Hello, I’m Katie McDermott with the Center for Transportation and Environment. This is CTE’s national teleconference series. The purpose of this live forum is to engage transportation and environmental professionals in a dialogue about current research, policies and best practices in the field. Today’s program introduces the key environmental provisions of the new federal transportation bill called “SAFETEA-LU,” or the Safe Accountable Flexible and Efficient Transportation Equity Act, a Legacy for Users. SAFETEA-LU was signed into law by President Bush on August 10 of this year, and this is the first in a series of CTE broadcasts that will be dedicated to discussing the implications of the new legislation on transportation and environmental programs. Our panel, participating with us today from Washington, D.C., courtesy of Reuter’s television, and from Raleigh, North Carolina, courtesy of the Agency for Public Telecommunications, will examine eight environmental provisions and discuss how transportation agencies, resource agencies and various stakeholder organizations are preparing for their implementation.
We invite you to discuss today’s topic with our panel, and you can use the numbers on your screen to phone or fax in your questions and comments at any time during today’s broadcast, or you can email us at cte_email@ncsu.edu. Close-captioning for today’s program is being provided by the North Carolina Agency for Public Telecommunications, and a phone bridge for audio transmission is available at 919-733-2429. After the broadcast, we invite you to participate in CTE’s web-based discussion forum called “After the Program,” where you can continue to talk about the issues raised during the live broadcast with our panel and other audience members. The discussion forum starts at 4:00 Eastern Standard Time today and will remain active for two weeks. Federal Highways will be referring to the forum to help capture some of the audience comments related to the discussion today in preparation for future guidance and proposed rule-making, so your participation in the forum over the next two weeks would be greatly appreciated.

A few more details before we get started. First, I hope you had an opportunity to download a copy of the program handout and the panelists’ PowerPoint slides from CTE’s website. If not, I encourage you to do that using the URL address that will be appearing on your screen (www.cte.ncsu.edu). From this site, you can also replay this program in its entirety, or you can order a copy of the DVD or written transcript. We’d also like to get your feedback on today’s program, and to do that, if you’re participating at one of our satellite downlink sites, you can complete the evaluation form located in your program handout and turn that in to a site coordinator before you leave. If you’re participating via the web, you can complete the online evaluation form located on CTE’s website. We thank you very much for your attention to that.

At this time, it is my pleasure to introduce today’s moderator, Ms. Shari Schaftlein. Shari is the team leader for programming policy development with the Federal Highway Administration’s Office of Project Development and Environmental Review in Washington, D.C. Prior to that, Shari was with Washington State DOT’s environmental office, where she managed the water-quality program and served as deputy director. Shari has also moderated a previous CTE broadcast and we’re delighted to have her back with us again. Shari, welcome to the program.

Schaftlein: Thanks Katie. The Federal Highway Administration really appreciates the opportunity to continue our outreach efforts on SAFETEA-LU. I’ll provide a little background on today’s program, and then introduce the panel. The new SAFETEA-LU law is over 800 pages long and has 458 sections to it. This law will fund approximately $50 billion in
transportation improvements each year for the next four years. As a handout for today, we’ve compiled under one list all the related planning and environmental provisions which number about 113 sections. Today we want to address the portions of this law that can enhance transportation and environmental decision-making, stewardship and the efficiency of the environmental review process.

Our goals are to oriented viewers to the substantive provisions in eight sections of the law and explain our implementation activities to date. We hope to gauge how outreach efforts and stakeholders’ understanding of the bill is coming along by the questions and comments we receive today. We want to encourage participation in the administrative roll-out efforts, those being federal rule making, the development of guidance and program activities such as training, research and documenting good practices.

The program today includes three parts. In the first and second part of the program, you’ll hear from five of my colleagues from a studio in Washington, D.C. on the environmental process-related provisions. The first part focusing on the environmental aspects of planning, need for process changes, managing historic elements of the highway given that the system is turning 50 years old, and 4(f) changes related to parks, refuges and historic sites.

The second part focuses on the five state delegation, a pilot program, CE delegation, design build and CE’s four Intelligent Transportation System (ITS) projects. In between each of these groups of presenters and after the second group of presentations, I will ask for comments and questions from our three panelists, two of which are in Raleigh and one of whom is in D.C. In addition, I’ll intersperse the audience questions and comments that come in related to these provisions.

In the third part of the program after the break, we would like to shift to a discussion on what do we hope to achieve with the new bill. We would like to hear about the possibilities as viewed from different perspectives. Congress has validated all of what was going on in TEA-21, the previous six-year transportation bill. By continuing programs and increasing funding for many programs, Congress has asked us to go further with public participation, coordinated planning, project and schedule management, and innovative contracting and financing. There was no backsliding on environmental protection. It will take some concentrated effort by all involved to meet Congress’ and all of the communities’ expectations, so we will take a look at proactive and partnership efforts underway to take advantage of the opportunities in the new bill to do better.
A quick review of roll-out efforts that got us where we are today: the bill was signed August 10. In the first couple of weeks, Federal Highways developed tables and spreadsheets to figure out what the law said, sorted out who would be taking lead on the various provisions, pulled out all the language about rule-making, guidance, submitting reports to Congress (of which I think about 90 are due), and took note of the due date for all these products. We identified technical corrections that the congress could make to make the law fit together better. The second wave of effort was to develop summary fact sheets in plain language and sort through the funding tables and earmarks, and get all that information up on the Federal Highways public main page Web site. In my office, Project Development and Environmental Review settled into the third wave of activity to develop implementation strategies for the provisions for which we were responsible.

We assigned leads to these provisions and then sent out a notice to all of our divisions and our resource center seeking team members for each of the provisions, and there are about six to 20 persons on each of these provision teams. Many of our provisions have cross-cutting influence with other parts of the department. Many meetings were held with Federal Lands, Federal Transit, Federal Aviation, our Office of the Secretary of Transportation, and others, to understand needs and reconcile different interpretations of the law. Of vital importance, to roll that was having an FHWA attorney assigned to each of the provisions. The first order of business was to get interim guidance out on the planning of environmental provisions since some of the provisions took place immediately upon the president’s signature. You’ll find that guidance referenced on the CTE website, and it came out September 2. As our FHWA teams and stakeholders have had time to digest the law, we’ve been compiling very long lists of questions and have been generating answers and some draft answers. Draft answers to questions are preceded today—you’ll hear the language—“our current thinking is.” That is to say, we are certainly keeping an open mind of continued dialogue and input. We could still be having a lot of internal debate, or I’ve heard a wide range of opinions from our stakeholders that we still need to reconcile.

Please note that while we would like to provide detailed schedules of next steps, we can’t. We can provide tentative milestone dates to help you plan your participation schedule. As you can imagine, a large number of people are involved in the review to get an agency position or rule-making out the door. Taking into account the Administrative Procedures Act and the Office of Management and Budget’s role of coordinating inter-agency reviews, there are approximately 90 rule-makings going on now related to the
law. Please note that once a notice or proposed rule-making is published in the federal register, we are limited in our outreach efforts. We cannot bias the process by deliberating with any person or group at the exclusion of others. So with that background, let’s move into introductions and the rest of the program.

In the studio here with me is Dominique Lueckenhoff. She is the associate director of the water program for EPA Region III in Philadelphia. She’s been with EPA for 17 years in a variety of programs and offices across the country. Her career has included a two-year stint as an EPA liaison to the Texas DOT.

Mark Kross is the environmental process and policy specialist for the past nine years with the Missouri DOT. He’s been with that department for 26 years. In addition, he serves as the TRB committee chair for the environmental analysis in transportation committee. I think Mark is on his fourth transportation bill, so he’s got some serious institutional knowledge on transportation and environmental provisions.

In the studio in Washington D.C.: one of our remote panel members there is Ted Boling. He serves in the position of deputy general council with the Council on Environmental Quality, a position he’s held for five years. He also served as council in the Department of Justice and Interior for 10 years. CEQ serves as the keeper of NEPA in the federal government, and helps to facilitate resolution between agencies as we all try to sort out and reconcile new policies, laws and executive orders.

My colleagues from Federal Highways in the office of Project Development and Environmental Review, in the order that they will be presenting for the first group of environmental process changes: we have Carol Adkins; she is a senior environmental specialist. She has had a 25-year career with Federal Highways. Besides major project troubleshooting she is influencing policy from air toxins to water quality. Pam Stephenson is a senior environmental specialist with a 10-year Federal Highways career. She helped build a national streamlining and stewardship initiative from the ground up. Her wealth of major project experience is serving her well as she leads a large team of folks on the 6002 environmental process changes. Lamar Smith, with 17 years with Federal Highways, serves as the team lead for training, technology and technical assistance. Lamar pushes us all to excel at the core Federal Highways responsibilities, so who better than he to lead on the 4(f) provisions? MaryAnn Naber serves as the federal preservation officer for Federal Highways, a position she has held for five years. Prior to this position, she was with the Advisory Council on Historic Preservation for 10 years.
In the second group of provisions addressing delegation, you will also hear from Owen Lindauer. He has 16 years of archaeology and historic preservation under his belt. He has been with Federal Highways almost a year, he has Texas and Arizona DOT experience. We are very fortunate to capitalize on his previous experience with categorical exclusions, and we’ll be depending on him to lead the CE delegation provision. I think collectively between this group you’re looking at about 90 years of government and professional experience. So Carol, if you’ll kick off the 6001 provision.

Adkins: Sure, Shari. SAFETEA-LU section 6001 added two new requirements for environmental considerations in the development of long-range transportation plans. The language for statewide planning and for metropolitan planning is nearly identical, and what it requires is that there be consultation during the development of the long-range transportation plan with state and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation. For the statewide plans there’s also a requirement that tribal agencies be contacted in this consultation process. What’s kind of interesting about this consultation is that Congress has actually directed through SAFETEA-LU how this consultation is to occur.

They’ve said that this consultation is to occur by comparing plans or maps with transportation plan with state and tribal, natural resource, and historic plans and maps or in some cases, inventories of natural resources and historic resources, only if they’re already available. There’s no requirement to go out and create the plans or the maps. However, there are a lot of plans already out there. A number of areas have watershed plans. I’m very pleased that we now have 50 state wildlife actions plans that we can use in this comparison process. And then of course there’s land use plans and a number of historic—in some area historic preservation plans. Comparing those plans has I think a lot of benefits that can be realized. Certainly, if we’re aware of potential conflicts with a natural resource or a cultural resource area, that certainly helps with decision-making in terms of estimating cost of mitigation if nothing else, but hopefully avoiding potential conflicts. I think it also presents an opportunity for us to develop our plans in later projects so that they can capitalize on a number of different goals in the public.

Finally, I think it gets us—it’s a real good opportunity for us to identify mitigation opportunities. That’s the other major new change that’s in the long-range planning process. That’s that now long-range transportation plans must include potential environmental mitigation activities and potential locations to carry them out. This discussion has to be developed in consultation with Federal, State and Tribal, wildlife,
land-management, and regulatory agencies. I see it as sort of—we have a continuum. We start with the consultation aspect; we compare the plans, and then finally come up with some identified mitigation possibilities. I’m very excited that this new requirement is in SAFETEA-LU, I think it’s going to set the stage for a much more streamlined environmental process. With that, I’m going to hand it over to Pam Stephenson to talk about project development process.

Stephenson: Section 6002 establishes a whole new environmental review process for highway transit and multi-modal projects. It is a requirement for EISs of projects done as an environmental impact statement, and it’s optional for environmental assessments. All projects that have a notice of intent that’s published after the signing of the bill must follow this new process. It does allow, however, opportunity for states that really did a major re-engineering process to continue under their old review if they really put a lot into it under the TEA-21 authority.

