IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-16586
Consolidated with No. 16-16605

PROTECTING ARIZONA'S RESOURCES AND CHILDREN, et al.,
Plaintiffs-Appellants,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.,
Defendants-Appellees.

GILA RIVER INDIAN COMMUNITY,
Plaintiff-Appellant,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona
Case No. 2:15-cv-00893-DJH (Lead Case)
Consolidated with
No. 2:15-cv-01219-PHX-DJH

STATE DEFENDANTS-APPELLEES' CONSOLIDATED BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, State Defendants-Appellees hereby certify that none of them has a parent corporation and that none of them has issued stock of which 10% or more is owned by a publicly held Corporation.

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ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
ADOT	Arizona Department of Transportation
Agencies	Federal Highway Administration and the Arizona Department of Transportation
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
FEIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
Gila River Community or Community	Gila River Indian Community
National Air Standards	National Ambient Air Quality Standards
NEPA	National Environmental Protection Act
PARC	Protecting Arizona's Resources and Children
Project	South Mountain Freeway Corridor/Loop 202
ROD	Record of Decision
Transportation Plan	Regional Transportation Plan and Regional Transportation Improvement Program

INTRODUCTION.

The South Mountain Freeway Corridor/Loop 202 ("Project") south of Phoenix, Arizona is critical to the state-federal regional strategy to address severe traffic congestion, the need for an east-west alternative to I-10 in Phoenix, and compliance with the Federal Clean Air Act. The Project is the product of a ***14-year*** comprehensive environmental analysis, and it is the policy choice of ***all*** state and federal transportation and planning agencies involved. Plaintiffs-Appellants[1] disagree with this policy choice. But disagreement over policy is not a valid ground for invalidating the approval of the Project.

Appellants have the burden to demonstrate, on the basis of the record ***as a whole,*** that the Federal Highway Administration ("FHWA") acted arbitrarily and capriciously. Appellants cannot satisfy their burden. They cite to snippets of the voluminous record, and distort and mischaracterize the record. This necessitates that Appellees provide the Court with extensive citations to the record evidence and large Supplemental Excerpts of Record. The ***whole*** record demonstrates that FHWA and the Arizona Department of Transportation ("ADOT") (collectively, "Agencies") rigorously adhered to the procedures required by federal law, and that the Agencies' findings are not arbitrary and capricious under the applicable

[1] Protecting Arizona's Resources and Children, et al. ("PARC") and the Gila River Indian Community ("Gila River Community" or "Community").

standard of review. *Lands Council v. McNair* ("*Lands Council*"), 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*).

JURISDICTIONAL STATEMENT.

Appellants PARC and Gila River Community challenged a final agency action reviewable under the Administrative Procedure Act (5 U.S.C. § 704). This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES STATEMENT.

I. May the approved federal-state Regional Transportation Plan inform the Project's purpose and need and the range of alternatives evaluated in the environmental impact statement ("EIS")?

II. Was the Agencies' evaluation of the environmental impacts of the Project arbitrary and capricious?

III. Were the Agencies' findings under 49 U.S.C. section 303 arbitrary and capricious?

ADDENDUM.

Pursuant to Ninth Circuit Rule 28-2.7, the pertinent statutes and regulations are included in an addendum to this brief.

STATEMENT OF FACTS/STATEMENT OF THE CASE.

I. Project History.

A. The Regional Transportation Planning Process.

The Project originates from the long range regional transportation plan approved by the state-federal Metropolitan Planning Organization for the Phoenix Metropolitan Region.[2] The regional transportation plan governs all major transportation decisions. It informs the scope of the environmental analysis for individual transportation projects.[3] 23 U.S.C. § 139(f)(3); *see HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1231 ("*HonoluluTraffic.com*") (9th Cir. 2014). Federal law requires Metropolitan Planning Organizations to develop and periodically update regional transportation plans to address regional mobility needs and to conform to regional plans for compliance with the Clean Air Act. 23 U.S.C. § 134(i)(1)(B); 42 U.S.C. § 7506(c)(2); 40 C.F.R. § 93.115(a); 23 C.F.R. § 450.324.

Planning for the Project began in the late 1980s as part of the regional transportation planning process. 4SER000699; 7SER001191-492.[4] Over time various studies and evaluations of possible alternative designs of the Project have

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[2] Here, the Maricopa Association of Governments, a regional planning agency that includes local governmental entities in Maricopa County, including the Gila River Community. 7SER001206.

[3] 23 U.S.C. § 134(k)(4); 23 C.F.R. § 450.318.

[4] The Appellees' Supplemental Excerpts of Record are cited as [vol.]SER[page]. Citations to the Gila River Community's Excerpts appear as [vol.]GRICER[page].

been examined. *Id.* The Phoenix Metropolitan Planning Organization approved regular updates for the regional transportation plan. 4SER000699. The current regional transportation plan was updated in 2014. 4SER000700.[5]

B. Required Linkage Between Regional Transportation Plans and Project Environmental Analysis.

Federal law links environmental analysis for individual transportation projects to the policies and decisions reflected in the regional transportation and air quality planning processes.[6] As a result, the approved Transportation Plan necessarily informs the NEPA analysis for individual projects. *See* 23 U.S.C. §§ 134(o), 135(g)(5), 139(f)(3); 49 U.S.C. § 5303(j)(3)(A).

Individual transportation projects must come from a regional transportation plan and must conform to the State's air quality implementation plan. 23 U.S.C. § 134(k)(4); 42 U.S.C. § 7506(c)(1), (c)(2)(D). Individual projects that conform to a State air quality implementation plan (1) must be included in a regional transportation plan and transportation improvement program that comply with federal Clean Air Act limitations on mobile source emissions, and (2) must generally retain the same concept and scope as the project described in the Transportation Plan. 42 U.S.C. § 7506(c)(2)(C); 40 C.F.R. § 93.110(a)-(b).

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[5] Full copies of relevant transportation plans and studies are available at FAR00021784-25990.

[6] 23 U.S.C. §§ 134, 135, 139(f), 168, amended by Pub. L. No. 114-94, 129 Stat. 1312 (Dec. 4, 2015); 42 U.S.C. § 7506(c)(2); 23 C.F.R. § 450.318; 23 C.F.R. pt. 450, app. A.

FHWA regulations expressly link the regional transportation planning process with the NEPA analysis of individual projects. 23 C.F.R. § 450.318; 23 C.F.R. pt. 450, app. A[7]; *see also HonoluluTraffic.com*, 742 F.3d at 1231. Under these regulations, the NEPA analysis for a project may use the regional transportation plan to shape the purpose and need for a specific project and the range of alternatives. 23 C.F.R. § 450.318(a), (b)*; HonoluluTraffic.com*, 742 F.3d at 1231. As FHWA explained:

> There are two ways in which the transportation process can begin limiting the alternative solutions to be evaluated during the NEPA process: (a) [s]haping the purpose and need for the project; or (b) evaluating alternatives during planning studies and eliminating some of the alternatives from detailed study in the NEPA process prior to its start.

23 C.F.R. pt. 450, app. A at ¶ 11. The Agencies followed this authorized path in their environmental analysis of the Project.

The Project is included in the Metropolitan Phoenix Regional Transportation Plan and the Transportation Improvement Program (collectively, "Transportation Plan"). The Transportation Plan conforms to Arizona's Clean Air Act implementation plans approved by the U.S. Environmental Protection Agency ("EPA"). 8SER001363-64.

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[7] References to 23 C.F.R. part 450 refer to the version in 72 Fed. Reg. 7274 (Feb. 14, 2007), which was subsequently amended in 2016, which was after the date of the Record of Decision.

II. The Project NEPA Process.

A. The Project Scoping Process.

FHWA began preparing an EIS in 2001. 66 Fed. Reg. 20,345 (Apr. 20, 2001). The Agencies invited 232 federal, state and local agencies, and other stakeholders to participate in the scoping of the Project analysis, with ***95*** agencies and interested parties participating in the scoping process (including the Gila River Community, and several members of PARC). 4SER000732; 9SER001513.

The Agencies conducted hundreds of scoping and other meetings to obtain the public's input on the Project. 9SER001513-38. As part of the scoping process, the Agencies formed a Citizens Advisory Team (including members of the PARC Plaintiffs) to provide input during the scoping and preparation of the EIS. The Citizens Advisory Team met on 60 occasions over twelve years. 9SER001518-21.

B. The Alternatives Screening Analysis.

The Agencies evaluated numerous alternatives to address the Project's purpose and need, including both different transportation modes (e.g., highways, transit) and eight separate alignment alternatives. 3GRICER221-25; 7SER001220-44. The Agencies evaluated additional alternatives outside of the Study Area during the alternatives screening process. 3GRICER227; 7SER001224-26. Throughout the scoping process, there were numerous public meetings, presentations, and informal coordination meetings, as well as regular meetings of the Citizens Advisory Team to advise the Agencies on community concerns.

9SER001517-21. The Agencies responded to comments submitted throughout the extensive scoping process. 19SER003473-3536; 5GRICER107-120.

As requested by members of the Citizens Advisory Team, the alternatives identified during the scoping process included an alternative alignment on the Gila River Community's land. 7SER001241-42. The Community however, voted to oppose any alignment on its land (and any study of such an alternative). 3GRICER244; 7SER001177; 9SER001497; 22SER004276; 27SER005359-60.

The Agencies then identified ***five alternatives***, as well as a No Action Alternative for additional study in the Draft EIS. 4GRICER014-22. The following graphics show the alignments studied during the scoping process. 7SER001224

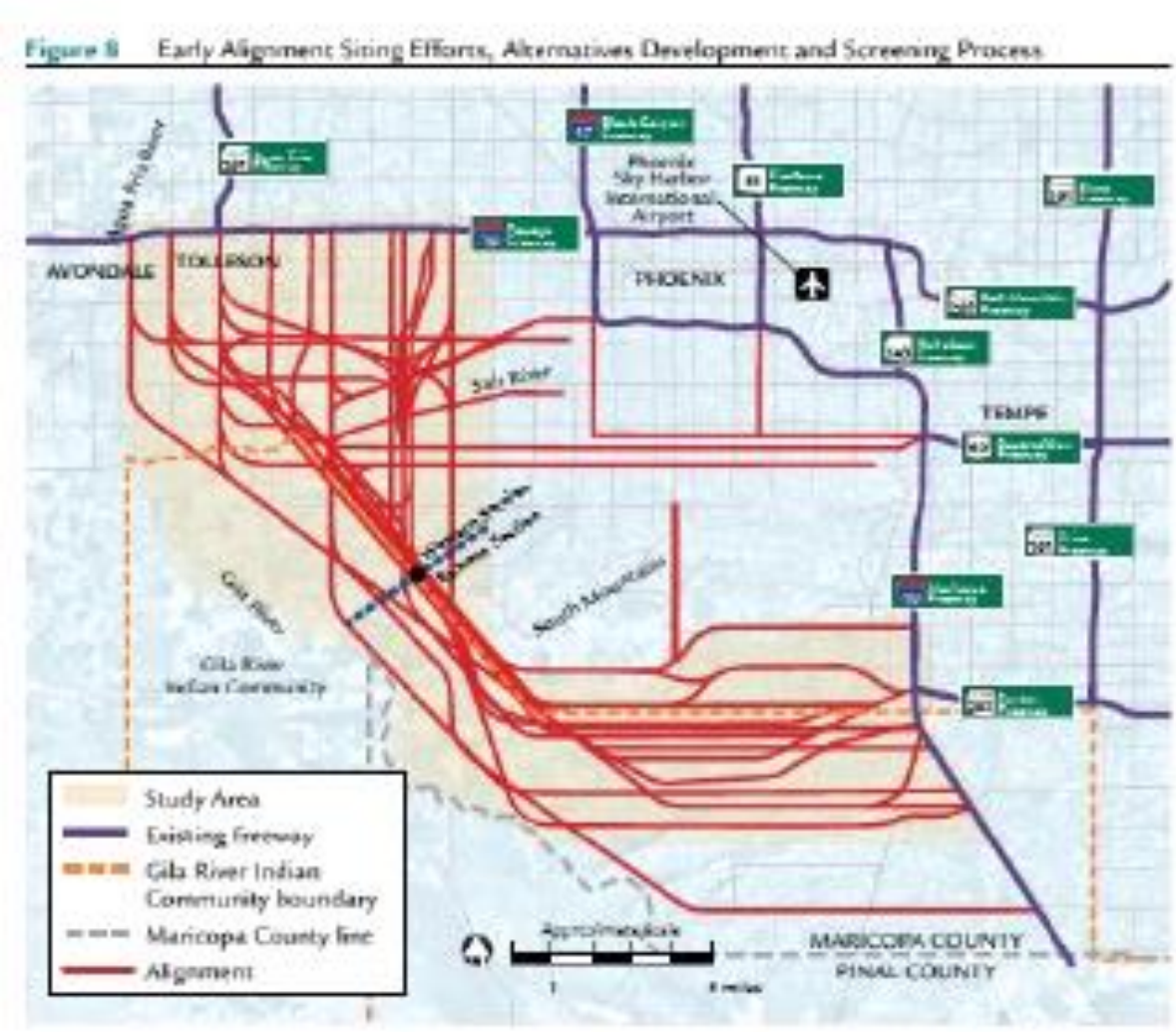


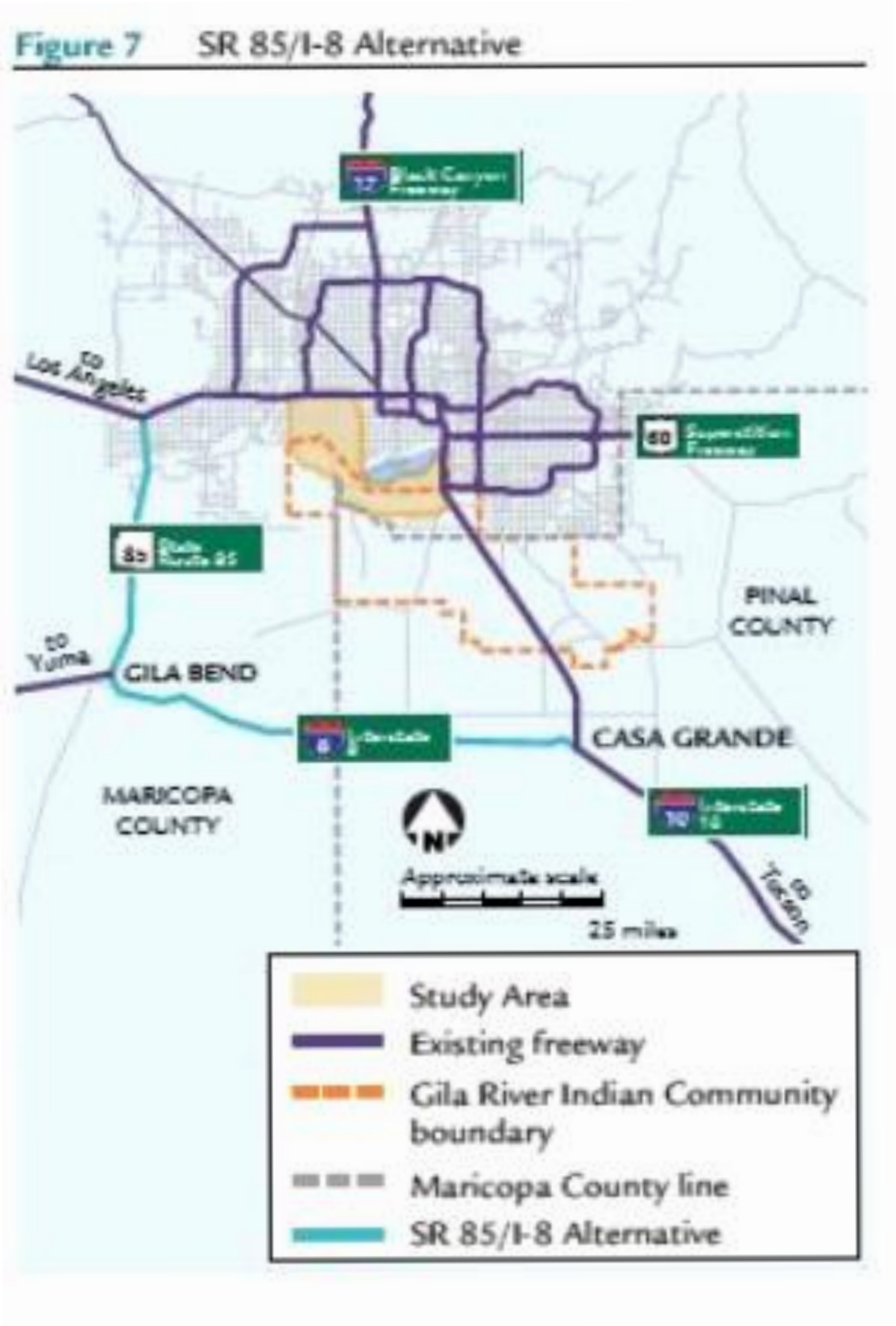
Figure 8 Early Alignment Siting Efforts, Alternatives Development and Screening Process
AVONDALE
TOLLESON
PHOENIX
TEMPE
Phoenix Sky Harbor International Airport
Salt River
Gila River
Gila River Indian Community
South Mountains
Study Area
Existing Freeway
Gila River Indian Community boundary
Maricopa County line
Alignment
MARICOPA COUNTY
PINAL COUNTY

7SER001224

Figure 6 Riggs Road Alternative

4SER000705

Figure 7 SR 85/I-8 Alternative



4SER000705

C. The Draft EIS, Public Involvement and Agency Consultation.

The Agencies involved the public extensively throughout the development of the Project. 7SER001182-83, 1214; 9SER001522-36, 1543. The Agencies issued the Notice of Availability for the Draft EIS in April 2013, and provided a 90-day comment period.[8] The Agencies conducted a public hearing on the Draft EIS (which was simultaneously available online) on May 21, 2013 . 9SER001534-35. Six community forums on the Draft EIS were held in various locations on the Draft EIS in June and July of 2013. 9SER001535-36. In addition, an elaborate public outreach campaign informed the public of the Project's environmental impacts and solicited public comments on the Draft EIS. 8SER001325-28; 9SER001517-36.[9]

During the Draft EIS phase alone, over 10,000 people participated by attending a hearing or public event, viewing Project information online, or providing comments on the Draft EIS. 4SER000733; 7SER001183; 9SER001536. The Agencies received 8,201 comments on the Draft EIS. *Id.* The Agencies reviewed and prepared responses to every comment on the Draft EIS.[10]

Throughout the NEPA process, the Agencies engaged in consultation with local, state, and federal agencies interested in the Project, and remained

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[8] 9SER001534; 78 Fed. Reg. 24,743-44 (Apr. 26, 2013).

[9] The entire Draft EIS is located at FAR00006448-7556.

[10] The full set of the Agencies' responses are located at FAR00002558-6447; FAR00001071-183.

consistently involved with 95 separate agency representatives. 4SER000732; 9SER001513. The Agencies engaged in extensive consultation with the EPA regarding the Project's air quality analysis, and conducted additional air quality studies as requested by EPA. 4SER000778-94; *see also* 12SER001870-1900.

D. Section 4(f) and National Historic Preservation Act Compliance.

Extensive coordination and consultation regarding Section 4(f) resources, such as South Mountain, occurred throughout the NEPA process. 9SER001508-10. The Agencies invited all consulting parties to participate in a Programmatic Agreement to document the Agencies' commitment to the protection of historic and cultural resources and mitigation of potential impacts in compliance with Section 4(f) of the Department of Transportation Act (49 U.S.C. § 303) and Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108). 4SER000757-58, 9SER001445-46, 1508-09; 22SER004287.

E. Extensive Consultation With the Gila River Indian Community; Concurrence by the Community in Evaluation and Mitigation of Cultural Resources.

The Agencies conducted detailed government-to-government consultation with the Gila River Community. Over the years, the Community has commented on the numerous studies and proposals regarding the Project. 3GRICER210; 7SER001209-48. The Community is a member of the Metropolitan Planning Organization, and participated in the development of the Transportation Plan. 3GRICER207; 7SER001206. No party has challenged the Transportation Plan.

Between 2001 and 2009, the Agencies conducted over 100 meetings with Gila River Community's leadership and members. 7SER001209-14. Gila River Community representatives were invited to specifically discuss such topics as: (1) procedural requirements and Gila River Community protocols; (2) the possibilities of studying alternatives on Gila River Community land; and (3) Gila River Community concerns regarding the proposed action's impacts on and off Community land. *Id*. The Agencies engaged in extensive and ongoing consultation with the Gila River Community on cultural resources and measures to avoid and minimize cultural resource impacts. The Community's Tribal Historic Preservation Officer ***concurred in the Agencies' evaluation and mitigation of impacts on cultural resources***. 8SER001327; 10SER001576-11SER001839; *see also* GRIC Dkt. Nos. 17-35, 17-37, 17-38.[11]

In August 2000, the Gila River Community Council ratified resolution GR-126-00 opposing any alignment on Community land. 27SER005359-60. In December 2005, the Council reaffirmed Resolution GR-126-00 and opposed the study of alternatives on Community land. 3GRIC212; 4SER000734-35; 7SER001212, 1215-16.

The Agencies entered into a Programmatic Agreement with the State Historic Preservation Office, Bureau of Reclamation, Ak-Chin Indian Community,

[11] Items cited as "GRIC Dkt. Nos." appear in the docket for the Gila River Community's appeal prior to the Court's *sua sponte* consolidation of the appeals.

Chemehuevi Tribe, Fort Mojave Tribe, Salt River Pima-Maricopa Indian Community, and other stakeholders. 22SER004287; 36 C.F.R. § 800.14(b).

F. Circulation of the Final EIS and Approval of Record of Decision.

The Agencies took seriously all comments and suggestions of the Gila River Community and other stakeholders throughout the environmental process. The Agencies made material revisions to the Final EIS ("FEIS"), Project, and Project mitigation measures in response to comments. 9SER001508-09; 12SER001901-23. These included material changes to the mitigation measures regarding cultural resources, development of a detailed Traditional Cultural Property eligibility assessment, and alterations to the Project to avoid a shrine site. 9SER001446-47.

The Agencies released the FEIS for public review on September 26, 2014. 4SER000746; 79 Fed. Reg. 57,929 (Sept. 26, 2014). The FEIS responded in detail to every comment on the Draft EIS. On November 7, 2014, the Agencies re-circulated the FEIS for an additional 30-day public review period. *Id.*; 4SER000746-47.

Following 14 years of analysis and consultation, on March 5, 2015, FHWA approved the Project and issued the Record of Decision ("ROD"). 4SER000689-6SER001052.[12] The ROD includes detailed responses to every comment on the FEIS. 4SER00755, 4SER000771-6SER001052. The ROD incorporates the

[12] The complete ROD is located at FAR00000001-1070.

Programmatic Agreement regarding mitigation of impacts to cultural resources. 4SER000757.

STANDARD OF REVIEW.

The court's review under the Administrative Procedure Act "is narrow, and [the court does] not substitute [its] judgment for that of the agency." *Lands Council*, 537 F.3d at 987. Courts will "reverse a decision as arbitrary and capricious ***only*** if the agency relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' or offered an explanation 'that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* (emphasis added).

If the evidence is susceptible to more than one rational interpretation, the court "must uphold [the agency's] findings." *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003).[13] Courts conduct a "particularly deferential review of an 'agency's predictive judgments about areas that are within the agency's field of discretion and expertise.'"[14]

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[13] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 664, 658 (2007); *Nat'l Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 810-11 (9th Cir. 1980).

[14] *Lands Council*, 537 F.3d at 993 (citing *Earthlink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006)); *see also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 592 (9th Cir. 2014).

SUMMARY OF ARGUMENT.

The Project Purpose and Need Complies with NEPA (§ I.A.-I.B., *infra*.). Federal law expressly links NEPA review of individual transportation projects to the policies and objectives of the applicable Transportation Plan. The Agencies' used the Transportation Plan to inform the purpose and need and the range of alternatives. *HonoluluTraffic.com*, 742 F.3d at 1231.

The Alternatives Analysis Complies with NEPA (§ I.C., *infra*.). The Agencies considered and evaluated a wide range of transportation solutions beyond the preferred alternative, including: multiple non-freeway alternatives not identified during the transportation planning process, nine alignments in the Western section of the Project, and numerous alignments in the Eastern section of the Project. The Agencies' elaborate screening process complies with NEPA. *HonoluluTraffic.com*, 742 F.3d at 1231; *Laguna Greenbelt v. U.S. Dep't of Transp.*, 42 F.3d 517 ("*Laguna Greenbelt*") (9th Cir. 1994).

The Agencies' Use of Approved Socio-Economic Projections for Evaluation of Alternatives Is Not Arbitrary and Capricious (§ I.E., *infra*.). The Agencies fully disclosed the socio-economic projections used to evaluate traffic and other impacts of the Project alternatives. The Agencies' technical determinations regarding the socio-economic projections are entitled to a high level of deference. *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 679 (9th Cir. 2016). The No Action Alternative did not assume the construction of the Project.

The Agencies reasonably determined that the level of projected growth within the Study Area will be the same if the Project is not approved. As in *Laguna Greenbelt*, 42 F.3d 577, a very high percentage of the land use in the Project Study Area is established.

FHWA Properly Considered Project Impacts and Appropriate Mitigation Measures (§ I.F.1.-3., *infra*.). The EIS's evaluation of the Project's impacts is based on detailed technical reports that use approved methods. That Appellants do not agree with the Agencies' choices in how to analyze impacts does not render the Agencies' analysis arbitrary or capricious. *Pryors Coal. v. Weldon*, 551 Fed. Appx. 426, 429 (9th Cir. 2014).

The EIS discusses the risk posed by potential hazardous materials transport and reasonably concludes that the risk posed by hazardous materials transport is not expected to be significant.

The EIS Analyzed Potential Impacts on the Gila River Indian Community and Mitigated the Impacts (I.F.3., *infra*.). The Agencies engaged in comprehensive consultation with the Gila River Community over many years to ensure all of its concerns with the Project and its design would be properly addressed. The EIS contains a detailed discussion of potential impacts to resources of concern to the Community. Indeed, the Community's Tribal Historic Preservation Officer ***concurred in*** the Agencies' evaluation of impacts on cultural resources and the measures adopted to mitigate cultural resource impacts. GRIC

Dkt. Nos. 17-35, 17-37, 17-38. The Community waived arguments related to the Agencies' lack of jurisdiction on Community lands. In any event, the Project avoids all Community land.

The EIS Mitigation Measures Address All Potential Impacts of the Project (§ I.F.4., *infra*.). The EIS provided ***not only*** a summary table of all of the mitigation measures, but ***also*** discussed mitigation measures in the context of the impact they are intended to address. NEPA does not require that a final, detailed mitigation plan be included in the EIS. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989).

The Agencies Considered and Responded to the Concerns of the Environmental Protection Agency (§ I.F.5., *infra*.). The Agencies consulted extensively with the EPA, fully disclosed the EPA's concerns, and responded in detail to every EPA comment. The Agencies have the discretion to rely on their own experts' determinations. *San Diego Navy-Broadway Complex Coal. v. U.S. Dep't of Def.*, 817 F.3d 653, 661 (9th Cir. 2016).

The Agencies Reasonably Determined That There Are No Feasible and Prudent Alternatives to the Impacts on Section 4(f) Resources (§ II.B., *infra*.) The Agencies studied multiple alignments within and outside of the Project's Study Area to avoid impacts to South Mountain. Multiple alignments were evaluated to determine whether alternatives to use of South Mountain were feasible and prudent.

An alternative that does not meet the purpose and need of the project is not prudent. *Alaska Ctr. for the Env't v. Armbrister*, 131 F.3d 1285, 1288 ("*Alaska Ctr. For the Env't*") (9th Cir. 1997). The Gila River Community's refusal to allow the evaluation of any alternative on Gila River Community land rendered any South Mountain avoidance alternative on Gila River Community lands "not prudent" under Section 4(f). The Agencies documented that alignments to the north of South Mountain would not meet the purpose and need for the Project.

The Agencies Conducted All Possible Planning to Minimize Harm to South Mountain (§ II.C., *infra*.). The ROD and FEIS document the Agencies' commitment to minimize harm to South Mountain, including: (1) reducing the Project's footprint from the original 40 acres to the 31.3 acres planned for under the current design; (2) skirting the park as much as possible to avoid bisecting the 16,000 acre park; (3) providing replacement lands to compensate for the use of 31.3 acres of the park; and (4) using slope treatments, rock sculpting, native vegetation landscaping and buffering, and native vegetation transplantation to blend the Project's appearance with the surrounding natural environment. These measures satisfy the "all possible planning" requirement. *City of Alexandria v. Slater*, 198 F.3d 862, 874 ("*City of Alexandria*") (D.C. Cir. 1999).

The Preferred Alternative Does Not Take Any Wells or Land Held in Trust for the Benefit of the Community (§ III., *infra*.). ADOT has required the construction contractor to avoid the well site properties held in trust for the Gila

River Community. The contractor has developed a final design that avoids the well site properties.

ARGUMENT.[15]

I. The EIS Complies With NEPA.

A. The Transportation Planning Process Properly Informed the Project Purpose and Need and Range of Alternatives.

The Gila River Community's challenge to the Project's purpose and need and range of alternatives ignores (1) the required linkage between the Transportation Plan and the NEPA process for individual projects, and (2) the exhaustive, 14-year environmental evaluation of the Project. *See*, Statement of Facts, *supra* at § I.B.[16] Congress expressly authorized FHWA to use the approved Transportation Plan to inform a project's purpose and need and range of alternatives evaluated in an EIS. 23 U.S.C. §§ 139(f)(3), 139(f)(4); *HonoluluTraffic.com*, 742 F.3d at 1230.

FHWA's regulations explain the linkage between the Transportation Plan and a project's EIS:

> For 40 years, the Congress has directed that federally-funded highway and transit projects must flow from the metropolitan and statewide transportation planning process. Over the years, the Congress has refined and

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[15] ADOT joins FHWA's Answering Brief on all claims not specifically addressed herein.

[16] *See* 23 U.S.C. §§ 134(i)(1)(B), 139(f)(3), 139(f)(4); 42 U.S.C. § 7506(c)(2); 40 C.F.R. § 93.115(a); 23 C.F.R. §§ 450.318, 450.324.

> strengthened the ***transportation planning process as the foundation for project decisions***, . . . and a Federal role that oversees the transportation planning process but does not second-guess the content of transportation plans and programs.
>
> Despite this statutory emphasis on transportation planning, the environmental analyses produced to meet the requirements of the NEPA of 1969 . . . have often been conducted *de novo*, disconnected from the analyses used to develop long-range transportation plans . . . .
>
> ***The purpose of this Appendix is to change this culture,*** by supporting congressional intent that statewide and metropolitan transportation planning should be the foundation for highway and transit projects.

23 C.F.R. pt. 450, app. A (emphasis added).

Discounting the interplay between regional transportation planning and the NEPA process as Appellants advocate would require the EIS for each and every transportation project to start at square one. This would ignore years of analysis and community involvement in the preparation of the Transportation Plan, analysis of the Transportation Plan for compliance with the Clean Air Act, and concurrence in the analysis by FHWA and the EPA. This is ***precisely*** what Congress and FHWA sought to avoid by linking the transportation planning process with project-level NEPA evaluations.[17]

The record in this case shows that the transportation planning process leading to the Transportation Plan included an examination of environmental

[17] 23 U.S.C. § 139(f); 23 C.F.R. § 450.318; 23 C.F.R. pt. 450, app. A.

factors, considered a range of locations and modes (e.g. highways, transit), included public participation, and complied with other applicable requirements.[18] It also demonstrates that the Metropolitan Planning Organization and its members (***including the Gila River Community***) regularly revisited the policies and objectives reflected in the Transportation Plan exactly as contemplated by federal law. *See, e.g.*, 25SER004837-5031.

In the 2007 Update of the Transportation Plan (26SER005032-5291), the Metropolitan Planning Organization expressly addressed the factors required to allow planning studies to be used in the NEPA process. The Transportation Plan described the outreach to interested agencies. 26SER005094. The entire 2007 Update included an extensive public involvement effort. 26SER005078-83. This included an opportunity to comment on the 2007 Update as it was developed. 26SER005081-83. Both in the 2007 Update and its supporting studies, the Metropolitan Planning Organization reported on its efforts to address environmental factors and mitigation of adverse impacts, exactly as proposed in both 23 C.F.R. § 450.318 and Appendix A to part 450 of the regulations. This is apparent from the 2007 Update, the 2003 Transportation Plan, and how this

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[18] *See*, *e.g.*, 25SER004837-5031 (2003 Transportation Plan); 26SER005032-5291 (2007 Update); 17SER003027 (1995 Transportation Plan update "included an extensive public participation effort"); 17SER003028-34 (documenting public involvement process for Transportation Plan update); 17SER003035-41 ("Chapter Six: Consultation on Environmental Mitigation and Resource Conservation"); 7SER001206.

information is used in the EIS. The Transportation Plan was again updated in 2014, using the same approach as in 2007. 4SER000700; 17SER003035-46.

B. The Project's Statement of Purpose and Need Complies With NEPA.

An EIS should "***briefly*** specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13 (emphasis added). Agencies have "considerable discretion to define the purpose and need of a project." *Westlands Water Dist. v. Dep't of the Interior*, 376 F.3d 853, 866-68 ("*Westlands*") (9th Cir. 2004) (purpose and need not arbitrary and capricious where it was based on statutory context). The Agencies did more than "briefly" discuss the purpose and need for the project. They reconfirmed the purpose and need previously identified in the Transportation Plan. 4SER000700-701; 17SER002974-3025.

Appellants want the Agencies to ignore the extensive prior documentation of the need for a transportation facility to address east-west mobility in the I-10 corridor in Phoenix. Controlling law, however, makes it clear that agencies may shape a project's purpose and need and range of alternatives based on the policies and objectives of the Transportation Plan.[19]

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[19] *HonoluluTraffic.com*, 742 F.3d at 1230 (EIS properly relied on Transportation Plan to shape purpose and need and range of alternatives); *Laguna Greenbelt*, 42 F.3d at 524 n. 6 (EIS may incorporate state studies to reduce duplication); 23 U.S.C. § 139(f)(3)(A) (A Project's statement of purpose and need may include

The Agencies used the transportation planning process as their ***starting point***. *See* 4SER000702-03; 7SER001184-93. After reviewing previous planning studies at the outset, the Agencies began developing the Project's purpose and need by using state-of-the-practice methods to analyze transportation needs of the Study Area. *See* 7SER001144. The Project's purpose is to address needs related to (1) transportation demand; (2) quality of traffic operations; (3) transportation capacity; and (4) travel time. 4SER000700; 7SER001194-1205; 15SER002574-2650. The analysis demonstrated that the need for a major transportation facility in the Study Area exists today. 4SER000700 (2012 road network can serve only 84% of demand ***today*** while operating at Level of Service D, i.e., congested conditions); 7SER001199 (describing existing deficiencies on current roadways based on current traffic levels). The need for a major east-west alternative to I-10 will be even greater in the future. 7SER001184-1205. Without the Project, the region's transportation network will suffer severe or major deficiencies. *Id*.

Appellants claim that the Agencies impermissibly narrowed the purpose and need to alternatives in the Study Area. The EIS demonstrates otherwise. Alternatives considered in the Draft EIS included many alternatives that were

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"achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan."); *see also* 23 C.F.R. § 771.111(a)(2) (information developed in local transportation planning process may be incorporated in further environmental review documents); 23 C.F.R. § 450.318(a), (b), (d) (NEPA documentation may incorporate the results of local planning studies in the development of a purpose and need and corresponding alternatives).

located outside of the Study Area. 3GRICER227; 7SER001224-26. Examples are the Riggs Road Alternative, the Interstate 8/State Route 85 ("I-8/SR 85") Alternative (*id.*), the U.S. Route 60 Extension (3GRICER230), the Interstate 10 Spur (*id.*); and the Central Avenue Tunnel (*id.*).

Appellants seize on one phrase in the extensive Transportation Plan ("major transportation facility") to argue that the outcome of the process was necessarily preordained. GRIC at 36; PARC at 17. The Transportation Plan's identification of the need for major transportation improvements in southwestern Phoenix reflects the considered judgment of ***all*** local, state, and federal transportation planning agencies. *See* 7SER001184-1205. The EIS extensively re-documented the need for the Project. *Id*.

Appellants ignore controlling Ninth Circuit authority to argue that the Agencies impermissibly restricted the statement of purpose and need. Ironically, many of the cases cited by Appellants ***upheld*** the EIS's statement of purpose and need.[20] The other cases cited by Appellants do not involve transportation projects,

[20] *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013) (agency "did not act arbitrarily and capriciously by generating the purpose and need statement based on the statutory context and objectives"); *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1068 (9th Cir. 2012) (court deferred to the agency in light of the statutory context, the project location, and the considerable discretion afforded to agencies); *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002) (fair reading of the purpose and need did not limit the project to a single alternative); *City of Carmel-By-The-Sea v. Dep't of Transp.*, 123 F.3d 1142, 1155 ("*Carmel-By-The-*

and therefore lack the express linkage to a planning process that federal law establishes here.[21]

In *HonoluluTraffic.com,* this Court upheld a purpose and need statement for a 20-mile rail transit project based on objectives in the Transportation Plan involving analogous facts. *See HonoluluTraffic.com*, 742 F.3d at 1231. As the Appellants do here, the plaintiffs argued that the Federal Transit Administration framed the purpose and need too narrowly where the Transportation Plan identified the specific need for a high capacity rail transit project from West Oahu to downtown Honolulu. *Id.* at 1230. This Court disagreed, finding that the "purpose was defined in accordance with the statutorily mandated formulation of the transportation plan that preceded the FEIS." *Id.* (quoting *HonoluluTraffic.com v. Fed. Transit Admin.*, Case No. 11-00307AWT, 2012 U.S. Dist. LEXIS 157937, *58 (D. Haw. Nov. 1, 2012) ("'[b]ecause the statement of purpose and need did not

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Sea") (9th Cir. 1997) (upheld purpose and need of relieving traffic congestion); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 198 (D.C. Cir. 1991) ("We conclude that the FAA acted reasonably in defining the purpose of its action, in eliminating alternatives that would not achieve it, and in discussing (with the required do-nothing option) the proposal that would. The agency has therefore complied with NEPA.").

[21] *See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010) (BLM adopted private company's interests in crafting purpose and need for project, which was not provided for by statute); *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (federal agency entered into two binding agreements committing them to authorize and fund plan well before environmental review had been initiated); *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 667 (7th Cir. 1997) (agency defined purpose of project without even evaluating obviously available alternatives).

foreclose all alternatives, and because it was shaped by federal legislative purposes, it was reasonable.'")).

HonoluluTraffic.com applies equally to highway projects, as the same statutes and regulations apply to both highway and transit projects. 23 U.S.C. § 139(f)(3); 23 C.F.R. § 450.318; 23 C.F.R. pt. 450, app. A. The Transportation Plan here, like the Transportation Plan in *HonoluluTraffic.com*, informed the Project purpose and need statement and the identification of reasonable alternatives. *See* 7SER001218-23.

C. The Alternatives Analysis Complied With NEPA.

1. Standard of Review.

There can be infinite potential alternatives to any major transportation improvement. To avoid analysis *ad infinitum*, the scope of the alternatives analysis is limited by the rule of reason. *See California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). Transportation agencies may look to the Transportation Plan to inform the range of alternatives to be evaluated in a project EIS. *HonoluluTraffic.com*, 742 F.3d at 1231.

"An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives."[22] The "range

[22] *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996); *see also Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1248 (9th Cir.

of alternatives that must be considered in the EIS need not extend beyond those ***reasonably related to the purposes of the project***." *Laguna Greenbelt*, 42 F.3d at 524 (emphasis added).

Federal agencies may rely on prior state and federal environmental studies to select alternatives for detailed evaluation in an EIS. *Laguna Greenbelt*, 42 F.3d at 524-25 (upholding EIS that restricted alternatives to two build alternatives based on prior state environmental studies); *HonoluluTraffic.com*, 742 F.3d at 1231.

2. The Agencies Considered a Reasonable Range of Alternatives.

The Agencies considered and evaluated a wide range of transportation solutions beyond the preferred alternative. 3GRICER219-4GRICER044; 7SER001218-44. The fact that FHWA ultimately identified a preferred alternative that included a highway on an alignment south of South Mountain does not render the range of alternatives unreasonable. Indeed, the NEPA regulations expressly encourage the identification of a preferred alternative in the Draft EIS. 40 C.F.R. § 1502.14(e).

2005) (proposed alternative of limiting vegetation removal "does not make sense" given project's purpose of preventing forest destruction and the likely destruction of forest cover by wildfires if project not implemented); *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1148 (9th Cir. 2000) (agency's purpose and need was to promote efficient delivery; alternative that did not further that objective need not be considered).

a) The Agencies Appropriately Considered the Transportation Plan in the Identification of the Range of Alternatives.

Congress adopted comprehensive revisions to federal law to streamline the NEPA process to meet the nation's transportation needs. Safe, Accountable, Flexible, Efficient Transportation Equity Act, Pub. L. No. 109-59, 119 Stat. 1114 (Aug. 10, 2005); 23 U.S.C. § 139. FHWA adopted regulations implementing the direction of Congress to link the NEPA process to the regional transportation planning process. 23 C.F.R. § 450.318. The regulations encourage the use of regional transportation planning decisions to inform the purpose and need and range of alternatives. *See* 23 C.F.R. § 450.318(a) ("The results . . . of these transportation planning studies may be used as part of the overall project development process consistent with [NEPA]."). Such documents are appropriately used to define the range of alternatives.[23]

b) The Agencies Considered Multiple Alternatives.

NEPA regulations expressly contemplate that agencies may screen alternatives from detailed study. "[F]or alternatives which were eliminated from detailed study, [the agency must] ***briefly*** discuss the reasons for their having been

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[23] *Cf. Citizens for Smart Growth v. Sec'y of the Dep't of Transp.*, 669 F.3d 1203, 1212 (11th Cir. 2012) (finding that "'[p]ublicly available documents . . . produced by, or in support of, the transportation planning process . . . may be incorporated directly or by reference into subsequent NEPA documents' and require review by the [FHWA] only 'as appropriate.'" (citing 23 C.F.R. § 450.212(b)); *see also* 23 C.F.R. § 450.318(b).

eliminated." 40 C.F.R. § 1502.14(a) (emphasis added). Where an agency has determined that an alternative is not reasonable, that alternative does not need to be carried forward for detailed analysis.[24] *HonoluluTraffic.com*, 742 F.3d at 1231; *Laguna Greenbelt*, 42 F.3d at 524.

During the NEPA process, the Agencies conducted an extensive, tiered alternatives evaluation that screened various modal, corridor, and alignment alternatives using a rigorous, multifaceted process. Appellants claim, incorrectly, that the Agencies only considered one alternative in the Eastern Section for detailed study as evidence of predetermination (*see, e.g.*, PARC at 19-21). This claim ignores the extensive process that led to the identification of the Eastern Section alternative, including screening of other alternatives from detailed study as permitted by NEPA.

The Agencies prepared an "Alternatives Development and Screening Process Memorandum" ("Alternatives Memorandum") including the following steps:

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[24] *See Res. Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1994) (agency entitled to identify parameters and/or criteria for generating alternatives for detailed consideration because "[w]ithout such criteria, an agency could generate countless alternatives"); *see also N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1541-43 (11th Cir. 1990) (upholding FHWA's decision to eliminate rail transit alternative).

- Identification of a large universe of alternatives that considered previous studies and input from the project team, other agencies, and the public. 4SER000702-12; 19SER003348-3449.
- Identification of multiple non-freeway alternatives not identified during the transportation planning process, including light rail, commuter rail, bus routes, van pools, additional arterial streets, and improved intersections. 3GRICER221-45; 4SER000702-15; 7SER001218-56.
- After reviewing these alternatives, the Agencies determined that a freeway was the most appropriate mode of transit for the Project. 7SER001223.
- After the modal options were narrowed, the Agencies analyzed nine alignments in the Western Section of the Project and ***nine*** alignments in the Eastern Section of the Project. 4SER000703-04; 7SER001224. The Agencies' analysis evaluated potential travel corridors and alignments over the course of 13 years. 4SER000702-12; 7SR001218-8SER001287.
- The screening analysis eliminated all but three western alignments and one eastern alignment from further study. 7SER001226-29. Specific reasons for elimination of initial western and eastern

alternatives are set forth in Tables 3-4 and 3-5 of the EIS, respectively. *Id.*

- The three western alignments and one eastern alignment reflect the conclusions of this extensive screening process. 4SER000702; 7SER001256.
- FHWA's experts conducted an independent review of the alternatives screening process, which validated the conclusions of the prior screening analysis. 21SER004027-34.

Appellants ignore this rigorous screening process.[25]

Appellants also mischaracterize the extent of public involvement in the alternatives screening process. FHWA's 2001 Notice of Intent solicited public comment"[t]o insure that the full range of issues related to [the] proposed action are addressed and all significant issues identified." 66 Fed. Reg. 20,345 (Apr. 20, 2001). The Agencies formed the Citizens Advisory Team in 2001. The Citizens Advisory Team participated extensively in the alternatives screening process. 9SER001518-21.

The cases relied on by the Community do not support their argument that the range of alternatives was unreasonable. In *Muckleshoot Indian Tribe v. U.S.*

[25] The "facts" cited by PARC, for example, consist entirely of PARC's own comments on the Draft EIS and ignore the facts found by FHWA. *See* PARC at 20-21.

Forest Service, 177 F.3d 800, 813 (9th Cir. 1999), the Ninth Circuit did not base its holding that the range of alternatives was unreasonable solely on the evaluation of only the no action alternative and two nearly identical alternatives. Rather, the Court noted that one alternative that the agency eliminated from detailed study actually met the purpose and need of the project ***better than*** the alternatives evaluated. *Id.* Similarly, in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d at 669-70, the Seventh Circuit held that the Corps had improperly eliminated facially reasonable alternatives ***without any*** evaluation.

Here, the Agencies engaged in a robust alternatives screening process aimed at determining which of the numerous alternatives met the purpose and need. Only ***after*** this evaluation process did the Agencies eliminate some alternatives from further study. The Agencies provided an explanation of the reasons for screening out the alternatives – precisely in the manner authorized by NEPA precedent.

HonoluluTraffic.com, 742 F.3d at 1231, expressly supports the Agencies methodology here. In *HonoluluTraffic.com*, the City of Honolulu conducted an alternatives screening process that eliminated several modal (e.g., transit, highway) and alignment alternatives in light of the project's purpose and need – informed, as here, by the approved Transportation Plan. *Id.* at 1226, 1230. The FEIS evaluated in detail a No Build option and three alignment alternatives – ***all*** consisting of a fixed rail transit option – the mode choice identified in the Transportation Plan.

For much of the 20-mile alignment, the FEIS evaluated ***one*** alignment alternative. *Id.* at 1231-32.

Plaintiffs in *HonoluluTraffic.com* claimed that the EIS did not consider all reasonable alternatives and should have considered alternatives that had been eliminated during the alternatives screening process. *Id.* This Court expressly rejected that contention. *HonoluluTraffic.com*, 742 F.3d at 1231.[26]

The Agencies here engaged in a lengthy alternatives analysis and eliminated several alternatives from detailed study that did not meet the Project's need, explaining the basis for their elimination in the EIS. 7SER001220-32. The Agencies carried forward for detailed analysis those alternatives that were reasonable in light of the Project's stated purpose and need.

3. The Agencies Addressed the Bases on Which Alternatives Were Eliminated.

a) Hybrid Alternatives.

The Agencies documented that they eliminated alternatives similar to Appellants' suggested hybrid alternative because such alternatives were not reasonable. *See* 5SER000814-15. Specifically, a partial freeway from Interstate 10 ("I-10") to Laveen Village is not reasonable because it would not meet the freeway's identified purpose and need, is inconsistent with regional transportation

[26] *See also Laguna Greenbelt*, 42 F.3d at 524-25 (rejecting challenges to an EIS for a 17-mile highway where the EIS discussed only three alternatives – the no action alternative and two variations of the highway's connection with an Interstate).

planning goals, and would result in substantial bottlenecks. 14SER002404. Construction of Carver road between 59th Street and 51st Avenue is included in the City of Phoenix's General Plan transportation element, and thus is part of the No Action Alternative. 5SER000814.

Improving 51st Avenue between Carver Road and Pecos Road or extending Pecos Road to 51st Avenue is unreasonable because at least a portion would be located on Community land, and the Community refused to allow design or construction of any alternative on its land. 13SER002155. Finally, improvements to the arterial street system in the southwestern portion of the Study Area (Laveen and Estrella Village) are in the City of Phoenix General Plan, and thus are part of the No Action Alternative – evaluated in detail in the FEIS. The Agencies therefore appropriately eliminated hybrid alternatives. 5SER000814-15.

NEPA does not require "separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered or which have substantially similar consequences." *Westlands*, 376 F.3d at 868; *see also Carmel-by-the-Sea*, 123 F.3d at 1158-59, (finding agency need not consider plaintiff's suggested alternative that was similar to alternative discussed in detail in FEIS and did not amount to a new, substantive proposal).

b) Depressed Freeway Alternative.

The Agencies evaluated a depressed freeway option. The ROD specifically notes that "[t]he assessment of profile options for the E1 Alternative in the Pecos

Road section resulted in agreement to eliminate the depressed profile option and carry forward the at-grade/elevated profile option." 4SER000708. The Agencies eliminated the depressed profile option because it would require additional land for drainage basins, resulting in substantially more residential displacements; would require pump stations, increasing the risk of flooding for the freeway; and would cost substantially more than the at-grade/elevated profile options. *Id.*; *see* 7SER001232-35.

c) Riggs Road/Beltline Road/51st Avenue Alternative.

The Agencies eliminated the Riggs Road Alternative because it was located on Community land. Given the Gila River Community's refusal to allow a project on its land, and the additional traffic on the Community's land that this alternative would cause, the Agencies reasonably concluded that this and other alternatives using Community land were not reasonable. 13SER002155.

The Agencies also reasonably concluded that the Riggs Road Alternative would not complete the loop system, thereby causing substantial out-of-direction travel for motorists. Motorists would either be forced to travel into the heavy congestion on I-10 or substantially out of their way to the south, defeating an important project purpose - establishing an alternative to the congestion on I-10. *See* 4SER000705 (Figure 6: Riggs Road Alternative). The Agencies reasonably concluded that none of the alternatives outside of the Study Area, including the Riggs Road Alternative, could address the identified purpose and need with regard

to regional travel demand, and existing and projected transportation system capacity deficiencies.[27]

d) I-8/SR 85 Alternative.

The I-8/SR 85 Alternative included 130 miles of major improvements to I-10 and I-8 (six times the length of the Project).[28] 9SER001497. The Agencies assessed the I-8/SR 85 Alternative and determined that it did not meet the Project's purpose and need based on regional transportation demand, and existing and projected transportation system and capacity deficiencies. 4SER000705. The Agencies also determined that the I-8/SR 85 Alternative would not function as a part of the regional transportation network, thus not meeting the purpose and need. 9SER001497.

e) Westerly Extension of the Superstition Freeway, Southerly Extension of SR 51 and Southerly Extension of I-10 to the Superstition Freeway.

The FEIS notes that the US 60 Extension to I-10 would: (1) cause substantial traffic performance impacts on I-10 (Maricopa Freeway) between

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[27] 5SER000879; *see also* 4SER000705 (Riggs Road Alternative did not meet purpose and need); 13SER002255-56.

[28] The I-8/SR 85 Alternative begins at I-10 approximately 32 miles west of downtown Phoenix and would either replace or widen SR 85 for approximately 35 miles south before connecting to I-8 in Gila Bend. It would then replace or widen I-8 for approximately 63 miles before reconnecting with I-10 at Casa Grande, approximately 56 miles south of downtown Phoenix. 7SER001224, 1229; 9SER001497.

SR 202L (Santan Freeway) and US 60 (Superstition Freeway); (2) increase undesirable congestion on US 60 (Superstition Freeway) and SR 101L (Price Freeway); (3) cause unintended underuse of SR 202L (Santan Freeway); (4) not address needs based on regional travel demand and existing and projected transportation system capacity deficiencies; (5) adversely impact existing residences and business, including thousands of residential displacements and over 100 business displacements; (6) cause substantial disruption to community character and cohesion, splitting South Mountain Village and constructing a barrier between schools, parks, and residences; and (7) not be consistent with local or regional planning, which includes a freeway alternative that completes the loop system. 7SER001229; *see also* 4SER000707-08; 5SER000814; 12SER001909; 7SER001228-29.

f) Freeway Improvements on Congested Freeways in the Urban Core.

The EIS notes that the Transportation Plan includes improvements to other freeway corridors such as I-10, new freeways such as the SR 303 Loop, arterial street improvements, and expansion of the existing bus and light rail systems. The EIS, *Purpose and Need* section concludes that, even with these improvements in place, "there is a clear need for a major transportation facility in the Study Area." 13SER002157.

g) Development of a Complete Arterial System in the Southwest Area.

The Transportation Plan identified a need for the Project despite other proposed improvements in the Phoenix arterial network. The first step of the Project's alternatives screening process included evaluating non-freeway and modal alternatives. 4SER000703. The Agencies evaluated whether non-freeway alternatives and/or single modes of transportation would satisfactorily address the need for the Project. *Id.* The Agencies evaluated arterial street improvements, but the analyses revealed that, even when combining improvements in the Transportation Plan with better-than-expected performance of the non-freeway improvements, substantial unmet demand in the region's transportation network would remain. *Id.*; 3GRICER223. Specifically, non-freeway alternatives had limited effectiveness in reducing overall traffic congestion and, therefore, would not meet the purpose and need of the Project. Non-freeway alternatives also did not adequately address the region's projected capacity and mobility needs. 4SER000704; *see also* 3GRICER223; 7SER001222. The Agencies documented that improvements to the arterial street network are included in the Transportation Plan and the travel demand modeling performed for the Project. Despite additional capacity provided by additional arterials, projected travel demand remains unmet. 5SER000839.

D. The Agencies Did Not Predetermine the Outcome of Their NEPA Review.

The identification of the Project in the Transportation Plan is entirely consistent with the NEPA process for transportation projects. *See* Section I.A., *supra*. As discussed *supra*, Federal law ***requires*** Transportation Plans to be "long-range" planning documents with a planning horizon of ***at least*** 20 years. 23 U.S.C. § 134(i)(2)(A)(ii); 23 C.F.R. § 450.322(a). Transportation Plans are required to be updated every five years and therefore remain up to date.

Although the Agencies used the Transportation Plan as a starting point in the NEPA analysis (4SER000702-03), they did not stop there. In 2001, the Agencies initiated the process of determining the purpose and need for the Project, reevaluating the need for a major transportation facility to relieve congestion in the I-10 corridor. 7SER001184-1205; *see* 3GRICER185. As described above, the Agencies conducted an extensive screening evaluation of a broad range of alternatives.

Metcalf v. Daley, 214 F.3d at 1142, relied upon by Appellants (GRIC at 37), is entirely inapposite. In *Metcalf*, the agencies entered into two binding agreements ***committing*** the agencies to authorize and fund a plan well before they had even initiated environmental review. *Id.* The Agencies made no such prior binding commitments here.

E. It Is Not Arbitrary and Capricious to Use Adopted Socio-Economic Projections in the Evaluation of the No Action Alternative.

1. Standard of Review.

An agency's technical determinations are entitled to a high level of deference. *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d at 679 ("We have stressed that we 'must defer to the agency's interpretation of complex scientific data' so long as the agency provides a reasonable explanation for adopting its approach and discloses the limitations of that approach."); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d at 602 ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." (internal quotation marks omitted)). Here, the Court is required to defer to the Agencies' technical determinations regarding socio-economic data used in the evaluation of the No Action Alternatives.

2. The Purpose of the No Action Alternative.

The purpose of a No Action Alternative is to briefly examine the likely impacts of not approving the proposed action – that is, the impacts of maintaining the status quo. *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592 (9th Cir. 2010). An agency's discussion of the No Action Alternative may be brief and may properly reject the No Action Alternative where it fails to meet the project's purpose and need. *Friends of Southeast's Future v.*

Morrison, 153 F.3d 1059 (9th Cir. 1998); *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990).

Citing ***no evidence***, Appellants make the bald assertion that the region's growth will be less in the absence of the Project. Appellants rely on this baseless assertion to claim that FHWA was required to adopt a different set of socio-economic projections for the No Action Alternative. Appellants ignore the explanation provided in the EIS for why the Agencies concluded that growth in the Study Area would not differ significantly regardless of whether the Project is built. 4SER000712-14.

Appellants' argument is nothing more than a disagreement over data and methodology. "NEPA does not require [the Court] to decide whether an EIS is based on the best scientific methodology available or to resolve disagreements among various experts." *Laguna Greenbelt,* 42 F.3d at 526.

Appellants claim that NEPA did not allow the Agencies to use the regional land use, population, and employment projections in the evaluation of the No Action alternative. Federal law assigns Metropolitan Planning Organizations the responsibility to develop and approve land use, population, and employment projections for use in the regional transportation planning process. 23 C.F.R. § 450.322(e). Federal law anticipates that state and federal transportation agency decisions will use the approved socio-economic projections in the evaluation of transportation project alternatives. 40 C.F.R. § 93.110(a) (requiring use of

Metropolitan Planning Organization socio-economic projections in Clean Air Act transportation conformity determinations), (b) (requiring the use of the most recent Metropolitan Planning Organization projections for conformity determinations); *see also* 4SER000713 (citing 40 C.F.R. § 93.110). Given that Congress assigned to Metropolitan Planning Organizations the responsibility to approve socio-economic projections to be used in the evaluation of transportation projects (and ***required*** transportation agencies to use these projections in the air quality analysis), it was not arbitrary and capricious for the Agencies to use the approved socio-economic projections in the analysis of the No Action Alternative. *Laguna Greenbelt*, 42 F.3d at 525-26.

3. Factors Included in The Socio-Economic Projections.

To develop the No Action Alternative, the Agencies not only used socio-economic projections to model potential impacts in the absence of the Project, but also relied on other data to assess whether or not the Metropolitan Planning Organization's projections are reasonable in light of the region's historical growth, existing land use plans, and population growth trends.

In considering population projections, the Agencies did not rely simply on the 2010 U.S. Census raw data, but rather, incorporated the county-level projections developed by the Arizona Department of Administration, which were then parsed to address smaller geographic areas and incorporated into the 2013 socio-economic projections. 12SER001879. The Agencies' socio-economic

projections reflect not only county-level projections, but also reflect general plans for local jurisdictions, and state-of-the-art land use modeling software to appropriately allocate economic, housing, and population growth based on their preexisting locations, land consumption, and the accessibility of regional market areas. *Id*. The Agencies thus explained the basis for their decision to rely upon the 2013 socio-economic projections. 4SER000782-84.

The Agencies addressed the EPA's comments regarding the socio-economic model in detail in both the FEIS's response to comments (*see* 12SER001870-1900) and the ROD's response to comments (*see* 4SER000778-94). The Agencies looked at the region's response to growth after implementation of major transportation projects and the lack of significant changes in the land use plans for the local jurisdictions following such improvements. These considerations and the multiple factors cited in the Metropolitan Planning Organization's projections support the Agencies' conclusions that these growth projections would not change significantly with or without the project. 4SER000782-84. This sophisticated analysis belies Appellants' false claim that the No Action Alternative assumed the construction of the Project. In fact, the No Action Alternative did ***not*** include the Project. 4SER000712-14; 7SER001257.

4. As in *Laguna Greenbelt,* a High Percentage of the Study Area Is Developed or is Committed to Development.

A very high percentage of the land use of the Project Study Area is established. Both the Western and Eastern Sections of the Study Area are constrained by existing development, the Gila River Community, the rapid urbanization of the Study Area, and the South Mountain Park/Preserve. *See* 8SER001315; 9SER001469, 1471.

Laguna Greenbelt stands for the proposition that where an agency provides a reasoned explanation for the determination that growth will remain largely unchanged in both action and no action scenarios, the agency does not violate NEPA. *Laguna Greenbelt*, 42 F.3d at 525-27 (agencies appropriately relied upon regional socio-economic projections and presumed similar levels of growth both with and without the project). The facts here are remarkably similar to the facts in *Laguna Greenbelt*.

First, in *Laguna Greenbelt*, FHWA explained that its determination that levels of growth would be similar both with and without the project rested, in part, on the level of development and existing land use designations in the Study Area. *Laguna Greenbelt*, 42 F.3d at 525. Similarly, the Agencies here explained that 67% of the land in the Study Area is currently developed, with only 22% of the remaining land, currently devoted to agricultural uses, potentially available for development. 4SER000783. *Laguna Greenbelt* noted that the 98.5% development

figure consisted of both existing and committed land uses. *Laguna Greenbelt*, 42 F.3d at 525. Here, 88% of the Study Area is zoned for intensive uses. 4SER000783. A high percentage of the Study Area here, like the study area in *Laguna Greenbelt*, is either already developed or is committed to development.

Second, in *Laguna Greenbelt*, FHWA explained that existing growth trends in the absence of the project would likely continue, and that the project was meant to address both existing and future congestion. *Laguna Greenbelt*, 42 F.3d at 525, 526-27. Here, the Agencies explicitly noted that the Phoenix Metropolitan Area has grown at a significant rate due to multiple factors including the cost of living, livability, mild climate, employment opportunities, a development-oriented regulatory environment, and key locations for industry. 4SER000782-83. The EIS also expressly noted that it is not simply future projected congestion levels that justify the Project, but ***existing*** congestion levels, which developed in the absence of the Project. 7SER001196-1205. Similar to *Laguna Greenbelt*, the growth trends in the Phoenix Metropolitan Area are likely to continue with or without the Project, and ***current*** congestion levels establish the need for the Project.

The cases that Appellants cite in support of their argument that the Agencies should have used some other, unspecified, data to construct the No Action Alternative are inapposite. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024 (9th Cir. 2008), not only did not concern the usage of socio-economic projections, but relied on a National Park management plan that expressly relied on

a plan that ***the court had previously invalidated***. *Friends of Yosemite Valley*, 520 F.3d at 1036. In contrast, here, no court has invalidated the Transportation Plan or the approved regional socio-economic projections.

In *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, 677 F.3d 596 ("*N.C. Wildlife Fed'n*") (4th Cir. 2012), the transportation agency defendants admitted that the administrative record mischaracterized the "no build" data, but insisted that their subsequent disclosures of the correct data during the course of litigation cured any defects. *N.C. Wildlife Fed'n*, 677 F.3d at 603-04. There, the relevant "no build" data was not available during the public review of the project. That is demonstrably not the case here. 4SER000712-14, 749, 751; 7SER001257; 8SER001290-1306; 14SER002398-99, 2402; 4GRICER014, 046-58. The court in *N.C. Wildlife Fed'n* expressly declined to address whether or not the use of the underlying data was appropriate due to the agencies' total failure to disclose the data's underlying assumptions and false responses to public concerns. *Id*. at 605 ("In sum, although we need not and we do not decide whether NEPA permits the Agencies to use [the Metropolitan Planning Organization's] data in this case."). Here, the Agencies fully disclosed that the Metropolitan Planning Organization's projections formed the basis for modeling of the project alternatives. 4SER000706, 713-14, 753-54; 7SER001134-35.

Both *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), and *Sierra Club v. U.S. Army Corps of*

Engineers, 701 F.2d 1011 (2d Cir. 1983), concern situations in which the federal lead agency wholly failed to make its own evaluation or wholly failed to provide any reasoned analysis in response to expert agency concerns. As demonstrated in the responses to comments included in the FEIS and ROD, the Agencies provided substantial analysis in response to the EPA's comments. *See* 4SER000778-94; 12SER001870-1900. Specifically, the Agencies responded to the EPA's comments on the No Action Alternative in the ROD. 4SER000782-84. The Agencies' reasoned response cannot properly be characterized as "ignor[ing] the conflicting views of other agencies having pertinent expertise." GRIC at 57. That Appellants disagree with the Agencies' chosen socio-economic methodology does not render the evaluation of the No Action Alternative invalid.[29]

The other two cases relied upon by Appellants are either misinterpreted or wholly inapposite. *Suffolk Cty. v. Sec'y of Interior*, 562 F.2d 1368, 1386 (2d Cir. 1977) (finding district court erred in reliance upon Plaintiffs' expert rather than deferring to the agency's expert determinations); *Silva v. Lynn*, 482 F.2d 1282, 1285-86 (1st Cir. 1973) (finding fault with an EIS where the lead agency wholly failed to describe a recurrent flooding problem at the project site).

[29] *See Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d at 679; *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1107 (9th Cir. 2016); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d at 602; *Laguna Greenbelt*, 42 F.3d at 526.

Finally, in *Center for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633 (9th Cir. 2010) the federal agency proposed to convey federal land to a mining company. The EIS assumed that the level of mining activity on the land would be the same whether or not the federal government retained ownership. The Court concluded that the record did not support this assumption because federal law restricts mining on federal land. *Id.* at 644-45. In contrast, here, the evidence supports the Agencies' finding that Phoenix will continue to grow whether or not the Project is built.

F. FHWA Properly Considered Project Impacts and Appropriate Mitigation Measures.

Contrary to Appellants' claim, the Agencies provided a "reasonably thorough discussion of the significant aspects of the *probable* environmental consequences" of the Project, and "discuss[ed] mitigation measures, with sufficient detail to ensure that environmental consequences [were] fairly evaluated." *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1136 (9th Cir. 2006), (quoting *California v. Block*, 690 F.2d at 761). The Agencies evaluated the Project's impacts in the EIS based on detailed technical reports using established methods. 8SER001288-9SER001479. That Appellants do not agree with the Agencies' choices in how to analyze various impacts is not a violation of NEPA and does not render the Agencies' analysis arbitrary or capricious. *Pryors Coal. v. Weldon*, 551 Fed. Appx. at 429.

1. The Environmental Impact Statement Discussed the Potential Impact of Hazardous Materials Transportation.

Contrary to Appellants' claim, the EIS discusses the risk posed by potential hazardous materials transport, both in the body of the EIS and in the responses to comments. 4SER000752; 5SER000969-70, 975; 8SER001327; 9SER001453. The EIS notes the ongoing research of ADOT and the Arizona Emergency Response Commission, along with ADOT's ability to restrict routes for the transport of hazardous materials, mitigates any potential impact from the transport of hazardous materials on the Project. *Id.*

PARC relies on a single, inapposite case to assert that the Agencies' consideration of potential hazardous materials impacts was insufficient. *See* PARC at 23-24, (citing *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016 (9th Cir. 2006)). *San Luis Obispo Mothers for Peace* considered whether or not the Nuclear Regulatory Commission was required to consider the potential impacts of a terrorist attack when approving a spent fuel storage installation. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1019. This Court determined that the Nuclear Regulatory Commission erred by categorically denying that NEPA required consideration of the potential environmental impacts of a terrorist attack. *Id.* at 1028-35.

Here, the Agencies did not categorically deny that potential for traffic accidents involving hazardous materials on highways. The Agencies reasonably

concluded that the risk posed by hazardous materials transport is not expected to be significant because ADOT and the Arizona Emergency Response Commission already engage in emergency planning for incidents regarding the transport of hazardous materials. 9SER001453. Hazardous materials transport on every highway in Arizona is subject to numerous laws and regulations. *See* 49 U.S.C. §§ 5101, *et seq.*; 49 C.F.R. pt. 177.

No evidence in the record suggests that the mere presence of the Project would cause the risk posed by hazardous materials transport to be any higher or greater than the risk already posed by existing freeways in the Phoenix Metropolitan Area. Therefore, the Agencies reasoned, ***after a thorough discussion of the issue***, that the risk of significant impacts from a hazardous materials spill are remote and speculative. 9SER001453.

2. The Agencies' Evaluation of Potential Air Quality Impacts Is Not Arbitrary and Capricious.

ADOT joins in the Federal Defendants' Brief, §§ I.D.2-3, regarding the Agencies' evaluation of air quality and health impacts. Specifically, the Project's air quality analysis, which used the more sophisticated MOVES2010b emissions model, demonstrated that the Project would meet all air quality requirements and would contribute to lower mobile source air toxics concentrations over the lifetime of the Project. 8SER001355-74; 16SER002902-73. Because air quality standards set by the EPA already protect sensitive populations, the Project inherently

accounts for such populations by meeting those air quality standards. 8SER001370.

3. The EIS Analyzed Potential Impacts on the Community and Its Members.

a) The Agencies Engaged in Extensive Consultation With the Gila River Community and Responded to All Gila River Community Comments.

The record reflects that the Agencies devoted significant resources to the evaluation of impacts on the Gila River Community throughout the NEPA process. The Agencies engaged in comprehensive consultation with the Community to ensure all of its concerns about the Project and its design would be properly addressed. 4SER000732-33; 7SER001206-16; *see also* 8SER001288-9SER001479 (discussing impacts to the Community throughout Chapter 4). The EIS provides a detailed discussion of potential environmental justice impacts specifically to the Gila River Community, and responds in detail to the environmental justice-related comments raised by the Community and its members. 8SER001312-32; 12SER001957-2012. The extensive record of consultation belies the Community's unfounded claim that its concerns were ignored.

b) The EIS Evaluated Impacts to Relevant Gila River Community Resources.

The EIS contains detailed discussion of potential impacts to Gila River Community resources including: Pee Posh Wetlands; drainage impacts; impacts to

the Laveen Conveyance Channel; floodplains; water impacts; air quality impacts (including criteria pollutants, mobile source air toxics, and particulate matter); vehicle miles traveled; impacts to sensitive species including eagles; and an extensive discussion of potential impacts to cultural resources.[30]

Organization of the impact discussion by resource category (e.g., cultural resources, air quality, water quality, etc.) does not render the EIS invalid. *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1002 (9th Cir. 2013). Gila River Community's argument is nothing more than a disagreement over the Agencies' form of presentation. *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1112 (9th Cir. 2015). In some cases, the impacts on the Gila River Community were the same as for the Project area generally. Accordingly, the Agencies limited discussion of impacts unique to the Community to "those areas where impacts would occur." 8SER001290.

The EIS discusses in depth the potential environmental consequences from the action and No Action alternatives, and presents this information so that each alternative's impacts may be compared to the other alternatives. 8SER001288-

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[30] 8SER001413-14; 16SER002801-02, 2818-19 9(Pee Posh Wetlands); 8SER001396 (drainage impacts);9SER001516 (Laveen Conveyance Channel); 8SER001396 (floodplains); 8SER001407 (water impacts); 8SER001356-59 (criteria air pollutants); 8SER001359-61 (mobile source air toxics); 8SER001364-68 (particulate matter); 8SER001355-74 (air quality impacts); 9SER001459 (vehicle miles traveled); 9SER001422-23 (bald and golden eagles); 8SER001414; 9SER001423, 1426 (culturally significant species); 9SER001427-64 (cultural resources).

9SER001479. The FEIS evaluated impacts in the following areas: land use; social conditions; environmental justice; displacements and relocations; economic impacts; air quality; noise; water resources; floodplains; waters of the United States; biological resources; cultural resources; hazardous materials; visual resources; and secondary and cumulative impacts. Potential impacts to the Community and its land are discussed throughout these sections where those impacts are expected to occur.[31]

As discussed at greater length in Sections I.D.2-3 the Federal Defendants' Brief, the Agencies followed FHWA guidance regarding the assessment of air quality impacts. 8SER001369. This analysis disclosed that near-road population exposure to Mobile Source Air Toxics is expected to be no different from or higher than ambient levels. 8SER001370. FHWA determined that a health risk assessment would not be informative for the public or for decision makers, given the very small percentage difference in Mobile Source Air Toxic concentrations expected in the 2035 action versus No Action alternative scenarios. 8SER001366-74. Even with air quality receptors located on or near Community land where air

[31] 8SER001290, 1038, 1314 (social conditions), 8SER 001317-22, 1325-29, 1331-32 (environmental justice), 8SER001338 (displacements and relocations), 8SER001363, 64; 16SER002917 (air quality), 8SER001378 (noise), 8SER001391, 1393, 1396 (water resources), 8SER001399, 1401 (floodplains), 8SER001404-05 (waters of the United States), 8SER001413-15, 9SER001424 (biology), 9SER001428-47 (cultural resources), 9SER001452 (hazardous materials), 9SER001454-57 (visual impacts).

quality impacts are expected to be most severe, the air quality analysis shows that the Project will not cause a violation of any National Ambient Air Quality Standards ("National Air Standards").[32] Compliance with National Air Standards inherently takes into account impacts on sensitive populations. 8SER001370. Therefore, not only were air quality impacts to the Community accounted for, but also they were shown to be no different than those expected throughout the Study Area.

The EIS discloses that there will be impacts to cultural resources, that the Project will increase traffic along the Gila River Community's northern border, that there may be impacts to habitat connectivity, and that a small portion of the South Mountain Park will be impacted by the Project. 7SER001154-56. The EIS provides a discussion of potential water quality impacts and air quality impacts,

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[32] *See* 12SER1894 ("The impacts from construction and operation of the action alternatives were subjected to analyses with respect to both the overall population and minority, low-income, and indigenous communities located near proposed project alignments."); 16SER002934-35 (addition of locations for NEPA Air Quality Analysis based on Gila River Community Comments); 26SER002959 (noting that Gila River Community air quality monitoring station was eliminated from analysis due to unapproved status of their plan by the EPA); 16SER002812-13 (acknowledging possible indirect impacts to the Community); 15SER002571 (requiring coordination with the Community for design of drainage features of the Project); 15SER002667 (acknowledging cultural resources impacts); 15SER002682 (Project is anticipated to benefit the Community through underpasses to access cultural sites and fencing to prevent trespass); 4SER000796-806 (Gila River Community Comments on FEIS and Responses); 12SER001901-23 (Gila River Community Comments on Draft EIS and Detailed Responses); 12SER001923 ("The [Community] opted not to disclose plans for any roadway network plans now or in the future.")

among others, and discusses the applicable mitigation measures for each of those impacts. 7SER001158-64; 8SER001355-74, 1388-1407. Because the majority of these impacts will affect not only the Community, but other portions of the Study Area, the Agencies discuss such impacts in the context of the whole area they will affect. Because current land use patterns show that the majority of the Community's land abutting the preferred alternative is either vacant or agricultural, there is no basis in the record to conclude that impacts on the Community would be any more severe than those on other populations within the Study Area.

Air quality receptors were in fact located on the Community's land. 4SER000765, 16SER002917. The Agencies explained why it was reasonable in this case to consider Mobile Source Air Toxic impacts on an area-wide basis (4SER000764, 780-81, 805), and explained that the "worst case locations" were used for the Project's Clean Air Act conformity and "hot spot" analyses (4SER000764, 8SER001362). The "worst case location" occurs at the 40th Street interchange, which occurs just north of the eastern portion of the Gila River Community boundary, within the Ahwatukee Foothills Village. 8SER001293, 1362. Based on the air quality analysis performed, the Agencies concluded that not only would Mobile Source Air Toxic concentrations ***substantially decrease*** throughout the Study Area (including a substantial portion of the Community's land), but that all of the action alternatives comply with the National Air Standards, due to pollutant concentrations decreasing rapidly as distance from the Project

increases. 4SER000803-04; 8SER001361-69. Based on these findings, the Agencies reasonably concluded that the applicable air quality standards would be met on the Community's land, as well as in other parts of the Study Area.

The EIS disclosed that hazardous materials are currently trucked through Arizona and the Phoenix Metropolitan Area on existing trucking routes, and that the level of heavy trucks using the Project is not expected to be any different from the levels on surrounding freeways. 5SER000850-51, 975; 9SER001453. Because the percentage of heavy trucks using any of the action alternatives would be similar to the percentage of heavy trucks traveling on surrounding roads, the risk presented by a potential hazardous materials spill on any of the action alternatives would be no different than the risk posed by existing freeways. 8SER001327. Additionally, ADOT has the authority to impose special restrictions where unique problems exist. 9SER001453.

c) The Community Waived Arguments Related to the Agencies' Lack of Jurisdiction on Community Lands.

