



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**23 CFR Part 635**

**[FHWA Docket No. FHWA–2018–0036]**

**RIN 2125–AF84**

**Construction and Maintenance—Promoting Innovation in Use of Patented and Proprietary Products**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The FHWA is revising its regulations to provide greater flexibility for States to use proprietary or patented materials in Federal-aid highway projects. This final rule rescinds the requirements limiting the use of Federal funds in paying for patented or proprietary materials, specifications, or processes specified in project plans and specifications, thus encouraging innovation in transportation technology and methods.

**DATES:** This final rule is effective [Insert date 30 days after date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mr. John Huyer, Office of Preconstruction, Construction, and Pavements, (720) 437-0515, or Mr. William Winne, Office of the Chief Counsel, (202) 366-1397, Federal Highway Administration, 1200 New Jersey Avenue, S.E., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

### **Electronic Access and Filing**

This document, the notice of proposed rulemaking (NPRM), supporting materials, and all comments received may be viewed online through the Federal eRulemaking portal at <http://www.regulations.gov>. An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: <http://www.archives.gov/federal-register> and the Government Publishing Office's Web page at: <http://www.gpo.gov/fdsys>.

### **Executive Summary**

The FHWA is revising its regulations at 23 CFR 635.411 to provide greater flexibility for States to use patented or proprietary materials in Federal-aid highway projects. Based on a century-old Federal requirement, the outdated requirements in 23 CFR 635.411(a)-(e) are being rescinded to encourage innovation in the development of highway transportation technology and methods. As a result, State Departments of Transportation (State DOTs) will no longer be required to provide certifications, make public interest findings, or develop research or experimental work plans to use patented or proprietary products in Federal-aid projects. Federal funds participation will no longer be restricted when State DOTs specify a trade name for approval in Federal-aid contracts. In addition, Federal-aid participation will no longer be restricted when a State DOT specifies patented or proprietary materials in design-build Request-for-Proposal documents.

## **Background**

The FHWA published an NPRM titled “Construction and Maintenance—Promoting Innovation in Use of Patented and Proprietary Products” at 83 FR 56758 on November 14, 2018. The NPRM offered two alternative deregulatory options relating to the use of patented and proprietary products. The use of these products has been limited by regulation for over a century (since 1916), and FHWA undertook this rulemaking in an effort to increase innovation and reduce regulatory burdens. The first option (Option 1) proposed removing the requirements of 23 CFR 635.411(a)-(e) and replacing them with a general certification requirement ensuring competition in the selection of materials and products. Alternatively, the second option (Option 2) proposed to rescind the patented and proprietary materials requirements of 23 CFR 635.411(a)-(e) and change the title of section 635.411 to “Culvert and Storm Sewer Materials Types.” Under its new title, the former paragraph (f) of section 635.411 would be retained to fulfill the mandate of section 1525 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. L. 112-141, 126 Stat. 405, July 6, 2012) for States to retain autonomy for the selection of storm sewer material types.

The NPRM solicited comments regarding this deregulatory initiative. The FHWA received 107 comments to the docket, including comments from 16 State DOTs, 14 associations, 22 manufacturers or suppliers, 4 construction companies, and numerous individuals. The FHWA considered all comments received before the close of business on the comment closing date, and the comments are available for examination in the docket (FHWA-2018-0036) at <http://www.regulations.gov>. The FHWA also considered

comments received after the comment closing date and filed in the docket prior to this final rule.

### **Discussion of Comments**

After consideration of the comments, FHWA selected Option 2 for the reasons summarized below. Option 2 reduces the regulatory burden on the States, fosters innovation in highway transportation technology, and provides greater flexibility for State DOTs in making materials and product selections in planning Federal-aid highway projects.

### **Reducing Regulatory Burdens**

Commenters argued Option 2 (rescinding the patented and proprietary materials requirements) better serves the purpose of decreasing unnecessary regulatory burdens on the States. These commenters argue Option 2 eliminates unnecessary regulatory and administrative burdens imposed by the existing regulations. Commenters who support Option 2 further argued that if an objective of the NPRM is to reduce regulatory and administrative burdens imposed on the States by the existing regulation, those burdens should not be replaced by new ones as proposed under Option 1 (replacing existing regulations with a general certification requirement). For example, the American Association of State Highway and Transportation Officials (AASHTO) commented that about half of its member State DOTs consider the paperwork required under the current regulation to be difficult and lengthy. Several State DOTs reported difficulty in: (1) proving to FHWA Division Offices the availability or non-availability of competitive

products; (2) providing the benefit of using one product over another; and (3) performing a reasonable cost analysis.