Section 6002 is really quite long, so I’m just going to go over some highlights of some key elements. It restates that the USDOT is the lead federal agency under NEPA, and that’s something that’s common with both NEPA. It’s not really a change and it does also reassert that they have the final decision-making in purpose and need alternatives. That being said, it also creates a whole new participating agency group that’s separate from cooperating agencies, in which USDOT must invite all agencies that may have interest in the project, that’s Federal, State, local, Tribal. If you’re invited, if you’re a federal agency you must accept unless you really are not going to be involved at all, and you have to meet certain criteria. You must state in writing that you have no jurisdiction, you have no expertise and you’re not planning on commenting on the project.

The idea behind the participating agency is really to give you an opportunity, or those agencies to get their input in very early throughout the process. For purpose and need, for example, the DOT must provide an opportunity for involvement to participating agencies and the public in defining our purpose and need. It does go on to say that the decision is made by the lead agency, but that only applies to the NEPA study, it does not apply to any other laws outside of NEPA.

Under the range of alternatives is a similar arrangement. The DOT must provide opportunities for involvement, the public and the participating agencies in determining the range of alternatives before they make their final decision. Something that’s a little different is that it also requires that the lead agency collaborate with participating agencies in methodologies that we used in the analysis of impacts as well as the level of
detail for the different alternatives. It also says that for identified preferred alternatives, you may develop that to a higher level of detail if you want to look at environmental impacts and mitigation for other laws, such as Section 404. That again is done in collaboration with your participating agencies. It also requires that there is a coordination plan that’s established by the Department of Transportation or the lead agency there that has to look at the agency and public coordination process. It may be program-wide; it may be project specific, it may include a project schedule that’s developed in consultation with your participating agencies. But that’s not a requirement.

However, it also sets out some expectations for deadlines, including maximum deadlines, such as 60 days for a DEIS comment and 30 days for other comment periods that you’ve requested comments on your process. The lead federal agency DOT may also extend that comment period if it’s warranted. It carries over from TEA-21 the concept of dispute resolution when we do have sticking points. It sets forth responsibilities for both the lead agency as well as those participating agencies when it comes to dispute resolution. It requires that the lead agency provide information on environmental and socio-economic resources as well as the location of alternatives as early as possible throughout the process. It also requires that participating agencies identify any issues of concern to them as early as possible, especially issues that could delay the process or result in denial of a permit. The resolution process can be requested or they can invoke this by either the project sponsor or even the governor of the state.

Also continued from TEA-21, it does allow for assistance to other agencies, recognizing that you’re asking them to get involved earlier, asking them to get involved maybe at different points. So it may require helping them out to do that. So you can provide financial assistance to other agencies to keep that process moving along. Something new is that they’re saying that these activities can actually be sort of pre-NEPA, they can be some of our planning activities that are getting at programmatic. All federal agencies and state agencies and tribes are eligible to receive such funds.

Something new this time around is a provision that establishes a 180-day statute of limitations for lawsuits challenging federal agency approvals for transportation projects. What this does is require a notification or publication of a notice that environmental decisions have been made in the Federal Register and this is something different and new. Those statutes of limitation, it applies to any decision, approvals, licenses and permits on a transportation project. It bars lawsuits unless they were filed within that 180 days. If there’s multiple decisions and there’s a lag time in between, say
for example your record of decision was one year and your permit for 404 was a year later, you would have to publish a new notice in the Federal Register announcing that permit had been given. And that would reset the clock again for 180 days on that permit decision.

At this point, we have been coordinating with the Department of Justice and other agencies on how the statute of limitation notices will occur, and we expect to get a guidance out fairly soon. As far as the rest of the guidance on 6002, we are targeting that coming out by the end of the year. I’m going to turn it over to Lamar for section 4(f).

Smith: Thank you, Pam. I have the privilege of talking about the new substantive provisions and the section 4(f) legislation, the very first major changes in the law since it was given to us in the DOT Act back in 1966. Then I’m going to talk about essentially three things: the *de minimis* provision, the requirement to address standards of feasibility and prudency in regulation, and also discuss the requirement in the law for analysis, evaluation and a report.

I’ll start with *de minimis* impacts, and as I indicated, this is the first substantive revision to the existing law, and if you know—and I’m sure you do—something about section 4(f), prior to a use, a secretary must determine and concur that there is no feasible and prudent avoidance alternatives available to the use of that section 4(f) property by a transportation project. In the SAFETEA-LU provision, however, where there is a determination that the impact, the use of a section 4(f) property by a transportation project results in a *de minimis* impact, then the alternatives analysis is not required. However, it still does require that all possible planning be included in a project as is often referred to as 4(f)-2.

The *de minimis* definitions and requirement process are different for historic sites than they are for parks, recreation areas, wildlife and waterfowl refuges. For historic sites, the process of determination of *de minimis* impacts is tied specifically to the 106 process. What that means is where the secretary, we, determine that a project will result in no adverse effect or no historic property is affected, then that allows us to determine that there is a *de minimis* impact on that resource. The impact must be determined in coordination with the consulting parties, the usual consulting parties in the 106 process, requires written concurrence of the SHPO.

For parks, recreation and wildlife waterfowl refuges, it’s a bit different, not quite nearly as specific as it was for historic properties. The law says *de minimis* impacts may be determined where there are no adverse effects on the activities, features or attributes of
the section 4(f) resource park, recreation area or refuge. In this case, the finding is
determined in consultation with the agencies with jurisdiction, requires public
involvement and notice and an opportunity to review and comment prior to the
secretary’s determination, and also requires written concurrence of the officials with
jurisdiction.

The feasible and prudent standard, SAFETEA-LU, required that DOT put out
regulations in one year that defines the standards that would be used to determine where
avoidance alternatives are feasible and prudent. It’s based on a number of different
interpretations of case law and this point specifically nationwide over the last 30 years or
so. It also will—the regulation, which is in development, will also clarify the application
of these legal standards.

And then finally, I wanted to mention and make sure that we all understood that
Congress requires a study—an evaluation and a report on the implementation of the
provision, specifically on process improvements provided by the new provisions of
Section 4(f). And on the *de minimis* impacts, it wants—they would like for us to report
out on the post-construction effectiveness of impact mitigation and avoidance, and also
identify the number, the location, the size, and the type of projects in which *de minimis*
determinations or findings were made.

At this time I’m going to turn it to MaryAnn Naber.

Naber: Thank you, Lamar. I have the privilege of speaking about what is one of the most
straightforward sections of SAFETEA-LU, Section 6007, which calls for the exemption
of the interstate highway system. This section essentially exempts the vast majority of the
interstate highway system from consideration as a historic property under the two
sections of U.S. code that we refer to collectively as 4(f).

The first section within this establishes that except for a specific identified
element, that the interstate system shall not be considered as a historic property for the
purposes of Section 4(f). It defines the specific elements in the second section as being
essentially those—exactly those—that are being identified as the exempted elements
from the administrative exemption from Section 106. So Section 6007 is closely linked to
the administrative Section 106 exemption. Only those pieces of the interstate which meet
criteria as nationally or exceptionally significant would continue to be considered under
both Section 4(f) and Section 106. Those include resources that are at least 50 years old
and meet the criteria for inclusion in the National Register, properties such as the George
Washington Memorial Bridge over the Hudson River in New York.
The second group of properties is those that are less than 50 years old and meet the criteria for exceptional significance under the National Register criteria: things like the Eisenhower Tunnel on I-70 in Colorado. The third group of properties is those that are already listed or have been officially determined eligible by the keeper of the National Register, such as the San Francisco Bay Bridge, which caries I-80 over San Francisco Bay.

The fourth group is those properties that were constructed prior to 1956 and were incorporated at a later date into the interstate highway system: resources such as the Washington Bridge in Rhode Island, which carries I-195 over the Seekonk River. Now any of these properties, to be considered exceptions to the exemption, would still have to retain sufficient integrity to be able to contribute or convey their significance.

Finally, the final section of Section 6007 does state clearly that this provision does not prohibit a state from carrying out construction, maintenance, restoration, or rehabilitation activities, even on those portions of the interstate which have been identified as exceptional, provided they have gone through the respective 106 and 4(f) processes.

As far as implementation, my task force has been working on a series of questions and answers that should be available in the next several weeks, which will explain a little bit more about how this section will be implemented, and at the current time, Federal Highways Headquarters is overseeing a contract that will convene statewide facilitated meetings, either virtually, by teleconference, or in some cases on site, among the interested stakeholders to determine what those excepted elements will be—those exceptions to the exemption, as it were. And you will be contacted soon if you are among SHPO, the state DOT or other facility owners of the interstate systems within a state, to set up those conversations. In the meantime, states are able to assume that the interstate system within their state is not to be considered under Section 106 and Section 4(f) unless it is likely to meet one of the four criteria that I mentioned before. Now I’m going to turn it back over to Ted Boling at this point to recap this section.

Boling: Okay, thank you MaryAnn. Actually, I was asked to lead off the discussion section with a question about how all this, and particularly the Section 6001 provisions, work with or relate to the Executive Order on Cooperative Conservation. As many of you probably know, President Bush, in August of last year, signed an executive order that mandated for agencies—the Department of the Interior, Agriculture, Commerce, EPA and others—to work cooperatively with state and local and, particularly, private interests to achieve
goals of cooperative conservation. Obviously this executive order falls on a great deal of policy emphasis in the same vein throughout this administration. The executive order also set in motion a cooperative conservation conference, which we held this year, in August, in St. Louis, where we had conservation partners from around the country come in and speak with senior policy leaders. We heard a number of transportation examples of how cooperative conservation can really work together to create partnerships and create improved landscapes as well as also improved transportation.

Consistent with that effort, there has been, through an inter-agency effort that Carol Adkins has been involved in, the development of guidance, called Eco-Logical, which we expect will be coming out around the beginning of next year. This guidance emphasizes the use of ecosystems as a basis for planning, and it really builds off of the 6001 provisions which Carol talked about, for the active incorporation and integration of ecosystem concepts, as well as tools such as mitigation banking, conservation banking—taking advantage of Section 6001’s proactive approach with regard to transportation planning and providing a very useful tool for the project-specific NEPA analysis to use and incorporate on a project-specific basis. Before I send it back to Carol, I’d like to ask if anyone else on the panel here has anything to add. Carol? No? Okay, Shari?

Schaftlein: Okay, thank you, Ted. We have a couple of questions that have come in, but I’d first like to offer a couple of questions to the audience. Andrea Firstar from Rails to Trails, a surface transportation policy project member group had submitted these, and she was unable to be with us today. I’d like the audience to be thinking about these and perhaps give us some statements or comments and email them in. What are the key principles and provisions that you would like relative to the changes affecting Section 4(f), and what are the key principles and provisions that you would like relative to the changes affecting NEPA? Now, for the two questions, Pam, I think these are going to go to you. I’ll read both of them and maybe you could make a couple notes and then we’ll go to D.C. to get them answered.

The first one is from John Hodges Couple from the Triangle J Council of Governance in North Carolina, regarding 6001. “Will anyone at the state level be responsible for generating a list of state agencies that must be consulted with?” And then the second question, from Suraya Teeple. “What additional legal standing is provided to participating agencies to challenge DOT purpose and need?” from the Florida DOT. Pam?
Stephenson: I’m sorry, Shari, I didn’t hear the second question. But I think the first one had to do more with planning. Was it really a planning question of 6001.

Schaftlein: Oh, excuse me, sorry.

Adkins: Well, I’ll take that. As I understand, the question was that at the state level is there going to be someone who is going to be responsible for maintaining a list of state agencies with whom to consult. I would say at this point we’re not sure exactly how the mechanics are going to be laid out. Certainly, SAFETEA-LU says that the consultation must occur. But it also says, “as appropriate,” and so I believe our current thinking is that we’ll be taking a rather light hand in determining how each state—well, actually, we will allow each state to determine the best method for its transportation planning to occur in terms of the consultation. I mean, certainly I would think that most state DOTs— their planners could probably walk across the hall and talk to their environmental people and have a fairly good idea after a fairly short conversation as to who the people are that need to be consulted. But again, it’s, I think, being left to the discretion of the individual states as to how to implement that.