The Gila River Community did not raise an argument related to the sufficiency of the Agencies' impacts analysis based on the Gila River Community's sovereign status below. Thus, the argument is waived. *See Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 455 (9th Cir. 2016). The fact that the Gila River Community and prospective amici now belatedly attempt to argue that the Community's sovereign status necessitates a higher

standard of review does not change the fact that the argument has been waived and is not the proper subject of this appeal.[33]

4. The EIS Mitigation Measures Address All Potential Impacts of the Project.

PARC selectively cites to a single summary table from the ROD and takes individual mitigation measures out of context to claim that the EIS does not adequately describe mitigation measures.

NEPA requires that mitigation measures be discussed with sufficient detail to allow evaluation of the potential impacts of a proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352-53. NEPA does not require that a final, detailed mitigation plan be included in the EIS. *Id.*; *see also Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 681 n. 4 (9th Cir. 2000). So long as potential mitigation measures are discussed with sufficient detail to evaluate the potential impacts of the proposed action, it is appropriate to defer a final decision on the specifics of mitigation measures until more information is known. *Pub. Util. Comm'n of Cal. v. Fed. Energy Regulatory Comm'n*, 900 F.2d 269, 282-83 (D.C. Cir. 1990).

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[33] The prospective amici may not insert new issues that were not raised by Appellants in the district court. *See* Dkt. No. 45; *United States v. Gementera*, 379 F.3d 596, 607-08 (9th Cir. 2004); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176 n. 8 (9th Cir. 2009). In any event, no court has held that a different or higher standard of review applies to a court's review of NEPA claims brought by a Native American tribe. ADOT joins in the Federal Defendants' argument on this issue.

Here, the EIS provided ***not only*** a summary table of all of the mitigation measures, but ***also*** discussed mitigation measures in the context of the impacts they are intended to address. The fact that the final design of some mitigation measures depends on further consultation with appropriate stakeholders, agencies, and jurisdictions does not render those measures inadequate. *Pub. Util. Comm'n of Cal.*, 900 F.2d at 282-83.

PARC cites to a ***single*** biological resource mitigation measure requiring further consultation with resource agencies and Gila River Community during the final design phase to assess appropriate locations and designs for wildlife undercrossings. PARC at 31. The EIS provided discussions of the types of culverts and crossings under consideration (9SER001424) and identified the most appropriate locations for such crossings (8SER001413). The Agencies' description of the type and location of wildlife crossings in the FEIS is not inadequate where a detailed engineering design of the wildlife crossings will be developed in consultation with the state and federal wildlife agencies.

Regarding floodplains, the EIS provides that bridge and culvert structures will be installed at areas appropriate to address 100-year flood waters. The FEIS requires that the specific locations of those structures and their detailed design will be determined during the completion of final engineering plans for the Project. 8SER001401. The EIS also discusses specific mitigation measures to be considered during the design phase for social conditions impacts – reducing the

amount of right of way, providing alternative access to the local road network, using noise barriers, aesthetic treatments of roadway structures, and landscaping to reduce the Project's intrusions upon adjacent communities. 8SER001310-15. Finally, further discussions with various resource agencies during the final design phase regarding species-specific mitigation is appropriate because no federally or state-protected species are expected to be impacted by the proposed Project. 9SER001424-25.

With regard to the other mitigation measures identified by PARC, additional discussion with the appropriate agencies and finalization of the design of mitigation measures at a later date is appropriate because each of the potential mitigation measures was described with sufficient detail to allow decision-makers to evaluate the Project's likely impacts. *See*, *e.g.*, 9SER001461 (discussing utility relocations, noting that utilities within the alignments have been identified and the length of potential impact identified); 8SER001338-41 (identifying the specific services and protections afforded to businesses and residents displaced by the Project, which must be coordinated with each affected individual); 8SER001315 (identifying a possible means of reconfiguring the local street network); 8SER001411 (identifying examples of appropriate design measures to mitigate geotechnical impacts).

PARC does not identify any specific deficiencies with any of the foregoing mitigation measures. Rather, PARC faults the EIS for requiring the Agencies to

conduct additional consultation with affected individuals and expert agencies. Requiring additional consultation does not render mitigation measures inadequate.

Should a mitigation measure be substantially changed, FHWA regulations require that the preparation of a supplemental EIS. 23 C.F.R. §§ 771.130(a), (f). This provides additional assurances the identified mitigation measures will be provided and cannot be changed without a proper NEPA analysis.

5. The Agencies Considered and Responded to the Comments of the Environmental Protection Agency.

The whole record belies assertions that the Agencies failed to fully consider and respond to the comments of the EPA. The Agencies engaged in extensive consultation with the EPA, and provided detailed responses to the EPA's comment letters, including additional analysis of certain issues. 4SER000778-94; 12SER001870-1900. While the Agencies are required by NEPA to give serious consideration to the concerns of the EPA, they are not required to adopt wholesale the EPA's viewpoint. *Tinicum Tp., Pa. v. U.S. Dep't of Transp.*, 685 F.3d 288, 295 (3d Cir. 2012) (holding that the agency "does not have to follow the EPA's comments slavishly – it just has to take them seriously." (internal quotation marks omitted)); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d at 201. Agencies have the discretion to rely on their own experts' determinations regarding a specific analysis or a specific aspect of a project. *San Diego Navy-Broadway Complex Coal. v. U.S. Dep't of Def.*, 817 F.3d at 661 (An agency "must have the

discretion to rely on the reasonable opinions of its own experts . . . ."). That is precisely what the Agencies did here.

II. The EIS Complies With Section 4(f).

A. Standard of Review.

The Court reviews FHWA's Section 4(f) findings under the "arbitrary and capricious" standard of review. *Ariz. Past & Future Found., Inc. v. Lewis*, 722 F.2d 1423, 1425 ("*Ariz. Past & Future*") (9th Cir. 1983). A reviewing court may not substitute its own judgment for that of the agency. *Id.*

B. Agencies Properly Determined That There Are No Feasible and Prudent Alternatives.

Section 4(f) of the Department of Transportation Act provides that FHWA may not approve the use of land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and private historical sites, unless it finds that: (1) there is no feasible and prudent alternative to the use of such land; and (2) the action includes all possible planning to minimize harm to the property resulting from the use. 49 U.S.C. § 303(c).

An alternative is not feasible if it cannot be built as a matter of sound engineering. 23 C.F.R. § 774.17. An alternative is ***not prudent*** if: (1) it compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need; (2) it results in unacceptable safety or operational problems; (3) after reasonable mitigation, it still causes severe social

economic or environmental impacts, severe disruption to established communities, severe disproportionate impacts to minority or low income populations, or severe impacts to environmental resources protected under other Federal statutes; (4) it results in additional construction, maintenance, or operational costs of an extraordinary magnitude; ***or*** (5) it involves multiple factors that, while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude. *Id.*

An alternative that does not meet the purpose and need of the project is not prudent. *Alaska Ctr. for the Env't*, 131 F.3d at 1288; *Ariz. Past & Future*, 722 F.2d at 1428; *see also HonoluluTraffic.com*, 742 F.3d at 1233 (upholding rejection of avoidance alternatives as imprudent where they did not meet the transportation needs of the project). Where a proposed alternative does not meet the purpose and need of a project, the agency is not required to conduct further Section 4(f) analysis. *See Alaska Ctr. for the Env't*, 131 F.3d at 1288.

1. The Community's Opposition Precluded Avoidance Alternatives South of South Mountain.

Coordination between FHWA, ADOT, and Gila River Community regarding alternatives to an alignment within South Mountain began at the Project's inception and continued throughout the NEPA process. *See* 7SER001206-16. After many years of coordination between the Agencies and Gila River Community, the Community rejected the evaluation of any alternative on

Community land, and opposed the selection of any alignment on Gila River Community land. 4SER000704-05, 749; 9SER001497; 27SER005359-60.

The Gila River Community's refusal to allow the evaluation of any alternative on Community land rendered any South Mountain avoidance alternative on Community lands "not prudent" under Section 4(f). 4SER000734-35; 7SER001220-25; 23 C.F.R. § 774.17 (alternative is "not prudent" if it causes severe social economic or environmental impacts, severe disruption to establish communities, severe disproportionate impacts to minority or low-income populations, or severe impacts to environmental resources protected under other Federal statutes).

The Secretary of the Interior has established requirements for State or local authorities to follow before granting rights of way through reservation lands. *See* 25 U.S.C. § 311. 25 C.F.R. Section 169.3 provides that "[n]o right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, ***without the prior written consent of the tribe***." 25 C.F.R. § 169.3 (emphasis added). The Gila River Community's opposition therefore foreclosed any prudent and feasible alternative alignment within the boundaries of Gila River Community lands.

2. The Agencies Evaluated Multiple Alternatives. The Section 4(f) Findings Are Not Arbitrary and Capricious.

The Agencies studied multiple alignments within and outside of the Project's Study Area to avoid impacts on South Mountain. 7SER001224, 1229; 9SER001497. The viability of the new alignments, and modifications to the action alternatives, were then evaluated to determine whether there would be unique problems or unusual factors associated with the revised action alternatives or whether the cost, social, economic, and environmental impacts, or community disruption resulting from avoiding the Section 4(f) resource would be of extraordinary magnitude. 9SER001482-1510.

Appellants ignore established Ninth Circuit precedent establishing that an alternative that does not meet the Project purpose and need is not a "prudent" alternative for purposes of Section 4(f).[34] PARC's reliance on *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984), is misplaced. As the Ninth Circuit subsequently explained, *Stop H-3*:

> ***assumed the rejected alternatives met the stated purpose of the project***. Consistent with *Overton Park*, [the Ninth Circuit] concluded that, if a rejected alternative would satisfy the purpose of the project without using land covered by section 4(f), an agency cannot reject those alternatives based on increased costs or community disruption unless the costs and disruption are of 'extraordinary magnitudes.'

[34] *Alaska Ctr. for the Env't.*, 131 F.3d at 1288; *Ariz. Past & Future*, 722 F.2d at 1428; *HonoluluTraffic.com*, 742 F.3d at 1233.

Alaska Ctr. for the Env't, 131 F.3d at 1288-89 (emphasis added). The law is clear: ***Where a rejected alternative does not meet the stated purpose and need***, "the FHWA is ***not required to make a further showing of 'unique problems' or 'truly unusual factors'*** associated with the . . . alternative." *Id.* at 1289 (emphasis added) (citing *Ariz. Past & Future*, 722 F.2d at 1428).

Here, FHWA evaluated several avoidance alternatives north of South Mountain. It reasonably determined that alternatives north of South Mountain are not prudent because they will not meet the purpose and need of the Project, will cause substantial adverse traffic performance impacts on I-10 and US 60, result in "thousands of residential displacements and over 100 business displacements," and disrupt community character and cohesion, and because they are inconsistent with local planning will create impacts of extraordinary magnitude to the homes and businesses north of South Mountain. 4SER000707, 734; 9SER001495-1501; 23 C.F.R. § 774.17.

Alternatives south of Gila River Community's land are not prudent because they do not satisfy the purpose and need of the Project as they are far to the south of the metropolitan area and thus will not function effectively as an east-west alternative to I-10 through central Phoenix. 4SER000734-35; 7SER001178-79; 20SER003537-3781. These alternatives also failed to meet regional transportation planning goals, caused substantial out of direction travel for motorists, and placed

the connector substantially south of downtown Phoenix. 4SER000734-35; 9SER001497; 20SER003537-3781.

Tunnel alternatives were investigated as design options to: (1) avoid the use of South Mountain and (2) avoid use-related impacts of landscape alteration, visual intrusion, access, and habitat connectivity. The Agencies reasonably determined that the tunnel alternatives were not prudent and feasible. 9SER001497-99; 20SER003537-3781. Tunnel alternatives would not avoid use of South Mountain, incurred safety concerns, technical feasibility concerns, and substantially increased costs. *Id*.

FHWA also studied various Bridge Alternatives, with similar conclusions. The Bridge Alternatives were determined not to be feasible and prudent because they would actually increase impacts to South Mountain, and would cause substantially increased construction costs and driver safety concerns. 9SER001499-1501; 20SER003537-3781. Based on these factors, Bridge Alternatives were likewise determined to be neither feasible nor prudent. *Id*.

Appellants fail to identify any eliminated alternatives for which the Agencies did not make a specific finding that the alternatives were not feasible or prudent. *See* 5SER000914; 13SER002154-57; 20SER003537-3781. They have, therefore, failed to meet their burden in demonstrating that the Agencies' Section 4(f) determination was arbitrary and capricious. *Adler v. Lewis*, 675 F.2d 1085, 1094 (9th Cir. 1982) ("Absent argument by appellants pointing to the record

and demonstrating with specificity the alleged errors of judgment or irrelevant factors that formed the basis for his decision, we are not inclined to make their case for them"). Accordingly, the Court must reject Appellants' argument and affirm the district court's judgment in favor of the Agencies on this issue.

C. The Agencies Conducted All Possible Planning to Minimize Harm to South Mountain.

Section 4(f)(2) requires that a transportation project using protected land must include "all possible planning . . . to minimize harm . . . ." 49 U.S.C. § 303(c)(2); 23 C.F.R. § 774.3(a)(2). "All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project." 23 C.F.R. § 774.17. With respect to parks and recreation areas, measures to minimize harm include, but are not limited to, design modifications or design goals, replacement of land or facilities of comparable value and function, or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways. *Id.*

Coordination efforts pertinent to interaction of the Project with Section 4(f) properties have continued since the start of the EIS process. 4SER000757-59; 9SER001445-46; 9SER001508-10. Table 5-2 of the FEIS documents such coordination efforts. 9SER001508-09. Coordination regarding the status of South Mountain as a traditional cultural property has been ongoing with the Gila River

Community, the State Historic Preservation Officer, and multiple jurisdictions. 4SER000757-59; 8SER001327; 9SER001508-09; 10SER001576-11SER001839.

The ROD and FEIS document the Agencies' commitment to minimize harm to South Mountain. 4SER000735, 744-45, 757-59. These commitments include: (1) reducing the freeway's footprint from the original 40 acres to the 31.3 acres planned for under the current design; (2) skirting the park as much as possible to avoid bisecting the 16,000-acre park; (3) providing replacement lands to compensate for the use of 31.3 acres of the park; (4) using slope treatments, rock sculpting, native vegetation landscaping and buffering, and native vegetation transplanting to blend the appearance of the freeway and slope cuts with the surrounding natural environment, as much as feasible; and (5) working with park stakeholders through the City of Phoenix to implement these improvements. 4SER000735. Contrary to PARC's claims, planned mitigation measures, such as those contemplated for the Project, satisfy an agency's responsibility to conduct all possible planning to minimize harm. *See City of Alexandria*, 198 F.3d at 874.

In *City of Alexandria*, the Court held that FHWA complied with the "all possible planning" requirement of Section 4(f) where it "made several significant project modifications to avoid or minimize impacts to section 4(f) properties." 198 F.3d at 874. There FHWA made several project modifications to avoid impacts to Section 4(f) properties, including altering an interchange design and eliminating construction of a temporary beltway overpass to minimize the risk of harm to a

resource. *Id.* The D.C. Circuit noted that "[w]here [FHWA] could identify no feasible and prudent plan for avoiding an impact to a 4(f) site, it offered plans to mitigate that impact . . . ." *Id.* The court had "little difficulty concluding that [FHWA] complied with its responsibilities under section 4(f) of the Department of Transportation Act." *Id.*

PARC also claims that the Project design was not sufficiently detailed for the Agencies to have satisfied the "all possible planning" requirements of Section 4(f). PARC misrepresents the design process for major transportation projects. The statutes governing Federal-aid highways ***prohibit*** final design prior to completion of the NEPA review for the project. 23 U.S.C. § 112(b)(3)(B); 23 C.F.R. § 771.113(a) ("[F]inal design activities . . . shall not proceed until" a FEIS has been approved). The NEPA regulations require NEPA evaluations early in the project design process. 40 C.F.R. § 1501.2; 23 C.F.R. § 774.9(a) ("The potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.")

In any event, the design completed for the NEPA process included extensive detail including the vertical and horizontal profile, project right-of-way, interchanges, drainage basins, sound walls, bridges, and wildlife crossings. In short, the design included all Project components at a level of detail that allowed evaluation of impacts and identification of mitigation. The following are

representative samples of the level of design completed during NEPA review to evaluate the Project's impacts.

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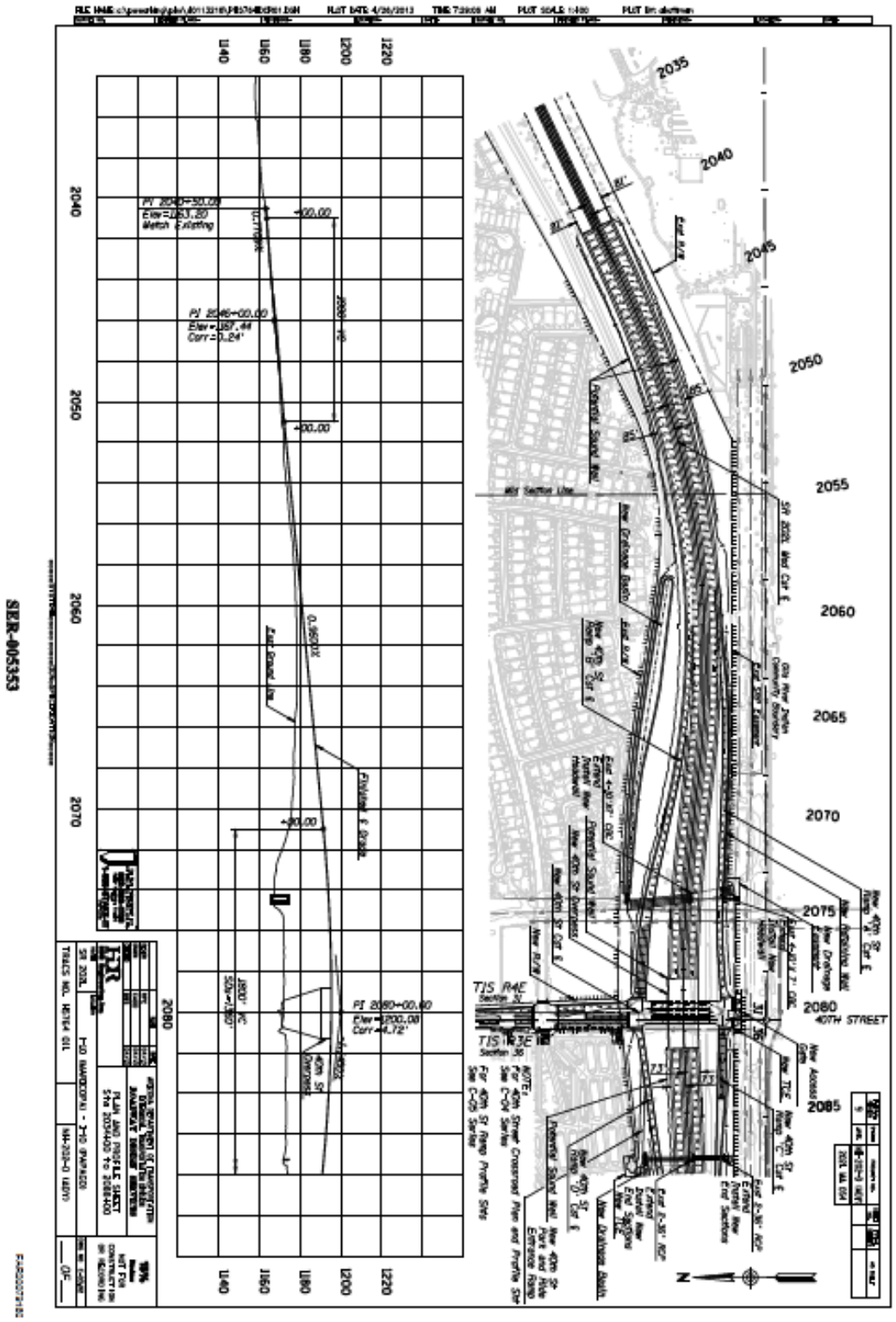
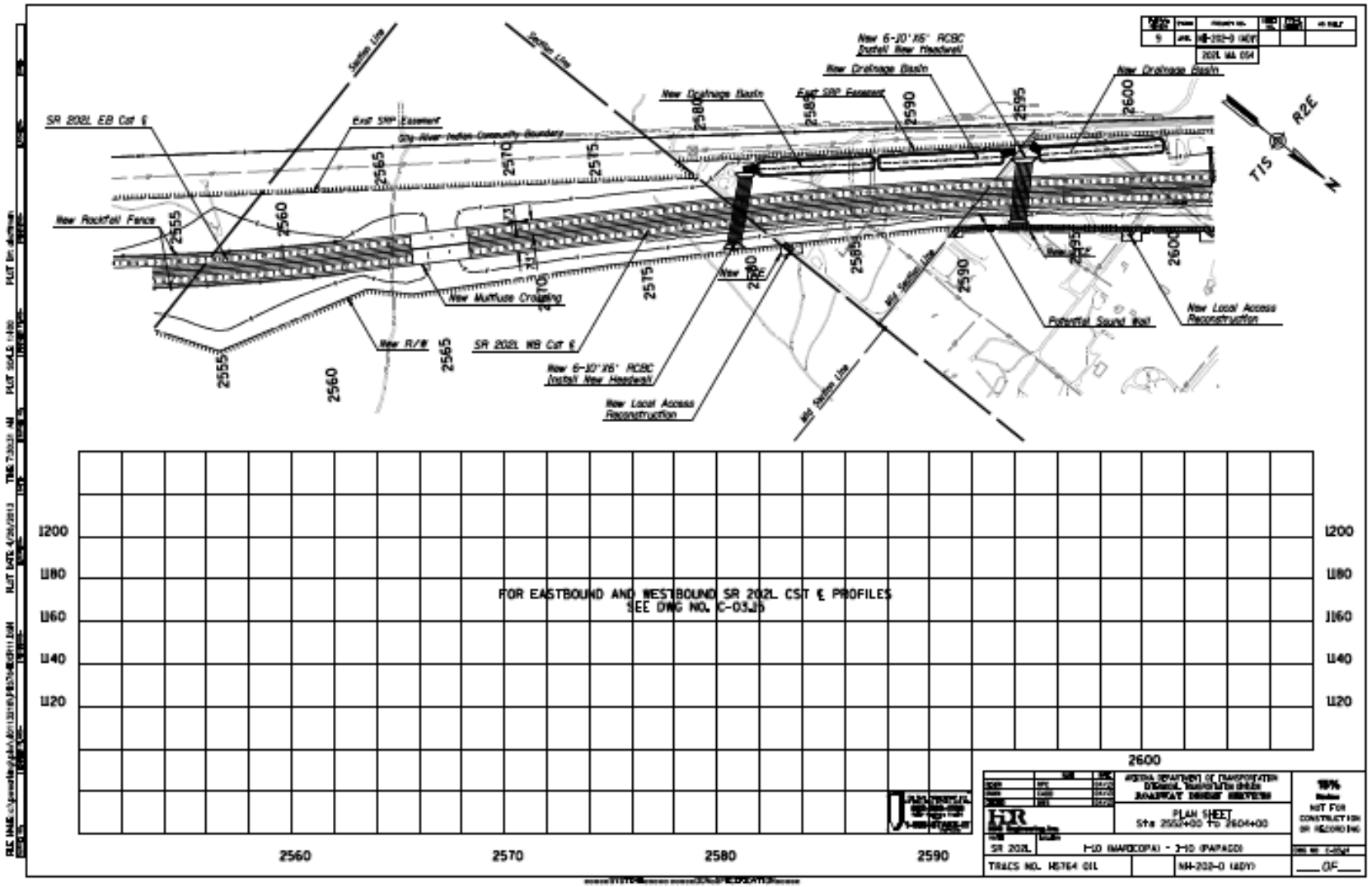


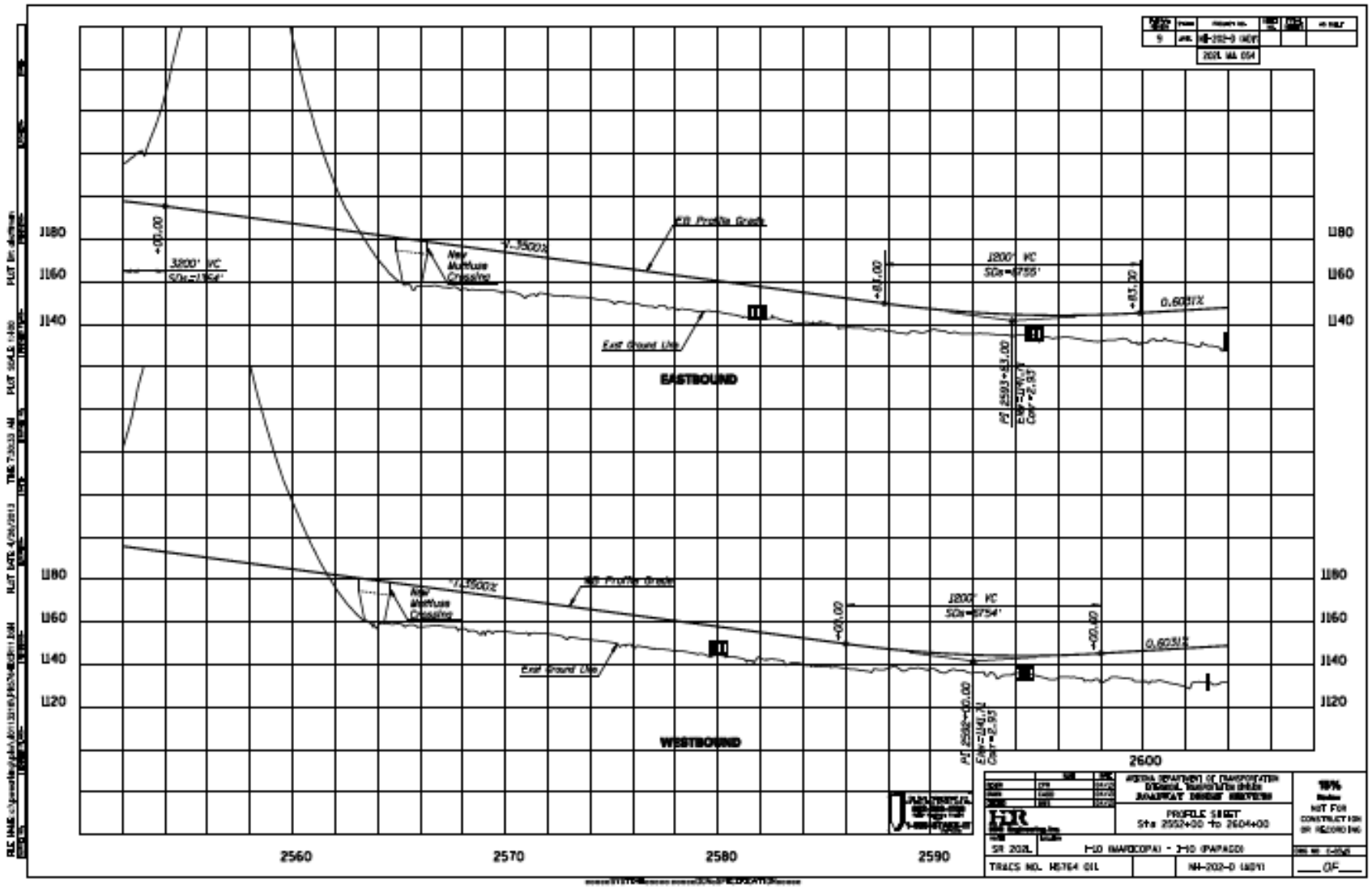
SER-005353

[35]

[35] The entire Pre-Initial Location/Design Concept Report and Initial Location/Design Concept Report are located at FAR0078570-78973 and 78975-79329.


SR 202L EB Cst ℄
New Rockfall Fence
New Multiuse Crossing
New R/W
SR 202L WB Cst ℄
New 6-10'X6' RCBC
Install New Headwall
New Local Access
Reconstruction
New Drainage Basin
Potential Sound Wall
FOR EASTBOUND AND WESTBOUND SR 202L CST ℄ PROFILES
SEE DWG NO. C-0315
2560
2570
2580
2590
2600
1200
1180
1160
1140
1120
PLAN SHEET
Sta 2502+00 TO 2604+00
SR 202L
I-10 (MARICOPA) - I-10 (PAPAGO)
TRACS NO. H8764 01L
NH-202-D (ADY)
R2E
T1S
N

SER-005356


EASTBOUND
WESTBOUND
Fill Profile Grade
Existing Ground Line
New Mortuse Crossing
3200' VC
3200' VC
2560
2570
2580
2590
2600
PROFILE SHEET
Sta 2552+00 to 2604+00
I-10 (MARICOPA) - I-10 (PAPAGO)
TRACS NO. H8764 01L
NH-202-D (ADY)

SER-005357

None of the cases cited by PARC hold that final design must be complete or substantially complete during the preparation of an EIS. *Defenders of Wildlife v. North Carolina Department of Transportation*, 762 F.3d 374 (4th Cir. 2014), did not address the extent to which design must be complete. Indeed, the court did not address the "all possible planning" component of Section 4(f) at all. Rather, the case concerned the exception to Section 4(f) that applies where the project and the 4(f) resource are jointly planned. *Defs. of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d at 401.

In *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), the court held that all possible planning for a proposed bridge project had not been completed where the location and size of the ***impacted parkland*** had not even been identified, and there had been ***no consultation*** with other agencies regarding minimization of harm. *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d at 1239. In *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2d Cir. 1972), the agency failed to identify the type of highway structure to be built, and the Secretary's evaluation was limited to a conclusory statement that all possible planning to minimize harm would continue to be exercised by responsible officials. *Monroe Cty. Conservation Council v. Volpe*, 472 F.2d at 701. The facts of these cases stand in stark contrast to the detailed Section 4(f) findings in the FEIS and the ROD. 4SER000757-59; 9SER001480-1510.

An agency's determinations "that a particular plan minimizes harm to [a Section 4(f) resource] deserves even greater deference than agency determinations concerning practicable alternatives." *Conservation Law Found. v. Fed. Highway Admin.*, 24 F.3d 1465, 1476-77 (1st Cir. 1994). Appellants bear a heavy burden in challenging an agency's decision as to harm minimization. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d at 204. Appellants fail to meet their burden.

III. The Preferred Alternative Does Not Take Any Wells or Land Held in Trust for the Benefit of the Community.

Contrary to the Community's claim, the Project will not take any Community property or otherwise impact property owned in trust by the United States for potential Community wells.[36] As the Community acknowledges, ADOT has inserted a binding contractual requirement for the construction contractor to "***avoid and preserve the GRIC well properties, GRIC's legal access to GRIC well properties, and the water wells, pipes, and ditches located therein***." 24SER004830-31 (emphasis added).

The Community points to draft conceptual designs as evidence that the Project will still impact the trust property. As disclosed during the proceedings on the Community's motion for injunctive relief pending appeal, ADOT and the contractor developed a Project design that will completely avoid the Well Properties and span via bridge the Well Properties' easements. Dkt. No. 9

[36] There are no wells on the trust property.

(Samour Decl. ¶¶ 32-37, Exs. I through L). This modification to the Project to avoid the Well Properties does not create any new significant environmental impacts. If any of the alterations were to result in significant environmental impacts, the Agencies would be required to conduct a reevaluation and, if necessary, prepare a supplemental EIS. *See* 40 C.F.R. § 1502.9(c).

The Gila River Community's argument is also moot. *Burke v. Barnes*, 479 U.S. 361, 363 (1987) ("Essentially, any change in the facts that ends the controversy renders the case moot."); *Idaho Rivers United v. U.S. Army Corps of Eng'rs*, Case No. C14-1800JLR, 2016 U.S. Dist. LEXIS 15803, *27-28 (W.D. Wash. Feb. 9, 2016) (citing *Sosna v. Iowa*, 419 U.S. 393 (1975)).

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/ / /

CONCLUSION.

For all of the above-stated reasons, ADOT respectfully requests the Court to affirm the district court's Judgment.

Dated: March 17, 2017

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STATEMENT OF RELATED CASES

The undersigned counsel is unaware of any cases beyond that identified by Appellants that are related within the meaning of Ninth Circuit Rule 28-2.6.

Dated: March 17, 2017

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9th Circuit Case No. 16-16605 Consolidated with No. 16-16586

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing contains ***15,395*** words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), ***which is less than the 15,400 words*** permitted by Fed. R. App. P. 32(a)(7)(B) and 9th Cir. R. 32-3.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The text of the brief is in 14-point Times New Roman, a proportionately spaced font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 17, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 17, 2017

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-16586
Consolidated with No. 16-16605

PROTECTING ARIZONA'S RESOURCES AND CHILDREN, et al.,
Plaintiffs-Appellants,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.,
Defendants-Appellees.

GILA RIVER INDIAN COMMUNITY,
Plaintiff-Appellant,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona
Case No. 2:15-cv-00893-DJH (Lead Case)
Consolidated with
No. 2:15-cv-01219-PHX-DJH

ADDENDUM TO STATE DEFENDANTS-APPELLEES' CONSOLIDATED BRIEF

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ADDENDUM

STATUTORY AND REGULATORY AUTHORITIES

5 U.S.C.
United States Code, 2015 Edition
Title 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I - THE AGENCIES GENERALLY
CHAPTER 7 - JUDICIAL REVIEW
Sec. 704 - Actions reviewable
From the U.S. Government Publishing Office, www.gpo.gov

§704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

23 U.S.C.
United States Code, 2015 Edition
Title 23 - HIGHWAYS
CHAPTER 1 - FEDERAL-AID HIGHWAYS
Sec. 112 - Letting of contracts
From the U.S. Government Publishing Office, www.gpo.gov

§112. Letting of contracts

(a) In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

(b) BIDDING REQUIREMENTS.—

(1) IN GENERAL.—Subject to paragraphs (2) and (3), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

(2) CONTRACTING FOR ENGINEERING AND DESIGN SERVICES.—

(A) GENERAL RULE.—Subject to paragraph (3), each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a project subject to the provisions of subsection (a) of this section shall be awarded in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40.

(B) PERFORMANCE AND AUDITS.—Any contract or subcontract awarded in accordance with subparagraph (A), whether funded in whole or in part with Federal-aid highway funds, shall be performed and audited in compliance with cost principles contained in the Federal Acquisition Regulations of part 31 of title 48, Code of Federal Regulations.

(C) INDIRECT COST RATES.—Instead of performing its own audits, a recipient of funds under a contract or subcontract awarded in accordance with subparagraph (A) shall accept indirect cost rates established in accordance with the Federal Acquisition Regulations for 1-year applicable accounting periods by a cognizant Federal or State government agency, if such rates are not currently under dispute.

(D) APPLICATION OF RATES.—Once a firm's indirect cost rates are accepted under this paragraph, the recipient of the funds shall apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and shall not be limited by administrative or de facto ceilings of any kind.

(E) PRENOTIFICATION; CONFIDENTIALITY OF DATA.—A recipient of funds requesting or using the cost and rate data described in subparagraph (D) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided, in whole or in part, to another firm or to any government agency which is not part of the group of agencies sharing cost data under this paragraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.

(F)(F) [1] Subparagraphs (B), (C), (D) and (E) herein shall not apply to the States of West Virginia or Minnesota.

(3) DESIGN-BUILD CONTRACTING.—

(A) IN GENERAL.—A State transportation department or local transportation agency may award a design-build contract for a qualified project described in subparagraph (C) using any procurement process permitted by applicable State and local law.

(B) LIMITATION ON FINAL DESIGN.—Final design under a design-build contract referred to in subparagraph (A) shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(C) QUALIFIED PROJECTS.—A qualified project referred to in subparagraph (A) is a project under this chapter (including intermodal projects) for which the Secretary has approved the use of design-build contracting under criteria specified in regulations issued by the Secretary.

(D) REGULATORY PROCESS.—Not later than 90 days after the date of enactment of the SAFETEA–LU, the Secretary shall issue revised regulations under section 1307(c) of the Transportation Equity Act for 21st Century (23 U.S.C. 112 note; 112 Stat. 230) that—

(i) do not preclude a State transportation department or local transportation agency, prior to compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332), from—

(I) issuing requests for proposals;

(II) proceeding with awards of design-build contracts; or

(III) issuing notices to proceed with preliminary design work under design-build contracts;

(ii) require that the State transportation department or local transportation agency receive concurrence from the Secretary before carrying out an activity under clause (i); and

(iii) preclude the design-build contractor from proceeding with final design or construction of any permanent improvement prior to completion of the process under such section 102.

(E) DESIGN-BUILD CONTRACT DEFINED.—In this paragraph, the term "design-build contract" means an agreement that provides for design and construction of a project by a contractor, regardless of whether the agreement is in the form of a design-build contract, a franchise agreement, or any other form of contract approved by the Secretary.

(4) METHOD OF CONTRACTING.—

(A) IN GENERAL.—

(i) 2-PHASE CONTRACT.—A contracting agency may award a 2-phase contract to a construction manager or general contractor for preconstruction and construction services.

(ii) PRECONSTRUCTION SERVICES PHASE.—In the preconstruction services phase of a contract under this paragraph, the contractor shall provide the contracting agency with advice for scheduling, work sequencing, cost engineering, constructability, cost estimating, and risk identification.

(iii) AGREEMENT.—Prior to the start of the construction services phase, the contracting agency and the contractor may agree to a price and other factors specified in regulation for the construction of the project or a portion of the project.

(iv) CONSTRUCTION PHASE.—If an agreement is reached under clause (iii), the contractor shall be responsible for the construction of the project or portion of the project at the negotiated price and in compliance with the other factors specified in the agreement.

(B) SELECTION.—A contract shall be awarded to a contractor under this paragraph using a competitive selection process based on qualifications, experience, best value, or any other combination of factors considered appropriate by the contracting agency.

(C) TIMING.—

(i) RELATIONSHIP TO NEPA PROCESS.—Prior to the completion of the environmental review process required under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332), a contracting agency may—

(I) issue requests for proposals;

(II) proceed with the award of a contract for preconstruction services under subparagraph (A)(ii); and

(III) issue notices to proceed with a preliminary design and any work related to preliminary design, to the extent that those actions do not limit any reasonable range of alternatives.

(ii) CONSTRUCTION SERVICES PHASE.—A contracting agency shall not proceed with the award of the construction services phase of a contract under subparagraph (A)(iv) and shall not proceed, or permit any consultant or contractor to proceed, with final design or construction until completion of the environmental review process required under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(iii) APPROVAL REQUIREMENT.—Prior to authorizing construction activities, the Secretary shall approve—

(I) the price estimate of the contracting agency for the entire project; and

(II) any price agreement with the general contractor for the project or a portion of the project.

(iv) DESIGN ACTIVITIES.—

(I) IN GENERAL.—A contracting agency may proceed, at the expense of the contracting agency, with design activities at any level of detail for a project before completion of the review process required for the project under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) without affecting subsequent approvals required for the project.

(II) REIMBURSEMENT.—Design activities carried out under subclause (I) shall be eligible for Federal reimbursement as a project expense in accordance with the requirements under section 109(r).

(v) TERMINATION PROVISION.—The Secretary shall require a contract to include an appropriate termination provision in the event that a no-build alternative is selected.

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State transportation department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(e) STANDARDIZED CONTRACT CLAUSE CONCERNING SITE CONDITIONS.—

(1) GENERAL RULE.—The Secretary shall issue regulations establishing and requiring, for inclusion in each contract entered into with respect to any project approved under section 106 of this title a contract clause, developed in accordance with guidelines established by the Secretary, which equitably addresses each of the following:

(A) Site conditions.

(B) Suspensions of work ordered by the State (other than a suspension of work caused by the fault of the contractor or by weather).

(C) Material changes in the scope of work specified in the contract.

The guidelines established by the Secretary shall not require arbitration.

(2) LIMITATION ON APPLICABILITY.—

(A) STATE LAW.—Paragraph (1) shall apply in a State except to the extent that such State adopts or has adopted by statute a formal procedure for the development of a contract clause

described in paragraph (1) or adopts or has adopted a statute which does not permit inclusion of such a contract clause.

(B) DESIGN-BUILD CONTRACTS.—Paragraph (1) shall not apply to any design-build contract approved under subsection (b)(3).

(f) SELECTION PROCESS.—A State may procure, under a single contract, the services of a consultant to prepare any environmental impact assessments or analyses required for a project, including environmental impact statements, as well as subsequent engineering and design work on the project if the State conducts a review that assesses the objectivity of the environmental assessment, environmental analysis, or environmental impact statement prior to its submission to the Secretary.

(g) TEMPORARY TRAFFIC CONTROL DEVICES.—

(1) ISSUANCE OF REGULATIONS.—The Secretary, after consultation with appropriate Federal and State officials, shall issue regulations establishing the conditions for the appropriate use of, and expenditure of funds for, uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations.

(2) EFFECTS OF REGULATIONS.—Based on regulations issued under paragraph (1), a State shall—

(A) develop separate pay items for the use of uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations; and

(B) incorporate such pay items into contract provisions to be included in each contract entered into by the State with respect to a highway project to ensure compliance with section 109(e)(2).

(3) LIMITATION.—Nothing in the regulations shall prohibit a State from implementing standards that are more stringent than those required under the regulations.

(4) POSITIVE PROTECTIVE MEASURES DEFINED.—In this subsection, the term "positive protective measures" means temporary traffic barriers, crash cushions, and other strategies to avoid traffic accidents in work zones, including full road closures.

(Pub. L. 85–767, Aug. 27, 1958, 72 Stat. 895; Pub. L. 90–495, §22(c), Aug. 23, 1968, 82 Stat. 827; Pub. L. 96–470, title I, §112(b)(1), Oct. 19, 1980, 94 Stat. 2239; Pub. L. 97–424, title I, §112, Jan. 6, 1983, 96 Stat. 2106; Pub. L. 100–17, title I, §111, Apr. 2, 1987, 101 Stat. 147; Pub. L. 104–59, title III, §307(a), Nov. 28, 1995, 109 Stat. 581; Pub. L. 105–178, title I, §§1205, 1212(a)(2)(A)(i), 1307(a), (b), June 9, 1998, 112 Stat. 184, 193, 229, 230; Pub. L. 107–217, §3(e)(1), Aug. 21, 2002, 116 Stat. 1299; Pub. L. 109–59, title I, §§1110(b), 1503, Aug. 10, 2005, 119 Stat. 1170, 1238; Pub. L. 109–115, div. A, title I, §174, Nov. 30, 2005, 119 Stat. 2426; Pub. L. 112–141, div. A, title I, §1303(a), July 6, 2012, 126 Stat. 531.)

REFERENCES IN TEXT

The date of enactment of the SAFETEA–LU, referred to in subsec. (b)(3)(D), is the date of enactment of Pub. L. 109–59, which was approved Aug. 10, 2005.

Section 1307(c) of the Transportation Equity Act for 21st Century, referred to in subsec. (b)(3)(D), is section 1307(c) of Pub. L. 105–178, which is set out as a note below.

The National Environmental Policy Act of 1969, referred to in subsec. (b)(4)(C)(iv)(I), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

2012—Subsec. (b)(4). Pub. L. 112–141 added par. (4).

2005—Subsec. (b)(2)(A). Pub. L. 109–115, §174(1), substituted "title 40" for "title 40 or equivalent State qualifications-based requirements".

Subsec. (b)(2)(B) to (D). Pub. L. 109–115, §174(2), (3), redesignated subpars. (C) to (E) as (B) to (D), respectively, and struck out heading and text of former subpar. (B). Text read as follows:

"(i) IN A COMPLYING STATE.—If, on the date of the enactment of this paragraph, the services described in subparagraph (A) may be awarded in a State in the manner described in subparagraph (A), subparagraph (A) shall apply in such State beginning on such date of enactment.

"(ii) IN A NONCOMPLYING STATE.—In the case of any other State, subparagraph (A) shall apply in such State beginning on the earlier of (I) August 1, 1989, or (II) the 10th day following the close of the 1st regular session of the legislature of a State which begins after the date of the enactment of this paragraph."

Subsec. (b)(2)(E). Pub. L. 109–115, §174(3), (4), redesignated subpar. (F) as (E) and substituted "subparagraph (D)" for "subparagraph (E)". Former subpar. (E) redesignated (D).

Subsec. (b)(2)(F). Pub. L. 109–115, §174(5), which directed that subpar. (F) be amended by substituting " (F) Subparagraphs (B), (C), (D) and (E) herein shall not apply to the States of West Virginia or Minnesota." for " 'State Option' and all that follows through the period", was executed by making the substitution for "STATE OPTION.—Subparagraphs (C), (D), (E), and (F) shall take effect 1 year after the date of the enactment of this subparagraph; except that if a State, during such 1-year period, adopts by statute an alternative process intended to promote engineering and design quality and ensure maximum competition by professional companies of all sizes providing engineering and design services, such subparagraphs shall not apply with respect to the State. If the Secretary determines that the legislature of the State did not convene and adjourn a full regular session during such 1-year period, the Secretary may extend such 1-year period until the adjournment of the next regular session of the legislature.", to reflect the probable intent of Congress.

Pub. L. 109–115, §174(3), redesignated subpar. (G) as (F). Former subpar. (F) redesignated (E).

Subsec. (b)(2)(G). Pub. L. 109–115, §174(3), redesignated subpar. (G) as (F).

Subsec. (b)(3)(C) to (E). Pub. L. 109–59, §1503, added subpars. (C) and (D), redesignated former subpar. (D) as (E), and struck out former subpar. (C), which described a qualified project as one for which the Secretary had approved the use of design-build contracting under criteria specified in regulations and for which total costs had been estimated to exceed specified amounts.

Subsecs. (f), (g). Pub. L. 109–59, §1110(b), added subsec. (g), redesignated former subsec. (g) as (f), and struck out former subsec. (f) which read as follows: "The provisions of this section shall not be applicable to contracts for projects on the Federal-aid secondary system in those States where the Secretary has discharged his responsibility pursuant to section 117 of this title, except where employees of a political subdivision of a State are working on a project outside of such political subdivision."

2002—Subsec. (b)(2)(A). Pub. L. 107–217 substituted "chapter 11 of title 40" for "title IX of the Federal Property and Administrative Services Act of 1949".

1998—Subsec. (a). Pub. L. 105–178, §1212(a)(2)(A)(i), substituted "State transportation department" for "State highway department".

Subsec. (b)(1). Pub. L. 105–178, §1307(a)(1), substituted "paragraphs (2) and (3)" for "paragraph (2)".

Pub. L. 105–178, §1212(a)(2)(A)(i), substituted "State transportation department" for "State highway department".

Subsec. (b)(2)(A). Pub. L. 105–178, §1307(a)(2), substituted "Subject to paragraph (3), each contract" for "Each contract".

Subsec. (b)(2)(B)(i). Pub. L. 105–178, §1205(a), struck out before period at end ", except to the extent that such State adopts by statute a formal procedure for the procurement of such services".

Subsec. (b)(2)(B)(ii). Pub. L. 105–178, §1205(a), struck out before period at end ", except to the extent that such State adopts or has adopted by statute a formal procedure for the procurement of the services described in subparagraph (A)".

Subsec. (b)(3). Pub. L. 105–178, §1307(a)(3), added par. (3).

Subsec. (d). Pub. L. 105–178, §1212(a)(2)(A)(i), substituted "State transportation department" for "State highway department".

Subsec. (e)(2). Pub. L. 105–178, §1307(b), designated existing provisions as subpar. (A), inserted heading, realigned margins, and added subpar. (B).

Subsec. (g). Pub. L. 105–178, §1205(b), added subsec. (g).

1995—Subsec. (b)(2)(C) to (G). Pub. L. 104–59 added subpars. (C) to (G).

1987—Subsec. (b). Pub. L. 100–17, §111(a), (b), (d), inserted subsec. heading, designated existing provisions as par. (1), inserted par. (1) heading, substituted "Subject to paragraph (2), construction" for "Construction" and inserted "or that an emergency exists", added par. (2), and realigned margins.

Subsecs. (e), (f). Pub. L. 100–17, §111(c), added subsec. (e) and redesignated former subsec. (e) as (f).

1983—Subsec. (b). Pub. L. 97–424, §112(1), substituted "unless the State highway department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective" for "unless

the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest" after "by competitive bidding,".

Subsec. (e). Pub. L. 97–424, §112(2), inserted exception relating to a situation where employees of a political subdivision of a State are working on a project outside of such political subdivision.

1980—Subsec. (b). Pub. L. 96–470 struck out provision that all findings by the Secretary that a method other than competitive bidding is in the public interest be reported in writing to the Committees on Public Works of the Senate and the House of Representatives.

1968—Subsec. (b). Pub. L. 90–495 required that contracts for the construction of each project be awarded only on the basis of the lowest responsive bid by a bidder meeting established criteria of responsibility and required that, to be imposed as a condition precedent, requirements and obligations have been specifically set forth in the advertised specifications.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of this title.

Effective Date of 1998 Amendment

Pub. L. 105–178, title I, §1307(e), June 9, 1998, 112 Stat. 231, provided that:

"(1) In general.—The amendments made by this section [amending this section] take effect 3 years after the date of enactment of this Act [June 9, 1998].

"(2) Transition provision.—

"(A) In general.—During the period before issuance of the regulations under subsection (c) [set out below], the Secretary may approve, in accordance with an experimental program described in subsection (d) [set out below], design-build contracts to be awarded using any process permitted by applicable State and local law; except that final design under any such contract shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

"(B) Previously awarded contracts.—The Secretary may approve design-build contracts awarded before the date of enactment of this Act.

"(C) Design-build contract defined.—In this paragraph, the term 'design-build contract' means an agreement that provides for design and construction of a project by a contractor, regardless of whether the agreement is in the form of a design-build contract, a franchise agreement, or any other form of contract approved by the Secretary."

Effective Date of 1968 Amendment

Amendment by Pub. L. 90–495 effective Aug. 23, 1968, see section 37 of Pub. L. 90–495, set out as a note under section 101 of this title.

Regulations

Pub. L. 112–141, div. A, title I, §1303(b), July 6, 2012, 126 Stat. 532, provided that: "The Secretary [of Transportation] shall promulgate such regulations as are necessary to carry out the amendment made by subsection (a) [amending this section]."

Pub. L. 105–178, title I, §1307(c), June 9, 1998, 112 Stat. 230, provided that:

"(1) In general.—Not later than the effective date specified in subsection (e) [see Effective Date of 1998 Amendment note above], after consultation with the American Association of State Highway and Transportation Officials and representatives from affected industries, the Secretary shall issue regulations to carry out the amendments made by this section [amending this section].

"(2) Contents.—The regulations shall—

"(A) identify the criteria to be used by the Secretary in approving the use by a State transportation department or local transportation agency of design-build contracting; and

"(B) establish the procedures to be followed by a State transportation department or local transportation agency for obtaining the Secretary's approval of the use of design-build contracting by the department or agency."

Effect on Experimental Program

Pub. L. 112–141, div. A, title I, §1303(c), July 6, 2012, 126 Stat. 532, provided that: "Nothing in this section [amending this section and enacting provisions set out as a note under this section] or the amendment made by this section affects the authority to carry out, or any project carried out under, any experimental program concerning construction manager risk that is being carried out by the Secretary [of Transportation]

as of the date of enactment of this Act [see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of this title].

Pub. L. 105–178, title I, §1307(d), June 9, 1998, 112 Stat. 231, provided that: "Nothing in this section [amending this section and enacting provisions set out as notes under this section] or the amendments made by this section affects the authority to carry out, or any project carried out under, any experimental program concerning design-build contracting that is being carried out by the Secretary as of the date of enactment of this Act [June 9, 1998]."

Report to Congress

Pub. L. 105–178, title I, §1307(f), June 9, 1998, 112 Stat. 231, provided that:

"(1) In general.—Not later than 5 years after the date of enactment of this Act [June 9, 1998], the Secretary shall submit to Congress a report on the effectiveness of design-build contracting procedures.

"(2) Contents.—The report shall contain—

"(A) an assessment of the effect of design-build contracting on project quality, project cost, and timeliness of project delivery;

"(B) recommendations on the appropriate level of design for design-build procurements;

"(C) an assessment of the impact of design-build contracting on small businesses;

"(D) assessment of the subjectivity used in design-build contracting; and

"(E) such recommendations concerning design-build contracting procedures as the Secretary determines to be appropriate."

Private Sector Involvement Program

Pub. L. 102–240, title I, §1060, Dec. 18, 1991, 105 Stat. 2003, provided that:

"(a) Establishment.—The Secretary shall establish a private sector involvement program to encourage States to contract with private firms for engineering and design services in carrying out Federal-aid highway projects when it would be cost effective.

"(b) Grants to States.—

"(1) In general.—In conducting the program under this section, the Secretary may make grants in each of fiscal years 1992, 1993, 1994, 1995, 1996, and 1997 to not less than 3 States which the Secretary determines have implemented in the fiscal year preceding the fiscal year of the grant the most effective programs for increasing the percentage of funds expended for contracting with private firms (including small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals) for engineering and design services in carrying out Federal-aid highway projects.

"(2) Use of grants.—A grant received by a State under this subsection may be used by the State only for awarding contracts for engineering and design services to carry out projects and activities for which Federal funds may be obligated under title 23, United States Code.

"(3) Funding.—There are authorized to be appropriated to carry out this section $5,000,000 for each of fiscal years 1992 through 1997. Such sums shall remain available until expended.

"(c) Report by FHWA.—Not later than 120 days after the date of the enactment of this Act [Dec. 18, 1991], the Administrator of the Federal Highway Administration shall submit to the Secretary a report on the amount of funds expended by each State in fiscal years 1980 through 1990 on contracts with private sector engineering and design firms in carrying out Federal-aid highway projects. The Secretary shall use information in the report to evaluate State engineering and design programs for the purpose of awarding grants under subsection (b).

"(d) Report to Congress.—Not later than 2 years after the date of the enactment of this Act [Dec. 18, 1991], the Secretary shall transmit to Congress a report on implementation of the program established under this section.

"(e) Engineering and Design Services Defined.—The term 'engineering and design services' means any category of service described in section 112(b) of title 23, United States Code.

"(f) Regulations.—Not later than 180 days after the date of the enactment of this Act [Dec. 18, 1991], the Secretary shall issue regulations to carry out this section."

Pilot Program for Uniform Audit Procedures

Pub. L. 102–240, title I, §1092, Dec. 18, 1991, 105 Stat. 2024, directed Secretary to establish pilot program to include no more than 10 States under which any contract or subcontract awarded in accordance with subsec. (b)(2)(A) of this section was to be performed and audited in compliance with cost principles contained in Federal acquisition regulations of part 41 of title 48 of Code of Federal Regulations, provided for

indirect cost rates in lieu of performing audits, and required each State participating in pilot program to report to Secretary not later than 3 years after Dec. 18, 1991, on results of program, prior to repeal by Pub. L. 104–59, title III, §307(b), Nov. 28, 1995, 109 Stat. 582. See subsec. (b)(2)(C) to (F) of this section.

Evaluation of State Procurement Practices

Pub. L. 102–240, title VI, §6014, Dec. 18, 1991, 105 Stat. 2181, directed Secretary to conduct a study to evaluate whether or not current procurement practices of State departments and agencies were adequate to ensure that highway and transit systems were designed, constructed, and maintained so as to achieve a high quality for such systems at the lowest overall cost and, not later than 2 years after Dec. 18, 1991, to transmit to Congress a report on the results of the study, together with an assessment of the need for establishing a national policy on transportation quality assurance and recommendations for appropriate legislative and administrative actions.

[1] *So in original.*

23 U.S.C.
United States Code, 2015 Edition
Title 23 - HIGHWAYS
CHAPTER 1 - FEDERAL-AID HIGHWAYS
Sec. 134 - Metropolitan transportation planning
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§134. Metropolitan transportation planning

(a) POLICY.—It is in the national interest—

(1) to encourage and promote the safe and efficient management, operation, and development of surface transportation systems that will serve the mobility needs of people and freight, foster economic growth and development within and between States and urbanized areas, and take into consideration resiliency needs while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes identified in this chapter; and

(2) to encourage the continued improvement and evolution of the metropolitan and statewide transportation planning processes by metropolitan planning organizations, State departments of transportation, and public transit operators as guided by the planning factors identified in subsection (h) and section 135(d).

(b) DEFINITIONS.—In this section and section 135, the following definitions apply:

(1) METROPOLITAN PLANNING AREA.—The term "metropolitan planning area" means the geographic area determined by agreement between the metropolitan planning organization for the area and the Governor under subsection (e).

(2) METROPOLITAN PLANNING ORGANIZATION.—The term "metropolitan planning organization" means the policy board of an organization established as a result of the designation process under subsection (d).

(3) NONMETROPOLITAN AREA.—The term "nonmetropolitan area" means a geographic area outside designated metropolitan planning areas.

(4) NONMETROPOLITAN LOCAL OFFICIAL.—The term "nonmetropolitan local official" means elected and appointed officials of general purpose local government in a nonmetropolitan area with responsibility for transportation.

(5) REGIONAL TRANSPORTATION PLANNING ORGANIZATION.—The term "regional transportation planning organization" means a policy board of an organization established as the result of a designation under section 135(m).

(6) TIP.—The term "TIP" means a transportation improvement program developed by a metropolitan planning organization under subsection (j).

(7) URBANIZED AREA.—The term "urbanized area" means a geographic area with a population of 50,000 or more, as determined by the Bureau of the Census.

(c) GENERAL REQUIREMENTS.—

(1) DEVELOPMENT OF LONG-RANGE PLANS AND TIPS.—To accomplish the objectives in subsection (a), metropolitan planning organizations designated under subsection (d), in cooperation with the State and public transportation operators, shall develop long-range transportation plans and transportation improvement programs through a performance-driven, outcome-based approach to planning for metropolitan areas of the State.

(2) CONTENTS.—The plans and TIPs for each metropolitan area shall provide for the development and integrated management and operation of transportation systems and facilities (including accessible pedestrian walkways, bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter vanpool providers) that will function as an intermodal transportation system for the

metropolitan planning area and as an integral part of an intermodal transportation system for the State and the United States.

(3) PROCESS OF DEVELOPMENT.—The process for developing the plans and TIPs shall provide for consideration of all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.

(d) DESIGNATION OF METROPOLITAN PLANNING ORGANIZATIONS.—

(1) IN GENERAL.—To carry out the transportation planning process required by this section, a metropolitan planning organization shall be designated for each urbanized area with a population of more than 50,000 individuals—

(A) by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population (including the largest incorporated city (based on population) as determined by the Bureau of the Census); or

(B) in accordance with procedures established by applicable State or local law.

(2) STRUCTURE.—Not later than 2 years after the date of enactment of MAP-21, each metropolitan planning organization that serves an area designated as a transportation management area shall consist of—

(A) local elected officials;

(B) officials of public agencies that administer or operate major modes of transportation in the metropolitan area, including representation by providers of public transportation; and

(C) appropriate State officials.

(3) REPRESENTATION.—

(A) IN GENERAL.—Designation or selection of officials or representatives under paragraph (2) shall be determined by the metropolitan planning organization according to the bylaws or enabling statute of the organization.

(B) PUBLIC TRANSPORTATION REPRESENTATIVE.—Subject to the bylaws or enabling statute of the metropolitan planning organization, a representative of a provider of public transportation may also serve as a representative of a local municipality.

(C) POWERS OF CERTAIN OFFICIALS.—An official described in paragraph (2)(B) shall have responsibilities, actions, duties, voting rights, and any other authority commensurate with other officials described in paragraph (2).

(4) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this subsection shall be construed to interfere with the authority, under any State law in effect on December 18, 1991, of a public agency with multimodal transportation responsibilities—

(A) to develop the plans and TIPs for adoption by a metropolitan planning organization; and

(B) to develop long-range capital plans, coordinate transit services and projects, and carry out other activities pursuant to State law.

(5) CONTINUING DESIGNATION.—A designation of a metropolitan planning organization under this subsection or any other provision of law shall remain in effect until the metropolitan planning organization is redesignated under paragraph (6).

(6) REDESIGNATION PROCEDURES.—

(A) IN GENERAL.—A metropolitan planning organization may be redesignated by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the existing planning area population (including the largest incorporated city (based on population) as determined by the Bureau of the Census) as appropriate to carry out this section.

(B) RESTRUCTURING.—A metropolitan planning organization may be restructured to meet the requirements of paragraph (2) without undertaking a redesignation.

(7) DESIGNATION OF MORE THAN 1 METROPOLITAN PLANNING ORGANIZATION.—More than 1 metropolitan planning organization may be designated within an existing metropolitan planning area only if the Governor and the existing metropolitan planning organization determine that the size and complexity of the existing metropolitan planning area make designation of more than 1 metropolitan planning organization for the area appropriate.

(e) METROPOLITAN PLANNING AREA BOUNDARIES.—

(1) IN GENERAL.—For the purposes of this section, the boundaries of a metropolitan planning area shall be determined by agreement between the metropolitan planning organization and the Governor.

(2) INCLUDED AREA.—Each metropolitan planning area—

(A) shall encompass at least the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period for the transportation plan; and

(B) may encompass the entire metropolitan statistical area or consolidated metropolitan statistical area, as defined by the Bureau of the Census.

(3) IDENTIFICATION OF NEW URBANIZED AREAS WITHIN EXISTING PLANNING AREA BOUNDARIES.—The designation by the Bureau of the Census of new urbanized areas within an existing metropolitan planning area shall not require the redesignation of the existing metropolitan planning organization.

(4) EXISTING METROPOLITAN PLANNING AREAS IN NONATTAINMENT.—

(A) IN GENERAL.—Notwithstanding paragraph (2), except as provided in subparagraph (B), in the case of an urbanized area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.) as of the date of enactment of the SAFETEA–LU, the boundaries of the metropolitan planning area in existence as of such date of enactment shall be retained.

(B) EXCEPTION.—The boundaries described in subparagraph (A) may be adjusted by agreement of the Governor and affected metropolitan planning organizations in the manner described in subsection (d)(6).

(5) NEW METROPOLITAN PLANNING AREAS IN NONATTAINMENT.—In the case of an urbanized area designated after the date of enactment of the SAFETEA–LU, as a nonattainment area for ozone or carbon monoxide, the boundaries of the metropolitan planning area—

(A) shall be established in the manner described in subsection (d)(1);

(B) shall encompass the areas described in paragraph (2)(A);

(C) may encompass the areas described in paragraph (2)(B); and

(D) may address any nonattainment area identified under the Clean Air Act (42 U.S.C. 7401 et seq.) for ozone or carbon monoxide.

(f) COORDINATION IN MULTISTATE AREAS.—

(1) IN GENERAL.—The Secretary shall encourage each Governor with responsibility for a portion of a multistate metropolitan area and the appropriate metropolitan planning organizations to provide coordinated transportation planning for the entire metropolitan area.

(2) INTERSTATE COMPACTS.—The consent of Congress is granted to any 2 or more States—

(A) to enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as the activities pertain to interstate areas and localities within the States; and

(B) to establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.

(3) RESERVATION OF RIGHTS.—The right to alter, amend, or repeal interstate compacts entered into under this subsection is expressly reserved.

(g) MPO CONSULTATION IN PLAN AND TIP COORDINATION.—

(1) NONATTAINMENT AREAS.—If more than 1 metropolitan planning organization has authority within a metropolitan area or an area which is designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.), each metropolitan planning organization shall consult with the other metropolitan planning organizations designated for such area and the State in the coordination of plans and TIPs required by this section.

(2) TRANSPORTATION IMPROVEMENTS LOCATED IN MULTIPLE MPOS.—If a transportation improvement, funded from the Highway Trust Fund or authorized under chapter 53 of title 49, is located within the boundaries of more than 1 metropolitan planning area, the metropolitan planning organizations shall coordinate plans and TIPs regarding the transportation improvement.

(3) RELATIONSHIP WITH OTHER PLANNING OFFICIALS.—

(A) IN GENERAL.—The Secretary shall encourage each metropolitan planning organization to consult with officials responsible for other types of planning activities that are affected by transportation in the area (including State and local planned growth, economic development, tourism, natural disaster risk reduction, environmental protection, airport operations, and freight movements) or to coordinate its planning process, to the maximum extent practicable, with such planning activities.

(B) REQUIREMENTS.—Under the metropolitan planning process, transportation plans and TIPs shall be developed with due consideration of other related planning activities within the metropolitan area, and the process shall provide for the design and delivery of transportation services within the metropolitan area that are provided by—

(i) recipients of assistance under chapter 53 of title 49;

(ii) governmental agencies and nonprofit organizations (including representatives of the agencies and organizations) that receive Federal assistance from a source other than the Department of Transportation to provide nonemergency transportation services; and

(iii) recipients of assistance under section 204.

(h) SCOPE OF PLANNING PROCESS.—

(1) IN GENERAL.—The metropolitan planning process for a metropolitan planning area under this section shall provide for consideration of projects and strategies that will—

(A) support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;

(B) increase the safety of the transportation system for motorized and nonmotorized users;

(C) increase the security of the transportation system for motorized and nonmotorized users;

(D) increase the accessibility and mobility of people and for freight;

(E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(F) enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;

(G) promote efficient system management and operation;

(H) emphasize the preservation of the existing transportation system;

(I) improve the resiliency and reliability of the transportation system and reduce or mitigate stormwater impacts of surface transportation; and

(J) enhance travel and tourism.

(2) PERFORMANCE-BASED APPROACH.—

(A) IN GENERAL.—The metropolitan transportation planning process shall provide for the establishment and use of a performance-based approach to transportation decisionmaking to support the national goals described in section 150(b) of this title and the general purposes described in section 5301 of title 49.

(B) PERFORMANCE TARGETS.—

(i) SURFACE TRANSPORTATION PERFORMANCE TARGETS.—

(I) IN GENERAL.—Each metropolitan planning organization shall establish performance targets that address the performance measures described in section 150(c), where

applicable, to use in tracking progress towards attainment of critical outcomes for the region of the metropolitan planning organization.

(II) COORDINATION.—Selection of performance targets by a metropolitan planning organization shall be coordinated with the relevant State to ensure consistency, to the maximum extent practicable.

(ii) PUBLIC TRANSPORTATION PERFORMANCE TARGETS.—Selection of performance targets by a metropolitan planning organization shall be coordinated, to the maximum extent practicable, with providers of public transportation to ensure consistency with sections 5326(c) and 5329(d) of title 49.

(C) TIMING.—Each metropolitan planning organization shall establish the performance targets under subparagraph (B) not later than 180 days after the date on which the relevant State or provider of public transportation establishes the performance targets.

(D) INTEGRATION OF OTHER PERFORMANCE-BASED PLANS.—A metropolitan planning organization shall integrate in the metropolitan transportation planning process, directly or by reference, the goals, objectives, performance measures, and targets described in other State transportation plans and transportation processes, as well as any plans developed under chapter 53 of title 49 by providers of public transportation, required as part of a performance-based program.

(3) FAILURE TO CONSIDER FACTORS.—The failure to consider any factor specified in paragraphs (1) and (2) shall not be reviewable by any court under this title or chapter 53 of title 49, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a transportation plan, a TIP, a project or strategy, or the certification of a planning process.

(i) DEVELOPMENT OF TRANSPORTATION PLAN.—

(1) REQUIREMENTS.—

(A) IN GENERAL.—Each metropolitan planning organization shall prepare and update a transportation plan for its metropolitan planning area in accordance with the requirements of this subsection.

(B) FREQUENCY.—

(i) IN GENERAL.—The metropolitan planning organization shall prepare and update such plan every 4 years (or more frequently, if the metropolitan planning organization elects to update more frequently) in the case of each of the following:

(I) Any area designated as nonattainment, as defined in section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)).

(II) Any area that was nonattainment and subsequently designated to attainment in accordance with section 107(d)(3) of that Act (42 U.S.C. 7407(d)(3)) and that is subject to a maintenance plan under section 175A of that Act (42 U.S.C. 7505a).

(ii) OTHER AREAS.—In the case of any other area required to have a transportation plan in accordance with the requirements of this subsection, the metropolitan planning organization shall prepare and update such plan every 5 years unless the metropolitan planning organization elects to update more frequently.

(2) TRANSPORTATION PLAN.—A transportation plan under this section shall be in a form that the Secretary determines to be appropriate and shall contain, at a minimum, the following:

(A) IDENTIFICATION OF TRANSPORTATION FACILITIES.—

(i) IN GENERAL.—An identification of transportation facilities (including major roadways, public transportation facilities, intercity bus facilities, multimodal and intermodal facilities, nonmotorized transportation facilities, and intermodal connectors) that should function as an integrated metropolitan transportation system, giving emphasis to those facilities that serve important national and regional transportation functions.

(ii) FACTORS.—In formulating the transportation plan, the metropolitan planning organization shall consider factors described in subsection (h) as the factors relate to a 20-year forecast period.

(B) PERFORMANCE MEASURES AND TARGETS.—A description of the performance measures and performance targets used in assessing the performance of the transportation system in accordance with subsection (h)(2).

(C) SYSTEM PERFORMANCE REPORT.—A system performance report and subsequent updates evaluating the condition and performance of the transportation system with respect to the performance targets described in subsection (h)(2), including—

(i) progress achieved by the metropolitan planning organization in meeting the performance targets in comparison with system performance recorded in previous reports; and

(ii) for metropolitan planning organizations that voluntarily elect to develop multiple scenarios, an analysis of how the preferred scenario has improved the conditions and performance of the transportation system and how changes in local policies and investments have impacted the costs necessary to achieve the identified performance targets.

(D) MITIGATION ACTIVITIES.—

(i) IN GENERAL.—A long-range transportation plan shall include a discussion of types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the plan.

(ii) CONSULTATION.—The discussion shall be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies.

(E) FINANCIAL PLAN.—

(i) IN GENERAL.—A financial plan that—

(I) demonstrates how the adopted transportation plan can be implemented;

(II) indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan; and

(III) recommends any additional financing strategies for needed projects and programs.

(ii) INCLUSIONS.—The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted transportation plan if reasonable additional resources beyond those identified in the financial plan were available.

(iii) COOPERATIVE DEVELOPMENT.—For the purpose of developing the transportation plan, the metropolitan planning organization, transit operator, and State shall cooperatively develop estimates of funds that will be available to support plan implementation.

(F) OPERATIONAL AND MANAGEMENT STRATEGIES.—Operational and management strategies to improve the performance of existing transportation facilities to relieve vehicular congestion and maximize the safety and mobility of people and goods.

(G) CAPITAL INVESTMENT AND OTHER STRATEGIES.—Capital investment and other strategies to preserve the existing and projected future metropolitan transportation infrastructure, provide for multimodal capacity increases based on regional priorities and needs, and reduce the vulnerability of the existing transportation infrastructure to natural disasters.

(H) TRANSPORTATION AND TRANSIT ENHANCEMENT ACTIVITIES.—Proposed transportation and transit enhancement activities including consideration of the role that intercity buses may play in reducing congestion, pollution, and energy consumption in a cost-effective manner and strategies and investments that preserve and enhance intercity bus systems, including systems that are privately owned and operated.

(3) COORDINATION WITH CLEAN AIR ACT AGENCIES.—In metropolitan areas that are in nonattainment for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.), the metropolitan planning organization shall coordinate the development of a transportation plan with the process for development of the transportation control measures of the State implementation plan required by that Act.

(4) OPTIONAL SCENARIO DEVELOPMENT.—

(A) IN GENERAL.—A metropolitan planning organization may, while fitting the needs and complexity of its community, voluntarily elect to develop multiple scenarios for consideration as part of the development of the metropolitan transportation plan, in accordance with subparagraph (B).

(B) RECOMMENDED COMPONENTS.—A metropolitan planning organization that chooses to develop multiple scenarios under subparagraph (A) shall be encouraged to consider—

(i) potential regional investment strategies for the planning horizon;

(ii) assumed distribution of population and employment;

(iii) a scenario that, to the maximum extent practicable, maintains baseline conditions for the performance measures identified in subsection (h)(2);

(iv) a scenario that improves the baseline conditions for as many of the performance measures identified in subsection (h)(2) as possible;

(v) revenue constrained scenarios based on the total revenues expected to be available over the forecast period of the plan; and

(vi) estimated costs and potential revenues available to support each scenario.

(C) METRICS.—In addition to the performance measures identified in section 150(c), metropolitan planning organizations may evaluate scenarios developed under this paragraph using locally-developed measures.

(5) CONSULTATION.—

(A) IN GENERAL.—In each metropolitan area, the metropolitan planning organization shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan.

(B) ISSUES.—The consultation shall involve, as appropriate—

(i) comparison of transportation plans with State conservation plans or maps, if available; or

(ii) comparison of transportation plans to inventories of natural or historic resources, if available.

(6) PARTICIPATION BY INTERESTED PARTIES.—

(A) IN GENERAL.—Each metropolitan planning organization shall provide citizens, affected public agencies, representatives of public transportation employees, public ports, freight shippers, providers of freight transportation services, private providers of transportation (including intercity bus operators, employer-based commuting programs, such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program), representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the transportation plan.

(B) CONTENTS OF PARTICIPATION PLAN.—A participation plan—

(i) shall be developed in consultation with all interested parties; and

(ii) shall provide that all interested parties have reasonable opportunities to comment on the contents of the transportation plan.

(C) METHODS.—In carrying out subparagraph (A), the metropolitan planning organization shall, to the maximum extent practicable—

(i) hold any public meetings at convenient and accessible locations and times;

(ii) employ visualization techniques to describe plans; and

(iii) make public information available in electronically accessible format and means, such as the World Wide Web, as appropriate to afford reasonable opportunity for consideration of public information under subparagraph (A).

(7) PUBLICATION.—A transportation plan involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web, approved by the metropolitan planning organization and submitted for information purposes to the Governor at such times and in such manner as the Secretary shall establish.

(8) SELECTION OF PROJECTS FROM ILLUSTRATIVE LIST.—Notwithstanding paragraph (2)(E), a State or metropolitan planning organization shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(E).

(j) METROPOLITAN TIP.—

(1) DEVELOPMENT.—

(A) IN GENERAL.—In cooperation with the State and any affected public transportation operator, the metropolitan planning organization designated for a metropolitan area shall develop a TIP for the metropolitan planning area that—

(i) contains projects consistent with the current metropolitan transportation plan;

(ii) reflects the investment priorities established in the current metropolitan transportation plan; and

(iii) once implemented, is designed to make progress toward achieving the performance targets established under subsection (h)(2).

(B) OPPORTUNITY FOR COMMENT.—In developing the TIP, the metropolitan planning organization, in cooperation with the State and any affected public transportation operator, shall provide an opportunity for participation by interested parties in the development of the program, in accordance with subsection (i)(5).

(C) FUNDING ESTIMATES.—For the purpose of developing the TIP, the metropolitan planning organization, public transportation agency, and State shall cooperatively develop estimates of funds that are reasonably expected to be available to support program implementation.

(D) UPDATING AND APPROVAL.—The TIP shall be—

(i) updated at least once every 4 years; and

(ii) approved by the metropolitan planning organization and the Governor.

(2) CONTENTS.—

(A) PRIORITY LIST.—The TIP shall include a priority list of proposed Federally supported projects and strategies to be carried out within each 4-year period after the initial adoption of the TIP.

(B) FINANCIAL PLAN.—The TIP shall include a financial plan that—

(i) demonstrates how the TIP can be implemented;

(ii) indicates resources from public and private sources that are reasonably expected to be available to carry out the program;

(iii) identifies innovative financing techniques to finance projects, programs, and strategies; and

(iv) may include, for illustrative purposes, additional projects that would be included in the approved TIP if reasonable additional resources beyond those identified in the financial plan were available.

(C) DESCRIPTIONS.—Each project in the TIP shall include sufficient descriptive material (such as type of work, termini, length, and other similar factors) to identify the project or phase of the project.

(D) PERFORMANCE TARGET ACHIEVEMENT.—The transportation improvement program shall include, to the maximum extent practicable, a description of the anticipated effect of the transportation improvement program toward achieving the performance targets established in the metropolitan transportation plan, linking investment priorities to those performance targets.

(3) INCLUDED PROJECTS.—

(A) PROJECTS UNDER THIS TITLE AND CHAPTER 53 OF TITLE 49.—A TIP developed under this subsection for a metropolitan area shall include the projects within the area that are proposed for funding under chapter 1 of this title and chapter 53 of title 49.

(B) PROJECTS UNDER CHAPTER 2.—

(i) REGIONALLY SIGNIFICANT PROJECTS.—Regionally significant projects proposed for funding under chapter 2 shall be identified individually in the transportation improvement program.