Commenters also reported that at least some State DOTs are reluctant to request Public Interest Findings (PIF) or develop experimental product work plans (hereinafter: proprietary product approval process) to use patented and proprietary materials in Federal-aid projects because they see it as time consuming, cumbersome, and believe it increases overhead costs. One State DOT commented that the proprietary product approval process causes delays by adding layers of approval between the State DOTs and FHWA. The same State DOT further commented it is difficult to determine the availability of equally suitable products under the existing regulation.

Commenters expressed concerns that the existing regulation imposes undue administrative burdens on the States relating to documenting and justifying the use of patented and proprietary products under the current proprietary product approval process. Rescinding the current regulation, FHWA believes, is consistent with reducing the time-consuming and cumbersome process that commenters believe increases overhead costs.

The FHWA agrees Option 2 best reduces unnecessary regulatory and administrative burdens on the States. State DOTs are responsible for the effective and efficient use of Federal-aid funds, subject to the requirements of Federal law. The FHWA believes, absent the existing regulation governing patented and proprietary products, State DOTs may implement material selection procedures that ensure fair and open competition while allowing for, and encouraging, innovation. The statutory

requirements of 23 U.S.C. 112 for competition and competitive bidding continue to apply to federally assisted projects.

In addition, this proposal could generate cost savings resulting from reduced administrative burden associated with the efforts by the States and FHWA related to the existing methods for approving patented and proprietary materials. These cost savings, measured in 2018 dollars, are expected to be \$313,848 per year.

After reviewing the comments received, FHWA is persuaded that rescinding the existing regulation would achieve the goal of reducing an unnecessary regulatory or administrative burden on the States, where such regulations or burdens are outdated or no longer serve an important public purpose. The FHWA is further persuaded that rescinding the existing regulation's requirement to identify equally suitable alternatives may reduce project planning delays.

### **Fostering Innovation**

Commenters who supported Option 2 also cited four primary reasons related to promoting innovation: (1) Option 2 would eliminate the existing regulation, which is a barrier to innovation; (2) Option 2 would best foster and accelerate innovation in the future; (3) Option 2 encourages innovation that may improve transportation systems relating to: (a) safety; (b) quality, resilience, performance, durability, and service life of transportation facilities; (c) efficiency and cost-effectiveness of repairs, treatment, maintenance, preservation, rehabilitation, reconstruction, or replacement of highway facilities; (d) minimizing congestion; and (e) implementing autonomous vehicle (AV) technology; and (4) Option 2 would best fulfill the Federal Government's important role

in supporting research and development leading to improvements in highway transportation technology.

Some commenters argued that the existing regulation is a barrier to innovation in highway technology. For example, one State DOT commented that the current regulation has created an industry perception that certain innovative products are excluded from federally funded highway projects. Commenters supporting Option 2 generally argued that FHWA should promote, encourage, and accelerate innovation and the improvements that may follow.

One commenter argued that fostering a competitive market for these products may lead to lower prices on old products as new ones become available. Another commenter argued that innovative products can lower the overall project cost or future maintenance costs. For example, by increasing the useful life of transportation facilities, the commenter argues, innovative products may both reduce the cost of maintenance and increase safety.

The AASHTO commented that a regulatory change would provide greater flexibility in approving connected and AV components that are certain to incorporate more proprietary and patented components than traditional highway products. One commenter suggested Option 2 may encourage development of AV technology, and suggested the proprietary product approval process under the existing regulation is not suitable for accelerated development of AV technology.

The FHWA agrees Option 2 best provides State DOTs greater flexibility to use innovative technologies in highway transportation. The Agency is persuaded by

comments that rescinding the regulation may accelerate innovation in planning Federal-aid projects by removing a requirement that may have been a “barrier” to innovation in highway transportation technology. Moreover, FHWA believes that the specification of innovative, higher-performing products will encourage others in the industry to develop and market products with comparable performance. This will ultimately result in a lower cost for the higher performing product due to the greater availability in the market.