Stephenson: Okay, what I thought I heard, Shari, for the question—and if I didn’t get it all, please let me know—was that the question had to deal with what additional legal status participating agencies had for development of purpose and need. Is that correct?

Schaftlein: Let me repeat it for you, Pam. The question is, “What additional legal standing is provided to participating agencies to challenge DOT purpose and need?”

Stephenson: Okay. Basically, how the participating agency—their roles and responsibility, as I mentioned before, is to bring to the DOT very—as soon as they realize that they have concerns and issues, that they need to tell the DOT. It’s all part of that give-and-take input coordination discussion. For purpose and need specifically, in the statute, it states that they have an opportunity to become involved in that purpose and need—in defining the purpose and need. But the ultimate decision is with the lead agency. So as far as challenging, I think if they had concerns with it, they should certainly bring that up very early. And if necessary, we would—if it went so far, we could actually go through the dispute resolution process.

Schaftlein: We have another question on 6001: “Will individual states or Federal Highways create a clearinghouse to collect the various plans and maps that will be needed for transportation planning consultation under Section 6001?” I think I’ll take a couple comments from folks here and then we’ll see if there’s some feedback from D.C. Mark, your thoughts on that?
Kross: Well, I’m thinking that it’s going to be more on a project-by-project basis, or possibly even a program basis. But you’ve got other partners like metropolitan planning organizations, regional planning commissions, and the like. You’re going to be tapping those groups for planning that they’ve done as well as the others as well. So it may be that there is kind of a storehouse of different agencies and others who would be contacted as there are transportation proposals in specific areas. And that clearinghouse is going to vary from region to region, community to community, really.

Schaftlein: Dominique?

Leuckenhoff: Yeah, I would also add that a number of federal agencies like EPA also keep this information on our own websites. For example, we have a lot of information on watersheds. We’ve had a website called “Surf Your Watershed.” Each of our regions has watershed related information. Beyond that, we can put you in contact with the right groups. I think it’s going to be important that you get to the custodians of that data and who generated that map or that plan, because planning, as you know, is a very iterative process, and you want to get the most current information that you can get your hands on. And I think over time, Federal Highways will be trying to collect best practices from around the country on what’s working in different regions and different states and put that up on our website on best practices so we can get some more ideas on that.

Kross: Shari?

Schaftlein: Okay, I have a couple questions for the folks here in the Raleigh studio. This has to do, Dominique, with 6002 and 6001; you’ve worked in and around EPA’s NEPA and water programs for a number of years, and part of these provisions are about bringing the resource agencies to the table early. I was wondering what you thought about what would work to make that a win-win situation for folks?

Leuckenhoff: Well, first of all I think that we have to credit our DOTs and Federal Highways through TEA 21 with a growing number of transportation liaisons within EPA, within the core, within Fish and Wildlife—folks that you know you can contact. We’ve done a lot of joint training together, and you know the interest. So I’ll start with that group of folks, and we can make those folks—a listing very available.

Beyond that, I think it’s important to think about what you want—what decision you’re trying to make, where your priorities are—and provide that information as early as possible to the agency, so that we, in turn, can be more strategic and effective in our response. The kind of fast and easy answer tends to be our NEPA programs, which might be the first point of contact. However, I’m in the water program, and, again, it depends on
what the issues are in terms of getting to us. You’ll also find that with this new legislation, we’re coming to you. EPA is very focused on expanding our collaborative efforts—as we heard earlier, the Department of the Interior, Fish and Wildlife, as with other federal agencies like the core USGS—so I think you’ll find that we’re coming to you in many instances.

Schaftlein: Mark, a question to you: Missouri has hosted a linking, planning and NEPA workshop. We’ve held a number of these around the country, so it seems like folks in Missouri would be primed to receive these new provisions. I’d ask you, how are you rolling out awareness and contemplating next steps on these provisions in Missouri?

Kross: We had a number of actions—well, one action plan with three elements to it associated with the linking planning and NEPA workshop. Section 6001 is kind of like the catalyst, I think, that’s going to reinvigorate that effort and keep the momentum going. One of the aspects is, at least in our “project scoping phase,” as we call it, is to have further involvement by the resource agencies, the regulatory agencies, and others, in things everywhere from identifying needs to identifying purpose and need, looking at alternatives, and the like. The other aspect of that is working with the metropolitan planning organizations and the regional planning commissions throughout the state to assess the environmental inventory that we have within plans that may have been done in those particular areas, as well as constraint mapping—GIS work that they’ve done, and try to pull all that together for consideration in that early planning work related to the environment.

Schaftlein: A question that just came in from Benjamin Steinberg from NARC in D.C.: “How will metropolitan planning organizations and regional councils play a role in Section 6001?” Mark, do you want to comment and then we’ll go to the D.C. studio for some comments from Carol and Ted.

Kross: Well, I’d say—there’s this whole rollout of SAFETEA-LU that’s happening, and we ourselves are just trying to get our hands around it, as is the FHWA and EPA and others. So I would anticipate that once we kind of have a better sense of what it is and what it may involve, there’s going to be an effort on the part of our planning group, our environmental group, and others at the DOT to actually work to talk to the metropolitan planning organizations, the regional planning commissions, and the like to say, “Okay, here’s what we’ve got now, here’s what we might consider doing,” and then just have that collaborative effort associated with that.

Schaftlein: Okay. Carol and Ted, could you pick up on that question as well?
Adkins: Yeah. Shari, I think that the MPOs and the regional councils are going to have a very important role to play in implementing these provisions of 6001. But I also think that it’s not going to be the kind of effort that we’re going to know exactly how to do it when we start. I think that the real key to a successful process really is in that consultation mode: to keep things transparent, to seek out those agencies that are listed in the act. But also, as I think Dominique referred to—help them to understand what it is that you need from them so that the collaboration and the time that’s spent can be productive. Certainly at Federal Highways we’re doing a lot of things in the planning process—we’re pursuing scenario planning techniques, we’re looking at Nature Serve. We’re also—and I’m going to borrow this from Ted again—EcoLogical has a great many resources appended to it, intermixed in it—best practices, websites, ideas for where to go for the type of information that will help in this process. So I really see this as, you know, this is the beginning; we’re taking these first steps in consultation and I think the process is going to grow and we’re going to learn from each other as it progresses. Ted?

Boling: You know, from my perspective, we look at all the NEPA programs and the environmental programs federal-wide, and we see this problem of interagency coordination just every day. And we at CEQ are particularly interested right now in the use of GIS solutions, and really think that the 6001 provisions on the comparison of maps between plans is a great step forward—a critical resource, potentially—for doing that sort of layering and comparison. Because we’ve done a lot of planning, and we’ve invested a lot in recovery plans under the Endangered Species act, mapping efforts at the ecosystem level, particularly on federal lands, and then metropolitan planning organizations have also had their efforts.

Unfortunately, you know, many times the maps that make up the bulk of the information that’s readily usable in these reside in a paper form. So for that reason, to address that—those of you who have studied information technology know that paper is the world’s worst place to store information—we’ve been working with the U.S. Geological Survey on their work under Geospatial One-Stop, a GIS portal that has the blessing of the office of Management and Budget as a one-stop shopping for geospatial information. And we are very interested in linking together the different analytical stovepipes: you have the NEPA shop, you have the water shop—that sort of thing, and oftentimes the GIS work is done in its own shop and gets translated to the public not through GIS data that you can take and compare, but is given in a PDF or just a paper form. That’s a waste; we ought to be able to use those resources in such a way that we
can layer them, we can learn from them, and do the sort of comparative exercise that’s provided for in Section 6001.

Schaftlein: We have a question on the 4(f) issue, so I’ll pass that back to Lamar here in just a second. This came in from Tom Linkous. He’s with the Division of Natural Areas and Preserves with the Ohio DNR. He asks, “How is de minimus impact determined, and who makes the final decision?” And a follow up: “How is the owner or operator of the 4(f) resource going to be involved?” Lamar?

Smith: Thank you, Shari. How is de minimus—if I understood, it’s a two part question. I hate two part questions because I can’t remember the parts, but [LAUGHTER] here’s how it works: de minimus impacts, number one, are minor—essentially minor—but we get to, in making a de minimus finding, use mitigation avoidance or enhancement to reduce that impact to de minimus levels. It is determined through a cooperative effort with the officials with jurisdiction: the owners, the administrators of those properties, if you will. Now I’m really speaking Parks, Recreation, Wildlife Waterfowl Refuge here, because for historic properties, it is more simply, “No adverse effect, no historic properties affected,” and that is determined through normal 106 process. There is a public involvement piece, and when the guidance comes out very soon, you will see that we have organized, choreographed the process, to include public involvement—review and comment of the public—prior to the concurrence in the determination of the officials with jurisdiction. But in the final analysis, the division offices: FHWA, the FTA offices and the regional offices, or if another USDOT modal administration chooses to use this provision, their management will make that final decision about what is de minimus.

Schaftlein: Thank you, Lamar. Dominique, a question for you: 6002 supports the use of liaisons and actually expands the eligibility to tribes and Federal Highways to accelerate project delivery. Given your experience as a liaison, I wonder if you have any suggestions for how to make those liaison programs work better so that we can implement 6001 and 6002.

Leuckenhoff: You just give liaisons lots of money [LAUGHTER]. Actually, that’s not the answer. I think that it’s important, again, to recognize that this is not a one-shoe-fits-all approach, that it’s going to vary per the priorities of your organization, of your region, and it’s going to be important to think about that in terms of the type of liaison, the type of expertise that you get, the type of support that that liaison has from his or her sponsoring agency. And it’s very important to have as high up the chain—that management sit down together along with the liaison, if the liaison exists, and talk about priorities, and find
where there is overlap, and where the win-win is. Because when you do that, you not only get the liaison, you get the rest of the organization; you get the greater capacity to accomplish some things together.

Schaftlein: Great. Mark, a question to you on the Historic Interstate Exemption issue: what does Missouri have underway, and maybe your neighboring states have underway, to implement this administrative solution for the Interstate Exemption?

Kross: Well, Shari, one of the things that came out of the AASHTO last month was that FHWA of course, by June 30 of 2006, has to identify those elements of national significance. So the aspect of actually working with the SHPO Office in Missouri and other states with the FHWA division offices related to environmental matters, and also with our own resources in historic preservation area of the DOTs to get their heads together even before the FHWA consultant makes the call to those states to say, “Okay what do you have?” at least gives that discourse—that discussion among the various agencies within the state—the opportunity to say, “Well, here’s what we all concur on,” or, “Here’s what we think,” as opposed to what the other agency may feel is one of those significant national elements. So I’d like to encourage state DOTs to get together with your partners in the historic preservation area and look at the interstate system—just see what you have out there and discuss that so that you’ve got a consistent, or if not consistent, at least an informed approach.

Schaftlein: Okay, thank you. We have one question that I’ll pass onto Carol, here. It’s about mitigation associated with 6001. This is from Joshua Burnim with American Wildlands in Montana: “What level of detail will be required in 6001 for long-range plans for mitigation locations? For example, wildlife crossing structures have been identified in many states; what level of detail will be up to the states?” And Carol, I think you’ve got about a minute, here.