(ii) OTHER PROJECTS.—Projects proposed for funding under chapter 2 that are not determined to be regionally significant shall be grouped in 1 line item or identified individually in the transportation improvement program.

(C) CONSISTENCY WITH LONG-RANGE TRANSPORTATION PLAN.—Each project shall be consistent with the long-range transportation plan developed under subsection (i) for the area.

(D) REQUIREMENT OF ANTICIPATED FULL FUNDING.—The program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project or the identified phase within the time period contemplated for completion of the project or the identified phase.

(4) NOTICE AND COMMENT.—Before approving a TIP, a metropolitan planning organization, in cooperation with the State and any affected public transportation operator, shall provide an opportunity for participation by interested parties in the development of the program, in accordance with subsection (i)(5).

(5) SELECTION OF PROJECTS.—

(A) IN GENERAL.—Except as otherwise provided in subsection (k)(4) and in addition to the TIP development required under paragraph (1), the selection of Federally funded projects in metropolitan areas shall be carried out, from the approved TIP—

(i) by—

(I) in the case of projects under this title, the State; and

(II) in the case of projects under chapter 53 of title 49, the designated recipients of public transportation funding; and

(ii) in cooperation with the metropolitan planning organization.

(B) MODIFICATIONS TO PROJECT PRIORITY.—Notwithstanding any other provision of law, action by the Secretary shall not be required to advance a project included in the approved TIP in place of another project in the program.

(6) SELECTION OF PROJECTS FROM ILLUSTRATIVE LIST.—

(A) NO REQUIRED SELECTION.—Notwithstanding paragraph (2)(B)(iv), a State or metropolitan planning organization shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(B)(iv).

(B) REQUIRED ACTION BY THE SECRETARY.—Action by the Secretary shall be required for a State or metropolitan planning organization to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(B)(iv) for inclusion in an approved TIP.

(7) PUBLICATION.—

(A) PUBLICATION OF TIPS.—A TIP involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review.

(B) PUBLICATION OF ANNUAL LISTINGS OF PROJECTS.—

(i) IN GENERAL.—An annual listing of projects, including investments in pedestrian walkways and bicycle transportation facilities, for which Federal funds have been obligated in the preceding year shall be published or otherwise made available by the cooperative effort of the State, transit operator, and metropolitan planning organization for public review.

(ii) REQUIREMENT.—The listing shall be consistent with the categories identified in the TIP.

(k) TRANSPORTATION MANAGEMENT AREAS.—

(1) IDENTIFICATION AND DESIGNATION.—

(A) REQUIRED IDENTIFICATION.—The Secretary shall identify as a transportation management area each urbanized area (as defined by the Bureau of the Census) with a population of over 200,000 individuals.

(B) DESIGNATIONS ON REQUEST.—The Secretary shall designate any additional area as a transportation management area on the request of the Governor and the metropolitan planning organization designated for the area.

(2) TRANSPORTATION PLANS.—In a transportation management area, transportation plans shall be based on a continuing and comprehensive transportation planning process carried out by the metropolitan planning organization in cooperation with the State and public transportation operators.

(3) CONGESTION MANAGEMENT PROCESS.—

(A) IN GENERAL.—Within a metropolitan planning area serving a transportation management area, the transportation planning process under this section shall address congestion management through a process that provides for effective management and operation, based on a cooperatively developed and implemented metropolitan-wide strategy, of new and existing transportation facilities eligible for funding under this title and chapter 53 of title 49 through the use of travel demand reduction (including intercity bus operators, employer-based commuting programs such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program), job access projects, and operational management strategies.

(B) SCHEDULE.—The Secretary shall establish an appropriate phase-in schedule for compliance with the requirements of this section but no sooner than 1 year after the identification of a transportation management area.

(C) CONGESTION MANAGEMENT PLAN.—A metropolitan planning organization serving a transportation management area may develop a plan that includes projects and strategies that will be considered in the TIP of such metropolitan planning organization. Such plan shall—

(i) develop regional goals to reduce vehicle miles traveled during peak commuting hours and improve transportation connections between areas with high job concentration and areas with high concentrations of low-income households;

(ii) identify existing public transportation services, employer-based commuter programs, and other existing transportation services that support access to jobs in the region; and

(iii) identify proposed projects and programs to reduce congestion and increase job access opportunities.

(D) PARTICIPATION.—In developing the plan under subparagraph (C), a metropolitan planning organization shall consult with employers, private and nonprofit providers of public transportation, transportation management organizations, and organizations that provide job access reverse commute projects or job-related services to low-income individuals.

(4) SELECTION OF PROJECTS.—

(A) IN GENERAL.—All Federally funded projects carried out within the boundaries of a metropolitan planning area serving a transportation management area under this title (excluding projects carried out on the National Highway System) or under chapter 53 of title 49 shall be selected for implementation from the approved TIP by the metropolitan planning organization

designated for the area in consultation with the State and any affected public transportation operator.

(B) NATIONAL HIGHWAY SYSTEM PROJECTS.—Projects carried out within the boundaries of a metropolitan planning area serving a transportation management area on the National Highway System shall be selected for implementation from the approved TIP by the State in cooperation with the metropolitan planning organization designated for the area.

(5) CERTIFICATION.—

(A) IN GENERAL.—The Secretary shall—

(i) ensure that the metropolitan planning process of a metropolitan planning organization serving a transportation management area is being carried out in accordance with applicable provisions of Federal law; and

(ii) subject to subparagraph (B), certify, not less often than once every 4 years, that the requirements of this paragraph are met with respect to the metropolitan planning process.

(B) REQUIREMENTS FOR CERTIFICATION.—The Secretary may make the certification under subparagraph (A) if—

(i) the transportation planning process complies with the requirements of this section and other applicable requirements of Federal law; and

(ii) there is a TIP for the metropolitan planning area that has been approved by the metropolitan planning organization and the Governor.

(C) EFFECT OF FAILURE TO CERTIFY.—

(i) WITHHOLDING OF PROJECT FUNDS.—If a metropolitan planning process of a metropolitan planning organization serving a transportation management area is not certified, the Secretary may withhold up to 20 percent of the funds attributable to the metropolitan planning area of the metropolitan planning organization for projects funded under this title and chapter 53 of title 49.

(ii) RESTORATION OF WITHHELD FUNDS.—The withheld funds shall be restored to the metropolitan planning area at such time as the metropolitan planning process is certified by the Secretary.

(D) REVIEW OF CERTIFICATION.—In making certification determinations under this paragraph, the Secretary shall provide for public involvement appropriate to the metropolitan area under review.

(l) REPORT ON PERFORMANCE-BASED PLANNING PROCESSES.—

(1) IN GENERAL.—The Secretary shall submit to Congress a report on the effectiveness of the performance-based planning processes of metropolitan planning organizations under this section, taking into consideration the requirements of this subsection.

(2) REPORT.—Not later than 5 years after the date of enactment of the MAP–21, the Secretary shall submit to Congress a report evaluating—

(A) the overall effectiveness of performance-based planning as a tool for guiding transportation investments;

(B) the effectiveness of the performance-based planning process of each metropolitan planning organization under this section;

(C) the extent to which metropolitan planning organizations have achieved, or are currently making substantial progress toward achieving, the performance targets specified under this section and whether metropolitan planning organizations are developing meaningful performance targets; and

(D) the technical capacity of metropolitan planning organizations that operate within a metropolitan planning area with a population of 200,000 or less and their ability to carry out the requirements of this section.

(3) PUBLICATION.—The report under paragraph (2) shall be published or otherwise made available in electronically accessible formats and means, including on the Internet.

(m) ABBREVIATED PLANS FOR CERTAIN AREAS.—

(1) IN GENERAL.—Subject to paragraph (2), in the case of a metropolitan area not designated as a transportation management area under this section, the Secretary may provide for the development of an abbreviated transportation plan and TIP for the metropolitan planning area that the Secretary determines is appropriate to achieve the purposes of this section, taking into account the complexity of transportation problems in the area.

(2) NONATTAINMENT AREAS.—The Secretary may not permit abbreviated plans or TIPs for a metropolitan area that is in nonattainment for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.).

(n) ADDITIONAL REQUIREMENTS FOR CERTAIN NONATTAINMENT AREAS.—

(1) IN GENERAL.—Notwithstanding any other provisions of this title or chapter 53 of title 49, for transportation management areas classified as nonattainment for ozone or carbon monoxide pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.), Federal funds may not be advanced in such area for any highway project that will result in a significant increase in the carrying capacity for single-occupant vehicles unless the project is addressed through a congestion management process.

(2) APPLICABILITY.—This subsection applies to a nonattainment area within the metropolitan planning area boundaries determined under subsection (e).

(o) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to confer on a metropolitan planning organization the authority to impose legal requirements on any transportation facility, provider, or project not eligible under this title or chapter 53 of title 49.

(p) FUNDING.—Funds apportioned under paragraphs (5)(D) and (6) of section 104(b) of this title or section 5305(g) of title 49 shall be available to carry out this section.

(q) CONTINUATION OF CURRENT REVIEW PRACTICE.—Since plans and TIPs described in this section are subject to a reasonable opportunity for public comment, since individual projects included in plans and TIPs are subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), and since decisions by the Secretary concerning plans and TIPs described in this section have not been reviewed under that Act as of January 1, 1997, any decision by the Secretary concerning a plan or TIP described in this section shall not be considered to be a Federal action subject to review under that Act.

(r) BI-STATE METROPOLITAN PLANNING ORGANIZATION.—

(1) DEFINITION OF BI-STATE MPO REGION.—In this subsection, the term "Bi-State MPO Region" has the meaning given the term "region" in subsection (a) of Article II of the Lake Tahoe Regional Planning Compact (Public Law 96–551; 94 Stat. 3234).

(2) TREATMENT.—For the purpose of this title, the Bi-State MPO Region shall be treated as—

(A) a metropolitan planning organization;

(B) a transportation management area under subsection (k); and

(C) an urbanized area, which is comprised of a population of 145,000 in the State of California and a population of 65,000 in the State of Nevada.

(3) SUBALLOCATED FUNDING.—

(A) PLANNING.—In determining the amounts under subparagraph (A) of section 133(d)(1) that shall be obligated for a fiscal year in the States of California and Nevada under clauses (i), (ii), and (iii) of that subparagraph, the Secretary shall, for each of those States—

(i) calculate the population under each of those clauses;

(ii) decrease the amount under section 133(d)(1)(A)(iii) by the population specified in paragraph (2) of this subsection for the Bi-State MPO Region in that State; and

(iii) increase the amount under section 133(d)(1)(A)(i) by the population specified in paragraph (2) of this subsection for the Bi-State MPO Region in that State.

(B) STBGP SET ASIDE.—In determining the amounts under paragraph (2) of section 133(h) that shall be obligated for a fiscal year in the States of California and Nevada, the Secretary shall, for the purpose of that subsection, calculate the populations for each of those States in a manner consistent with subparagraph (A).

(Added Pub. L. 87–866, §9(a), Oct. 23, 1962, 76 Stat. 1148; amended Pub. L. 91–605, title I, §143, Dec. 31, 1970, 84 Stat. 1737; Pub. L. 95–599, title I, §169, Nov. 6, 1978, 92 Stat. 2723; Pub. L. 102–240, title I, §1024(a), Dec. 18, 1991, 105 Stat. 1955; Pub. L. 102–388, title V, §502(b), Oct. 6, 1992, 106 Stat. 1566; Pub. L. 103–429, §3(5), Oct. 31, 1994, 108 Stat. 4377; Pub. L. 104–59, title III, §317, Nov. 28, 1995, 109 Stat. 588; Pub. L. 105–178, title I, §1203(a)–(m), (o), June 9, 1998, 112 Stat. 170–179; Pub. L. 105–206, title IX, §9003(c), July 22, 1998, 112 Stat. 839; Pub. L. 109–59, title VI, §6001(a), Aug. 10, 2005, 119 Stat. 1839; Pub. L. 110–244, title I, §101(n), June 6, 2008, 122 Stat. 1576; Pub. L. 112–141, div. A, title I, §1201(a), July 6, 2012, 126 Stat. 500; Pub. L. 114–94, div. A, title I, §1201, Dec. 4, 2015, 129 Stat. 1371.)

REFERENCES IN TEXT

The date of enactment of MAP-21, referred to in subsecs. (d)(2) and (l)(2), is deemed to be Oct. 1, 2012, see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of this title.

The Clean Air Act, referred to in subsecs. (e)(4)(A), (5)(D), (g)(1), (i)(3), (m)(2), and (n)(1), is act July 14, 1955, ch. 360, 69 Stat. 322, which is classified generally to chapter 85 (§7401 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of Title 42 and Tables.

The date of enactment of the SAFETEA–LU, referred to in subsec. (e)(4)(A), (5), is the date of enactment of Pub. L. 109–59, which was approved Aug. 10, 2005.

The National Environmental Policy Act of 1969, referred to in subsec. (q), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

2015—Subsec. (a)(1). Pub. L. 114–94, §1201(1), substituted "people and freight," for "people and freight and" and inserted "and take into consideration resiliency needs" after "urbanized areas,".

Subsec. (c)(2). Pub. L. 114–94, §1201(2), substituted ", bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter vanpool providers" for "and bicycle transportation facilities".

Subsec. (d)(3), (4). Pub. L. 114–94, §1201(3)(A), (B), added par. (3) and redesignated former par. (3) as (4). Former par. (4) redesignated (5).

Subsec. (d)(5). Pub. L. 114–94, §1201(A), (C), redesignated par. (4) as (5) and substituted "paragraph (6)" for "paragraph (5)". Former par. (5) redesignated (6).

Subsec. (d)(6), (7). Pub. L. 114–94, §1201(3)(A), redesignated pars. (5) and (6) as (6) and (7), respectively.

Subsec. (e)(4)(B). Pub. L. 114–94, §1201(4), substituted "subsection (d)(6)" for "subsection (d)(5)".

Subsec. (g)(3)(A). Pub. L. 114–94, §1201(5), inserted "tourism, natural disaster risk reduction," after "economic development,".

Subsec. (h)(1)(I), (J). Pub. L. 114–94, §1201(6)(A), added subpars. (I) and (J).

Subsec. (h)(2)(A). Pub. L. 114–94, §1201(6)(B), substituted "and the general purposes described in section 5301 of title 49" for "and in section 5301(c) of title 49".

Subsec. (i)(2)(A)(i). Pub. L. 114–94, §1201(7)(A)(i), substituted "public transportation facilities, intercity bus facilities," for "transit,".

Subsec. (i)(2)(G). Pub. L. 114–94, §1201(7)(A)(ii), substituted ", provide" for "and provide" and inserted ", and reduce the vulnerability of the existing transportation infrastructure to natural disasters" before period at end.

Subsec. (i)(2)(H). Pub. L. 114–94, §1201(7)(A)(iii), inserted before period at end "including consideration of the role that intercity buses may play in reducing congestion, pollution, and energy consumption in a cost-

effective manner and strategies and investments that preserve and enhance intercity bus systems, including systems that are privately owned and operated".

Subsec. (i)(6)(A). Pub. L. 114–94, §1201(7)(B), inserted "public ports," before "freight shippers," and " (including intercity bus operators, employer-based commuting programs, such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program)" after "private providers of transportation".

Subsec. (i)(8). Pub. L. 114–94, §1201(7)(C), substituted "paragraph (2)(E)" for "paragraph (2)(C)" in two places.

Subsec. (k)(3)(A). Pub. L. 114–94, §1201(8)(A), inserted "(including intercity bus operators, employer-based commuting programs such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program), job access projects," after "reduction".

Subsec. (k)(3)(C), (D). Pub. L. 114–94, §1201(8)(B), added subpars. (C) and (D).

Subsec. (l)(1). Pub. L. 114–94, §1201(9)(A), inserted period at end.

Subsec. (l)(2)(D). Pub. L. 114–94, §1201(9)(B), substituted "with a population of 200,000 or less" for "of less than 200,000".

Subsec. (n)(1). Pub. L. 114–94, §1201(10), inserted "49" after "chapter 53 of title".

Subsec. (p). Pub. L. 114–94, §1201(11), substituted "Funds apportioned under paragraphs (5)(D) and (6) of section 104(b)" for "Funds set aside under section 104(f)".

Subsec. (r). Pub. L. 114–94, §1201(12), added subsec. (r).

2012—Pub. L. 112–141 amended section generally. Prior to amendment, section related to metropolitan transportation planning and consisted of subsecs. (a) to (p).

2008—Subsec. (f)(3)(C)(ii)(II). Pub. L. 110–244, §101(n)(1), added subcl. (II) and struck out former subcl. (II). Prior to amendment, text read as follows: "In addition to funds made available to the metropolitan planning organization for the Lake Tahoe region under other provisions of this title and under chapter 53 of title 49, 1 percent of the funds allocated under section 202 shall be used to carry out the transportation planning process for the Lake Tahoe region under this subparagraph."

Subsec. (j)(3)(D). Pub. L. 110–244, §101(n)(2), inserted "or the identified phase" after "the project" in two places.

Subsec. (k)(2). Pub. L. 110–244, §101(n)(3), struck out "a metropolitan planning area serving" before "a transportation management area,".

2005—Pub. L. 109–59 amended section catchline and text generally, substituting provisions relating to metropolitan transportation planning for provisions relating to, in subsec. (a), general requirements for development of transportation plans and programs for urbanized areas, in subsec. (b), designation of metropolitan planning organizations, in subsec. (c), determination of metropolitan planning area boundaries, in subsec. (d), coordination of transportation planning in multistate metropolitan areas, in subsec. (e), coordination of metropolitan planning organizations, in subsec. (f), scope of the planning process, in subsec. (g), development of a long-range transportation plan, in subsec. (h), development of a metropolitan area transportation improvement program, in subsec. (i), designation of transportation management areas, in subsec. (j), abbreviated plans and programs for areas not designated as transportation management areas, in subsec. (k), transfer of funds, in subsec. (l), additional requirements for nonattainment areas under the Clean Air Act,in subsec. (m), limitation on statutory construction, in subsec. (n), funding, and in subsec. (o), review of plans and programs under the National Environmental Policy Act of 1969.

1998—Subsec. (a). Pub. L. 105–178, §1203(a), reenacted heading without change and amended text of subsec. (a) generally. Prior to amendment, text read as follows: "It is in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner which will efficiently maximize mobility of people and goods within and through urbanized areas and minimize transportation-related fuel consumption and air pollution. To accomplish this objective, metropolitan planning organizations, in cooperation with the State, shall develop transportation plans and programs for urbanized areas of the State. Such plans and programs shall provide for the development of transportation facilities (including pedestrian walkways and bicycle transportation facilities) which will function as an intermodal transportation system for the State, the metropolitan areas, and the Nation. The process for developing such plans and programs shall provide for consideration of all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems."

Subsec. (b)(1), (2). Pub. L. 105–178, §1203(b)(1), added pars. (1) and (2) and struck out former pars. (1) and (2) which read as follows:

"(1) IN GENERAL.—To carry out the transportation planning process required by this section, a metropolitan planning organization shall be designated for each urbanized area of more than 50,000 population by agreement among the Governor and units of general purpose local government which together represent at least 75 percent of the affected population (including the central city or cities as defined by the Bureau of the Census) or in accordance with procedures established by applicable State or local law.

"(2) MEMBERSHIP OF CERTAIN MPO'S.—In a metropolitan area designated as a transportation management area, the metropolitan planning organization designated for such area shall include local elected officials, officials of agencies which administer or operate major modes of transportation in the metropolitan area (including all transportation agencies included in the metropolitan planning organization on June 1, 1991) and appropriate State officials. This paragraph shall only apply to a metropolitan planning organization which is redesignated after the date of the enactment of this section."

Subsec. (b)(4). Pub. L. 105–178, §1203(b)(2), reenacted heading without change and amended text of par. (4) generally. Prior to amendment, text read as follows: "Designations of metropolitan planning organizations, whether made under this section or other provisions of law, shall remain in effect until redesignated under paragraph (5) or revoked by agreement among the Governor and units of general purpose local government which together represent at least 75 percent of the affected population or as otherwise provided under State or local procedures."

Subsec. (b)(5)(A). Pub. L. 105–178, §1203(b)(3), substituted "agreement between the Governor" for "agreement among the Governor" and "government that together represent" for "government which together represent".

Subsec. (b)(6). Pub. L. 105–178, §1203(b)(4), amended heading and text of par. (6) generally. Prior to amendment, text read as follows: "More than 1 metropolitan planning organization may be designated within an urbanized area as defined by the Bureau of the Census only if the Governor determines that the size and complexity of the urbanized area make designation of more than 1 metropolitan planning organization for such area appropriate."

Subsec. (c). Pub. L. 105–178, §1203(c), inserted "Planning" before "Area" in subsec. heading, designated first sentence as par. (1), inserted par. heading, and inserted "planning" before "area", added pars. (2) to (4), realigned margins, and struck out at end "Each metropolitan area shall cover at least the existing urbanized area and the contiguous area expected to become urbanized within the 20-year forecast period and may encompass the entire metropolitan statistical area or consolidated metropolitan statistical area, as defined by the Bureau of the Census. For areas designated as nonattainment areas for ozone or carbon monoxide under the Clean Air Act, the boundaries of the metropolitan area shall at least include the boundaries of the nonattainment area, except as otherwise provided by agreement between the metropolitan planning organization and the Governor."

Subsec. (d). Pub. L. 105–178, §1203(d), reenacted heading without change and amended text of subsec. (d) generally. Prior to amendment, text read as follows:

"(1) IN GENERAL.—The Secretary shall establish such requirements as the Secretary considers appropriate to encourage Governors and metropolitan planning organizations with responsibility for a portion of a multi-State metropolitan area to provide coordinated transportation planning for the entire metropolitan area.

"(2) COMPACTS.—The consent of Congress is hereby given to any 2 or more States to enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as such activities pertain to interstate areas and localities within such States and to establish such agencies, joint or otherwise, as such States may deem desirable for making such agreements and compacts effective."

Subsec. (e). Pub. L. 105–178, §1203(e), substituted "MPOs" for "MPO's" in subsec. heading, designated existing provisions as par. (1) and inserted par. heading, added par. (2), and realigned margins.

Subsec. (f). Pub. L. 105–178, §1203(f), amended heading and text of subsec. (f) generally, substituting provisions relating to scope of planning process for provisions relating to factors to be considered in developing transportation plans and programs.

Subsec. (g). Pub. L. 105–178, §1203(g)(6), substituted "Long-Range Transportation Plan" for "Long Range Plan" in heading.

Subsec. (g)(1). Pub. L. 105–178, §1203(g)(8), substituted "long-range transportation plan" for "long range plan".

Subsec. (g)(2). Pub. L. 105–178, §1203(g)(1), (7), (8), substituted "Long-range transportation plan" for "Long range plan" in heading and substituted "long-range transportation plan" for "long range plan" and "contain, at a minimum, the following" for ", at a minimum" in introductory provisions.

Subsec. (g)(2)(A). Pub. L. 105–178, §1203(g)(2), (8), substituted "An identification of" for "Identify" and "long-range transportation plan" for "long range plan".

Subsec. (g)(2)(B). Pub. L. 105–178, §1203(g)(3), added subpar. (B) and struck out former subpar. (B) which read as follows: "Include a financial plan that demonstrates how the long-range plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends any innovative financing techniques to finance needed projects and programs, including such techniques as value capture, tolls and congestion pricing."

Subsec. (g)(3). Pub. L. 105–178, §1203(g)(8), substituted "long-range transportation plan" for "long range plan".

Subsec. (g)(4). Pub. L. 105–178, §1203(g)(4), (8), substituted "long-range transportation plan" for "long range plan" in two places and inserted "freight shippers, providers of freight transportation services," after "transportation agency employees," and "representatives of users of public transit," after "private providers of transportation,".

Subsec. (g)(5). Pub. L. 105–178, §1203(g)(7), (8), substituted "long-range transportation plan" for "long range plan" in heading and in introductory provisions.

Subsec. (g)(6). Pub. L. 105–178, §1203(g)(5), added par. (6).

Subsec. (h). Pub. L. 105–178, §1203(h), amended heading and text of subsec. (h) generally. Prior to amendment, text related to transportation improvement program, providing for development of program, priority and selection of projects, major capital investments, requirement of inclusion of projects within area proposed for funding, and provision of reasonable notice and opportunity to comment for interested citizens.

Subsec. (h)(5)(A). Pub. L. 105–178, §1203(o), as added by Pub. L. 105–206, §9003(c), struck out "for implementation" after "federally funded projects" in introductory provisions.

Subsec. (i)(1). Pub. L. 105–178, §1203(i)(1), reenacted heading without change and amended text of par. (1) generally. Prior to amendment, text read as follows: "The Secretary shall designate as transportation management areas all urbanized areas over 200,000 population. The Secretary shall designate any additional area as a transportation management area upon the request of the Governor and the metropolitan planning organization designated for such area or the affected local officials. Such additional areas shall include upon such a request the Lake Tahoe Basin as defined by Public Law 96–551."

Subsec. (i)(4). Pub. L. 105–178, §1203(i)(2), reenacted heading without change and amended text of par. (4) generally. Prior to amendment, text read as follows: "All projects carried out within the boundaries of a transportation management area with Federal participation pursuant to this title (excluding projects undertaken on the National Highway System and pursuant to the bridge and Interstate maintenance programs) or pursuant to chapter 53 of title 49 shall be selected by the metropolitan planning organization designated for such area in consultation with the State and in conformance with the transportation improvement program for such area and priorities established therein. Projects undertaken within the boundaries of a transportation management area on the National Highway System or pursuant to the bridge and Interstate maintenance programs shall be selected by the State in cooperation with the metropolitan planning organization designated for such area and shall be in conformance with the transportation improvement program for such area."

Subsec. (i)(5). Pub. L. 105–178, §1203(i)(3), reenacted heading without change and amended text of par. (5) generally. Prior to amendment, text read as follows: "The Secretary shall assure that each metropolitan planning organization in each transportation management area is carrying out its responsibilities under applicable provisions of Federal law, and shall so certify at least once every 3 years. The Secretary may make such certification only if (1) a metropolitan planning organization is complying with the requirements of this section and other applicable requirements of Federal law, and (2) there is a transportation improvement program for the area that has been approved by the metropolitan planning organization and the Governor. If after September 30, 1993, a metropolitan planning organization is not certified by the Secretary, the Secretary may withhold, in whole or in part, the apportionment under section 104(b)(3) attributed to the relevant metropolitan area pursuant to section 133(d)(3) and capital funds apportioned under the formula program under section 5336 of title 49. If a metropolitan planning organization remains uncertified for more than 2 consecutive years after September 30, 1994, 20 percent of the apportionment attributed to that metropolitan area under section 133(d)(3) and capital funds apportioned under the formula program under section 5336 of title 49 shall be withheld. The withheld apportionments shall be restored to the metropolitan area at such time as the metropolitan planning organization is certified by the Secretary. The Secretary shall not withhold certification under this section based upon the policies and criteria established by a metropolitan planning organization or transit grant recipient for determining the feasibility of private enterprise participation in accordance with section 5306(a) of title 49."

Subsec. (j). Pub. L. 105–178, §1203(j), reenacted heading without change and amended text of subsec. (j) generally. Prior to amendment, text read as follows: "For metropolitan areas not designated as transportation management areas under this section, the Secretary may provide for the development of abbreviated metropolitan transportation plans and programs that the Secretary determines to be appropriate to achieve the purposes of this section, taking into account the complexity of transportation problems, including transportation related air quality problems, in such areas. In no event shall the Secretary provide abbreviated plans or programs for metropolitan areas which are in nonattainment for ozone or carbon monoxide under the Clean Air Act."

Subsec. (l). Pub. L. 105–178, §1203(k), designated existing provisions as par. (1), inserted heading, and added par. (2).

Subsec. (n). Pub. L. 105–178, §1203(l), amended heading and text of subsec. (n) generally. Prior to amendment, text read as follows: "Any funds set aside pursuant to section 104(f) of this title that are not used for the purpose of carrying out this section may be made available by the metropolitan planning organization to the State for the purpose of funding activities under section 135."

Subsec. (o). Pub. L. 105–178, §1203(m), added subsec. (o).

1995—Subsec. (f)(16). Pub. L. 104–59 added par. (16).

1994—Subsecs. (h)(5), (i)(3), (4). Pub. L. 103–429, §3(5)(A), substituted "chapter 53 of title 49" for "the Federal Transit Act".

Subsec. (i)(5). Pub. L. 103–429, §3(5)(B), substituted "section 5336 of title 49" for "section 9 of the Federal Transit Act" in two places and "section 5306(a) of title 49" for "section 8(o) of the Federal Transit Act".

Subsec. (k). Pub. L. 103–429, §3(5)(C), (D), substituted "chapter 53 of title 49" for "the Federal Transit Act" wherever appearing and "chapter 53 funds" for "Federal Transit Act funds".

Subsecs. (l), (m). Pub. L. 103–429, §3(5)(C), substituted "chapter 53 of title 49" for "the Federal Transit Act".

1992—Subsec. (k). Pub. L. 102–388 inserted at end "The provisions of title 23, United States Code, regarding the non-Federal share shall apply to title 23 funds used for transit projects and the provisions of the Federal Transit Act regarding non-Federal share shall apply to Federal Transit Act funds used for highway projects."

1991—Pub. L. 102–240 substituted section catchline for one which read: "Transportation planning in certain urban areas" and amended text generally, substituting present provisions for provisions relating to transportation planning in certain urban areas, including provisions stating transportation objectives, requiring continuing comprehensive planning process by States and local communities, and relating to redesignation of metropolitan planning organizations, designation of contiguous interstate areas as critical transportation regions and corridors, establishment of planning bodies for such regions and corridors, and authorization of appropriations.

1978—Subsec. (a). Pub. L. 95–599, §169(a), inserted provisions related to cooperation with local officials and specific considerations in the planning process.

Subsecs. (b), (c). Pub. L. 95–599, §169(b), added subsec. (b) and redesignated former subsec. (b) as (c).

1970—Pub. L. 91–605 designated existing provisions as subsec. (a), inserted provision prohibiting a highway construction project in any urban area of 50,000 or more population unless responsible public officials of such area have been consulted and their views considered with respect to the corridor, the location, and the design of the project, and added subsec. (b).

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of this title.

Effective Date of 1998 Amendment

Title IX of Pub. L. 105–206 effective simultaneously with enactment of Pub. L. 105–178 and to be treated as included in Pub. L. 105–178 at time of enactment, and provisions of Pub. L. 105–178, as in effect on day before July 22, 1998, that are amended by title IX of Pub. L. 105–206 to be treated as not enacted, see section 9016 of Pub. L. 105–206, set out as a note under section 101 of this title.

Effective Date of 1991 Amendment

Amendment by Pub. L. 102–240 effective Dec. 18, 1991, and applicable to funds authorized to be appropriated or made available after Sept. 30, 1991, and, with certain exceptions, not applicable to funds appropriated or made available on or before Sept. 30, 1991, see section 1100 of Pub. L. 102–240, set out as a note under section 104 of this title.

Schedule for Implementation

Pub. L. 109–59, title VI, §6001(b), Aug. 10, 2005, 119 Stat. 1857, provided that: "The Secretary [of Transportation] shall issue guidance on a schedule for implementation of the changes made by this section [amending this section and section 135 of this title], taking into consideration the established planning update cycle for States and metropolitan planning organizations. The Secretary shall not require a State or metropolitan planning organization to deviate from its established planning update cycle to implement changes made by this section. Beginning July 1, 2007, State or metropolitan planning organization plan or program updates shall reflect changes made by this section."

Demonstration Project for Restricted Access to Central Business District of Metropolitan Areas

Pub. L. 95–599, title I, §155, Nov. 6, 1978, 92 Stat. 2717, authorized Secretary of Transportation to carry out a demonstration project in a metropolitan area respecting the restriction of access of motor vehicles to the central business district during peak hours of traffic, authorized the necessary appropriations, and required progress reports and a final report and recommendations not later than three years after Nov. 6, 1978.

Reduction of Urban Blight Adjacent to Federal-Aid Primary and Interstate Highways Located in Central Business Districts

Pub. L. 95–599, title I, §159, Nov. 6, 1978, 92 Stat. 2718, directed Secretary to conduct a study and submit a report to Congress not later than two years after Nov. 6, 1978, respecting the potential for reducing urban blight adjacent to Federal-aid primary and interstate highways located in central business districts.

Urban System Study

Pub. L. 94–280, title I, §149, May 5, 1976, 90 Stat. 447, directed Secretary of Transportation to conduct a study of the factors involved in planning, selection, etc., of Federal-aid urban system routes including an analysis of organizations carrying out the planning process, the status of jurisdiction over roads, programing responsibilities under local and State laws, and authority of local units, such study to be submitted to Congress within six months of May 5, 1976.

Fringe Parking Demonstration Projects

Pub. L. 90–495, §11, Aug. 23, 1968, 82 Stat. 820, authorized Secretary to approve construction of publicly owned parking facilities under this title until June 30, 1971, as a demonstration project, authorized the Federal share of any project under this section to be 50%, prevented approval of projects by the Secretary unless the State or political subdivision thereof where the project is located can construct, maintain, and operate the facility, unless the Secretary has entered into an agreement with the State or political subdivision governing the financing, maintenance, and operation of the facility, and unless the Secretary has approved design standards for construction of the facility, defined "parking facilities", permitted a State or political subdivision to contract for the operation of such facility, prohibited approval of the project by the Secretary unless it is carried on in accordance with section 134 of this title (this section), and required annual reports to Congress on the demonstration projects approved under this section, prior to repeal by Pub. L. 91–605, title I, §134(c), Dec. 31, 1970, 84 Stat. 1734. See section 137 of this title.

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Title 23 - HIGHWAYS
CHAPTER 1 - FEDERAL-AID HIGHWAYS
Sec. 135 - Statewide and nonmetropolitan transportation planning
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§135. Statewide and nonmetropolitan transportation planning

(a) General Requirements.—

(1) Development of plans and programs.—Subject to section 134, to accomplish the objectives stated in section 134(a), each State shall develop a statewide transportation plan and a statewide transportation improvement program for all areas of the State.

(2) Contents.—The statewide transportation plan and the transportation improvement program developed for each State shall provide for the development and integrated management and operation of transportation systems and facilities (including accessible pedestrian walkways, bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter van pool providers) that will function as an intermodal transportation system for the State and an integral part of an intermodal transportation system for the United States.

(3) Process of development.—The process for developing the statewide plan and the transportation improvement program shall provide for consideration of all modes of transportation and the policies stated in section 134(a) and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.

(b) Coordination With Metropolitan Planning; State Implementation Plan.—A State shall—

(1) coordinate planning carried out under this section with the transportation planning activities carried out under section 134 for metropolitan areas of the State and with statewide trade and economic development planning activities and related multistate planning efforts; and

(2) develop the transportation portion of the State implementation plan as required by the Clean Air Act (42 U.S.C. 7401 et seq.).

(c) Interstate Agreements.—

(1) In general.—Two or more States may enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section related to interstate areas and localities in the States and establishing authorities the States consider desirable for making the agreements and compacts effective.

(2) Reservation of rights.—The right to alter, amend, or repeal interstate compacts entered into under this subsection is expressly reserved.

(d) Scope of Planning Process.—

(1) In general.—Each State shall carry out a statewide transportation planning process that provides for consideration and implementation of projects, strategies, and services that will—

(A) support the economic vitality of the United States, the States, nonmetropolitan areas, and metropolitan areas, especially by enabling global competitiveness, productivity, and efficiency;

(B) increase the safety of the transportation system for motorized and nonmotorized users;

(C) increase the security of the transportation system for motorized and nonmotorized users;

(D) increase the accessibility and mobility of people and freight;

(E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(F) enhance the integration and connectivity of the transportation system, across and between modes throughout the State, for people and freight;

(G) promote efficient system management and operation;

(H) emphasize the preservation of the existing transportation system;

(I) improve the resiliency and reliability of the transportation system and reduce or mitigate stormwater impacts of surface transportation; and

(J) enhance travel and tourism.

(2) PERFORMANCE-BASED APPROACH.—

(A) IN GENERAL.—The statewide transportation planning process shall provide for the establishment and use of a performance-based approach to transportation decisionmaking to support the national goals described in section 150(b) of this title and the general purposes described in section 5301 of title 49.

(B) PERFORMANCE TARGETS.—

(i) SURFACE TRANSPORTATION PERFORMANCE TARGETS.—

(I) IN GENERAL.—Each State shall establish performance targets that address the performance measures described in section 150(c), where applicable, to use in tracking progress towards attainment of critical outcomes for the State.

(II) COORDINATION.—Selection of performance targets by a State shall be coordinated with the relevant metropolitan planning organizations to ensure consistency, to the maximum extent practicable.

(ii) PUBLIC TRANSPORTATION PERFORMANCE TARGETS.—In areas not represented by a metropolitan planning organization, selection of performance targets by a State shall be coordinated, to the maximum extent practicable, with providers of public transportation to ensure consistency with sections 5326(c) and 5329(d) of title 49.

(C) INTEGRATION OF OTHER PERFORMANCE-BASED PLANS.—A State shall integrate into the statewide transportation planning process, directly or by reference, the goals, objectives, performance measures, and targets described in this paragraph, in other State transportation plans and transportation processes, as well as any plans developed pursuant to chapter 53 of title 49 by providers of public transportation in areas not represented by a metropolitan planning organization required as part of a performance-based program.

(D) USE OF PERFORMANCE MEASURES AND TARGETS.—The performance measures and targets established under this paragraph shall be considered by a State when developing policies, programs, and investment priorities reflected in the statewide transportation plan and statewide transportation improvement program.

(3) FAILURE TO CONSIDER FACTORS.—The failure to take into consideration the factors specified in paragraphs (1) and (2) shall not be subject to review by any court under this title, chapter 53 of title 49, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a statewide transportation plan, a statewide transportation improvement program, a project or strategy, or the certification of a planning process.

(e) ADDITIONAL REQUIREMENTS.—In carrying out planning under this section, each State shall, at a minimum—

(1) with respect to nonmetropolitan areas, cooperate with affected local officials with responsibility for transportation or, if applicable, through regional transportation planning organizations described in subsection (m);

(2) consider the concerns of Indian tribal governments and Federal land management agencies that have jurisdiction over land within the boundaries of the State; and

(3) consider coordination of transportation plans, the transportation improvement program, and planning activities with related planning activities being carried out outside of metropolitan planning areas and between States.

(f) Long-range Statewide Transportation Plan.—

(1) Development.—Each State shall develop a long-range statewide transportation plan, with a minimum 20-year forecast period for all areas of the State, that provides for the development and implementation of the intermodal transportation system of the State.

(2) Consultation with governments.—

(A) Metropolitan areas.—The statewide transportation plan shall be developed for each metropolitan area in the State in cooperation with the metropolitan planning organization designated for the metropolitan area under section 134.

(B) Nonmetropolitan areas.—

(i) In general.—With respect to nonmetropolitan areas, the statewide transportation plan shall be developed in cooperation with affected nonmetropolitan officials with responsibility for transportation or, if applicable, through regional transportation planning organizations described in subsection (m).

(ii) Role of secretary.—The Secretary shall not review or approve the consultation process in each State.

(C) Indian tribal areas.—With respect to each area of the State under the jurisdiction of an Indian tribal government, the statewide transportation plan shall be developed in consultation with the tribal government and the Secretary of the Interior.

(D) Consultation, comparison, and consideration.—

(i) In general.—The long-range transportation plan shall be developed, as appropriate, in consultation with State, tribal, and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation.

(ii) Comparison and consideration.—Consultation under clause (i) shall involve comparison of transportation plans to State and tribal conservation plans or maps, if available, and comparison of transportation plans to inventories of natural or historic resources, if available.

(3) Participation by interested parties.—

(A) In general.—In developing the statewide transportation plan, the State shall provide to—

(i) nonmetropolitan local elected officials or, if applicable, through regional transportation planning organizations described in subsection (m), an opportunity to participate in accordance with subparagraph (B)(i); and

(ii) citizens, affected public agencies, representatives of public transportation employees, public ports, freight shippers, private providers of transportation (including intercity bus operators, employer-based commuting programs, such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program), representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, providers of freight transportation services, and other interested parties a reasonable opportunity to comment on the proposed plan.

(B) Methods.—In carrying out subparagraph (A), the State shall, to the maximum extent practicable—

(i) develop and document a consultative process to carry out subparagraph (A)(i) that is separate and discrete from the public involvement process developed under clause (ii);

(ii) hold any public meetings at convenient and accessible locations and times;

(iii) employ visualization techniques to describe plans; and

(iv) make public information available in electronically accessible format and means, such as the World Wide Web, as appropriate to afford reasonable opportunity for consideration of public information under subparagraph (A).

(4) Mitigation activities.—

(A) IN GENERAL.—A long-range transportation plan shall include a discussion of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the plan.

(B) CONSULTATION.—The discussion shall be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies.

(5) FINANCIAL PLAN.—The statewide transportation plan may include—

(A) a financial plan that—

(i) demonstrates how the adopted statewide transportation plan can be implemented;

(ii) indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan; and

(iii) recommends any additional financing strategies for needed projects and programs; and

(B) for illustrative purposes, additional projects that would be included in the adopted statewide transportation plan if reasonable additional resources beyond those identified in the financial plan were available.

(6) SELECTION OF PROJECTS FROM ILLUSTRATIVE LIST.—A State shall not be required to select any project from the illustrative list of additional projects included in the financial plan described in paragraph (5).

(7) PERFORMANCE-BASED APPROACH.—The statewide transportation plan shall include—

(A) a description of the performance measures and performance targets used in assessing the performance of the transportation system in accordance with subsection (d)(2); and

(B) a system performance report and subsequent updates evaluating the condition and performance of the transportation system with respect to the performance targets described in subsection (d)(2), including progress achieved by the metropolitan planning organization in meeting the performance targets in comparison with system performance recorded in previous reports;

(8) EXISTING SYSTEM.—The statewide transportation plan should include capital, operations and management strategies, investments, procedures, and other measures to ensure the preservation and most efficient use of the existing transportation system, including consideration of the role that intercity buses may play in reducing congestion, pollution, and energy consumption in a cost-effective manner and strategies and investments that preserve and enhance intercity bus systems, including systems that are privately owned and operated.

(9) PUBLICATION OF LONG-RANGE TRANSPORTATION PLANS.—Each long-range transportation plan prepared by a State shall be published or otherwise made available, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web.

(g) STATEWIDE TRANSPORTATION IMPROVEMENT PROGRAM.—

(1) DEVELOPMENT.—

(A) IN GENERAL.—Each State shall develop a statewide transportation improvement program for all areas of the State.

(B) DURATION AND UPDATING OF PROGRAM.—Each program developed under subparagraph (A) shall cover a period of 4 years and shall be updated every 4 years or more frequently if the Governor of the State elects to update more frequently.

(2) CONSULTATION WITH GOVERNMENTS.—

(A) METROPOLITAN AREAS.—With respect to each metropolitan area in the State, the program shall be developed in cooperation with the metropolitan planning organization designated for the metropolitan area under section 134.

(B) NONMETROPOLITAN AREAS.—

(i) IN GENERAL.—With respect to each nonmetropolitan area in the State, the program shall be developed in consultation with affected nonmetropolitan local officials with responsibility for transportation or, if applicable, through regional transportation planning organizations described in subsection (m).

(ii) ROLE OF SECRETARY.—The Secretary shall not review or approve the specific consultation process in the State.

(C) INDIAN TRIBAL AREAS.—With respect to each area of the State under the jurisdiction of an Indian tribal government, the program shall be developed in consultation with the tribal government and the Secretary of the Interior.

(3) PARTICIPATION BY INTERESTED PARTIES.—In developing the program, the State shall provide citizens, affected public agencies, representatives of public transportation employees, public ports, freight shippers, private providers of transportation (including intercity bus operators),,[1] providers of freight transportation services, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the proposed program.

(4) PERFORMANCE TARGET ACHIEVEMENT.—A statewide transportation improvement program shall include, to the maximum extent practicable, a discussion of the anticipated effect of the statewide transportation improvement program toward achieving the performance targets established in the statewide transportation plan, linking investment priorities to those performance targets.

(5) INCLUDED PROJECTS.—

(A) IN GENERAL.—A transportation improvement program developed under this subsection for a State shall include Federally supported surface transportation expenditures within the boundaries of the State.

(B) LISTING OF PROJECTS.—

(i) IN GENERAL.—An annual listing of projects for which funds have been obligated for the preceding year in each metropolitan planning area shall be published or otherwise made available by the cooperative effort of the State, transit operator, and the metropolitan planning organization for public review.

(ii) FUNDING CATEGORIES.—The listing described in clause (i) shall be consistent with the funding categories identified in each metropolitan transportation improvement program.

(C) PROJECTS UNDER CHAPTER 2.—

(i) REGIONALLY SIGNIFICANT PROJECTS.—Regionally significant projects proposed for funding under chapter 2 shall be identified individually in the transportation improvement program.

(ii) OTHER PROJECTS.—Projects proposed for funding under chapter 2 that are not determined to be regionally significant shall be grouped in 1 line item or identified individually in the transportation improvement program.

(D) CONSISTENCY WITH STATEWIDE TRANSPORTATION PLAN.—Each project shall be—

(i) consistent with the statewide transportation plan developed under this section for the State;

(ii) identical to the project or phase of the project as described in an approved metropolitan transportation plan; and

(iii) in conformance with the applicable State air quality implementation plan developed under the Clean Air Act (42 U.S.C. 7401 et seq.), if the project is carried out in an area designated as a nonattainment area for ozone, particulate matter, or carbon monoxide under part D of title I of that Act (42 U.S.C. 7501 et seq.).

(E) REQUIREMENT OF ANTICIPATED FULL FUNDING.—The transportation improvement program shall include a project, or an identified phase of a project, only if full funding can reasonably be

anticipated to be available for the project within the time period contemplated for completion of the project.

(F) FINANCIAL PLAN.—

(i) IN GENERAL.—The transportation improvement program may include a financial plan that demonstrates how the approved transportation improvement program can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the transportation improvement program, and recommends any additional financing strategies for needed projects and programs.

(ii) ADDITIONAL PROJECTS.—The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted transportation plan if reasonable additional resources beyond those identified in the financial plan were available.

(G) SELECTION OF PROJECTS FROM ILLUSTRATIVE LIST.—

(i) NO REQUIRED SELECTION.—Notwithstanding subparagraph (F), a State shall not be required to select any project from the illustrative list of additional projects included in the financial plan under subparagraph (F).

(ii) REQUIRED ACTION BY THE SECRETARY.—Action by the Secretary shall be required for a State to select any project from the illustrative list of additional projects included in the financial plan under subparagraph (F) for inclusion in an approved transportation improvement program.

(H) PRIORITIES.—The transportation improvement program shall reflect the priorities for programming and expenditures of funds, including transportation enhancement activities, required by this title and chapter 53 of title 49.

(6) PROJECT SELECTION FOR AREAS OF LESS THAN 50,000 POPULATION.—

(A) IN GENERAL.—Projects carried out in areas with populations of less than 50,000 individuals shall be selected, from the approved transportation improvement program (excluding projects carried out on the National Highway System and projects carried out under the bridge program or the Interstate maintenance program under this title or under sections 5310 and 5311 of title 49), by the State in cooperation with the affected nonmetropolitan local officials with responsibility for transportation or, if applicable, through regional transportation planning organizations described in subsection (m).

(B) OTHER PROJECTS.—Projects carried out in areas with populations of less than 50,000 individuals on the National Highway System or under the bridge program or the Interstate maintenance program under this title or under sections 5310, 5311, 5316,[2] and 5317 [2] of title 49 shall be selected, from the approved statewide transportation improvement program, by the State in consultation with the affected nonmetropolitan local officials with responsibility for transportation.

(7) TRANSPORTATION IMPROVEMENT PROGRAM APPROVAL.—Every 4 years, a transportation improvement program developed under this subsection shall be reviewed and approved by the Secretary if based on a current planning finding.

(8) PLANNING FINDING.—A finding shall be made by the Secretary at least every 4 years that the transportation planning process through which statewide transportation plans and programs are developed is consistent with this section and section 134.

(9) MODIFICATIONS TO PROJECT PRIORITY.—Notwithstanding any other provision of law, action by the Secretary shall not be required to advance a project included in the approved transportation improvement program in place of another project in the program.

(h) PERFORMANCE-BASED PLANNING PROCESSES EVALUATION.—

(1) IN GENERAL.—The Secretary shall establish criteria to evaluate the effectiveness of the performance-based planning processes of States, taking into consideration the following:

(A) The extent to which the State is making progress toward achieving, the performance targets described in subsection (d)(2), taking into account whether the State developed appropriate performance targets.

(B) The extent to which the State has made transportation investments that are efficient and cost-effective.

(C) The extent to which the State—

(i) has developed an investment process that relies on public input and awareness to ensure that investments are transparent and accountable; and

(ii) provides reports allowing the public to access the information being collected in a format that allows the public to meaningfully assess the performance of the State.

(2) Report.—

(A) In general.—Not later than 5 years after the date of enactment of the MAP–21, the Secretary shall submit to Congress a report evaluating—

(i) the overall effectiveness of performance-based planning as a tool for guiding transportation investments; and

(ii) the effectiveness of the performance-based planning process of each State.

(B) Publication.—The report under subparagraph (A) shall be published or otherwise made available in electronically accessible formats and means, including on the Internet.

(i) Funding.—Funds apportioned under paragraphs (5)(D) and (6) of section 104(b) of this title and set aside under section 5305(g) of title 49 shall be available to carry out this section.

(j) Treatment of Certain State Laws as Congestion Management Processes.—For purposes of this section and section 134, and sections 5303 and 5304 of title 49, State laws, rules, or regulations pertaining to congestion management systems or programs may constitute the congestion management process under this section and section 134, and sections 5303 and 5304 of title 49, if the Secretary finds that the State laws, rules, or regulations are consistent with, and fulfill the intent of, the purposes of this section and section 134 and sections 5303 and 5304 of title 49, as appropriate.

(k) Continuation of Current Review Practice.—Since the statewide transportation plan and the transportation improvement program described in this section are subject to a reasonable opportunity for public comment, since individual projects included in the statewide transportation plans and the transportation improvement program are subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), and since decisions by the Secretary concerning statewide transportation plans or the transportation improvement program described in this section have not been reviewed under that Act as of January 1, 1997, any decision by the Secretary concerning a metropolitan or statewide transportation plan or the transportation improvement program described in this section shall not be considered to be a Federal action subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(l) Schedule for Implementation.—The Secretary shall issue guidance on a schedule for implementation of the changes made by this section, taking into consideration the established planning update cycle for States. The Secretary shall not require a State to deviate from its established planning update cycle to implement changes made by this section. States shall reflect changes made to their transportation plan or transportation improvement program updates not later than 2 years after the date of issuance of guidance by the Secretary under this subsection.

(m) Designation of Regional Transportation Planning Organizations.—

(1) In general.—To carry out the transportation planning process required by this section, a State may establish and designate regional transportation planning organizations to enhance the planning, coordination, and implementation of statewide strategic long-range transportation plans and transportation improvement programs, with an emphasis on addressing the needs of nonmetropolitan areas of the State.

(2) Structure.—A regional transportation planning organization shall be established as a multijurisdictional organization of nonmetropolitan local officials or their designees who volunteer

for such organization and representatives of local transportation systems who volunteer for such organization.

(3) REQUIREMENTS.—A regional transportation planning organization shall establish, at a minimum—

(A) a policy committee, the majority of which shall consist of nonmetropolitan local officials, or their designees, and, as appropriate, additional representatives from the State, private business, transportation service providers, economic development practitioners, and the public in the region; and

(B) a fiscal and administrative agent, such as an existing regional planning and development organization, to provide professional planning, management, and administrative support.

(4) DUTIES.—The duties of a regional transportation planning organization shall include—

(A) developing and maintaining, in cooperation with the State, regional long-range multimodal transportation plans;

(B) developing a regional transportation improvement program for consideration by the State;

(C) fostering the coordination of local planning, land use, and economic development plans with State, regional, and local transportation plans and programs;

(D) providing technical assistance to local officials;

(E) participating in national, multistate, and State policy and planning development processes to ensure the regional and local input of nonmetropolitan areas;

(F) providing a forum for public participation in the statewide and regional transportation planning processes;

(G) considering and sharing plans and programs with neighboring regional transportation planning organizations, metropolitan planning organizations, and, where appropriate, tribal organizations; and

(H) conducting other duties, as necessary, to support and enhance the statewide planning process under subsection (d).

(5) STATES WITHOUT REGIONAL TRANSPORTATION PLANNING ORGANIZATIONS.—If a State chooses not to establish or designate a regional transportation planning organization, the State shall consult with affected nonmetropolitan local officials to determine projects that may be of regional significance.

(Added Pub. L. 90–495, §10(a), Aug. 23, 1968, 82 Stat. 820; amended Pub. L. 91–605, title I, §§106(g), 125, Dec. 31, 1970, 84 Stat. 1718, 1729; Pub. L. 93–87, title I, §119, Aug. 13, 1973, 87 Stat. 259; Pub. L. 94–280, title I, §123(a), May 5, 1976, 90 Stat. 439; Pub. L. 102–240, title I, §1025(a), Dec. 18, 1991, 105 Stat. 1962; Pub. L. 103–429, §3(6), Oct. 31, 1994, 108 Stat. 4378; Pub. L. 105–178, title I, §1204(a)–(h), June 9, 1998, 112 Stat. 180–184; Pub. L. 109–59, title VI, §6001(a), Aug. 10, 2005, 119 Stat. 1851; Pub. L. 112–141, div. A, title I, §1202(a), July 6, 2012, 126 Stat. 514; Pub. L. 114–94, div. A, title I, §§1104(e)(3), 1202, Dec. 4, 2015, 129 Stat. 1332, 1374.)

REFERENCES IN TEXT

The Clean Air Act, referred to in subsecs. (b)(2) and (g)(5)(D)(iii), is act July 14, 1955, ch. 360, 69 Stat. 322, which is classified generally to chapter 85 (§7401 et seq.) of Title 42, The Public Health and Welfare. Part D of title I of the Act is classified generally to subpart 1 (§7501 et seq.) of part D of subchapter I of chapter 85 of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of Title 42 and Tables.

Sections 5316 and 5317 of title 49, referred to in subsec. (g)(6)(B), were repealed by Pub. L. 112–141, div. B, §20002(a), July 6, 2012, 126 Stat. 622.

The date of enactment of the MAP–21, referred to in subsec. (h)(2)(A), is deemed to be Oct. 1, 2012, see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of this title.

The National Environmental Policy Act of 1969, referred to in subsec. (k), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

PRIOR PROVISIONS

A prior section 135, Pub. L. 89–139, §4(a), Aug. 28, 1965, 79 Stat. 578, called for a highway safety program in each State approved by the Secretary, prior to repeal by Pub. L. 89–564, title I, §102(a), Sept. 9, 1966, 80 Stat. 734. See section 402 of this title.

AMENDMENTS

2015—Subsec. (a)(2). Pub. L. 114–94, §1202(1), substituted ", bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter van pool providers" for "and bicycle transportation facilities".

Subsec. (d)(1)(I), (J). Pub. L. 114–94, §1202(2)(A), added subpars. (I) and (J).

Subsec. (d)(2)(A). Pub. L. 114–94, §1202(2)(B)(i), substituted "and the general purposes described in section 5301 of title 49" for "and in section 5301(c) of title 49".

Subsec. (d)(2)(B)(ii), (C). Pub. L. 114–94, §1202(2)(B)(ii), (iii), struck out "urbanized" before "areas".

Subsec. (f)(3)(A)(ii). Pub. L. 114–94, §1202(3)(A), inserted "public ports," before "freight shippers," and "(including intercity bus operators, employer-based commuting programs, such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program)" after "private providers of transportation".

Subsec. (f)(7). Pub. L. 114–94, §1202(3)(B), substituted "shall" for "should" in introductory provisions.

Subsec. (f)(8). Pub. L. 114–94, §1202(3)(C), inserted before period at end ", including consideration of the role that intercity buses may play in reducing congestion, pollution, and energy consumption in a cost-effective manner and strategies and investments that preserve and enhance intercity bus systems, including systems that are privately owned and operated".

Subsec. (g)(3). Pub. L. 114–94, §1202(4), inserted "public ports," before "freight shippers" and "(including intercity bus operators)," after "private providers of transportation".

Subsec. (i). Pub. L. 114–94, §1104(e)(3), substituted "paragraphs (5)(D) and (6) of section 104(b)" for "section 104(b)(5)".

2012—Pub. L. 112–141 amended section generally. Prior to amendment, section related to statewide transportation planning.

2005—Pub. L. 109–59 amended section catchline and text generally, substituting provisions relating to statewide transportation planning for provisions relating to, in subsec. (a), development of plans and programs by each State, in subsec. (b), coordination of State with Federal planning, in subsec. (c), scope of planning process, in subsec. (d), additional minimum requirements for each State to consider, in subsec. (e), development of a long-range transportation plan, in subsec. (f), development of a State transportation improvement program, in subsec. (g), funding, in subsec. (h), treatment of certain State laws as congestion management systems, and, in subsec. (i), review of plans and programs under the National Environmental Policy Act of 1969.

1998—Subsec. (a). Pub. L. 105–178, §1204(a), reenacted heading without change and amended text of subsec. (a) generally. Prior to amendment, text read as follows: "It is in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner that will serve all areas of the State efficiently and effectively. Subject to section 134 of this title, the State shall develop transportation plans and programs for all areas of the State. Such plans and programs shall provide for development of transportation facilities (including pedestrian walkways and bicycle transportation facilities) which will function as an intermodal State transportation system. The process for developing such plans and programs shall provide for consideration of all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems."

Subsec. (b). Pub. L. 105–178, §1204(b), inserted "and sections 5303 through 5305 of title 49" after "section 134 of this title".

Subsec. (c). Pub. L. 105–178, §1204(c), amended heading and text of subsec. (c) generally, substituting provisions relating to scope of planning process for provisions relating to considerations to be involved in State's continuous transportation planning process.

Subsec. (d). Pub. L. 105–178, §1204(d), reenacted heading without change and amended text of subsec. (d) generally. Prior to amendment, text read as follows: "Each State in carrying out planning under this section shall, at a minimum, consider the following:

"(1) The coordination of transportation plans and programs developed for metropolitan areas of the State under section 134 with the State transportation plans and programs developed under this section and

the reconciliation of such plans and programs as necessary to ensure connectivity within transportation systems.

"(2) Investment strategies to improve adjoining State and local roads that support rural economic growth and tourism development, Federal agency renewable resources management, and multipurpose land management practices, including recreation development.

"(3) The concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the State."

Subsec. (e). Pub. L. 105–178, §1204(e), amended heading and text of subsec. (e) generally. Prior to amendment, text read as follows: "The State shall develop a long-range transportation plan for all areas of the State. With respect to metropolitan areas of the State, the plan shall be developed in cooperation with metropolitan planning organizations designated for metropolitan areas in the State under section 134. With respect to areas of the State under the jurisdiction of an Indian tribal government, the plan shall be developed in cooperation with such government and the Secretary of the Interior. In developing the plan, the State shall provide citizens, affected public agencies, representatives of transportation agency employees, other affected employee representatives, private providers of transportation, and other interested parties with a reasonable opportunity to comment on the proposed plan. In addition, the State shall develop a long-range plan for bicycle transportation and pedestrian walkways for appropriate areas of the State which shall be incorporated into the long-range transportation plan."

Subsec. (f). Pub. L. 105–178, §1204(f), amended heading and text of subsec. (f) generally. Prior to amendment, text related to transportation improvement programs, including program development, requirement for inclusion of certain projects for State transportation improvement program, project selection for areas less than 50,000 population, and requirement of biennial review and approval.

Subsec. (g). Pub. L. 105–178, §1204(g), which directed substitution of "section 505(a)" for "section 307(c)(1)" in section 134(g), was executed by making the substitution in subsec. (g) of this section to reflect the probable intent of Congress.

Subsec. (i). Pub. L. 105–178, §1204(h), added subsec. (i).

1994—Subsec. (f)(2). Pub. L. 103–429, §3(6)(A), substituted "chapter 53 of title 49" for "the Federal Transit Act".

Subsec. (h). Pub. L. 103–429, §3(6)(B), substituted "sections 5303–5306 and 5323(k) of title 49" for "section 8 of the Federal Transit Act, United States Code" and "section 8 of such Act".

1991—Pub. L. 102–240 substituted section catchline for one which read: "Traffic operations improvement programs", and amended text generally. Prior to amendment, text read as follows:

"(a) The Congress hereby finds and declares it to be in the national interest that each State shall have a continuing program designed to reduce traffic congestion and facilitate the flow of traffic.

"(b) The Secretary may approve under this section any project for improvements on any public road which project will directly facilitate and control traffic flow on any of the Federal-aid systems."

1976—Pub. L. 94–280 struck out introductory words "Urban area" in section catchline.

Subsec. (a). Pub. L. 94–280 struck out "within the designated boundaries of urban areas of the State" and "in the urban areas" after "continuing program" and "flow of traffic", respectively.

Subsec. (b). Pub. L. 94–280 substituted "any project for improvements on any public road which project will directly facilitate and control traffic flow on any of the Federal-aid systems" for "any project on an extension of the Federal-aid primary or secondary system in urban areas and on the Federal-aid urban system for improvements which directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and loading and unloading ramps. If such project is located in an urban area of more than fifty thousand population, such project shall be based on a continuing comprehensive transportation planning process carried on in accordance with section 134 of this title".

Subsec. (c). Pub. L. 94–280 struck out subsec. (c) which provided for an annual report by the Secretary on projects approved under this section with recommendations for further improvement of traffic operations in accordance with this section.

1973—Subsecs. (c), (d). Pub. L. 93–87 struck out subsec. (c) which provided for apportionment of sums authorized to carry out this section in accordance with section 104(b)(3) of this title, and redesignated subsec. (d) as (c).

1970—Subsec. (b). Pub. L. 91–605 inserted reference to the Federal-aid urban system and required that projects under this section be based on a continuing comprehensive transportation planning process carried on in accordance with section 134 of this title only in urban areas of more than fifty thousand population.

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of this title.

Effective Date of 1991 Amendment

Amendment by Pub. L. 102–240 effective Dec. 18, 1991, and applicable to funds authorized to be appropriated or made available after Sept. 30, 1991, and, with certain exceptions, not applicable to funds appropriated or made available on or before Sept. 30, 1991, see section 1100 of Pub. L. 102–240, set out as a note under section 104 of this title.

Effective Date

Section effective Aug. 23, 1968, see section 37 of Pub. L. 90–495, set out as an Effective Date of 1968 Amendment note under section 101 of this title.

Participation of Local Elected Officials

Pub. L. 105–178, title I, §1204(i), June 9, 1998, 112 Stat. 184, provided that:

"(1) Study.—The Secretary shall conduct a study on the effectiveness of the participation of local elected officials in transportation planning and programming. In conducting the study, the Secretary shall consider the degree of cooperation between each State, local officials in rural areas in the State, and regional planning and development organizations in the State.

"(2) Report.—Not later than 2 years after the date of enactment of this Act [June 9, 1998], the Secretary shall transmit to Congress a report containing the results of the study with any recommendations the Secretary determines appropriate as a result of the study."

Advanced Travel Forecasting Procedures Program

Pub. L. 109–59, title V, §5512, Aug. 10, 2005, 119 Stat. 1828, as amended by Pub. L. 110–244, title I, §111(g)(2), June 6, 2008, 122 Stat. 1605, provided that:

"(a) Continuation and Acceleration of TRANSIMS Deployment.—

"(1) In general.—The Secretary [of Transportation] shall accelerate the deployment of the advanced transportation model known as the 'Transportation Analysis Simulation System' (in this section referred to as 'TRANSIMS'), developed by the Los Alamos National Laboratory.

"(2) Program application.—The purpose of the program is to assist State departments of transportation and metropolitan planning organizations—

"(A) to implement TRANSIMS;

"(B) to develop methods for TRANSIMS applications to transportation planning, air quality analysis, regulatory compliance, and response to natural disasters and other transportation disruptions; and

"(C) to provide training and technical assistance for the implementation of TRANSIMS.

"(b) Required Activities.—The Secretary [of Transportation] shall use funds made available to carry out this section to—

"(1) provide funding to State departments of transportation and metropolitan planning organizations serving transportation management areas designated under chapter 52 [53] of title 49, United States Code, representing a diversity of populations, geographic regions, and analytic needs to implement TRANSIMS;

"(2) develop methods to demonstrate a wide spectrum of TRANSIMS applications to support local, metropolitan, statewide transportation planning, including integrating highway and transit operational considerations into the transportation Planning process, and estimating the effects of induced travel demand and transit ridership in making transportation conformity determinations where applicable;

"(3) provide training and technical assistance with respect to the implementation and application of TRANSIMS to States, local governments, and metropolitan planning organizations with responsibility for travel modeling;

"(4) to further develop TRANSIMS for additional applications, including—

"(A) congestion analyses;

"(B) major investment studies;

"(C) economic impact analyses;

"(D) alternative analyses;
"(E) freight movement studies;
"(F) emergency evacuation studies;
"(G) port studies;
"(H) airport access studies;
"(I) induced demand studies; and
"(J) transit ridership analysis.

"(c) ELIGIBLE ACTIVITIES.—The program may support the development of methods to plan for the transportation response to chemical and biological terrorism and other security concerns.

"(d) ALLOCATION OF FUNDS.—Not more than 75 percent of the funds made available to carry out this section may be allocated to activities described in subsection (b)(1).

"(e) FUNDING.—Of the amounts made available by section 5101(a)(1) of this Act [119 Stat. 1779], $2,625,000 for each of fiscal years 2006 through 2009 shall be available to carry out this section."

Pub. L. 105–178, title I, §1210, June 9, 1998, 112 Stat. 187, provided that:

"(a) ESTABLISHMENT.—The Secretary shall establish an advanced travel forecasting procedures program—

"(1) to provide for completion of the advanced transportation model developed under the Transportation Analysis Simulation System (referred to in this section as 'TRANSIMS'); and

"(2) to provide support for early deployment of the advanced transportation modeling computer software and graphics package developed under TRANSIMS and the program established under this section to States, local governments, and metropolitan planning organizations with responsibility for travel modeling.

"(b) ELIGIBLE ACTIVITIES.—The Secretary shall use funds made available under this section to—

"(1) provide funding for completion of core development of the advanced transportation model;

"(2) develop user-friendly advanced transportation modeling computer software and graphics packages;

"(3) provide training and technical assistance with respect to the implementation and application of the advanced transportation model to States, local governments, and metropolitan planning organizations with responsibility for travel modeling; and

"(4) allocate funds to not more than 12 entities described in paragraph (3), representing a diversity of populations and geographic regions, for a pilot program to enable transportation management areas designated under section 134(i) [now 134(k)] of title 23, United States Code, to convert from the use of travel forecasting procedures in use by the areas as of the date of enactment of this Act [June 9, 1998] to the use of the advanced transportation model.

"(c) FUNDING.—

"(1) IN GENERAL.—There are authorized to be appropriated from the Highway Trust Fund (other than the Mass Transit Account) to carry out this section $4,000,000 for fiscal year 1998, $3,000,000 for fiscal year 1999, $6,500,000 for fiscal year 2000, $5,000,000 for fiscal year 2001, $4,000,000 for fiscal year 2002, and $2,500,000 for fiscal year 2003.

"(2) ALLOCATION OF FUNDS.—

"(A) FISCAL YEARS 1998 AND 1999.—For each of fiscal years 1998 and 1999, 100 percent of the funds made available under paragraph (1) shall be allocated to activities as described in paragraphs (1), (2), and (3) of subsection (b).

"(B) FISCAL YEARS 2000 THROUGH 2003.—For each of fiscal years 2000 through 2003, not more than 50 percent of the funds made available under paragraph (1) may be allocated to activities described in subsection (b)(4).

"(3) CONTRACT AUTHORITY.—Funds authorized under this subsection shall be available for obligation in the same manner as if the funds were apportioned under chapter 1 of title 23, United States Code, except that the Federal share of the cost of—

"(A) any activity described in paragraph (1), (2), or (3) of subsection (b) shall not exceed 100 percent; and

"(B) any activity described in subsection (b)(4) shall not exceed 80 percent."

DEMONSTRATION PROJECT FOR AUTOMATED ROADWAY MANAGEMENT SYSTEM

Pub. L. 95–599, title I, §154, Nov. 6, 1978, 92 Stat. 2716, authorized the Secretary of Transportation to carry out a demonstration project for the use of an automated roadway management system to increase roadway capacity without adding additional lanes of pavement and authorized appropriations for fiscal years 1979 to 1981.

Traffic Control Signalization Demonstration Projects

Pub. L. 94–280, title I, §146, May 5, 1976, 90 Stat. 446, authorized the Secretary of Transportation to carry out traffic control signalization demonstration projects, appropriated funds for fiscal years 1977 and 1978, and required participating States and the Secretary to submit reports on the progress of such projects.

Authorization of Appropriations

Pub. L. 89–285, title III, §304, Oct. 22, 1965, 79 Stat. 1033, as amended by Pub. L. 97–449, §2(a), Jan. 12, 1983, 96 Stat. 2439, authorized an appropriation of $500,000 to the Secretary for highway safety programs under this section.

Definitions

For additional definitions of terms used in this section, see section 134 of this title.

[1] *So in original.*

[2] *See References in Text note below.*

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United States Code, 2015 Edition
Title 23 - HIGHWAYS
CHAPTER 1 - FEDERAL-AID HIGHWAYS
Sec. 139 - Efficient environmental reviews for project decisionmaking
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§139. Efficient environmental reviews for project decisionmaking

(a) DEFINITIONS.—In this section, the following definitions apply:

(1) AGENCY.—The term "agency" means any agency, department, or other unit of Federal, State, local, or Indian tribal government.

(2) ENVIRONMENTAL IMPACT STATEMENT.—The term "environmental impact statement" means the detailed statement of environmental impacts required to be prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(3) ENVIRONMENTAL REVIEW PROCESS.—

(A) IN GENERAL.—The term "environmental review process" means the process for preparing for a project an environmental impact statement, environmental assessment, categorical exclusion, or other document prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(B) INCLUSIONS.—The term "environmental review process" includes the process for and completion of any environmental permit, approval, review, or study required for a project under any Federal law other than the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(4) LEAD AGENCY.—The term "lead agency" means the Department of Transportation and, if applicable, any State or local governmental entity serving as a joint lead agency pursuant to this section.

(5) MULTIMODAL PROJECT.—The term "multimodal project" means a project that requires the approval of more than 1 Department of Transportation operating administration or secretarial office.

(6) PROJECT.—

(A) IN GENERAL.—The term "project" means any highway project, public transportation capital project, or multimodal project that, if implemented as proposed by the project sponsor, would require approval by any operating administration or secretarial office within the Department of Transportation.

(B) CONSIDERATIONS.—In determining whether a project is a project under subparagraph (A), the Secretary shall take into account, if known, any sources of Federal funding or financing identified by the project sponsor, including any discretionary grant, loan, and loan guarantee programs administered by the Department of Transportation.

(7) PROJECT SPONSOR.—The term "project sponsor" means the agency or other entity, including any private or public-private entity, that seeks approval of the Secretary for a project.

(8) STATE TRANSPORTATION DEPARTMENT.—The term "State transportation department" means any statewide agency of a State with responsibility for one or more modes of transportation.

(b) APPLICABILITY.—

(1) IN GENERAL.—The project development procedures in this section are applicable to all projects for which an environmental impact statement is prepared under the National Environmental Policy Act of 1969 and may be applied, to the extent determined appropriate by the Secretary, to other projects for which an environmental document is prepared pursuant to such Act.

(2) FLEXIBILITY.—Any authorities granted in this section may be exercised, and any requirements established under this section may be satisfied, for a project, class of projects, or program of projects.

(3) PROGRAMMATIC COMPLIANCE.—

(A) IN GENERAL.—The Secretary shall allow for the use of programmatic approaches to conduct environmental reviews that—

(i) eliminate repetitive discussions of the same issues;

(ii) focus on the actual issues ripe for analyses at each level of review; and

(iii) are consistent with—

(I) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(II) other applicable laws.

(B) REQUIREMENTS.—In carrying out subparagraph (A), the Secretary shall ensure that programmatic reviews—

(i) promote transparency, including the transparency of—

(I) the analyses and data used in the environmental reviews;

(II) the treatment of any deferred issues raised by agencies or the public; and

(III) the temporal and spatial scales to be used to analyze issues under subclauses (I) and (II);

(ii) use accurate and timely information, including through establishment of—

(I) criteria for determining the general duration of the usefulness of the review; and

(II) a timeline for updating an out-of-date review;

(iii) describe—

(I) the relationship between any programmatic analysis and future tiered analysis; and

(II) the role of the public in the creation of future tiered analysis;

(iv) are available to other relevant Federal and State agencies, Indian tribes, and the public; and

(v) provide notice and public comment opportunities consistent with applicable requirements.

(c) LEAD AGENCIES.—

(1) FEDERAL LEAD AGENCY.—

(A) IN GENERAL.—The Department of Transportation, or an operating administration thereof designated by the Secretary, shall be the Federal lead agency in the environmental review process for a project.

(B) MODAL ADMINISTRATION.—If the project requires approval from more than 1 modal administration within the Department, the Secretary may designate a single modal administration to serve as the Federal lead agency for the Department in the environmental review process for the project.

(2) JOINT LEAD AGENCIES.—Nothing in this section precludes another agency from being a joint lead agency in accordance with regulations under the National Environmental Policy Act of 1969.

(3) PROJECT SPONSOR AS JOINT LEAD AGENCY.—Any project sponsor that is a State or local governmental entity receiving funds under this title or chapter 53 of title 49 for the project shall serve as a joint lead agency with the Department for purposes of preparing any environmental document under the National Environmental Policy Act of 1969 and may prepare any such environmental document required in support of any action or approval by the Secretary if the Federal lead agency furnishes guidance in such preparation and independently evaluates such document and the document is approved and adopted by the Secretary prior to the Secretary taking any subsequent action or making any approval based on such document, whether or not the Secretary's action or approval results in Federal funding.

(4) ENSURING COMPLIANCE.—The Secretary shall ensure that the project sponsor complies with all design and mitigation commitments made jointly by the Secretary and the project sponsor in any environmental document prepared by the project sponsor in accordance with this subsection and that such document is appropriately supplemented if project changes become necessary.

(5) ADOPTION AND USE OF DOCUMENTS.—Any environmental document prepared in accordance with this subsection may be adopted or used by any Federal agency making any approval to the same extent that such Federal agency could adopt or use a document prepared by another Federal agency.

(6) ROLES AND RESPONSIBILITY OF LEAD AGENCY.—With respect to the environmental review process for any project, the lead agency shall have authority and responsibility—

(A) to take such actions as are necessary and proper, within the authority of the lead agency, to facilitate the expeditious resolution of the environmental review process for the project;

(B) to prepare or ensure that any required environmental impact statement or other document required to be completed under the National Environmental Policy Act of 1969 is completed in accordance with this section and applicable Federal law; and

(C) to consider and respond to comments received from participating agencies on matters within the special expertise or jurisdiction of those agencies.

(d) PARTICIPATING AGENCIES.—

(1) IN GENERAL.—The lead agency shall be responsible for inviting and designating participating agencies in accordance with this subsection.

(2) INVITATION.—Not later than 45 days after the date of publication of a notice of intent to prepare an environmental impact statement or the initiation of an environmental assessment, the lead agency shall identify any other Federal and non-Federal agencies that may have an interest in the project, and shall invite such agencies to become participating agencies in the environmental review process for the project. The invitation shall set a deadline for responses to be submitted. The deadline may be extended by the lead agency for good cause.

(3) FEDERAL PARTICIPATING AGENCIES.—Any Federal agency that is invited by the lead agency to participate in the environmental review process for a project shall be designated as a participating agency by the lead agency unless the invited agency informs the lead agency, in writing, by the deadline specified in the invitation that the invited agency—

(A) has no jurisdiction or authority with respect to the project;

(B) has no expertise or information relevant to the project; and

(C) does not intend to submit comments on the project.

(4) EFFECT OF DESIGNATION.—

(A) REQUIREMENT.—A participating agency shall comply with the requirements of this section.