### **Providing Flexibility for the States Relating to Materials Selection**

Commenters who supported Option 2 also cited two primary reasons related to its ability to provide flexibility for States. First, commenters argued that the existing regulation limits their flexibility on materials selection. Next, commenters also argued that, considering the uncertainty regarding how Option 1 would be administered by FHWA, it could also limit the flexibility of State DOTs.

Multiple commenters argued the existing regulation lacks flexibility. Multiple commenters observed that the existing regulation is too restrictive, complicated, unclear, time-consuming, and not consistently implemented by State DOTs and FHWA. For example, certain State members of AASHTO that support Option 2 commented about difficulties they encountered under the current regulation. Some of these State DOTs cited difficulties in completing the paperwork for use of patented or proprietary products to the satisfaction of the relevant FHWA Division Office. Those States also cited related difficulties in successfully obtaining Federal participation after the paperwork was submitted.

The AASHTO commented that some of its member State DOTs have experienced variability in dealing with FHWA Division Offices. Certain State DOTs believe that division offices interpret the existing regulation inconsistently among States. The AASHTO maintains that, while some division offices provide more leeway, others do not recognize the State's prerogative to certify patented and proprietary products and, in some instances, have discouraged them from doing so. Some commenters also argued that some State DOTs are reluctant to use the proprietary product approval process because they perceive it as too cumbersome and time consuming.

Commenters also argued that Option 2 would provide the most flexibility to the States. Multiple State DOTs commented that Option 1 may not adequately unburden States from current regulatory restrictions in this area — and thus may not increase flexibility, or at least not in a way comparable to Option 2. Several State DOTs, including Oregon, Washington, Idaho, Montana, North Dakota, South Dakota, and Wyoming, expressed support for Option 2 as providing the most flexibility. One commenter argued that Option 2 would provide State DOTs with the most flexibility to determine which products are the best fit for their own unique transportation needs.

The FHWA agrees Option 2 best provides flexibility to State DOTs in selecting materials for use in Federal-aid highway projects. A common theme among the comments indicated that the level of effort necessary to comply with the existing regulation is time consuming, cumbersome, and imposes undue administrative “paperwork” burdens on the States.

The added flexibility provided to States by this rescission may also provide State DOTs an advantage by potentially obtaining highway materials or products at a lower price. Specifying a patented article in the solicitation materials would not, by itself, limit competition.

The FHWA believes State DOTs utilize new product evaluation processes and approved product lists that provide fair and transparent procedures for the evaluation, selection, and use of materials, including patented and proprietary products.

The FHWA is persuaded that rescinding the existing regulation provides needed flexibility to the States to manage Federal financial assistance under 23 U.S.C. 145.

#### **Comments relating to Option 1**

Under Option 1 of the NPRM, the existing regulatory requirements of 23 CFR 635.411(a)-(e) were proposed for removal. The FHWA proposed replacing them with general certification requirements in new paragraphs 23 CFR 635.411(a) and 23 CFR 630.112(c)(6) to ensure competition in the selection of materials and products. This change would have required a State DOT to: (1) implement procedures and specifications that provide for fair, open, and transparent competition awarded only by contract to the lowest responsive bid submitted by a responsible bidder pursuant to 23 U.S.C. 112; and (2) certify adherence to those procedures and specifications.

Commenters who supported Option 1, including some State DOT members of AASHTO, argued that one of its benefits is that FHWA would create regulations establishing a general framework for the State processes and would provide for greater consistency across the country as compared to Option 2. Those commenters expressed a

preference for consistency that would promote competition and provide more transparency regarding Federal-aid decisionmaking compared to Option 2. The commenters expressed the belief that manufacturers might better understand the protocols for the use of patented and proprietary materials under a national framework. One State DOT compared the patented and proprietary rules to the design exception process. It argued that process is well defined and it could be used as a model if FHWA adopts Option 1.