Adkins: Okay, well actually I don’t think that there has been any specific level of detail identified, and I don’t believe that there probably will be. I think that, you know, plans are going to differ from state to state in terms of their specificity. Some are very general policy plans, and in a very general policy plan, you might not, you know, expect to see a lot of detail in terms of where wild life crossings go, because it’s just policy. So I think that each state—it’s going to develop in a different manner in terms of how much detail is included. And again, I think this is going to be an iterative process where we learn what we can do, what we can’t do, what works really well in terms of syncing up with a policy-level plan, and what sort of detail could go into a plan that has more project-level or corridor-level detail.
Schaftlein: Thanks, Carol. I also think that we at Federal Highways have been doing a lot of work on the Exemplary Ecosystem initiatives, and there’s been a lot of planning and coordination that’s had to take place. We’ve got several winners of awards on that, and I think we’re going to be posting and announcing a new set of those here in the near future. I think it would help folks to kind of study some of those Exemplary Ecosystems and talk to the partners and the resource agencies that have been involved with that, and perhaps think about what would have helped make that happen better or easier if they had coordinated in the planning stage and given that some thought. Mark?

Kross: I don’t really have anything to say. I thought you covered that pretty well yourself, Shari.

Leuckenhoff: The only thing I’ll say is that we are on the resource agency side, and I think that I can speak not only for the feds, but the states, who are very interested in finding out more about these exemplary environmental stewardship projects. The ones that we’ve seen certainly have been very impressive so please share them with us.

Schaftlein: Great! We’ll take a break right now and be back in 10 minutes. And I appreciate all the questions coming in. The ones we don’t get to right now we’ll try to get to them in the second part. Thank you.

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Schaftlein: Welcome back. We will not hear from Carol and Owen on the delegation provisions. And I’ve asked Lamar to address the NEPA issues associated with design-build and the categorical exclusion provision addressing ITS projects. Again, Ted Bowling from CEQ will comment and answer a couple of questions we’ve provided to him. So Carol, if you could . . .

Adkins: Hello again. Section 6005 of SAFETEA-LU creates what is entitled the “Surface Transportation Project Delivery Pilot Program.” This program allows up to five states who are identified in the legislation as Texas, Oklahoma, California, Alaska and Ohio to apply to the USDOT Federal Highway Administration to actually assume NEPA responsibilities that Federal Highways normally undertakes as part of our NEPA review process that are associated with other laws such as Section 106 of the National Historic Preservation Act, Section 404 of the Clean Water Act, ESA Consultation. The pilot program requires the states, although they’re already identified, to actually submit an application. And the legislation provides some outlines as to what they would expect to find in this application. Certainly the states need to show how they are going to structure
themselves and how they are going to provide the staffing capacity and the financial resources to take on these additional responsibilities. DOT Federal Highways is currently in the process of developing a Notice of Proposed Rulemaking for the application requirements, which was one of the requirements of Section 6005, that we do rulemaking for the application itself. We’re also in the process right now of developing a guidance package that will deal with other aspects of this assignment program.

The states, once they have been approved for NEPA responsibilities and any other environmental responsibilities that they request, they will become solely responsible and liable for those responsibilities. In fact, they’ll have to agree to have exclusive jurisdiction of the US District Courts in any civil action against the state in this pilot program. So this actually involves them ceding part of their sovereign immunity in order to undertake these responsibilities. So while they’re going to be getting some authority that they haven’t had previously, they’re also going to be receiving some liability that they haven’t had previously.

Once the applications are approved by the Department of Transportation, and I want to take this opportunity to also mention that, say, a state requests the responsibilities for coordination and consultation under the Endangered Species Act in their application. Federal Highways is required to consult with Fish & Wildlife Service as to their concerns or assessment of that state’s abilities to undertake those responsibilities. And that would be done as the application is being reviewed and approved. But once the application is approved then the states have to also enter into a memorandum of understanding or other written agreement with Federal Highways that will cover how they’re going to undertake their duties, how we’re going to measure their performance and a number of other aspects of the implementation of this program. I also want to point out that the legislation specifically excluded conformity determinations and planning determination from the list of authorities that could be assumed under this program. Federal Highways has also determined that tribal consultation cannot be assigned under this program. We can continue with any administrative arrangements that currently exist and states can enter into additional ones with the tribes. But if a tribe does not wish to consult with a state DOT instead of Federal Highways, then Federal Highways will continue to consult with that tribe.

The legislation also requires that—I’ve already talked about the regulations, which you are doing—it requires that for the first two years of this delegation that audits be conducted twice a year and then once a year thereafter. These audits are going to be
public audits. They will be published and Federal Highways is responsible for responding to any comments that are received on the audit. And then finally, we are required to submit an annual report to Congress. And so that’s pretty much what’s expected on your 6005.

And now I’d like to toss it over to Owen, who is going to talk about categorical exclusions.

Lindaur: Hi. Section 6004, also known as the section dealing with state assumption of responsibilities for categorical exclusions, let me first talk about what it does. It allows the Federal Highway Division office to assign, and for states to assume, Federal Highway’s responsibilities and legal liabilities for making categorical exclusion determinations. The scope of this delegated responsibility for determining whether or not an action is a categorical exclusion is limited though only to types of activities that are specifically designated by Federal Highway Administration. If a state assumes this responsibility for making categorical exclusions determinations, and I might add, states aren’t required to assume this responsibility but they can if they choose to and the Federal Highway Division Office assigns that responsibility. Those projects for which the state has assumed responsibility, the Federal Highway Division Offices may also assign and the state may also assume all or part of Federal Highway’s responsibilities for environmental review, consultation and other related actions required under any federal law applicable with the exception of government to government consultation with federally-recognized Indian tribes.

How is this implemented? This provision is available to be implemented to any state, unlike the 6005 section, which is only a five-state pilot. So any state can implement this through the development of a memorandum of understanding, which is subject to public notice and comment. Before I go further I’d like to make a little distinction between delegation because often this section is described as a delegation of responsibilities for categorical exclusions. In practice most Federal Highway Division Offices have signed programmatic agreements with their Department of Transportation offices that administratively delegate much of decision-making and approvals to the states while leaving the Federal Highway Administration still responsible overall and legally liable for any decisions or actions that have been taken. Section 6004 delegates both the administrative responsibilities and the legal liabilities to states for CEs. There have been some questions that have come up in discussions with states on how this section would work with regard to these existing agreements that are administrative
agreements. Our current thinking is that these existing agreements need to be cited in these memoranda of understandings and such that the assignment of responsibilities in the MOU would supersede those in the existing agreements.

Our current thinking in terms of the scope of this delegation is that the by the title of this section and the location with other environmental provisions, we see the scope of the Section 6004 delegation as limited to the Federal Highway environmental requirements and compliance. We see the scope of the delegation for state determinations of categorical exclusions as constrained only to those activities that are specifically designated such as on a list which could be attached to the memorandum of understanding. We think that there could be certain thresholds that are established through conversations, negotiations between the Federal Highway Division Offices and the state DOTs on where those thresholds would lie. And those would be useful in establishing whether or not a state could determine whether or not a categorical exclusion, I mean an activity is a categorical exclusion. We also believe that the guidance that we’ll be giving should be flexible enough to allow the division offices of the Federal Highway Administration to set those thresholds where they see as appropriate.

Lamar, over to you.

Smith: Thank you, Owen. I appreciate it. This is for my director. I am not using the overheads because there are only two and I’d just rather talk about the two things that I’m going to talk about, design-build first of all. And what the law required of us to do is to issue within 90 days, which I can tell you is not going to happen. Nobody issues regulations in 90 days. But anyway, that was the requirement. And to revise our existing design-build regulation such that they would not preclude a state or a local from doing three different things, and that is issuing requests for proposals, awarding design-build contracts, and issuing notices to proceed prior to the completion of the NEPA process.

So what that means is you don’t need a record of decision to do one of those three things, issue the request for proposals, award the design-build contract or issue notices to proceed with preliminary design. There is a prohibition against the design-build team or the design-builder from proceeding with final design. That’s a safeguard of NEPA which will be incorporated into our regulation. And another interesting point about this provision 1503 is that in order for a state or local to use it they must receive the concurrence of the Federal Highway Administration.

The next thing I’m going to talk about is 6010, and it’s an interesting provision that I might say kind of took us a little bit by surprise. We weren’t sure where it came
from. But it simply requires that the Federal Highway Administration add to its list of categorical exclusions in regulation 7701, categorical exclusions to cover ITS deployment projects. And the second provision of 6010 is the Federal Highway Administration would go about developing programmatic agreements with the CFOs in the Advisory Council for handling the section 106 process on these ITS deployment projects.

And Ted . . .

Boling: Okay, thank you. I’d like to start off the discussion group, first of all, with an observation about design-build and invite Lamar or anyone else to chip in on this. You know, in one sense, design-build is really entirely compatible with the NEPA process. Indeed the NEPA process was intended to inform the design and building of transportation projects and most others. And really that critical threshold between preliminary design and final design is going to be an important consideration throughout incorporating the NEPA process. But then we also see, at CEQ we’re great advocates, have been for many years, of adaptive management and really a continual learning NEPA process in recognition of continual learning. The current chairman of the Council on Environmental Quality, James Conaton, comes from an environmental management systems background and he has brought a great deal of emphasis on that aspect to it. The CEQ NEPA Task Force similarly, in its survey of best NEPA practices, recommended that CEQ take certain steps, guidance and whatnot, to advance the incorporation of adaptive management and environmental management systems into our NEPA programs. And we look to design-build as a way to further that effort. I don’t know if Lamar or anyone else has any other thoughts to add to that before we send it back to Carolina.

Smith: Yeah, just a couple of thoughts. I think that in terms of project development and delivering the best product that we possibly can, design-build makes a heck of a lot of sense. And it makes sense in terms of environmental analysis and to address those concerns of people, even people like me, the NEPA geeks, that there’s enough protection if it’s done correctly that the process itself is intact. You get input from the people that are in the best position to provide input and you wind up actually with a more efficient and a better environmentally sensitive product.

Ted: Ideally. I mean certainly with its provisions for auditing, for corrective action or preventative action to address environmental concerns, you know it can be a tool to get over, first of all, that trust exercise at the level [RECORDING STOPS]
Schaftlein: Okay, we’ll take a couple of questions on these provisions with our folks here in Raleigh. Mark, with this set of provisions we’ve heard about that have been presented, how do you see it affecting program and project delivery for Missouri, kind of taking all these provisions in whole?

Kross: One of the advantages of SAFETEA-LU in the provisions that it has, Section 6001, of course, talks about getting into the environmental aspects of things at the planning stage. And if you could work to have those agencies, other interested parties, metropolitan planning organizations and the like, become more involved at that early stage, that should then lead into the NEPA aspect of things in a much more reasonable fashion and one that should be expedited because hopefully the broader issues would be addressed in the planning phases. And then as you get to focus down more in the NEPA phase those broader issues will sort of already been covered by things. Also the timeframes associated with Section 6002 are helpful in that they provide an upper limit for commenting but hopefully if you’ve been working with your participating agencies, your cooperating agencies in this, there will be that understanding from as early as the planning stages of just what the issues are and hopefully you have been working through a lot of those as well. And then that 180-day statute of limitations is really helpful, especially if you’ve got a project out there that may be one that’s potentially sensitive for folks that have real concerns on that. That may help buy time for the DOT agencies in terms of that. And then finally on the design and build aspect, as we get into design-build at the Missouri DOT, there’s kind of a learning curve associated with that. And I think it’s incumbent upon us to work with the resource agencies and the permitting agencies as well, to bring design-build into their culture so that they’re more familiar with it, know what they can do to get a best solution that’s environmentally sensitive and on time as well.

Schaftlein: Dominique, your thoughts? How do you think resource agencies are viewing this set of provisions we’ve heard kind of in total? Do you think they’re seeing a little bit to better projects and timely projects and meeting environmental sensitivities too?

Lueckenhoff: Well, I think we’re excited about the flexibility aspect, I think across the board. We’ve just talked about transportation planning. That provision, 6001, which actually promotes comparison of transportation plans to environmental plans, we’re hearing that Interior has now helped to produce wildlife plans for all 50 states, which actually will help to avoid conflicts down the line because this means we’re getting up the chain in terms of transportation planning earlier and earlier and earlier to get to that win-win. As Transportation looks at Carter preservation, this provision also encourages a look at early
environmental mitigation planning. There are great opportunities to restore sensitive wetlands. I think in collaboration with resource agencies—state, federal and local, identifying those areas—I think it’s exciting to actually see how the stars could align and have some great opportunities out there for results.