(B) IMPLICATION.—Designation as a participating agency under this subsection shall not imply that the participating agency—

(i) supports a proposed project; or

(ii) has any jurisdiction over, or special expertise with respect to evaluation of, the project.

(5) COOPERATING AGENCY.—A participating agency may also be designated by a lead agency as a "cooperating agency" under the regulations contained in part 1500 of title 40, Code of Federal Regulations.

(6) DESIGNATIONS FOR CATEGORIES OF PROJECTS.—The Secretary may exercise the authorities granted under this subsection for a project, class of projects, or program of projects.

(7) CONCURRENT REVIEWS.—Each participating agency and cooperating agency shall—

(A) carry out the obligations of that agency under other applicable law concurrently, and in conjunction, with the review required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), unless doing so would impair the ability of the Federal agency to conduct needed analysis or otherwise carry out those obligations; and

(B) formulate and implement administrative, policy, and procedural mechanisms to enable the agency to ensure completion of the environmental review process in a timely, coordinated, and environmentally responsible manner.

(8) SINGLE NEPA DOCUMENT.—

(A) IN GENERAL.—Except as inconsistent with paragraph (7), to the maximum extent practicable and consistent with Federal law, all Federal permits and reviews for a project shall rely on a single environment document prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) under the leadership of the lead agency.

(B) USE OF DOCUMENT.—

(i) IN GENERAL.—To the maximum extent practicable, the lead agency shall develop an environmental document sufficient to satisfy the requirements for any Federal approval or other Federal action required for the project, including permits issued by other Federal agencies.

(ii) COOPERATION OF PARTICIPATING AGENCIES.—Other participating agencies shall cooperate with the lead agency and provide timely information to help the lead agency carry out this subparagraph.

(C) TREATMENT AS PARTICIPATING AND COOPERATING AGENCIES.—A Federal agency required to make an approval or take an action for a project, as described in subparagraph (B), shall work with the lead agency for the project to ensure that the agency making the approval or taking the action is treated as being both a participating and cooperating agency for the project.

(9) PARTICIPATING AGENCY RESPONSIBILITIES.—An agency participating in the environmental review process under this section shall—

(A) provide comments, responses, studies, or methodologies on those areas within the special expertise or jurisdiction of the agency; and

(B) use the process to address any environmental issues of concern to the agency.

(e) PROJECT INITIATION.—

(1) IN GENERAL.—The project sponsor shall notify the Secretary of the type of work, termini, length and general location of the proposed project (including any additional information that the project sponsor considers to be important to initiate the process for the proposed project), together with a statement of any Federal approvals anticipated to be necessary for the proposed project, for the purpose of informing the Secretary that the environmental review process should be initiated.

(2) SUBMISSION OF DOCUMENTS.—The project sponsor may satisfy the requirement under paragraph (1) by submitting to the Secretary any relevant documents containing the information described in that paragraph, including a draft notice for publication in the Federal Register announcing the preparation of an environmental review for the project.

(3) REVIEW OF APPLICATION.—Not later than 45 days after the date on which the Secretary receives notification under paragraph (1), the Secretary shall provide to the project sponsor a written response that, as applicable—

(A) describes the determination of the Secretary—

(i) to initiate the environmental review process, including a timeline and an expected date for the publication in the Federal Register of the relevant notice of intent; or

(ii) to decline the application, including an explanation of the reasons for that decision; or

(B) requests additional information, and provides to the project sponsor an accounting regarding what documentation is necessary to initiate the environmental review process.

(4) REQUEST TO DESIGNATE A LEAD AGENCY.—

(A) IN GENERAL.—Any project sponsor may submit to the Secretary a request to designate the operating administration or secretarial office within the Department of Transportation with the expertise on the proposed project to serve as the Federal lead agency for the project.

(B) SECRETARIAL ACTION.—

(i) IN GENERAL.—If the Secretary receives a request under subparagraph (A), the Secretary shall respond to the request not later than 45 days after the date of receipt.

(ii) REQUIREMENTS.—The response under clause (i) shall—

(I) approve the request;

(II) deny the request, with an explanation of the reasons for the denial; or

(III) require the submission of additional information.

(iii) ADDITIONAL INFORMATION.—If additional information is submitted in accordance with clause (ii)(III), the Secretary shall respond to the submission not later than 45 days after the date of receipt.

(5) ENVIRONMENTAL CHECKLIST.—

(A) DEVELOPMENT.—The lead agency for a project, in consultation with participating agencies, shall develop, as appropriate, a checklist to help project sponsors identify potential natural, cultural, and historic resources in the area of the project.

(B) PURPOSE.—The purposes of the checklist are—

(i) to identify agencies and organizations that can provide information about natural, cultural, and historic resources;

(ii) to develop the information needed to determine the range of alternatives; and

(iii) to improve interagency collaboration to help expedite the permitting process for the lead agency and participating agencies.

(f) PURPOSE AND NEED; ALTERNATIVES ANALYSIS.—

(1) PARTICIPATION.—As early as practicable during the environmental review process, the lead agency shall provide an opportunity for involvement by participating agencies and the public in defining the purpose and need for a project.

(2) DEFINITION.—Following participation under paragraph (1), the lead agency shall define the project's purpose and need for purposes of any document which the lead agency is responsible for preparing for the project.

(3) OBJECTIVES.—The statement of purpose and need shall include a clear statement of the objectives that the proposed action is intended to achieve, which may include—

(A) achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan;

(B) supporting land use, economic development, or growth objectives established in applicable Federal, State, local, or tribal plans; and

(C) serving national defense, national security, or other national objectives, as established in Federal laws, plans, or policies.

(4) ALTERNATIVES ANALYSIS.—

(A) PARTICIPATION.—

(i) In general.—As early as practicable during the environmental review process, the lead agency shall provide an opportunity for involvement by participating agencies and the public in determining the range of alternatives to be considered for a project.

(ii) COMMENTS OF PARTICIPATING AGENCIES.—To the maximum extent practicable and consistent with applicable law, each participating agency receiving an opportunity for involvement under clause (i) shall limit the comments of the agency to subject matter areas within the special expertise or jurisdiction of the agency.

(iii) EFFECT OF NONPARTICIPATION.—A participating agency that declines to participate in the development of the purpose and need and range of alternatives for a project shall be required to comply with the schedule developed under subsection (g)(1)(B).

(B) RANGE OF ALTERNATIVES.—

(i) DETERMINATION.—Following participation under subparagraph (A), the lead agency shall determine the range of alternatives for consideration in any document which the lead agency is responsible for preparing for the project.

(ii) USE.—To the maximum extent practicable and consistent with Federal law, the range of alternatives determined for a project under clause (i) shall be used for all Federal environmental reviews and permit processes required for the project unless the alternatives must be modified—

(I) to address significant new information or circumstances, and the lead agency and participating agencies agree that the alternatives must be modified to address the new information or circumstances; or

(II) for the lead agency or a participating agency to fulfill the responsibilities of the agency under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) in a timely manner.

(C) METHODOLOGIES.—The lead agency also shall determine, in collaboration with participating agencies at appropriate times during the study process, the methodologies to be used and the level of detail required in the analysis of each alternative for a project.

(D) PREFERRED ALTERNATIVE.—At the discretion of the lead agency, the preferred alternative for a project, after being identified, may be developed to a higher level of detail than other alternatives in order to facilitate the development of mitigation measures or concurrent compliance with other applicable laws if the lead agency determines that the development of such higher level of detail will not prevent the lead agency from making an impartial decision as to whether to accept another alternative which is being considered in the environmental review process.

(E) REDUCTION OF DUPLICATION.—

(i) IN GENERAL.—In carrying out this paragraph, the lead agency shall reduce duplication, to the maximum extent practicable, between—

(I) the evaluation of alternatives under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(II) the evaluation of alternatives in the metropolitan transportation planning process under section 134 or an environmental review process carried out under State law (referred to in this subparagraph as a "State environmental review process").

(ii) CONSIDERATION OF ALTERNATIVES.—The lead agency may eliminate from detailed consideration an alternative proposed in an environmental impact statement regarding a project if, as determined by the lead agency—

(I) the alternative was considered in a metropolitan planning process or a State environmental review process by a metropolitan planning organization or a State or local transportation agency, as applicable;

(II) the lead agency provided guidance to the metropolitan planning organization or State or local transportation agency, as applicable, regarding analysis of alternatives in the metropolitan planning process or State environmental review process, including guidance on the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and any other Federal law necessary for approval of the project;

(III) the applicable metropolitan planning process or State environmental review process included an opportunity for public review and comment;

(IV) the applicable metropolitan planning organization or State or local transportation agency rejected the alternative after considering public comments;

(V) the Federal lead agency independently reviewed the alternative evaluation approved by the applicable metropolitan planning organization or State or local transportation agency; and

(VI) the Federal lead agency determined—

(aa) in consultation with Federal participating or cooperating agencies, that the alternative to be eliminated from consideration is not necessary for compliance with the

National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); or

(bb) with the concurrence of Federal agencies with jurisdiction over a permit or approval required for a project, that the alternative to be eliminated from consideration is not necessary for any permit or approval under any other Federal law.

(g) Coordination and Scheduling.—

(1) Coordination plan.—

(A) In general.—Not later than 90 days after the date of publication of a notice of intent to prepare an environmental impact statement or the initiation of an environmental assessment, the lead agency shall establish a plan for coordinating public and agency participation in and comment on the environmental review process for a project or category of projects. The coordination plan may be incorporated into a memorandum of understanding.

(B) Schedule.—

(i) In general.—The lead agency shall establish as part of such coordination plan, after consultation with and the concurrence of each participating agency for the project and with the State in which the project is located (and, if the State is not the project sponsor, with the project sponsor), a schedule for completion of the environmental review process for the project.

(ii) Factors for consideration.—In establishing the schedule, the lead agency shall consider factors such as—

(I) the responsibilities of participating agencies under applicable laws;

(II) resources available to the cooperating agencies;

(III) overall size and complexity of the project;

(IV) the overall schedule for and cost of the project; and

(V) the sensitivity of the natural and historic resources that could be affected by the project.

(C) Consistency with other time periods.—A schedule under subparagraph (B) shall be consistent with any other relevant time periods established under Federal law.

(D) Modification.—The lead agency may—

(i) lengthen a schedule established under subparagraph (B) for good cause; and

(ii) shorten a schedule only with the concurrence of the affected cooperating agencies.

(E) Dissemination.—A copy of a schedule under subparagraph (B), and of any modifications to the schedule, shall be—

(i) provided to all participating agencies and to the State transportation department of the State in which the project is located (and, if the State is not the project sponsor, to the project sponsor); and

(ii) made available to the public.

(2) Comment deadlines.—The lead agency shall establish the following deadlines for comment during the environmental review process for a project:

(A) For comments by agencies and the public on a draft environmental impact statement, a period of not more than 60 days after publication in the Federal Register of notice of the date of public availability of such document, unless—

(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

(ii) the deadline is extended by the lead agency for good cause.

(B) For all other comment periods established by the lead agency for agency or public comments in the environmental review process, a period of no more than 30 days from availability of the materials on which comment is requested, unless—

(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

(ii) the deadline is extended by the lead agency for good cause.

(3) DEADLINES FOR DECISIONS UNDER OTHER LAWS.—In any case in which a decision under any Federal law relating to a project (including the issuance or denial of a permit or license) is required to be made by the later of the date that is 180 days after the date on which the Secretary made all final decisions of the lead agency with respect to the project, or 180 days after the date on which an application was submitted for the permit or license, the Secretary shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives and publish on the Internet—

(A) as soon as practicable after the 180-day period, an initial notice of the failure of the Federal agency to make the decision; and

(B) every 60 days thereafter until such date as all decisions of the Federal agency relating to the project have been made by the Federal agency, an additional notice that describes the number of decisions of the Federal agency that remain outstanding as of the date of the additional notice.

(4) INVOLVEMENT OF THE PUBLIC.—Nothing in this subsection shall reduce any time period provided for public comment in the environmental review process under existing Federal law, including a regulation.

(h) ISSUE IDENTIFICATION AND RESOLUTION.—

(1) COOPERATION.—The lead agency and the participating agencies shall work cooperatively in accordance with this section to identify and resolve issues that could delay completion of the environmental review process or could result in denial of any approvals required for the project under applicable laws.

(2) LEAD AGENCY RESPONSIBILITIES.—The lead agency shall make information available to the participating agencies as early as practicable in the environmental review process regarding the environmental and socioeconomic resources located within the project area and the general locations of the alternatives under consideration. Such information may be based on existing data sources, including geographic information systems mapping.

(3) PARTICIPATING AGENCY RESPONSIBILITIES.—Based on information received from the lead agency, participating agencies shall identify, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts. In this paragraph, issues of concern include any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.

(4) ISSUE RESOLUTION.—Any issue resolved by the lead agency with the concurrence of participating agencies may not be reconsidered unless significant new information or circumstances arise.

(5) INTERIM DECISION ON ACHIEVING ACCELERATED DECISIONMAKING.—

(A) IN GENERAL.—Not later than 30 days after the close of the public comment period on a draft environmental impact statement, the Secretary may convene a meeting with the project sponsor, lead agency, resource agencies, and any relevant State agencies to ensure that all parties are on schedule to meet deadlines for decisions to be made regarding the project.

(B) DEADLINES.—The deadlines referred to in subparagraph (A) shall be those established under subsection (g), or any other deadlines established by the lead agency, in consultation with the project sponsor and other relevant agencies.

(C) FAILURE TO ASSURE.—If the relevant agencies cannot provide reasonable assurances that the deadlines described in subparagraph (B) will be met, the Secretary may initiate the issue resolution and referral process described under paragraph (6) before the completion of the record of decision.

(6) ACCELERATED ISSUE RESOLUTION AND REFERRAL.—

(A) AGENCY ISSUE RESOLUTION MEETING.—

(i) IN GENERAL.—A Federal agency of jurisdiction, project sponsor, or the Governor of a State in which a project is located may request an issue resolution meeting to be conducted by the lead agency.

(ii) ACTION BY LEAD AGENCY.—The lead agency shall convene an issue resolution meeting under clause (i) with the relevant participating agencies and the project sponsor, including the Governor only if the meeting was requested by the Governor, to resolve issues that could—

(I) delay completion of the environmental review process; or

(II) result in denial of any approvals required for the project under applicable laws.

(iii) DATE.—A meeting requested under this subparagraph shall be held by not later than 21 days after the date of receipt of the request for the meeting, unless the lead agency determines that there is good cause to extend the time for the meeting.

(iv) NOTIFICATION.—On receipt of a request for a meeting under this subparagraph, the lead agency shall notify all relevant participating agencies of the request, including the issue to be resolved, and the date for the meeting.

(v) DISPUTES.—If a relevant participating agency with jurisdiction over an approval required for a project under applicable law determines that the relevant information necessary to resolve the issue has not been obtained and could not have been obtained within a reasonable time, but the lead agency disagrees, the resolution of the dispute shall be forwarded to the heads of the relevant agencies for resolution.

(vi) CONVENTION BY LEAD AGENCY.—A lead agency may convene an issue resolution meeting under this subsection at any time without the request of the Federal agency of jurisdiction, project sponsor, or the Governor of a State.

(B) ELEVATION OF ISSUE RESOLUTION.—

(i) IN GENERAL.—If issue resolution is not achieved by not later than 30 days after the date of a relevant meeting under subparagraph (A), the Secretary shall notify the lead agency, the heads of the relevant participating agencies, and the project sponsor (including the Governor only if the initial issue resolution meeting request came from the Governor) that an issue resolution meeting will be convened.

(ii) REQUIREMENTS.—The Secretary shall identify the issues to be addressed at the meeting and convene the meeting not later than 30 days after the date of issuance of the notice.

(C) REFERRAL OF ISSUE RESOLUTION.—

(i) REFERRAL TO COUNCIL ON ENVIRONMENTAL QUALITY.—

(I) IN GENERAL.—If resolution is not achieved by not later than 30 days after the date of an issue resolution meeting under subparagraph (B), the Secretary shall refer the matter to the Council on Environmental Quality.

(II) MEETING.—Not later than 30 days after the date of receipt of a referral from the Secretary under subclause (I), the Council on Environmental Quality shall hold an issue resolution meeting with the lead agency, the heads of relevant participating agencies, and the project sponsor (including the Governor only if an initial request for an issue resolution meeting came from the Governor).

(ii) REFERRAL TO THE PRESIDENT.—If a resolution is not achieved by not later than 30 days after the date of the meeting convened by the Council on Environmental Quality under clause (i)(II), the Secretary shall refer the matter directly to the President.

(7) FINANCIAL PENALTY PROVISIONS.—

(A) IN GENERAL.—A Federal agency of jurisdiction over an approval required for a project under applicable laws shall complete any required approval on an expeditious basis using the shortest existing applicable process.

(B) FAILURE TO DECIDE.—

(i) IN GENERAL.—If an agency described in subparagraph (A) fails to render a decision under any Federal law relating to a project that requires the preparation of an environmental impact statement or environmental assessment, including the issuance or denial of a permit, license, or other approval by the date described in clause (ii), an amount of funding equal to the amounts specified in subclause (I) or (II) shall be rescinded from the applicable office of the head of the agency, or equivalent office to which the authority for rendering the decision has been delegated by law by not later than 1 day after the applicable date under clause (ii), and once each week thereafter until a final decision is rendered, subject to subparagraph (C) —

(I) $20,000 for any project for which an annual financial plan is required under subsection (h) or (i) of section 106; or

(II) $10,000 for any other project requiring preparation of an environmental assessment or environmental impact statement.

(ii) DESCRIPTION OF DATE.—The date referred to in clause (i) is—

(I) the date that is 30 days after the date for rendering a decision as described in the project schedule established pursuant to subsection (g)(1)(B);

(II) if no schedule exists, the later of—

(aa) the date that is 180 days after the date on which an application for the permit, license, or approval is complete; and

(bb) the date that is 180 days after the date on which the Federal lead agency issues a decision on the project under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); or

(III) a modified date in accordance with subsection (g)(1)(D).

(C) LIMITATIONS.—

(i) IN GENERAL.—No rescission of funds under subparagraph (B) relating to an individual project shall exceed, in any fiscal year, an amount equal to 2.5 percent of the funds made available for the applicable agency office.

(ii) FAILURE TO DECIDE.—The total amount rescinded in a fiscal year as a result of a failure by an agency to make a decision by an applicable deadline shall not exceed an amount equal to 7 percent of the funds made available for the applicable agency office for that fiscal year.

(D) NO FAULT OF AGENCY.—A rescission of funds under this paragraph shall not be made if the lead agency for the project certifies that—

(i) the agency has not received necessary information or approvals from another entity, such as the project sponsor, in a manner that affects the ability of the agency to meet any requirements under State, local, or Federal law; or

(ii) significant new information or circumstances, including a major modification to an aspect of the project, requires additional analysis for the agency to make a decision on the project application.

(E) LIMITATION.—The Federal agency with jurisdiction for the decision from which funds are rescinded pursuant to this paragraph shall not reprogram funds to the office of the head of the agency, or equivalent office, to reimburse that office for the loss of the funds.

(F) AUDITS.—In any fiscal year in which any funds are rescinded from a Federal agency pursuant to this paragraph, the Inspector General of that agency shall—

(i) conduct an audit to assess compliance with the requirements of this paragraph; and

(ii) not later than 120 days after the end of the fiscal year during which the rescission occurred, submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report describing the reasons why the transfers were levied, including allocations of resources.

(G) EFFECT OF PARAGRAPH.—Nothing in this paragraph affects or limits the application of, or obligation to comply with, any Federal, State, local, or tribal law.

(8) EXPEDIENT DECISIONS AND REVIEWS.—To ensure that Federal environmental decisions and reviews are expeditiously made—

(A) adequate resources made available under this title shall be devoted to ensuring that applicable environmental reviews under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) are completed on an expeditious basis and that the shortest existing applicable process under that Act is implemented; and

(B) the President shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate, not less frequently than once every 120 days after the date of enactment of the MAP–21, a report on the status and progress of the following projects and activities funded under this title with respect to compliance with applicable requirements under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.):

(i) Projects and activities required to prepare an annual financial plan under section 106(i).

(ii) A sample of not less than 5 percent of the projects requiring preparation of an environmental impact statement or environmental assessment in each State.

(i) PERFORMANCE MEASUREMENT.—The Secretary shall establish a program to measure and report on progress toward improving and expediting the planning and environmental review process.

(j) ASSISTANCE TO AFFECTED STATE AND FEDERAL AGENCIES.—

(1) IN GENERAL.—

(A) AUTHORITY TO PROVIDE FUNDS.—The Secretary may allow a public entity receiving financial assistance from the Department of Transportation under this title or chapter 53 of title 49 to provide funds to Federal agencies (including the Department), State agencies, and Indian tribes participating in the environmental review process for the project or program.

(B) USE OF FUNDS.—Funds referred to in subparagraph (A) may be provided only to support activities that directly and meaningfully contribute to expediting and improving permitting and review processes, including planning, approval, and consultation processes for the project or program.

(2) ACTIVITIES ELIGIBLE FOR FUNDING.—Activities for which funds may be provided under paragraph (1) include transportation planning activities that precede the initiation of the environmental review process, activities directly related to the environmental review process, dedicated staffing, training of agency personnel, information gathering and mapping, and development of programmatic agreements.

(3) USE OF FEDERAL LANDS HIGHWAY FUNDS.—The Secretary may also use funds made available under section 204 [1] for a project for the purposes specified in this subsection with respect to the environmental review process for the project.

(4) AMOUNTS.—Requests under paragraph (1) may be approved only for the additional amounts that the Secretary determines are necessary for the Federal agencies, State agencies, or Indian tribes participating in the environmental review process to meet the time limits for environmental review.

(5) CONDITION.—A request under paragraph (1) to expedite time limits for environmental review may be approved only if such time limits are less than the customary time necessary for such review.

(6) AGREEMENT.—Prior to providing funds approved by the Secretary for dedicated staffing at an affected agency under paragraphs (1) and (2), the affected agency and the requesting public entity shall enter into an agreement that establishes the projects and priorities to be addressed by the use of the funds.

(k) JUDICIAL REVIEW AND SAVINGS CLAUSE.—

(1) JUDICIAL REVIEW.—Except as set forth under subsection (l), nothing in this section shall affect the reviewability of any final Federal agency action in a court of the United States or in the court of any State.

(2) SAVINGS CLAUSE.—Nothing in this section shall be construed as superseding, amending, or modifying the National Environmental Policy Act of 1969 or any other Federal environmental statute or affect the responsibility of any Federal officer to comply with or enforce any such statute.

(3) LIMITATIONS.—Nothing in this section shall preempt or interfere with—

(A) any practice of seeking, considering, or responding to public comment; or

(B) any power, jurisdiction, responsibility, or authority that a Federal, State, or local government agency, metropolitan planning organization, Indian tribe, or project sponsor has with respect to carrying out a project or any other provisions of law applicable to projects, plans, or programs.

(l) LIMITATIONS ON CLAIMS.—

(1) IN GENERAL.—Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project shall be barred unless it is filed within 150 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed. Nothing in this subsection shall create a right to judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

(2) NEW INFORMATION.—The Secretary shall consider new information received after the close of a comment period if the information satisfies the requirements for a supplemental environmental impact statement under section 771.130 of title 23, Code of Federal Regulations. The preparation of a supplemental environmental impact statement when required shall be considered a separate final agency action and the deadline for filing a claim for judicial review of such action shall be 150 days after the date of publication of a notice in the Federal Register announcing such action.

(m) ENHANCED TECHNICAL ASSISTANCE AND ACCELERATED PROJECT COMPLETION.—

(1) DEFINITION OF COVERED PROJECT.—In this subsection, the term "covered project" means a project—

(A) that has an ongoing environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(B) for which at least 2 years, beginning on the date on which a notice of intent is issued, have elapsed without the issuance of a record of decision.

(2) TECHNICAL ASSISTANCE.—At the request of a project sponsor or the Governor of a State in which a project is located, the Secretary shall provide additional technical assistance to resolve for a covered project any outstanding issues and project delay, including by—

(A) providing additional staff, training, and expertise;

(B) facilitating interagency coordination;

(C) promoting more efficient collaboration; and

(D) supplying specialized onsite assistance.

(3) SCOPE OF WORK.—

(A) IN GENERAL.—In providing technical assistance for a covered project under this subsection, the Secretary shall establish a scope of work that describes the actions that the Secretary will take to resolve the outstanding issues and project delays, including establishing a schedule under subparagraph (B).

(B) SCHEDULE.—

(i) IN GENERAL.—The Secretary shall establish and meet a schedule for the completion of any permit, approval, review, or study, required for the covered project by the date that is not

later than 4 years after the date on which a notice of intent for the covered project is issued.

(ii) INCLUSIONS.—The schedule under clause (i) shall—

(I) comply with all applicable laws;

(II) require the concurrence of the Council on Environmental Quality and each participating agency for the project with the State in which the project is located or the project sponsor, as applicable; and

(III) reflect any new information that becomes available and any changes in circumstances that may result in new significant impacts that could affect the timeline for completion of any permit, approval, review, or study required for the covered project.

(4) CONSULTATION.—In providing technical assistance for a covered project under this subsection, the Secretary shall consult, if appropriate, with resource and participating agencies on all methods available to resolve the outstanding issues and project delays for a covered project as expeditiously as possible.

(5) ENFORCEMENT.—

(A) IN GENERAL.—All provisions of this section shall apply to this subsection, including the financial penalty provisions under subsection (h)(6).

(B) RESTRICTION.—If the Secretary enforces this subsection under subsection (h)(6), the Secretary may use a date included in a schedule under paragraph (3)(B) that is created pursuant to and is in compliance with this subsection in lieu of the dates under subsection (h)(6)(B)(ii).

(n) ACCELERATED DECISIONMAKING IN ENVIRONMENTAL REVIEWS.—

(1) IN GENERAL.—In preparing a final environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), if the lead agency modifies the statement in response to comments that are minor and are confined to factual corrections or explanations of why the comments do not warrant additional agency response, the lead agency may write on errata sheets attached to the statement instead of rewriting the draft statement, subject to the condition that the errata sheets—

(A) cite the sources, authorities, and reasons that support the position of the agency; and

(B) if appropriate, indicate the circumstances that would trigger agency reappraisal or further response.

(2) SINGLE DOCUMENT.—To the maximum extent practicable, the lead agency shall expeditiously develop a single document that consists of a final environmental impact statement and a record of decision, unless—

(A) the final environmental impact statement makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or

(B) there is a significant new circumstance or information relevant to environmental concerns that bears on the proposed action or the impacts of the proposed action.

(o) IMPROVING TRANSPARENCY IN ENVIRONMENTAL REVIEWS.—

(1) IN GENERAL.—Not later than 18 months after the date of enactment of this subsection, the Secretary shall—

(A) use the searchable Internet website maintained under section 41003(b) of the FAST Act —

(i) to make publicly available the status and progress of projects requiring an environmental assessment or an environmental impact statement with respect to compliance with applicable requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and any other Federal, State, or local approval required for those projects; and

(ii) to make publicly available the names of participating agencies not participating in the development of a project purpose and need and range of alternatives under subsection (f); and

(B) issue reporting standards to meet the requirements of subparagraph (A).

(2) FEDERAL, STATE, AND LOCAL AGENCY PARTICIPATION.—

(A) FEDERAL AGENCIES.—A Federal agency participating in the environmental review or permitting process for a project shall provide to the Secretary information regarding the status and progress of the approval of the project for publication on the Internet website referred to in paragraph (1)(A), consistent with the standards established under paragraph (1)(B).

(B) STATE AND LOCAL AGENCIES.—The Secretary shall encourage State and local agencies participating in the environmental review permitting process for a project to provide information regarding the status and progress of the approval of the project for publication on the Internet website referred to in paragraph (1)(A).

(3) STATES WITH DELEGATED AUTHORITY.—A State with delegated authority for responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) pursuant to section 327 shall be responsible for supplying to the Secretary project development and compliance status for all applicable projects.

(Added Pub. L. 109–59, title VI, §6002(a), Aug. 10, 2005, 119 Stat. 1857; amended Pub. L. 112–141, div. A, title I, §§1305–1309, July 6, 2012, 126 Stat. 533–539; Pub. L. 114–94, div. A, title I, §1304(a)–(j)(1), Dec. 4, 2015, 129 Stat. 1378–1385.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsecs. (a)(2), (3), (b)(1), (3)(A)(iii)(I), (c)(2), (3), (6)(B), (d)(7)(A), (8)(A), (f)(4)(B)(ii)(II), (E)(i)(I), (ii)(II), (VI)(aa), (h)(7)(B)(ii)(II)(bb), (8), (k)(2), (m)(1)(A), (n)(1), and (o)(1)(A)(i), (3), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The date of enactment of the MAP–21, referred to in subsec. (h)(8)(B), is deemed to be Oct. 1, 2012, see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of this title.

Section 204 of this title, referred to in subsec. (j)(3), was repealed and a new section 204 enacted by Pub. L. 112–141, div. A, title I, §1119(a), July 6, 2012, 126 Stat. 473, 489.

The date of enactment of this subsection, referred to in subsec. (o)(1), is the date of enactment of Pub. L. 114–94, which was approved Dec. 4, 2015.

Section 41003(b) of the FAST Act, referred to in subsec. (o)(1)(A), is section 41003(b) of Pub. L. 114–94, known as the FAST Act and also known as the Fixing America's Surface Transportation Act, which is classified to section 4370m–2(b) of Title 42, The Public Health and Welfare.

CODIFICATION

Section 6002(a) of Pub. L. 109–59, which directed that this section be inserted after section 138 of subchapter I of chapter 1 of this title, was executed by adding this section after section 138 of chapter 1 of this title, to reflect the probable intent of Congress and the amendment by Pub. L. 109–59, §1602(b)(6)(A), which struck out the subchapter I heading preceding section 101 of this title.

PRIOR PROVISIONS

A prior section 139, added Pub. L. 90–495, §16(a), Aug. 23, 1968, 82 Stat. 823; amended Pub. L. 91–605, title I, §§106(b)(1), 140, Dec. 31, 1970, 84 Stat. 1716, 1736; Pub. L. 94–280, title I, §125, May 5, 1976, 90 Stat. 440; Pub. L. 97–134, §10, Dec. 29, 1981, 95 Stat. 1702; Pub. L. 97–424, title I, §116(a)(3), Jan. 6, 1983, 96 Stat. 2109; Pub. L. 98–229, §8(a), Mar. 9, 1984, 98 Stat. 56, related to additions to the Interstate System, prior to repeal by Pub. L. 105–178, title I, §1106(c)(2)(A), June 9, 1998, 112 Stat. 136.

AMENDMENTS

Subsec. (a)(5). Pub. L. 114–94, §1304(a)(1), added par. (5) and struck out former par. (5). Prior to amendment, text read as follows: "The term 'multimodal project' means a project funded, in whole or in part, under this title or chapter 53 of title 49 and involving the participation of more than one Department of Transportation administration or agency."

Subsec. (a)(6). Pub. L. 114–94, §1304(a)(2), added par. (6) and struck out former par. (6). Prior to amendment, text read as follows: "The term 'project' means any highway project, public transportation capital project, or multimodal project that requires the approval of the Secretary."

Subsec. (b)(3)(A). Pub. L. 114–94, §1304(b)(1), struck out "initiate a rulemaking to" after "shall" in introductory provisions.

Subsec. (b)(3)(B). Pub. L. 114–94, §1304(b)(2), added subpar. (B) and struck out former subpar. (B) which related to programmatic compliance requirements.

Subsec. (c)(1)(A). Pub. L. 114–94, §1304(c)(1), inserted ", or an operating administration thereof designated by the Secretary," after "Department of Transportation".

Subsec. (c)(6)(C). Pub. L. 114–94, §1304(c)(2), added subpar. (C).

Subsec. (d)(2). Pub. L. 114–94, §1304(d)(1), substituted "Not later than 45 days after the date of publication of a notice of intent to prepare an environmental impact statement or the initiation of an environmental assessment, the lead agency shall identify" for "The lead agency shall identify, as early as practicable in the environmental review process for a project,".

Subsec. (d)(8), (9). Pub. L. 114–94, §1304(d)(2), added pars. (8) and (9).

Subsec. (e)(1). Pub. L. 114–94, §1304(e)(1), inserted "(including any additional information that the project sponsor considers to be important to initiate the process for the proposed project)" after "general location of the proposed project".

Subsec. (e)(3) to (5). Pub. L. 114–94, §1304(e)(2), added pars. (3) to (5).

Subsec. (f). Pub. L. 114–94, §1304(f)(1), inserted "; Alternatives Analysis" after "Need" in heading.

Subsec. (f)(4)(A). Pub. L. 114–94, §1304(f)(2)(A), added subpar. (A) and struck out former subpar. (A). Prior to amendment, text read as follows: "As early as practicable during the environmental review process, the lead agency shall provide an opportunity for involvement by participating agencies and the public in determining the range of alternatives to be considered for a project."

Subsec. (f)(4)(B). Pub. L. 114–94, §1304(f)(2)(B), designated existing provisions as cl. (i), inserted heading, substituted "Following participation under subparagraph (A)" for "Following participation under paragraph (1)", and added cl. (ii).

Subsec. (f)(4)(E). Pub. L. 114–94, §1304(f)(2)(C), added subpar. (E).

Subsec. (g)(1)(A). Pub. L. 114–94, §1304(g)(1)(A), substituted "Not later than 90 days after the date of publication of a notice of intent to prepare an environmental impact statement or the initiation of an environmental assessment, the lead agency" for "The lead agency".

Subsec. (g)(1)(B)(i). Pub. L. 114–94, §1304(g)(1)(B), substituted "shall establish as part of such coordination plan" for "may establish as part of the coordination plan".

Subsec. (g)(3). Pub. L. 114–94, §1304(g)(2), inserted "and publish on the Internet" after "House of Representatives" in introductory provisions.

Subsec. (h)(4). Pub. L. 114–94, §1304(h)(1)(B), added par. (4). Former par. (4) redesignated (5).

Subsec. (h)(5). Pub. L. 114–94, §1304(h)(1)(A), redesignated par. (4) as (5). Former par. (5) redesignated (6).

Subsec. (h)(5)(C). Pub. L. 114–94, §1304(h)(2), substituted "paragraph (6)" for "paragraph (5) and".

Subsec. (h)(6), (7). Pub. L. 114–94, §1304(h)(1)(A), redesignated pars. (5) and (6) as (6) and (7), respectively. Former par. (7) redesignated (8).

Subsec. (h)(7)(B)(i)(I). Pub. L. 114–94, §1304(h)(3)(A), substituted "is required under subsection (h) or (i) of section 106" for "under section 106(i) is required".

Subsec. (h)(7)(B)(ii). Pub. L. 114–94, §1304(h)(3)(B), added cl. (ii) and struck out former cl. (ii). Prior to amendment, text read as follows: "The date referred to in clause (i) is the later of—

"(I) the date that is 180 days after the date on which an application for the permit, license, or approval is complete; and

"(II) the date that is 180 days after the date on which the Federal lead agency issues a decision on the project under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)."

Subsec. (h)(8). Pub. L. 114–94, §1304(h)(1)(A), redesignated par. (7) as (8).

Subsec. (j)(1). Pub. L. 114–94, §1304(i)(1), added par. (1) and struck out former par. (1). Prior to amendment, text read as follows: "For a project that is subject to the environmental review process established under this section and for which funds are made available to a State under this title or chapter 53 of title 49, the Secretary may approve a request by the State to provide funds so made available under this title or such chapter 53 to affected Federal agencies (including the Department of Transportation), State agencies, and Indian tribes participating in the environmental review process for the projects in that State or participating in a State process that has been approved by the Secretary for that State. Such funds may be provided only to support activities that directly and meaningfully contribute to expediting and improving transportation project planning and delivery for projects in that State."

Subsec. (j)(2). Pub. L. 114–94, §1304(i)(2), inserted "activities directly related to the environmental review process," before "dedicated staffing,".

Subsec. (j)(6). Pub. L. 114–94, §1304(i)(3), added par. (6) and struck out former par. (6). Prior to amendment, text read as follows: "Prior to providing funds approved by the Secretary for dedicated staffing at an affected Federal agency under paragraphs (1) and (2), the affected Federal agency and the State agency shall enter into a memorandum of understanding that establishes the projects and priorities to be addressed by the use of the funds."

Subsecs. (n), (o). Pub. L. 114–94, §1304(j)(1), added subsec. (n) and (o).

2012—Subsec. (b)(2). Pub. L. 112–141, §1305(a)(1), inserted ", and any requirements established under this section may be satisfied," after "exercised".

Subsec. (b)(3). Pub. L. 112–141, §1305(a)(2), added par. (3).

Subsec. (c)(1). Pub. L. 112–141, §1305(b)(1), designated existing provisions as subpar. (A), inserted subpar. heading, and added subpar. (B).

Subsec. (d)(4). Pub. L. 112–141, §1305(c)(1), added par. (4) and struck out former par. (4). Prior to amendment, text read as follows: "Designation as a participating agency under this subsection shall not imply that the participating agency—

"(A) supports a proposed project; or

"(B) has any jurisdiction over, or special expertise with respect to evaluation of, the project."

Subsec. (d)(7). Pub. L. 112–141, §1305(c)(2), added par. (7) and struck out former par. (7). Prior to amendment, text read as follows: "Each Federal agency shall, to the maximum extent practicable—

"(A) carry out obligations of the Federal agency under other applicable law concurrently, and in conjunction, with the review required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), unless doing so would impair the ability of the Federal agency to carry out those obligations; and

"(B) formulate and implement administrative, policy, and procedural mechanisms to enable the agency to ensure completion of the environmental review process in a timely, coordinated, and environmentally responsible manner."

Subsec. (e). Pub. L. 112–141, §1305(d), designated existing provisions as par. (1), inserted par. heading, and added par. (2).

Subsec. (g)(1)(B)(i). Pub. L. 112–141, §1305(e), inserted "and the concurrence of" after "consultation with".

Subsec. (h)(4) to (7). Pub. L. 112–141, §1306, added pars. (4) to (7) and struck out former par. (4) which related to issue resolution.

Subsec. (j)(6). Pub. L. 112–141, §1307, added par. (6).

Subsec. (l). Pub. L. 112–141, §1308, substituted "150 days" for "180 days" in pars. (1) and (2).

Subsec. (m). Pub. L. 112–141, §1309, added subsec. (m).

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of this title.

Implementation of Programmatic Compliance

Pub. L. 114–94, div. A, title I, §1304(k), Dec. 4, 2015, 129 Stat. 1386, provided that:

"(1) Rulemaking.—Not later than 1 year after the date of enactment of this Act [Dec. 4, 2015], the Secretary [of Transportation] shall complete a rulemaking to implement the provisions of section 139(b)(3) of title 23, United States Code, as amended by this section.

"(2) Consultation.—Before initiating the rulemaking under paragraph (1), the Secretary shall consult with relevant Federal agencies, relevant State resource agencies, State departments of transportation, Indian tribes, and the public on the appropriate use and scope of the programmatic approaches.

"(3) Requirements.—In carrying out this subsection, the Secretary shall ensure that the rulemaking meets the requirements of section 139(b)(3)(B) of title 23, United States Code, as amended by this section.

"(4) Comment period.—The Secretary shall—

"(A) allow not fewer than 60 days for public notice and comment on the proposed rule; and

"(B) address any comments received under this subsection."

Memoranda of Agency Agreements for Early Coordination

Pub. L. 112–141, div. A, title I, §1320, July 6, 2012, 126 Stat. 551, provided that:

"(a) In General.—It is the sense of Congress that—

"(1) the Secretary [of Transportation] and other Federal agencies with relevant jurisdiction in the environmental review process should cooperate with each other and other agencies on environmental review and project delivery activities at the earliest practicable time to avoid delays and duplication of effort later in the process, head off potential conflicts, and ensure that planning and project development decisions reflect environmental values; and

"(2) such cooperation should include the development of policies and the designation of staff that advise planning agencies or project sponsors of studies or other information foreseeably required for later Federal action and early consultation with appropriate State and local agencies and Indian tribes.

"(b) Technical Assistance.—If requested at any time by a State or local planning agency, the Secretary and other Federal agencies with relevant jurisdiction in the environmental review process, shall, to the extent practicable and appropriate, as determined by the agencies, provide technical assistance to the State or local planning agency on accomplishing the early coordination activities described in subsection (d).

"(c) Memorandum of Agency Agreement.—If requested at any time by a State or local planning agency, the lead agency, in consultation with other Federal agencies with relevant jurisdiction in the environmental review process, may establish memoranda of agreement with the project sponsor, State, and local governments and other appropriate entities to accomplish the early coordination activities described in subsection (d).

"(d) Early Coordination Activities.—Early coordination activities shall include, to the maximum extent practicable, the following:

"(1) Technical assistance on identifying potential impacts and mitigation issues in an integrated fashion.

"(2) The potential appropriateness of using planning products and decisions in later environmental reviews.

"(3) The identification and elimination from detailed study in the environmental review process of the issues that are not significant or that have been covered by prior environmental reviews.

"(4) The identification of other environmental review and consultation requirements so that the lead and cooperating agencies may prepare, as appropriate, other required analyses and studies concurrently with planning activities.

"(5) The identification by agencies with jurisdiction over any permits related to the project of any and all relevant information that will reasonably be required for the project.

"(6) The reduction of duplication between requirements under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and State and local planning and environmental review requirements, unless the agencies are specifically barred from doing so by applicable law.

"(7) Timelines for the completion of agency actions during the planning and environmental review processes.

"(8) Other appropriate factors."

Existing Environmental Review Process

Pub. L. 109–59, title VI, §6002(b), Aug. 10, 2005, 119 Stat. 1865, provided that: "Nothing in this section [enacting this section and repealing provisions set out as a note under section 109 of this title] affects any existing State environmental review process, program, agreement, or funding arrangement approved by the Secretary [of Transportation] under section 1309 of the Transportation Equity Act for the 21st Century [Pub. L. 105–178] (112 Stat. 232; 23 U.S.C. 109 note) as such section was in effect on the day preceding the date of enactment of the SAFETEA–LU [Aug. 10, 2005]."

Delegation of a Reporting Authority

Memorandum of President of the United States, Jan. 31, 2013, 78 F.R. 8351, provided:

Memorandum for the Secretary of Transportation

By the authority vested in me as President by the Constitution and the laws of the United States, including section 301 of title 3, United States Code, I hereby delegate to you the functions and authority conferred upon the President by section 1306 of the Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, to make the specified reports to the Congress.

You are authorized and directed to notify the appropriate congressional committees and publish this memorandum in the Federal Register.

BARACK OBAMA.

[1] *See References in Text note below.*

23 U.S.C.
United States Code, 2015 Edition
Title 23 - HIGHWAYS
CHAPTER 1 - FEDERAL-AID HIGHWAYS
Sec. 168 - Integration of planning and environmental review
From the U.S. Government Publishing Office, www.gpo.gov

§168. Integration of planning and environmental review

(a) DEFINITIONS.—In this section, the following definitions apply:

(1) ENVIRONMENTAL REVIEW PROCESS.—The term "environmental review process" has the meaning given the term in section 139(a).

(2) LEAD AGENCY.—The term "lead agency" has the meaning given the term in section 139(a).

(3) PLANNING PRODUCT.—The term "planning product" means a decision, analysis, study, or other documented information that is the result of an evaluation or decisionmaking process carried out by a metropolitan planning organization or a State, as appropriate, during metropolitan or statewide transportation planning under section 134 or 135, respectively.

(4) PROJECT.—The term "project" has the meaning given the term in section 139(a).

(5) PROJECT SPONSOR.—The term "project sponsor" has the meaning given the term in section 139(a).

(6) RELEVANT AGENCY.—The term "relevant agency" means the agency with authority under subparagraph (A) or (B) of subsection (b)(1).

(b) ADOPTION OR INCORPORATION BY REFERENCE OF PLANNING PRODUCTS FOR USE IN NEPA PROCEEDINGS.—

(1) IN GENERAL.—Subject to subsection (d) and to the maximum extent practicable and appropriate, the following agencies may adopt or incorporate by reference and use a planning product in proceedings relating to any class of action in the environmental review process of the project:

(A) The lead agency for a project, with respect to an environmental impact statement, environmental assessment, categorical exclusion, or other document prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(B) The cooperating agency with responsibility under Federal law, with respect to the process for and completion of any environmental permit, approval, review, or study required for a project under any Federal law other than the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), if consistent with that law.

(2) IDENTIFICATION.—If the relevant agency makes a determination to adopt or incorporate by reference and use a planning product, the relevant agency shall identify the agencies that participated in the development of the planning products.

(3) ADOPTION OR INCORPORATION BY REFERENCE OF PLANNING PRODUCTS.—The relevant agency may—

(A) adopt or incorporate by reference an entire planning product under paragraph (1); or

(B) select portions of a planning project under paragraph (1) for adoption or incorporation by reference.

(4) TIMING.—A determination under paragraph (1) with respect to the adoption or incorporation by reference of a planning product may—

(A) be made at the time the relevant agencies decide the appropriate scope of environmental review for the project; or

(B) occur later in the environmental review process, as appropriate.

(c) APPLICABILITY.—

(1) PLANNING DECISIONS.—The relevant agency in the environmental review process may adopt or incorporate by reference decisions from a planning product, including—

(A) whether tolling, private financial assistance, or other special financial measures are necessary to implement the project;

(B) a decision with respect to general travel corridor or modal choice, including a decision to implement corridor or subarea study recommendations to advance different modal solutions as separate projects with independent utility;

(C) the purpose and the need for the proposed action;

(D) preliminary screening of alternatives and elimination of unreasonable alternatives;

(E) a basic description of the environmental setting;

(F) a decision with respect to methodologies for analysis; and

(G) an identification of programmatic level mitigation for potential impacts of a project, including a programmatic mitigation plan developed in accordance with section 169, that the relevant agency determines are more effectively addressed on a national or regional scale, including—

(i) measures to avoid, minimize, and mitigate impacts at a national or regional scale of proposed transportation investments on environmental resources, including regional ecosystem and water resources; and

(ii) potential mitigation activities, locations, and investments.

(2) PLANNING ANALYSES.—The relevant agency in the environmental review process may adopt or incorporate by reference analyses from a planning product, including—

(A) travel demands;

(B) regional development and growth;

(C) local land use, growth management, and development;

(D) population and employment;

(E) natural and built environmental conditions;

(F) environmental resources and environmentally sensitive areas;

(G) potential environmental effects, including the identification of resources of concern and potential direct, indirect, and cumulative effects on those resources; and

(H) mitigation needs for a proposed project, or for programmatic level mitigation, for potential effects that the lead agency determines are most effectively addressed at a regional or national program level.

(d) CONDITIONS.—The relevant agency in the environmental review process may adopt or incorporate by reference a planning product under this section if the relevant agency determines, with the concurrence of the lead agency and, if the planning product is necessary for a cooperating agency to issue a permit, review, or approval for the project, with the concurrence of the cooperating agency, that the following conditions have been met:

(1) The planning product was developed through a planning process conducted pursuant to applicable Federal law.

(2) The planning product was developed in consultation with appropriate Federal and State resource agencies and Indian tribes.

(3) The planning process included broad multidisciplinary consideration of systems-level or corridor-wide transportation needs and potential effects, including effects on the human and natural environment.

(4) The planning process included public notice that the planning products produced in the planning process may be adopted during a subsequent environmental review process in accordance with this section.

(5) During the environmental review process, the relevant agency has—

(A) made the planning documents available for public review and comment by members of the general public and Federal, State, local, and tribal governments that may have an interest in the proposed project;

(B) provided notice of the intention of the relevant agency to adopt or incorporate by reference the planning product; and

(C) considered any resulting comments.

(6) There is no significant new information or new circumstance that has a reasonable likelihood of affecting the continued validity or appropriateness of the planning product.

(7) The planning product has a rational basis and is based on reliable and reasonably current data and reasonable and scientifically acceptable methodologies.

(8) The planning product is documented in sufficient detail to support the decision or the results of the analysis and to meet requirements for use of the information in the environmental review process.

(9) The planning product is appropriate for adoption or incorporation by reference and use in the environmental review process for the project and is incorporated in accordance with, and is sufficient to meet the requirements of, the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and section 1502.21 of title 40, Code of Federal Regulations (as in effect on the date of enactment of the FAST Act).

(10) The planning product was approved within the 5-year period ending on the date on which the information is adopted or incorporated by reference.

(e) Effect of Adoption or Incorporation by Reference.—Any planning product adopted or incorporated by reference by the relevant agency in accordance with this section may be—

(1) incorporated directly into an environmental review process document or other environmental document; and

(2) relied on and used by other Federal agencies in carrying out reviews of the project.

(f) Rules of Construction.—

(1) In general.—This section does not make the environmental review process applicable to the transportation planning process conducted under this title and chapter 53 of title 49.

(2) Transportation planning activities.—Initiation of the environmental review process as a part of, or concurrently with, transportation planning activities does not subject transportation plans and programs to the environmental review process.

(3) Planning products.—This section does not affect the use of planning products in the environmental review process pursuant to other authorities under any other provision of law or restrict the initiation of the environmental review process during planning.

(Added Pub. L. 112–141, div. A, title I, §1310(a), July 6, 2012, 126 Stat. 540; amended Pub. L. 114–94, div. A, title I, §1305, Dec. 4, 2015, 129 Stat. 1386.)

References in Text

The National Environmental Policy Act of 1969, referred to in subsecs. (b)(1) and (d)(9), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The date of enactment of the FAST Act, referred to in subsec. (d)(9), is the date of enactment of Pub. L. 114–94, which was approved Dec. 4, 2015.

Amendments

2015—Pub. L. 114–94 amended section generally. Prior to amendment, section related to integration of planning and environmental review.

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date

Section effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of this title.

25 U.S.C.
United States Code, 2015 Edition
Title 25 - INDIANS
CHAPTER 8 - RIGHTS-OF-WAY THROUGH INDIAN LANDS
Sec. 311 - Opening highways
From the U.S. Government Publishing Office, www.gpo.gov

§311. Opening highways

The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

(Mar. 3, 1901, ch. 832, §4, 31 Stat. 1084.)

28 U.S.C.
United States Code, 2015 Edition
Title 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART IV - JURISDICTION AND VENUE
CHAPTER 83 - COURTS OF APPEALS
Sec. 1291 - Final decisions of district courts
From the U.S. Government Publishing Office, www.gpo.gov

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, §48, 65 Stat. 726; Pub. L. 85–508, §12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97–164, title I, §124, Apr. 2, 1982, 96 Stat. 36.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§225(a), 933(a)(1), and section 1356 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and sections 61 and 62 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, §128, 36 Stat. 1133; Aug. 24, 1912, ch. 390, §9, 37 Stat. 566; Jan. 28, 1915, ch. 22, §2, 38 Stat. 804; Feb. 7, 1925, ch. 150, 43 Stat. 813; Sept. 21, 1922, ch. 370, §3, 42 Stat. 1006; Feb. 13, 1925, ch. 229, §1, 43 Stat. 936; Jan. 31, 1928, ch. 14, §1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Feb. 16, 1933, ch. 91, §3, 47 Stat. 817; May 31, 1935, ch. 160, 49 Stat. 313; June 20, 1938, ch. 526, 52 Stat. 779; Aug. 2, 1946, ch. 753, §412(a)(1), 60 Stat. 844).

This section rephrases and simplifies paragraphs "First", "Second", and "Third" of section 225(a) of title 28, U.S.C., 1940 ed., which referred to each Territory and Possession separately, and to sections 61 and 62 of the Canal Zone Code, section 933(a)(1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of section 1356 of title 48, U.S.C., 1940 ed., relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." (See definitive section 451 of this title.)

Paragraph "Fourth" of section 225(a) of title 28, U.S.C., 1940 ed., is incorporated in section 1293 of this title.

Words "Fifth. In the United States Court for China, in all cases" in said section 225(a) were omitted. (See reviser's note under section 411 of this title.)

Venue provisions of section 1356 of title 48, U.S.C., 1940 ed., are incorporated in section 1295 of this title.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1295 of this title.

In addition to the jurisdiction conferred by this chapter, the courts of appeals also have appellate jurisdiction in proceedings under Title 11, Bankruptcy, and jurisdiction to review:

(1) Orders of the Secretary of the Treasury denying an application for, suspending, revoking, or annulling a basic permit under chapter 8 of title 27;

(2) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(3) Orders of the Secretary of the Army under sections 504, 505 and 516 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters;

(4) Orders of the Civil Aeronautics Board under chapter 9 of title 49, except orders as to foreign air carriers which are subject to the President's approval;

(5) Orders under chapter 1 of title 7, refusing to designate boards of trade as contract markets or suspending or revoking such designations, or excluding persons from trading in contract markets;

(6) Orders of the Federal Power Commission under chapter 12 of title 16;

(7) Orders of the Federal Security Administrator under section 371(e) of title 21, in a case of actual controversy as to the validity of any such order, by any person adversely affected thereby;

(8) Orders of the Federal Power Commission under chapter 15B of title 15;

(9) Final orders of the National Labor Relations Board;

(10) Cease and desist orders under section 193 of title 7;

(11) Orders of the Securities and Exchange Commission;

(12) Orders to cease and desist from violating section 1599 of title 7;

(13) Wage orders of the Administrator of the Wage and Hour Division of the Department of Labor under section 208 of title 29;

(14) Orders under sections 81r and 1641 of title 19, U.S.C., 1940 ed., Customs Duties.

The courts of appeals also have jurisdiction to enforce:

(1) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(2) Final orders of the National Labor Relations Board;

(3) Orders to cease and desist from violating section 1599 of title 7.

The Court of Appeals for the District of Columbia also has jurisdiction to review orders of the Post Office Department under section 576 of title 39 relating to discriminations in sending second-class publications by freight; Maritime Commission orders denying transfer to foreign registry of vessels under subsidy contract; sugar allotment orders; decisions of the Federal Communications Commission granting or refusing applications for construction permits for radio stations, or for radio station licenses, or for renewal or modification of radio station licenses, or suspending any radio operator's license.

Changes were made in phraseology.

Amendments

1982—Pub. L. 97–164, §124, inserted "(other than the United States Court of Appeals for the Federal Circuit)" after "The court of appeals" and inserted provision that the jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

1958—Pub. L. 85–508 struck out provisions which gave courts of appeals jurisdiction of appeals from District Court for Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted reference to District Court of Guam.

Effective Date of 1982 Amendment

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

Effective Date of 1958 Amendment

Amendment by Pub. L. 85–508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c.16 as required by sections 1 and 8(c) of Pub. L. 85–508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

Termination of United States District Court for the District of the Canal Zone

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96–70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

42 U.S.C.
United States Code, 2015 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 85 - AIR POLLUTION PREVENTION AND CONTROL
SUBCHAPTER I - PROGRAMS AND ACTIVITIES
Part D - Plan Requirements for Nonattainment Areas
subpart 1 - nonattainment areas in general
Sec. 7506 - Limitations on certain Federal assistance
From the U.S. Government Publishing Office, www.gpo.gov

§7506. Limitations on certain Federal assistance

(a), (b) Repealed. Pub. L. 101–549, title I, §110(4), Nov. 15, 1990, 104 Stat. 2470

(c) Activities not conforming to approved or promulgated plans

(1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means—

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not—

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

(2) Any transportation plan or program developed pursuant to title 23 or chapter 53 of title 49 shall implement the transportation provisions of any applicable implementation plan approved under this chapter applicable to all or part of the area covered by such transportation plan or program. No Federal agency may approve, accept or fund any transportation plan, program or project unless such plan, program or project has been found to conform to any applicable implementation plan in effect under this chapter. In particular—

(A) no transportation plan or transportation improvement program may be adopted by a metropolitan planning organization designated under title 23 or chapter 53 of title 49, or be found to be in conformity by a metropolitan planning organization until a final determination has been made that emissions expected from implementation of such plans and programs are consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable implementation plan, and that the plan or program will conform to the requirements of paragraph (1)(B);

(B) no metropolitan planning organization or other recipient of funds under title 23 or chapter 53 of title 49 shall adopt or approve a transportation improvement program of projects until it determines that such program provides for timely implementation of transportation control measures consistent with schedules included in the applicable implementation plan;

(C) a transportation project may be adopted or approved by a metropolitan planning organization or any recipient of funds designated under title 23 or chapter 53 of title 49, or found in conformity by a metropolitan planning organization or approved, accepted, or funded by the Department of Transportation only if it meets either the requirements of subparagraph (D) or the following requirements—

(i) such a project comes from a conforming plan and program;

(ii) the design concept and scope of such project have not changed significantly since the conformity finding regarding the plan and program from which the project derived; and

(iii) the design concept and scope of such project at the time of the conformity determination for the program was adequate to determine emissions.

(D) Any project not referred to in subparagraph (C) shall be treated as conforming to the applicable implementation plan only if it is demonstrated that the projected emissions from such project, when considered together with emissions projected for the conforming transportation plans and programs within the nonattainment area, do not cause such plans and programs to exceed the emission reduction projections and schedules assigned to such plans and programs in the applicable implementation plan.

(E) The appropriate metropolitan planning organization shall redetermine conformity of existing transportation plans and programs not later than 2 years after the date on which the Administrator —

(i) finds a motor vehicle emissions budget to be adequate in accordance with section 93.118(e)(4) of title 40, Code of Federal Regulations (as in effect on October 1, 2004);

(ii) approves an implementation plan that establishes a motor vehicle emissions budget if that budget has not yet been determined to be adequate in accordance with clause (i); or

(iii) promulgates an implementation plan that establishes or revises a motor vehicle emissions budget.

(3) Until such time as the implementation plan revision referred to in paragraph (4)(C) [1] is approved, conformity of such plans, programs, and projects will be demonstrated if—

(A) the transportation plans and programs—

(i) are consistent with the most recent estimates of mobile source emissions;

(ii) provide for the expeditious implementation of transportation control measures in the applicable implementation plan; and

(iii) with respect to ozone and carbon monoxide nonattainment areas, contribute to annual emissions reductions consistent with sections 7511a(b)(1) and 7512a(a)(7) of this title; and

(B) the transportation projects—

(i) come from a conforming transportation plan and program as defined in subparagraph (A) or for 12 months after November 15, 1990, from a transportation program found to conform within 3 years prior to November 15, 1990; and

(ii) in carbon monoxide nonattainment areas, eliminate or reduce the severity and number of violations of the carbon monoxide standards in the area substantially affected by the project.

With regard to subparagraph (B)(ii), such determination may be made as part of either the conformity determination for the transportation program or for the individual project taken as a whole during the environmental review phase of project development.

(4) CRITERIA AND PROCEDURES FOR DETERMINING CONFORMITY.—

(A) IN GENERAL.—The Administrator shall promulgate, and periodically update, criteria and procedures for determining conformity (except in the case of transportation plans, programs, and projects) of, and for keeping the Administrator informed about, the activities referred to in paragraph (1).

(B) TRANSPORTATION PLANS, PROGRAMS, AND PROJECTS.—The Administrator, with the concurrence of the Secretary of Transportation, shall promulgate, and periodically update, criteria and procedures

for demonstrating and assuring conformity in the case of transportation plans, programs, and projects.

(C) CIVIL ACTION TO COMPEL PROMULGATION.—A civil action may be brought against the Administrator and the Secretary of Transportation under section 7604 of this title to compel promulgation of such criteria and procedures and the Federal district court shall have jurisdiction to order such promulgation.

(D) The procedures and criteria shall, at a minimum—

(i) address the consultation procedures to be undertaken by metropolitan planning organizations and the Secretary of Transportation with State and local air quality agencies and State departments of transportation before such organizations and the Secretary make conformity determinations;

(ii) address the appropriate frequency for making conformity determinations, but the frequency for making conformity determinations on updated transportation plans and programs shall be every 4 years, except in a case in which—

(I) the metropolitan planning organization elects to update a transportation plan or program more frequently; or

(II) the metropolitan planning organization is required to determine conformity in accordance with paragraph (2)(E); and

(iii) address how conformity determinations will be made with respect to maintenance plans.

(E) INCLUSION OF CRITERIA AND PROCEDURES IN SIP.—Not later than 2 years after August 10, 2005, the procedures under subparagraph (A) shall include a requirement that each State include in the State implementation plan criteria and procedures for consultation required by subparagraph (D)(i), and enforcement and enforceability (pursuant to sections 93.125(c) and 93.122(a)(4)(ii) of title 40, Code of Federal Regulations) in accordance with the Administrator's criteria and procedures for consultation, enforcement and enforceability.

(F) Compliance with the rules of the Administrator for determining the conformity of transportation plans, programs, and projects funded or approved under title 23 or chapter 53 of title 49 to State or Federal implementation plans shall not be required for traffic signal synchronization projects prior to the funding, approval or implementation of such projects. The supporting regional emissions analysis for any conformity determination made with respect to a transportation plan, program, or project shall consider the effect on emissions of any such project funded, approved, or implemented prior to the conformity determination.

(5) APPLICABILITY.—This subsection shall apply only with respect to—

(A) a nonattainment area and each pollutant for which the area is designated as a nonattainment area; and

(B) an area that was designated as a nonattainment area but that was later redesignated by the Administrator as an attainment area and that is required to develop a maintenance plan under section 7505a of this title with respect to the specific pollutant for which the area was designated nonattainment.

(6) Notwithstanding paragraph 5,[2] this subsection shall not apply with respect to an area designated nonattainment under section 7407(d)(1) of this title until 1 year after that area is first designated nonattainment for a specific national ambient air quality standard. This paragraph only applies with respect to the national ambient air quality standard for which an area is newly designated nonattainment and does not affect the area's requirements with respect to all other national ambient air quality standards for which the area is designated nonattainment or has been redesignated from nonattainment to attainment with a maintenance plan pursuant to section 7505a [1] of this title (including any pre-existing national ambient air quality standard for a pollutant for which a new or revised standard has been issued).

(7) CONFORMITY HORIZON FOR TRANSPORTATION PLANS.—

(A) IN GENERAL.—Each conformity determination required under this section for a transportation plan under section 134(i) of title 23 or section 5303(i) of title 49 shall require a demonstration of conformity for the period ending on either the final year of the transportation plan, or at the election of the metropolitan planning organization, after consultation with the air pollution control agency and solicitation of public comments and consideration of such comments, the longest of the following periods:

(i) The first 10-year period of any such transportation plan.

(ii) The latest year in the implementation plan applicable to the area that contains a motor vehicle emission budget.

(iii) The year after the completion date of a regionally significant project if the project is included in the transportation improvement program or the project requires approval before the subsequent conformity determination.

(B) REGIONAL EMISSIONS ANALYSIS.—The conformity determination shall be accompanied by a regional emissions analysis for the last year of the transportation plan and for any year shown to exceed emission budgets by a prior analysis, if such year extends beyond the applicable period as determined under subparagraph (A).

(C) EXCEPTION.—In any case in which an area has a revision to an implementation plan under section 7505a(b) of this title and the Administrator has found the motor vehicles emissions budgets from that revision to be adequate in accordance with section 93.118(e)(4) of title 40, Code of Federal Regulations (as in effect on October 1, 2004), or has approved the revision, the demonstration of conformity at the election of the metropolitan planning organization, after consultation with the air pollution control agency and solicitation of public comments and consideration of such comments, shall be required to extend only through the last year of the implementation plan required under section 7505a(b) of this title.

(D) EFFECT OF ELECTION.—Any election by a metropolitan planning organization under this paragraph shall continue in effect until the metropolitan planning organization elects otherwise.

(E) AIR POLLUTION CONTROL AGENCY DEFINED.—In this paragraph, the term "air pollution control agency" means an air pollution control agency (as defined in section 7602(b) of this title) that is responsible for developing plans or controlling air pollution within the area covered by a transportation plan.

(8) SUBSTITUTION OF TRANSPORTATION CONTROL MEASURES.—

(A) IN GENERAL.—Transportation control measures that are specified in an implementation plan may be replaced or added to the implementation plan with alternate or additional transportation control measures—

(i) if the substitute measures achieve equivalent or greater emissions reductions than the control measure to be replaced, as demonstrated with an emissions impact analysis that is consistent with the current methodology used for evaluating the replaced control measure in the implementation plan;

(ii) if the substitute control measures are implemented—

(I) in accordance with a schedule that is consistent with the schedule provided for control measures in the implementation plan; or

(II) if the implementation plan date for implementation of the control measure to be replaced has passed, as soon as practicable after the implementation plan date but not later than the date on which emission reductions are necessary to achieve the purpose of the implementation plan;

(iii) if the substitute and additional control measures are accompanied with evidence of adequate personnel and funding and authority under State or local law to implement, monitor, and enforce the control measures;

(iv) if the substitute and additional control measures were developed through a collaborative process that included—

(I) participation by representatives of all affected jurisdictions (including local air pollution control agencies, the State air pollution control agency, and State and local transportation agencies);

(II) consultation with the Administrator; and

(III) reasonable public notice and opportunity for comment; and

(v) if the metropolitan planning organization, State air pollution control agency, and the Administrator concur with the equivalency of the substitute or additional control measures.

(B) ADOPTION.—(i) Concurrence by the metropolitan planning organization, State air pollution control agency and the Administrator as required by subparagraph (A)(v) shall constitute adoption of the substitute or additional control measures so long as the requirements of subparagraphs (A)(i), (A)(ii), (A)(iii) and (A)(iv) are met.

(ii) Once adopted, the substitute or additional control measures become, by operation of law, part of the State implementation plan and become federally enforceable.

(iii) Within 90 days of its concurrence under subparagraph (A)(v), the State air pollution control agency shall submit the substitute or additional control measure to the Administrator for incorporation in the codification of the applicable implementation plan. Nothwithstanding [3] any other provision of this chapter, no additional State process shall be necessary to support such revision to the applicable plan.

(C) NO REQUIREMENT FOR EXPRESS PERMISSION.—The substitution or addition of a transportation control measure in accordance with this paragraph and the funding or approval of such a control measure shall not be contingent on the existence of any provision in the applicable implementation plan that expressly permits such a substitution or addition.

(D) NO REQUIREMENT FOR NEW CONFORMITY DETERMINATION.—The substitution or addition of a transportation control measure in accordance with this paragraph shall not require—

(i) a new conformity determination for the transportation plan; or

(ii) a revision of the implementation plan.

(E) CONTINUATION OF CONTROL MEASURE BEING REPLACED.—A control measure that is being replaced by a substitute control measure under this paragraph shall remain in effect until the substitute control measure is adopted by the State pursuant to subparagraph (B).

(F) EFFECT OF ADOPTION.—Adoption of a substitute control measure shall constitute rescission of the previously applicable control measure.

(9) LAPSE OF CONFORMITY.—If a conformity determination required under this subsection for a transportation plan under section 134(i) of title 23 or section 5303(i) of title 49 or a transportation improvement program under section 134(j) of such title 23 or under section 5303(j) of such title 49 is not made by the applicable deadline and such failure is not corrected by additional measures to either reduce motor vehicle emissions sufficient to demonstrate compliance with the requirements of this subsection within 12 months after such deadline or other measures sufficient to correct such failures, the transportation plan shall lapse.

(10) LAPSE.—In this subsection, the term "lapse" means that the conformity determination for a transportation plan or transportation improvement program has expired, and thus there is no currently conforming transportation plan or transportation improvement program.

(d) Priority of achieving and maintaining national primary ambient air quality standards

Each department, agency, or instrumentality of the Federal Government having authority to conduct or support any program with air-quality related transportation consequences shall give priority in the exercise of such authority, consistent with statutory requirements for allocation among States or other jurisdictions, to the implementation of those portions of plans prepared under this section to achieve and maintain the national primary ambient air-quality standard. This paragraph extends to, but is not limited to, authority exercised under chapter 53 of title 49, title 23, and the Housing and Urban Development Act.

(July 14, 1955, ch. 360, title I, §176, as added Pub. L. 95–95, title I, §129(b), Aug. 7, 1977, 91 Stat. 749; amended Pub. L. 95–190, §14(a)(59), Nov. 16, 1977, 91 Stat. 1403; Pub. L. 101–549, title I, §§101(f), 110(4), Nov. 15, 1990, 104 Stat. 2409, 2470; Pub. L. 104–59, title III, §305(b), Nov. 28, 1995, 109 Stat. 580; Pub. L. 104–260, §1, Oct. 9, 1996, 110 Stat. 3175; Pub. L. 106–377, §1(a)(1) [title III], Oct. 27, 2000, 114 Stat. 1441, 1441A–44; Pub. L. 109–59, title VI, §6011(a)–(f), Aug. 10, 2005, 119 Stat. 1878–1881.)

References in Text

Paragraph (4) of subsec. (c), referred to in subsec. (c)(3), was amended by Pub. L. 109–59, title VI, §6011(f), Aug. 10, 2005, 119 Stat. 1881, to redesignate subpar. (C) as (E), strike it out, and add new subpars. (C) and (E). See 2005 Amendment notes below.

Section 7505a of this title, referred to in subsec. (c)(6), was in the original "section 175(A)" and was translated as reading "section 175A", meaning section 175A of act July 14, 1955, which is classified to section 7505a of this title, to reflect the probable intent of Congress.

The Housing and Urban Development Act, referred to in subsec. (d), may be the name for a series of acts sharing the same name but enacted in different years by Pub. L. 89–117, Aug. 10, 1965, 79 Stat. 451; Pub. L. 90–448, Aug. 1, 1968, 82 Stat. 476; Pub. L. 91–152, Dec. 24, 1969, 83 Stat. 379; and Pub. L. 91–609, Dec. 31, 1970, 84 Stat. 1770, respectively. For complete classification of these Acts to the Code, see Short Title notes set out under section 1701 of Title 12, Banks and Banking, and Tables.

Codification

In subsecs. (c)(2) and (d), "chapter 53 of title 49" substituted for "the Urban Mass Transportation Act [49 App. U.S.C. 1601 et seq.]" and in subsec. (c)(4)(F) substituted for "Federal Transit Act" on authority of Pub. L. 103–272, §6(b), July 5, 1994, 108 Stat. 1378 (the first section of which enacted subtitles II, III, and V to X of Title 49, Transportation), and of Pub. L. 102–240, title III, §3003(b), Dec. 18, 1991, 105 Stat. 2088, which provided that references in laws to the Urban Mass Transportation Act of 1964 be deemed to be references to the Federal Transit Act.

Amendments

2005—Subsec. (c)(2)(E). Pub. L. 109–59, §6011(a), added subpar. (E).

Subsec. (c)(4). Pub. L. 109–59, §6011(f)(1)–(3), inserted par. (4) and subpar. (A) headings, in first sentence substituted "The Administrator shall promulgate, and periodically update," for "No later than one year after November 15, 1990, the Administrator shall promulgate", designated second sentence as subpar. (B), inserted heading, substituted "The Administrator, with the concurrence of the Secretary of Transportation, shall promulgate, and periodically update," for "No later than one year after November 15, 1990, the Administrator, with the concurrence of the Secretary of Transportation, shall promulgate", designated third sentence as subpar. (C), inserted heading, substituted "A civil action" for "A suit", and redesignated former subpars. (B) to (D) as (D) to (F), respectively.

Subsec. (c)(4)(B)(ii). Pub. L. 109–59, §6011(b), amended cl. (ii) generally. Prior to amendment, cl. (ii) read as follows: "address the appropriate frequency for making conformity determinations, but in no case shall such determinations for transportation plans and programs be less frequent than every three years; and".

Subsec. (c)(4)(E). Pub. L. 109–59, §6011(f)(4), added subpar. (E) and struck out former subpar. (E) which read as follows: "Such procedures shall also include a requirement that each State shall submit to the Administrator and the Secretary of Transportation within 24 months of November 15, 1990, a revision to its implementation plan that includes criteria and procedures for assessing the conformity of any plan, program, or project subject to the conformity requirements of this subsection."

Subsec. (c)(7) to (10). Pub. L. 109–59, §6011(c)–(e), added pars. (7) to (10).

2000—Subsec. (c)(6). Pub. L. 106–377 added par. (6).

1996—Subsec. (c)(4)(D). Pub. L. 104–260 added subpar. (D).

1995—Subsec. (c)(5). Pub. L. 104–59 added par. (5).

1990—Subsecs. (a), (b). Pub. L. 101–549, §110(4), struck out subsec. (a) which related to approval of projects or award of grants, and subsec. (b) which related to implementation of approved or promulgated plans.

Subsec. (c). Pub. L. 101–549, §101(f), designated existing provisions as par. (1), struck out "(1)", "(2)", "(3)", and "(4)" before "engage in", "support in", "license or", and "approve, any", respectively, substituted "conform to an implementation plan after it" for "conform to a plan after it", "conform to an implementation plan approved" for "conform to a plan approved", and "conformity to such an implementation plan shall" for

"conformity to such a plan shall", inserted "Conformity to an implementation plan means—" followed immediately by subpars. (A) and (B) and closing provisions relating to determination of conformity being based on recent estimates of emissions and the determination of such estimates, and added pars. (2) to (4).

1977—Subsec. (a)(1). Pub. L. 95–190 inserted "national" before "primary".

REGULATIONS

Pub. L. 109–59, title VI, §6011(g), Aug. 10, 2005, 119 Stat. 1882, provided that: "Not later than 2 years after the date of enactment of this Act [Aug. 10, 2005], the Administrator of the Environmental Protection Agency shall promulgate revised regulations to implement the changes made by this section [amending this section]."

[1] *See References in Text note below.*

[2] *So in original. Probably should be "paragraph (5),".*

[3] *So in original. Probably should be "Notwithstanding".*

49 U.S.C.
United States Code, 2015 Edition
Title 49 - TRANSPORTATION
SUBTITLE I - DEPARTMENT OF TRANSPORTATION
CHAPTER 3 - GENERAL DUTIES AND POWERS
SUBCHAPTER I - DUTIES OF THE SECRETARY OF TRANSPORTATION
Sec. 303 - Policy on lands, wildlife and waterfowl refuges, and historic sites
From the U.S. Government Publishing Office, www.gpo.gov

§303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) Approval of Programs and Projects.—Subject to subsections (d) and (h), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 [1] of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(d) De Minimis Impacts.—

(1) Requirements.—

(A) Requirements for historic sites.—The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges.—The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) Criteria.—In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) Historic sites.—With respect to historic sites, the Secretary may make a finding of de minimis impact only if—

(A) the Secretary has determined, in accordance with the consultation process required under section 306108 of title 54, United States Code,[2] that—

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) PARKS, RECREATION AREAS, AND WILDLIFE OR WATERFOWL REFUGES.—With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if—

(A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

(e) SATISFACTION OF REQUIREMENTS FOR CERTAIN HISTORIC SITES.—

(1) IN GENERAL.—The Secretary shall—

(A) align, to the maximum extent practicable, the requirements of this section with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and section 306108 of title 54, including implementing regulations; and

(B) not later than 90 days after the date of enactment of this subsection, coordinate with the Secretary of the Interior and the Executive Director of the Advisory Council on Historic Preservation (referred to in this subsection as the "Council") to establish procedures to satisfy the requirements described in subparagraph (A) (including regulations).

(2) AVOIDANCE ALTERNATIVE ANALYSIS.—

(A) IN GENERAL.—If, in an analysis required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Secretary determines that there is no feasible or prudent alternative to avoid use of a historic site, the Secretary may—

(i) include the determination of the Secretary in the analysis required under that Act;

(ii) provide a notice of the determination to—

(I) each applicable State historic preservation officer and tribal historic preservation officer;

(II) the Council, if the Council is participating in the consultation process under section 306108 of title 54; and

(III) the Secretary of the Interior; and

(iii) request from the applicable preservation officer, the Council, and the Secretary of the Interior a concurrence that the determination is sufficient to satisfy subsection (c)(1).

(B) CONCURRENCE.—If the applicable preservation officer, the Council, and the Secretary of the Interior each provide a concurrence requested under subparagraph (A)(iii), no further analysis under subsection (c)(1) shall be required.

(C) PUBLICATION.—A notice of a determination, together with each relevant concurrence to that determination, under subparagraph (A) shall—

(i) be included in the record of decision or finding of no significant impact of the Secretary; and

(ii) be posted on an appropriate Federal website by not later than 3 days after the date of receipt by the Secretary of all concurrences requested under subparagraph (A)(iii).