Another commenter argued the existing regulation is misunderstood with respect to competition requirements. The commenter believes that arguments that the existing regulation stifles innovation and patented and proprietary products cannot be used in Federal-aid projects are incorrect. The commenter further stated that patented and proprietary materials can be used in Federal-aid projects based on a proper justification, those justifications provide a critical oversight function, and they guard against the imposition of sole-source specifications that restrict competition. The same commenter further argued the existing regulation provides a safeguard that when data is obtained through independent experimentation of new transportation technology, better and more objective evidence about its effectiveness is available as compared to a vendor's sales or promotional material.

Commenters opposing Option 1 suggested, among other things: (1) existing requirements discourage State DOTs from using patented and proprietary products to improve highway transportation technology, and this may continue under new requirements established by Option 1; (2) State DOTs are confused by the current

requirements for certifications to obtain approval for the use of patented and proprietary products and similar confusion may continue under the as-yet-undefined certification process for Option 1; (3) the existing process for certification is unduly complicated and time consuming, and there is no indication Option 1 would resolve this; and (4) the term “fair, open, and transparent competition” lacks clarity and would require new regulation to define the term. Commenters also expressed the belief that the existing regulations are outdated, unclear, and not applied uniformly.

Comments about Option 1 lacking clarity with respect to the definition of the term “fair, open, and transparent competition” were not considered by FHWA as they were speculative in nature. However, after considering comments submitted to the docket, FHWA agrees Option 1 is not the appropriate regulatory alternative to finalize as part of this rulemaking. The FHWA notes that rescinding the existing regulations without replacing them with a new certification process better reduces regulatory burdens on the States, fosters greater innovation in highway transportation technology, affords greater flexibility to the States for materials selection in Federal-aid highway projects, and is consistent with the statutory authority provided under 23 U.S.C. 106(c). In addition, rescinding the existing regulation affords deference to the States to determine which projects are subject to Federal financial assistance pursuant to 23 U.S.C. 145.

### **Competition**

Commenters who supported either Option 1 or the existing regulation cited two primary reasons why they believed that Option 2 constitutes a harm to competition. First, commenters argued that under Option 2 suppliers of patented products may control

prices. Next, commenters also argued that the bidding process may be manipulated under Option 2 by limiting access to certain proprietary products or offering inconsistent pricing.

Similarly, some commenters who supported either Option 1 or the existing regulation also argued that Option 2 would eliminate nationwide consistency on requirements for competition. Some commenters argued that Option 1 would provide adequate nationwide consistency while others preferred the existing regulation and argued that it should be maintained. Some commenters argued that a uniform standard under Option 1 would also benefit product manufacturers that operate in multiple States.

In contrast to commenters raising concerns about competition, many commenters supporting Option 2 argued that it is improper to speculate about competition problems in advance of the regulatory change. There is no basis, they argued, for FHWA to simply presume that Option 2 would create a problem. These commenters either argued that no problem was likely to arise or suggested that FHWA should first remove the existing regulation and then monitor whether any problem arises that should be addressed.

Commenters supporting Option 2 also pointed to the standards found in the Office of Management and Budget's (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. These commenters argued that reliance on OMB's regulations would adequately ensure that a State's specification of a patented or proprietary product complies with the competition mandate in 23 U.S.C. 112.

The FHWA acknowledges the commenters who argued that, under Option 2, suppliers of patented products may control prices, but these concerns are speculative.

Some commenters attempted to compare the Federal-aid highway program to the prescription drug industry in this regard, but these markets are inherently different. The FHWA believes that States, as responsible stewards of the limited amount of Federal funding apportioned to them, have an incentive not to waste limited resources on proprietary products that would have costs exceeding demonstrated benefits. It is important to note that this final rule does not require States to use proprietary products, and FHWA believes that States would not choose to do so unless there are benefits that exceed the costs associated with the use of such products. States, as rational market actors, are best situated to make this determination on a case-by-case basis as they consider whether a proprietary product would fit a specific programmatic need.

In response to comments regarding competition, many States already have procedures established under State law or regulation relating to competition for federally assisted contracts, and the use of patented and proprietary materials in Federal-aid projects. Nevertheless, ensuring competition and requiring awards to the lowest responsive bidder in the Federal-aid highway program remain statutory duties of the Secretary and the statutory requirements of 23 U.S.C. 112 continue to apply to Federal-aid assisted State contracts. As long as the contract specifications are clear in terms of what materials the State DOT requires, it remains the responsibility of any prospective bidder to find materials that are responsive to the applicable contract specification. Concerns relating to potential prosecution of anticompetitive legal actions is speculative and outside the scope of FHWA's authority.