Schaftlein: Mark, you participated in the AASHTO three-day workshop that we held a few weeks ago for, I think almost all the states were present for the planning and environmental workshop. Can you provide some thoughts on what other states were thinking and talking about relative to the delegated authorities for these environmental requirements?

Kross: Well, there’s a whole host of questions associated with that that a lot of folks didn’t have answers for. And just the aspect, for example, of what advantage do you get through delegation, some states have really good sound working relationships with the Federal Highway Administration Division Offices and it may be that if they’re working really closely together there’s no real advantage seen associated with that. But then there’s the aspect of the litigation and whether or not the states want to assume all that legal responsibility for the projects that they have. And then one of the other aspects is the five-state full NEPA environmental delegation that’s being offered to the pilot states identified, and if you are a neighboring state like Missouri is to Oklahoma, you’ve got some interest in hearing what’s happening with those pilot activities because it may be that Oklahoma as a lead state for a bi-state project brings a lot more weight to the table in the decision-making because they’re speaking not only for the state DOT but also for the Federal Highway Administration for those types of projects. And in our discussions at the workshop that was an issue we had some concerns on. But it’s going to be interesting just to stand back and see how that develops and see if there are advantages that the other states gain through that delegation process. And if so, I’m certain that we’ll be taking a look into the opportunities as well.

Schaftlein: I think that’s why it’s a pilot program; we’ll see how it goes over the next few years and when the next version of the U.S. Transportation Bill after SAFETEA-LU comes out we’ll start to see some language in there perhaps about even further delegation.

Kross: SAFETEA-LU II?

Schaftlein: Yeah. We have a phone call that’s come in from Doug Hagameyer from Austin, Texas. And I think he’d like to share some thoughts on design-build and some of his experiences. Doug? [SILENCE] Okay, we’ll come back to Doug. Dominique, I’ve kind of got a general question for you. We’ve got a lot of information to get out, a lot of rulemaking, a lot of guidance and a lot of money is on the line to get this information out
and get it applied to the projects. I was wondering if you had any suggestions and get it applied to the projects. I was wondering if you had any suggestions for outreach so that we can get the work out to local, state, federal resource agencies so they can come up to speed quickly and continue to work with us or comment on these provisions. Any suggestions?

Lueckenhoff: Well, I think the umbrella approach is always a good one, looking at our umbrella organizations that we work with. For example our AASHTO, ASWIPCA, which is the state water managers. We also have our overall state environmental ECOs as well as groups locally that actually are interested. I think I would probably start with the low-hanging fruit. That means there are folks that are ready to get to work and put these provisions to good use. And I think continuing to work with our networks of sister federal agencies as well as state environmental and DOT agencies to get the word out. But it will be sort of a nested approach of having them get the word out for us and then responding to those who have an interest.

Kross: Sheri, if I may add too, there are all those constituencies that are just touching this for the first time, just as we are at MODOT Division Office in Missouri and others. So once we get more of a handle on this thing I think it’s an advantageous thing to get in touch with planning partners, get in touch with other agencies, get in touch with even consultants doing work for DOTs or other agencies related to transportation and at least give them a short course in SAFETEA-LU and just what the requirements and what the flexibility is associated with that.

Schaftlein: We would also love to hear from the audience if they have suggestions about outreach and conferences and things like that so we can continue to get the word out.

Kross: There are a whole host of local planning opportunities that are available to. And if you can just tap into your planners and the resources that they have in terms of outreach that would be helpful as well.

Lueckenhoff: I’ll add that we don’t want to leave out the trade associations in industry. They’ve done a fantastic job as we’ve been working with them recently in a collaborative effort to get the word out to their constituencies.

Schaftlein: I have one question that came in that I think we can answer here, from Suraya Teeple at the Florida DOT. The question was, it was said that the Federal Highway Administration will have to respond to audits. And the question is “so who will conduct the audits of the state assumption of NEPA and what form will these audits take?” We haven’t determined that exactly yet but what we have been doing is meeting with—there’s a meeting coming
up in December with the five delegated states to start talking about this and get some ideas on what might work. But I would expect a mix of Federal Highway’s headquarters staff and division staff and those are some of the things that will get talked about in December when all of the states get together, I think, out in California to begin thinking about how will we actually be administering that. So when the rulemaking for the application comes out in April, is about the time we will also have the guidance that will be available for how we will be implementing all of this as well.

Kross: So do you foresee that as kind of a program review the way the FHWA will look at different elements of their programs?

Schaftlein: Yes, compliance with all of the aspects of NEPA.

Kross: Um-hmm.

Schaftlein: Okay, I think we’ve got Doug Hagameyer back online from Austin, Texas to share a couple of thoughts about design-build.

Hagameyer: Okay, glad to be back this time. Just from a perspective of a person involved with the management of the environmental side of design-build projects in Texas, I think I agreed with some comments earlier that the design-build process can certainly foster greater streamlining of the environmental process or the NEPA process. But I’d like to offer up to the panel a couple of quick questions about how we might see some programs evolve relative to how dynamic the system can be. In other words, when we have a reevaluation or a permit modification on larger project, we may actually in fact see that multiple times during the process if it’s a large enough project. And how would you guys see that playing out within terms of say, statute of limitations, agency oversight or need to review or approve those types of processes and/or is there really a mechanism here to make that system work faster.

Kross: We thought about that in Missouri and on one of our design-build that we’re doing NEPA work on now. And the aspect of that is we’re trying to look at kind of, I don’t want to use the term “worst case” because it doesn’t sound good, but just the aspect of looking at the broadest footprint of impacts that you might have and hope that you’ve got so much of that covered that if you permit for the worst case instance then you’re in a position to scale that back as you get into that detailed design further into that design-build process.

Hagameyer: Well certainly, if I can counter to that a little bit, the challenge is always that you want your FEIS to minimize impacts and so we are always balancing what we need to clear when we try to start those projects. But is there a way of streamlining or an advantage that we can adapt in the SAFETEA-LU environment?
Kross: Well, when I say worst case it would be with an aspect of trying to minimize things as much as possible but you don’t want to minimize it to the point where you constrain the builder and his costs skyrocket for the project. So I think that SAFETEA-LU provides that opportunity for flexibility as does the entire NEPA process to at least say, okay, if you’ve got this worst case and you can find that acceptable, as you modify things and scale it back, if you don’t exceed that footprint that you’ve covered or if you don’t exceed it in a way that has a significant impact on things, it may be that you don’t have to reopen your entire NEPA process, reset that entire clock for the 180-day statute of limitations.

Schaftlein: Dominique, any follow up? You have had some experience with design, build in Texas.

Lueckenhoff: Well, yes, in fact I was in Austin so it is nice to hear the call form Austin. I think that again it is having, providing the right information at the right time so that you don’t have to slow down in terms of the permit requirements. So I will go back and reiterate the importance of good, clear communication particularly with those resource regulatory agencies that are responsible for providing the permit and enabling them to get involved din the process so I think we have seen a lot of good examples of that in terms of design/build, making sure that their expectations are also clear, that we are communicating to you. Again, putting predictability, clarity and consistency in the process along with having the best information available throughout the stages and that is why I think also the provisions in terms of alignment of environmental and transportation plans supported through GIS, and we talked about systems approach is going to really enable this whole process, the projects that are nested within these areas.

Schaftlein: I’ve got about five questions here that I would like to share with studio in DC. But I will just ask them one at a time and then we will go to DC. For Carol Adkins, will Federal Highway administration require the states requesting delegation to have an environmental system in place?

Adkins: Our current thinking is that they are going to have some sort of system. Now whether you want to call it environmental management, but some accountability system in order to demonstrate that they are managing the environmental responsibilities that they are assigned and in an appropriate manner. But we really haven’t made any hard and fast conclusions in that regard right now.

Schaftlein: All right. A question, perhaps, for Lamar from Suraya Teeple, Florida DOT again is, right away acquisition effected in any way by the new design/build environmental provisions?
Smith: It doesn’t mention right away acquisition. There is some flexibility existing in our acquisition regulations, the at risk purchase using state funds, those are not changed. Nothing that frees up going out and allowing purchase of a right away using federal dollars prior to NEPA, no.

Schaftlein: Okay. We have got two questions on the delegated CEs. The first is from Wayne Kober. Will Federal Highways develop some templates for programmatic categorical exclusion agreements that the states are going to put in place to save the states from reinventing the wheel? And then the second one, Owen, I hope you can answer is, it was stated that the list of thresholds could be established to allow states to determine CEs. How would this differ from the existing programmatic agreements for states other than the states would assume the legal liability?

Lindauer: All right, let me take the second question first because I think that is the more straightforward one. The existing agreements, and there are many of them for delegation of basically administrative tasks related to categorical exclusions, those are administrative agreements. They allow the state DOTs to act on behalf of the Federal Highway Administration but the Federal Highway Administration to some, or to a large degree, still may need to approve certain things depending on the specific agreements in terms of decisions and certainly the Federal Highway Administration is still legally liable for the actions and decisions that are occurring under those NEPA processes. Whereas the delegation under section 6004 is assignments of responsibilities by the Federal Highway Administration and an assumption of those responsibilities by the state DOTs as such that the state DOTs are both responsible and liable for the decisions so there isn’t an administrative aspect there. The states are taking on the administrative responsibilities as well as the responsibilities and liabilities of those decisions and actions.

Now moving on to the first question about programmatic categorical exclusions, the section 6004 doesn’t actually talk about programmatic categorical exclusions in terms of what might be defined as a categorical exclusion other than activities that are specifically designated by, in the words of the act, the secretary. And so I can answer it only in a general sense in the sense that the actions or the activities that are agreed upon between the division, the Federal Highway division office and the state DOT with data of background information that supports the contention that those activities do not individually or cumulatively have a significant impact on the environment. Those are the ones that will end up occurring on this list of activities that could be subject to the assignment of responsibility under 6004.
Schaftlein: There are a couple questions I think that have come in regarding how are the federal resource agencies going to respond to this categorical exclusion, this delegation of authority? Alex Levy, from Arcadis Consultants, asks: “Since SAFETEA-LU allows Federal Highways to delegate CE oversight authority to state highway administrations what mechanism does Federal Highways envision using to ensure that it does not summarily convey its statutory authority for oversight in formal, federal interagency coordination under such laws as the endangered species act when the federal trust resources occur in conjunction with the categorically excluded projects?” And a second follow-up question that maybe Carol or Owen could answer, “what will you do if for example the US Fish & Wildlife Service says the state DOT is not capable of taking over NEPA?”

Lindauer: Well, let me take the second one. I think the second one had to do with what happens with a state if a situation where a state isn’t either prepared or comfortable or willing to take on some NEPA related responsibilities. Well, certainly the state is not obligated to take on those responsibilities according to the language of the section 6004. And the details of which responsibilities are assigned by the Federal Highway Administration and which ones are assumed are all spelled out in the memorandum of understanding. And the memorandum of understanding is a document that will be subject to public notice and comment so that there will be an opportunity for not just the public but other federal or state resource agencies to make comments regarding their own experiences or opinions about whether that is a good thing or a not so good thing. Let me see, the first question was over to me as well about whether or not the assignment of responsibilities to state DOTs or to the states, how would that bear on larger inter-federal agency consultations that the Federal Highway Administration normally has taken on, in the language of the act, section 6004, when responsibilities for determining categorical exclusions are assigned and other responsibilities related to those activities are assigned to a state, the state literally is to be considered to be a federal agency. Literally, they are standing in our shoes. And so it is our understanding that the state DOT would be recognized as if they were, or are, legally would be a federal agency for purposes of that delegation.