(3) ALIGNING HISTORICAL REVIEWS.—

(A) IN GENERAL.—If the Secretary, the applicable preservation officer, the Council, and the Secretary of the Interior concur that no feasible and prudent alternative exists as described in

paragraph (2), the Secretary may provide to the applicable preservation officer, the Council, and the Secretary of the Interior notice of the intent of the Secretary to satisfy subsection (c)(2) through the consultation requirements of section 306108 of title 54.

(B) SATISFACTION OF CONDITIONS.—To satisfy subsection (c)(2), the applicable preservation officer, the Council, and the Secretary of the Interior shall concur in the treatment of the applicable historic site described in the memorandum of agreement or programmatic agreement developed under section 306108 of title 54.

(f) REFERENCES TO PAST TRANSPORTATION ENVIRONMENTAL AUTHORITIES.—

(1) SECTION 4(F) REQUIREMENTS.—The requirements of this section are commonly referred to as section 4(f) requirements (see section 4(f) of the Department of Transportation Act (Public Law 89–670; 80 Stat. 934) as in effect before the repeal of that section).

(2) SECTION 106 REQUIREMENTS.—The requirements of section 306108 of title 54 are commonly referred to as section 106 requirements (see section 106 of the National Historic Preservation Act of 1966 (Public Law 89–665; 80 Stat. 917) as in effect before the repeal of that section).

(g) BRIDGE EXEMPTION FROM CONSIDERATION.—A common post-1945 concrete or steel bridge or culvert (as described in 77 Fed. Reg. 68790) that is exempt from individual review under section 306108 of title 54 shall be exempt from consideration under this section.

(h) RAIL AND TRANSIT.—

(1) IN GENERAL.—Improvements to, or the maintenance, rehabilitation, or operation of, railroad or rail transit lines or elements thereof that are in use or were historically used for the transportation of goods or passengers shall not be considered a use of a historic site under subsection (c), regardless of whether the railroad or rail transit line or element thereof is listed on, or eligible for listing on, the National Register of Historic Places.

(2) EXCEPTIONS.—

(A) IN GENERAL.—Paragraph (1) shall not apply to—

(i) stations; or

(ii) bridges or tunnels located on—

(I) railroad lines that have been abandoned; or

(II) transit lines that are not in use.

(B) CLARIFICATION WITH RESPECT TO CERTAIN BRIDGES AND TUNNELS.—The bridges and tunnels referred to in subparagraph (A)(ii) do not include bridges or tunnels located on railroad or transit lines—

(i) over which service has been discontinued; or

(ii) that have been railbanked or otherwise reserved for the transportation of goods or passengers.

(Pub. L. 97–449, §1(b), Jan. 12, 1983, 96 Stat. 2419; Pub. L. 100–17, title I, §133(d), Apr. 2, 1987, 101 Stat. 173; Pub. L. 109–59, title VI, §6009(a)(2), Aug. 10, 2005, 119 Stat. 1875; Pub. L. 113–287, §5(p), Dec. 19, 2014, 128 Stat. 3272; Pub. L. 114–94, div. A, title I, §§1301(b), 1302(b), 1303(b), title XI, §11502(b), Dec. 4, 2015, 129 Stat. 1376, 1378, 1690.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
303(a)	49:1651(b)(2).	Oct. 15, 1966, Pub. L. 89–670, §2(b)(2), 80 Stat. 931.
	49:1653(f) (1st sentence).	Oct. 15, 1966, Pub. L. 89–670, §4(f), 80 Stat. 934; restated Aug. 23, 1968, Pub. L. 90–495, §18(b), 82 Stat. 824.
303(b)	49:1653(f) (2d sentence).	

303(c)	49:1653(f) (less 1st, 2d sentences).	

In subsection (a), the words "hereby declared to be" before "the policy" are omitted as surplus. The words "of the United States Government" are substituted for "national" for clarity and consistency.

In subsection (b), the words "crossed by transportation activities or facilities" are substituted for "traversed" for clarity.

In subsection (c), before clause (1), the words "After August 23, 1968" after "Secretary" are omitted as executed. The word "transportation" is inserted before "program" for clarity. In clause (2), the words "or project" are added for consistency.

References in Text

Section 204 of title 23, referred to in subsec. (c), was repealed and a new section 204 enacted by Pub. L. 112–141, div. A, title I, §1119(a), July 6, 2012, 126 Stat. 473, 489.

The National Environmental Policy Act of 1969, referred to in subsec. (e)(1)(A), (2)(A), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The date of enactment of this subsection, referred to in subsec. (e)(1)(B), is the date of enactment of Pub. L. 114–94, which was approved Dec. 4, 2015.

Amendments

2015—Subsec. (c). Pub. L. 114–94, §11502(b)(1), substituted "subsections (d) and (h)" for "subsection (d)".

Subsec. (e). Pub. L. 114–94, §1301(b), added subsec. (e).

Subsec. (f). Pub. L. 114–94, §1302(b), added subsec. (f).

Subsec. (g). Pub. L. 114–94, §1303(b), added subsec. (g).

Subsec. (h). Pub. L. 114–94, §11502(b)(2), added subsec. (h).

2014—Subsec. (d)(2)(A). Pub. L. 113–287 substituted "section 306108 of title 54, United States Code" for "section 106 of the National Historic Preservation Act (16 U.S.C. 470f)" in introductory provisions.

2005—Subsec. (c). Pub. L. 109–59, §6009(a)(2)(A), inserted heading and substituted "Subject to subsection (d), the Secretary" for "The Secretary" in introductory provisions.

Subsec. (d). Pub. L. 109–59, §6009(a)(2)(B), added subsec. (d).

1987—Subsec. (c). Pub. L. 100–17 inserted "(other than any project for a park road or parkway under section 204 of title 23)" after "program or project".

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Treatment of Military Flight Operations

Pub. L. 105–85, div. A, title X, §1079, Nov. 18, 1997, 111 Stat. 1916, provided that: "No military flight operation (including a military training flight), or designation of airspace for such an operation, may be treated as a transportation program or project for purposes of section 303(c) of title 49, United States Code."

[1] *See References in Text note below.*

[2] *So in original. The words ", United States Code" probably should not appear.*

49 U.S.C.
United States Code, 2015 Edition
Title 49 - TRANSPORTATION
SUBTITLE III - GENERAL AND INTERMODAL PROGRAMS
CHAPTER 51 - TRANSPORTATION OF HAZARDOUS MATERIAL
From the U.S. Government Publishing Office, www.gpo.gov

CHAPTER 51—TRANSPORTATION OF HAZARDOUS MATERIAL

Sec.

AMENDMENTS

2012—Pub. L. 112–141, div. C, title III, §33007(b), July 6, 2012, 126 Stat. 836, added item 5118.

2005—Pub. L. 109–59, title VII, §§7111, 7115(a)(2), (h), 7123(c), Aug. 10, 2005, 119 Stat. 1899, 1901, 1908, struck out item 5111 "Rail tank cars", substituted "Special permits and exclusions" for "Exemptions and exclusions" in item 5117, struck out item 5118 "Inspectors", added items 5127 and 5128, and struck out former item 5127 "Authorization of appropriations".

2001—Pub. L. 107–56, title X, §1012(a)(2), Oct. 26, 2001, 115 Stat. 397, added item 5103a.

§5101. Purpose

The purpose of this chapter is to protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 759; Pub. L. 109–59, title VII, §7101(b), Aug. 10, 2005, 119 Stat. 1891.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5101	49 App.:1801.	Jan. 3, 1975, Pub. L. 93–633, §102, 88 Stat. 2156.

The words "It is declared to be the policy of Congress", "the Nation", and "which are" are omitted as surplus.

AMENDMENTS

2005—Pub. L. 109–59 substituted "The purpose of this chapter is to protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce" for "The purpose of this chapter is to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation".

SHORT TITLE OF 2015 AMENDMENT

Pub. L. 114–94, div. A, title III, §3001, Dec. 4, 2015, 129 Stat. 1446, provided that: "This title [amending sections 5302 to 5304, 5307, 5309 to 5312, 5314, 5315, 5323, 5325, 5327, 5329, 5336 to 5340, and 10501 of this title and sections 5313 and 5314 of Title 5, Government Organization and Employees, repealing sections 5313, 5319, and 5322 of this title, enacting provisions set out as notes under 5309, 5310, 5325, 5329, 5338 of this title, section 5313 of Title 5, and section 12143 of Title 42, The Public Health and Welfare, amending provisions set out as a note under sections 5303 of this title, and repealing provisions set out as a note under section 5309 of this title] may be cited as the 'Federal Public Transportation Act of 2015'."

Pub. L. 114–94, div. A, title VII, §7001, Dec. 4, 2015, 129 Stat. 1588, provided that: "This title [amending sections 5103, 5107 to 5109, 5116, 5117, 5121, and 5128 of this title and enacting provisions set out as notes under sections 5103, 5116, 20103, 20141, 20155, and 31305 of this title] may be cited as the 'Hazardous Materials Transportation Safety Improvement Act of 2015'."

SHORT TITLE OF 2012 AMENDMENT

Pub. L. 112–141, div. B, §20001, July 6, 2012, 126 Stat. 622, provided that: "This division [see Tables for classification] may be cited as the 'Federal Public Transportation Act of 2012'."

Pub. L. 112–141, div. C, title III, §33001, July 6, 2012, 126 Stat. 832, provided that: "This title [see Tables for classification] may be cited as the 'Hazardous Materials Transportation Safety Improvement Act of 2012'."

SHORT TITLE OF 2005 AMENDMENT

Pub. L. 109–59, title III, §3001, Aug. 10, 2005, 119 Stat. 1544, provided that: "This title [see Tables for classification] may be cited as the 'Federal Public Transportation Act of 2005'."

Pub. L. 109–59, title VII, §7001, Aug. 10, 2005, 119 Stat. 1891, provided that: "This title [see Tables for classification] may be cited as the 'Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005'."

SHORT TITLE OF 1998 AMENDMENT

Pub. L. 105–178, title III, §3001, June 9, 1998, 112 Stat. 338, provided that: "This title [amending sections 5302 to 5305, 5307 to 5315, 5317 to 5320, 5323, 5325 to 5328, and 5333 to 5338 of this title and enacting provisions set out as notes under sections 301, 5301, 5307 to 5310, 5323, 5336, and 5338 of this title and sections 138 and 322 of Title 23, Highways] may be cited as the 'Federal Transit Act of 1998'."

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104–291, title II, §201, Oct. 11, 1996, 110 Stat. 3453, provided that: "This title [enacting section 5908 of this title and amending sections 5901 to 5903 and 5905 to 5907 of this title] may be cited as the 'Intermodal Safe Container Transportation Amendments Act of 1996'."

Short Title of 1994 Amendment

Pub. L. 103–311, title I, §101, Aug. 26, 1994, 108 Stat. 1673, provided that: "This title [amending sections 5102 to 5104, 5107, 5108, 5110, 5116, 5117, 5121, and 5125 to 5127 of this title and enacting provisions set out as notes under this section, sections 5103, 5112, and 5121 of this title, and section 307 of Title 23, Highways] may be cited as the 'Hazardous Materials Transportation Authorization Act of 1994'."

Transfer of Functions

For transfer of duties, powers, and authority of Research and Special Programs Administration under this chapter to the Administrator of the Pipeline and Hazardous Materials Safety Administration, see section 2(b) of Pub. L. 108–426, set out as a note under section 108 of this title.

Findings

Pub. L. 109–59, title VII, §7101(a), Aug. 10, 2005, 119 Stat. 1891, provided that: "Congress finds with respect to hazardous materials transportation that—

"(1) approximately 4,000,000,000 tons of regulated hazardous materials are transported each year and approximately 1,200,000 movements of hazardous materials occur each day, according to Department of Transportation estimates;

"(2) the movement of hazardous materials in commerce is necessary to maintain economic vitality and meet consumer demands and must be conducted in a safe, secure, and efficient manner;

"(3) accidents involving, or unauthorized access to, hazardous materials in transportation may result in a release of such materials and pose a serious threat to public health and safety;

"(4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable; and

"(5) in order to provide reasonable, adequate, and cost-effective protection from the risks posed by the transportation of hazardous materials, a network of well-trained State and local emergency response personnel and hazmat employees is essential."

Buy American

Pub. L. 103–311, title I, §123, Aug. 26, 1994, 108 Stat. 1682, provided that:

"(a) Compliance With Buy American Act.—None of the funds made available under this title [see Short Title of 1994 Amendment note above] may be expended in violation of sections 2 through 4 of the Act of March 3, 1933 ([former] 41 U.S.C. 10a–10c; popularly known as the 'Buy American Act' [see 41 U.S.C. 8301 et seq.]), which are applicable to those funds.

"(b) Sense of Congress; Requirement Regarding Notice.—

"(1) In the case of any equipment or products that may be authorized to be purchased with financial assistance provided under this title, it is the sense of Congress that entities receiving such assistance should, in expending such assistance, purchase only American-made equipment and products.

"(2) In providing financial assistance under this title, the Secretary of Transportation shall provide to each recipient of the assistance a notice describing the statement made in paragraph (1) by Congress.

"(c) Prohibition of Contracts.—If it has been finally determined by a court or Federal agency that any person intentionally affixed a label bearing a 'Made in America' inscription, or any inscription with the same meaning, to any product sold in or shipped to the United States that is not made in the United States, such person shall be ineligible to receive any contract or subcontract made with funds provided pursuant to this title, pursuant to the debarment, suspension, and ineligibility procedures described in sections 9.400 through 9.409 of title 48, Code of Federal Regulations.

"(d) Reciprocity.—

"(1) Except as provided in paragraph (2), no contract or subcontract may be made with funds authorized under this title to a company organized under the laws of a foreign country unless the Secretary of Transportation finds that such country affords comparable opportunities to companies organized under laws of the United States.

"(2)(A) The Secretary of Transportation may waive the provisions of paragraph (1) if the products or services required are not reasonably available from companies organized under the laws of the United States. Any such waiver shall be reported to Congress.

"(B) Paragraph (1) shall not apply to the extent that to do so would violate the General Agreement on Tariffs and Trade or any other international agreement to which the United States is a party."

"Secretary" Defined

Pub. L. 112–141, div. C, title III, §33002, July 6, 2012, 126 Stat. 832, provided that: "In this title [see Tables for classification], the term 'Secretary' means the Secretary of Transportation."

§5102. Definitions

In this chapter—

(1) "commerce" means trade or transportation in the jurisdiction of the United States—

(A) between a place in a State and a place outside of the State;

(B) that affects trade or transportation between a place in a State and a place outside of the State; or

(C) on a United States-registered aircraft.

(2) "hazardous material" means a substance or material the Secretary designates under section 5103(a) of this title.

(3) "hazmat employee"—

(A) means an individual—

(i) who—

(I) is employed on a full time, part time, or temporary basis by a hazmat employer; or

(II) is self-employed (including an owner-operator of a motor vehicle, vessel, or aircraft) transporting hazardous material in commerce; and

(ii) who during the course of such full time, part time, or temporary employment, or such self employment, directly affects hazardous material transportation safety as the Secretary decides by regulation; and

(B) includes an individual, employed on a full time, part time, or temporary basis by a hazmat employer, or self employed, who during the course of employment—

(i) loads, unloads, or handles hazardous material;

(ii) designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce;

(iii) prepares hazardous material for transportation;

(iv) is responsible for the safety of transporting hazardous material; or

(v) operates a vehicle used to transport hazardous material.

(4) "hazmat employer"—

(A) means a person—

(i) who—

(I) employs or uses at least 1 hazmat employee on a full time, part time, or temporary basis; or

(II) is self-employed (including an owner-operator of a motor vehicle, vessel, or aircraft) transporting hazardous material in commerce; and

(ii) who—

(I) transports hazardous material in commerce;

(II) causes hazardous material to be transported in commerce; or

(III) designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce; and

(B) includes a department, agency, or instrumentality of the United States Government, or an authority of a State, political subdivision of a State, or Indian tribe, carrying out an activity described in clause (ii).

(5) "imminent hazard" means the existence of a condition relating to hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment.

(6) "Indian tribe" has the same meaning given that term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(7) "motor carrier"—

(A) means a motor carrier, motor private carrier, and freight forwarder as those terms are defined in section 13102; but

(B) does not include a freight forwarder, as so defined, if the freight forwarder is not performing a function relating to highway transportation.

(8) "National Response Team" means the National Response Team established under the National Contingency Plan established under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9605).

(9) "person", in addition to its meaning under section 1 of title 1—

(A) includes a government, Indian tribe, or authority of a government or tribe that—

(i) offers hazardous material for transportation in commerce;

(ii) transports hazardous material to further a commercial enterprise; or

(iii) designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce; but

(B) does not include—

(i) the United States Postal Service; and

(ii) in sections 5123 and 5124 of this title, a department, agency, or instrumentality of the Government.

(10) "public sector employee"—

(A) means an individual employed by a State, political subdivision of a State, or Indian tribe and who during the course of employment has responsibilities related to responding to an accident or incident involving the transportation of hazardous material;

(B) includes an individual employed by a State, political subdivision of a State, or Indian tribe as a firefighter or law enforcement officer; and

(C) includes an individual who volunteers to serve as a firefighter for a State, political subdivision of a State, or Indian tribe.

(11) "Secretary" means the Secretary of Transportation except as otherwise provided.

(12) "State" means—

(A) except in section 5119 of this title, a State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, the Virgin Islands, American Samoa, Guam, and any other territory or possession of the United States designated by the Secretary; and

(B) in section 5119 of this title, a State of the United States and the District of Columbia.

(13) "transports" or "transportation" means the movement of property and loading, unloading, or storage incidental to the movement.

(14) "United States" means all of the States.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 759; Pub. L. 103–311, title I, §117(a)(1), Aug. 26, 1994, 108 Stat. 1678; Pub. L. 104–88, title III, §308(d), Dec. 29, 1995, 109 Stat. 947; Pub. L. 109–

59, title VII, §§7102, 7126, Aug. 10, 2005, 119 Stat. 1892, 1909; Pub. L. 110–244, title III, §302(a), June 6, 2008, 122 Stat. 1618.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5102(1)	49 App.:1802(1)–(3), (13).	Jan. 3, 1975, Pub. L. 93–633, §103, 88 Stat. 2156; restated Nov. 16, 1990, Pub. L. 101–615, §3(a), 104 Stat. 3245; Oct. 24, 1992, Pub. L. 102–508, §§501, 502, 106 Stat. 3311.
5102(2)	49 App.:1802(4).	
5102(3)	49 App.:1802(5).	
5102(4)	49 App.:1802(6).	
5102(5)	49 App.:1802(7).	
5102(6)	49 App.:1802(8).	
5102(7)	49 App.:1802(9).	
5102(8)	49 App.:1802(10).	
5102(9)	49 App.:1802(11).	
5102(10)	49 App.:1802(12).	
5102(11)	49 App.:1802(14).	
5102(12)	49 App.:1802(15).	
5102(13)	49 App.:1802(16).	

In this chapter, the words "or shipped" are omitted as being included in "transported".

In clause (1), before subclause (A), the text of 49 App.:1802(1), (3), and (13) is omitted because the complete names of the Administrator of the Environmental Protection Agency, Director of the Federal Emergency Management Agency, and Secretary of Transportation are used the first time the terms appear in a section. The words "traffic, commerce" are omitted as surplus. In subclause (B), the words "between a place in a State and a place outside of the State" are substituted for "described in clause (A)" for clarity.

In clauses (3)(C) and (10)(B), the words "at a minimum" are omitted as surplus.

In clause (5), the words "administrative hearing or other" are omitted as surplus.

In clause (9), before subclause (A), the words "including any trustee, receiver, assignee, or similar representative thereof" are omitted as surplus.

In clause (12), the words "by any mode" are omitted as surplus.

AMENDMENTS

2008—Par. (3). Pub. L. 110–244 amended Pub. L. 109–59, §7102(2). See 2005 Amendment notes below.

2005—Par. (1)(C). Pub. L. 109–59, §7102(1), added subpar. (C).

Par. (2). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation".

Par. (3)(A)(i). Pub. L. 109–59, §7102(2)(A), as amended by Pub. L. 110–244, §302(a)(1), (2), added cl. (i) and struck out former cl. (i) which read as follows: "employed by a hazmat employer; and".

Par. (3)(A)(ii). Pub. L. 109–59, §7102(2)(B), as amended by Pub. L. 110–244, §302(a)(1), (3), substituted "course of such full time, part time, or temporary employment, or such self employment," for "course of employment" and inserted "and" at end.

Par. (3)(B). Pub. L. 109–59, §7102(2)(D)(i), as amended by Pub. L. 110–244, §302(a)(1), substituted "employed on a full time, part time, or temporary basis by a hazmat employer, or self employed," for "employed by a hazmat employer," in introductory provisions.

Pub. L. 109–59, §7102(2)(C), as amended by Pub. L. 110–244, §302(a)(1), redesignated subpar. (C) as (B) and struck out former subpar. (B) which read as follows: "includes an owner-operator of a motor vehicle transporting hazardous material in commerce; and".

Par. (3)(B)(ii). Pub. L. 109–59, §7102(2)(D)(ii), as amended by Pub. L. 110–244, §302(a)(1), added cl. (ii) and struck out former cl. (ii) which read as follows: "manufactures, reconditions, or tests containers, drums, and packagings represented as qualified for use in transporting hazardous material;".

Par. (3)(C). Pub. L. 109–59, §7102(2)(C), as amended by Pub. L. 110–244, §302(a)(1), redesignated subpar. (C) as (B).

Par. (4). Pub. L. 109–59, §7102(3), amended par. (4) generally. Prior to amendment, par. (4) consisted of subpars. (A) to (C), which included within definition of "hazmat employer" a person using at least one employee in connection with transporting or containers for transporting hazardous material, an owner-operator of a motor vehicle transporting hazardous material in commerce, and a department, agency, or instrumentality of the United States Government, or an authority of a State, political subdivision of a State, or Indian tribe, carrying out certain described activities.

Par. (5). Pub. L. 109–59, §7102(4), inserted "relating to hazardous material" after "of a condition".

Par. (7). Pub. L. 109–59, §7102(5), amended par. (7) generally. Prior to amendment, par. (7) read as follows: " 'motor carrier' means a motor carrier, motor private carrier, and freight forwarder as those terms are defined in section 13102 of this title."

Par. (8). Pub. L. 109–59, §7102(6), substituted "National Response Team" for "national response team" in two places and "National Contingency Plan" for "national contingency plan".

Par. (9)(A). Pub. L. 109–59, §7102(7), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "includes a government, Indian tribe, or authority of a government or tribe offering hazardous material for transportation in commerce or transporting hazardous material to further a commercial enterprise; but".

Pars. (11) to (14). Pub. L. 109–59, §7102(8), added par. (11) and redesignated former pars. (11) to (13) as (12) to (14), respectively.

1995—Par. (7). Pub. L. 104–88 substituted "motor carrier, motor private" for "motor common carrier, motor contract carrier, motor private" and "section 13102" for "section 10102".

1994—Pars. (3)(C)(ii), (4)(A)(iii). Pub. L. 103–311 substituted "packagings" for "packages".

Effective Date of 2008 Amendment

Amendment by Pub. L. 110–244 effective as of the date of enactment of Pub. L. 109–59 (Aug. 10, 2005) and to be treated as included in Pub. L. 109–59 as of that date, and provisions of Pub. L. 109–59, as in effect on the day before June 6, 2008, that are amended by Pub. L. 110–244 to be treated as not enacted, see section 121(b) of Pub. L. 110–244, set out as a note under section 101 of Title 23, Highways.

§5103. General regulatory authority

(a) Designating Material as Hazardous.—The Secretary shall designate material (including an explosive, radioactive material, infectious substance, flammable or combustible liquid, solid, or gas, toxic, oxidizing, or corrosive material, and compressed gas) or a group or class of material as hazardous when the Secretary determines that transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or property.

(b) Regulations for Safe Transportation.—(1) The Secretary shall prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. The regulations—

(A) apply to a person who—

(i) transports hazardous material in commerce;

(ii) causes hazardous material to be transported in commerce;

(iii) designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce;

(iv) prepares or accepts hazardous material for transportation in commerce;

(v) is responsible for the safety of transporting hazardous material in commerce;

(vi) certifies compliance with any requirement under this chapter; or

(vii) misrepresents whether such person is engaged in any activity under clause (i) through (vi); and

(B) shall govern safety aspects, including security, of the transportation of hazardous material the Secretary considers appropriate.

(2) A proceeding to prescribe the regulations must be conducted under section 553 of title 5, including an opportunity for informal oral presentation.

(c) Federally Declared Disasters and Emergencies.—

(1) In general.—The Secretary may by order waive compliance with any part of an applicable standard prescribed under this chapter without prior notice and comment and on terms the Secretary considers appropriate if the Secretary determines that—

(A) it is in the public interest to grant the waiver;

(B) the waiver is not inconsistent with the safety of transporting hazardous materials; and

(C) the waiver is necessary to facilitate the safe movement of hazardous materials into, from, and within an area of a major disaster or emergency that has been declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.).

(2) Period of waiver.—A waiver under this subsection may be issued for a period of not more than 60 days and may be renewed upon application to the Secretary only after notice and an opportunity for a hearing on the waiver. The Secretary shall immediately revoke the waiver if continuation of the waiver would not be consistent with the goals and objectives of this chapter.

(3) Statement of reasons.—The Secretary shall include in any order issued under this section the reasons for granting the waiver.

(d) Consultation.—When prescribing a security regulation or issuing a security order that affects the safety of the transportation of hazardous material, the Secretary of Homeland Security shall consult with the Secretary of Transportation.

(e) Biennial Report.—The Secretary of Transportation shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Senate Committee on Commerce, Science, and Transportation a biennial report providing information on whether the Secretary has designated as hazardous materials for purposes of chapter 51 of such title all by-products of the methamphetamine-production process that are known by the Secretary to pose an unreasonable risk to health and safety or property when transported in commerce in a particular amount and form.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 761; Pub. L. 103–311, title I, §117(a)(2), Aug. 26, 1994, 108 Stat. 1678; Pub. L. 103–429, §6(3), Oct. 31, 1994, 108 Stat. 4378; Pub. L. 107–296, title XVII, §1711(a), Nov. 25, 2002, 116 Stat. 2319; Pub. L. 109–59, title VII, §§7103, 7126, Aug. 10, 2005, 119 Stat. 1893, 1909; Pub. L. 109–177, title VII, §741, Mar. 9, 2006, 120 Stat. 272; Pub. L. 114–94, div. A, title VII, §7201, Dec. 4, 2015, 129 Stat. 1589.)

Historical and Revision Notes

Pub. L. 103–272

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5103(a)	49 App.:1803.	Jan. 3, 1975, Pub. L. 93–633, §104, 88 Stat. 2156.
5103(b)	49 App.:1804(a) (1)–(3).	Jan. 3, 1975, Pub. L. 93–633, §105(a) (1)–(3), 88 Stat. 2157; restated Nov. 16, 1990, Pub. L. 101–615, §4, 104 Stat. 3247.

In subsection (a), the words "such quantity and form of material" and "in his discretion" are omitted as surplus.

In subsection (b)(1), before clause (A), the words "in accordance with section 553 of title 5" are omitted because 5:553 applies unless otherwise stated. In clause (A)(i), the words "hazardous material in commerce", and in clause (A)(ii), the words "hazardous material . . . in commerce", are added for consistency in this chapter.

Pub. L. 103–429

This amends 49:5103(b)(2) to clarify the restatement of 49 App.:1804(a)(2) by section 1 of the Act of July 5, 1994 (Public Law 103–272, 108 Stat. 761).

References in Text

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, referred to in subsec. (c)(1)(C), is Pub. L. 93–288, May 22, 1974, 88 Stat. 143, which is classified principally to chapter 68 (§5121 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 5121 of Title 42 and Tables.

Amendments

2015—Subsecs. (c) to (e). Pub. L. 114–94 added subsec. (c) and redesignated former subsecs. (c) and (d) as (d) and (e), respectively.

2006—Subsec. (d). Pub. L. 109–177 added subsec. (d).

2005—Subsec. (a). Pub. L. 109–59, §7126, substituted "Secretary shall designate" for "Secretary of Transportation shall designate".

Pub. L. 109–59, §7103(a), substituted "infectious substance, flammable or combustible liquid, solid, or gas, toxic, oxidizing, or corrosive material," for "etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material," and "determines" for "decides".

Subsec. (b)(1)(A). Pub. L. 109–59, §7103(b), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "apply to a person—

"(i) transporting hazardous material in commerce;

"(ii) causing hazardous material to be transported in commerce; or

"(iii) manufacturing, fabricating, marking, maintaining, reconditioning, repairing, or testing a packaging or a container that is represented, marked, certified, or sold by that person as qualified for use in transporting hazardous material in commerce; and".

Subsec. (b)(1)(C). Pub. L. 109–59, §7103(c)(1), struck out heading and text of subpar. (C). Text read as follows: "When prescribing a security regulation or issuing a security order that affects the safety of the transportation of hazardous material, the Secretary of Homeland Security shall consult with the Secretary."

Subsec. (c). Pub. L. 109–59, §7103(c)(2), added subsec. (c).

2002—Subsec. (b)(1). Pub. L. 107–296, §1711(a)(1), substituted "transportation, including security," for "transportation" in introductory provisions.

Subsec. (b)(1)(B). Pub. L. 107–296, §1711(a)(2), substituted "aspects, including security," for "aspects".

Subsec. (b)(1)(C). Pub. L. 107–296, §1711(a)(3), added subpar. (C).

1994—Subsec. (b)(1)(A)(iii). Pub. L. 103–311 substituted "a packaging or a" for "a package or".

Subsec. (b)(2). Pub. L. 103–429 substituted "be conducted under section 553 of title 5, including" for "include" and "presentation" for "presentations".

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–429 effective July 5, 1994, see section 9 of Pub. L. 103–429, set out as a note under section 321 of this title.

GAO Study on Acceptance of Classification Examinations

Pub. L. 114–94, div. A, title VII, §7207, Dec. 4, 2015, 129 Stat. 1592, provided that:

"(a) In General.—Not later than 180 days after the date of enactment of this Act [Dec. 4, 2015], the Comptroller General of the United States shall evaluate and transmit to the Secretary [of Transportation], the Committee on Transportation and Infrastructure of the House of Representatives, and the Committee on Commerce, Science, and Transportation of the Senate, a report on the standards, metrics, and protocols that the Secretary uses to regulate the performance of persons approved to recommend hazard classifications pursuant to section 173.56(b) of title 49, Code of Federal Regulations (commonly referred to as 'third-party labs').

"(b) EVALUATION.—The evaluation required under subsection (a) shall—

"(1) identify what standards and protocols are used to approve such persons, assess the adequacy of such standards and protocols to ensure that persons seeking approval are qualified and capable of performing classifications, and make recommendations to address any deficiencies identified;

"(2) assess the adequacy of the Secretary's oversight of persons approved to perform the classifications, including the qualification of individuals engaged in the oversight of approved persons, and make recommendations to enhance oversight sufficiently to ensure that classifications are issued as required;

"(3) identify what standards and protocols exist to rescind, suspend, or deny approval of persons who perform such classifications, assess the adequacy of such standards and protocols, and make recommendations to enhance such standards and protocols if necessary; and

"(4) include annual data for fiscal years 2005 through 2015 on the number of applications received for new classifications pursuant to section 173.56(b) of title 49, Code of Federal Regulations, of those applications how many classifications recommended by persons approved by the Secretary were changed to another classification and the reasons for the change, and how many hazardous materials incidents have been attributed to a classification recommended by such approved persons in the United States.

"(c) ACTION PLAN.—Not later than 180 days after receiving the report required under subsection (a), the Secretary shall make available to the public a plan describing any actions the Secretary will take to establish standards, metrics, and protocols based on the findings and recommendations in the report to ensure that persons approved to perform classification examinations required under section 173.56(b) of title 49, Code of Federal Regulations, can sufficiently perform such examinations in a manner that meets the hazardous materials regulations.

"(d) REGULATIONS.—If the report required under subsection (a) recommends new regulations in order for the Secretary to have confidence in the accuracy of classification recommendations rendered by persons approved to perform classification examinations required under section 173.56(b) of title 49, Code of Federal Regulations, the Secretary shall consider such recommendations, and if determined appropriate, issue regulations to address the recommendations not later than 18 months after the date of the publication of the plan under subsection (c)."

RAILROAD CARRIER EMPLOYEE EXPOSURE TO RADIATION STUDY

Pub. L. 110–432, div. A, title IV, §411, Oct. 16, 2008, 122 Stat. 4888, provided that:

"(a) STUDY.—The Secretary of Transportation shall, in consultation with the Secretary of Energy, the Secretary of Labor, the Administrator of the Environmental Protection Agency, and the Chairman of the Nuclear Regulatory Commission, as appropriate, conduct a study of the potential hazards to which employees of railroad carriers and railroad contractors or subcontractors are exposed during the transportation of high-level radioactive waste and spent nuclear fuel (as defined in section 5101(a) [probably means section 5105(a)] of title 49, United States Code), supplementing the report submitted under section 5101(b) [probably means section 5105(b)] of that title, which may include—

"(1) an analysis of the potential application of 'as low as reasonably achievable' principles for exposure to radiation to such employees with an emphasis on the need for special protection from radiation exposure for such employees during the first trimester of pregnancy or who are undergoing or have recently undergone radiation therapy;

"(2) the feasibility of requiring real-time dosimetry monitoring for such employees;

"(3) the feasibility of requiring routine radiation exposure monitoring in fixed railroad locations, such as yards and repair facilities; and

"(4) a review of the effectiveness of the Department's packaging requirements for radioactive materials.

"(b) REPORT.—Not later than 18 months after the date of enactment of this Act [Oct. 16, 2008], the Secretary of Transportation shall transmit a report on the results of the study required by subsection (a) and any recommendations to further protect employees of a railroad carrier or of a contractor or subcontractor to a railroad carrier from unsafe exposure to radiation during the transportation of high-level radioactive waste and spent nuclear fuel to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Transportation and Infrastructure.

"(c) REGULATORY AUTHORITY.—The Secretary of Transportation may issue regulations that the Secretary determines appropriate, pursuant to the report required by subsection (b), to protect railroad employees from unsafe exposure to radiation during the transportation of radioactive materials."

[For definitions of "railroad carrier", "Department", "railroad", and "Secretary", as used in section 411 of Pub. L. 110–432, set out above, see section 2(a) of Pub. L. 110–432, set out as a note under section 20102 of this title.]

Safe Placement of Train Cars

Pub. L. 103–311, title I, §111, Aug. 26, 1994, 108 Stat. 1676, provided that: "The Secretary of Transportation shall conduct a study of existing practices regarding the placement of cars on trains, with particular attention to the placement of cars that carry hazardous materials. In conducting the study, the Secretary shall consider whether such placement practices increase the risk of derailment, hazardous materials spills, or tank ruptures or have any other adverse effect on safety. The results of the study shall be submitted to Congress within 1 year after the date of enactment of this Act [Aug. 26, 1994]."

Fiber Drum Packaging

Pub. L. 104–88, title IV, §406, Dec. 29, 1995, 109 Stat. 957, provided that:

"(a) In General.—In the administration of chapter 51 of title 49, United States Code, the Secretary of Transportation shall issue a final rule within 60 days after the date of the enactment of this Act [Dec. 29, 1995] authorizing the continued use of fiber drum packaging with a removable head for the transportation of liquid hazardous materials with respect to those liquid hazardous materials transported by such drums pursuant to regulations in effect on September 30, 1991, if—

"(1) the packaging is in compliance with regulations of the Secretary under the Hazardous Materials Transportation Act [former 49 U.S.C. 1801 et seq.] as in effect on September 30, 1991; and

"(2) the packaging will not be used for the transportation of hazardous materials that include materials which are poisonous by inhalation or materials in Packing Groups I and II.

"(b) Expiration.—The regulation referred to in subsection (a) shall expire on the later of September 30, 1997, or the date on which funds are authorized to be appropriated to carry out chapter 51 of title 49, United States Code (relating to transportation of hazardous materials), for fiscal years beginning after September 30, 1997.

"(c) Study.—

"(1) In general.—Within 90 days after the date of the enactment of this Act [Dec. 29, 1995], the Secretary shall contract with the National Academy of Sciences to conduct a study—

"(A) to determine whether the requirements of section 5103(b) of title 49, United States Code (relating to regulations for safe transportation), as they pertain to fiber drum packaging with a removable head can be met for the transportation of liquid hazardous materials (with respect to those liquid hazardous materials transported by such drums pursuant to regulations in effect on September 30, 1991) with standards (including fiber drum industry standards set forth in a June 8, 1992, exemption application submitted to the Department of Transportation), other than the performance-oriented packaging standards adopted under docket number HM–181 contained in part 178 of title 49, Code of Federal Regulations; and

"(B) to determine whether a packaging standard (including such fiber drum industry standards), other than such performance-oriented packaging standards, will provide an equal or greater level of safety for the transportation of liquid hazardous materials than would be provided if such performance-oriented packaging standards were in effect.

"(2) Completion.—The study shall be completed before March 1, 1997 and shall be transmitted to the Committee on Commerce, Science, and Transportation of the Senate and the Transportation and Infrastructure Committee of the House of Representatives.

"(d) Secretarial Action.—By September 30, 1997, the Secretary shall issue final regulations to determine what standards should apply to fiber drum packaging with a removable head for transportation of liquid hazardous materials (with respect to those liquid hazardous materials transported by such drums pursuant to regulations in effect on September 30, 1991) after September 30, 1997. In issuing such regulations, the Secretary shall give full and substantial consideration to the results of the study conducted in subsection (c)."

Pub. L. 103–311, title I, §122, Aug. 26, 1994, 108 Stat. 1681, provided that:

"(a) Initiation of Rulemaking Proceeding.—Not later than the 60th day following the date of enactment of this Act [Aug. 26, 1994], the Secretary of Transportation shall initiate a rulemaking proceeding to determine whether the requirements of section 5103(b) of title 49, United States Code (relating to regulations for safe transportation), as they pertain to open head fiber drum packaging can be met for the domestic transportation of liquid hazardous materials (with respect to those classifications of liquid hazardous materials transported by such drums pursuant to regulations in effect on September 30, 1991) with standards other than the

performance-oriented packaging standards adopted under docket number HM–181 contained in part 178 of title 49, Code of Federal Regulations.

"(b) ISSUANCE OF STANDARDS.—If the Secretary of Transportation determines, as a result of the rulemaking proceeding initiated under subsection (a), that a packaging standard other than the performance-oriented packaging standards referred to in subsection (a) will provide an equal or greater level of safety for the domestic transportation of liquid hazardous materials than would be provided if such performance-oriented packaging standards were in effect, the Secretary shall issue regulations which implement such other standard and which take effect before October 1, 1996.

"(c) COMPLETION OF RULEMAKING PROCEEDING.—The rulemaking proceeding initiated under subsection (a) shall be completed before October 1, 1995.

"(d) LIMITATIONS.—

"(1) The provisions of subsections (a), (b), and (c) shall not apply to packaging for those hazardous materials regulated by the Department of Transportation as poisonous by inhalation under chapter 51 of title 49, United States Code.

"(2) Nothing in this section shall be construed to prohibit the Secretary of Transportation from issuing or enforcing regulations for the international transportation of hazardous materials."

§5103a. Limitation on issuance of hazmat licenses

(a) LIMITATION.—

(1) ISSUANCE OF LICENSES.—A State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary of Homeland Security has first determined, upon receipt of a notification under subsection (d)(1)(B), that the individual does not pose a security risk warranting denial of the license.

(2) RENEWALS INCLUDED.—For the purposes of this section, the term "issue", with respect to a license, includes renewal of the license.

(b) HAZARDOUS MATERIALS DESCRIBED.—The limitation in subsection (a) shall apply with respect to any material defined as hazardous material by the Secretary of Transportation for which the Secretary of Transportation requires placarding of a commercial motor vehicle transporting that material in commerce.

(c) RECOMMENDATIONS ON CHEMICAL AND BIOLOGICAL MATERIALS.—The Secretary of Health and Human Services shall recommend to the Secretary of Transportation any chemical or biological material or agent for regulation as a hazardous material under section 5103(a) if the Secretary of Health and Human Services determines that such material or agent poses a significant risk to the health of individuals.

(d) BACKGROUND RECORDS CHECK.—

(1) IN GENERAL.—Upon the request of a State regarding issuance of a license described in subsection (a)(1) to an individual, the Attorney General—

(A) shall carry out a background records check regarding the individual; and

(B) upon completing the background records check, shall notify the Secretary of Homeland Security of the completion and results of the background records check.

(2) SCOPE.—A background records check regarding an individual under this subsection shall consist of the following:

(A) A check of the relevant criminal history data bases.

(B) In the case of an alien, a check of the relevant data bases to determine the status of the alien under the immigration laws of the United States.

(C) As appropriate, a check of the relevant international data bases through Interpol–U.S. National Central Bureau or other appropriate means.

(e) REPORTING REQUIREMENT.—Each State shall submit to the Secretary of Homeland Security, at such time and in such manner as the Secretary of Homeland Security may prescribe, the name,

address, and such other information as the Secretary of Homeland Security may require, concerning —

(1) each alien to whom the State issues a license described in subsection (a); and

(2) each other individual to whom such a license is issued, as the Secretary of Homeland Security may require.

(f) ALIEN DEFINED.—In this section, the term "alien" has the meaning given the term in section 101(a)(3) of the Immigration and Nationality Act.

(g) BACKGROUND CHECKS FOR DRIVERS HAULING HAZARDOUS MATERIALS.—

(1) IN GENERAL.—

(A) EMPLOYER NOTIFICATION.—Not later than 90 days after the date of enactment of this subsection, the Director of the Transportation Security Administration, after receiving comments from interested parties, shall develop and implement a process for notifying hazmat employers designated by an applicant of the results of the applicant's background record check, if—

(i) such notification is appropriate considering the potential security implications; and

(ii) the Director, in a final notification of threat assessment,[1] served on the applicant [1] determines that the applicant does not meet the standards set forth in regulations issued to carry out this section.

(B) RELATIONSHIP TO OTHER BACKGROUND RECORDS CHECKS.—

(i) ELIMINATION OF REDUNDANT CHECKS.—An individual with respect to whom the Transportation Security Administration—

(I) has performed a security threat assessment under this section; and

(II) has issued a final notification of no security threat,

is deemed to have met the requirements of any other background check that is required for purposes of any Federal law applicable to transportation workers if that background check is equivalent to, or less stringent than, the background check required under this section.

(ii) DETERMINATION BY DIRECTOR.—Not later than 60 days after the date of issuance of the report under paragraph (5), but no later than 120 days after the date of enactment of this subsection, the Director shall initiate a rulemaking proceeding, including notice and opportunity for comment, to determine which background checks required for purposes of Federal laws applicable to transportation workers are equivalent to, or less stringent than, those required under this section.

(iii) FUTURE RULEMAKINGS.—The Director shall make a determination under the criteria established under clause (ii) with respect to any rulemaking proceeding to establish or modify required background checks for transportation workers initiated after the date of enactment of this subsection.

(2) APPEALS PROCESS FOR MORE STRINGENT STATE PROCEDURES.—If a State establishes its own standards for applicants for a hazardous materials endorsement to a commercial driver's license, the State shall also provide—

(A) an appeals process similar to and to the same extent as the process provided under part 1572 of title 49, Code of Federal Regulations, by which an applicant denied a hazardous materials endorsement to a commercial driver's license by that State may appeal that denial; and

(B) a waiver process similar to and to the same extent as the process provided under part 1572 of title 49, Code of Federal Regulations, by which an applicant denied a hazardous materials endorsement to a commercial driver's license by that State may apply for a waiver.

(3) CLARIFICATION OF TERM DEFINED IN REGULATIONS.—The term "transportation security incident", as defined in part 1572 of title 49, Code of Federal Regulations, does not include a work stoppage or other nonviolent employee-related action resulting from an employer-employee dispute. Not

later than 30 days after the date of enactment of this subsection, the Director shall modify the definition of that term to reflect the preceding sentence.

(4) BACKGROUND CHECK CAPACITY.—Not later than October 1, 2005, the Director shall transmit to the Committee on Commerce, Science, and Transportation of the Senate and the Committees on Transportation and Infrastructure and Homeland Security of the House of Representatives a report on the implementation of fingerprint-based security threat assessments and the adequacy of fingerprinting locations, personnel, and resources to accomplish the timely processing of fingerprint-based security threat assessments for individuals holding commercial driver's licenses who are applying to renew hazardous materials endorsements.

(5) REPORT.—

(A) IN GENERAL.—Not later than 60 days after the date of enactment of this subsection, the Director shall transmit to the committees referred to in paragraph (4) a report on the Director's plans to reduce or eliminate redundant background checks for holders of hazardous materials endorsements performed under this section.

(B) CONTENTS.—The report shall—

(i) include a list of background checks and other security or threat assessment requirements applicable to transportation workers under Federal laws for which the Department of Homeland Security is responsible and the process by which the Secretary of Homeland Security will determine whether such checks or assessments are equivalent to, or less stringent than, the background check performed under this section; and

(ii) provide an analysis of how the Director plans to reduce or eliminate redundant background checks in a manner that will continue to ensure the highest level of safety and security.

(h) COMMERCIAL MOTOR VEHICLE OPERATORS REGISTERED TO OPERATE IN MEXICO OR CANADA.—

(1) IN GENERAL.—Beginning on the date that is 6 months after the date of enactment of this subsection, a commercial motor vehicle operator registered to operate in Mexico or Canada shall not operate a commercial motor vehicle transporting a hazardous material in commerce in the United States until the operator has undergone a background records check similar to the background records check required for commercial motor vehicle operators licensed in the United States to transport hazardous materials in commerce.

(2) EXTENSION.—The Director of the Transportation Security Administration may extend the deadline established by paragraph (1) for a period not to exceed 6 months if the Director determines that such an extension is necessary.

(3) COMMERCIAL MOTOR VEHICLE DEFINED.—In this subsection, the term "commercial motor vehicle" has the meaning given that term by section 31101.

(Added Pub. L. 107–56, title X, §1012(a)(1), Oct. 26, 2001, 115 Stat. 396; amended Pub. L. 109–59, title VII, §§7104, 7105, 7126, Aug. 10, 2005, 119 Stat. 1894, 1909; Pub. L. 110–53, title XV, §1556(a), Aug. 3, 2007, 121 Stat. 475; Pub. L. 110–244, title III, §302(b), June 6, 2008, 122 Stat. 1618.)

REFERENCES IN TEXT

Section 101(a)(3) of the Immigration and Nationality Act, referred to in subsec. (f), is classified to section 1101(a)(3) of Title 8, Aliens and Nationality.

The date of enactment of this subsection, referred to in subsecs. (g) and (h), is the date of enactment of Pub. L. 109–59, which was approved Aug. 10, 2005.

AMENDMENTS

2008—Subsec. (g)(1)(B)(ii). Pub. L. 110–244 substituted "subsection" for "Act".

2007—Subsec. (a)(1). Pub. L. 110–53, §1556(a)(1), substituted "Secretary of Homeland Security" for "Secretary".

Subsec. (b). Pub. L. 110–53, §1556(a)(2), substituted "Secretary of Transportation" for "Secretary" in two places.

Subsec. (d)(1)(B). Pub. L. 110–53, §1556(a)(3), substituted "Secretary of Homeland Security" for "Secretary".

Subsec. (e). Pub. L. 110–53, §1556(a)(4), substituted "Secretary of Homeland Security" for "Secretary" wherever appearing.

2005—Subsec. (a)(1). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation".

Pub. L. 109–59, §7104(c), substituted "subsection (d)(1)(B)," for "subsection (c)(1)(B),".

Subsec. (b). Pub. L. 109–59, §7104(a), substituted "with respect to any material defined as hazardous material by the Secretary for which the Secretary requires placarding of a commercial motor vehicle transporting that material in commerce" for "with respect to—

"(1) any material defined as a hazardous material by the Secretary of Transportation; and

"(2) any chemical or biological material or agent determined by the Secretary of Health and Human Services or the Attorney General as being a threat to the national security of the United States".

Subsec. (c). Pub. L. 109–59, §7104(b)(2), added subsec. (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 109–59, §7104(b)(1), redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (d)(1)(B). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation".

Subsec. (e). Pub. L. 109–59, §7126, substituted "submit to the Secretary" for "submit to the Secretary of Transportation" in introductory provisions.

Pub. L. 109–59, §7104(b)(1), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (f). Pub. L. 109–59, §7104(b)(1), redesignated subsec. (e) as (f).

Subsecs. (g), (h). Pub. L. 109–59, §7105, added subsecs. (g) and (h).

Authorization of Appropriations

Pub. L. 107–56, title X, §1012(c), Oct. 26, 2001, 115 Stat. 398, provided that: "There is authorized to be appropriated for the Department of Transportation and the Department of Justice such amounts as may be necessary to carry out section 5103a of title 49, United States Code, as added by subsection (a)."

[1] *So in original. Comma probably should appear after "applicant".*

§5104. Representation and tampering

(a) Representation.—A person may represent, by marking or otherwise, that—

(1) a package, component of a package, or packaging for transporting hazardous material is safe, certified, or complies with this chapter only if the package, component of a package, or packaging meets the requirements of each applicable regulation prescribed under this chapter; or

(2) hazardous material is present in a package, container, motor vehicle, rail freight car, aircraft, or vessel only if the material is present.

(b) Tampering.—No person may alter, remove, destroy, or otherwise tamper unlawfully with—

(1) a marking, label, placard, or description on a document required under this chapter or a regulation prescribed under this chapter; or

(2) a package, component of a package, or packaging, container, motor vehicle, rail freight car, aircraft, or vessel used to transport hazardous material.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 761; Pub. L. 103–311, title I, §117(b), Aug. 26, 1994, 108 Stat. 1678; Pub. L. 103–429, §6(4), Oct. 31, 1994, 108 Stat. 4378; Pub. L. 109–59, title VII, §7106, Aug. 10, 2005, 119 Stat. 1897.)

Historical and Revision Notes
Pub. L. 103–272

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5104(a)	49 App.:1804(e).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §105(e), (f); added Nov. 16, 1990, Pub. L. 101–615, §5, 104 Stat. 3252.

5104(b)	49 App.:1804(f).	

In subsection (a)(1), the words "the requirements of" and "applicable" are omitted as surplus.
In subsection (b), before clause (1), the word "deface" is omitted as surplus.

PUB. L. 103–429

This amends 49:5104(a)(1) to clarify the restatement of 49 App.:1804(e)(1) by section 1 of the Act of July 5, 1994 (Public Law 103–272, 108 Stat. 761).

AMENDMENTS

2005—Subsec. (a)(1). Pub. L. 109–59, §7106(a), substituted "a package, component of a package, or packaging for" for "a container, package, or packaging (or a component of a container, package, or packaging) for" and "the package, component of a package, or packaging meets" for "the container, package, or packaging (or a component of a container, package, or packaging) meets".

Subsec. (b). Pub. L. 109–59, §7106(b)(1), substituted "No person may" for "A person may not" in introductory provisions.

Subsec. (b)(2). Pub. L. 109–59, §7106(b)(2), inserted "component of a package, or packaging," after "package,".

1994—Subsec. (a)(1). Pub. L. 103–429 inserted "applicable" after "each".

Pub. L. 103–311 substituted ", package, or packaging (or a component of a container, package, or packaging)" for "or package" in two places.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–429 effective July 5, 1994, see section 9 of Pub. L. 103–429, set out as a note under section 321 of this title.

§5105. Transporting certain highly radioactive material

(a) DEFINITIONS.—In this section, "high-level radioactive waste" and "spent nuclear fuel" have the same meanings given those terms in section 2 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10101).

(b) TRANSPORTATION SAFETY STUDY.—In consultation with the Secretary of Energy, the Nuclear Regulatory Commission, potentially affected States and Indian tribes, representatives of the rail transportation industry, and shippers of high-level radioactive waste and spent nuclear fuel, the Secretary shall conduct a study comparing the safety of using trains operated only to transport high-level radioactive waste and spent nuclear fuel with the safety of using other methods of rail transportation for transporting that waste and fuel. The Secretary shall submit to Congress not later than November 16, 1991, a report on the results of the study.

(c) SAFE RAIL TRANSPORTATION REGULATIONS.—Not later than November 16, 1992, after considering the results of the study conducted under subsection (b) of this section, the Secretary shall prescribe amendments to existing regulations that the Secretary considers appropriate to provide for the safe rail transportation of high-level radioactive waste and spent nuclear fuel, including trains operated only for transporting high-level radioactive waste and spent nuclear fuel.

(d) INSPECTIONS OF MOTOR VEHICLES TRANSPORTING CERTAIN MATERIAL.—(1) Not later than November 16, 1991, the Secretary shall require by regulation that before each use of a motor vehicle to transport a highway-route-controlled quantity of radioactive material in commerce, the vehicle shall be inspected and certified as complying with this chapter and applicable United States motor carrier safety laws and regulations. The Secretary may require that the inspection be carried out by an authorized United States Government inspector or according to appropriate State procedures.

(2) The Secretary may allow a person, transporting or causing to be transported a highway-route-controlled quantity of radioactive material, to inspect the motor vehicle used to transport the material and to certify that the vehicle complies with this chapter. The inspector qualification requirements the Secretary prescribes for an individual inspecting a motor vehicle apply to an individual conducting an inspection under this paragraph.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 762; Pub. L. 109–59, title VII, §§7107, 7126, Aug. 10, 2005, 119 Stat. 1897, 1909.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5105(a)	49 App.:1813(e).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §116(e); added Oct. 24, 1992, Pub. L. 102–508, §505(2), 106 Stat. 3311.
	49 App.:1813 (note).	Nov. 16, 1990, Pub. L. 101–615, §16(e), 104 Stat. 3263.
5105(b)	49 App.:1813(a).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §116(a)–(d); added Oct. 30, 1984, Pub. L. 98–559, §3, 98 Stat. 2907; restated Nov. 16, 1990, Pub. L. 101–615, §15, 104 Stat. 3261; Oct. 24, 1992, Pub. L. 102–508, §505(1), 106 Stat. 3311.
5105(c)	49 App.:1813(b).	
5105(d)	49 App.:1813(c).	
5105(e)	49 App.:1813(d).	

In subsection (a), section 16(e) of the Hazardous Materials Transportation Uniform Safety Act of 1990 (Public Law 101–615, 104 Stat. 3263) is included to correct a mistake in the source provisions being restated. See section 16(a)(1) of the Act of 1990 (Public Law 101–615, 104 Stat. 3262), stating that the meanings of "high-level radioactive waste" and "spent nuclear fuel" are as defined in 49 App.:1813, as added by section 15 of the Act (104 Stat. 3261). See also Cong. Rec. S16863 (daily ed., Oct. 23, 1990).

In subsection (b), the words "Secretary of Energy" are substituted for "Department of Energy" because of 42:7131.

In subsection (c), the word "regulations" is substituted for "rule" for consistency in the revised title and with other titles of the United States Code and because "rule" and "regulation" are synonymous.

In subsection (d), before clause (1), the words "In combination" are omitted as surplus.

AMENDMENTS

2005—Subsecs. (b), (c). Pub. L. 109–59, §7126, substituted "Secretary shall" for "Secretary of Transportation shall" wherever appearing.

Subsec. (d). Pub. L. 109–59, §7126, substituted "Secretary shall" for "Secretary of Transportation shall" in par. (1) and "Secretary may" for "Secretary of Transportation may" in par. (2).

Pub. L. 109–59, §7107, redesignated subsec. (e) as (d) and struck out former subsec. (d) which related to a study to be conducted not later than Nov. 16, 1991, to decide which factors, if any, shippers and carriers should consider when selecting routes and modes that would enhance overall public safety related to the transportation of high-level radioactive waste and spent nuclear fuel.

Subsec. (e). Pub. L. 109–59, §7107(2), redesignated subsec. (e) as (d).

§5106. Handling criteria

The Secretary may prescribe criteria for handling hazardous material, including—

(1) a minimum number of personnel;

(2) minimum levels of training and qualifications for personnel;

(3) the kind and frequency of inspections;

(4) equipment for detecting, warning of, and controlling risks posed by the hazardous material;

(5) specifications for the use of equipment and facilities used in handling and transporting the hazardous material; and

(6) a system of monitoring safety procedures for transporting the hazardous material.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 763; Pub. L. 109–59, title VII, §7126, Aug. 10, 2005, 119 Stat. 1909.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5106	49 App.:1805(a).	Jan. 3, 1975, Pub. L. 93–633, §106(a), 88 Stat. 2157.

Before clause (1), the text of 49 App.:1805(a) (last sentence) is omitted as being included in "prescribe". In clause (4), the words "to be used" are omitted as surplus. In clause (6), the word "assurance" is omitted as surplus.

AMENDMENTS

2005—Pub. L. 109–59 substituted "Secretary" for "Secretary of Transportation" in introductory provisions.

§5107. Hazmat employee training requirements and grants

(a) TRAINING REQUIREMENTS.—The Secretary shall prescribe by regulation requirements for training that a hazmat employer must give hazmat employees of the employer on the safe loading, unloading, handling, storing, and transporting of hazardous material and emergency preparedness for responding to an accident or incident involving the transportation of hazardous material. The regulations—

(1) shall establish the date, as provided by subsection (b) of this section, by which the training shall be completed; and

(2) may provide for different training for different classes or categories of hazardous material and hazmat employees.

(b) BEGINNING AND COMPLETING TRAINING.—A hazmat employer shall begin the training of hazmat employees of the employer not later than 6 months after the Secretary prescribes the regulations under subsection (a) of this section. The training shall be completed within a reasonable period of time after—

(1) 6 months after the regulations are prescribed; or

(2) the date on which an individual is to begin carrying out a duty or power of a hazmat employee if the individual is employed as a hazmat employee after the 6-month period.

(c) CERTIFICATION OF TRAINING.—After completing the training, each hazmat employer shall certify, with documentation the Secretary may require by regulation, that the hazmat employees of the employer have received training and have been tested on appropriate transportation areas of responsibility, including at least one of the following:

(1) recognizing and understanding the Department of Transportation hazardous material classification system.

(2) the use and limitations of the Department hazardous material placarding, labeling, and marking systems.

(3) general handling procedures, loading and unloading techniques, and strategies to reduce the probability of release or damage during or incidental to transporting hazardous material.

(4) health, safety, and risk factors associated with hazardous material and the transportation of hazardous material.

(5) appropriate emergency response and communication procedures for dealing with an accident or incident involving hazardous material transportation.

(6) the use of the Department Emergency Response Guidebook and recognition of its limitations or the use of equivalent documents and recognition of the limitations of those documents.

(7) applicable hazardous material transportation regulations.

(8) personal protection techniques.

(9) preparing a shipping document for transporting hazardous material.

(d) Coordination of Training Requirements.—In consultation with the Administrator of the Environmental Protection Agency and the Secretary of Labor, the Secretary shall ensure that the training requirements prescribed under this section do not conflict with or duplicate—

(1) the requirements of regulations the Secretary of Labor prescribes related to hazard communication, and hazardous waste operations, and emergency response that are contained in part 1910 of title 29, Code of Federal Regulations; and

(2) the regulations the Agency prescribes related to worker protection standards for hazardous waste operations that are contained in part 311 of title 40, Code of Federal Regulations.

(e) Training Grants.—

(1) In general.—Subject to the availability of funds under section 5128(c), the Secretary shall make grants under this subsection—

(A) for training instructors to train hazmat employees; and

(B) to the extent determined appropriate by the Secretary, for such instructors to train hazmat employees.

(2) Eligibility.—A grant under this subsection shall be made through a competitive process to a nonprofit organization that demonstrates—

(A) expertise in conducting a training program for hazmat employees; and

(B) the ability to reach and involve in a training program a target population of hazmat employees.

(f) Training of Certain Employees.—The Secretary shall ensure that maintenance-of-way employees and railroad signalmen receive general awareness and familiarization training and safety training pursuant to section 172.704 of title 49, Code of Federal Regulations.

(g) Relationship to Other Laws.—(1) Chapter 35 of title 44 does not apply to an activity of the Secretary under subsections (a)–(d) of this section.

(2) An action of the Secretary under subsections (a)–(d) of this section and section 5106 is not an exercise, under section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653(b)(1)), of statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

(h) Existing Effort.—No grant under subsection (e) shall supplant or replace existing employer-provided hazardous materials training efforts or obligations.

(i) Community Safety Grants.—The Secretary shall establish a competitive program for making grants to nonprofit organizations for—

(1) conducting national outreach and training programs to assist communities in preparing for and responding to accidents and incidents involving the transportation of hazardous materials, including Class 3 flammable liquids by rail; and

(2) training State and local personnel responsible for enforcing the safe transportation of hazardous materials, including Class 3 flammable liquids.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 763; Pub. L. 103–311, title I, §§106, 119(c)(1)–(3), Aug. 26, 1994, 108 Stat. 1674, 1680; Pub. L. 109–59, title VII, §§7108, 7126, Aug. 10, 2005, 119 Stat. 1897, 1909; Pub. L. 112–141, div. C, title III, §33016, July 6, 2012, 126 Stat. 841; Pub. L. 114–94, div. A, title VII, §7301, Dec. 4, 2015, 129 Stat. 1594.)

Historical and Revision Notes

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5107(a)	49 App.:1805(b)(1), (2), (5) (1st sentence).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §106(b); added Nov. 16, 1990,

		Pub. L. 101–615, §7(3), 104 Stat. 3253.
5107(b)	49 App.:1805(b)(4), (5) (last sentence).	
5107(c)	49 App.:1805(b)(6).	
5107(d)	49 App.:1805(b)(3) (1st sentence).	
5107(e)	49 App.:1816(a)–(c).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §118(a)–(c); added Nov. 16, 1990, Pub. L. 101–615, §18, 104 Stat. 3269.
5107(f)(1)	49 App.:1805(b)(7).	
5107(f)(2)	49 App.:1805(b)(3) (last sentence).	

In subsections (a)(1) and (b), before clause (1), the words "in order to comply with requirements established by such regulations" are omitted as surplus.

In subsection (a), before clause (1), the words "Within 18 months after November 16, 1990" are omitted as obsolete. In clause (1), the words "as provided by subsection (b) of this section" are added for clarity.

In subsection (b), before clause (1), the words "in accordance with the requirements established by such regulations" are omitted as surplus.

In subsection (c), before clause (1), the words "in accordance with the requirements established under this subsection" and "appropriate" before "documentation" are omitted as surplus.

In subsection (d), before clause (1), the words "take such actions as may be necessary to" are omitted as surplus. In clauses (1) and (2), the words "(and amendments thereto)" are omitted as surplus. In clause (1), the words "Secretary of Labor" are substituted for "Occupational Safety and Health Administration of the Department of Labor" because of 29:551.

In subsection (e), the words "and education" are omitted as being included in "training". Before clause (1), the words "regarding the safe loading, unloading, handling, storage, and transportation of hazardous materials and emergency preparedness for responding to accidents or incidents involving the transportation of hazardous materials in order to meet the requirements issued under section 1816(b) of this title may be made under this section" are omitted as surplus.

In subsection (f)(1), the words "(relating to coordination of Federal information policy)" are omitted as surplus.

AMENDMENTS

2015—Subsec. (i). Pub. L. 114–94 added subsec. (i).

2012—Subsec. (e)(2). Pub. L. 112–141 inserted "through a competitive process" after "shall be made" and struck out "hazmat employee" after "nonprofit" in introductory provisions.

2005—Subsecs. (a) to (d). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation" in introductory provisions of subsecs. (a) to (c) and "Secretary shall" for "Secretary of Transportation shall" in introductory provisions of subsec. (d).

Subsec. (e). Pub. L. 109–59, §7108(1), added subsec. (e) and struck out heading and text of former subsec. (e). Text read as follows: "The Secretary shall, subject to the availability of funds under section 5127(c)(3), make grants for training instructors to train hazmat employees under this section. A grant under this subsection shall be made to a nonprofit hazmat employee organization that demonstrates—

"(1) expertise in conducting a training program for hazmat employees; and

"(2) the ability to reach and involve in a training program a target population of hazmat employees."

Subsec. (f). Pub. L. 109–59, §7108(3), added subsec. (f). Former subsec. (f) redesignated (g).

Subsec. (g). Pub. L. 109–59, §7108(2), redesignated subsec. (f) as (g). Former subsec. (g) redesignated (h).

Subsec. (g)(1). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation".

Subsec. (g)(2). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation".

Pub. L. 109–59, §7108(4), substituted "section 5106" for "sections 5106, 5108(a)–(g)(1) and (h), and 5109 of this title".

Subsec. (h). Pub. L. 109–59, §7108(2), redesignated subsec. (g) as (h).

1994—Subsec. (d). Pub. L. 103–311, §106, in introductory provisions inserted "or duplicate" after "conflict with" and in par. (1) substituted "hazard communication, and hazardous waste operations, and" for "hazardous waste operations and".

Subsec. (e). Pub. L. 103–311, §119(c)(1), (2), in first sentence substituted "The Secretary shall, subject to the availability of funds under section 5127(c)(3), make grants for training instructors to train hazmat employees under this section." for "In consultation with the Secretaries of Transportation and Labor and the Administrator, the Director of the National Institute of Environmental Health Sciences may make grants to train hazmat employees under this section." and in second sentence inserted "hazmat employee" after "nonprofit".

Subsec. (g). Pub. L. 103–311, §119(c)(3), added subsec. (g).

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

§5108. Registration

(a) Persons Required to File.—(1) A person shall file a registration statement with the Secretary under this subsection if the person is transporting or causing to be transported in commerce any of the following:

(A) a highway-route-controlled quantity of radioactive material.

(B) more than 25 kilograms of a Division 1.1, 1.2, or 1.3 explosive material in a motor vehicle, rail car, or transport container.

(C) more than one liter in each package of a hazardous material the Secretary designates as extremely toxic by inhalation.

(D) hazardous material in a bulk packaging, container, or tank, as defined by the Secretary, if the bulk packaging, container, or tank has a capacity of at least 3,500 gallons or more than 468 cubic feet.

(E) a shipment of at least 5,000 pounds (except in a bulk packaging) of a class of hazardous material for which placarding of a vehicle, rail car, or freight container is required under regulations prescribed under this chapter.

(2) The Secretary may require any of the following persons to file a registration statement with the Secretary under this subsection:

(A) a person transporting or causing to be transported hazardous material in commerce and not required to file a registration statement under paragraph (1) of this subsection.

(B) a person designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

(3) A person required to file a registration statement under this subsection may transport or cause to be transported, or design, manufacture, fabricate, inspect, mark, maintain, recondition, repair, or test a package, container packaging component, or container for use in transporting, hazardous material, only if the person has a statement on file as required by this subsection.

(4) The Secretary may waive the filing of a registration statement, or the payment of a fee, required under this subsection, or both, for any person not domiciled in the United States who solely offers hazardous materials for transportation to the United States from a place outside the United States if the country of which such person is a domiciliary does not require persons domiciled in the United States who solely offer hazardous materials for transportation to the foreign country from places in the United States to file registration statements, or to pay fees, for making such an offer.

(b) Form, Contents, and Limitation on Filings.—(1) A registration statement under subsection (a) of this section shall be in the form and contain information the Secretary requires by regulation. The Secretary may use existing forms of the Department of Transportation and the Environmental Protection Agency to carry out this subsection. The statement shall include—

(A) the name and principal place of business of the registrant;

(B) a description of each activity the registrant carries out for which filing a statement under subsection (a) of this section is required; and

(C) each State in which the person carries out any of the activities.

(2) A person carrying out more than one activity, or an activity at more than one location, for which filing is required only has to file one registration statement to comply with subsection (a) of this section.

(c) Filing.—Each person required to file a registration statement under subsection (a) shall file the statement in accordance with regulations prescribed by the Secretary.

(d) Simplifying the Registration Process.—The Secretary may take necessary action to simplify the registration process under subsections (a)–(c) of this section and to minimize the number of applications, documents, and other information a person is required to file under this chapter and other laws of the United States.

(e) Cooperation With Administrator.—The Administrator of the Environmental Protection Agency shall assist the Secretary in carrying out subsections (a)–(g)(1) and (h) of this section by providing the Secretary with information the Secretary requests to carry out the objectives of subsections (a)–(g)(1) and (h).

(f) Availability of Statements.—The Secretary shall make a registration statement filed under subsection (a) of this section available for inspection by any person for a fee the Secretary establishes. However, this subsection does not require the release of information described in section 552(b) of title 5 or otherwise protected by law from disclosure to the public.

(g) Fees.—(1) The Secretary shall establish, impose, and collect from a person required to file a registration statement under subsection (a) of this section a fee necessary to pay for the costs of the Secretary in processing the statement.

(2)(A) In addition to a fee established under paragraph (1) of this subsection, the Secretary shall establish and impose by regulation and collect an annual fee. Subject to subparagraph (B) of this paragraph, the fee shall be at least $250 but not more than $3,000 from each person required to file a registration statement under this section. The Secretary shall determine the amount of the fee under this paragraph on at least one of the following:

(i) gross revenue from transporting hazardous material.

(ii) the type of hazardous material transported or caused to be transported.

(iii) the amount of hazardous material transported or caused to be transported.

(iv) the number of shipments of hazardous material.

(v) the number of activities that the person carries out for which filing a registration statement is required under this section.

(vi) the threat to property, individuals, and the environment from an accident or incident involving the hazardous material transported or caused to be transported.

(vii) the percentage of gross revenue derived from transporting hazardous material.

(viii) the amount to be made available to carry out sections 5108(g)(2), 5115, and 5116 of this title.

(ix) other factors the Secretary considers appropriate.

(B) The Secretary shall adjust the amount being collected under this paragraph to reflect any unexpended balance in the account established under section 5116(h) of this title. However, the Secretary is not required to refund any fee collected under this paragraph.

(C) The Secretary shall transfer to the Secretary of the Treasury amounts the Secretary of Transportation collects under this paragraph for deposit in the Hazardous Materials Emergency Preparedness Fund established under section 5116(h) of this title.

(3) FEES ON EXEMPT PERSONS.—Notwithstanding subsection (a)(4), the Secretary shall impose and collect a fee of $25 from a person who is required to register under this section but who is otherwise exempted by the Secretary from paying any fee under this section. The fee shall be used to pay the costs incurred by the Secretary in processing registration statements filed by such persons.

(h) MAINTAINING PROOF OF FILING AND PAYMENT OF FEES.—The Secretary may prescribe regulations requiring a person required to file a registration statement under subsection (a) of this section to maintain proof of the filing and payment of fees imposed under subsection (g) of this section.

(i) RELATIONSHIP TO OTHER LAWS.—(1) Chapter 35 of title 44 does not apply to an activity of the Secretary under subsections (a)–(g)(1) and (h) of this section.

(2)(A) This section does not apply to an employee of a hazmat employer.

(B) Subsections (a)–(h) of this section do not apply to a department, agency, or instrumentality of the United States Government, an authority of a State or political subdivision of a State, an Indian tribe, or an employee of a department, agency, instrumentality, or authority carrying out official duties.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 765; Pub. L. 103–311, title I, §§104, 117(a)(3), 119(d)(1), Aug. 26, 1994, 108 Stat. 1673, 1678, 1680; Pub. L. 105–102, §2(3), Nov. 20, 1997, 111 Stat. 2204; Pub. L. 105–225, §7(b)(1), Aug. 12, 1998, 112 Stat. 1511; Pub. L. 109–59, title VII, §§7109(a)–(c), (e), (f), 7114(d)(3), 7126, Aug. 10, 2005, 119 Stat. 1897, 1898, 1900, 1909; Pub. L. 114–94, div. A, title VII, §7203(b)(1), Dec. 4, 2015, 129 Stat. 1591.)

HISTORICAL AND REVISION NOTES
PUB. L. 103–272

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5108(a)(1)	49 App.:1805(c)(1).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §106(c); added Nov. 16, 1990, Pub. L. 101–615, §8(a), 104 Stat. 3255; Oct. 24, 1992, Pub. L. 102–508, §503(a)(1)–(3), (b), 106 Stat. 3311.
5108(a)(2)	49 App.:1805(c)(3).	
5108(a)(3)	49 App.:1805(c)(4).	
5108(b)	49 App.:1805(c)(7), (8).	
5108(c)	49 App.:1805(c)(5), (6).	
5108(d)	49 App.:1805(c)(9).	
5108(e)	49 App.:1805(c)(2).	
5108(f)	49 App.:1805(c)(10).	
5108(g)(1)	49 App.:1805(c)(11).	
5108(g)(2)	49 App.:1815(h) (1)–(5).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §117A(h)(1)– (5); added Nov. 16, 1990, Pub. L. 101–615, §17, 104 Stat. 3267.
5108(h)	49 App.:1805(c)(12).	
5108(i)	49 App.:1805(c) (13)–(15).	

In subsection (b)(1), before clause (A), the words "at a minimum" are omitted as surplus.

In subsection (d), the words "streamline and", "with respect to a person who is required to file a registration statement under this subsection", and "with the Department of Transportation" are omitted as surplus.

In subsection (g), the word "impose" is substituted for "assess" for consistency in the revised title and with other titles of the United States Code.

In subsection (g)(2)(A), before clause (i), the words "Not later than September 30, 1992" are omitted as obsolete. In clause (viii), the words "of funds" are omitted as surplus.

In subsection (g)(2)(B), the words "of fees" and "from persons" are omitted as surplus.

In subsection (i)(1), the words "(relating to coordination of Federal information policy)" are omitted as surplus.

In subsection (i)(2)(A), the words "Notwithstanding any other provisions of this subsection" are omitted as surplus.

PUB. L. 105–102

This amends 49:5108(f) to correct an erroneous cross-reference.

AMENDMENTS

2015—Subsec. (g)(2)(B), (C). Pub. L. 114–94 substituted "5116(h)" for "5116(i)".

2005—Subsec. (a)(1). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation" in introductory provisions.

Subsec. (a)(1)(B). Pub. L. 109–59, §7109(a)(1), substituted "Division 1.1, 1.2, or 1.3 explosive material" for "class A or B explosive".

Subsec. (a)(2). Pub. L. 109–59, §7126, substituted "Secretary may" for "Secretary of Transportation may" in introductory provisions.

Subsec. (a)(2)(B). Pub. L. 109–59, §7109(a)(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: "a person manufacturing, fabricating, marking, maintaining, reconditioning, repairing, or testing a package or container the person represents, marks, certifies, or sells for use in transporting in commerce hazardous material the Secretary designates."

Subsec. (a)(3). Pub. L. 109–59, §7109(a)(3), substituted "design, manufacture, fabricate, inspect, mark, maintain, recondition, repair, or test a package, container packaging component, or" for "manufacture, fabricate, mark, maintain, recondition, repair, or test a package or".

Subsec. (b)(1). Pub. L. 109–59, §7126, substituted "Secretary requires" for "Secretary of Transportation requires" in introductory provisions.

Subsec. (b)(1)(C). Pub. L. 109–59, §7109(b), substituted "any of the activities" for "the activity".

Subsec. (c). Pub. L. 109–59, §7109(c), amended heading and text of subsec. (c) generally. Prior to amendment, text read as follows:

"(1) Each person required to file a registration statement under subsection (a) of this section must file the first statement not later than March 31, 1992. The Secretary of Transportation may extend that date to September 30, 1992, for activities referred to in subsection (a)(1) of this section. A person shall renew the statement periodically consistent with regulations the Secretary prescribes, but not more than once each year and not less than once every 5 years.

"(2) The Secretary of Transportation shall decide by regulation when and under what circumstances a registration statement must be amended and the procedures to follow in amending the statement."

Subsecs. (d) to (f). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation" in subsec. (d), "Secretary in carrying" for "Secretary of Transportation in carrying" in subsec. (e), and "Secretary shall" for "Secretary of Transportation shall" in subsec. (f).

Subsec. (g)(1). Pub. L. 109–59, §7126, substituted "Secretary shall" for "Secretary of Transportation shall".

Pub. L. 109–59, §7109(f)(1), substituted "shall" for "may".

Subsec. (g)(2)(A). Pub. L. 109–59, §7126, substituted "Secretary shall establish" for "Secretary of Transportation shall establish" in introductory provisions.

Pub. L. 109–59, §7109(f)(2), substituted "$3,000" for "$5,000" in introductory provisions.

Subsec. (g)(2)(B). Pub. L. 109–59, §7126, substituted "Secretary shall" for "Secretary of Transportation shall".

