

Finally, it seems clear from the comments received that several parties are concerned about and wish to discuss and resolve a number of substantive issues relating to this program. While this is an important matter, these are procedural guidelines and thus not the appropriate forum for the resolution of such substantive rather than procedural issues. The Department's policies on substantive issues are generally addressed through certifications and are discussed in the Department's determination letters.

II. Summary and Discussion of the Comments

Twenty comments were submitted and considered, including one from a private individual.

Two comments were received from the following public transit authorities and planning organizations:

- Northern Illinois Regional Transportation Authority
- Metropolitan Transit Commission, Oakland, CA

Twelve comments were received from the following public transit providers:

- Central Arkansas Transit Authority
- New York City Department of Transportation
- Metropolitan Transit Authority, New York, NY
- Triangle Transit Authority, Research Triangle Park, NC
- Public Works Office/Transit, Johnson County KS
- StarTran, Lincoln, NE
- Washington Metropolitan Area Transit Authority
- Los Angeles County Metropolitan Transit Authority
- Regional Transportation Commission, Clark County, NV
- New Jersey Transit Corporation
- North County Transit District, Oceanside, CA
- Metropolitan Atlanta Rapid Transit Authority

One comment was received from a state department of transportation:

- State of Michigan, Department of Transportation

Three labor organizations provided comments:

- Amalgamated Transit Union
- Transportation Trades Department, AFL-CIO
- Transport Workers Union of America

Finally, one public transit association provided comments:

- American Public Transit Association

The Department has carefully reviewed and considered all of the comments in developing these guidelines. The following provides a

summary of the comments and the Department's response.

A. Definition of "Irreparable Harm"

One comment indicated that the safeguard against irreparable harm to employees in § 215.3(d)(8) pending completion of the special dispute resolution process is an essential protection which should be included in the guidelines. Others, however, suggested that the language concerning irreparable harm would add a new substantive protection under section 5333(b), which they view as providing a "remedial scheme to provide compensation" when employees are affected by a project.

Section 5333(b), requires more than providing compensation for impacts upon employees. It is also intended to minimize the impact of Federal projects on employees. The restriction against causing "irreparable harm" in § 215.3(d)(8), however, is limited solely to any action which would "result in irreparable harm to employees *if such action concerns matters subject to the steps set forth in paragraph (e) of this section.*" (Emphasis added.) In specifying that no action may be taken which would result in irreparable harm, the Department intends for the recipient of funds to be able to take any necessary action that will not irreparably harm employees while allowing a project to move forward. The minimal restriction would remain in effect only until final terms and conditions are determined and certified.

B. Definition of "Material Effect"

The § 215.3(b)(1) provision with respect to "material effect" states that the procedural requirements of § 215.3(b)(2) through § 215.3(h) will not apply "absent a potentially material effect on employees." One comment indicated that the phrase "material effect on employees" should be limited in its scope to material adverse effects on employees so that if a project for routine replacement of equipment and/or facilities of like kind and character has a positive effect on employees, no referral would be required. Impacts, however, may be viewed by some individuals as positive while others view the same effect as contrary to their interests. Therefore, no adjustment need be made to accommodate this concern.

One comment noted that "[i]t is not clear whether the substantive determination of materiality (material effect on employees) is to be a subjective judgment of the Department or a legal determination based on specific standards or precedents." The Department, however, will consult with

FTA, where necessary, and will determine which projects have a "potentially material effect on employees" based on available applicable precedent and policy.

C. Definition of the Phrase "Where Circumstances So Warrant"

Several comments were made indicating that the phrase "where circumstances so warrant" in § 215.3(h) enables the Department to retain the right to withhold certification at its discretion. One saw this as an expansion of the language of the law which would give the Department "veto authority over the release of grant funds." The Department intends the phrase "where circumstances so warrant" to mean that certification will not be issued where circumstances inconsistent with the statute prevent the Department from certifying. For instance, in a situation involving the Metropolitan Atlanta Rapid Transit Authority (MARTA) in Georgia, the Department was unable to certify grants for a short time because state law prohibited MARTA from providing the requisite protections. Accordingly, given that at least one comment indicated this is an expansion of the current law, the Department will clarify the intent of this language by amending § 215.3(h) of the guidelines to read: "Notwithstanding the foregoing, the Department retains the right to withhold certification where circumstances inconsistent with the statute so warrant until such circumstances have been resolved."

D. Definition of "Sufficient" as Applied to Objections to Certification

In § 215.3(d)(2)(i), the guidelines provide that the Department will "determine whether the objections raised are sufficient" when one party objects to terms and conditions proposed by the Department as the basis for certification of a project. In § 215.3(d)(3), the guidelines set forth the criteria which the Department will consider in determining whether an objection will be considered sufficient.

Comments indicated concern that the transit agencies would not be given the same opportunity as would be provided to the employees to object to the referred terms and conditions, citing as an example where it believed that existing protections include provisions that are no longer legally required or that are burdensome. Such objections, if raised by the transit agencies, would require the Department to make a determination as to whether they are sufficient. The definition does not favor either party over the other.