Adkins: And to answer the other aspect of the question, which would be what would we at Federal Highways do if the information that we received from a particular agency, was that they did not believe that a state was capable of undertaking particular responsibility and first of all we are hoping really hard that that doesn’t happen but if it does a couple of things. First of all I didn’t go into great detail in the application process but the
application must also be available for 30 days for public comment before it comes to us. So in addition to the agency comments that we’ll seek; we’ll also have public comments which should give us again a feel for how well this particular state is currently administering its responsibilities in the environmental arena. Certainly, as part of that consultation with the other agencies, we would probably want to know specifics. Why is it, what is it and certainly also the assignment—the pilot program can apply to one or more highway projects. So it is conceivable that perhaps on a particular project that the Federal Highways would agree with a particular agency that perhaps this is not a good candidate for assignment under this program. We aren’t required to accept all of the projects that the state applies to assume and we will be careful about how we delegate those responsibilities so I think it will be a process where we will talk and we will try to determine exactly what the area of weakness is and see if there is a containment strategy that can be applied and work from there.

Schaftlein: Thank you, Carol. That is all the questions that we have received for the second round of presentations so what I would like to spend some time in our next eight or so minutes we have before our break is to go back to a few of the questions on some of the first group of presentations we received and, Pam, I have a question that came in on 6002. We have gotten this question a number of times. What are the key differences between cooperating agencies and participating agencies?

Boling: Hi, Shari, it is Ted Boling. Pam is not with us, but I will take this one because we had at CEQ, a lot of, I would say it was an inordinate amount of our focus on the transportation bill focused exactly in on that issue because participating agencies are really sort of a new category. But the bill was amended to underscore that cooperating agency status which is enshrined in the CEQ regulations and has been the focus of CEQ guidance for many years now. It still exists. You can sort of draw concentric circles of involvement with the lead agency or the co-lead agencies at the center, cooperating agencies as those of you are familiar with, CEQ is a cooperating agency guidance know, are invested in the project usually bring their own resources, actually may assume assignments for part of the NEPA analysis and really ordinarily bring their own resources to the project although certainly under the highway provisions there are opportunities to share resources to facilitate that level of cooperation.

Participating agencies are on the periphery there. The participating agencies provision was designed to first of all sweep broadly to ensure that every agency that had in any way an interest was invited to participate in the process got in early and didn’t
necessarily have to adopt the mantle or the responsibilities of the cooperating agency but
had an early opportunity to get its involvement in the shaping of alternatives of purpose
in need and also with regard to federal agencies they are really required to kind of fish or
cut bait. I mean, there is a provision in there that says that you are a participating agency
unless you explicitly disavow.

And so while it is sort of this broad sweeping exercise is going to be somewhat
administratively challenging to manage because literally the agencies are going to have to
be contacted broadly as well as also make their involvement at that very early stage a
high quality involvement, ultimately we think it will help improve the program.

Schaftlein: Thank you, Ted. Lamar, we have got a question here under the 6009 provision. Under the
De Minimus determination for parks, etcetera, what does it mean that avoidance
minimization and mitigation or enhancement measures will be considered? And this
came in from Eddie Sutherland from the Hickson Company in Texas.

Smith: Essentially what that means is that you are not looking at only the effects. You are
looking at the effects in the context but you are looking at the effects at the end of the
day. And that includes what are the effects in consideration of any avoidance
minimization, mitigation or enhancement measures that included in the project to get
yourself to that point of making a de minimus determination. That particular language,
avoidance minimization, mitigation or enhancement comes right out of SAFETEA-LU
and section 4(f) language, as you know, is all possible planning minimized harm. So that
is the way that we are looking at the SAFETEA-LU avoidance minimization etcetera is
being, those things are all possible in planning and minimizing harm and the law, in the
conference report language made it clear that while the de minimus provision satisfied the
law in terms of alternatives, avoidance analysis, it did not satisfy the responsibility to
include all possible planning and minimized harm.

Schaftlein: One follow-up question, Lamar. What form of written concurrence does the state historic
preservation office need to provide to meet the de minimus provision? If they have
commented on the 106 process do they need to provide additional comment directly
related to the de minimus issue?

Smith: That is probably the toughest question you are going to ask me today because I don’t
know the answer to that. Honestly there is a—I don’t want to say that it is not close to a
resolution but this has been, I would say, the issue that has held us back from issuing
guidance. I don’t like to air laundry in this forum but here we are. There is a huge
difference of opinion on whether or not the SHPO concurrence in the 106 findings would
suffice and there is another faction that says no, the law is clear. The provision requires the concurrence of the SHPO in the *de minimus* determination even though the same thing, how you write that guidance and what you require and practice—it’s important to truly understand. So I am sorry but we will know soon.

Schaftlein: Okay, has Pam joined us at the table there?

M: She is not on this panel.

Schaftlein: Okay.

M: Answer 6002 questions.

Schaftlein: Here is a 6001 question, Carol, and we just got a minute here. There is a concern that the mitigation requirements will result in a lawsuit at the project level if proposed environmental mitigation is not consistent with the potential mitigation envisioned in the long-range plan and tips. What are your thoughts on that?

Adkins: I haven’t really thought about that to be quite honest. Ted, do you have any thoughts about how that would—I mean because a lot of what is on the plan is, it is the plan. It starts to progress and some things make it into the tip and some things just sort of stay on the plan. So I don’t think that from a legal perspective—I know that anything that is implemented has to come from a performing plan and tip, but as far as whether it was in the plan as proposed—you know, we talk in terms of potential mitigation activities I don’t think there is an expectation in the law that given a set of circumstances that then precludes those potential mitigation activities from actually happening considering that we have got a 20 year horizon that there is a legal concern there but I am not an attorney do I probably shouldn’t even be spouting off. But here is an attorney.

Boling: Well, I am an attorney but I am going to have to demure a little bit on this, too, because I think picking up on Carol’s answer to the question that came from Montana about the level of detail of those plans, and I think it really is a question of scale and scope and interpretation. I mean, certainly there are provisions in 6001 that explicitly and implicitly indicate that you are going to have consistency between projects and plans. But to what degree do we have consistency is going to have to recognize that the plans, particularly the long-range transportation plans are going to have a certain, pardon the expression, this granularity to them. There is sort of a coarse filter and project level will be more of a fine filter analysis and so while anyone could file a lawsuit, mind you, and I can’t say that no one would ever attempt to bring such a claim—I would expect that ultimately that would be decided on the basic principles of deference to agency expertise and then also
reasoned decision-making in the translation from a long-range core-scale plan down to
the more fine-scale implementation decisions made on a project level.

Schaftlein: Thanks, Ted. Appreciate the answer and we are going to take another 10 minute break
here and we will come back with Part III of the program.

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Schaftlein: Welcome back to part three of our program today. Now let’s turn our dialogue to the
implication of the new provisions and offer some insight and answers and answer some
questions about proactive and partnership efforts underway to implement the new law.
We have heard about all the rules. It is kind of time to look up now and think about what
do we want to see out on the ground out here as we implement SAFETEA-LU. So I
would like again, the audience to be thinking of some answers to a couple questions. Will
these provisions influence better outcomes for communities? Are there any partnerships
you would like to see improve to deliver a better product? We would like to hear your
thoughts and we will certainly get these up on the website as well.

For the folks here in Raleigh, a couple questions. Dominique, you just came off
launching the Green Highways Initiative last week at the University of Maryland for the
mid-Atlantic, quite a show; couple hundred people there. I think that is a great
opportunity for coordinating and developing partnerships and you could maybe comment
on how that might be helpful in implementing the SAFETEA-LU provisions.

Leuckenhoff: Yes, we were delighted with the attendance and the participation and in fact I think that I
would like to show that it was a public-private event and this is a public-private approach.
The Green Highways Initiative is actually a response. I think certainly starting with EPA
and other resource agencies—federal and state—to the excellent types of environmental
stewardship projects that we have seen come through our DOTs and Federal Highways
and we want to look at how we continue to enable those types of approaches. We are
looking at providing incentives. We are very focused on market-driven approaches. We
are seeing that certainly from the government end of things, declining resources so we are
all looking at ways to leverage those resources which means we want to leverage more
partnerships. We think that it is smart to actually have industry help come up with the
answers because, frankly, that is where the capacity is. So we think that SAFETEA-LU
again providing that flexibility, providing the cooperative research support, we are
looking at how we can leverage our resource dollars research dollars toward the same
ends. Focusing on environmental areas like storm water, innovative storm water management, watershed driven approaches so that there are multiple benefits, not just more effective storm water practices for transportation which are a little bit different than our traditional practices, transportation being linear versus site specific practices that we have pushed in the past, and working with our transportation partners along with industry to innovate.

We are also looking at the whole recycling area, recycling and reuse. How can we get more of these materials into smart highway construction, and then also ecosystem management and in conservation? I think we heard some of the opportunities there that are very well spelled out in SAFETEA-LU. So we are hoping that the models that we come up with can actually show how we can take advantage of the provisions, but also help to create some new technology that can be shared around the country.

Schaftlein: And I understand that there will probably be at TRB, this winter’s TRB meeting in DC, a session on the Green Highways so if folks can hear what occurred and what some of the next steps are. Is that right?

Leuckenhoff: Yes. In fact, Mark chairs that committee and I want to say thank you to Mark and some of the other folks on the committee for embracing this, participating with this and we are continuing to dialogue with all the stakeholders so we will share the outcome of the forum that we had at this TRB committee meeting as well as the next steps.

Kross: And that will be the full day Sunday before Monday’s sessions begin for TRB so it is a workshop all day on Sunday.

Schaftlein: Okay. Mark, a question for you. I would like to know as a chair of the TRB Environmental Analysis Transportation you have taken a look at some of the research provisions. I was wondering what you saw in there for environmental funding for questions we might have.

Kross: Well, there is $2.2 billion in research apparently associated with SAFETEA-LU. And of that there are certain sections that are more directed towards environmental research. One is section 5207 which is a surface transportation environmental cooperative research program. And that is $67.5 million over five years. So there is an opportunity there. I am not certain how that program is going to be set up. It is a cooperative indication associated with the title of that program and it may be that AASHTO, FHWA, and others will have a hand in seeing that develop. And then there is what is called F-SHRP or the Future Strategic Highway Research Program that has $205 million over the course of the full act and that is something that has always been a good opportunity for research.
questions that come up either in groups like the TRB committees or through state DOTs. So if there are environmental research questions out there that people have I would encourage you to work, even if you are not associated with a DOT, contact your state DOTs and just say here is a potential environmental research question that you have and those are always being worked on in terms of trying to find funding for those. They go through a process of election where all the state DOTs have a hand in saying whether or not certain research questions are priorities that they have and I think that the new SAFETEA-LU provides some interesting opportunities and actually some new programs as well associated with environmental research.

Schaftlein: And for the viewers we did post on the website all the line items dealing with research and available funding and we soon hope to have available for folks the Federal Highways contact for those research provisions that will have responsibility for implementing so you can get in touch with that person about research ideas and how the program is going to roll out in the near future.

Kross: There are other opportunities as well. University Transportation Research Centers are funded to the tune of $348.5 million over the life of the act. And groups such as CTE here are getting funds associated with things that can be rolled into environmental and transportation research as well. So there are opportunities like that and there are so many different research programs in this, I don’t know that the FHWA or also the research departments at DOTs have fully fathomed just what is out there and what the opportunities are.

Schaftlein: And, Dominique, I know the resource agencies don’t have really large research budgets but they do a lot of research and gather a lot of data. Are you seeing opportunities for how we might join our research dollars for some mutual benefit?