## **Additional Comments**

Some commenters supported retaining the existing regulation and expressed support for the current process for using patented and proprietary materials in Federal-aid projects. Those commenters included five State DOTs, one industry association, and three manufacturers. The commenters expressed the belief that the regulation should not be changed and existing procedures allow State DOTs to justify the use of innovative, patented, or proprietary products. They went on to express the belief the existing regulation works well and strikes an appropriate balance between ensuring competition while allowing the use of patented and proprietary products based on a documented proprietary product approval.

As noted above, FHWA believes that cost savings would result if the requirements at 23 CFR 635.411(a) through (e) are rescinded by this rulemaking. In addition, State DOTs remain responsible for the effective and efficient use of Federal-aid funds, and continue to be subject to the statutory requirements of 23 U.S.C. 112 for competition and competitive bidding.

## **RULEMAKING ANALYSES AND NOTICES**

**Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulations and Controlling Regulatory Costs), and DOT Policies and Procedures for Rulemaking**

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order (EO) 12866, and within the meaning of the U.S.

Department of Transportation’s regulatory policies and procedures. This action complies with EOs 12866, 13563, and 13771 to improve regulation. The FHWA anticipates that the economic impact of this rulemaking would be minimal. The FHWA anticipates that the rule would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Although FHWA has determined that this action would not be a significant regulatory action, this action is considered an EO 13771 deregulatory action. This action could generate cost savings that are applicable to offsetting the costs associated with other regulatory actions as required by EO 13771. These cost savings, measured in 2018 dollars, are expected to be \$313,848 per year.

The cost savings resulting from this action result from reduced administrative burden associated with the efforts by the States and FHWA related to the existing methods for approving patented and proprietary materials.

Currently, there are three methods available to approve specific patented and proprietary products for use on Federal-aid highway construction projects:<sup>1</sup>

1. Certification: A certification is the written and signed statement of an appropriate contracting agency official certifying that a particular patented or proprietary product is either:

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<sup>1</sup> [https://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm#\\_Hlk307505978](https://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm#_Hlk307505978)

- a. Necessary for synchronization with existing facilities; or
  - b. A unique product for which there is no equally suitable alternative.
2. Experimental Products: If a contracting agency requests to use a proprietary product for research or for a distinctive type of construction on a relatively short section of road for experimental purposes, it must submit an experimental product work plan for review and approval. The work plan should provide for the evaluation of the proprietary product, and where appropriate, a comparison with current technology.
3. Public Interest Finding: A PIF is an approval by the FHWA Division Administrator, based on a request from a contracting agency that it is in the public interest to allow the contracting agency to require the use of a specific material or product even though other equally acceptable materials or products are available.

To estimate the cost savings from removing the need for the above categories of approvals, FHWA estimated the number of new approvals that would be generated in the future in the above categories if the rule does not change as a baseline scenario and compared it to the scenario in the final rule. The estimated number of new approvals per year is multiplied by the estimated number of hours required to process the documentation for that specific type of approval (including conducting analysis and documenting methods and results) by the appropriate labor cost (wage rate multiplied by a factor to account for employer provided benefits). Currently, the work related to

approvals is conducted by both FHWA and State agencies because, in some cases, FHWA has delegated authority to States via stewardship and oversight agreements for such issues. In addition to the time required to process the approvals, time is also required by FHWA to review the resulting documentation. Finally, both of those activities require a minimal time allowance for management of the process.

Under the final rule, the costs associated with approvals for patented and proprietary materials may not be completely removed. This is because twelve States are believed (according to information from FHWA Division offices) to have their own laws or policies that are similar to existing FHWA requirements. Absent other information, this analysis assumes those State laws or policies would remain in place even after an FHWA rule change. For those States, this analysis assumes that the total number of hours associated with processing and managing approvals would remain unchanged but that the work would be conducted solely by State agency staff (rather than a mix of State and FHWA staff as is assumed in the baseline calculations) and that time spent on FHWA review would no longer be needed.