Subsec. (g)(2)(C). Pub. L. 109–59, §7126, substituted "Secretary shall" for "Secretary of Transportation shall".

Pub. L. 109–59, §7114(d)(3), substituted "the Hazardous Materials Emergency Preparedness Fund established" for "the account the Secretary of the Treasury establishes".

Subsec. (g)(3). Pub. L. 109–59, §7109(f)(3), added par. (3).

Subsec. (h). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation".

Subsec. (i)(1). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation".

Subsec. (i)(2)(B). Pub. L. 109–59, §7109(e), inserted "an Indian tribe," after "subdivision of a State,".

1998—Subsec. (f). Pub. L. 105–225 substituted "section 552(b)" for "section 552(f)".

1997—Subsec. (f). Pub. L. 105–102 which directed substitution of "section 552(b)" for "section 522(f)" could not be executed because "section 522(f)" did not appear.

1994—Subsec. (a)(1)(D). Pub. L. 103–311, §117(a)(3), substituted "a bulk packaging" for "a bulk package" and "the bulk packaging" for "the package".

Subsec. (a)(4). Pub. L. 103–311, §104, added par. (4).

Subsec. (g)(2)(A)(viii). Pub. L. 103–311, §119(d)(1), struck out "5107(e)," before "5108(g)(2)".

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Registration

Pub. L. 109–59, title VII, §7109(d), Aug. 10, 2005, 119 Stat. 1898, provided that: "As soon as practicable, the Administrator of the Pipeline and Hazardous Materials Safety Administration shall transmit to the Federal Motor Carrier Safety Administration hazardous material registrant information obtained before, on, or after the date of enactment of this Act [Aug. 10, 2005] under section 5108 of title 49, United States Code, together with any Department of Transportation identification number for each registrant."

§5109. Motor carrier safety permits

(a) Requirement.—A motor carrier may transport or cause to be transported by motor vehicle in commerce hazardous material only if the carrier holds a safety permit the Secretary issues under this section authorizing the transportation and keeps a copy of the permit, or other proof of its existence, in the vehicle. The Secretary shall issue a permit if the Secretary finds the carrier is fit, willing, and able—

(1) to provide the transportation to be authorized by the permit;

(2) to comply with this chapter and regulations the Secretary prescribes to carry out this chapter; and

(3) to comply with applicable United States motor carrier safety laws and regulations and applicable minimum financial responsibility laws and regulations.

(b) Applicable Transportation.—The Secretary shall prescribe by regulation the hazardous material and amounts of hazardous material to which this section applies. However, this section shall apply at least to transportation by a motor carrier, in amounts the Secretary establishes, of—

(1) a class A or B explosive;

(2) liquefied natural gas;

(3) hazardous material the Secretary designates as extremely toxic by inhalation; and

(4) a highway-route-controlled quantity of radioactive material, as defined by the Secretary.

(c) Applications.—A motor carrier shall file an application with the Secretary for a safety permit to provide transportation under this section. The Secretary may approve any part of the application or deny the application. The application shall be under oath and contain information the Secretary requires by regulation.

(d) Amendments, Suspensions, and Revocations.—(1) After notice and an opportunity for a hearing, the Secretary may amend, suspend, or revoke a safety permit, as provided by procedures prescribed under subsection (e) of this section, when the Secretary decides the motor carrier is not complying with a requirement of this chapter, a regulation prescribed under this chapter, or an applicable United States motor carrier safety law or regulation or minimum financial responsibility law or regulation.

(2) If the Secretary decides an imminent hazard exists, the Secretary may amend, suspend, or revoke a permit before scheduling a hearing.

(e) Procedures.—The Secretary shall prescribe by regulation—

(1) application procedures, including form, content, and fees necessary to recover the complete cost of carrying out this section;

(2) standards for deciding the duration, terms, and limitations of a safety permit;

(3) procedures to amend, suspend, or revoke a permit; and

(4) other procedures the Secretary considers appropriate to carry out this section.

(f) SHIPPER RESPONSIBILITY.—A person offering hazardous material for motor vehicle transportation in commerce may offer the material to a motor carrier only if the carrier has a safety permit issued under this section authorizing the transportation.

(g) CONDITIONS.—A motor carrier may provide transportation under a safety permit issued under this section only if the carrier complies with conditions the Secretary finds are required to protect public safety.

(h) LIMITATION ON DENIAL.—The Secretary may not deny a non-temporary permit held by a motor carrier pursuant to this section based on a comprehensive review of that carrier triggered by safety management system scores or out-of-service disqualification standards, unless—

(1) the carrier has the opportunity, prior to the denial of such permit, to submit a written description of corrective actions taken and other documentation the carrier wishes the Secretary to consider, including a corrective action plan; and

(2) the Secretary determines the actions or plan is insufficient to address the safety concerns identified during the course of the comprehensive review.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 767; Pub. L. 109–59, title VII, §7126, Aug. 10, 2005, 119 Stat. 1909; Pub. L. 114–94, div. A, title VII, §7202, Dec. 4, 2015, 129 Stat. 1589.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5109(a)	49 App.:1805(d)(1), (2).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §106(d); added Nov. 16, 1990, Pub. L. 101–615, §8(a), 104 Stat. 3257; Oct. 24, 1992, Pub. L. 102–508, §503(a)(4), (5), (b), 106 Stat. 3311.
5109(b)	49 App.:1805(d)(5).	
5109(c)	49 App.:1805(d)(7).	
5109(d)	49 App.:1805(d)(4).	
5109(e)	49 App.:1805(d)(6).	
5109(f)	49 App.:1805(d)(3).	
5109(g)	49 App.:1805(d)(8).	
5109(h)	49 App.:1805 (note).	Nov. 16, 1990, Pub. L. 101–615, §8(b), 104 Stat. 3258.

In subsection (a), before clause (1), the words "Except as provided in this subsection" and "used to provide such transportation" are omitted as surplus.

In subsection (b), before clause (1), the word "all" is omitted as surplus.

In subsection (e)(2), the word "conditions" is omitted as being included in "terms".

In subsection (h), the text of section 8(b) (words before semicolon of the Hazardous Materials Transportation Uniform Safety Act of 1990 (Public Law 101–615, 104 Stat. 3258) is omitted as obsolete.

AMENDMENTS

2015—Subsec. (h). Pub. L. 114–94 amended subsec. (h) generally. Prior to amendment, text read as follows: "The Secretary shall prescribe regulations necessary to carry out this section not later than November 16, 1991."

2005—Subsec. (a). Pub. L. 109–59 substituted "Secretary issues" for "Secretary of Transportation issues" in introductory provisions.

EFFECTIVE DATE OF 2015 AMENDMENT

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Motor Carrier Safety Permits

Pub. L. 112–141, div. C, title III, §33014, July 6, 2012, 126 Stat. 840, provided that:

"(a) Review.—Not later than 1 year after the date of enactment of this Act [see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of Title 23, Highways], the Secretary [of Transportation] shall conduct a study of, and transmit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on, the implementation of the hazardous material safety permit program under section 5109 of title 49, United States Code. In conducting the study, the Secretary shall review, at a minimum—

"(1) the list of hazardous materials requiring a safety permit;

"(2) the number of permits that have been issued, denied, revoked, or suspended since inception of the program and the number of commercial motor carriers that have never had a permit denied, revoked, or suspended since inception of the program;

"(3) the reasons for such denials, revocations, or suspensions;

"(4) the criteria used by the Federal Motor Carrier Safety Administration to determine whether a hazardous material safety permit issued by a State is equivalent to the Federal permit; and

"(5) actions the Secretary could implement to improve the program, including whether to provide opportunities for an additional level of fitness review prior to the denial, revocation, or suspension of a safety permit.

"(b) Actions Taken.—Not later than 2 years after the date of enactment of this Act, based on the study conducted under subsection (a), the Secretary shall either institute a rulemaking to make any necessary improvements to the hazardous materials safety permit program under section 5109 of title 49, United States Code or publish in the Federal Register the Secretary's justification for why a rulemaking is not necessary."

§5110. Shipping papers and disclosure

(a) Providing Shipping Papers.—Each person offering for transportation in commerce hazardous material to which the shipping paper requirements of the Secretary apply shall provide to the carrier providing the transportation a shipping paper that makes the disclosures the Secretary prescribes in regulations.

(b) Keeping Shipping Papers on the Vehicle.—(1) A motor carrier, and the person offering the hazardous material for transportation if a private motor carrier, shall keep the shipping paper on the vehicle transporting the material.

(2) Except as provided in paragraph (1) of this subsection, the shipping paper shall be kept in a location the Secretary specifies in a motor vehicle, train, vessel, aircraft, or facility until—

(A) the hazardous material no longer is in transportation; or

(B) the documents are made available to a representative of a department, agency, or instrumentality of the United States Government or a State or local authority responding to an accident or incident involving the motor vehicle, train, vessel, aircraft, or facility.

(c) Disclosure to Emergency Response Authorities.—When an incident involving hazardous material being transported in commerce occurs, the person transporting the material, immediately on request of appropriate emergency response authorities, shall disclose to the authorities information about the material.

(d) Retention of Papers.—

(1) Offerors.—The person who provides the shipping paper under this section shall retain the paper, or an electronic format of it, for a period of 2 years after the date that the shipping paper is provided to the carrier, with the paper or electronic format to be accessible through the offeror's principal place of business.

(2) Carriers.—The carrier required to keep the shipping paper under this section,[1] shall retain the paper, or an electronic format of it, for a period of 1 year after the date that the shipping paper

is provided to the carrier, with the paper or electronic format to be accessible through the carrier's principal place of business.

(3) AVAILABILITY TO GOVERNMENT AGENCIES.—Any person required to keep a shipping paper under this subsection shall, upon request, make it available to a Federal, State, or local government agency at reasonable times and locations.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 768; Pub. L. 103–311, title I, §115, Aug. 26, 1994, 108 Stat. 1678; Pub. L. 109–59, title VII, §§7110, 7126, Aug. 10, 2005, 119 Stat. 1898, 1909; Pub. L. 110–244, title III, §302(i), June 6, 2008, 122 Stat. 1618.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5110(a)	49 App.:1804(g)(1) (1st sentence words before "for the carrier").	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §105(g); added Nov. 16, 1990, Pub. L. 101–615, §6, 104 Stat. 3253.
5110(b)	49 App.:1804(g)(2).	
5110(c)	49 App.:1804(g)(1) (1st sentence words after "paragraph (2)", last sentence), (3).	
5110(d)	49 App.:1804(g)(4).	

In subsection (c)(1), the words "A motor carrier" are substituted for "the carrier" for clarity.

AMENDMENTS

2008—Subsec. (d)(1). Pub. L. 110–244, §302(i)(2), substituted "offeror's" for "shipper's".

Pub. L. 110–244, §302(i)(1), which directed substitution of "Offerors" for "Shippers" "in the subsection heading", was executed by making the substitution in par. (1) heading to reflect the probable intent of Congress.

2005—Subsec. (a). Pub. L. 109–59, §7126, substituted "Secretary apply" for "Secretary of Transportation apply".

Pub. L. 109–59, §7110(a)(1), substituted "in regulations" for "under subsection (b) of this section".

Subsecs. (b), (c). Pub. L. 109–59, §7110(a)(2), (3), redesignated subsecs. (c) and (d) as (b) and (c), respectively, and struck out former subsec. (b) which related to considerations and requirements in carrying out subsec. (a).

Subsec. (d). Pub. L. 109–59, §7110(b), reenacted heading without change and amended text of subsec. (d) generally. Prior to amendment, text read as follows: "After the hazardous material to which a shipping paper provided to a carrier under subsection (a) applies is no longer in transportation, the person who provided the shipping paper and the carrier required to maintain it under subsection (a) shall retain the paper or electronic image thereof for a period of 1 year to be accessible through their respective principal places of business. Such person and carrier shall, upon request, make the shipping paper available to a Federal, State, or local government agency at reasonable times and locations."

Pub. L. 109–59, §7110(a)(3), redesignated subsec. (e) as (d). Former subsec. (d) redesignated (c).

Subsec. (e). Pub. L. 109–59, §7110(a)(3), redesignated subsec. (e) as (d).

1994—Subsec. (e). Pub. L. 103–311 added subsec. (e).

IMPROVEMENTS TO HAZARDOUS MATERIALS IDENTIFICATION SYSTEMS

Pub. L. 101–615, §25, Nov. 16, 1990, 104 Stat. 3273, provided that:

"(a) RULEMAKING PROCEEDING.—

"(1) INITIATION.—In order to develop methods of improving the current system of identifying hazardous materials being transported in vehicles for safeguarding the health and safety of persons responding to emergencies involving such hazardous materials and the public and to facilitate the review and reporting process required by subsection (d), the Secretary of Transportation shall initiate a rulemaking proceeding not later than 30 days after the date of the enactment of this Act [Nov. 16, 1990].

"(2) PRIMARY PURPOSES.—The primary purposes of the rulemaking proceeding initiated under this subsection are—

"(A) to determine methods of improving the current system of placarding vehicles transporting hazardous materials; and

"(B) to determine methods for establishing and operating a central reporting system and computerized telecommunications data center described in subsection (b)(1).

"(3) METHODS OF IMPROVING PLACARDING SYSTEM.—The methods of improving the current system of placarding to be considered under the rulemaking proceeding initiated under this subsection shall include methods to make such placards more visible, methods to reduce the number of improper and missing placards, alternative methods of marking vehicles for the purpose of identifying the hazardous materials being transported, methods of modifying the composition of placards in order to ensure their resistance to flammability, methods of improving the coding system used with respect to such placards, identification of appropriate emergency response procedures through symbols on placards, and whether or not telephone numbers of any continually monitored telephone systems which are established under the Hazardous Materials Transportation Act [see 49 U.S.C. 5101 et seq.] are displayed on vehicles transporting hazardous materials.

"(4) COMPLETION OF RULEMAKING PROCEEDING WITH RESPECT TO REPORTING SYSTEM AND DATA CENTER.—Not later than 19 months after the date of the enactment of this Act [Nov. 16, 1990], the Secretary of Transportation shall complete the rulemaking proceeding initiated with respect to the central reporting system and computerized telecommunications data center described in subsection (b).

"(5) FINAL RULE WITH RESPECT TO PLACARDING.—Not later than 30 months after the date of the enactment of this Act, the Secretary of Transportation shall issue a final rule relating to improving the current system for placarding vehicles transporting hazardous materials.

"(b) CENTRAL REPORTING SYSTEM AND COMPUTERIZED TELECOMMUNICATIONS DATA CENTER STUDY.—

"(1) ARRANGEMENTS WITH NATIONAL ACADEMY OF SCIENCES.—Not later than 30 days after the date of the enactment of this Act [Nov. 16, 1990], the Secretary of Transportation shall undertake to enter into appropriate arrangements with the National Academy of Sciences to conduct a study of the feasibility and necessity of establishing and operating a central reporting system and computerized telecommunications data center that is capable of receiving, storing, and retrieving data concerning all daily shipments of hazardous materials, that can identify hazardous materials being transported by any mode of transportation, and that can provide information to facilitate responses to accidents and incidents involving the transportation of hazardous materials.

"(2) CONSULTATION AND REPORT.—In entering into any arrangements with the National Academy of Sciences for conducting the study under this section, the Secretary of Transportation shall request the National Academy of Sciences—

"(A) to consult with the Department of Transportation, the Department of Health and Human Services, the Environmental Protection Agency, the Federal Emergency Management Agency, and the Occupational Safety and Health Administration, shippers and carriers of hazardous materials, manufacturers of computerized telecommunications systems, State and local emergency preparedness organizations (including law enforcement and firefighting organizations), and appropriate international organizations in conducting such study; and

"(B) to submit, not later than 19 months after the date of the enactment of this Act, to the Secretary, the Committee on Commerce, Science, and Transportation of the Senate, and the Committees on Energy and Commerce and Public Works and Transportation of the House of Representatives a report on the results of such study.

Such report shall include recommendations of the National Academy of Sciences with respect to establishment and operation of a central reporting system and computerized telecommunications data center described in paragraph (1).

"(3) AUTHORIZATION OF APPROPRIATION.—In addition to amounts authorized under section 115 of the Hazardous Materials Transportation Act [see 49 U.S.C. 5127(a)], there is authorized to be appropriated to the Secretary of Transportation to carry out this subsection $350,000.

"(c) ADDITIONAL PURPOSES OF RULEMAKING PROCEEDING AND STUDY.—Additional purposes of the rulemaking proceeding initiated under subsection (a) with respect to a central reporting system and computerized telecommunications data center described in subsection (b) and the study conducted under subsection (b) are —

"(1) to determine whether such a system and center should be established and operated by the United States Government or by a private entity, either on its own initiative or under contract with the United States;

"(2) to determine, on an annualized basis, the estimated cost for establishing, operating, and maintaining such a system and center and for carrier and shipper compliance with such a system;

"(3) to determine methods for financing the cost of establishing, operating, and maintaining such a system and center;

"(4) to determine projected safety benefits of establishing and operating such a system and center;

"(5) to determine whether or not shippers, carriers, and handlers of hazardous materials, in addition to law enforcement officials and persons responsible for responding to emergencies involving hazardous materials, should have access to such system for obtaining information concerning shipments of hazardous materials and technical and other information and advice with respect to such emergencies;

"(6) to determine methods for ensuring the security of the information and data stored in such a system;

"(7) to determine types of hazardous materials and types of shipments for which information and data should be stored in such a system;

"(8) to determine the degree of liability of the operator of such a system and center for providing incorrect, false, or misleading information;

"(9) to determine deadlines by which shippers, carriers, and handlers of hazardous materials should be required to submit information to the operator of such a system and center and minimum standards relating to the form and contents of such information;

"(10) to determine measures (including the imposition of civil and criminal penalties) for ensuring compliance with the deadlines and standards referred to in paragraph (9); and

"(11) to determine methods for accessing such a system through mobile satellite service or other technologies having the capability to provide 2-way voice, data, or facsimile services.

"(d) Review and Report to Congress.—

"(1) In general.—Not later than 25 months after the date of the enactment of this Act [Nov. 16, 1990], the Secretary of Transportation shall review the report of the National Academy of Sciences submitted under subsection (b) and the results of rulemaking proceeding initiated under subsection (a) with respect to a central reporting system and computerized telecommunications data center and shall prepare and submit to Congress a report summarizing the report of the National Academy of Sciences and the results of such rulemaking proceeding, together with the Secretary's recommendations concerning the establishment and operation of such a system and center and the Secretary's recommendations concerning implementation of the recommendations contained in the report of the National Academy of Sciences.

"(2) Weight to be given to recommendations of nas.—In conducting the review and preparing the report under this subsection, the Secretary shall give substantial weight to the recommendations contained in the report of the National Academy of Sciences submitted under subsection (b).

"(3) Inclusion of reasons for not following recommendations.—If the Secretary does not include in the report prepared for submission to Congress under this subsection a recommendation for implementation of a recommendation contained in the report of the National Academy of Sciences submitted under subsection (b), the Secretary shall include in the report to Congress under this subsection the Secretary's reasons for not recommending implementation of the recommendation of the National Academy of Sciences."

Continually Monitored Telephone Systems

Pub. L. 101–615, §26, Nov. 16, 1990, 104 Stat. 3273, provided that:

"(a) Rulemaking Proceeding.—Not later than 90 days after the date of the enactment of this Act [Nov. 16, 1990], the Secretary of Transportation shall initiate a rulemaking proceeding on the feasibility, necessity, and safety benefits of requiring carriers involved in the hazardous materials transportation industry to establish continually monitored telephone systems equipped to provide emergency response information and assistance with respect to accidents and incidents involving hazardous materials. Additional objectives of such proceeding shall be to determine which hazardous materials, if any, should be covered by such a requirement and which segments of such industry (including persons who own and operate motor vehicles, trains, vessels, aircraft, and in-transit storage facilities) should be covered by such a requirement.

"(b) Completion of Proceeding.—Not later than 30 months after the date of the enactment of this Act [Nov. 16, 1990], the Secretary of Transportation shall complete the proceeding under this section and may issue a final rule relating to establishment of continually monitored telephone systems described in subsection (a)."

[1] *So in original. Comma probably should not appear.*

[§5111. Repealed. Pub. L. 109–59, title VII, §7111, Aug. 10, 2005, 119 Stat. 1899]

Section, Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 769, related to use of rail tank cars built before Jan. 1, 1971, to transport hazardous material in commerce.

§5112. Highway routing of hazardous material

(a) Application.—(1) This section applies to a motor vehicle only if the vehicle is transporting hazardous material in commerce for which placarding of the vehicle is required under regulations prescribed under this chapter. However, the Secretary by regulation may extend application of this section or a standard prescribed under subsection (b) of this section to—

(A) any use of a vehicle under this paragraph to transport any hazardous material in commerce; and

(B) any motor vehicle used to transport hazardous material in commerce.

(2) Except as provided by subsection (d) of this section and section 5125(c) of this title, each State and Indian tribe may establish, maintain, and enforce—

(A) designations of specific highway routes over which hazardous material may and may not be transported by motor vehicle; and

(B) limitations and requirements related to highway routing.

(b) Standards for States and Indian Tribes.—(1) The Secretary, in consultation with the States, shall prescribe by regulation standards for States and Indian tribes to use in carrying out subsection (a) of this section. The standards shall include—

(A) a requirement that a highway routing designation, limitation, or requirement of a State or Indian tribe shall enhance public safety in the area subject to the jurisdiction of the State or tribe and in areas of the United States not subject to the jurisdiction of the State or tribe and directly affected by the designation, limitation, or requirement;

(B) minimum procedural requirements to ensure public participation when the State or Indian tribe is establishing a highway routing designation, limitation, or requirement;

(C) a requirement that, in establishing a highway routing designation, limitation, or requirement, a State or Indian tribe consult with appropriate State, local, and tribal officials having jurisdiction over areas of the United States not subject to the jurisdiction of that State or tribe establishing the designation, limitation, or requirement and with affected industries;

(D) a requirement that a highway routing designation, limitation, or requirement of a State or Indian tribe shall ensure through highway routing for the transportation of hazardous material between adjacent areas;

(E) a requirement that a highway routing designation, limitation, or requirement of one State or Indian tribe affecting the transportation of hazardous material in another State or tribe may be established, maintained, and enforced by the State or tribe establishing the designation, limitation, or requirement only if—

(i) the designation, limitation, or requirement is agreed to by the other State or tribe within a reasonable period or is approved by the Secretary under subsection (d) of this section; and

(ii) the designation, limitation, or requirement is not an unreasonable burden on commerce;

(F) a requirement that establishing a highway routing designation, limitation, or requirement of a State or Indian tribe be completed in a timely way;

(G) a requirement that a highway routing designation, limitation, or requirement of a State or Indian tribe provide reasonable routes for motor vehicles transporting hazardous material to reach terminals, facilities for food, fuel, repairs, and rest, and places to load and unload hazardous material;

(H) a requirement that a State be responsible—

(i) for ensuring that political subdivisions of the State comply with standards prescribed under this subsection in establishing, maintaining, and enforcing a highway routing designation, limitation, or requirement; and

(ii) for resolving a dispute between political subdivisions; and

(I) a requirement that, in carrying out subsection (a) of this section, a State or Indian tribe shall consider—

(i) population densities;

(ii) the types of highways;

(iii) the types and amounts of hazardous material;

(iv) emergency response capabilities;

(v) the results of consulting with affected persons;

(vi) exposure and other risk factors;

(vii) terrain considerations;

(viii) the continuity of routes;

(ix) alternative routes;

(x) the effects on commerce;

(xi) delays in transportation; and

(xii) other factors the Secretary considers appropriate.

(2) The Secretary may not assign a specific weight that a State or Indian tribe shall use when considering the factors under paragraph (1)(I) of this subsection.

(c) LIST OF ROUTE DESIGNATIONS.—

(1) IN GENERAL.—In coordination with the States, the Secretary shall update and publish periodically a list of currently effective hazardous material highway route designations.

(2) STATE RESPONSIBILITIES.—

(A) IN GENERAL.—Each State shall submit to the Secretary, in a form and manner to be determined by the Secretary and in accordance with subparagraph (B)—

(i) the name of the State agency responsible for hazardous material highway route designations; and

(ii) a list of the State's currently effective hazardous material highway route designations.

(B) FREQUENCY.—Each State shall submit the information described in subparagraph (A)(ii)—

(i) at least once every 2 years; and

(ii) not later than 60 days after a hazardous material highway route designation is established, amended, or discontinued.

(d) DISPUTE RESOLUTION.—(1) The Secretary shall prescribe regulations for resolving a dispute related to through highway routing or to an agreement with a proposed highway route designation, limitation, or requirement between or among States, political subdivisions of different States, or Indian tribes.

(2) A State or Indian tribe involved in a dispute under this subsection may petition the Secretary to resolve the dispute. The Secretary shall resolve the dispute not later than one year after receiving the petition. The resolution shall provide the greatest level of highway safety without being an unreasonable burden on commerce and shall ensure compliance with standards prescribed under subsection (b) of this section.

(3)(A) After a petition is filed under this subsection, a civil action about the subject matter of the dispute may be brought in a court only after the earlier of—

(i) the day the Secretary issues a final decision; or

(ii) the last day of the one-year period beginning on the day the Secretary receives the petition.

(B) A State or Indian tribe adversely affected by a decision of the Secretary under this subsection may bring a civil action for judicial review of the decision in an appropriate district court of the United States not later than 89 days after the day the decision becomes final.

(e) Relationship to Other Laws.—This section and regulations prescribed under this section do not affect sections 31111 and 31113 of this title or section 127 of title 23.

(f) Existing Radioactive Material Routing Regulations.—The Secretary is not required to amend or again prescribe regulations related to highway routing designations over which radioactive material may and may not be transported by motor vehicles, and limitations and requirements related to the routing, that were in effect on November 16, 1990.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 769; Pub. L. 109–59, title VII, §7126, Aug. 10, 2005, 119 Stat. 1909; Pub. L. 112–141, div. C, title III, §33013(a), July 6, 2012, 126 Stat. 839.)

Historical and Revision Notes

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5112(a)(1)	49 App.:1804(b)(7).	Jan. 3, 1975, Pub. L. 93–633, §105(b)(1)–(3), (5)–(9), (c), 88 Stat. 2157; restated Nov. 16, 1990, Pub. L. 101–615, §4, 104 Stat. 3248, 3251.
5112(a)(2)	49 App.:1804(b)(1).	
5112(b)(1)	49 App.:1804(b)(2), (3).	
5112(b)(2)	49 App.:1804(b)(9).	
5112(c)	49 App.:1804(c).	
5112(d)	49 App.:1804(b)(5).	
5112(e)	49 App.:1804(b)(6).	
5112(f)	49 App.:1804(b)(8).	

In subsection (a)(1), the words "in the area which is subject to the jurisdiction of such State or Indian tribe" are omitted as surplus.

In subsection (b)(1), before clause (A), the words "Not later than 18 months after November 16, 1990" are omitted as obsolete. In clause (H)(i), the words "prescribed under this subsection" are added for clarity.

In subsection (d)(1), the words "within 18 months of November 16, 1990" are omitted as obsolete. The words "over a matter" are omitted as surplus.

In subsection (d)(3), the word "civil" is added for consistency in the revised title and with other titles of the United States Code.

In subsection (e), the words "superseding or otherwise", "application of", "relating to vehicle weight limitations", and "relating to vehicle length and vehicle width limitations, respectively" are omitted as surplus.

In subsection (f), the word "modify" is omitted as surplus and for consistency in the revised title. The words "issued by the Department of Transportation before November 16, 1990, and" are omitted as obsolete.

Amendments

2012—Subsec. (c). Pub. L. 112–141 designated existing provisions as par. (1), inserted heading, and added par. (2).

2005—Subsec. (a)(1). Pub. L. 109–59 substituted "Secretary" for "Secretary of Transportation" in introductory provisions.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

Study of Hazardous Materials Transportation by Motor Carriers Near Federal Prisons

Pub. L. 103–311, title I, §121, Aug. 26, 1994, 108 Stat. 1681, directed Secretary of Transportation to submit to Congress, not later than 1 year after Aug. 26, 1994, report on results of study to determine safety considerations of transporting hazardous materials by motor carriers in close proximity to Federal prisons, particularly those housing maximum security prisoners, which was to include evaluation of ability of such facilities and designated local planning agencies to safely evacuate such prisoners in event of emergency and

any special training, equipment, or personnel that would be required by such facility and designated local emergency planning agencies to carry out such evacuation.

§5113. Unsatisfactory safety rating

A violation of section 31144(c)(3) shall be considered a violation of this chapter, and shall be subject to the penalties in sections 5123 and 5124.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 771; Pub. L. 105–178, title IV, §4009(b), June 9, 1998, 112 Stat. 407; Pub. L. 109–59, title VII, §7112(a), Aug. 10, 2005, 119 Stat. 1899.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5113(a)	49 App.:1814(a).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §117; added Nov. 3, 1990, Pub. L. 101–500, §15(b)(1), 104 Stat. 1218.
5113(b)	49 App.:1814(b).	
5113(c)	49 App.:1814(c).	
5113(d)	49 App.:2501 (note).	Nov. 3, 1990, Pub. L. 101–500, §15(b)(2), 104 Stat. 1219.

In subsections (a) and (c), the words "individuals" is substituted for "passengers, including the driver" for clarity and consistency.

In subsection (a), before clause (1), the words "Effective January 1, 1991" are omitted as obsolete. The words "to take such action as may be necessary " are omitted as surplus.

In subsection (b), the words "from the Secretary" and "conditions and other" are omitted as surplus.

In subsection (d), the words "Not later than 1 year after the date of enactment of this Act" are omitted as obsolete.

AMENDMENTS

2005—Pub. L. 109–59 amended text generally. Prior to amendment, text read as follows: "See section 31144."

1998—Pub. L. 105–178 substituted "See section 31144." for subsecs. (a) to (d) which related to unsatisfactory safety ratings.

§5114. Air transportation of ionizing radiation material

(a) TRANSPORTING IN AIR COMMERCE.—Material that emits ionizing radiation spontaneously may be transported on a passenger-carrying aircraft in air commerce (as defined in section 40102(a) of this title) only if the material is intended for a use in, or incident to, research or medical diagnosis or treatment and does not present an unreasonable hazard to health and safety when being prepared for, and during, transportation.

(b) PROCEDURES.—The Secretary shall prescribe procedures for monitoring and enforcing regulations prescribed under this section.

(c) NONAPPLICATION.—This section does not apply to material the Secretary decides does not pose a significant hazard to health or safety when transported because of its low order of radioactivity.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 772; Pub. L. 109–59, title VII, §7126, Aug. 10, 2005, 119 Stat. 1909.)

HISTORICAL AND REVISION NOTES

Revised	*Source (U.S. Code)*	*Source (Statutes at Large)*

Section		
5114(a)	49 App.:1807(a) (1st, 2d sentences), (b) (1st sentence).	Jan. 3, 1975, Pub. L. 93–633, §108, 88 Stat. 2159; Nov. 16, 1990, Pub. L. 101–615, §10, 104 Stat. 3259.
5114(b)	49 App.:1807(a) (last sentence).	
5114(c)	49 App.:1807(b) (last sentence).	

In subsection (a), the text of 49 App.:1807(a) (1st sentence) is omitted as executed. The words "or combination of materials" are omitted as surplus.

In subsection (b), the words "further" and "effective" are omitted as surplus.

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–59 substituted "Secretary" for "Secretary of Transportation".

§5115. Training curriculum for the public sector

(a) IN GENERAL.—In coordination with the Administrator of the Federal Emergency Management Agency, the Chairman of the Nuclear Regulatory Commission, the Administrator of the Environmental Protection Agency, the Secretaries of Labor, Energy, and Health and Human Services, and the Director of the National Institute of Environmental Health Sciences, and using existing coordinating mechanisms of the National Response Team and, for radioactive material, the Federal Radiological Preparedness Coordinating Committee, the Secretary of Transportation shall maintain, and update periodically, a current curriculum of courses, including online curriculum as appropriate, necessary to train public sector emergency response and preparedness teams in matters relating to the transportation of hazardous material. Only in developing the curriculum, the Secretary of Transportation shall consult with regional response teams established under the national contingency plan established under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9605), representatives of commissions established under section 301 of the Emergency Planning and Community Right-To-Know Act of 1986 (42 U.S.C. 11001), persons (including governmental entities) that provide training for responding to accidents and incidents involving the transportation of hazardous material, and representatives of persons that respond to those accidents and incidents.

(b) REQUIREMENTS.—The curriculum maintained and updated under subsection (a) of this section—

(1) shall include—

(A) a recommended course of study to train public sector employees to respond to an accident or incident involving the transportation of hazardous material and to plan for those responses;

(B) recommended courses and minimum number of hours of instruction necessary for public sector employees to be able to respond safely and efficiently to an accident or incident involving the transportation of hazardous material and to plan those responses; and

(C) appropriate emergency response training and planning programs for public sector employees developed with Federal financial assistance, including programs developed with grants made under section 126(g) of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 9660a); and

(2) may include recommendations on material appropriate for use in a recommended course described in clause (1)(B) of this subsection.

(c) TRAINING ON COMPLYING WITH LEGAL REQUIREMENTS.—A recommended course described in subsection (b)(1)(B) of this section shall provide the training necessary for public sector employees to comply with—

(1) regulations related to hazardous waste operations and emergency response contained in part 1910 of title 29, Code of Federal Regulations, prescribed by the Secretary of Labor;

(2) regulations related to worker protection standards for hazardous waste operations contained in part 311 of title 40, Code of Federal Regulations, prescribed by the Administrator; and

(3) standards related to emergency response training prescribed by the National Fire Protection Association and such other voluntary consensus standard-setting organizations as the Secretary of Transportation determines appropriate.

(d) DISTRIBUTION AND PUBLICATION.—With the National Response Team—

(1) the Secretary shall distribute the curriculum and any updates to the curriculum to the regional response teams and all committees and commissions established under section 301 of the Emergency Planning and Community Right-To-Know Act of 1986 (42 U.S.C. 11001); and

(2) the Secretary may publish and distribute a list of programs and courses maintained and updated under this section and of any programs utilizing such courses.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 772; Pub. L. 103–429, §6(5), Oct. 31, 1994, 108 Stat. 4378; Pub. L. 109–59, title VII, §§7113, 7126, Aug. 10, 2005, 119 Stat. 1899, 1909; Pub. L. 109–295, title VI, §612(c), Oct. 4, 2006, 120 Stat. 1410; Pub. L. 112–141, div. C, title III, §33004(a), July 6, 2012, 126 Stat. 832; Pub. L. 114–94, div. A, title VI, §6013, Dec. 4, 2015, 129 Stat. 1570.)

HISTORICAL AND REVISION NOTES

PUB. L. 103–272

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5115(a)	49 App.:1815(g)(1), (5).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §117A (g)(1)–(6), (8); added Nov. 16, 1990, Pub. L. 101–615, §17, 104 Stat. 3265, 3267.
5115(b)	49 App.:1815(g)(2), (3).	
5115(c)	49 App.:1815(g)(4).	
5115(d)(1)	49 App.:1815(g)(6).	
5115(d)(2)	49 App.:1815(g)(8).	

In subsection (c)(3), the words "including standards 471 and 472" are omitted as surplus.

In subsection (d)(1), the word "updates" is substituted for "amendments" for clarity.

PUB. L. 103–429

This amends 49:5115(b)(1)(C) to make a cross-reference more precise.

AMENDMENTS

2015—Subsec. (a). Pub. L. 114–94 inserted ", including online curriculum as appropriate," after "a current curriculum of courses".

2012—Subsecs. (b)(1)(B), (2), (c). Pub. L. 112–141 struck out "basic" after "recommended".

2005—Subsec. (a). Pub. L. 109–59, §7113(a), inserted heading and first sentence and struck out former heading and first sentence. Text read as follows: "Not later than November 16, 1992, in coordination with the Director of the Federal Emergency Management Agency, Chairman of the Nuclear Regulatory Commission, Administrator of the Environmental Protection Agency, Secretaries of Labor, Energy, and Health and Human Services, and Director of the National Institute of Environmental Health Sciences, and using the existing coordinating mechanisms of the national response team and, for radioactive material, the Federal Radiological Preparedness Coordinating Committee, the Secretary of Transportation shall develop and update periodically a curriculum consisting of a list of courses necessary to train public sector emergency response and preparedness teams."

Subsec. (b). Pub. L. 109–59, §7113(b)(1), substituted "maintained and updated" for "developed" in introductory provisions.

Subsec. (b)(1)(C). Pub. L. 109–59, §7113(b)(2), substituted "with Federal financial assistance, including programs" for "under other United States Government grant programs, including those".

Subsec. (c)(3). Pub. L. 109–59, §7113(c), inserted "and such other voluntary consensus standard-setting organizations as the Secretary of Transportation determines appropriate" before period at end.

Subsec. (d). Pub. L. 109–59, §7113(d)(1), substituted "National Response Team" for "national response team" in introductory provisions.

Subsec. (d)(1). Pub. L. 109–59, §7113(d)(2), substituted "Secretary" for "Director of the Federal Emergency Management Agency".

Subsec. (d)(2). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation".

Pub. L. 109–59, §7113(d)(3), inserted "and distribute" after "publish" and substituted "list of programs and courses maintained and updated under this section and of any programs utilizing such courses" for "list of programs that uses a course developed under this section for training public sector employees to respond to an accident or incident involving the transportation of hazardous material".

1994—Subsec. (b)(1)(C). Pub. L. 103–429 substituted "126(g)" for "126".

Change of Name

"Administrator of the Federal Emergency Management Agency" substituted for "Director of the Federal Emergency Management Agency" in subsec. (a) on authority of section 612(c) of Pub. L. 109–295, set out as a note under section 313 of Title 6, Domestic Security. Any reference to the Administrator of the Federal Emergency Management Agency in title VI of Pub. L. 109–295 or an amendment by title VI to be considered to refer and apply to the Director of the Federal Emergency Management Agency until Mar. 31, 2007, see section 612(f)(2) of Pub. L. 109–295, set out as a note under section 313 of Title 6.

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–429 effective July 5, 1994, see section 9 of Pub. L. 103–429, set out as a note under section 321 of this title.

§5116. Planning and training grants, monitoring, and review

(a) Planning and Training Grants.—(1) The Secretary shall make grants to States and Indian tribes—

(A) to develop, improve, and carry out emergency plans under the Emergency Planning and Community Right-To-Know Act of 1986 (42 U.S.C. 11001 et seq.), including ascertaining flow patterns of hazardous material on lands under the jurisdiction of a State or Indian tribe, and between lands under the jurisdiction of a State or Indian tribe and lands of another State or Indian tribe;

(B) to decide on the need for regional hazardous material emergency response teams; and

(C) to train public sector employees to respond to accidents and incidents involving hazardous material.

(2) To the extent that a grant is used to train emergency responders under paragraph (1)(C), the State or Indian tribe shall provide written certification to the Secretary that the emergency responders who receive training under the grant will have the ability to protect nearby persons, property, and the environment from the effects of accidents or incidents involving the transportation of hazardous material in accordance with existing regulations or National Fire Protection Association standards for competence of responders to accidents and incidents involving hazardous materials.

(3) The Secretary may make a grant to a State or Indian tribe under paragraph (1) of this subsection only if—

(A) the State or Indian tribe certifies that the total amount the State or Indian tribe expends (except amounts of the Federal Government) for the purpose of the grant will at least equal the average level of expenditure for the last 5 years; and

(B) any emergency response training provided under the grant shall consist of—

(i) a course developed or identified under section 5115 of this title; or

(ii) any other course the Secretary determines is consistent with the objectives of this section.

(4) A State or Indian tribe receiving a grant under this subsection shall ensure that planning and emergency response training under the grant is coordinated with adjacent States and Indian tribes.

(5) A training grant under paragraph (1)(C) may be used—

(A) to pay—

(i) the tuition costs of public sector employees being trained;

(ii) travel expenses of those employees to and from the training facility;

(iii) room and board of those employees when at the training facility; and

(iv) travel expenses of individuals providing the training;

(B) by the State, political subdivision, or Indian tribe to provide the training; and

(C) to make an agreement with a person (including an authority of a State, a political subdivision of a State or Indian tribe, or a local jurisdiction), subject to approval by the Secretary, to provide the training if—

(i) the agreement allows the Secretary and the State or Indian tribe to conduct random examinations, inspections, and audits of the training without prior notice;

(ii) the person agrees to have an auditable accounting system; and

(iii) the State or Indian tribe conducts at least one on-site observation of the training each year.

(6) The Secretary shall allocate amounts made available for grants under this subsection among eligible States and Indian tribes based on the needs of the States and Indian tribes for emergency response planning and training. In making a decision about those needs, the Secretary shall consider —

(A) the number of hazardous material facilities in the State or on land under the jurisdiction of the Indian tribe;

(B) the types and amounts of hazardous material transported in the State or on such land;

(C) whether the State or Indian tribe imposes and collects a fee for transporting hazardous material;

(D) whether such fee is used only to carry out a purpose related to transporting hazardous material;

(E) the past record of the State or Indian tribe in effectively managing planning and training grants; and

(F) any other factors the Secretary determines are appropriate to carry out this subsection.

(b) Compliance With Certain Law.—The Secretary may make a grant to a State under this section in a fiscal year only if the State certifies that the State complies with sections 301 and 303 of the Emergency Planning and Community Right-To-Know Act of 1986 (42 U.S.C. 11001, 11003).

(c) Applications.—A State or Indian tribe interested in receiving a grant under this section shall submit an application to the Secretary. The application must be submitted at the time, and contain information, the Secretary requires by regulation to carry out the objectives of this section.

(d) Government's Share of Costs.—A grant under this section is for 80 percent of the cost the State or Indian tribe incurs in the fiscal year to carry out the activity for which the grant is made. Amounts of the State or tribe under subsection (a)(3)(A) of this section are not part of the non-Government share under this subsection.

(e) Monitoring and Technical Assistance.—In coordination with the Secretaries of Transportation and Energy, Administrator of the Environmental Protection Agency, and Director of the National Institute of Environmental Health Sciences, the Administrator of the Federal Emergency Management Agency shall monitor public sector emergency response planning and training for an accident or incident involving hazardous material. Considering the results of the monitoring, the Secretaries, Administrators, and Director each shall provide technical assistance to a State, political subdivision of a State, or Indian tribe for carrying out emergency response training and planning for an accident or incident involving hazardous material and shall coordinate the assistance using the

existing coordinating mechanisms of the National Response Team and, for radioactive material, the Federal Radiological Preparedness Coordinating Committee.

(f) Delegation of Authority.—To minimize administrative costs and to coordinate Federal financial assistance for emergency response training and planning, the Secretary may delegate to the Administrator of the Federal Emergency Management Agency, Director of the National Institute of Environmental Health Sciences, Chairman of the Nuclear Regulatory Commission, Administrator of the Environmental Protection Agency, and Secretaries of Labor and Energy any of the following:

(1) authority to receive applications for grants under this section.

(2) authority to review applications for technical compliance with this section.

(3) authority to review applications to recommend approval or disapproval.

(4) any other ministerial duty associated with grants under this section.

(g) Minimizing Duplication of Effort and Expenses.—The Secretaries of Transportation, Labor, and Energy, Administrator of the Federal Emergency Management Agency, Director of the National Institute of Environmental Health Sciences, Chairman of the Nuclear Regulatory Commission, and Administrator of the Environmental Protection Agency shall review periodically, with the head of each department, agency, or instrumentality of the Government, all emergency response and preparedness training programs of that department, agency, or instrumentality to minimize duplication of effort and expense of the department, agency, or instrumentality in carrying out the programs and shall take necessary action to minimize duplication.

(h) Annual Registration Fee Account and Its Uses.—The Secretary of the Treasury shall establish an account in the Treasury (to be known as the "Hazardous Materials Emergency Preparedness Fund") into which the Secretary of the Treasury shall deposit amounts the Secretary of Transportation transfers to the Secretary of the Treasury under section 5108(g)(2)(C) of this title. Without further appropriation, amounts in the account are available—

(1) to make grants under this section and section 5107(e);

(2) to monitor and provide technical assistance under subsection (e) of this section;

(3) to publish and distribute an emergency response guide; and

(4) to pay administrative costs of carrying out this section and sections 5107(e) and 5108(g)(2) of this title, except that not more than 2 percent of the amounts made available from the account in a fiscal year may be used to pay those costs.

(i) Supplemental Training Grants.—

(1) In order to further the purposes of subsection (a), the Secretary shall, subject to the availability of funds and through a competitive process, make a grant or make grants to national nonprofit fire service organizations for the purpose of training instructors to conduct hazardous materials response training programs for individuals with statutory responsibility to respond to hazardous materials accidents and incidents.

(2) For the purposes of this subsection the Secretary, after consultation with interested organizations, shall—

(A) identify regions or locations in which fire departments or other organizations which provide emergency response to hazardous materials transportation accidents and incidents are in need of hazardous materials training; and

(B) prioritize such needs and develop a means for identifying additional specific training needs.

(3) Funds granted to an organization under this subsection shall only be used—

(A) to provide training, including portable training, for instructors to conduct hazardous materials response training programs;

(B) to purchase training equipment used exclusively to train instructors to conduct such training programs; and

(C) to disseminate such information and materials as are necessary for the conduct of such training programs.

(4) The Secretary may only make a grant to an organization under this subsection in a fiscal year if the organization enters into an agreement with the Secretary to provide training, including portable training, for instructors to conduct hazardous materials response training programs in such fiscal year that will use—

(A) a course or courses developed or identified under section 5115 of this title; or

(B) other courses which the Secretary determines are consistent with the objectives of this subsection;

for training individuals with statutory responsibility to respond to accidents and incidents involving hazardous materials. Such agreement also shall provide that training courses shall comply with Federal regulations and national consensus standards for hazardous materials response and be open to all such individuals on a nondiscriminatory basis.

(5) The Secretary may not award a grant to an organization under this subsection unless the organization ensures that emergency responders who receive training under the grant will have the ability to protect nearby persons, property, and the environment from the effects of accidents or incidents involving the transportation of hazardous material in accordance with existing regulations or National Fire Protection Association standards for competence of responders to accidents and incidents involving hazardous materials.

(6) Notwithstanding paragraphs (1) and (3), to the extent determined appropriate by the Secretary, a grant awarded by the Secretary to an organization under this subsection to conduct hazardous material response training programs may be used to train individuals with responsibility to respond to accidents and incidents involving hazardous material.

(7) For the purposes of this subsection, the term "portable training" means live, instructor-led training provided by certified fire service instructors that can be offered in any suitable setting, rather than specific designated facilities. Under this training delivery model, instructors travel to locations convenient to students and utilize local facilities and resources.

(8) The Secretary may impose such additional terms and conditions on grants to be made under this subsection as the Secretary determines are necessary to protect the interests of the United States and to carry out the objectives of this subsection.

(j) REPORTS.—The Secretary shall submit an annual report to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate and make available the report to the public. The report submitted under this subsection shall include information on the allocation and uses of the planning and training grants under subsection (a) and grants under subsection (i) of this section and under subsections (e) and (i) of section 5107. The report submitted under this subsection shall identify the ultimate recipients of such grants and include—

(1) a detailed accounting and description of each grant expenditure by each grant recipient, including the amount of, and purpose for, each expenditure;

(2) the number of persons trained under the grant program, by training level;

(3) an evaluation of the efficacy of such planning and training programs; and

(4) any recommendations the Secretary may have for improving such grant programs.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 773; Pub. L. 103–311, title I, §§105, 119(a), (d)(2), (3), Aug. 26, 1994, 108 Stat. 1673, 1679, 1680; Pub. L. 103–429, §7(c), Oct. 31, 1994, 108 Stat. 4389; Pub. L. 104–287, §§5(8), 6(b), Oct. 11, 1996, 110 Stat. 3389, 3398; Pub. L. 109–59, title VII, §§7114(a)–(d)(2), (e), 7126, Aug. 10, 2005, 119 Stat. 1900, 1909; Pub. L. 109–295, title VI, §612(c), Oct. 4, 2006, 120 Stat. 1410; Pub. L. 112–141, div. C, title III, §33004(b), July 6, 2012, 126 Stat. 832; Pub. L. 114–94, div. A, title VII, §7203(a), (b)(2), Dec. 4, 2015, 129 Stat. 1589, 1591.)

HISTORICAL AND REVISION NOTES

PUB. L. 103–272

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*

5116(a)	49 App.:1815(a).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §117A(a)–(f), (g)(7), (9), (h)(6); added Nov. 16, 1990, Pub. L. 101–615, §17, 104 Stat. 3263, 3266, 3267, 3268.
5116(b)(1)	49 App.:1815(b)(1).	
5116(b)(2)	49 App.:1815(b) (2)–(4).	
5116(b)(3)	49 App.:1815(b)(5), (6).	
5116(b)(4)	49 App.:1815(b)(7).	
5116(c)	49 App.:1815(c).	
5116(d)	49 App.:1815(e).	
5116(e)	49 App.:1815(d).	
5116(f)	49 App.:1815(g)(7).	
5116(g)	49 App.:1815(f).	
5116(h)	49 App.:1815(g)(9).	
5116(i)	49 App.:1815(h)(6).	

In subsections (a)(2)(A) and (b)(2)(A), the words "at least equal" are substituted for "be maintained at a level which does not fall below" to eliminate unnecessary words.

In subsection (a)(2)(B), the words "by the State emergency response commission" are omitted as surplus.

In subsection (b)(2)(B)(i), the words "or courses" are omitted because of 1:1.

In subsection (c), the words "including compliance with such sections with respect to accidents and incidents involving the transportation of hazardous materials" are omitted as surplus.

In subsection (d), the word "section" is substituted for "subsection" for clarity because there are no objectives in the subsection being restated.

In subsection (e), the words "A grant under this section is for" are substituted for "By a grant under this section, the Secretary shall reimburse any State or Indian tribe an amount not to exceed" to eliminate unnecessary words and for consistency in the revised title. The words "which are required to be expended under subsections (a)(2) and (b)(2) of this section" are omitted as surplus. The words "under this subsection" are added for clarity.

In subsection (h), the words "including coordination of training programs" are omitted as surplus.

Pub. L. 104–287, §5(8)

This amends 49:5116(j)(4)(A) to correct an erroneous cross-reference.

References in Text

The Emergency Planning and Community Right-To-Know Act of 1986, referred to in subsec. (a)(1)(A), is title III of Pub. L. 99–499, Oct. 17, 1986, 100 Stat. 1728, which is classified generally to chapter 116 (§11001 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 11001 of Title 42 and Tables.

Amendments

2015—Subsec. (a). Pub. L. 114–94, §7203(a)(3), added subsec. (a) and struck out former subsec. (a) which related to planning grants.

Subsecs. (b), (c). Pub. L. 114–94, §7203(a)(1), (2), redesignated subsecs. (c) and (d) as (b) and (c), respectively, and struck out former subsec. (b) which related to training grants.

Subsec. (d). Pub. L. 114–94, §7203(a)(1), (b)(2)(A), redesignated subsec. (e) as (d) and substituted "subsection (a)(3)(A)" for "subsections (a)(2)(A) and (b)(2)(A)". Former subsec. (d) redesignated (c).

Subsecs. (e) to (g). Pub. L. 114–94, §7203(a)(1), redesignated subsecs. (f) to (h) as (e) to (g), respectively. Former subsec. (e) redesignated (d).

Subsec. (h). Pub. L. 114–94, §7203(a)(1), redesignated subsec. (i) as (h). Former subsec. (h) redesignated (g).

Subsec. (h)(1). Pub. L. 114–94, §7203(b)(2)(B)(i), inserted "and section 5107(e)" after "section".

Subsec. (h)(2). Pub. L. 114–94, §7203(b)(2)(B)(ii), substituted "subsection (e)" for "subsection (f)".

Subsec. (h)(4). Pub. L. 114–94, §7203(b)(2)(B)(iii), substituted "5107(e) and 5108(g)(2)" for "5108(g)(2) and 5115".

Subsec. (i). Pub. L. 114–94, §7203(a)(1), (b)(2)(C), redesignated subsec. (j) as (i) and substituted "subsection (a)" for "subsection (b)" in par. (1). Former subsec. (i) redesignated (h).

Subsec. (j). Pub. L. 114–94, §7203(b)(2)(D), substituted, in introductory provisions, "planning and training grants under subsection (a) and grants under subsection (i) of this section and under subsections (e) and (i) of section 5107" for "planning grants allocated under subsection (a), training grants under subsection (b), and grants under subsection (j) of this section and under section 5107" and redesignated subpars. (A) to (D) as pars. (1) to (4), respectively.

Pub. L. 114–94, §7203(a)(1), redesignated subsec. (k) as (j). Former subsec. (j) redesignated (i).

Subsec. (k). Pub. L. 114–94, §7203(a)(1), redesignated subsec. (k) as (j).

2012—Subsec. (b)(1). Pub. L. 112–141, §33004(b)(1), inserted at end "To the extent that a grant is used to train emergency responders, the State or Indian tribe shall provide written certification to the Secretary that the emergency responders who receive training under the grant will have the ability to protect nearby persons, property, and the environment from the effects of accidents or incidents involving the transportation of hazardous material in accordance with existing regulations or National Fire Protection Association standards for competence of responders to accidents and incidents involving hazardous materials."

Subsec. (j)(1). Pub. L. 112–141, §33004(b)(2)(A), substituted "funds and through a competitive process, make a grant or make grants to national nonprofit fire service organizations for" for "funds, make grants to national nonprofit employee organizations engaged solely in fighting fires for".

Subsec. (j)(3)(A). Pub. L. 112–141, §33004(b)(2)(B), substituted "provide training, including portable training, for" for "train".

Subsec. (j)(4). Pub. L. 112–141, §33004(b)(2)(C)(ii), which directed insertion of "comply with Federal regulations and national consensus standards for hazardous materials response and" after "training course shall", was executed by making the insertion after "training courses shall" in concluding provisions, to reflect the probable intent of Congress.

Pub. L. 112–141, §33004(b)(2)(C)(i), substituted "provide training, including portable training, for" for "train" in introductory provisions.

Subsec. (j)(5) to (8). Pub. L. 112–141, §33004(b)(2)(D), (E), added pars. (5) to (7) and redesignated former par. (5) as (8).

Subsec. (k). Pub. L. 112–141, §33004(b)(3), substituted "an annual report" for "annually" and inserted "the report" after "make available" in first sentence, substituted ". The report submitted under this subsection shall include information" for "information" and "The report submitted under this subsection shall identify the ultimate recipients of such grants and include—" for "The report shall identify the ultimate recipients of training grants and include a detailed accounting of all grant expenditures by grant recipients, the number of persons trained under the grant programs, and an evaluation of the efficacy of training programs carried out.", and added pars. (A) to (D).

2005—Subsec. (a)(1), (2). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation" in introductory provisions.

Subsec. (a)(2)(A). Pub. L. 109–59, §7114(a), substituted "5 fiscal years" for "2 fiscal years".

Subsec. (b)(1). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation".

Subsec. (b)(2). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation" in introductory provisions.

Subsec. (b)(2)(A). Pub. L. 109–59, §7114(a), substituted "5 fiscal years" for "2 fiscal years".

Subsec. (b)(3)(C), (4). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation" in introductory provisions of par. (3)(C) and "Secretary shall allocate" for "Secretary of Transportation shall allocate" in introductory provisions of par. (4).

Subsecs. (c), (d). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation" in subsec. (c) and "Secretary." for "Secretary of Transportation." in subsec. (d).

Subsec. (f). Pub. L. 109–59, §7114(b), substituted "National Response Team" for "national response team".

Subsec. (g). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation" in introductory provisions.

Pub. L. 109–59, §7114(c), substituted "Federal financial assistance" for "Government grant programs" in introductory provisions.

Subsec. (i). Pub. L. 109–59, §7114(d)(1), (2), in introductory provisions, inserted "(to be known as the 'Hazardous Materials Emergency Preparedness Fund')" after "an account in the Treasury" and struck out "collects under section 5108(g)(2)(A) of this title and" before "transfers to the Secretary", added par. (3), and redesignated former par. (3) as (4) and substituted "2 percent" for "10 percent".

Subsec. (k). Pub. L. 109–59, §7114(e), substituted "The Secretary shall submit annually to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate and make available to the public information on the allocation and uses of the planning grants allocated under subsection (a), training grants under subsection (b), and grants under subsection (j) of this section and under section 5107" for "Not later than September 30, 1997, the Secretary shall submit to Congress a report on the allocation and uses of training grants authorized under subsection (b) for fiscal year 1993 through fiscal year 1996 and grants authorized under subsection (j) and section 5107 for fiscal years 1995 and 1996" and "The report" for "Such report".

1996—Subsec. (a)(2). Pub. L. 104–287, §6(b), made technical correction to directory language of Pub. L. 103–311, §105(b)(2). See 1994 Amendment note below.

Subsec. (j)(4)(A). Pub. L. 104–287, §5(8), substituted "section 5115 of this title" for "subsection (g)".

1994—Subsec. (a)(1). Pub. L. 103–311, §105(a), in introductory provisions inserted "and Indian tribes" after "States", and in subpar. (A) substituted "on lands under the jurisdiction of a State or Indian tribe, and between lands under the jurisdiction of a State or Indian tribe and lands of another State or Indian tribe" for "in a State and between States".

Subsec. (a)(2). Pub. L. 103–311, §105(b)(2), as amended by Pub. L. 104–287, §6(b), struck out "the State" after "only if" in introductory provisions.

Pub. L. 103–311, §105(b)(1), inserted "or Indian tribe" after "grant to a State" in introductory provisions.

Subsec. (a)(2)(A). Pub. L. 103–311, §105(b)(1), (3), inserted "the State or Indian tribe" before "certifies" and "or Indian tribe" before "expends".

Subsec. (a)(2)(B). Pub. L. 103–311, §105(b)(4), inserted "the State" before "agrees".

Subsec. (a)(3). Pub. L. 103–311, §105(c), added par. (3).

Subsec. (i)(1). Pub. L. 103–311, §119(d)(2), as amended by Pub. L. 103–429, struck out "and section 5107(e) of this title" after "under this section".

Subsec. (i)(3). Pub. L. 103–311, §119(d)(3), as amended by Pub. L. 103–429, substituted "5108(g)(2)" for "5107(e), 5108(g)(2),".

Subsecs. (j), (k). Pub. L. 103–311, §119(a), added subsecs. (j) and (k).

Change of Name

"Administrator of the Federal Emergency Management Agency", "Administrators, and Director", and "Administrator of the Federal Emergency Management Agency, Director of the National Institute of Environmental Health Sciences" substituted for "Director of the Federal Emergency Management Agency", "Administrator, and Directors", and "Directors of the Federal Emergency Management Agency and National Institute of Environmental Health Sciences", respectively, in subsecs. (f) to (h), on authority of section 612(c) of Pub. L. 109–295, set out as a note under section 313 of Title 6, Domestic Security. Any reference to the Administrator of the Federal Emergency Management Agency in title VI of Pub. L. 109–295 or an amendment by title VI to be considered to refer and apply to the Director of the Federal Emergency Management Agency until Mar. 31, 2007, see section 612(f)(2) of Pub. L. 109–295, set out as a note under section 313 of Title 6.

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

Effective Date of 1996 Amendment

Pub. L. 104–287, §6(b), Oct. 11, 1996, 110 Stat. 3398, provided that the amendment made by section 6(b) is effective Aug. 26, 1994.

Effective Date of 1994 Amendment

Pub. L. 103–429, §7(c), Oct. 31, 1994, 108 Stat. 4389, provided that the amendment made by section 7(c) is effective Aug. 26, 1994.

Savings Clause

Pub. L. 114–94, div. A, title VII, §7203(c), Dec. 4, 2015, 129 Stat. 1591, provided that: "Nothing in this section [amending this section and section 5108 of this title] may be construed to prohibit the Secretary [of Transportation] from recovering and deobligating funds from grants that are not managed or expended in compliance with a grant agreement."

§5117. Special permits and exclusions

(a) Authority To Issue Special Permits.—(1) As provided under procedures prescribed by regulation, the Secretary may issue, modify, or terminate a special permit authorizing a variance from this chapter or a regulation prescribed under section 5103(b), 5104, 5110, or 5112 of this title to a person performing a function regulated by the Secretary under section 5103(b)(1) in a way that achieves a safety level—

(A) at least equal to the safety level required under this chapter; or

(B) consistent with the public interest and this chapter, if a required safety level does not exist.

(2) A special permit issued under this section shall be effective for an initial period of not more than 2 years and may be renewed by the Secretary upon application for successive periods of not more than 4 years each or, in the case of a special permit relating to section 5112, for an additional period of not more than 2 years.

(b) Applications.—When applying for a special permit or renewal of a special permit under this section, the person must provide a safety analysis prescribed by the Secretary that justifies the special permit. The Secretary shall publish in the Federal Register notice that an application for a new special permit or a modification to an existing special permit has been filed and shall give the public an opportunity to inspect the safety analysis and comment on the application. The Secretary shall make available to the public on the Department of Transportation's Internet Web site any special permit other than a new special permit or a modification to an existing special permit and shall give the public an opportunity to inspect the safety analysis and comment on the application for a period of not more than 15 days. This subsection does not require the release of information protected by law from public disclosure.

(c) Applications To Be Dealt With Promptly.—The Secretary shall issue or renew a special permit or approval for which an application was filed or deny such issuance or renewal within 120 days after the first day of the month following the date of the filing of such application, or the Secretary shall make available to the public a statement of the reason why the Secretary's decision on a special permit or approval is delayed, along with an estimate of the additional time necessary before the decision is made.

(d) Exclusions.—(1) The Secretary shall exclude, in any part, from this chapter and regulations prescribed under this chapter—

(A) a public vessel (as defined in section 2101 of title 46);

(B) a vessel exempted under section 3702 of title 46 from chapter 37 of title 46; and

(C) a vessel to the extent it is regulated under the Ports and Waterways Safety Act of 1972 (33 U.S.C. 1221 et seq.).

(2) This chapter and regulations prescribed under this chapter do not prohibit—

(A) or regulate transportation of a firearm (as defined in section 232 of title 18), or ammunition for a firearm, by an individual for personal use; or

(B) transportation of a firearm or ammunition in commerce.

(e) Limitation on Authority.—Unless the Secretary decides that an emergency exists, a special permit or renewal granted under this section is the only way a person subject to this chapter may be granted a variance from this chapter.

(f) Incorporation Into Regulations.—

(1) In general.—Not later than 1 year after the date on which a special permit has been in continuous effect for a 10-year period, the Secretary shall conduct a review and analysis of that special permit to determine whether it may be converted into the hazardous materials regulations.

(2) FACTORS.—In conducting the review and analysis under paragraph (1), the Secretary may consider—

(A) the safety record for hazardous materials transported under the special permit;

(B) the application of a special permit;

(C) the suitability of provisions in the special permit for incorporation into the hazardous materials regulations; and

(D) rulemaking activity in related areas.

(3) RULEMAKING.—After completing the review and analysis under paragraph (1) and after providing notice and opportunity for public comment, the Secretary shall either institute a rulemaking to incorporate the special permit into the hazardous materials regulations or publish in the Federal Register the Secretary's justification for why the special permit is not appropriate for incorporation into the regulations.

(g) DISCLOSURE OF FINAL ACTION.—The Secretary shall periodically, but at least every 120 days—

(1) publish in the Federal Register notice of the final disposition of each application for a new special permit, modification to an existing special permit, or approval during the preceding quarter; and

(2) make available to the public on the Department of Transportation's Internet Web site notice of the final disposition of any other special permit during the preceding quarter.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 776; Pub. L. 103–311, title I, §120(a), Aug. 26, 1994, 108 Stat. 1680; Pub. L. 109–59, title VII, §§7115(a)(1), (b)–(g), 7126, Aug. 10, 2005, 119 Stat. 1901, 1909; Pub. L. 112–141, div. C, title III, §33012(c), July 6, 2012, 126 Stat. 839; Pub. L. 114–94, div. A, title VII, §7204, Dec. 4, 2015, 129 Stat. 1592.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5117(a)	49 App.:1806(a) (1st, 2d sentences).	Jan. 3, 1975, Pub. L. 93–633, §107, 88 Stat. 2158; Nov. 16, 1990, Pub. L. 101–615, §9, 104 Stat. 3259.
5117(b)	49 App.:1806(a) (3d–last sentences).	
5117(c)(1)	49 App.:1806(b).	
5117(c)(2)	49 App.:1806(c).	
5117(d)	49 App.:1806(d).	

In subsection (a)(1), before clause (A), the words "or renew" and "subject to the requirements of this chapter" are omitted as surplus. In clause (A), the words "at least equal to the safety level required under this chapter" are substituted for "which is equal to or exceeds that level of safety which would be required in the absence of such exemption" to eliminate unnecessary words.

In subsection (a)(2), the words "issued or renewed" are omitted as surplus.

In subsection (b), the words "upon application" and "grant of such" are omitted as surplus. The words "give the public an opportunity to inspect" are substituted for "afford access to . . . public" for clarity. The words "described by subsection (b) of section 552 of title 5, or which is otherwise" are omitted as surplus.

In subsection (c)(1), clauses (A) and (B) are substituted for "any vessel which is excepted from the application of section 201 of the Ports and Waterways Safety Act of 1972 by paragraph (2) of such section". Section 201 of that Act amended section 4417a of the Revised Statutes (classified at 46:391a prior to its repeal and reenactment as part of the codification of subtitle II of title 46 in 1983). Clauses (A) and (B) restate the exceptions provided by section 201 of that Act and by section 4417a of the Revised Statutes as subsequently amended. Clause (C) is substituted for "any other vessel regulated under such Act, to the extent of such regulation" because of the restatement.

In subsection (c)(2), before clause (A), the word "prescribed" is substituted for "issued" for consistency in the revised title and with other titles of the United States Code.

In subsection (d), the words "by which", "the requirements of", and "or relieved of the obligation to meet any requirements imposed under" are omitted as surplus.

References in Text

The Ports and Waterways Safety Act of 1972, referred to in subsec. (d)(1)(C), is Pub. L. 92–340, July 10, 1972, 86 Stat. 424, as amended, which is classified generally to chapter 25 (§1221 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1221 of Title 33 and Tables.

Amendments

2015—Subsec. (b). Pub. L. 114–94, §7204(1), substituted "an application for a new special permit or a modification to an existing special permit" for "an application for a special permit" and inserted "The Secretary shall make available to the public on the Department of Transportation's Internet Web site any special permit other than a new special permit or a modification to an existing special permit and shall give the public an opportunity to inspect the safety analysis and comment on the application for a period of not more than 15 days." before "This subsection".

Subsec. (c). Pub. L. 114–94, §7204(2), substituted "a special permit or approval" for "the special permit" in two places, "120 days" for "180 days", and "make available to the public" for "publish", and struck out "in the Federal Register" after "a statement".

Subsec. (g). Pub. L. 114–94, §7204(3), added subsec. (g).

2012—Subsec. (f). Pub. L. 112–141 added subsec. (f).

2005—Pub. L. 109–59, §7115(a)(1), substituted "Special permits and exclusions" for "Exemptions and exclusions" in section catchline.

Subsec. (a). Pub. L. 109–59, §7115(b), substituted "Issue Special Permits" for "Exempt" in heading.

Subsec. (a)(1). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation" in introductory provisions.

Pub. L. 109–59, §7115(c), in introductory provisions, substituted "issue, modify, or terminate a special permit authorizing a variance" for "issue an exemption" and "performing a function regulated by the Secretary under section 5103(b)(1)" for "transporting, or causing to be transported, hazardous material".

Subsec. (a)(2). Pub. L. 109–59, §7115(d), amended par. (2) generally. Prior to amendment, par. (2) read as follows: "An exemption under this subsection is effective for not more than 2 years and may be renewed on application to the Secretary."

Subsec. (b). Pub. L. 109–59, §7115(e), substituted "the special permit" for "the exemption" and substituted "a special permit" for "an exemption" wherever appearing.

Subsec. (c). Pub. L. 109–59, §7115(f), substituted "the special permit" for "the exemption" in two places.

Subsec. (e). Pub. L. 109–59, §7115(g), substituted "a special permit" for "an exemption" and "be granted a variance" for "be exempt".

1994—Subsecs. (c) to (e). Pub. L. 103–311 added subsec. (c) and redesignated former subsecs. (c) and (d) as (d) and (e), respectively.

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

Special Permits, Approvals, and Exclusions

Pub. L. 112–141, div. C, title III, §33012(a), (b), July 6, 2012, 126 Stat. 838, provided that:

"(a) Rulemaking.—Not later than 2 years after the date of enactment of this Act [see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of Title 23, Highways], the Secretary [of Transportation], after providing notice and an opportunity for public comment, shall issue regulations that establish—

"(1) standard operating procedures to support administration of the special permit and approval programs; and

"(2) objective criteria to support the evaluation of special permit and approval applications.

"(b) Review of Special Permits.—

"(1) REVIEW.—Not later than 1 year after the date of enactment of this Act, the Secretary shall conduct a review and analysis of special permits that have been in continuous effect for a 10-year period to determine which special permits may be converted into the hazardous materials regulations.

"(2) FACTORS.—In conducting the review and analysis under paragraph (1), the Secretary may consider—

"(A) the safety record for hazardous materials transported under the special permit;

"(B) the application of a special permit;

"(C) the suitability of provisions in the special permit for incorporation into the hazardous materials regulations; and

"(D) rulemaking activity in related areas.

"(3) RULEMAKING.—After completing the review and analysis under paragraph (1), but not later than 3 years after the date of enactment of this Act, and after providing notice and opportunity for public comment, the Secretary shall issue regulations to incorporate into the hazardous materials regulations any special permits identified in the review under paragraph (1) that the Secretary determines are appropriate for incorporation, based on the factors identified in paragraph (2)."

§5118. Hazardous material technical assessment, research and development, and analysis program

(a) RISK REDUCTION.—

(1) PROGRAM AUTHORIZED.—The Secretary of Transportation may develop and implement a hazardous material technical assessment, research and development, and analysis program for the purpose of—

(A) reducing the risks associated with the transportation of hazardous material; and

(B) identifying and evaluating new technologies to facilitate the safe, secure, and efficient transportation of hazardous material.

(2) COORDINATION.—In developing the program under paragraph (1), the Secretary shall—

(A) utilize information gathered from other modal administrations with similar programs;

(B) coordinate with other modal administrations, as appropriate; and

(C) coordinate, as appropriate, with other Federal agencies.

(b) COOPERATION.—In carrying out subsection (a), the Secretary shall work cooperatively with regulated and other entities, including shippers, carriers, emergency responders, State and local officials, and academic institutions.

(c) COOPERATIVE RESEARCH.—

(1) IN GENERAL.—As part of the program established under subsection (a), the Secretary may carry out cooperative research on hazardous materials transport.

(2) NATIONAL ACADEMIES.—The Secretary may enter into an agreement with the National Academies to support research described in paragraph (1).

(3) RESEARCH.—Research conducted under this subsection may include activities relating to—

(A) emergency planning and response, including information and programs that can be readily assessed and implemented in local jurisdictions;

(B) risk analysis and perception and data assessment;

(C) commodity flow data, including voluntary collaboration between shippers and first responders for secure data exchange of critical information;

(D) integration of safety and security;

(E) cargo packaging and handling;

(F) hazmat release consequences; and

(G) materials and equipment testing.

(Added Pub. L. 112–141, div. C, title III, §33007(a), July 6, 2012, 126 Stat. 835; amended Pub. L. 114–94, div. A, title VI, §6014, Dec. 4, 2015, 129 Stat. 1570.)

PRIOR PROVISIONS

A prior section 5118, Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 777; Pub. L. 108–426, §2(c)(2), Nov. 30, 2004, 118 Stat. 2424, related to employment of additional hazardous material safety inspectors, prior to repeal by Pub. L. 109–59, title VII, §7115(h), Aug. 10, 2005, 119 Stat. 1901.

AMENDMENTS

2015—Subsec. (a)(2)(C). Pub. L. 114–94, §6014(1), added subpar. (C).
Subsec. (c). Pub. L. 114–94, §6014(2), added subsec. (c).

EFFECTIVE DATE OF 2015 AMENDMENT

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

EFFECTIVE DATE

Section effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

§5119. Uniform forms and procedures

(a) ESTABLISHMENT OF WORKING GROUP.—The Secretary shall establish a working group of State and local government officials, including representatives of the National Governors' Association, the National Association of Counties, the National League of Cities, the United States Conference of Mayors, the National Conference of State Legislatures, and the Alliance for Uniform Hazmat Transportation Procedures.

(b) PURPOSE OF WORKING GROUP.—The purpose of the working group shall be to develop uniform forms and procedures for a State to register, and to issue permits to, persons that transport, or cause to be transported, hazardous material by motor vehicle in the State.

(c) LIMITATION ON WORKING GROUP.—The working group may not propose to define or limit the amount of a fee a State may impose or collect.

(d) PROCEDURE.—The Secretary shall develop a procedure for the working group to employ in developing recommendations for the Secretary to harmonize existing State registration and permit laws and regulations relating to the transportation of hazardous materials, with special attention paid to each State's unique safety concerns and interest in maintaining strong hazmat safety standards.

(e) REPORT OF WORKING GROUP.—Not later than 18 months after the date of enactment of this subsection, the working group shall transmit to the Secretary a report containing recommendations for establishing uniform forms and procedures described in subsection (b).

(f) REGULATIONS.—Not later than 18 months after the date the working group's report is delivered to the Secretary, the Secretary shall issue regulations to carry out such recommendations of the working group as the Secretary considers appropriate. In developing such regulations, the Secretary shall consider the State needs associated with the transition to and implementation of a uniform forms and procedures program.

(g) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed as prohibiting a State from voluntarily participating in a program of uniform forms and procedures until such time as the Secretary issues regulations under subsection (f).

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 777; Pub. L. 104–287, §5(9), Oct. 11, 1996, 110 Stat. 3389; Pub. L. 109–59, title VII, §7116, Aug. 10, 2005, 119 Stat. 1901.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5119(a)	49 App.:1819(a).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §121(a)–(g); added Nov. 16, 1990, Pub. L. 101–615, §22, 104 Stat. 3271; Oct. 24, 1992, Pub. L. 102–508, §507, 106 Stat. 3312.

5119(b)	49 App.:1819(b), (c).	
5119(c)(1)	49 App.:1819(d).	
5119(c)(2)	49 App.:1819(e).	
5119(c)(3)	49 App.:1819(f).	
5119(d)	49 App.:1819(g).	

In subsection (a), before clause (1), the words "As soon as practicable after November 16, 1990" are omitted as obsolete.

In subsection (c)(1), the words "Subject to the provisions of this subsection" and "to the Secretary" are omitted as surplus.

References in Text

The date of enactment of this subsection, referred to in subsec. (e), is the date of enactment of Pub. L. 109–59, which was approved Aug. 10, 2005.

Amendments

2005—Pub. L. 109–59 reenacted section catchline without change and amended text generally. Prior to amendment, section consisted of subsecs. (a) to (d) relating to establishment of working group, consultation and reporting, regulations, and relationship to other laws.

1996—Subsec. (b)(2), Pub. L. 104–287 substituted "Transportation and Infrastructure" for "Public Works and Transportation".

§5120. International uniformity of standards and requirements

(a) Participation in International Forums.—Subject to guidance and direction from the Secretary of State, the Secretary of Transportation shall participate in international forums that establish or recommend mandatory standards and requirements for transporting hazardous material in international commerce.

(b) Consultation.—The Secretary may consult with interested authorities to ensure that, to the extent practicable, regulations the Secretary prescribes under sections 5103(b), 5104, 5110, and 5112 of this title are consistent with standards and requirements related to transporting hazardous material that international authorities adopt.

(c) Differences With International Standards and Requirements.—This section—

(1) does not require the Secretary to prescribe a standard or requirement identical to a standard or requirement adopted by an international authority if the Secretary decides the standard or requirement is unnecessary or unsafe; and

(2) does not prohibit the Secretary from prescribing a safety standard or requirement more stringent than a standard or requirement adopted by an international authority if the Secretary decides the standard or requirement is necessary in the public interest.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 778; Pub. L. 109–59, title VII, §§7117, 7126, Aug. 10, 2005, 119 Stat. 1902, 1909.)