Leuckenhoff: Oh, definitely. And we are already having these discussions. And some of the areas that I mentioned earlier such as storm water. I think it is important to take advantage of the flexibility in the act and to look at what the win/win is in terms of these environmental areas as we identify our mutual priorities in research. So as we are looking at storm water innovation and investing in research we are sitting down side by side and leveraging our resources. Not only that, but we will both use the outputs versus a yours and mine approach. So we are excited about those types of opportunities. I think that we have to say we have done some of that in the past and we have continued to build a good relationship but I think that this is going to help move things farther along.
Schaftlein: I have been on several NCHRP panels and it has been really good when we get resource agency participation. If you can find the right folks around the country who have an expertise in an issue and make sure they’re involved in some of those panels and get a really good collaboration and discussion going on, and even in some of the decision that’s going on in picking research. For example on the 25/25 panel we have an EPA representative on the quick turnaround research and just brings a great wealth of perspective as the transportation folks where are the priorities for research.

And Mark, I understand that AASHTO is in the process of standing committee on environment, trying to look at, summarize the research that’s been done?

Kross: That’s right, Shari. There’s a lot of research that goes on that may be funded by the FHWA. State DOTs may be looking at individual research questions that they have. There may be research acts such as SAFETEA-LU. And just getting a handle on that research, what’s been doing, trying to access what our environmental research needs are is something that—I hate to call it a disconnect, but it seems like it’s hard to inform folks of what’s going on in research, so AASHTO is trying to do a research effort to find out what the research and what the implementation is and whether or not there are new research questions that need to be asked, and if it looks like there is a lot of research that’s been covered through former environmental research needs conferences that have been held by TRB among others that have involved agency’s representatives as well as DOT’s and others. This is going to help us get a handle on the next phase of research or the continuing phase of research that needs to be done to help transportation and the environment.

Schaftlein: We had a question that came in earlier related to this subject from Monique DiGiorgio, from the Southern Rockies Ecosystem Project in Colorado. Her concern was that the environmental stewardship funds allotted in the last transportation bill were instrumental in helping states and DOTs to fund research on important environmental issues such as wildlife linkages and wildlife crossings in Colorado. These funds are no longer in SAFETEA-LU. Is there another pot of money that will help states continue their work?

Kind of a follow up to this is, are they advance research funds in Section 5201 available for this kind of use, and if so what will be the criteria and disbursement procedure for these funds?

Kross: Well Shari, if I can handle that, I’m not familiar with 5201 in the advance research funds, so I can’t really address that aspect, but there are elements of 5207, 5210, as I mentioned previously, that have opportunities for studying research questions such as that, and
ecology and the environment is a big topic now, and I know that there is a task force that TRB has that involves of good biologists and others who are involved in ecology and transportation, and I know there’s a effort to actually bring that task force at TRB up to full committee status. It may be that they assume the mantle of being kind of the clearing house to direct research questions, et cetera, too. I don’t want to speak for Tom Lankis, who’s head of that task force, but there are opportunities out there, and I think until we get a really handle on what SAFETEA-LU has in terms of research we’ll hold that there are still opportunities available for the concerns that this individual has.

Schaftlein: So I would tell Monique to stand by as we kind of work our way through the research provisions and determine what the criteria and what funds are available, but that, you know, this seems like a very relevant topic that will compete well as our research funds become available.

I’d like to just take a minute on kind of follow up on the research, and a lot of questions have come up here with data, and let folks know that on December 8 and 9 in Washington DC, TRB hosting a two day work shop on the data implications in SAFETEA-LU, and there will be about 120 folks there talking about the various subject matters of SAFETEA-LU, one of them being environment and planning, where folks are looking at all the provisions and asking what are the data implications. Are there data requirements? Or are there expectations from Congress to implement some of these provisions that will require some data? So I think there’s about 40 folks coming to the environment and planning session to have a discussion about that, and those deliberations will be up on TRB’s website and there will be a presentation at the annual TRB meeting as well.

We—Federal Highways—and I think Dominique is going to be helping us, again, another TRB event to help with data issues, looking to host another environmental GIS peer exchange possibly next spring or summer. As you have seen what’s in these provisions, do you have suggestions of what we might we take—deal with at that peer exchange next summer that would be helpful for SAFETEA-LU?

Leuckenhoff: Well, actually I was just looking quickly at section 5207, which is this step, and one of the provisions in terms of cooperative research indicates—actually to develop indicators of environmental performance, I think that it’s going to be very important to talk about what conditions, what data is available to define conditions of the environment, and I think that it’s always important to get everybody together because we will only use the outputs if we’ve all agreed to the inputs, comparing the types of data that we have
available to us, I think continuing to pull in private sector relative to that information and identifying a core set of indicators.

Performance measures, actually, are becoming more and more important, certainly to us in government. Not only to measure to progress, but to report progress to our public, and that’s why I think this whole data arena and environmental assessment, using good information systems is going to become more and more of a priority in terms of how we work together.

Schaftlein: I think I’d like to involve the DC panel a bit. We’ve got several carry over questions from our first summary of all the provisions. And Pam, one that came in from Candace at Snohomish County Public Works, what are the requirements to publish a FONSI? What is the statute of limitations for lawsuits regarding a FONSI notice? Are these limitations stated in the notice?

Stephenson: Okay, let me go back and just sort of go over the statute of limitation provision one more time, or at least just get some key point in that. What is being the published in the Federal Register is a notice of the decision. It’s not the decision itself. So it would not—you would not see a FONSI published in the Federal Register notice to kick off that statute of limitation. However, what we’re telling people—and this is again—we’re working with Department of Justice and other agencies, but we’re telling our divisions and the state DOTs to really look at this and assess the need to publish a notice of the decision that’s been made on a transportation project to start that 180 day statute of limitation clock, because not every decision is really warrant that, so to really take it on a step by step basis.

So for example, an EIS project—you may want to for EIS just for your record of decision to put out that notice. You may want to for some permits, but not for all permits, for a 4(f)-4. You may want to for a—when you have a FONSI, but you may not. So it’s not automatic for every single environmental decision that’s made, for every transportation project.

Schaftlein: Okay a question on 6004 for Owen. Could you please elaborate on the process to include projects other than those on the C and D list in 771, and you might want to provide a little background for some of the viewers on that.

Lindauer: Okay, the 23-CFR, 771-117 C and D is the regulation regarding—the Federal Highways regulation—regarding categorical exclusions. 771-117 C is actually a list of activities that are categorically excluded. 771-117 section D actually has a list of examples of types of activities that could be determined to be categorical exclusions.
I think the question had to do with what happens if you got an activity that is on neither the C nor the D list. Could that activity be included as part of that assignment of responsibilities for determining categorical determinations under 6004? Our current thinking is yes, that is possible. In fact that’s an idea that’s sort of come out of practice. Many of the administrative categorical exclusion delegation agreements have lists of activities that are—actions that aren’t on either the C or the D lists, and the state DOTs have a lot of experience in doing environmental reviews of activities and they have a track record of data and documentation that show that there are activities that are neither individually or cumulatively responsible for impacts on the environment.

And so it is possible in the development of a memorandum of understanding for a division office in the Federal Highway Administration to work with their partners at the state department of transportation to identify activities that aren’t on the C or the D list that warrant listing and being included as activities that do not individually or cumulatively have an impact on the environment.

Schaftlein: Okay thank you, Owen. Mark, do you have a follow up?

Kross: Well, associated with that as well, some of us DOTs really are saying that the C and the D lists we’re comfortable with and we work well with our FHWA division offices on those. So adding additional CEs may open up that whole process, and at least that I would have a concern that some of the flexibility that we have now related to categorical exclusions may be compromised or we may lose that. So I guess I would look to the D list and say there is flexibility associated with that D list to actually include other projects, but not have them listed specifically as CEs, but have the division offices say, “Yeah, it’s obvious that there is no significant environmental impact associated with this action,” and do that open ended CE process associated with that.

There was also a comment about thresholds associated with CE determination, and here again I’m looking at flexibility and I’m thinking if we start identifying thresholds for CEs that we’ll run into problems associated with having to live up to what a state like New Jersey has to do out in Missouri, and there’s a concern associated with that. So instead of setting a threshold limit wherein you either have a CE or you don’t, I guess I’m not looking favorable upon that and I’ll look to that word, flexibility, in the title of the act to say let’s keep that flexibility out there so that the states in the Midwest don’t have to live with what’s happening on either coast for example.
Schaftlein: I’ve got a few more questions here on 6001, and this question really gets I think the hand-off, Pam and Carol, between 6001 and 6002, the linking planning in NEPA, a discussion that we’ve been promoting and encouraging.

From Ernie Combs at the Washington State DOT, he asks will there be a requirement to capture the 6001 efforts within EA’s NEISs. Carol?

Stephenson: I’m assuming—I guess what’s not asked, or what the question wants to continue, that to be able to use the decisions of the products that come out of your planning process in your NEPA decision making process, just to sort of carry that thought through. Even now with your—under NEPA—that you would need to incorporate decisions or incorporate documents by reference, and we would assume that same kind of incorporation by reference would be documented and shown in your NEPA documents.

Adkins: I concur with you, Pam. I mean I don’t think that in terms of a requirement to somehow exert what’s in the plan—I mean I think if it’s done well and it’s something that really has some baring on our decision making when we get to project development, then certainly, if not requirement, it’s just a very prudent thing to do.

Boling: Yes, it makes sense. It’s a requirement of logic and reason decision making to show. And in particular, you know, the 6001 process ideally will result in a body of information that helps particularly with EA FONSI context, to help support findings of no significant impact, because you’re incorporating by reference, building off the broader landscape level experience and providing a better reason for that finding of no significant impact. I mean if you weren’t using that products of the transportation exercise, first of all you’re missing an opportunity to use a resource, but then also you’re just leaving the decision hanging on a sort of ad hock, fact specific, case specific judgment. So it’s a requirement with a small “r”, a requirement of logic.

Boling: I would agree. I was disappointed, a little disappointed that the law didn’t call it out explicitly. I guess for me I would have—that would have put the questions to bed forever, but you know it’s inherently there. It’s a transportation decision making process yielding plans, and if you don’t utilize the work that has gone into that planned development, and especially now with the linkage of economic development and land use and considering other plans, conservation plans and then mitigation, I think it would just be an absolutely wasted effort if you didn’t take advantage of that in NEPA.

Adkins: Exactly.

Schaftlein: Mark? You had a comment?
Kross: I guess I’d like to consider it as a seamless process wherein you build off those planning studies that you have and you help focus your alternatives, your options, your purpose and need on something that would help to minimize impacts to environmental constraints that you may identify in the planning phase. So at least for me I would see just building on what you’ve gotten broader and more focused as you work through the process of 6001 to 6002.

Leuckenhoff: I’ll have to add one more word here because my resource colleagues will give me a hard time, but it’s avoid first then minimize, and I think that’s the advantage of having plans in data layers, so that DOTs can do the kind of overlays and clearly demonstrate how there’s been avoidance first, then minimization before mitigation.

Schaftlein: Something that’s perplexing to Dick Turner, from the Montana DOT, was since section 135 U.S. code does not require states to develop project specific statewide plans, and most states do not develop statewide plans, how do you envision that Federal Highways will interpret this requirement during the rule making process for states with policy plans? Carol, I know that question has come up a bit. Do you want to take that?

Adkins: You mean in terms of the level of detail that goes into defining the mitigation aspects? Is that—

Schaftlein: Yeah, comparing plans and doing the mitigation conversation, yeah.

Adkins: Well, I mean I think, again, it’s a transportation plan that is done on a policy basis. I would say that the plans that you have available, you would be looking for some balance in terms of what you’ve got in your transportation plan and looking at what then there is in other plans that you might be able to overlay and determine, you know, where are the resources? I mean even if we talk in terms of policies, the transportation plan doesn’t start on a fresh sheet of paper every time we update it. We know it’s in previous plans. We know it’s coming through the pipeline, and so I think that we have to look at the other plans in terms of what we already know is progressing through that plan.