In addition to the cost savings that have been quantified here, there may be additional positive impacts from the rulemaking related to supporting the adoption of patented and proprietary products. Although FHWA has undertaken various efforts to grant States the flexibility to use such products, to the extent that the current rules and guidance discourage their use, the final rule removes those barriers. Since patented and proprietary products are/may be more expensive than non-proprietary alternatives, this could lead to States paying more for proprietary and patented products if certain products

are specified in Federal-aid contracts. However, ARTBA, in its petition for repeal, states that such products could “save lives, minimize congestion, and otherwise improve the quality of our Nation’s highways.”<sup>2</sup> Thus, there may be benefits associated with greater adoption of existing products. An increase in the willingness to adopt patented and proprietary products may have secondary impacts and spur additional innovation if product developers perceive there to be a larger market for new products. Those potential benefits from additional innovation have not been quantified in this analysis.

### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), FHWA has evaluated the effects of this action on small entities and has determined that the action is not anticipated to have a significant economic impact on a substantial number of small entities. The amendment addresses obligation of Federal funds to States for Federal-aid 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 Regulatory Flexibility Act does not apply, and FHWA certifies that the action will not have a significant economic impact on a substantial number of small entities.

### **Unfunded Mandates Reform Act of 1995**

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48, March 22, 1995) as it will not result in the expenditure by State, local, Tribal governments, in the aggregate, or by

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<sup>2</sup> ARTBA, “Petition for Rulemaking to Repeal the Proprietary and Patented Products Rule 23 CFR 635.411”, March 27, 2018.

the private sector, of \$155 million or more in any 1 year (2 U.S.C. 1532 et seq.). In addition, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

**Executive Order 13132 (Federalism)**

This action has been analyzed in accordance with the principles and criteria contained in EO 13132 dated August 4, 1999, and FHWA has determined that this action would not have a substantial direct effect or sufficient federalism implications on the States. The FHWA has also determined that this action would not preempt any State law or regulation or affect the States’ ability to discharge traditional State governmental functions.

**Executive Order 12372 (Intergovernmental Review)**

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

**Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et. seq.), Federal agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that the rule does not contain collection of information requirements for the purposes of the PRA.

### **National Environmental Policy Act**

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), and has determined that this action would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

### **Executive Order 12630 (Taking of Private Property)**

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

### **Executive Order 12988 (Civil Justice Reform)**

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

### **Executive Order 13045 (Protection of Children)**

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

### **Executive Order 13175 (Tribal Consultation)**

The FHWA has analyzed this action under EO 13175, dated November 6, 2000, and believes that the action would not have substantial direct effects on one or more Indian Tribes; would not impose substantial direct compliance costs on Indian Tribal

governments; and would not preempt Tribal laws. The rulemaking addresses obligations of Federal funds to States for Federal-aid highway projects and would not impose any direct compliance requirements on Indian Tribal governments. Therefore, a Tribal summary impact statement is not required.

#### **Executive Order 13211 (Energy Effects)**

We have analyzed this action under EO 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The FHWA has determined that this is not a significant energy action under that order since it is not a significant regulatory action under EO 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

#### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in the spring and fall 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 630**

Grant programs, transportation, highways and roads.

## List of Subjects in 23 CFR Part 635

Construction materials, Design-build, Grant programs, transportation, highways and roads.

Issued on September 23, 2019.

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Nicole R. Nason,  
Administrator,  
Federal Highway Administration.

In consideration of the foregoing, FHWA amends 23 CFR part 635 as follows:

### **PART 635 – CONSTRUCTION AND MAINTENANCE**

1. The authority citation for part 635 continues to read as follows:

Authority: Sections 1525 and 1303 of Pub. L. 112-141, Sec. 1503 of Pub. L. 109-59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.*; Sec. 1041(a), Pub. L. 102-240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.85(a)(1).

2. Revise § 635.411 to read as follows:

#### **§ 635.411 Culvert and Storm Sewer Material Types.**

State Departments of Transportation (State DOTs) shall have the autonomy to determine culvert and storm sewer material types to be included in the construction of a project on a Federal-aid highway.

[FR Doc. 2019-20933 Filed: 9/26/2019 8:45 am; Publication Date: 9/27/2019]