Division, Riverside, CA .....	4	09–30–2006
14239–N .....	Marlin Gas Transport, Inc., Odessa, FL .....	1	09–30–2006
14237–N .....	Advanced Technology Materials, Inc. (ATMI), Danbury, CT .....	1	09–30–2006