Schaftlein: A couple more questions that kind of follow the same thinking. This one is from Michelle Suverkubbe from H.W. Lockner in Virginia. How can mitigation activities be defined in the comprehensive long range plan when the environmental impacts reach project would not be known at that time? And then kind of the question, what was the reasoning for making this change in the process? And I think the reason for it was folks thought that with the GIS data and the layers that we’ve got, that we’ve got the capacity to start doing coordinated planning. I think, Carol, the coordinated planning work you’ve done on the executive order on streamlining speaks to that. Your thoughts?
Adkins: Definitely, I mean I can’t tell you exactly why it was put in SAFETEA-LU, but I think just in working for the last two years on the integrated planning work group under the executive order on 13274, you know it just seems that the stars aligning. I think Dominique may have used that expression, but I think there are just a lot of folks who were frustrated on a number of different levels. I mean we have transportation improvements that we need to happen. We also have resources that need to be protected. We have agencies doing plan A on transportation and another one doing the watershed plan, and yet maybe another one doing a wildlife plan. But nobody’s talking effectively to each other, so I really believe that this was the first overture of, let’s sit down and talk. Let’s see what’s on the board here and let’s see—are there some ways that we can realize multiple goals by doing a better job of looking at the different resources and needs early on. That’s my take on how that happened.

Stephenson: And some of the local governments are doing that right now. We had Riverside County doing that with their CTAP program as well as some of the other counties in California. So it’s an idea that’s out there and its time has come.

Boling: And it’s not just a Southern California kind of thing. Actually one of the best examples that we’ve seen has come out of Montana, where they’ve done some planning and they actually helped knit together the mitigation to correspond with the needs with wildlife migration corridors in a logical way. That was in a sort of—you know—an I-93 specific context. The overlay of maps on migration corridors as well as the need for transportation improvements, that’s sort of the model there. I mean it’s yet—certainly we could envision this as an endlessly frustrating exercise of—you know—well we need more detail, but as—once again, to use the ecological brochure, what we envision here is really a continuous cycle of improvement as we’re moving along.

Adkins: And just to address the first question that had to do with how do you know what the impacts are until you’ve done the environmental analysis—well, part of the way of knowing what the impacts might be is by looking at those plans, looking at the inventory, seeing where the resources are. Talk to the people who know where the resources are. You may not be able to, and you won’t be able to, get it down to it’s going to be .732 acres of impact. Nobody’s expecting that, but certainly if you have some very sensitive watershed or something and you know you’re going to be crossing it, you can get within a ball park of what those impacts are going to be, and I think that’s really the kind of assessment that’s being looked at.
Boling: Yeah, the example that springs to mind for me is the Oregon Bridges Projects, where at a programmatic level they knew that they had had a certain number that bridges that would need replacement. They also knew that they were going to have stream crossing issues that intersected with threatening endangered salmon issues, and as well as also bull trout and other threatened an endangered species, and basically the developed a programmatic approach that had a certain level of site specific, you know, planned-do check act, and particularly corrective action, to deal with the fact that you know you’re going to have new information. So let’s plan for new information. Plan for how we’re going to respond to it, and not just do a sort of worse case analysis and leave that at that, but plan for environmental improvement as we’re moving forward.

Schaftlein: Okay. I think Mark; do you have some follow up?

Kross: Right, one of the aspects of this, again, is the discussion of mitigation in the planning phase and it’s not identification to mitigation, it’s mitigation options that you may have. And I just have to keep emphasizing that SAFETEA-LU is not saying you have to mitigate at the planning phase, and I guess when I first became aware of the integration of plans, transportation plans with historic preservation plans, et cetera, was at an AASHTO SRI foundation workshop in New Mexico in February of 2004 where we were talking about trying to work to involve out planning partners that have whole host of different plans that are regional plans, maybe even historic reservation plans, without any integration of those plans with transportation planning and what transportation planning could do to benefit from tapping into these things as well as the other plans tapping into the transportation plans. As long as we’re not talking, we lose that opportunity to build on a lot of work that’s already been done. So I just have to emphasize first of all that I think that was the reasoning that probably played into consideration of planning studies for transportation related to other topical areas, and then the aspect of mitigation, and I keep wanting to emphasize this because I keep hearing mitigation at planning, and we’re talking about options associated with mitigation.

Schaftlein: Okay, Lamar a question for that you came in from George Gefrich, from the Tran System Corporation in Massachusetts. Will FHWA reissue the technical advisory relative to these NEPA changes?

Smith: I’m sorry if I’m laughing. Whatever I say will be wrong. I have full confidence that we’re going to be able issue a new revised, updated technical advisory, but I have to ask, what’s wrong with ours? It’s only 14 years old. [LAUGHTER]
Anyway, I’m sorry. I’m joking. Yes, we are thinking about it. We tried—if you remember back in 2000 when we were—the last attempt to update our NEPA regulations and a number of different things happened. The regulations were never finalized, and with that went the revision to the technical advisor for a number of different reasons, but it’s on our to-do list.

Schaftlein: I’ll give you an easier one now as a follow-up, Lamar. This came from Chris Anderson, from the New York State Department of Transportation, and the question is, is farmland included under 4(f), or will that fall upon the states to handle?

Smith: Well, farms in and of themselves are not considered to be section 4F resources. The condition for a farm or farmland to be a section 4F would be a historic farmland, so whatever is required by the farmland protection act or the state farmland protection regulations would need to be complied with, but unless it’s a historic farm, then section 4(f) would not offer any protections for it.

Schaftlein: Dominique, we’ve wanted to talk a little bit about opportunities for partnering compliance, kind of the forward looking working with SAFETEA-LU. You would like to talk a little bit about the EMS program and what EPA is doing and how that might coordinate with SAFETEA-LU requirements?

Leuckenhoff: Well, I know we’re running out of time so I want to sort of get to the bottom of it. I do want to put in a plug for EMS. There was an earlier discussion centered around NEPA delegation and audits from Federal Highways, and EPA has some experience in terms of delegation of our environmental laws and statutes to our state environmental departments, and we’re now really pushing EMS as our systems approaches, because given the complexities of the business that these organizations do and certainly DOTs, it’s easier to audit and come up with check lists to audit the system versus trying to inspect and look at every widget in that operation. So that’s just a plug for you to consider that and we continue to offer our help, our experience in the area of EMS. I think that it also helps to incorporate a lot of aspects of doing business. So I just wanted to put a quick plug in for that.

Schaftlein: Well, I hope we get some more comments from the audience on some of the proactive things and we can get those up on the website. I’d like to take just a couple of minutes to wrap up and follow up with one of the questions that came in the wrap up. I think we’ve met our goals today to orient folks to the provisions, of new environmental provisions and looked at a few proactive and partnership opportunities.
So let me recap what the next admin steps are. Amy Phillips, from BNA, who produces the environment and transportation weekly, wanted the panelists to comment an anticipated timeframe for guidance and regulations on each of the provisions addressed today. And what I thought we could do—I’ve got some notes—but what I thought we could do was just go to the DC studio and they could give their one sentence, two sentence clear next step time frame guess-timate, and we’ll just go across from left to right with folks that are there to cover the provisions that we’ve talked about today, if the DC folks would not mind doing that, and then I’ll wrap up from there.

So, Carol, with 6001.

Adkins: Okay, well my understanding that the MPRM for 6001 is due to be out in spring. I know that planning section and Federal Highways is working very hard on writing it right now. I believe they’re on schedule. I’m not sure when the final rule is expected to be issued.

While I’m here I may as well just talk about 6005. Six thousand five has a window of 270 days to issue the regulations for the application for participation in the pilot program. We are expecting to have an MPRM out hopefully in early December, and right now we are on target for a mid-May 2006 final rule. Owen?

Lindauer: Okay, 6004 is—our work group has prepared graph to guidance and a template MOU based on our meetings with AASHTO and other federal resource agencies. We know there is great interest in both the guidance and the template MOU. The current plan in terms of schedule of releasing that is some time next month. I’m working now, trying to work in a review option perhaps by some state DOTs or AASHTO and some resources agencies of the template MOU and guidance. I know that resource agencies have expressed a desire to look at that before it sort of comes out, and so I’m working towards having that event occur as sort of allowing a little sort of sneak of a peek at what we’re working at, so I haven’t actually gotten the full okey-dokey to proceed that way, but that’s where we’re headed. Over to you, then, Mark.

Kross: Three things I’ll start with for F, September the second, and the agency’s interim guidance. We allowed for the de minimus findings be made on 106 properties; that’s about all we said. We are working toward issuing guidance very soon. The emporium is being prepared on feasible and prudent, MPRM is being prepared on the design build and the ideas everything is on our schedule.

Schaftlein: Quickly, from the last two persons.

Stephenson: Okay, 6002, we’re going really two tracks. Everyone is anxious to start with the statute of limitations; that guidance will be going out first. As I mentioned earlier we have
coordinated that with agencies, as well as with our team, the Federal Highways Team, and we anticipate that should be coming out very quickly in the next couple of weeks. As far as 6002 is the review process, our target date is having some by the end of this year.

Naber: And finally for 6007 there was no rule-making required, as you know. We do have draft guidance prepared and once that is approved at headquarters, we anticipate that that will be widely available within the next several weeks, we hope, and that will explain exactly how we’re going to go about identifying the exceptions to the exemption.

Schaftlein: Thank you very much. I hope everyone keeps an eye on the Federal Highways web pages, these announcements in the dockets where all the input can be made public. We’ve been using a search service to scan all the web pages and news article on environment and SAFETEA-LU. There is just a growing wealth of information now, what NGOs association and consulting firms are gathering and putting out on SAFETEA-LU so I encourage you to take a look at that, and we’re also looking at the workshops and speaking engagements across the country where folks have SAFETEA-LU topics on the agenda and we’ll be posting that information up perhaps on our Reneva web site so that folks can continue to find venues near them to come up to speed with SAFETEA-LU.

So to close, I would like to offer thanks to all of the panelists, to the Federal Highways panel, it is a pleasure and joy to work with such a professional group of people, and to our panelists here in Raleigh, I hope that your leadership and influence is widespread; we will be able to deliver environmental stewardship and environmental review processes, improved ones, with your help. Thank you all very much.

McDermott: Well, thank you, Shari, and on behalf of CTE, thanks again to all of our panelists, and thank you especially for participating in today’s program. Federal Highways and Federal Transit Administration helped co-produce this program with CTE and we appreciate their support. Also I’d like to acknowledge the many downlink sites across the country that tuned in today including EPA’s Air Pollution Distance Learning Network. I must also recognize the efforts of the Agency for Public Telecommunications, the UNC Center for Public Television, North Carolina State University Video Communications Services and East Bay Media, all of whom made possible today’s live broadcast and web simulcast, and special thanks as well to Reuters Television for providing the remote link from Washington DC.

Just a few reminders before we leave you. You can continue today’s discussion on the SAFETEA-LU environmental provisions in CTE’s “After-the-Program” discussion forum. We hope you’ll take advantage of this opportunity. Your comments
can help shape future guidance and proposed rule-making that’s related to some of the SAFETEA-LU provisions discussed today. The web discussion forum will start at 4:00 Eastern Standard Time and remain active for two weeks. DVDs or written transcripts of today’s broadcast are also available as well from CTE’s website, and you can replay this program in its entirety from CTE’s webcast archive. And please don’t forget to turn in your evaluation from before you leave today, or if you are participating via the web you can complete the online evaluation form on CTE’s website.

We invite to regularly visit our website and check our newsletter for more information on the teleconferences developed through the year. This is our final program for 2005. When we return next spring we will have special programs on the SAFETEA-LU planning and environmental provisions as well as on new topics including bicycle and pedestrian issues and Federal Highways’ recent scan tour on successful wetland mitigation programs.

That’s our program for today. Thank you for being with us, and until next time, good day again from Raleigh, NC.

[END OF RECORDING]