Historical and Revision Notes

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5120(a)	49 App.:1804(d)(1).	Jan. 3, 1975, Pub. L. 93–633, §105(d), 88 Stat. 2157; restated Nov. 16, 1990, Pub. L. 101–615 §4, 104 Stat. 3252.
5120(b)	49 App.:1804(d)(2) (1st sentence).	
5120(c)	49 App.:1804(d)(2) (last sentence).	

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–59, §7126, substituted "Secretary may" for "Secretary of Transportation may".

Pub. L. 109–59, §7117(a), inserted "and requirements" after "standards".

Subsec. (c)(1). Pub. L. 109–59, §7126, substituted "Secretary to prescribe" for "Secretary of Transportation to prescribe".

Pub. L. 109–59, §7117(b)(1), inserted "or requirement" after "standard" wherever appearing.

Subsec. (c)(2). Pub. L. 109–59, §7117(b)(2), struck out "included in a standard" before "adopted" and inserted "standard or" before "requirement" wherever appearing.

§5121. Administrative

(a) GENERAL AUTHORITY.—To carry out this chapter, the Secretary may investigate, conduct tests, make reports, issue subpenas, conduct hearings, require the production of records and property, take depositions, and conduct research, development, demonstration, and training activities. Except as provided in subsections (c) and (d), after notice and an opportunity for a hearing, the Secretary may issue an order requiring compliance with this chapter or a regulation prescribed, or an order, special permit, or approval issued, under this chapter.

(b) RECORDS, REPORTS, AND INFORMATION.—A person subject to this chapter shall—

(1) maintain records and property, make reports, and provide information the Secretary by regulation or order requires; and

(2) make the records, property, reports, and information available for inspection when the Secretary undertakes an investigation or makes a request.

(c) INSPECTIONS AND INVESTIGATIONS.—

(1) IN GENERAL.—A designated officer, employee, or agent of the Secretary—

(A) may inspect and investigate, at a reasonable time and in a reasonable manner, records and property relating to a function described in section 5103(b)(1);

(B) except in the case of packaging immediately adjacent to its hazardous material contents, may gain access to, open, and examine a package offered for, or in, transportation when the officer, employee, or agent has an objectively reasonable and articulable belief that the package may contain a hazardous material;

(C) may remove from transportation a package or related packages in a shipment offered for or in transportation for which—

(i) such officer, employee, or agent has an objectively reasonable and articulable belief that the package may pose an imminent hazard; and

(ii) such officer, employee, or agent contemporaneously documents such belief in accordance with procedures set forth in guidance or regulations prescribed under subsection (e);

(D) may gather information from the offeror, carrier, packaging manufacturer or tester, or other person responsible for the package, to ascertain the nature and hazards of the contents of the package;

(E) as necessary, under terms and conditions specified by the Secretary, may order the offeror, carrier, packaging manufacturer or tester, or other person responsible for the package to have the package transported to, opened, and the contents examined and analyzed, at a facility appropriate for the conduct of such examination and analysis;

(F) when safety might otherwise be compromised, may authorize properly qualified personnel to assist in the activities conducted under this subsection; and

(G) shall provide to the affected offeror, carrier, packaging manufacturer or tester, or other person responsible for the package reasonable notice of—

(i) his or her decision to exercise his or her authority under paragraph (1);

(ii) any findings made; and

(iii) any actions being taken as a result of a finding of noncompliance.

(2) DISPLAY OF CREDENTIALS.—An officer, employee, or agent acting under this subsection shall display proper credentials, in person or in writing, when requested.

(3) SAFE RESUMPTION OF TRANSPORTATION.—In instances when, as a result of an inspection or investigation under this subsection, an imminent hazard is not found to exist, the Secretary, in accordance with procedures set forth in regulations prescribed under subsection (e), shall assist—

(A) in the safe and prompt resumption of transportation of the package concerned; or

(B) in any case in which the hazardous material being transported is perishable, in the safe and expeditious resumption of transportation of the perishable hazardous material.

(d) EMERGENCY ORDERS.—

(1) IN GENERAL.—If, upon inspection, investigation, testing, or research, the Secretary determines that a violation of a provision of this chapter, or a regulation prescribed under this chapter, or an unsafe condition or practice, constitutes or is causing an imminent hazard, the Secretary may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard.

(2) WRITTEN ORDERS.—The action of the Secretary under paragraph (1) shall be in a written emergency order that—

(A) describes the violation, condition, or practice that constitutes or is causing the imminent hazard;

(B) states the restrictions, prohibitions, recalls, or out-of-service orders issued or imposed; and

(C) describes the standards and procedures for obtaining relief from the order.

(3) OPPORTUNITY FOR REVIEW.—After taking action under paragraph (1), the Secretary shall provide for review of the action under section 554 of title 5 if a petition for review is filed within 20 calendar days of the date of issuance of the order for the action.

(4) EXPIRATION OF EFFECTIVENESS OF ORDER.—If a petition for review of an action is filed under paragraph (3) and the review under that paragraph is not completed by the end of the 30-day period beginning on the date the petition is filed, the action shall cease to be effective at the end of such period unless the Secretary determines, in writing, that the imminent hazard providing a basis for the action continues to exist.

(5) OUT-OF-SERVICE ORDER DEFINED.—In this subsection, the term "out-of-service order" means a requirement that an aircraft, vessel, motor vehicle, train, railcar, locomotive, other vehicle, transport unit, transport vehicle, freight container, potable tank, or other package not be moved until specified conditions have been met.

(e) REGULATIONS.—

(1) TEMPORARY REGULATIONS.—Not later than 60 days after the date of enactment of the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005, the Secretary shall issue temporary regulations to carry out subsections (c) and (d). The temporary regulations shall expire on the date of issuance of the regulations under paragraph (2).

(2) FINAL REGULATIONS.—Not later than 1 year after such date of enactment, the Secretary shall issue regulations to carry out subsections (c) and (d) in accordance with subchapter II of chapter 5 of title 5.

(3) MATTERS TO BE ADDRESSED.—The regulations issued under this subsection shall address—

(A) the safe and expeditious resumption of transportation of perishable hazardous material, including radiopharmaceuticals and other medical products, that may require timely delivery due to life-threatening situations;

(B) the means by which—

(i) noncompliant packages that present an imminent hazard are placed out-of-service until the condition is corrected; and

(ii) noncompliant packages that do not present a hazard are moved to their final destination;

(C) appropriate training and equipment for inspectors; and

(D) the proper closure of packaging in accordance with the hazardous material regulations.

(f) FACILITY, STAFF, AND REPORTING SYSTEM ON RISKS, EMERGENCIES, AND ACTIONS.—(1) The Secretary shall—

(A) maintain a facility and technical staff sufficient to provide, within the United States Government, the capability of evaluating a risk related to the transportation of hazardous material and material alleged to be hazardous;

(B) maintain a central reporting system and information center capable of providing information and advice to law enforcement and firefighting personnel, other interested individuals, and officers and employees of the Government and State and local governments on meeting an emergency related to the transportation of hazardous material; and

(C) conduct a continuous review on all aspects of transporting hazardous material to decide on and take appropriate actions to ensure safe transportation of hazardous material.

(2) Paragraph (1) of this subsection does not prevent the Secretary from making a contract with a private entity for use of a supplemental reporting system and information center operated and maintained by the contractor.

(g) GRANTS AND COOPERATIVE AGREEMENTS.—The Secretary may enter into grants and cooperative agreements with a person, agency, or instrumentality of the United States, a unit of State or local government, an Indian tribe, a foreign government (in coordination with the Department of State), an educational institution, or other appropriate entity—

(1) to expand risk assessment and emergency response capabilities with respect to the safety and security of transportation of hazardous material;

(2) to enhance emergency communications capacity as determined necessary by the Secretary, including the use of integrated, interoperable emergency communications technologies where appropriate;

(3) to conduct research, development, demonstration, risk assessment, and emergency response planning and training activities; or

(4) to otherwise carry out this chapter.

(h) REPORT.—The Secretary shall, once every 2 years, prepare and make available to the public on the Department of Transportation's Internet Web site a comprehensive report on the transportation of hazardous materials during the preceding 2 calendar years. The report shall include—

(1) a statistical compilation of accidents and casualties related to the transportation of hazardous material;

(2) a list and summary of applicable Government regulations, criteria, orders, and special permits;

(3) a summary of the basis for each special permit;

(4) an evaluation of the effectiveness of enforcement activities relating to a function regulated by the Secretary under section 5103(b)(1) and the degree of voluntary compliance with regulations;

(5) a summary of outstanding problems in carrying out this chapter in order of priority; and

(6) recommendations for appropriate legislation.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 779; Pub. L. 103–311, title I, §§108, 117(a)(2), Aug. 26, 1994, 108 Stat. 1674, 1678; Pub. L. 109–59, title VII, §§7118, 7126, Aug. 10, 2005, 119 Stat. 1902, 1909; Pub. L. 110–244, title III, §302(e), June 6, 2008, 122 Stat. 1618; Pub. L. 112–141, div. C, title II, §32501(c), title III, §33009(a), (b)(1), (c), July 6, 2012, 126 Stat. 803, 836, 837; Pub. L. 114–94, div. A, title VII, §7205, Dec. 4, 2015, 129 Stat. 1592.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5121(a)	49 App.:1808(a) (1st sentence, last sentence words before semicolon).	Jan. 3, 1975, Pub. L. 93–633, §109(a) (1st sentence, last sentence words before semicolon), (b), (c), 88 Stat. 2159.
5121(b)	49 App.:1808(b).	
5121(c)	49 App.:1808(c).	
5121(d)	49 App.:1808(d).	Jan. 3, 1975, Pub. L. 93–633, §109(d), 88 Stat. 2159; Oct. 30, 1984, Pub. L. 98–559, §1(a), 98 Stat. 2907; Nov. 16, 1990, Pub. L. 101–615, §11, 104 Stat. 3259.
5121(e)	49 App.:1808(e).	Jan. 3, 1975, Pub. L. 93–633, §109(e), 88 Stat. 2159; Oct. 30, 1984, Pub. L. 98–559, §1(b), 98 Stat. 2907.

In subsection (a), the words "to the extent necessary . . . his responsibilities under" and "relevant" are omitted as surplus. The word "documents" is omitted as being included in "records". The words "directly or indirectly" are omitted as surplus. The word "prescribed" is substituted for "issued" for consistency in the revised title and with other titles of the United States Code.

In subsection (b), before clause (1), the words "requirements under" are omitted as surplus. In clause (1), the words "establish and" are omitted as surplus. The word "requires" is substituted for "prescribe" for clarity and consistency.

In subsection (c)(1), before clause (A), the words "enter upon . . . and examine" and "of persons to the extent such records and properties" are omitted as surplus. In clause (B), the words "or shipment by any person" are omitted as surplus.

In subsection (d)(1), before clause (A), the words "establish and" are omitted as executed. In clause (B), the words "capable of" are substituted for "so as to be able to" to eliminate unnecessary words. The words "technical and other" and "of communities" are omitted as surplus. The words "and employees" are added for consistency in the revised title and with other titles of the Code. In clause (C), the words "in order" and "to be able to" are omitted as surplus.

In subsection (e), before clause (1), the words "prepare and" and "comprehensive" are omitted as surplus. In clause (1), the word "thorough" is omitted as surplus. In clause (2), the words "in effect" are omitted as surplus. In clause (3), the words "granted or maintained" are omitted as surplus. In clause (6), the words "additional . . . as are deemed necessary or" are omitted as surplus.

REFERENCES IN TEXT

The date of enactment of the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005, referred to in subsec. (e), is the date of enactment of title VII of Pub. L. 109–59, which was approved Aug. 10, 2005.

AMENDMENTS

2015—Subsec. (h). Pub. L. 114–94 substituted "make available to the public on the Department of Transportation's Internet Web site" for "transmit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate" in introductory provisions.

2012—Subsec. (c)(1)(G). Pub. L. 112–141, §33009(a), added subpar. (G).

Subsec. (c)(2). Pub. L. 112–141, §32501(c), inserted ", in person or in writing," after "proper credentials".

Subsec. (e)(3). Pub. L. 112–141, §33009(b)(1), added par. (3).

Subsec. (g)(1). Pub. L. 112–141, §33009(c), inserted "safety and" before "security".

2008—Subsec. (h)(2). Pub. L. 110–244, §302(e)(1), substituted "special permits" for "exemptions".

Subsec. (h)(3). Pub. L. 110–244, §302(e)(2), substituted "special permit" for "exemption".

2005—Subsec. (a). Pub. L. 109–59, §7126, substituted "Secretary may investigate" for "Secretary of Transportation may investigate".

Pub. L. 109–59, §7118(a), inserted "conduct tests," after "investigate," and substituted "Except as provided in subsections (c) and (d), after" for "After" and "regulation prescribed, or an order, special permit, or approval issued," for "regulation prescribed".

Subsec. (b)(1). Pub. L. 109–59, §7118(b)(1), inserted "and property" after "records".

Subsec. (b)(2). Pub. L. 109–59, §7118(b)(2), inserted "property," after "records," and "for inspection" after "available" and substituted "undertakes an investigation or makes a request" for "requests".

Subsec. (c). Pub. L. 109–59, §7118(c), amended heading and text of subsec. (c) generally. Prior to amendment, text read as follows:

"(1) The Secretary may authorize an officer, employee, or agent to inspect, at a reasonable time and in a reasonable way, records and property related to—

"(A) manufacturing, fabricating, marking, maintaining, reconditioning, repairing, testing, or distributing a packaging or a container for use by a person in transporting hazardous material in commerce; or

"(B) the transportation of hazardous material in commerce.

"(2) An officer, employee, or agent under this subsection shall display proper credentials when requested."

Subsecs. (d), (e). Pub. L. 109–59, §7118(d), added subsecs. (d) and (e). Former subsecs. (d) and (e) redesignated (f) and (h), respectively.

Subsec. (f). Pub. L. 109–59, §7118(d)(1), redesignated subsec. (d) as (f).

Subsec. (g). Pub. L. 109–59, §7118(e), added subsec. (g).

Subsec. (h). Pub. L. 109–59, §7118(f)(1), substituted "transmit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate" for "submit to the President for transmittal to the Congress" in introductory provisions.

Pub. L. 109–59, §7118(d)(1), redesignated subsec. (e) as (h).

Subsec. (h)(4). Pub. L. 109–59, §7118(f)(2), inserted "relating to a function regulated by the Secretary under section 5103(b)(1)" after "activities".

1994—Subsec. (c)(1)(A). Pub. L. 103–311, §117(a)(2), substituted "a packaging or a" for "a package or".

Subsec. (e). Pub. L. 103–311, §108, substituted "Report" for "Annual Report" in heading and substituted first sentence for former first sentence which read as follows: "The Secretary shall submit to the President, for submission to Congress, not later than June 15th of each year, a report about the transportation of hazardous material during the prior calendar year."

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

Paperless Hazard Communications Pilot Program

Pub. L. 112–141, div. C, title III, §33005, July 6, 2012, 126 Stat. 833, provided that:

"(a) In General.—The Secretary [of Transportation] may conduct pilot projects to evaluate the feasibility and effectiveness of using paperless hazard communications systems. At least 1 of the pilot projects under this section shall take place in a rural area.

"(b) Requirements.—In conducting pilot projects under this section, the Secretary—

"(1) may not waive the requirements under section 5110 of title 49, United States Code; and

"(2) shall consult with organizations representing—

"(A) fire services personnel;

"(B) law enforcement and other appropriate enforcement personnel;

"(C) other emergency response providers;

"(D) persons who offer hazardous material for transportation;

"(E) persons who transport hazardous material by air, highway, rail, and water; and

"(F) employees of persons who transport or offer for transportation hazardous material by air, highway, rail, and water.

"(c) Report.—Not later than 2 years after the date of enactment of this Act [see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of Title 23, Highways], the Secretary shall—

"(1) prepare a report on the results of the pilot projects carried out under this section, including—

"(A) a detailed description of the pilot projects;

"(B) an evaluation of each pilot project, including an evaluation of the performance of each paperless hazard communications system in such project;

"(C) an assessment of the safety and security impact of using paperless hazard communications systems, including any impact on the public, emergency response, law enforcement, and the conduct of inspections and investigations;

"(D) an analysis of the associated benefits and costs of using the paperless hazard communications systems for each mode of transportation; and

"(E) a recommendation that incorporates the information gathered in subparagraphs (A), (B), (C), and (D) on whether paperless hazard communications systems should be permanently incorporated into the Federal hazardous material transportation safety program under chapter 51 of title 49, United States Code; and

"(2) submit a final report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives that contains the results of the pilot projects carried out under this section, including the matters described in paragraph (1).

"(d) PAPERLESS HAZARD COMMUNICATIONS SYSTEM DEFINED.—In this section, the term 'paperless hazard communications system' means the use of advanced communications methods, such as wireless communications devices, to convey hazard information between all parties in the transportation chain, including emergency responders and law enforcement personnel. The format of communication may be equivalent to that used by the carrier."

HAZARDOUS MATERIAL ENFORCEMENT TRAINING

Pub. L. 112–141, div. C, title III, §33008, July 6, 2012, 126 Stat. 836, provided that:

"(a) IN GENERAL.—Not later than 18 months after the date of enactment of this Act [see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of Title 23, Highways], the Secretary [of Transportation] shall develop uniform performance standards for training hazardous material inspectors and investigators on—

"(1) how to collect, analyze, and publish findings from inspections and investigations of accidents or incidents involving the transportation of hazardous material; and

"(2) how to identify noncompliance with regulations issued under chapter 51 of title 49, United States Code, and take appropriate enforcement action.

"(b) STANDARDS AND GUIDELINES.—The Secretary may develop—

"(1) guidelines for hazardous material inspector and investigator qualifications;

"(2) best practices and standards for hazardous material inspector and investigator training programs; and

"(3) standard protocols to coordinate investigation efforts among Federal, State, and local jurisdictions on accidents or incidents involving the transportation of hazardous material.

"(c) AVAILABILITY.—The standards, protocols, and guidelines established under this section—

"(1) shall be mandatory for—

"(A) the Department of Transportation's multimodal personnel conducting hazardous material enforcement inspections or investigations; and

"(B) State employees who conduct federally funded compliance reviews, inspections, or investigations; and

"(2) shall be made available to Federal, State, and local hazardous material safety enforcement personnel."

FINALIZING REGULATIONS

Pub. L. 112–141, div. C, title III, §33009(b)(2), July 6, 2012, 126 Stat. 837, provided that: "In accordance with section 5103(b)(2) of title 49, United States Code, not later than 1 year after the date of enactment of this Act [see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of Title 23, Highways], the Secretary [of Transportation] shall take all actions necessary to finalize a regulation under paragraph (1) of this subsection [amending this section]."

TOLL FREE NUMBER FOR REPORTING

Pub. L. 103–311, title I, §116, Aug. 26, 1994, 108 Stat. 1678, provided that: "The Secretary of Transportation shall designate a toll free telephone number for transporters of hazardous materials and other

individuals to report to the Secretary possible violations of chapter 51 of title 49, United States Code, or any order or regulation issued under that chapter."

§5122. Enforcement

(a) GENERAL.—At the request of the Secretary, the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this chapter or a regulation prescribed or order, special permit, or approval issued under this chapter. The court may award appropriate relief, including a temporary or permanent injunction, punitive damages, and assessment of civil penalties considering the same penalty amounts and factors as prescribed for the Secretary in an administrative case under section 5123.

(b) IMMINENT HAZARDS.—(1) If the Secretary has reason to believe that an imminent hazard exists, the Secretary may bring a civil action in an appropriate district court of the United States—

(A) to suspend or restrict the transportation of the hazardous material responsible for the hazard; or

(B) to eliminate or mitigate the hazard.

(2) On request of the Secretary, the Attorney General shall bring an action under paragraph (1) of this subsection.

(c) WITHHOLDING OF CLEARANCE.—(1) If any owner, operator, or individual in charge of a vessel is liable for a civil penalty under section 5123 of this title or for a fine under section 5124 of this title, or if reasonable cause exists to believe that such owner, operator, or individual in charge may be subject to such a civil penalty or fine, the Secretary of Homeland Security, upon the request of the Secretary, shall with respect to such vessel refuse or revoke any clearance required by section 60105 of title 46.

(2) Clearance refused or revoked under this subsection may be granted upon the filing of a bond or other surety satisfactory to the Secretary.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 780; Pub. L. 104–324, title III, §312(a), Oct. 19, 1996, 110 Stat. 3920; Pub. L. 109–59, title VII, §§7119, 7126, Aug. 10, 2005, 119 Stat. 1905, 1909; Pub. L. 109–304, §17(h)(1), Oct. 6, 2006, 120 Stat. 1709.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5122(a)	49 App.:1808(a) (last sentence words after semicolon). 49 App.:1810(a).	Jan. 3, 1975, Pub. L. 93–633, §§109(a) (last sentence words after semicolon), 111(a), 88 Stat. 2159, 2161.
5122(b)	49 App.:1810(b).	Jan. 3, 1975, Pub. L. 93–633, §111(b), 88 Stat. 2161; Nov. 16, 1990, Pub. L. 101–615, §3(b), 104 Stat. 3247.

In this section, the words "bring a civil action" are substituted for "bring an action in" in 49 App.:1810 and "petition . . . for an order . . . for such other order" for consistency in the revised title and with other titles of the United States Code.

In subsection (a), the text of 49 App.:1808(a) (last sentence words after semicolon) and the words "for equitable relief" in 49 App.:1810(a) are omitted as surplus. The words "enforce this chapter" are substituted for "redress a violation by any person of a provision of this chapter" to eliminate unnecessary words. The words "regulation prescribed or order issued" are substituted for "order or regulation issued" for consistency in the revised title and with other titles of the Code. The words "The court may award appropriate relief, including" are substituted for "Such district courts shall have jurisdiction to determine such actions and may

grant such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and" to eliminate unnecessary words.

In subsection (b)(1), before clause (A), the words "as is necessary" are omitted as surplus.

AMENDMENTS

2006—Subsec. (c)(1). Pub. L. 109–304 substituted "Secretary of Homeland Security" and "section 60105 of title 46" for "Secretary of the Treasury" and "section 4197 of the Revised Statutes of the United States (46 App. U.S.C. 91)", respectively.

2005—Subsec. (a). Pub. L. 109–59, §7126, substituted "Secretary" for "Secretary of Transportation".

Pub. L. 109–59, §7119(a), substituted "this chapter or a regulation prescribed or order, special permit, or approval" for "this chapter or a regulation prescribed or order" and "The court may award appropriate relief, including a temporary or permanent injunction, punitive damages, and assessment of civil penalties considering the same penalty amounts and factors as prescribed for the Secretary in an administrative case under section 5123" for "The court may award appropriate relief, including punitive damages".

Subsec. (b)(1)(B). Pub. L. 109–59, §7119(b), substituted "or mitigate the hazard" for "or ameliorate the hazard".

1996—Subsec. (c). Pub. L. 104–324 added subsec. (c).

§5123. Civil penalty

(a) PENALTY.—(1) A person that knowingly violates this chapter or a regulation, order, special permit, or approval issued under this chapter is liable to the United States Government for a civil penalty of not more than $75,000 for each violation. A person acts knowingly when—

(A) the person has actual knowledge of the facts giving rise to the violation; or

(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

(2) If the Secretary finds that a violation under paragraph (1) results in death, serious illness, or severe injury to any person or substantial destruction of property, the Secretary may increase the amount of the civil penalty for such violation to not more than $175,000.

(3) If the violation is related to training, a person described in paragraph (1) shall be liable for a civil penalty of at least $450.

(4) A separate violation occurs for each day the violation, committed by a person that transports or causes to be transported hazardous material, continues.

(b) HEARING REQUIREMENT.—The Secretary may find that a person has violated this chapter or a regulation prescribed or order, special permit, or approval issued under this chapter only after notice and an opportunity for a hearing. The Secretary shall impose a penalty under this section by giving the person written notice of the amount of the penalty.

(c) PENALTY CONSIDERATIONS.—In determining the amount of a civil penalty under this section, the Secretary shall consider—

(1) the nature, circumstances, extent, and gravity of the violation;

(2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and

(3) other matters that justice requires.

(d) CIVIL ACTIONS TO COLLECT.—The Attorney General may bring a civil action in an appropriate district court of the United States to collect a civil penalty under this section and any accrued interest on the civil penalty as calculated in accordance with section 1005 of the Oil Pollution Act of 1990 (33 U.S.C. 2705). In the civil action, the amount and appropriateness of the civil penalty shall not be subject to review.

(e) COMPROMISE.—The Secretary may compromise the amount of a civil penalty imposed under this section before referral to the Attorney General.

(f) SETOFF.—The Government may deduct the amount of a civil penalty imposed or compromised under this section from amounts it owes the person liable for the penalty.

(g) Depositing Amounts Collected.—Amounts collected under this section shall be deposited in the Treasury as miscellaneous receipts.

(h) Penalty for Obstruction of Inspections and Investigations.—

(1) The Secretary may impose a penalty on a person who obstructs or prevents the Secretary from carrying out inspections or investigations under subsection (c) or (i) of section 5121.

(2) For the purposes of this subsection, the term "obstructs" means actions that were known, or reasonably should have been known, to prevent, hinder, or impede an investigation.

(i) Prohibition on Hazardous Material Operations After Nonpayment of Penalties.—

(1) In general.—Except as provided under paragraph (2), a person subject to the jurisdiction of the Secretary under this chapter who fails to pay a civil penalty assessed under this chapter, or fails to arrange and abide by an acceptable payment plan for such civil penalty, may not conduct any activity regulated under this chapter beginning on the 91st day after the date specified by order of the Secretary for payment of such penalty unless the person has filed a formal administrative or judicial appeal of the penalty.

(2) Exception.—Paragraph (1) shall not apply to any person who is unable to pay a civil penalty because such person is a debtor in a case under chapter 11 of title 11.

(3) Rulemaking.—Not later than 2 years after the date of enactment of this subsection, the Secretary, after providing notice and an opportunity for public comment, shall issue regulations that—

(A) set forth procedures to require a person who is delinquent in paying civil penalties to cease any activity regulated under this chapter until payment has been made or an acceptable payment plan has been arranged; and

(B) ensures [1] that the person described in subparagraph (A)—

(i) is notified in writing; and

(ii) is given an opportunity to respond before the person is required to cease the activity.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 780; Pub. L. 109–59, title VII, §§7120(a)–(c), 7126, Aug. 10, 2005, 119 Stat. 1905, 1906, 1909; Pub. L. 112–141, div. C, title III, §33010, July 6, 2012, 126 Stat. 837.)

Historical and Revision Notes

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5123(a)(1)	49 App.:1809(a)(1) (1st sentence less 3d–16th words, 2d sentence words before 4th comma, 3d sentence).	Jan. 3, 1975, Pub. L. 93–633, §110(a)(1), 88 Stat. 2160; Nov. 16, 1990, Pub. L. 101–615, §12(a)(1), 104 Stat. 3259.
	49 App.:1809(a)(3).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §110(a)(3); added Nov. 16, 1990, Pub. L. 101–615, §12(a)(2), 104 Stat. 3259.
5123(a)(2)	49 App.:1809(a)(1) (2d sentence words after 4th comma).	
5123(b)	49 App.:1809(a)(1) (1st sentence 3d–16th words, 4th sentence).	
5123(c)	49 App.:1809(a)(1) (last sentence).	
5123(d), (e)	49 App.:1809(a)(2) (1st sentence).	Jan. 3, 1975, Pub. L. 93–633, §110(a)(2), 88 Stat. 2160.
5123(f)	49 App.:1809(a)(2) (2d sentence).	
5123(g)	49 App.:1809(a)(2) (last	

	sentence).	

In subsection (a)(1), before clause (1), the words "A person that knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of at least $250 but not more than $25,000 for each violation" are substituted for 49 App.:1809(a)(1) (1st sentence less 3d–16th words, 2d sentence words before 4th comma, 3d sentence) to eliminate unnecessary words.

In subsection (b), the word "impose" is substituted for "assessed" for consistency.

In subsection (c)(2), the words "the violator" are substituted for "the person found to have committed such violation" to eliminate unnecessary words.

In subsection (f), the words "imposed or compromised" are substituted for "of such penalty, when finally determined (or agreed upon in compromise)" to eliminate unnecessary words and for consistency. The words "liable for the penalty" are substituted for "charged" for clarity.

References in Text

The date of enactment of this subsection, referred to in subsec. (i)(3), is the date of enactment of Pub. L. 112–141, which was approved July 6, 2012.

Amendments

2012—Subsec. (a)(1). Pub. L. 112–141, §33010(1)(A), in introductory provisions, struck out "at least $250 but" after "civil penalty of" and substituted "$75,000" for "$50,000".

Subsec. (a)(2). Pub. L. 112–141, §33010(1)(B), substituted "$175,000" for "$100,000".

Subsec. (a)(3). Pub. L. 112–141, §33010(1)(C), amended par. (3) generally. Prior to amendment, par. (3) read as follows: "If the violation is related to training, paragraph (1) shall be applied by substituting '$450' for '$250'."

Subsecs. (h), (i). Pub. L. 112–141, §33010(2), added subsecs. (h) and (i).

2005—Subsec. (a)(1). Pub. L. 109–59, §7120(a)(1), in introductory provisions substituted "regulation, order, special permit, or approval issued" for "regulation prescribed or order issued" and "$50,000" for "$25,000".

Subsec. (a)(2) to (4). Pub. L. 109–59, §7120(a)(2), (3), added pars. (2) and (3) and redesignated former par. (2) as (4).

Subsec. (b). Pub. L. 109–59, §7126, substituted "Secretary may" for "Secretary of Transportation may".

Pub. L. 109–59, §7120(b), substituted "regulation prescribed or order, special permit, or approval issued" for "regulation prescribed".

Subsec. (d). Pub. L. 109–59, §7120(c), substituted "section and any accrued interest on the civil penalty as calculated in accordance with section 1005 of the Oil Pollution Act of 1990 (33 U.S.C. 2705). In the civil action, the amount and appropriateness of the civil penalty shall not be subject to review." for "section."

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

Effective Date of 2005 Amendment

Pub. L. 109–59, title VII, §7120(d), Aug. 10, 2005, 119 Stat. 1906, provided that:

"(1) Hearing requirement.—The amendment made by subsection (b) [amending this section] shall take effect on the date of enactment of this Act [Aug. 10, 2005], and shall apply with respect to violations described in section 5123(a) of title 49, United States Code (as amended by this section), that occur on or after that date.

"(2) Civil actions to collect.—The amendment made by subsection (c) [amending this section] shall apply with respect to civil penalties imposed on violations described in section 5123(a) of title 49, United States Code (as amended by this section), that occur on or after the date of enactment of this Act [Aug. 10, 2005]."

[1] *So in original. Probably should be "ensure".*

§5124. Criminal penalty

(a) In General.—A person knowingly violating section 5104(b) or willfully or recklessly violating this chapter or a regulation, order, special permit, or approval issued under this chapter shall be fined under title 18, imprisoned for not more than 5 years, or both; except that the maximum amount of imprisonment shall be 10 years in any case in which the violation involves the release of a hazardous material that results in death or bodily injury to any person.

(b) Knowing Violations.—For purposes of this section—

(1) a person acts knowingly when—

(A) the person has actual knowledge of the facts giving rise to the violation; or

(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge; and

(2) knowledge of the existence of a statutory provision, or a regulation or a requirement required by the Secretary, is not an element of an offense under this section.

(c) Willful Violations.—For purposes of this section, a person acts willfully when—

(1) the person has knowledge of the facts giving rise to the violation; and

(2) the person has knowledge that the conduct was unlawful.

(d) Reckless Violations.—For purposes of this section, a person acts recklessly when the person displays a deliberate indifference or conscious disregard to the consequences of that person's conduct.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 781; Pub. L. 109–59, title VII, §7121, Aug. 10, 2005, 119 Stat. 1906.)

Historical and Revision Notes

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5124	49 App.:1809(b).	Jan. 3, 1975, Pub. L. 93–633, §110(b), 88 Stat. 2161; restated Nov. 16, 1990, Pub. L. 101–615, §12(b), 104 Stat. 3259.

Amendments

2005—Pub. L. 109–59 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows: "A person knowingly violating section 5104(b) of this title or willfully violating this chapter or a regulation prescribed or order issued under this chapter shall be fined under title 18, imprisoned for not more than 5 years, or both."

§5125. Preemption

(a) General.—Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

(b) Substantive Differences.—(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a

State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security, is preempted:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material and other written hazardous materials transportation incident reporting involving State or local emergency responders in the initial response to the incident.

(E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

(2) If the Secretary prescribes or has prescribed under section 5103(b), 5104, 5110, or 5112 of this title or prior comparable provision of law a regulation or standard related to a subject referred to in paragraph (1) of this subsection, a State, political subdivision of a State, or Indian tribe may prescribe, issue, maintain, and enforce only a law, regulation, standard, or order about the subject that is substantively the same as a provision of this chapter or a regulation prescribed or order issued under this chapter. The Secretary shall decide on and publish in the Federal Register the effective date of section 5103(b) of this title for any regulation or standard about any of those subjects that the Secretary prescribes. The effective date may not be earlier than 90 days after the Secretary prescribes the regulation or standard nor later than the last day of the 2-year period beginning on the date the Secretary prescribes the regulation or standard.

(3) If a State, political subdivision of a State, or Indian tribe imposes a fine or penalty the Secretary decides is appropriate for a violation related to a subject referred to in paragraph (1) of this subsection, an additional fine or penalty may not be imposed by any other authority.

(c) Compliance With Section 5112(b) Regulations.—(1) Except as provided in paragraph (2) of this subsection, after the last day of the 2-year period beginning on the date a regulation is prescribed under section 5112(b) of this title, a State or Indian tribe may establish, maintain, or enforce a highway routing designation over which hazardous material may or may not be transported by motor vehicles, or a limitation or requirement related to highway routing, only if the designation, limitation, or requirement complies with section 5112(b), and is published in the Department's hazardous materials route registry under section 5112(c).

(2)(A) A highway routing designation, limitation, or requirement established before the date a regulation is prescribed under section 5112(b) of this title does not have to comply with section 5112(b)(1)(B), (C), and (F).

(B) This subsection and section 5112 of this title do not require a State or Indian tribe to comply with section 5112(b)(1)(I) if the highway routing designation, limitation, or requirement was established before November 16, 1990.

(C) The Secretary may allow a highway routing designation, limitation, or requirement to continue in effect until a dispute related to the designation, limitation, or requirement is resolved under section 5112(d) of this title.

(d) Decisions on Preemption.—(1) A person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision, or tribe may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted by subsection (a), (b)(1), or (c) of this section or section 5119(f). The Secretary shall publish notice of the application in the Federal Register. The Secretary shall issue a decision on an application for a determination within 180 days after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Federal Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional time necessary before the decision is made. After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary

takes final action on the application or until 180 days after the application is filed, whichever occurs first.

(2) After consulting with States, political subdivisions of States, and Indian tribes, the Secretary shall prescribe regulations for carrying out paragraph (1) of this subsection.

(3) Subsection (a) of this section does not prevent a State, political subdivision of a State, or Indian tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

(e) WAIVER OF PREEMPTION.—A State, political subdivision of a State, or Indian tribe may apply to the Secretary for a waiver of preemption of a requirement the State, political subdivision, or tribe acknowledges is preempted by subsection (a), (b)(1), or (c) of this section or section 5119(f). Under a procedure the Secretary prescribes by regulation, the Secretary may waive preemption on deciding the requirement—

(1) provides the public at least as much protection as do requirements of this chapter and regulations prescribed under this chapter; and

(2) is not an unreasonable burden on commerce.

(f) FEES.—(1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

(2) A State or political subdivision thereof or Indian tribe that levies a fee in connection with the transportation of hazardous materials shall biennially report to the Secretary on—

(A) the basis on which the fee is levied upon persons involved in such transportation;

(B) the purposes for which the revenues from the fee are used;

(C) the annual total amount of the revenues collected from the fee; and

(D) such other matters as the Secretary requests.

(g) APPLICATION OF EACH PREEMPTION STANDARD.—Each standard for preemption in subsection (a), (b)(1), or (c), and in section 5119(f), is independent in its application to a requirement of a State, political subdivision of a State, or Indian tribe.

(h) NON-FEDERAL ENFORCEMENT STANDARDS.—This section does not apply to any procedure, penalty, required mental state, or other standard utilized by a State, political subdivision of a State, or Indian tribe to enforce a requirement applicable to the transportation of hazardous material.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 781; Pub. L. 103–311, title I, §§107, 117(a)(2), 120(b), Aug. 26, 1994, 108 Stat. 1674, 1678, 1681; Pub. L. 103–429, §6(6), Oct. 31, 1994, 108 Stat. 4378; Pub. L. 107–296, title XVII, §1711(b), Nov. 25, 2002, 116 Stat. 2320; Pub. L. 109–59, title VII, §§7122, 7123(a), 7126, Aug. 10, 2005, 119 Stat. 1907, 1909; Pub. L. 110–244, title III, §302(c), June 6, 2008, 122 Stat. 1618; Pub. L. 112–141, div. C, title III, §§33006(d), 33011, 33013(b), July 6, 2012, 126 Stat. 835, 838, 839.)

HISTORICAL AND REVISION NOTES

PUB. L. 103–272

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5125(a)	49 App.:1811(a).	Jan. 3, 1975, Pub. L. 93–633, §112(a)–(e), 88 Stat. 2161; Nov. 30, 1979, Pub. L. 96–129, §216(a), 93 Stat. 1015; restated Nov. 16, 1990, Pub. L. 101–615, §13, 104 Stat. 3259.
5125(b)	49 App.:1804(a)(4), (5).	Jan. 3, 1975, Pub. L. 93–633, §105(a)(4), (5), (b)(4), 88 Stat. 2157;

		restated Nov. 16, 1990, Pub. L. 101–615, §4, 104 Stat. 3247, 3250.
5125(c)	49 App.:1804(b)(4).	
5125(d)	49 App.:1811(c).	
5125(e)	49 App.:1811(d).	
5125(f)	49 App.:1811(e).	
5125(g)	49 App.:1811(b).	

In subsections (a) and (b)(1), the words "and unless authorized by Federal law" are omitted as surplus.

In subsection (a), before clause (1), the reference to subsections (b) and (c) is substituted for 49 App.:1811(a)(3) for clarity.

In subsection (b)(1), before clause (A), the words "ruling, provision" are omitted as surplus.

In subsection (b)(3), the word "imposes" is substituted for "assesses" for consistency.

In subsection (c)(1), the words "the procedural requirements of" and "the substantive requirements of" are omitted as surplus.

In subsection (c)(2)(A), the words "procedural requirements of the Federal standards established pursuant to" are omitted as surplus.

In subsection (f), the words "may bring a civil action for judicial review" are substituted for "may seek judicial review . . . only by filing a petition" for consistency in the revised title.

PUB. L. 103–429

This amends 49:5125(a) and (b)(1) to clarify the restatement of 49 App.:1804(a)(4) and 1811(a) by section 1 of the Act of July 5, 1994 (Public Law 103–272, 108 Stat. 781).

AMENDMENTS

2012—Subsec. (b)(1)(D). Pub. L. 112–141, §33006(d), inserted "and other written hazardous materials transportation incident reporting involving State or local emergency responders in the initial response to the incident" before period at end.

Subsec. (c)(1). Pub. L. 112–141, §33013(b), inserted ", and is published in the Department's hazardous materials route registry under section 5112(c)" before period at end.

Subsec. (f)(2). Pub. L. 112–141, §33011, substituted "biennially" for ", upon the Secretary's request,".

2008—Subsec. (d)(1). Pub. L. 110–244, §302(c)(1), substituted "5119(f)" for "5119(e)".

Subsec. (e). Pub. L. 110–244, §302(c)(2), substituted "5119(f)" for "5119(b)" in introductory provisions.

Subsec. (g). Pub. L. 110–244, §302(c)(2), (3), substituted "(a), (b)(1), or (c)" for "(b), (c)(1), or (d)" and "5119(f)" for "5119(b)".

2005—Subsec. (b)(1)(E). Pub. L. 109–59, §7122(a)(1), added subpar. (E) and struck out former subpar. (E) which read as follows: "the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material."

Subsec. (b)(2). Pub. L. 109–59, §7126, substituted "If the Secretary" for "If the Secretary of Transportation".

Pub. L. 109–59, §7122(a)(2), substituted "subjects that the Secretary prescribes. The" for "subjects that the Secretary prescribes after November 16, 1990. However, the".

Subsec. (d)(1). Pub. L. 109–59, §7122(b), inserted "or section 5119(e)" before period at end of first sentence.

Subsec. (e). Pub. L. 109–59, §7122(c), inserted "or section 5119(b)" before period at end of first sentence.

Subsec. (f). Pub. L. 109–59, §7123(a), redesignated subsec. (g) as (f), realigned margins, and struck out heading and text of former subsec. (f). Text read as follows: "A party to a proceeding under subsection (d) or (e) of this section may bring a civil action in an appropriate district court of the United States for judicial review of the decision of the Secretary not later than 60 days after the decision becomes final."

Subsec. (g). Pub. L. 109–59, §7123(a)(2), redesignated subsec. (h) as (g). Former subsec. (g) redesignated (f).

Subsecs. (h), (i). Pub. L. 109–59, §7123(a)(2), redesignated subsecs. (h) and (i) as (g) and (h), respectively.

Pub. L. 109–59, §7122(d), added subsecs. (h) and (i).

2002—Subsecs. (a), (b)(1). Pub. L. 107–296 substituted "chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of

Homeland Security" for "chapter or a regulation prescribed under this chapter" wherever appearing.

1994—Subsecs. (a), (b)(1). Pub. L. 103–429 inserted "and unless authorized by another law of the United States" after "section" in introductory provisions.

Subsec. (b)(1)(E). Pub. L. 103–311, §117(a)(2), substituted "a packaging or a" for "a package or".

Subsec. (d). Pub. L. 103–311, §120(b), inserted after second sentence "The Secretary shall issue a decision on an application for a determination within 180 days after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Federal Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional time necessary before the decision is made."

Subsec. (g). Pub. L. 103–311, §107, designated existing provisions as par. (1) and added par. (2).

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

Effective Date of 2002 Amendment

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–429 effective July 5, 1994, see section 9 of Pub. L. 103–429, set out as a note under section 321 of this title.

§5126. Relationship to other laws

(a) Contracts.—A person under contract with a department, agency, or instrumentality of the United States Government that transports hazardous material, or causes hazardous material to be transported, or designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented as qualified for use in transporting hazardous material shall comply with this chapter, regulations prescribed and orders issued under this chapter, and all other requirements of the Government, State and local governments, and Indian tribes (except a requirement preempted by a law of the United States) in the same way and to the same extent that any person engaging in that transportation, designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing that is in or affects commerce must comply with the provision, regulation, order, or requirement.

(b) Nonapplication.—This chapter does not apply to—

(1) a pipeline subject to regulation under chapter 601 of this title; or

(2) any matter that is subject to the postal laws and regulations of the United States under this chapter or title 18 or 39.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 783; Pub. L. 103–311, title I, §117(a)(2), Aug. 26, 1994, 108 Stat. 1678; Pub. L. 109–59, title VII, §7124, Aug. 10, 2005, 119 Stat. 1908; Pub. L. 110–244, title III, §302(d), June 6, 2008, 122 Stat. 1618.)

Historical and Revision Notes

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5126(a)	49 App.:1818.	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §120; added Nov. 16, 1990, Pub. L. 101–615, §20, 104 Stat. 3270.
5126(b)	49 App.:1811(f).	Jan. 3, 1975, Pub. L. 93–633, §112(f), 88 Stat. 2161; Nov. 30, 1979, Pub. L. 96–129, §216(a), 93 Stat. 1015;

		restated Nov. 16, 1990, Pub. L. 101–615, §13, 104 Stat. 3260.

In subsection (a), the word "manufactures" is substituted for "manufacturers" to correct an error in the source provisions. The words "of the executive, legislative, or judicial branch", "be subject to and", "substantive and procedural", and "this chapter or any other" are omitted as surplus.

Amendments

2008—Subsec. (a). Pub. L. 110–244 amended Pub. L. 109–59. See 2005 Amendment note below.

2005—Subsec. (a). Pub. L. 109–59, §7124(4), substituted "designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing" for "manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing".

Pub. L. 109–59, §7124(3), as amended by Pub. L. 110–244, substituted "shall comply with this chapter" for "must comply with this chapter".

Pub. L. 109–59, §7124(1), (2), substituted "transports hazardous material, or causes hazardous material to be transported," for "transports or causes to be transported hazardous material," and "designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented" for "manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a packaging or a container that the person represents, marks, certifies, or sells".

1994—Subsec. (a). Pub. L. 103–311 substituted "a packaging or a" for "a package or".

Effective Date of 2008 Amendment

Amendment by Pub. L. 110–244 effective as of the date of enactment of Pub. L. 109–59 (Aug. 10, 2005) and to be treated as included in Pub. L. 109–59 as of that date, and provisions of Pub. L. 109–59, as in effect on the day before June 6, 2008, that are amended by Pub. L. 110–244 to be treated as not enacted, see section 121(b) of Pub. L. 110–244, set out as a note under section 101 of Title 23, Highways.

§5127. Judicial review

(a) Filing and Venue.—Except as provided in section 20114(c), a person adversely affected or aggrieved by a final action of the Secretary under this chapter may petition for review of the final action in the United States Court of Appeals for the District of Columbia or in the court of appeals for the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not more than 60 days after the Secretary's action becomes final.

(b) Judicial Procedures.—When a petition is filed under subsection (a), the clerk of the court immediately shall send a copy of the petition to the Secretary. The Secretary shall file with the court a record of any proceeding in which the final action was issued, as provided in section 2112 of title 28.

(c) Authority of Court.—The court has exclusive jurisdiction, as provided in subchapter II of chapter 5 of title 5, to affirm or set aside any part of the Secretary's final action and may order the Secretary to conduct further proceedings.

(d) Requirement for Prior Objection.—In reviewing a final action under this section, the court may consider an objection to a final action of the Secretary only if the objection was made in the course of a proceeding or review conducted by the Secretary or if there was a reasonable ground for not making the objection in the proceeding.

(Added Pub. L. 109–59, title VII, §7123(b), Aug. 10, 2005, 119 Stat. 1907.)

Prior Provisions

A prior section 5127 was renumbered section 5128 of this title.

§5128. Authorization of appropriations

(a) In General.—There are authorized to be appropriated to the Secretary to carry out this chapter (except sections 5107(e), 5108(g)(2), 5113, 5115, 5116, and 5119)—

(1) $53,000,000 for fiscal year 2016;

(2) $55,000,000 for fiscal year 2017;
(3) $57,000,000 for fiscal year 2018;
(4) $58,000,000 for fiscal year 2019; and
(5) $60,000,000 for fiscal year 2020.

(b) HAZARDOUS MATERIALS EMERGENCY PREPAREDNESS FUND.—From the Hazardous Materials Emergency Preparedness Fund established under section 5116(h), the Secretary may expend, for each of fiscal years 2016 through 2020—
(1) $21,988,000 to carry out section 5116(a);
(2) $150,000 to carry out section 5116(e);
(3) $625,000 to publish and distribute the Emergency Response Guidebook under section 5116(h)(3); and
(4) $1,000,000 to carry out section 5116(i).

(c) HAZARDOUS MATERIALS TRAINING GRANTS.—From the Hazardous Materials Emergency Preparedness Fund established pursuant to section 5116(h), the Secretary may expend $4,000,000 for each of fiscal years 2016 through 2020 to carry out section 5107(e).

(d) COMMUNITY SAFETY GRANTS.—Of the amounts made available under subsection (a) to carry out this chapter, the Secretary shall withhold $1,000,000 for each of fiscal years 2016 through 2020 to carry out section 5107(i).

(e) CREDITS TO APPROPRIATIONS.—
(1) EXPENSES.—In addition to amounts otherwise made available to carry out this chapter, the Secretary may credit amounts received from a State, Indian tribe, or other public authority or private entity for expenses the Secretary incurs in providing training to the State, Indian tribe, authority, or entity.
(2) AVAILABILITY OF AMOUNTS.—Amounts made available under this section shall remain available until expended.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 783, §5127; Pub. L. 103–311, title I, §§103, 119(b), (c)(4), Aug. 26, 1994, 108 Stat. 1673, 1680; renumbered §5128 and amended Pub. L. 109–59, title VII, §§7123(b), 7125, Aug. 10, 2005, 119 Stat. 1907, 1908; Pub. L. 110–244, title III, §302(f), June 6, 2008, 122 Stat. 1618; Pub. L. 112–141, div. C, title III, §33017, July 6, 2012, 126 Stat. 841; Pub. L. 113–159, title I, §1301, Aug. 8, 2014, 128 Stat. 1847; Pub. L. 114–21, title I, §1301, May 29, 2015, 129 Stat. 225; Pub. L. 114–41, title I, §1301, July 31, 2015, 129 Stat. 453; Pub. L. 114–73, title I, §1301, Oct. 29, 2015, 129 Stat. 575; Pub. L. 114–87, title I, §1301, Nov. 20, 2015, 129 Stat. 684; Pub. L. 114–94, div. A, title VII, §7101, Dec. 4, 2015, 129 Stat. 1588.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5127(a)	49 App.:1812(a).	Jan. 3, 1975, Pub. L. 93–633, §115, 88 Stat. 2164; July 19, 1975, Pub. L. 94–56, §4, 89 Stat. 264; Oct. 11, 1976, Pub. L. 94–474, §3, 90 Stat. 2068; Sept. 30, 1978, Pub. L. 95–403, 92 Stat. 863; Oct. 30, 1984, Pub. L. 98–559, §2, 98 Stat. 2907; restated Nov. 16, 1990, Pub. L. 101–615, §14, 104 Stat. 3260; Oct. 24, 1992, Pub. L. 102–508, §504, 106 Stat. 3311.
5127(b)	49 App.:1816(d).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §118(d); added Nov. 16, 1990, Pub. L. 101–615, §18, 104 Stat.

		3269; Oct. 24, 1992, Pub. L. 102–508, §506, 106 Stat. 3312.
5127(c)	49 App.:1815(i)(3).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §117A(i); added Nov. 16, 1990, Pub. L. 101–615, §17, 104 Stat. 3268.
5127(d)	49 App.:1815(i)(1), (2), (4).	
5127(e)	49 App.:1819(h) (1st sentence).	Jan. 3, 1975, Pub. L. 93–633, 88 Stat. 2156, §121(h); added Nov. 16, 1990, Pub. L. 101–615, §22, 104 Stat. 3272.
5127(f)	49 App.:1812(b).	
5127(g)	49 App.:1815(i)(5). 49 App.:1819(h) (last sentence).	

In the section, references to fiscal years 1991 and 1992 are omitted as obsolete.

In subsections (b), (c)(1), and (d), the words "amounts in" are omitted as surplus.

In subsection (c), the text of 49 App.:1815(i)(3)(A) is omitted as obsolete.

In subsection (c)(2), the words "relating to dissemination of the curriculum" are omitted as surplus.

AMENDMENTS

2015—Pub. L. 114–94 amended section generally. Prior to amendment, section related to authorization of appropriations for fiscal years 2013 to 2015.

Subsec. (a)(3). Pub. L. 114–41, §1301(a)(2), added par. (3) and struck out former par. (3) which read as follows: "$35,615,474 for the period beginning on October 1, 2014, and ending on July 31, 2015."

Pub. L. 114–21, §1301(a), amended par. (3) generally. Prior to amendment, par. (3) read as follows: "$28,468,948 for the period beginning on October 1, 2014, and ending on May 31, 2015."

Subsec. (a)(4). Pub. L. 114–87, §1301(a), amended par. (4) generally. Prior to amendment, par. (4) read as follows: "$5,958,639 for the period beginning on October 1, 2015, and ending on November 20, 2015."

Pub. L. 114–73, §1301(a), amended par. (4) generally. Prior to amendment, par. (4) read as follows: "$3,388,246 for the period beginning on October 1, 2015, and ending on October 29, 2015."

Pub. L. 114–41, §1301(a), added par. (4).

Subsec. (b)(1). Pub. L. 114–41, §1301(b)(1), substituted "FISCAL YEARS 2013 THROUGH 2015"for "FISCAL YEARS 2013 AND 2014" in heading and "fiscal years 2013 through 2015" for "fiscal years 2013 and 2014" in introductory provisions.

Subsec. (b)(2). Pub. L. 114–87, §1301(b), amended par. (2) generally. Prior to amendment, text read as follows: "From the Hazardous Materials Emergency Preparedness Fund established under section 5116(i), the Secretary may expend for the period beginning on October 1, 2015, and ending on November 20, 2015—

"(A) $26,197 to carry out section 5115;

"(B) $3,037,705 to carry out subsections (a) and (b) of section 5116, of which not less than $1,902,049 shall be available to carry out section 5116(b);

"(C) $20,902 to carry out section 5116(f);

"(D) $87,090 to publish and distribute the Emergency Response Guidebook under section 5116(i)(3); and

"(E) $139,344 to carry out section 5116(j)."

Pub. L. 114–73, §1301(b), amended par. (2) generally. Prior to amendment, text read as follows: "From the Hazardous Materials Emergency Preparedness Fund established under section 5116(i), the Secretary may expend for the period beginning on October 1, 2015, and ending on October 29, 2015—

"(A) $14,896 to carry out section 5115;

"(B) $1,727,322 to carry out subsections (a) and (b) of section 5116, of which not less than $1,081,557 shall be available to carry out section 5116(b);

"(C) $11,885 to carry out section 5116(f);

"(D) $49,522 to publish and distribute the Emergency Response Guidebook under section 5116(i)(3); and

"(E) $79,235 to carry out section 5116(j)."

Pub. L. 114–41, §1301(b)(2), added par. (2) and struck out former par. (2). Prior to amendment, text read as follows: "From the Hazardous Materials Emergency Preparedness Fund established under section 5116(i), the Secretary may expend for the period beginning on October 1, 2014, and ending on July 31, 2015—

"(A) $156,581 to carry out section 5115;

"(B) $18,156,712 to carry out subsections (a) and (b) of section 5116, of which not less than $11,368,767 shall be available to carry out section 5116(b);

"(C) $124,932 to carry out section 5116(f);

"(D) $520,548 to publish and distribute the Emergency Response Guidebook under section 5116(i)(3); and

"(E) $832,877 to carry out section 5116(j)."

Pub. L. 114–21, §1301(b), amended par. (2) generally. Prior to amendment, text read as follows: "From the Hazardous Materials Emergency Preparedness Fund established under section 5116(i), the Secretary may expend for the period beginning on October 1, 2014, and ending on May 31, 2015—

"(A) $125,162 to carry out section 5115;

"(B) $14,513,425 to carry out subsections (a) and (b) of section 5116, of which not less than $9,087,534 shall be available to carry out section 5116(b);

"(C) $99,863 to carry out section 5116(f);

"(D) $416,096 to publish and distribute the Emergency Response Guidebook under section 5116(i)(3); and

"(E) $665,753 to carry out section 5116(j)."

Subsec. (c). Pub. L. 114–87, §1301(c), substituted "and $710,383 for the period beginning on October 1, 2015, and ending on December 4, 2015," for "and $557,377 for the period beginning on October 1, 2015, and ending on November 20, 2015,".

Pub. L. 114–73, §1301(c), substituted "and $557,377 for the period beginning on October 1, 2015, and ending on November 20, 2015," for "and $316,940 for the period beginning on October 1, 2015, and ending on October 29, 2015,".

Pub. L. 114–41, §1301(c), substituted "each of fiscal years 2013 through 2015 and $316,940 for the period beginning on October 1, 2015, and ending on October 29, 2015," for "each of the fiscal years 2013 and 2014 and $3,331,507 for the period beginning on October 1, 2014, and ending on July 31, 2015,".

Pub. L. 114–21, §1301(c), substituted "and $3,331,507 for the period beginning on October 1, 2014, and ending on July 31, 2015," for "and $2,663,014 for the period beginning on October 1, 2014, and ending on May 31, 2015,".

2014—Subsec. (a)(3). Pub. L. 113–159, §1301(a), added par. (3).

Subsec. (b). Pub. L. 113–159, §1301(b), designated existing provisions as par. (1) and inserted heading, redesignated former pars. (1) to (5) as subpars. (A) to (E), respectively, of par. (1) and realigned margins, and added par. (2).

Subsec. (c). Pub. L. 113–159, §1301(c), inserted "and $2,663,014 for the period beginning on October 1, 2014, and ending on May 31, 2015," after "2014".

2012—Pub. L. 112–141 amended section generally. Prior to amendment, section related to authorization of appropriations for fiscal years 2005 to 2008.

2008—Pub. L. 110–244 substituted "Authorization" for "Authorizations" in section catchline.

2005—Pub. L. 109–59, §7125, substituted "Authorizations" for "Authorization" in section catchline and amended text generally, substituting provisions relating to authorization of appropriations for fiscal years 2005 to 2008, consisting of subsecs. (a) to (f), for provisions relating to authorization of appropriations for fiscal years 1993 to 1998, consisting of subsecs. (a) to (g).

Pub. L. 109–59, §7123(b), renumbered section 5127 of this title as this section.

1994—Subsec. (a). Pub. L. 103–311, §103, substituted "fiscal year 1993, $18,000,000 for fiscal year 1994, $18,540,000 for fiscal year 1995, $19,100,000 for fiscal year 1996, and $19,670,000 for fiscal year 1997" for "the fiscal year ending September 30, 1993,".

Subsec. (b). Pub. L. 103–311, §119(c)(4), amended subsec. (b)(1) generally. Prior to amendment, subsec. (b)(1) read as follows:

"(b) HAZMAT EMPLOYEE TRAINING.—(1) Not more than $250,000 is available to the Director of the National Institute of Environmental Health Sciences from the account established under section 5116(i) of this title for each of the fiscal years ending September 30, 1993–1998, to carry out section 5107(e) of this title."

Pub. L. 103–311, §119(b), designated existing provisions as par. (1) and added par. (2).

EFFECTIVE DATE OF 2015 AMENDMENT

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

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SUBTITLE III - GENERAL AND INTERMODAL PROGRAMS
CHAPTER 53 - PUBLIC TRANSPORTATION
Sec. 5303 - Metropolitan transportation planning
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§5303. Metropolitan transportation planning

(a) POLICY.—It is in the national interest—

(1) to encourage and promote the safe and efficient management, operation, and development of resilient surface transportation systems that will serve the mobility needs of people and freight and foster economic growth and development within and between States and urbanized areas, while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes identified in this chapter; and

(2) to encourage the continued improvement and evolution of the metropolitan and statewide transportation planning processes by metropolitan planning organizations, State departments of transportation, and public transit operators as guided by the planning factors identified in subsection (h) and section 5304(d).

(b) DEFINITIONS.—In this section and section 5304, the following definitions apply:

(1) METROPOLITAN PLANNING AREA.—The term "metropolitan planning area" means the geographic area determined by agreement between the metropolitan planning organization for the area and the Governor under subsection (e).

(2) METROPOLITAN PLANNING ORGANIZATION.—The term "metropolitan planning organization" means the policy board of an organization established as a result of the designation process under subsection (d).

(3) NONMETROPOLITAN AREA.—The term "nonmetropolitan area" means a geographic area outside designated metropolitan planning areas.

(4) NONMETROPOLITAN LOCAL OFFICIAL.—The term "nonmetropolitan local official" means elected and appointed officials of general purpose local government in a nonmetropolitan area with responsibility for transportation.

(5) REGIONAL TRANSPORTATION PLANNING ORGANIZATION.—The term "regional transportation planning organization" means a policy board of an organization established as the result of a designation under section 5304(l).

(6) TIP.—The term "TIP" means a transportation improvement program developed by a metropolitan planning organization under subsection (j).

(7) URBANIZED AREA.—The term "urbanized area" means a geographic area with a population of 50,000 or more, as determined by the Bureau of the Census.

(c) GENERAL REQUIREMENTS.—

(1) DEVELOPMENT OF LONG-RANGE PLANS AND TIPS.—To accomplish the objectives in subsection (a), metropolitan planning organizations designated under subsection (d), in cooperation with the State and public transportation operators, shall develop long-range transportation plans and transportation improvement programs through a performance-driven, outcome-based approach to planning for metropolitan areas of the State.

(2) CONTENTS.—The plans and TIPs for each metropolitan area shall provide for the development and integrated management and operation of transportation systems and facilities (including accessible pedestrian walkways, bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter vanpool providers) that will function as an intermodal transportation system for the

metropolitan planning area and as an integral part of an intermodal transportation system for the State and the United States.

(3) PROCESS OF DEVELOPMENT.—The process for developing the plans and TIPs shall provide for consideration of all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate, based on the complexity of the transportation problems to be addressed.

(d) DESIGNATION OF METROPOLITAN PLANNING ORGANIZATIONS.—

(1) IN GENERAL.—To carry out the transportation planning process required by this section, a metropolitan planning organization shall be designated for each urbanized area with a population of more than 50,000 individuals—

(A) by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population (including the largest incorporated city (based on population) as determined by the Bureau of the Census); or

(B) in accordance with procedures established by applicable State or local law.

(2) STRUCTURE.—Not later than 2 years after the date of enactment of the Federal Public Transportation Act of 2012, each metropolitan planning organization that serves an area designated as a transportation management area shall consist of—

(A) local elected officials;

(B) officials of public agencies that administer or operate major modes of transportation in the metropolitan area, including representation by providers of public transportation; and

(C) appropriate State officials.

(3) REPRESENTATION.—

(A) IN GENERAL.—Designation or selection of officials or representatives under paragraph (2) shall be determined by the metropolitan planning organization according to the bylaws or enabling statute of the organization.

(B) PUBLIC TRANSPORTATION REPRESENTATIVE.—Subject to the bylaws or enabling statute of the metropolitan planning organization, a representative of a provider of public transportation may also serve as a representative of a local municipality.

(C) POWERS OF CERTAIN OFFICIALS.—An official described in paragraph (2)(B) shall have responsibilities, actions, duties, voting rights, and any other authority commensurate with other officials described in paragraph (2).

(4) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this subsection shall be construed to interfere with the authority, under any State law in effect on December 18, 1991, of a public agency with multimodal transportation responsibilities—

(A) to develop the plans and TIPs for adoption by a metropolitan planning organization; and

(B) to develop long-range capital plans, coordinate transit services and projects, and carry out other activities pursuant to State law.

(5) CONTINUING DESIGNATION.—A designation of a metropolitan planning organization under this subsection or any other provision of law shall remain in effect until the metropolitan planning organization is redesignated under paragraph (6).

(6) REDESIGNATION PROCEDURES.—

(A) IN GENERAL.—A metropolitan planning organization may be redesignated by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the existing planning area population (including the largest incorporated city (based on population) as determined by the Bureau of the Census) as appropriate to carry out this section.

(B) RESTRUCTURING.—A metropolitan planning organization may be restructured to meet the requirements of paragraph (2) without undertaking a redesignation.

(7) DESIGNATION OF MORE THAN 1 METROPOLITAN PLANNING ORGANIZATION.—More than 1 metropolitan planning organization may be designated within an existing metropolitan planning area only if the Governor and the existing metropolitan planning organization determine that the size and complexity of the existing metropolitan planning area make designation of more than 1 metropolitan planning organization for the area appropriate.

(e) METROPOLITAN PLANNING AREA BOUNDARIES.—

(1) IN GENERAL.—For the purposes of this section, the boundaries of a metropolitan planning area shall be determined by agreement between the metropolitan planning organization and the Governor.

(2) INCLUDED AREA.—Each metropolitan planning area—

(A) shall encompass at least the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period for the transportation plan; and

(B) may encompass the entire metropolitan statistical area or consolidated metropolitan statistical area, as defined by the Bureau of the Census.

(3) IDENTIFICATION OF NEW URBANIZED AREAS WITHIN EXISTING PLANNING AREA BOUNDARIES.—The designation by the Bureau of the Census of new urbanized areas within an existing metropolitan planning area shall not require the redesignation of the existing metropolitan planning organization.

(4) EXISTING METROPOLITAN PLANNING AREAS IN NONATTAINMENT.—

(A) IN GENERAL.—Notwithstanding paragraph (2), except as provided in subparagraph (B), in the case of an urbanized area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.) as of the date of enactment of the SAFETEA–LU, the boundaries of the metropolitan planning area in existence as of such date of enactment shall be retained.

(B) EXCEPTION.—The boundaries described in subparagraph (A) may be adjusted by agreement of the Governor and affected metropolitan planning organizations in the manner described in subsection (d)(6).

(5) NEW METROPOLITAN PLANNING AREAS IN NONATTAINMENT.—In the case of an urbanized area designated after the date of enactment of the SAFETEA–LU, as a nonattainment area for ozone or carbon monoxide, the boundaries of the metropolitan planning area—

(A) shall be established in the manner described in subsection (d)(1);

(B) shall encompass the areas described in paragraph (2)(A);

(C) may encompass the areas described in paragraph (2)(B); and

(D) may address any nonattainment area identified under the Clean Air Act (42 U.S.C. 7401 et seq.) for ozone or carbon monoxide.

(f) COORDINATION IN MULTISTATE AREAS.—

(1) IN GENERAL.—The Secretary shall encourage each Governor with responsibility for a portion of a multistate metropolitan area and the appropriate metropolitan planning organizations to provide coordinated transportation planning for the entire metropolitan area.

(2) INTERSTATE COMPACTS.—The consent of Congress is granted to any 2 or more States—

(A) to enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as the activities pertain to interstate areas and localities within the States; and

(B) to establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.

(3) RESERVATION OF RIGHTS.—The right to alter, amend, or repeal interstate compacts entered into under this subsection is expressly reserved.

(g) MPO CONSULTATION IN PLAN AND TIP COORDINATION.—

(1) NONATTAINMENT AREAS.—If more than 1 metropolitan planning organization has authority within a metropolitan area or an area which is designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.), each metropolitan planning organization shall consult with the other metropolitan planning organizations designated for such area and the State in the coordination of plans and TIPs required by this section.

(2) TRANSPORTATION IMPROVEMENTS LOCATED IN MULTIPLE MPOS.—If a transportation improvement, funded under this chapter or title 23, is located within the boundaries of more than 1 metropolitan planning area, the metropolitan planning organizations shall coordinate plans and TIPs regarding the transportation improvement.

(3) RELATIONSHIP WITH OTHER PLANNING OFFICIALS.—

(A) IN GENERAL.—The Secretary shall encourage each metropolitan planning organization to consult with officials responsible for other types of planning activities that are affected by transportation in the area (including State and local planned growth, economic development, tourism, natural disaster risk reduction, environmental protection, airport operations, and freight movements) or to coordinate its planning process, to the maximum extent practicable, with such planning activities.

(B) REQUIREMENTS.—Under the metropolitan planning process, transportation plans and TIPs shall be developed with due consideration of other related planning activities within the metropolitan area, and the process shall provide for the design and delivery of transportation services within the metropolitan area that are provided by—

(i) recipients of assistance under this chapter;

(ii) governmental agencies and nonprofit organizations (including representatives of the agencies and organizations) that receive Federal assistance from a source other than the Department of Transportation to provide nonemergency transportation services; and

(iii) recipients of assistance under section 204 of title 23.

(h) SCOPE OF PLANNING PROCESS.—

(1) IN GENERAL.—The metropolitan planning process for a metropolitan planning area under this section shall provide for consideration of projects and strategies that will—

(A) support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;

(B) increase the safety of the transportation system for motorized and nonmotorized users;

(C) increase the security of the transportation system for motorized and nonmotorized users;

(D) increase the accessibility and mobility of people and for freight;

(E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;

(F) enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;

(G) promote efficient system management and operation;

(H) emphasize the preservation of the existing transportation system; and

(I) improve the resiliency and reliability of the transportation system.

(2) PERFORMANCE-BASED APPROACH.—

(A) IN GENERAL.—The metropolitan transportation planning process shall provide for the establishment and use of a performance-based approach to transportation decisionmaking to support the national goals described in section 150(b) of title 23 and the general purposes described in section 5301.

(B) PERFORMANCE TARGETS.—

(i) SURFACE TRANSPORTATION PERFORMANCE TARGETS.—

(I) IN GENERAL.—Each metropolitan planning organization shall establish performance targets that address the performance measures described in section 150(c) of title 23, where applicable, to use in tracking progress towards attainment of critical outcomes for the region of the metropolitan planning organization.

(II) COORDINATION.—Selection of performance targets by a metropolitan planning organization shall be coordinated with the relevant State to ensure consistency, to the maximum extent practicable.

(ii) PUBLIC TRANSPORTATION PERFORMANCE TARGETS.—Selection of performance targets by a metropolitan planning organization shall be coordinated, to the maximum extent practicable, with providers of public transportation to ensure consistency with sections 5326(c) and 5329(d).

(C) TIMING.—Each metropolitan planning organization shall establish the performance targets under subparagraph (B) not later than 180 days after the date on which the relevant State or provider of public transportation establishes the performance targets.

(D) INTEGRATION OF OTHER PERFORMANCE-BASED PLANS.—A metropolitan planning organization shall integrate in the metropolitan transportation planning process, directly or by reference, the goals, objectives, performance measures, and targets described in other State transportation plans and transportation processes, as well as any plans developed by recipients of assistance under this chapter, required as part of a performance-based program.

(3) FAILURE TO CONSIDER FACTORS.—The failure to consider any factor specified in paragraphs (1) and (2) shall not be reviewable by any court under this chapter, title 23, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a transportation plan, a TIP, a project or strategy, or the certification of a planning process.

(i) DEVELOPMENT OF TRANSPORTATION PLAN.—

(1) REQUIREMENTS.—

(A) IN GENERAL.—Each metropolitan planning organization shall prepare and update a transportation plan for its metropolitan planning area in accordance with the requirements of this subsection.

(B) FREQUENCY.—

(i) IN GENERAL.—The metropolitan planning organization shall prepare and update such plan every 4 years (or more frequently, if the metropolitan planning organization elects to update more frequently) in the case of each of the following:

(I) Any area designated as nonattainment, as defined in section 107(d) of the Clean Air Act (42 U.S.C. 7407(d)).

(II) Any area that was nonattainment and subsequently designated to attainment in accordance with section 107(d)(3) of that Act (42 U.S.C. 7407(d)(3)) and that is subject to a maintenance plan under section 175A of that Act (42 U.S.C. 7505a).

(ii) OTHER AREAS.—In the case of any other area required to have a transportation plan in accordance with the requirements of this subsection, the metropolitan planning organization shall prepare and update such plan every 5 years unless the metropolitan planning organization elects to update more frequently.

(2) TRANSPORTATION PLAN.—A transportation plan under this section shall be in a form that the Secretary determines to be appropriate and shall contain, at a minimum, the following:

(A) IDENTIFICATION OF TRANSPORTATION FACILITIES.—

(i) IN GENERAL.—An identification of transportation facilities (including major roadways, public transportation facilities, intercity bus facilities, multimodal and intermodal facilities, nonmotorized transportation facilities, and intermodal connectors) that should function as an integrated metropolitan transportation system, giving emphasis to those facilities that serve important national and regional transportation functions.

(ii) FACTORS.—In formulating the transportation plan, the metropolitan planning organization shall consider factors described in subsection (h) as the factors relate to a 20-year forecast period.

(B) PERFORMANCE MEASURES AND TARGETS.—A description of the performance measures and performance targets used in assessing the performance of the transportation system in accordance with subsection (h)(2).

(C) SYSTEM PERFORMANCE REPORT.—A system performance report and subsequent updates evaluating the condition and performance of the transportation system with respect to the performance targets described in subsection (h)(2), including—

(i) progress achieved by the metropolitan planning organization in meeting the performance targets in comparison with system performance recorded in previous reports; and

(ii) for metropolitan planning organizations that voluntarily elect to develop multiple scenarios, an analysis of how the preferred scenario has improved the conditions and performance of the transportation system and how changes in local policies and investments have impacted the costs necessary to achieve the identified performance targets.

(D) MITIGATION ACTIVITIES.—

(i) IN GENERAL.—A long-range transportation plan shall include a discussion of types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the plan.

(ii) CONSULTATION.—The discussion shall be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies.

(E) FINANCIAL PLAN.—

(i) IN GENERAL.—A financial plan that—

(I) demonstrates how the adopted transportation plan can be implemented;

(II) indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan; and

(III) recommends any additional financing strategies for needed projects and programs.

(ii) INCLUSIONS.—The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted transportation plan if reasonable additional resources beyond those identified in the financial plan were available.

(iii) COOPERATIVE DEVELOPMENT.—For the purpose of developing the transportation plan, the metropolitan planning organization, transit operator, and State shall cooperatively develop estimates of funds that will be available to support plan implementation.

(F) OPERATIONAL AND MANAGEMENT STRATEGIES.—Operational and management strategies to improve the performance of existing transportation facilities to relieve vehicular congestion and maximize the safety and mobility of people and goods.

(G) CAPITAL INVESTMENT AND OTHER STRATEGIES.—Capital investment and other strategies to preserve the existing and projected future metropolitan transportation infrastructure, provide for multimodal capacity increases based on regional priorities and needs, and reduce the vulnerability of the existing transportation infrastructure to natural disasters.

(H) TRANSPORTATION AND TRANSIT ENHANCEMENT ACTIVITIES.—Proposed transportation and transit enhancement activities, including consideration of the role that intercity buses may play in reducing congestion, pollution, and energy consumption in a cost-effective manner and strategies and investments that preserve and enhance intercity bus systems, including systems that are privately owned and operated.

(3) COORDINATION WITH CLEAN AIR ACT AGENCIES.—In metropolitan areas that are in nonattainment for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.), the metropolitan planning organization shall coordinate the development of a transportation plan with the process

for development of the transportation control measures of the State implementation plan required by that Act.

(4) Optional scenario development.—

(A) In general.—A metropolitan planning organization may, while fitting the needs and complexity of its community, voluntarily elect to develop multiple scenarios for consideration as part of the development of the metropolitan transportation plan, in accordance with subparagraph (B).

(B) Recommended components.—A metropolitan planning organization that chooses to develop multiple scenarios under subparagraph (A) shall be encouraged to consider—

(i) potential regional investment strategies for the planning horizon;

(ii) assumed distribution of population and employment;

(iii) a scenario that, to the maximum extent practicable, maintains baseline conditions for the performance measures identified in subsection (h)(2);

(iv) a scenario that improves the baseline conditions for as many of the performance measures identified in subsection (h)(2) as possible;

(v) revenue constrained scenarios based on the total revenues expected to be available over the forecast period of the plan; and

(vi) estimated costs and potential revenues available to support each scenario.

(C) Metrics.—In addition to the performance measures identified in section 150(c) of title 23, metropolitan planning organizations may evaluate scenarios developed under this paragraph using locally-developed measures.

(5) Consultation.—

(A) In general.—In each metropolitan area, the metropolitan planning organization shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan.

(B) Issues.—The consultation shall involve, as appropriate—

(i) comparison of transportation plans with State conservation plans or maps, if available; or

(ii) comparison of transportation plans to inventories of natural or historic resources, if available.

(6) Participation by interested parties.—

(A) In general.—Each metropolitan planning organization shall provide citizens, affected public agencies, representatives of public transportation employees, public ports, freight shippers, providers of freight transportation services, private providers of transportation (including intercity bus operators, employer-based commuting programs, such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program), representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the transportation plan.

(B) Contents of participation plan.—A participation plan—

(i) shall be developed in consultation with all interested parties; and

(ii) shall provide that all interested parties have reasonable opportunities to comment on the contents of the transportation plan.

(C) Methods.—In carrying out subparagraph (A), the metropolitan planning organization shall, to the maximum extent practicable—

(i) hold any public meetings at convenient and accessible locations and times;

(ii) employ visualization techniques to describe plans; and

(iii) make public information available in electronically accessible format and means, such as the World Wide Web, as appropriate to afford reasonable opportunity for consideration of

public information under subparagraph (A).

(7) PUBLICATION.—A transportation plan involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web, approved by the metropolitan planning organization and submitted for information purposes to the Governor at such times and in such manner as the Secretary shall establish.

(8) SELECTION OF PROJECTS FROM ILLUSTRATIVE LIST.—Notwithstanding paragraph (2)(E), a State or metropolitan planning organization shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(E).

(j) METROPOLITAN TIP.—

(1) DEVELOPMENT.—

(A) IN GENERAL.—In cooperation with the State and any affected public transportation operator, the metropolitan planning organization designated for a metropolitan area shall develop a TIP for the metropolitan planning area that—

(i) contains projects consistent with the current metropolitan transportation plan;

(ii) reflects the investment priorities established in the current metropolitan transportation plan; and

(iii) once implemented, is designed to make progress toward achieving the performance targets established under subsection (h)(2).

(B) OPPORTUNITY FOR COMMENT.—In developing the TIP, the metropolitan planning organization, in cooperation with the State and any affected public transportation operator, shall provide an opportunity for participation by interested parties in the development of the program, in accordance with subsection (i)(5).

(C) FUNDING ESTIMATES.—For the purpose of developing the TIP, the metropolitan planning organization, public transportation agency, and State shall cooperatively develop estimates of funds that are reasonably expected to be available to support program implementation.

(D) UPDATING AND APPROVAL.—The TIP shall be—

(i) updated at least once every 4 years; and

(ii) approved by the metropolitan planning organization and the Governor.

(2) CONTENTS.—

(A) PRIORITY LIST.—The TIP shall include a priority list of proposed Federally supported projects and strategies to be carried out within each 4-year period after the initial adoption of the TIP.

(B) FINANCIAL PLAN.—The TIP shall include a financial plan that—

(i) demonstrates how the TIP can be implemented;

(ii) indicates resources from public and private sources that are reasonably expected to be available to carry out the program;

(iii) identifies innovative financing techniques to finance projects, programs, and strategies; and

(iv) may include, for illustrative purposes, additional projects that would be included in the approved TIP if reasonable additional resources beyond those identified in the financial plan were available.

(C) DESCRIPTIONS.—Each project in the TIP shall include sufficient descriptive material (such as type of work, termini, length, and other similar factors) to identify the project or phase of the project.

(D) PERFORMANCE TARGET ACHIEVEMENT.—The transportation improvement program shall include, to the maximum extent practicable, a description of the anticipated effect of the

transportation improvement program toward achieving the performance targets established in the metropolitan transportation plan, linking investment priorities to those performance targets.

(3) INCLUDED PROJECTS.—

(A) PROJECTS UNDER THIS CHAPTER AND TITLE 23.—A TIP developed under this subsection for a metropolitan area shall include the projects within the area that are proposed for funding under this chapter and chapter 1 of title 23.

(B) PROJECTS UNDER CHAPTER 2 OF TITLE 23.—

(i) REGIONALLY SIGNIFICANT PROJECTS.—Regionally significant projects proposed for funding under chapter 2 of title 23 shall be identified individually in the transportation improvement program.

(ii) OTHER PROJECTS.—Projects proposed for funding under chapter 2 of title 23 that are not determined to be regionally significant shall be grouped in 1 line item or identified individually in the transportation improvement program.

(C) CONSISTENCY WITH LONG-RANGE TRANSPORTATION PLAN.—Each project shall be consistent with the long-range transportation plan developed under subsection (i) for the area.

(D) REQUIREMENT OF ANTICIPATED FULL FUNDING.—The program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project or the identified phase within the time period contemplated for completion of the project or the identified phase.

(4) NOTICE AND COMMENT.—Before approving a TIP, a metropolitan planning organization, in cooperation with the State and any affected public transportation operator, shall provide an opportunity for participation by interested parties in the development of the program, in accordance with subsection (i)(5).

(5) SELECTION OF PROJECTS.—

(A) IN GENERAL.—Except as otherwise provided in subsection (k)(4) and in addition to the TIP development required under paragraph (1), the selection of Federally funded projects in metropolitan areas shall be carried out, from the approved TIP—

(i) by—

(I) in the case of projects under title 23, the State; and

(II) in the case of projects under this chapter, the designated recipients of public transportation funding; and

(ii) in cooperation with the metropolitan planning organization.

(B) MODIFICATIONS TO PROJECT PRIORITY.—Notwithstanding any other provision of law, action by the Secretary shall not be required to advance a project included in the approved TIP in place of another project in the program.

(6) SELECTION OF PROJECTS FROM ILLUSTRATIVE LIST.—

(A) NO REQUIRED SELECTION.—Notwithstanding paragraph (2)(B)(iv), a State or metropolitan planning organization shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(B)(iv).

(B) REQUIRED ACTION BY THE SECRETARY.—Action by the Secretary shall be required for a State or metropolitan planning organization to select any project from the illustrative list of additional projects included in the financial plan under paragraph (2)(B)(iv) for inclusion in an approved TIP.

(7) PUBLICATION.—

(A) PUBLICATION OF TIPS.—A TIP involving Federal participation shall be published or otherwise made readily available by the metropolitan planning organization for public review.

(B) PUBLICATION OF ANNUAL LISTINGS OF PROJECTS.—

(i) IN GENERAL.—An annual listing of projects, including investments in pedestrian walkways and bicycle transportation facilities, for which Federal funds have been obligated in the preceding year shall be published or otherwise made available by the cooperative effort of the State, transit operator, and metropolitan planning organization for public review.

(ii) REQUIREMENT.—The listing shall be consistent with the categories identified in the TIP.

(k) TRANSPORTATION MANAGEMENT AREAS.—

(1) IDENTIFICATION AND DESIGNATION.—

(A) REQUIRED IDENTIFICATION.—The Secretary shall identify as a transportation management area each urbanized area (as defined by the Bureau of the Census) with a population of over 200,000 individuals.

(B) DESIGNATIONS ON REQUEST.—The Secretary shall designate any additional area as a transportation management area on the request of the Governor and the metropolitan planning organization designated for the area.

(2) TRANSPORTATION PLANS.—In a transportation management area, transportation plans shall be based on a continuing and comprehensive transportation planning process carried out by the metropolitan planning organization in cooperation with the State and public transportation operators.

(3) CONGESTION MANAGEMENT PROCESS.—

(A) IN GENERAL.—Within a metropolitan planning area serving a transportation management area, the transportation planning process under this section shall address congestion management through a process that provides for effective management and operation, based on a cooperatively developed and implemented metropolitan-wide strategy, of new and existing transportation facilities eligible for funding under this chapter and title 23 through the use of travel demand reduction (including intercity bus operators, employer-based commuting programs, such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program), job access projects, and operational management strategies.

(B) SCHEDULE.—The Secretary shall establish an appropriate phase-in schedule for compliance with the requirements of this section but no sooner than 1 year after the identification of a transportation management area.

(C) CONGESTION MANAGEMENT PLAN.—A metropolitan planning organization serving a transportation management area may develop a plan that includes projects and strategies that will be considered in the TIP of such metropolitan planning organization. Such plan shall—

(i) develop regional goals to reduce vehicle miles traveled during peak commuting hours and improve transportation connections between areas with high job concentration and areas with high concentrations of low-income households;

(ii) identify existing public transportation services, employer-based commuter programs, and other existing transportation services that support access to jobs in the region; and

(iii) identify proposed projects and programs to reduce congestion and increase job access opportunities.

(D) PARTICIPATION.—In developing the plan under subparagraph (C), a metropolitan planning organization shall consult with employers, private and non-profit providers of public transportation, transportation management organizations, and organizations that provide job access reverse commute projects or job-related services to low-income individuals.

(4) SELECTION OF PROJECTS.—

(A) IN GENERAL.—All Federally funded projects carried out within the boundaries of a metropolitan planning area serving a transportation management area under title 23 (excluding projects carried out on the National Highway System) or under this chapter shall be selected for implementation from the approved TIP by the metropolitan planning organization designated for the area in consultation with the State and any affected public transportation operator.

(B) NATIONAL HIGHWAY SYSTEM PROJECTS.—Projects carried out within the boundaries of a metropolitan planning area serving a transportation management area on the National Highway System shall be selected for implementation from the approved TIP by the State in cooperation with the metropolitan planning organization designated for the area.

(5) CERTIFICATION.—

(A) IN GENERAL.—The Secretary shall—

(i) ensure that the metropolitan planning process of a metropolitan planning organization serving a transportation management area is being carried out in accordance with applicable provisions of Federal law; and

(ii) subject to subparagraph (B), certify, not less often than once every 4 years, that the requirements of this paragraph are met with respect to the metropolitan planning process.

(B) REQUIREMENTS FOR CERTIFICATION.—The Secretary may make the certification under subparagraph (A) if—

(i) the transportation planning process complies with the requirements of this section and other applicable requirements of Federal law; and

(ii) there is a TIP for the metropolitan planning area that has been approved by the metropolitan planning organization and the Governor.

(C) EFFECT OF FAILURE TO CERTIFY.—

(i) WITHHOLDING OF PROJECT FUNDS.—If a metropolitan planning process of a metropolitan planning organization serving a transportation management area is not certified, the Secretary may withhold up to 20 percent of the funds attributable to the metropolitan planning area of the metropolitan planning organization for projects funded under this chapter and title 23.

(ii) RESTORATION OF WITHHELD FUNDS.—The withheld funds shall be restored to the metropolitan planning area at such time as the metropolitan planning process is certified by the Secretary.

(D) REVIEW OF CERTIFICATION.—In making certification determinations under this paragraph, the Secretary shall provide for public involvement appropriate to the metropolitan area under review.

(l) REPORT ON PERFORMANCE-BASED PLANNING PROCESSES.—

(1) IN GENERAL.—The Secretary shall submit to Congress a report on the effectiveness of the performance-based planning processes of metropolitan planning organizations under this section, taking into consideration the requirements of this subsection.

(2) REPORT.—Not later than 5 years after the date of enactment of the Federal Public Transportation Act of 2012, the Secretary shall submit to Congress a report evaluating—

(A) the overall effectiveness of performance-based planning as a tool for guiding transportation investments;

(B) the effectiveness of the performance-based planning process of each metropolitan planning organization under this section;

(C) the extent to which metropolitan planning organizations have achieved, or are currently making substantial progress toward achieving, the performance targets specified under this section and whether metropolitan planning organizations are developing meaningful performance targets; and

(D) the technical capacity of metropolitan planning organizations that operate within a metropolitan planning area with a population of 200,000 or less and their ability to carry out the requirements of this section.

(3) PUBLICATION.—The report under paragraph (2) shall be published or otherwise made available in electronically accessible formats and means, including on the Internet.

(m) Abbreviated Plans for Certain Areas.—

(1) In general.—Subject to paragraph (2), in the case of a metropolitan area not designated as a transportation management area under this section, the Secretary may provide for the development of an abbreviated transportation plan and TIP for the metropolitan planning area that the Secretary determines is appropriate to achieve the purposes of this section, taking into account the complexity of transportation problems in the area.

(2) Nonattainment areas.—The Secretary may not permit abbreviated plans or TIPs for a metropolitan area that is in nonattainment for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.).

(n) Additional Requirements for Certain Nonattainment Areas.—

(1) In general.—Notwithstanding any other provisions of this chapter or title 23, for transportation management areas classified as nonattainment for ozone or carbon monoxide pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.), Federal funds may not be advanced in such area for any highway project that will result in a significant increase in the carrying capacity for single-occupant vehicles unless the project is addressed through a congestion management process.

(2) Applicability.—This subsection applies to a nonattainment area within the metropolitan planning area boundaries determined under subsection (e).

(o) Limitation on Statutory Construction.—Nothing in this section shall be construed to confer on a metropolitan planning organization the authority to impose legal requirements on any transportation facility, provider, or project not eligible under this chapter or title 23.

(p) Funding.—Funds apportioned under section 104(b)(5) of title 23 or section 5305(g) shall be available to carry out this section.

(q) Continuation of Current Review Practice.—Since plans and TIPs described in this section are subject to a reasonable opportunity for public comment, since individual projects included in plans and TIPs are subject to review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), and since decisions by the Secretary concerning plans and TIPs described in this section have not been reviewed under that Act as of January 1, 1997, any decision by the Secretary concerning a plan or TIP described in this section shall not be considered to be a Federal action subject to review under that Act.

(r) Bi-State Metropolitan Planning Organization.—

(1) Definition of bi-state mpo region.—In this subsection, the term "Bi-State Metropolitan Planning Organization" has the meaning given the term "region" in subsection (a) of Article II of the Lake Tahoe Regional Planning Compact (Public Law 96–551; 94 Stat. 3234).

(2) Treatment.—For the purpose of this title, the Bi-State Metropolitan Planning Organization shall be treated as—

(A) a metropolitan planning organization;

(B) a transportation management area under subsection (k); and

(C) an urbanized area, which is comprised of a population of 145,000 in the State of California and a population of 65,000 in the State of Nevada.

(Pub. L. 103–272, §1(d), July 5, 1994, 108 Stat. 788; Pub. L. 104–287, §5(10), Oct. 11, 1996, 110 Stat. 3389; Pub. L. 105–102, §2(4), Nov. 20, 1997, 111 Stat. 2204; Pub. L. 105–178, title III, §§3004, 3029(b)(1)–(3), June 9, 1998, 112 Stat. 341, 372; Pub. L. 105–206, title IX, §9009(b), July 22, 1998, 112 Stat. 852; Pub. L. 109–59, title III, §3005(a), Aug. 10, 2005, 119 Stat. 1547; Pub. L. 110–244, title II, §201(b), June 6, 2008, 122 Stat. 1609; Pub. L. 112–141, div. B, §20005(a), July 6, 2012, 126 Stat. 628; Pub. L. 114–94, div. A, title III, §3003(a), Dec. 4, 2015, 129 Stat. 1447.)

Historical and Revision Notes

Pub. L. 103–272

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*

5303(a)	49 App.:1607(a) (2d–last sentences).	July 9, 1964, Pub. L. 88–365, 78 Stat. 302, §8(a) (2d–last sentences)–(g), (n); added Nov. 6, 1978, Pub. L. 95–599, §305(b), 92 Stat. 2743; Apr. 2, 1987, Pub. L. 100–17, §310, 101 Stat. 227; restated Dec. 18, 1991, Pub. L. 102–240, §3012, 105 Stat. 2098, 2104.
5303(b)	49 App.:1607(f).	
5303(c)(1)	49 App.:1607(b)(1).	
5303(c)(2)	49 App.:1607(b)(2).	
5303(c)(3)	49 App.:1607(b)(6).	
5303(c)(4)	49 App.:1607(b)(4).	
5303(c)(5)	49 App.:1607(b)(5).	
5303(c)(6)	49 App.:1607(b)(3).	
5303(d)	49 App.:1607(c).	
5303(e)	49 App.:1607(d), (e).	
5303(f)	49 App.:1607(g).	
5303(g)	49 App.:1607(n).	
5303(h)	49 App.:1607(p).	July 9, 1964, Pub. L. 88–365, 78 Stat. 302, §8(p); added Nov. 6, 1978, Pub. L. 95–599, §305(b), 92 Stat. 2743; Apr. 2, 1987, Pub. L. 100–17, §310, 101 Stat. 227; restated Dec. 18, 1991, Pub. L. 102–240, §3012, 105 Stat. 2105; Oct. 6, 1992, Pub. L. 102–388, §502(h), 106 Stat. 1566.

In this section, the word "together" is omitted as surplus. The words "Secretary of Commerce" are substituted for "Bureau of the Census" because of 15:1511(e).

In subsection (b)(2), the word "applicable" is omitted as surplus.

In subsection (b)(3), the words "where it does not yet occur" are omitted as surplus.

In subsection (b)(4), the words "the provisions of all applicable" are omitted as surplus.

In subsection (c)(4), before clause (A), the words "whether made under this section or other provisions of law" are omitted as surplus.

In subsection (d), the word "entire" is omitted as surplus.

In subsection (e)(2), the words "or compacts" and "joint or otherwise" are omitted as surplus.

In subsection (f)(3), the word "area" is added for clarity and consistency with 42:7501(2).

In subsection (f)(5)(A), the words "published or otherwise" are omitted as surplus.

In subsection (g), before clause (1), the words "local governmental authorities" are substituted for "local public bodies", and the words "departments, agencies, and instrumentalities of the Government" are substituted for "Federal departments and agencies", for consistency in the revised title and with other titles of the United States Code.

In subsection (h)(6)(A), the words "for obligation", "a period of", and "the close of" are omitted as surplus.

PUB. L. 104–287

This amends 49:5303(f)(2) and (h)(4) to correct erroneous cross-references.

PUB. L. 105–102, §2(4)(A)

This amends 49:5303(c)(1) to correct an erroneous cross-reference.

PUB. L. 105–102, §2(4)(B)

This amends 49:5303(c)(4)(A) to correct an erroneous cross-reference.

PUB. L. 105–102, §2(4)(C)

This amends 49:5303(c)(5)(A) to correct an erroneous cross-reference.

References in Text

The date of enactment of the Federal Public Transportation Act of 2012, referred to in subsecs. (d)(2) and (l)(2), is deemed to be Oct. 1, 2012, see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of Title 23, Highways.

The Clean Air Act, referred to in subsecs. (e)(4)(A), (5)(D), (g)(1), (i)(3), (m)(2), and (n)(1), is act July 14, 1955, ch. 360, 69 Stat. 322, which is classified generally to chapter 85 (§7401 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of Title 42 and Tables.

The date of enactment of the SAFETEA-LU, referred to in subsec. (e)(4)(A), (5), is the date of enactment of title III of Pub. L. 109–59, which was approved Aug. 10, 2005.

The National Environmental Policy Act of 1969, referred to in subsec. (q), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

Amendments

2015—Subsec. (a)(1). Pub. L. 114–94, §3003(a)(1), inserted "resilient" after "development of".

Subsec. (c)(2). Pub. L. 114–94, §3003(a)(2), substituted ", bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter vanpool providers" for "and bicycle transportation facilities".

Subsec. (d)(3) to (7). Pub. L. 114–94, §3003(a)(3), added par. (3), redesignated pars. (3) to (6) as (4) to (7), respectively, and in par. (5), substituted "paragraph (6)" for "paragraph (5)".

Subsec. (e)(4)(B). Pub. L. 114–94, §3003(a)(4), substituted "subsection (d)(6)" for "subsection (d)(5)".

Subsec. (g)(3)(A). Pub. L. 114–94, §3003(a)(5), inserted "tourism, natural disaster risk reduction," after "economic development,".

Subsec. (h)(1)(I). Pub. L. 114–94, §3003(a)(6), added subpar. (I).

Subsec. (i)(2)(A)(i). Pub. L. 114–94, §3003(a)(7)(A)(i), substituted "public transportation facilities, intercity bus facilities" for "transit".

Subsec. (i)(2)(G). Pub. L. 114–94, §3003(a)(7)(A)(ii), substituted ", provide" for "and provide" and inserted before period at end ", and reduce the vulnerability of the existing transportation infrastructure to natural disasters".

Subsec. (i)(2)(H). Pub. L. 114–94, §3003(a)(7)(A)(iii), inserted before period at end ", including consideration of the role that intercity buses may play in reducing congestion, pollution, and energy consumption in a cost-effective manner and strategies and investments that preserve and enhance intercity bus systems, including systems that are privately owned and operated".

Subsec. (i)(6)(A). Pub. L. 114–94, §3003(a)(7)(B), inserted "public ports," before "freight shippers," and " (including intercity bus operators, employer-based commuting programs, such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program)" after "private providers of transportation".

Subsec. (i)(8). Pub. L. 114–94, §3003(a)(7)(C), substituted "paragraph (2)(E)" for "paragraph (2)(C)" in two places.

Subsec. (k)(3)(A). Pub. L. 114–94, §3003(a)(8)(A), inserted "(including intercity bus operators, employer-based commuting programs, such as a carpool program, vanpool program, transit benefit program, parking cash-out program, shuttle program, or telework program), job access projects," after "travel demand reduction".

Subsec. (k)(3)(C), (D). Pub. L. 114–94, §3003(a)(8)(B), added subpars. (C) and (D).

Subsec. (l)(1). Pub. L. 114–94, §3003(a)(9)(A), inserted a period at end.

Subsec. (l)(2)(D). Pub. L. 114–94, §3003(a)(9)(B), substituted "with a population of 200,000 or less" for "of less than 200,000".

Subsec. (p). Pub. L. 114–94, §3003(a)(10), substituted "Funds apportioned under section 104(b)(5)" for "Funds set aside under section 104(f)".

Subsec. (r). Pub. L. 114–94, §3003(a)(11), added subsec. (r).

2012—Pub. L. 112–141 amended section generally, substituting provisions consisting of subsecs. (a) to (q), including requirement to submit report on performance-based planning processes, for former provisions consisting of subsecs. (a) to (p).

2008—Subsec. (f)(3)(C)(ii)(II). Pub. L. 110–244, §201(b)(1), added subcl. (II) and struck out former subcl. (II). Prior to amendment, text read as follows: "In addition to funds made available to the metropolitan planning organization for the Lake Tahoe region under other provisions of this chapter and title 23, 1 percent of the funds allocated under section 202 of title 23 shall be used to carry out the transportation planning process for the Lake Tahoe region under this subparagraph."

Subsec. (j)(3)(D). Pub. L. 110–244, §201(b)(2), inserted "or the identified phase" after "the project" in two places.

Subsec. (k)(2). Pub. L. 110–244, §201(b)(3), struck out "a metropolitan planning area serving" before "a transportation management area,".

2005—Pub. L. 109–59 amended section catchline and text generally. Prior to amendment, text consisted of subsecs. (a) to (h) relating to designation of a metropolitan planning organization for each urbanized area with a population of more than 50,000, general requirements, scope of planning process, boundaries of each area, coordination in multistate areas, development of long-range transportation plans, grants for studies and evaluations, and apportionment of funds.

1998—Subsecs. (a), (b). Pub. L. 105–178, §3004(a), added subsecs. (a) and (b) and struck out headings and text of former subsecs. (a) and (b) which related to development requirements and plan and program factors, respectively.

Subsec. (c)(1)(A). Pub. L. 105–178, §3004(b)(1)(B), substituted "or cities, as defined by the Bureau of the Census)" for "as defined by the Secretary of Commerce)".

Pub. L. 105–178, §3004(b)(1)(A), as amended by Pub. L. 105–206, §9009(b)(1)(A), substituted "general purpose local government that together represent" for "general local government representing".

Subsec. (c)(2). Pub. L. 105–178, §3004(b)(2), substituted "Each policy board of a metropolitan planning organization that serves an area designated as a transportation management area when designated or redesignated under this subsection shall consist of" for "In a metropolitan area designated as a transportation management area, the designated metropolitan planning organization, if redesignated after December 18, 1991, shall include" and "officials of public agencies" for "officials of authorities".

Subsec. (c)(3). Pub. L. 105–178, §3004(b)(3), as amended by Pub. L. 105–206, §9009(b)(1)(B), substituted "within an existing metropolitan planning area only if the chief executive officer of the State and the existing metropolitan organization determine that the size and complexity of the existing metropolitan planning area" for "in an urbanized area (as defined by the Secretary of Commerce) only if the chief executive officer decides that the size and complexity of the urbanized area".

Subsec. (c)(4)(A). Pub. L. 105–178, §3004(b)(4), as added by Pub. L. 105–206, §9009(b)(1)(E), directed an amendment identical to that made by Pub. L. 105–102, §2(4)(B). See 1997 Amendment note below.

Subsec. (c)(5)(A). Pub. L. 105–178, §3004(b)(5)(A), formerly §3004(b)(4)(A), as renumbered and amended by Pub. L. 105–206, §9009(b)(1)(C), (D), substituted "general purpose local government that together represent" for "general local government representing".

Subsec. (c)(5)(B). Pub. L. 105–178, §3004(b)(5)(B), formerly §3004(b)(4)(B), as renumbered by Pub. L. 105–206, §9009(b)(1)(D), substituted "or cities, as defined by the Bureau of the Census)" for "as defined by the Secretary of Commerce)".

Subsec. (c)(5)(D). Pub. L. 105–178, §3004(b)(5)(C), formerly §3004(b)(4)(C), as renumbered by Pub. L. 105–206, §9009(b)(1)(D), added subpar. (D).

Subsec. (d). Pub. L. 105–178, §3004(c), inserted "Planning" after "Metropolitan" in subsec. heading, designated existing provisions as par. (1), inserted par. heading, realigned margins, inserted "planning" before "area" in first sentence and substituted pars. (2) to (4) for "The area shall cover at least the existing urbanized area and the contiguous area expected to become urbanized within the 20-year forecast period and may include the Metropolitan Statistical Area or Consolidated Metropolitan Statistical Area, as defined by the Secretary of Commerce. An area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 et seq.) shall include at least the boundaries of the nonattainment area, except as the chief executive officer and metropolitan planning organization otherwise agree."

Subsec. (e)(2). Pub. L. 105–178, §3004(d)(1), inserted "or compact" after "2 States making an agreement" and substituted "making the agreements and compacts effective" for "making the agreement effective".

Subsec. (e)(4) to (6). Pub. L. 105–178, §3004(d)(2), as amended by Pub. L. 105–206, §9009(b)(2), added pars. (4) to (6).

Subsec. (f). Pub. L. 105–178, §3004(e)(5), substituted "Developing Long-Range Transportation Plans" for "Developing Long-Range Plans" in heading.

Pub. L. 105–178, §3004(e)(6), which directed substitution of "long-range transportation plans" for "long-range plans" wherever appearing, could not be executed because "long-range plans" does not appear in text.

Subsec. (f)(1)(A). Pub. L. 105–178, §3004(e)(1)(A), substituted "national, regional, and metropolitan transportation functions" for "United States and regional transportation functions".

Subsec. (f)(1)(B)(iii). Pub. L. 105–178, §3004(e)(1)(B), added cl. (iii) and struck out former cl. (iii) which read as follows: "recommends innovative financing techniques, including value capture, tolls, and congestion pricing, to finance needed projects and programs;".

Subsec. (f)(1)(C). Pub. L. 105–178, §3004(e)(1)(C), added subpar. (C) and struck out former subpar. (C) which read as follows: "assess capital investment and other measures necessary—

"(i) to ensure the preservation of the existing metropolitan transportation system, including requirements for operational improvements, resurfacing, restoration, and rehabilitation of existing and future major roadways, and operations, maintenance, modernization, and rehabilitation of existing and future mass transportation facilities; and

"(ii) to use existing transportation facilities most efficiently to relieve vehicular congestion and maximize the mobility of individuals and goods; and".

Subsec. (f)(1)(E). Pub. L. 105–178, §3004(f)(1), as added by Pub. L. 105–206, §9009(b)(3), added subpar. (E).

Subsec. (f)(2). Pub. L. 105–178, §3004(e)(2), substituted "and any State or local goals developed within the cooperative metropolitan planning process as they relate to a 20-year forecast period and to other forecast periods as determined by the participants in the planning process" for "as they are related to a 20-year forecast period".

Subsec. (f)(4). Pub. L. 105–178, §3004(e)(3), inserted "freight shippers, providers of freight transportation services," after "mass transportation authority employees," and "representatives of users of public transit," after "private providers of transportation,".

Subsec. (f)(5)(A). Pub. L. 105–178, §3004(e)(4), inserted "published or otherwise" before "made readily available".

Subsec. (f)(6). Pub. L. 105–178, §3004(f)(2), as added by Pub. L. 105–206, §9009(b)(3), added par. (6).

Subsec. (h)(1). Pub. L. 105–178, §3029(b)(1), (2), substituted "subsection (c) or (h)(1) of section 5338 of this title" for "section 5338(g)(1) of this title" and "sections 5304 and 5305 of this title" for "sections 5304–5306 of this title".

Subsec. (h)(2)(A), (3)(A). Pub. L. 105–178, §3029(b)(1), substituted "subsection (c) or (h)(1) of section 5338 of this title" for "section 5338(g)(1) of this title".

Subsec. (h)(4). Pub. L. 105–178, §3029(b)(3), substituted "subsection (c) or (h)(1) of section 5338 of this title" for "section 5338(g) of this title".

1997—Subsec. (c)(1). Pub. L. 105–102, §2(4)(A), inserted "and sections 5304–5306 of this title" after "this section".

Subsec. (c)(4)(A). Pub. L. 105–102, §2(4)(B), substituted "paragraph (5)" for "paragraph (3)".

Subsec. (c)(5)(A). Pub. L. 105–102, §2(4)(C), inserted "and sections 5304–5306 of this title" after "this section".

1996—Subsec. (f)(2). Pub. L. 104–287, §5(10)(A), substituted "subsection (b)" for "subsection (e)".

Subsec. (h)(4). Pub. L. 104–287, §5(10)(B), substituted "section 5338(g)" for "5338(g)(1)".

Effective Date of 2015 Amendment

Amendment by Pub. L. 114–94 effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as a note under section 5313 of Title 5, Government Organization and Employees.

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

Effective Date of 1998 Amendment

Title IX of Pub. L. 105–206 effective simultaneously with enactment of Pub. L. 105–178 and to be treated as included in Pub. L. 105–178 at time of enactment, and provisions of Pub. L. 105–178, as in effect on day before July 22, 1998, that are amended by title IX of Pub. L. 105–206 to be treated as not enacted, see section 9016 of Pub. L. 105–206, set out as a note under section 101 of Title 23, Highways.

Effective Date of 1996 Amendment

Section 8(1) of Pub. L. 104–287, as amended by Pub. L. 105–102, §3(d)(2)(A), Nov. 20, 1997, 111 Stat. 2215, provided that: "The amendments made by sections 3 and 5(10)–(17), (19), (20), (52), (53), (55), (61), (62), (65), (70), (77)–(79), and (91)–(93) of this Act [amending this section, sections 5307, 5309, 5315, 5317,

5323, 5325, 5327, 5336, 5338, 20301, 21301, 22106, 32702, 32705, 40109, 41109, 46301, 46306, 46316, 60114, 70102, and 70112 of this title, and section 1445 of Title 28, Judiciary and Judicial Procedure] shall take effect on July 5, 1994."

Pilot Program for Transit-Oriented Development Planning

Pub. L. 112–141, div. B, §20005(b), July 6, 2012, 126 Stat. 642, provided that:

"(1) Definitions.—In this subsection the following definitions shall apply:

"(A) Eligible project.—The term 'eligible project' means a new fixed guideway capital project or a core capacity improvement project, as those terms are defined in section 5309 of title 49, United States Code, as amended by this division.

"(B) Secretary.—The term 'Secretary' means the Secretary of Transportation.

"(2) General authority.—The Secretary may make grants under this subsection to a State or local governmental authority to assist in financing comprehensive planning associated with an eligible project that seeks to—

"(A) enhance economic development, ridership, and other goals established during the project development and engineering processes;

"(B) facilitate multimodal connectivity and accessibility;

"(C) increase access to transit hubs for pedestrian and bicycle traffic;

"(D) enable mixed-use development;

"(E) identify infrastructure needs associated with the eligible project; and

"(F) include private sector participation.

"(3) Eligibility.—A State or local governmental authority that desires to participate in the program under this subsection shall submit to the Secretary an application that contains, at a minimum—

"(A) identification of an eligible project;

"(B) a schedule and process for the development of a comprehensive plan;

"(C) a description of how the eligible project and the proposed comprehensive plan advance the metropolitan transportation plan of the metropolitan planning organization;

"(D) proposed performance criteria for the development and implementation of the comprehensive plan; and

"(E) identification of—

"(i) partners;

"(ii) availability of and authority for funding; and

"(iii) potential State, local or other impediments to the implementation of the comprehensive plan."

Guidance on Documenting Compliance With Requirements of Private Enterprise Participation in Public Transportation Planning and Transportation Improvement Programs

Pub. L. 112–141, div. B, §20013(d), July 6, 2012, 126 Stat. 694, as amended by Pub. L. 114–94, div. A, title III, §3010(b), Dec. 4, 2015, 129 Stat. 1474, provided that: "Not later than 1 year after the date of enactment of this Act [see section 3(a), (b) of Pub. L. 112–141, set out as Effective and Termination Dates of 2012 Amendment notes under section 101 of Title 23, Highways], the Secretary [of Transportation] shall publish in the Federal Register policy guidance regarding how to best document compliance by recipients of Federal assistance under chapter 53 of title 49, United States Code, with the requirements regarding private enterprise participation in public transportation planning and transportation improvement programs under sections 5303(i)(6), 5306(a), and 5307(b) of such title 49."

Schedule for Implementation

Pub. L. 109–59, title III, §3005(b), Aug. 10, 2005, 119 Stat. 1559, required the Secretary of Transportation to issue guidance on a schedule for implementation of the changes made to this section by section 3005(a) of Pub. L. 109–59 and required State or metropolitan planning organization plan or program updates to reflect such changes beginning July 1, 2007.

54 U.S.C.
United States Code, 2015 Edition
Title 54 - NATIONAL PARK SERVICE AND RELATED PROGRAMS
Subtitle III - National Preservation Programs
DIVISION A - HISTORIC PRESERVATION

CHAPTER 3061 - PROGRAM RESPONSIBILITIES AND AUTHORITIES
SUBCHAPTER I - IN GENERAL
Sec. 306108 - Effect of undertaking on historic property
From the U.S. Government Publishing Office, www.gpo.gov

§306108. Effect of undertaking on historic property

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

(Pub. L. 113–287, §3, Dec. 19, 2014, 128 Stat. 3227.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306108	16 U.S.C. 470f.	Pub. L. 89–665, title I, §106, Oct. 15, 1966, 80 Stat. 917; Pub. L. 94–422, title II, §201(3), Sept. 28, 1976, 90 Stat. 1320.

The words "historic property" are substituted for "district, site, building, structure, or object that is included in or eligible for inclusion in the National Register" because of the definition of "historic property" in section 300308 of the new title.

FEDERAL REGISTER

Vol. 72, No. 030

Rules and Regulations

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Highway Administration (FHWA)

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Transit Administration

23 CFR Parts 450 and 500

49 CFR Part 613

[Docket No. FHWA-2005-22986]

RIN 2125-AF09; FTA RIN 2132-AA82

Statewide Transportation Planning; Metropolitan Transportation Planning

Part III

72 FR 7224

DATE: Wednesday, February 14, 2007

ACTION: Final rule.

SUMMARY: This final rule revises the regulations governing the development of metropolitan transportation plans and programs for urbanized areas, State transportation plans and programs and the regulations for Congestion Management Systems. The revision results from the passage of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005), which also incorporates changes initiated in its predecessor legislation, the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, June 9, 1998) and generally will make the regulations consistent with current statutory requirements.

EFFECTIVE DATE: March 16, 2007.

. . .

Appendix A to Part 450--Linking the Transportation Planning and NEPA Processes

Background and Overview:

This Appendix provides additional information to explain the linkage between the transportation planning and project development/National Environmental Policy Act (NEPA) processes. It is intended to be non-binding and should not be construed as a rule of general applicability.

For 40 years, the Congress has directed that federally-funded highway and transit projects must flow from metropolitan and statewide transportation planning processes (pursuant to *23 U.S.C. 134*-135 and *49 U.S.C. 5303-5306*). Over the years, the Congress has refined and strengthened the transportation planning process as the foundation for project decisions, emphasizing public involvement, consideration of environmental and other factors, and a Federal role that oversees the transportation planning process but does not second-guess the content of transportation plans and programs.

Despite this statutory emphasis on transportation planning, the environmental analyses produced to meet the requirements of the NEPA of 1969 (*42 U.S.C. 4231 et seq.*) have often been conducted *de novo,* disconnected from the analyses used to develop long-range transportation plans, statewide and metropolitan Transportation Improvement Programs (STIPs/TIPs), or planning-level corridor/subarea/feasibility studies. When the NEPA and transportation planning processes are not well coordinated, the NEPA process may lead to the development of information that is more appropriately developed in the planning process, resulting in duplication of work and delays in transportation improvements.

The purpose of this Appendix is to change this culture, by supporting congressional intent that statewide and metropolitan transportation planning should be the foundation for highway and transit project decisions. This Appendix was crafted to recognize that transportation planning processes vary across the country. This document provides details on how information, analysis, and products from transportation planning can be incorporated into and relied upon in NEPA documents under existing laws, regardless of when the Notice of Intent has been published. This Appendix presents environmental review as a continuum of sequential study, refinement, and expansion performed in transportation planning and during project development/NEPA, with information developed and conclusions drawn in early stages utilized in subsequent (and more detailed) review stages.

The information below is intended for use by State departments of transportation (State DOTs), metropolitan planning organizations (MPOs), and public transportation operators to clarify the circumstances under which transportation planning level choices and analyses can be adopted or incorporated into the process required by NEPA. Additionally, the FHWA and the FTA will work with Federal environmental, regulatory, and resource agencies to incorporate the principles of this Appendix in their day-to-day NEPA policies and procedures related to their involvement in highway and transit projects.

This Appendix does not extend NEPA requirements to transportation plans and programs. The Transportation Efficiency Act for the 21st Century (TEA-21) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) specifically exempted transportation plans and programs from NEPA review. Therefore, initiating the NEPA process as part of, or concurrently with, a [*7281] transportation planning study does not subject transportation plans and programs to NEPA.

Implementation of this Appendix by States, MPOs, and public transportation operators is voluntary. The degree to which studies, analyses, or conclusions from the transportation planning process can be incorporated into the project development/NEPA processes will depend upon how well they meet certain standards established by NEPA regulations and guidance. While some transportation planning processes already meet these standards, others will need some modification.

The remainder of this Appendix document utilizes a "Question and Answer" format, organized into three primary categories ("Procedural Issues," "Substantive Issues," and "Administrative Issues").

I. Procedural Issues:

1. In what format should the transportation planning information be included?

To be included in the NEPA process, work from the transportation planning process must be documented in a form that can be appended to the NEPA document or incorporated by reference. Documents may be incorporated by reference if they are readily available so as to not impede agency or public review of the action. Any document incorporated by reference must be "reasonably available for inspection by potentially interested persons within the time allowed for comment." Incorporated materials must be cited in the NEPA document and their contents briefly described, so that the reader understands why the document is cited and knows where to look for further information. To the extent possible, the documentation should be in a form such as official actions by the MPO, State DOT, or public transportation operator and/or correspondence within and among the organizations involved in the transportation planning process.

2. What is a reasonable level of detail for a planning product that is intended to be used in a NEPA document? How does this level of detail compare to what is considered a full NEPA analysis?

For purposes of transportation planning alone, a planning-level analysis does not need to rise to the level of detail required in the NEPA process. Rather, it needs to be accurate and up-to-date, and should adequately support recommended improvements in the statewide or metropolitan long-range transportation plan. The SAFETEA-LU requires transportation planning processes to focus on setting a context and following acceptable procedures. For example, the SAFETEA-LU requires a "discussion of the types of potential environmental mitigation activities" and potential areas for their implementation, rather than details on specific strategies. The SAFETEA-LU also emphasizes consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies.

However, the Environmental Assessment (EA) or Environmental Impact Statement (EIS) ultimately will be judged by the standards applicable under the NEPA regulations and guidance from the Council on Environmental Quality (CEQ). To the extent the information incorporated from the transportation planning process, standing alone, does not contain all of the information or analysis required by NEPA, then it will need to be supplemented by other information contained in the EIS or EA that would, in conjunction with the information from the plan, collectively meet the requirements of NEPA. The intent is not to require NEPA studies in the transportation planning process. As an option, the NEPA analyses prepared for project development can be integrated with transportation planning studies (see the response to Question 9 for additional information).

3. What type and extent of involvement from Federal, Tribal, State, and local environmental, regulatory, and resource agencies is needed in the transportation planning process in order for planning-level decisions to be more readily accepted in the NEPA process?

Sections 3005, 3006, and 6001 of the SAFETEA-LU established formal consultation requirements for MPOs and State DOTs to employ with environmental, regulatory, and resource agencies in the development of long-range transportation plans. For example, metropolitan transportation plans now "shall include a discussion of the types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the [transportation] plan," and that these planning-level discussions "shall be developed in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies." In addition, MPOs "shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of a long-range transportation plan," and that this consultation "shall involve, as appropriate, comparison of transportation plans with State conservation plans or maps, if available, or comparison of transportation plans to inventories of natural or historic resources, if available." Similar SAFETEA-LU language addresses the development of the long-range statewide transportation plan, with the addition of Tribal conservation plans or maps to this planning-level "comparison."

In addition, section 6002 of the SAFETEA-LU established several mechanisms for increased efficiency in environmental reviews for project decision-making. For example, the term "lead agency" collectively means the U. S. Department of Transportation and a State or local governmental entity serving as a joint lead agency for the NEPA process. In addition, the lead agency is responsible for inviting and designating "participating agencies" (i.e., other Federal or non-Federal agencies that may have an interest in the proposed project). Any Federal agency that is invited by the lead agency to participate in the environmental review process for a project shall be designated as a participating agency by the lead agency unless the invited agency informs the lead agency, in writing, by the deadline specified in the invitation that the invited agency:

(a) Has no jurisdiction or authority with respect to the project; (b) has no expertise or information relevant to the project; and (c) does not intend to submit comments on the project.

Past successful examples of using transportation planning products in NEPA analysis are based on early and continuous involvement of environmental, regulatory, and resource agencies. Without this early coordination, environmental, regulatory, and resource agencies are more likely to expect decisions made or analyses conducted in the transportation planning process to be revisited during the NEPA process. Early participation in transportation planning provides environmental, regulatory, and resource agencies better insight into the needs and objectives of the locality. Additionally, early participation provides an important opportunity for environmental, regulatory, and resource agency concerns to be identified and addressed early in the process, such as those related to permit applications. Moreover, Federal, Tribal, State, and local environmental, regulatory, and resource agencies are able to share data on particular resources, which can play a critical role in determining the feasibility of a transportation solution with respect to environmental impacts. The use of other agency planning outputs can result in a transportation project that could support multiple goals (transportation, environmental, and community). Further, planning decisions by these other agencies may have impacts on

long-range transportation plans and/or the STIP/TIP, thereby providing important input to the transportation planning process and advancing integrated decision-making.

4. What is the procedure for using decisions or analyses from the transportation planning process?

The lead agencies jointly decide, and must agree, on what processes and consultation techniques are used to determine the transportation planning products that will be incorporated into the NEPA process. At a minimum, a robust scoping/early coordination process (which explains to Federal and State environmental, regulatory, and resource agencies and the public the information and/or analyses utilized to develop the planning products, how the purpose and need was developed and refined, and how the design concept and scope were determined) should play a critical role in leading to informed decisions by the lead agencies on the suitability of the transportation planning information, analyses, documents, and decisions for use in the NEPA process. As part of a rigorous scoping/early coordination process, the FHWA and the FTA should ensure that the transportation planning results are appropriately documented, shared, and used.

5. To what extent can the FHWA/FTA provide up-front assurance that decisions and additional investments made in the transportation planning process will allow planning-level decisions and analyses to be used in the NEPA process? [*7282]

There are no guarantees. However, the potential is greatly improved for transportation planning processes that address the "3-C" planning principles (comprehensive, cooperative, and continuous); incorporate the intent of NEPA through the consideration of natural, physical, and social effects; involve environmental, regulatory, and resource agencies; thoroughly document the transportation planning process information, analysis, and decision; and vet the planning results through the applicable public involvement processes.

6. What considerations will the FHWA/FTA take into account in their review of transportation planning products for acceptance in project development/NEPA?

The FHWA and the FTA will give deference to decisions resulting from the transportation planning process if the FHWA and FTA determine that the planning process is consistent with the "3-C" planning principles and when the planning study process, alternatives considered, and resulting decisions have a rational basis that is thoroughly documented and vetted through the applicable public involvement processes. Moreover, any applicable program-specific requirements (e.g., those of the Congestion Mitigation and Air Quality Improvement Program or the FTA's Capital Investment Grant program) also must be met.

The NEPA requires that the FHWA and the FTA be able to stand behind the overall soundness and credibility of analyses conducted and decisions made during the transportation planning process if they are incorporated into a NEPA document. For example, if systems-level or other broad objectives or choices from the transportation plan are incorporated into the purpose and need statement for a NEPA document, the FHWA and the FTA should not revisit whether these are the best objectives or choices among other options. Rather, the FHWA and the FTA review would include making sure that objectives or choices derived from the transportation plan were: Based on transportation planning factors established by Federal law; reflect a credible and articulated planning rationale; founded on reliable data; and developed through transportation planning processes meeting FHWA and FTA statutory and regulatory requirements. In addition, the basis for the goals and choices must be documented and included in the NEPA document. The FHWA/FTA reviewers do not need to review whether assumptions or analytical methods used in the studies are the best available, but, instead, need to assure that such assumptions or analytical methods are reasonable, scientifically acceptable, and consistent with goals, objectives, and policies set forth in long-range transportation plans. This review would include determining whether: (a) Assumptions have a rational basis and are up-to-date and (b) data, analytical methods, and modeling techniques are reliable, defensible, reasonably current, and meet data quality requirements.

II. Substantive Issues

General Issues To Be Considered:

7. What should be considered in order to rely upon transportation planning studies in NEPA?

The following questions should be answered prior to accepting studies conducted during the transportation planning process for use in NEPA. While not a "checklist," these questions are intended to guide the practitioner's analysis of the planning products:

. How much time has passed since the planning studies and corresponding decisions were made?

. Were the future year policy assumptions used in the transportation planning process related to land use, economic development, transportation costs, and network expansion consistent with those to be used in the NEPA process?

. Is the information still relevant/valid?

. What changes have occurred in the area since the study was completed?

. Is the information in a format that can be appended to an environmental document or reformatted to do so?

. Are the analyses in a planning-level report or document based on data, analytical methods, and modeling techniques that are reliable, defensible, and consistent with those used in other regional transportation studies and project development activities?

. Were the FHWA and FTA, other agencies, and the public involved in the relevant planning analysis and the corresponding planning decisions?

. Were the planning products available to other agencies and the public during NEPA scoping?

. During NEPA scoping, was a clear connection between the decisions made in planning and those to be made during the project development stage explained to the public and others? What was the response?

. Are natural resource and land use plans being informed by transportation planning products, and vice versa?

Purpose and Need:

8. How can transportation planning be used to shape a project's purpose and need in the NEPA process?

A sound transportation planning process is the primary source of the project purpose and need. Through transportation planning, State and local governments, with involvement of stakeholders and the public, establish a vision for the region's future transportation system, define transportation goals and objectives for realizing that vision, decide which needs to address, and determine the timeframe for addressing these issues. The transportation planning process also provides a potential forum to define a project's purpose and need by framing the scope of the problem to be addressed by a proposed project. This scope may be further refined during the transportation planning process as more information about the transportation need is collected and consultation with the public and other stakeholders clarifies other issues and goals for the region.

23 U.S.C. 139(f), as amended by the SAFETEA-LU Section 6002, provides additional focus regarding the definition of the purpose and need and objectives. For example, the lead agency, as early as practicable during the environmental review process, shall provide an opportunity for involvement by participating agencies and the public in defining the purpose and need for a project. The statement of purpose and need shall include a clear statement of the objectives that the proposed action is intended to achieve, which may include: (a) Achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan; (b) supporting land use, economic development, or growth objectives established in applicable Federal, State, local, or Tribal plans; and (c) serving national defense, national security, or other national objectives, as established in Federal laws, plans, or policies.

The transportation planning process can be utilized to develop the purpose and need in the following ways:

(a) Goals and objectives from the transportation planning process may be part of the project's purpose and need statement;

(b) A general travel corridor or general mode or modes (e.g., highway, transit, or a highway/transit combination) resulting from planning analyses may be part of the project's purpose and need statement;

(c) If the financial plan for a metropolitan transportation plan indicates that funding for a specific project will require special funding sources (e.g., tolls or public-private financing), such information may be included in the purpose and need statement; or

(d) The results of analyses from management systems (e.g., congestion, pavement, bridge, and/or safety) may shape the purpose and need statement.

The use of these planning-level goals and choices must be appropriately explained during NEPA scoping and in the NEPA document.

Consistent with NEPA, the purpose and need statement should be a statement of a transportation problem, not a specific solution. However, the purpose and need statement should be specific enough to generate alternatives that may potentially yield real solutions to the problem at-hand. A purpose and need statement that yields only one alternative may indicate a purpose and need that is too narrowly defined.

Short of a fully integrated transportation decisionmaking process, many State DOTs develop information for their purpose and need statements when implementing interagency NEPA/Section 404 process merger agreements. These agreements may need to be expanded to include commitments to share and utilize transportation planning products when developing a project's purpose and need.

9. Under what conditions can the NEPA process be initiated in conjunction with transportation planning studies?

The NEPA process may be initiated in conjunction with transportation planning studies in a number of ways. A common method is the "tiered EIS," in which the first-tier EIS evaluates general travel corridors, modes, and/or packages of projects at a planning level of detail, leading to the refinement of purpose and need and, ideally, selection of the design concept and scope for a project or series of projects. Subsequently, second-tier NEPA review(s) of the resulting [*7283] projects would be performed in the usual way. The first-tier EIS uses the NEPA process as a tool to involve environmental, regulatory, and resource agencies and the public in the planning decisions, as well as to ensure the appropriate consideration of environmental factors in these planning decisions.

Corridor or subarea analyses/studies are another option when the long-range transportation plan leaves open the possibility of multiple approaches to fulfill its goals and objectives. In such cases, the formal NEPA process could be initiated through publication of a NOI in conjunction with a corridor or subarea planning study. Similarly, some public transportation operators developing major capital projects perform the mandatory planning Alternatives Analysis required for funding under FTA's Capital Investment Grant program [*49 U.S.C. 5309(d)* and (e)] within the NEPA process and combine the planning Alternatives Analysis with the draft EIS.

Alternatives:

10. In the context of this Appendix, what is the meaning of the term "alternatives"?

This Appendix uses the term "alternatives" as specified in the NEPA regulations (*40 CFR 1502.14*), where it is defined in its broadest sense to include everything from major modal alternatives and location alternatives to minor design changes that would mitigate adverse impacts. This Appendix does not use the term as it is used in many other contexts (e.g., "prudent and feasible alternatives" under Section 4(f) of the Department of Transportation Act, the "Least Environmentally Damaging Practicable Alternative" under the Clean Water Act, or the planning Alternatives Analysis in *49 U.S.C. 5309(d)* and (e)).

11. Under what circumstances can alternatives be eliminated from detailed consideration during the NEPA process based on information and analysis from the transportation planning process?

There are two ways in which the transportation planning process can begin limiting the alternative solutions to be evaluated during the NEPA process: (a) Shaping the purpose and need for the project; or (b) evaluating alternatives during planning studies and eliminating some of the alternatives from detailed study in the NEPA process prior to its start. Each approach requires careful attention, and is summarized below.

(a) *Shaping the Purpose and Need for the Project:* The transportation planning process should shape the purpose and need and, thereby, the range of reasonable alternatives. With proper documentation and public involvement, a purpose and need derived from the planning process can legitimately narrow the alternatives analyzed in the NEPA process. See the response to Question 8 for further discussion on how the planning process can shape the purpose and need used in the NEPA process.

For example, the purpose and need may be shaped by the transportation planning process in a manner that consequently narrows the range of alternatives that must be considered in detail in the NEPA document when:

(1) The transportation planning process has selected a *general travel corridor* as best addressing identified transportation problems and the rationale for the determination in the planning document is reflected in the purpose and need statement of the subsequent NEPA document;

(2) The transportation planning process has selected a *general mode* (e.g., highway, transit, or a highway/transit combination) that accomplishes its goals and objectives, and these documented determinations are reflected in the purpose and need statement of the subsequent NEPA document; or

(3) The transportation planning process determines that the project needs to be funded by *tolls or other non-traditional funding sources* in order for the long-range transportation plan to be fiscally constrained or identifies goals and objectives that can only be met by toll roads or other non-traditional funding sources, and that determination of those goals and objectives is reflected in the purpose and need statement of the subsequent NEPA document.

(b) *Evaluating and Eliminating Alternatives During the Transportation Planning Process:* The evaluation and elimination of alternatives during the transportation planning process can be incorporated by reference into a NEPA document under certain circumstances. In these cases, the planning study becomes part of the NEPA process and provides a basis for screening out alternatives. As with any part of the NEPA process, the analysis of alternatives to be incorporated from the process must have a rational basis that has been thoroughly documented (including documentation of the necessary and appropriate vetting through the applicable public involvement processes). This record should be made available for public review during the NEPA scoping process.

See responses to Questions 4, 5, 6, and 7 for additional elements to consider with respect to acceptance of planning products for NEPA documentation and the response to Question 12 on the information or analysis from the transportation planning process necessary for supporting the elimination of an alternative(s) from detailed consideration in the NEPA process.

For instance, under FTA's Capital Investment Grant program, the alternatives considered in the NEPA process may be narrowed in those instances that the planning Alternatives Analysis required by *49 U.S.C. 5309(e)* is conducted as a planning study prior to the NEPA review. In fact, the FTA may be able to narrow the alternatives considered in detail in the NEPA document to the No-Build (No Action) alternative and the Locally Preferred Alternative. Alternatives must meet the following criteria if they are deemed sufficiently considered by a planning Alternatives Analysis under FTA's Capital Investment Grant program conducted prior to NEPA without a programmatic NEPA analysis and documentation:

. During the planning Alternatives Analysis, all of the reasonable alternatives under consideration must be fully evaluated in terms of their transportation impacts; capital and operating costs; social, economic, and environmental impacts; and technical considerations;

. There must be appropriate public involvement in the planning Alternatives Analysis;

. The appropriate Federal, State, and local environmental, regulatory, and resource agencies must be engaged in the planning Alternatives Analysis;

. The results of the planning Alternatives Analysis must be documented;

. The NEPA scoping participants must agree on the alternatives that will be considered in the NEPA review; and

. The subsequent NEPA document must include the evaluation of alternatives from the planning Alternatives Analysis.

The above criteria apply specifically to FTA's Capital Investment Grant process. However, for other transportation projects, if the planning process has included the analysis and stakeholder involvement that would be undertaken in a first tier NEPA process, then the alternatives screening conducted in the transportation planning process may be incorporated by reference, described, and relied upon in the project-level NEPA document. At that point, the project-level NEPA analysis can focus on the remaining alternatives.

12. What information or analysis from the transportation planning process is needed in an EA or EIS to support the elimination of an alternative(s) from detailed consideration?

The section of the EA or EIS that discusses alternatives considered but eliminated from detailed consideration should:

(a) Identify any alternatives eliminated during the transportation planning process (this could include broad categories of alternatives, as when a long-range transportation plan selects a general travel corridor based on a corridor study, thereby eliminating all alternatives along other alignments);

(b) Briefly summarize the reasons for eliminating the alternative; and

(c) Include a summary of the analysis process that supports the elimination of alternatives (the summary should reference the relevant sections or pages of the analysis or study) and incorporate it by reference or append it to the NEPA document.

Any analyses or studies used to eliminate alternatives from detailed consideration should be made available to the public and participating agencies during the NEPA scoping process and should be reasonably available during comment periods.

Alternatives passed over during the transportation planning process because they are infeasible or do not meet the NEPA "purpose and need" can be omitted from the detailed analysis of alternatives in the NEPA document, as long as the rationale for elimination is explained in the NEPA document. Alternatives that remain "reasonable" after the planning-level analysis must be addressed in the EIS, even when they are not the preferred alternative. When the proposed action evaluated in an EA involves unresolved conflicts concerning alternative uses of available resources, NEPA requires that appropriate alternatives be studied, developed, and described.

Affected Environment and Environmental Consequences: [*7284]

13. What types of planning products provide analysis of the affected environment and environmental consequences that are useful in a project-level NEPA analysis and document?

The following planning products are valuable inputs to the discussion of the affected environment and environmental consequences (both its current state and future state in the absence of the proposed action) in the project-level NEPA analysis and document:

. Regional development and growth analyses;

. Local land use, growth management, or development plans; and

. Population and employment projections.

The following are types of information, analysis, and other products from the transportation planning process that can be used in the discussion of the affected environment and environmental consequences in an EA or EIS:

(a) Geographic information system (GIS) overlays showing the past, current, or predicted future conditions of the natural and built environments;

(b) Environmental scans that identify environmental resources and environmentally sensitive areas;

(c) Descriptions of airsheds and watersheds;

(d) Demographic trends and forecasts;

(e) Projections of future land use, natural resource conservation areas, and development; and

(f) The outputs of natural resource planning efforts, such as wildlife conservation plans, watershed plans, special area management plans, and multiple species habitat conservation plans.

However, in most cases, the assessment of the affected environment and environmental consequences conducted during the transportation planning process will not be detailed or current enough to meet NEPA standards and, thus, the inventory and evaluation of affected resources and the analysis of consequences of the alternatives will need to be supplemented with more refined analysis and possibly site-specific details during the NEPA process.

14. What information from the transportation planning process is useful in describing a baseline for the NEPA analysis of indirect and cumulative impacts?

Because the nature of the transportation planning process is to look broadly at future land use, development, population increases, and other growth factors, the planning analysis can provide the basis for the assessment of indirect and cumulative impacts required under NEPA. The consideration in the transportation planning process of development, growth, and consistency with local land use, growth management, or development plans, as well as population and employment projections, provides an overview of the multitude of factors in an area that are creating pressures not only on the transportation system, but on the natural ecosystem and important environmental and community resources. An analysis of all reasonably foreseeable actions in the area also should be a part of the transportation planning process.

This planning-level information should be captured and utilized in the analysis of indirect and cumulative impacts during the NEPA process.

To be used in the analysis of indirect and cumulative impacts, such information should:

(a) Be sufficiently detailed that differences in consequences of alternatives can be readily identified;

(b) Be based on current data (e.g., data from the most recent Census) or be updated by additional information;

(c) Be based on reasonable assumptions that are clearly stated; and/or

(d) Rely on analytical methods and modeling techniques that are reliable, defensible, and reasonably current.

Environmental Mitigation:

15. How can planning-level efforts best support advance mitigation, mitigation banking, and priorities for environmental mitigation investments?

A lesson learned from efforts to establish mitigation banks and advance mitigation agreements and alternative mitigation options is the importance of beginning interagency discussions during the transportation planning process. Development pressures, habitat alteration, complicated real estate transactions, and competition for potential mitigation sites by public and private project proponents can encumber the already difficult task of mitigating for "like" value and function and reinforce the need to examine mitigation strategies as early as possible.

Robust use of remote sensing, GIS, and decision support systems for evaluating conservation strategies are all contributing to the advancement of natural resource and environmental planning. The outputs from environmental planning can now better inform transportation planning processes, including the development of mitigation strategies, so that transportation and conservation goals can be optimally met. For example, long-range transportation plans can be screened to assess the effect of general travel corridors or density, on the viability of sensitive plant and animal species or habitats. This type of screening provides a basis for early collaboration among transportation and environmental staffs, the public, and regulatory agencies to explore areas where impacts must be avoided and identify areas for mitigation investments. This can lead to mitigation strategies that are both more economical and more effective from an environmental stewardship perspective than traditional project-specific mitigation measures.

III. Administrative Issues:

16. Are Federal funds eligible to pay for these additional, or more in depth, environmental studies in transportation planning?

Yes. For example, the following FHWA and FTA funds may be utilized for conducting environmental studies and analyses within transportation planning:

. FHWA planning and research funds, as defined under 23 CFR Part 420 (e.g., Metropolitan Planning (PL), Statewide Planning and Research (SPR), National Highway System (NHS), Surface Transportation Program (STP), and Equity Bonus); and

. FTA planning and research funds (*49 U.S.C. 5303* and *49 U.S.C. 5313(b)*), urban formula funds (*49 U.S.C. 5307*), and (in limited circumstances) transit capital investment funds (*49 U.S.C. 5309*).

The eligible transportation planning-related uses of these funds may include: (a) Conducting feasibility or subarea/corridor needs studies and (b) developing system-wide environmental information/inventories (e.g., wetland banking inventories or standards to identify historically significant sites). Particularly in the case of PL and SPR funds, the proposed expenditure must be closely related to the development of transportation plans and programs under *23 U.S.C. 134*-135 and *49 U.S.C. 5303-5306*.

For FHWA funding programs, once a general travel corridor or specific project has progressed to a point in the preliminary engineering/NEPA phase that clearly extends beyond transportation planning, additional in-depth environmental studies must be funded through the program category for which the ultimate project qualifies (e.g., NHS, STP, Interstate Maintenance, and/or Bridge), rather than PL or SPR funds.

Another source of funding is FHWA's Transportation Enhancement program, which may be used for activities such as: conducting archeological planning and research; developing inventories such as those for historic bridges and highways, and other surface transportation-related structures; conducting studies to determine the extent of water pollution

due to highway runoff; and conducting studies to reduce vehicle-caused wildlife mortality while maintaining habitat connectivity.

The FHWA and the FTA encourage State DOTs, MPOs, and public transportation operators to seek partners for some of these studies from environmental, regulatory, and resource agencies, non-government organizations, and other government and private sector entities with similar data needs, or environmental interests. In some cases, these partners may contribute data and expertise to the studies, as well as funding.

17. What staffing or organizational arrangements may be helpful in allowing planning products to be accepted in the NEPA process?

Certain organizational and staffing arrangements may support a more integrated approach to the planning/NEPA decision-making continuum. In many cases, planning organizations do not have environmental expertise on staff or readily accessible. Likewise, the review and regulatory responsibilities of many environmental, regulatory, and resource agencies make involvement in the transportation planning process a challenge for staff resources. These challenges may be partially met by improved use of the outputs of each agency's planning resources and by augmenting their capabilities through greater use of GIS and remote sensing technologies (see *http://www.gis.fhwa.dot.gov/* for additional information on the use of GIS). Sharing databases and the planning products of local land use decision-makers and State and Federal environmental, regulatory, and [*7285] resource agencies also provide efficiencies in acquiring and sharing the data and information needed for both transportation planning and NEPA work.

Additional opportunities such as shared staff, training across disciplines, and (in some cases) reorganizing to eliminate structural divisions between planning and NEPA practitioners may also need to be considered in order to better integrate NEPA considerations into transportation planning studies. The answers to the following two questions also contain useful information on training and staffing opportunities.

18. How have environmental, regulatory, and resource agency liaisons (Federally- and State DOT-funded positions) and partnership agreements been used to provide the expertise and interagency participation needed to enhance the consideration of environmental factors in the planning process?

For several years, States have utilized Federal and State transportation funds to support focused and accelerated project review by a variety of local, State, Tribal, and Federal agencies. While Section 1309(e) of the TEA-21 and its successor in SAFETEA-LU section 6002 speak specifically to transportation project streamlining, there are other authorities that have been used to fund positions, such as the Intergovernmental Cooperation Act (*31 U.S.C. 6505*). In addition, long-term, on-call consultant contracts can provide backfill support for staff that are detailed to other parts of an agency for temporary assignments. At last count (as of 2003), 246 positions were being funded. Additional information on interagency funding agreements is available at: *http://environment.fhwa.dot.gov/strmlng/igdocs/index.htm*.

Moreover, every State has advanced a variety of stewardship and streamlining initiatives that necessitate early involvement of environmental, regulatory, and resource agencies in the project development process. Such process improvements have: addressed the exchange of data to support avoidance and impact analysis; established formal and informal consultation and review schedules; advanced mitigation strategies; and resulted in a variety of programmatic reviews. Interagency agreements and workplans have evolved to describe performance objectives, as well as specific roles and responsibilities related to new streamlining initiatives. Some States have improved collaboration and efficiency by co-locating environmental, regulatory, and resource and transportation agency staff.

19. What training opportunities are available to MPOs, State DOTs, public transportation operators and environmental, regulatory, and resource agencies to assist in their understanding of the transportation planning and NEPA processes?

Both the FHWA and the FTA offer a variety of transportation planning, public involvement, and NEPA courses through the National Highway Institute and/or the National Transit Institute. Of particular note is the Linking Planning and NEPA Workshop, which provides a forum and facilitated group discussion among and between State DOT; MPO; Federal, Tribal, and State environmental, regulatory, and resource agencies; and FHWA/FTA representatives (at both the executive and program manager levels) to develop a State-specific action plan that will provide for strengthened linkages between the transportation planning and NEPA processes.

Moreover, the U.S. Fish and Wildlife Service offers Green Infrastructure Workshops that are focused on integrating planning for natural resources ("green infrastructure") with the development, economic, and other infrastructure needs of society ("gray infrastructure").

Robust planning and multi-issue environmental screening requires input from a wide variety of disciplines, including information technology; transportation planning; the NEPA process; and regulatory, permitting, and environmental specialty areas (e.g., noise, air quality, and biology). Senior managers at transportation and partner agencies can arrange a variety of individual training programs to support learning curves and skill development that contribute to a strengthened link of the transportation planning and NEPA processes. Formal and informal mentoring on an intra-agency basis can be arranged. Employee exchanges within and between agencies can be periodically scheduled, and persons involved with professional leadership programs can seek temporary assignments with partner agencies.

IV. Additional Information on this Topic

Valuable sources of information are FHWA's environment website (*http://www.fhwa.dot.gov/environment/index.htm*) and FTA's environmental streamlining website (*http://www.environment.fta.dot.gov*). Another source of information and case studies is NCHRP Report 8-38 (Consideration of Environmental Factors in Transportation Systems Planning), which is available at *http://www4.trb.org/trb/crp.nsf/All+Projects/NCHRP+8-38*. In addition, AASHTO's Center for Environmental Excellence website is continuously updated with news and links to information of interest to transportation and environmental professionals (*www.transportation.environment.org*).

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23 CFR Parts 450 and 500

49 CFR Part 613

[Docket No. FHWA-2005-22986]

RIN 2125-AF09; FTA RIN 2132-AA82

Statewide Transportation Planning; Metropolitan Transportation Planning

Part III

72 FR 7224

DATE: Wednesday, February 14, 2007

ACTION: Final rule.

SUMMARY: This final rule revises the regulations governing the development of metropolitan transportation plans and programs for urbanized areas, State transportation plans and programs and the regulations for Congestion Management Systems. The revision results from the passage of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005), which also incorporates changes initiated in its predecessor legislation, the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, June 9, 1998) and generally will make the regulations consistent with current statutory requirements.

EFFECTIVE DATE: March 16, 2007.

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23 C.F.R. § 450.212 Transportation planning studies and project development.

(a) Pursuant to section 1308 of the Transportation Equity Act for the 21st Century, TEA-21 (Pub. L. 105-178), a State(s), MPO(s), or public transportation operator(s) may undertake a multimodal, systems-level corridor or subarea planning study as part of the statewide transportation planning process. To the extent practicable, development of these transportation planning studies shall involve consultation with, or joint efforts among, the State(s), MPO(s), and/or public transportation operator(s). The results or decisions of these transportation planning studies may be used as part of the

overall project development process consistent with the National Environmental Policy Act (NEPA) of 1969 (*42 U.S.C. 4321 et seq.*) and associated implementing regulations (23 CFR part 771 and 40 CFR parts 1500-1508). Specifically, these corridor or subarea studies may result in producing any of the following for a proposed transportation project:

(1) Purpose and need or goals and objective statement(s);

(2) General travel corridor and/or general mode(s) definition (e.g., highway, transit, or a highway/transit combination);

(3) Preliminary screening of alternatives and elimination of unreasonable alternatives;

(4) Basic description of the environmental setting; and/or

(5) Preliminary identification of environmental impacts and environmental mitigation.

(b) Publicly available documents or other source material produced by, or in support of, the transportation planning process described in this subpart may be incorporated directly or by reference into subsequent NEPA documents, in accordance with *40 CFR 1502.21*, if:

(1) The NEPA lead agencies agree that such incorporation will aid in establishing or evaluating the purpose and need for the Federal action, reasonable alternatives, cumulative or other impacts on the human and natural environment, or mitigation of these impacts; and

(2) The systems-level, corridor, or subarea planning study is conducted with:

(i) Involvement of interested State, local, Tribal, and Federal agencies;

(ii) Public review;

(iii) Reasonable opportunity to comment during the statewide transportation planning process and development of the corridor or subarea planning study;

(iv) Documentation of relevant decisions in a form that is identifiable and available for review during the NEPA scoping process and can be appended to or referenced in the NEPA document; and

(v) The review of the FHWA and the FTA, as appropriate.

(c) By agreement of the NEPA lead agencies, the above integration may be accomplished through tiering (as described in *40 CFR 1502.20*), incorporating the subarea or corridor planning study into the draft Environmental Impact Statement or Environmental Assessment, or other means that the NEPA lead agencies deem appropriate. Additional information to further explain the linkages between the transportation planning and project development/NEPA processes is contained in Appendix A to this part, including an explanation that is non-binding guidance material.

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EFFECTIVE DATE: March 16, 2007.

. . .

23 C.F.R. § 450.318 Transportation planning studies and project development.

(a) Pursuant to section 1308 of the Transportation Equity Act for the 21st Century, TEA-21 (Pub. L. 105-178), an MPO(s), State(s), or public transportation operator(s) may undertake a multimodal, systems-level corridor or subarea planning study as part of the metropolitan transportation planning process. To the extent practicable, development of these transportation planning studies shall involve consultation with, or joint efforts among, the MPO(s), State(s), and/or public transportation operator(s). The results or decisions of these transportation planning studies may be used as

part of the overall project development process consistent with the National Environmental Policy Act (NEPA) of 1969 (*42 U.S.C. 4321 et seq.*) and associated implementing regulations (23 CFR part 771 and 40 CFR parts 1500-1508). Specifically, these corridor or subarea studies may result in producing any of the following for a proposed transportation project:

(1) Purpose and need or goals and objective statement(s);

(2) General travel corridor and/or general mode(s) definition (e.g., highway, transit, or a highway/transit combination);

(3) Preliminary screening of alternatives and elimination of unreasonable alternatives;

(4) Basic description of the environmental setting; and/or

(5) Preliminary identification of environmental impacts and environmental mitigation.

(b) Publicly available documents or other source material produced by, or in support of, the transportation planning process described in this subpart may be incorporated directly or by reference into subsequent NEPA documents, in accordance with *40 CFR 1502.21*, if:

(1) The NEPA lead agencies agree that such incorporation will aid in establishing or evaluating the purpose and need for the Federal action, reasonable alternatives, cumulative or other impacts on the human and natural environment, or mitigation of these impacts; and

(2) The systems-level, corridor, or subarea planning study is conducted with:

(i) Involvement of interested State, local, Tribal, and Federal agencies;

(ii) Public review;

(iii) Reasonable opportunity to comment during the metropolitan transportation planning process and development of the corridor or subarea planning study;

(iv) Documentation of relevant decisions in a form that is identifiable and available for review during the NEPA scoping process and can be appended to or referenced in the NEPA document; and

(v) The review of the FHWA and the FTA, as appropriate.

(c) By agreement of the NEPA lead agencies, the above integration may be accomplished through tiering (as described in *40 CFR 1502.20*), incorporating the subarea or corridor planning study into the draft Environmental Impact Statement (EIS) or Environmental Assessment, or other means that the NEPA lead agencies deem appropriate.

(d) For transit fixed guideway projects requiring an Alternatives Analysis (*49 U.S.C. 5309(d)* and (e)), the Alternatives Analysis described in 49 CFR part 611 constitutes the planning required by section 1308 of the TEA-21. The Alternatives Analysis may or may not be combined with the preparation of a NEPA document (e.g., a draft EIS). When an Alternatives Analysis is separate from the preparation of a NEPA document, the results of the Alternatives Analysis may be used during a subsequent environmental review process as described in paragraph (a).

(e) Additional information to further explain the linkages between the transportation planning and project development/NEPA processes is contained in Appendix A to this part, including an explanation that it is non-binding guidance material.

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EFFECTIVE DATE: March 16, 2007.

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23 C.F.R. § 450.322 Development and content of the metropolitan transportation plan.

(a) The metropolitan transportation planning process shall include the development of a transportation plan addressing no less than a 20-year planning horizon as of the effective date. In nonattainment and maintenance areas, the effective date of the transportation plan shall be the date of a conformity determination issued by the FHWA and the FTA. In attainment areas, the effective date of the transportation plan shall be its date of adoption by the MPO.

(b) The transportation plan shall include both long-range and short-range strategies/actions that lead to the development of an integrated multimodal transportation system to facilitate the safe and efficient movement of people and goods in addressing current and future transportation demand.

(c) The MPO shall review and update the transportation plan at least every four years in air quality nonattainment and maintenance areas and at least every five years in attainment areas to confirm the transportation plan's validity and consistency with current and forecasted transportation and land use conditions and trends and to extend the forecast period to at least a 20-year planning horizon. In addition, the MPO may revise the transportation plan at any time using the procedures in this section without a requirement to extend the horizon year. The transportation plan (and any revisions) shall be approved by the MPO and submitted for information purposes to the Governor. Copies of any updated or revised transportation plans must be provided to the FHWA and the FTA.

(d) In metropolitan areas that are in nonattainment for ozone or carbon monoxide, the MPO shall coordinate the development of the metropolitan transportation plan with the process for developing transportation control measures (TCMs) in a State Implementation Plan (SIP).

(e) The MPO, the State(s), and the public transportation operator(s) shall validate data utilized in preparing other existing modal plans for providing input to the transportation plan. In updating the transportation plan, the MPO shall base the update on the latest available estimates and assumptions for population, land use, travel, employment, congestion, and economic activity. The MPO shall approve transportation plan contents and supporting analyses produced by a transportation plan update.

(f) The metropolitan transportation plan shall, at a minimum, include:

(1) The projected transportation demand of persons and goods in the metropolitan planning area over the period of the transportation plan;

(2) Existing and proposed transportation facilities (including major roadways, transit, multimodal and intermodal facilities, pedestrian walkways and bicycle facilities, and intermodal connectors) that should function as an integrated metropolitan transportation system, giving emphasis to those facilities that serve important national and regional transportation functions over the period of the transportation plan. In addition, the locally preferred alternative selected from an Alternatives Analysis under the FTA's Capital Investment Grant program (*49 U.S.C. 5309* and 49 CFR part 611) needs to be adopted as part of the metropolitan transportation plan as a condition for funding under *49 U.S.C. 5309*;

(3) Operational and management strategies to improve the performance of existing transportation facilities to relieve vehicular congestion and maximize the safety and mobility of people and goods;

(4) Consideration of the results of the congestion management process in TMAs that meet the requirements of this subpart, including the identification of SOV projects that result from a congestion management process in TMAs that are nonattainment for ozone or carbon monoxide;

(5) Assessment of capital investment and other strategies to preserve the existing and projected future metropolitan transportation [*7276] infrastructure and provide for multimodal capacity increases based on regional priorities and needs. The metropolitan transportation plan may consider projects and strategies that address areas or corridors where current or projected congestion threatens the efficient functioning of key elements of the metropolitan area's transportation system;

(6) Design concept and design scope descriptions of all existing and proposed transportation facilities in sufficient detail, regardless of funding source, in nonattainment and maintenance areas for conformity determinations under the EPA's transportation conformity rule (40 CFR part 93). In all areas (regardless of air quality designation), all proposed improvements shall be described in sufficient detail to develop cost estimates;

(7) A discussion of types of potential environmental mitigation activities and potential areas to carry out these activities, including activities that may have the greatest potential to restore and maintain the environmental functions affected by the metropolitan transportation plan. The discussion may focus on policies, programs, or strategies, rather than at the project level. The discussion shall be developed in consultation with Federal, State, and Tribal land management, wildlife, and regulatory agencies. The MPO may establish reasonable timeframes for performing this consultation;

(8) Pedestrian walkway and bicycle transportation facilities in accordance with *23 U.S.C. 217(g)*;

(9) Transportation and transit enhancement activities, as appropriate; and

(10) A financial plan that demonstrates how the adopted transportation plan can be implemented.

(i) For purposes of transportation system operations and maintenance, the financial plan shall contain system-level estimates of costs and revenue sources that are reasonably expected to be available to adequately operate and maintain Federal-aid highways (as defined by *23 U.S.C. 101(a)(5)*) and public transportation (as defined by title 49 U.S.C. Chapter 53).

(ii) For the purpose of developing the metropolitan transportation plan, the MPO, public transportation operator(s), and State shall cooperatively develop estimates of funds that will be available to support metropolitan transportation plan implementation, as required under § 450.314(a). All necessary financial resources from public and private sources that are reasonably expected to be made available to carry out the transportation plan shall be identified.

(iii) The financial plan shall include recommendations on any additional financing strategies to fund projects and programs included in the metropolitan transportation plan. In the case of new funding sources, strategies for ensuring their availability shall be identified.

(iv) In developing the financial plan, the MPO shall take into account all projects and strategies proposed for funding under title *23 U.S.C.*, *title 49* U.S.C. Chapter 53 or with other Federal funds; State assistance; local sources; and private participation. Starting December 11, 2007, revenue and cost estimates that support the metropolitan transportation plan must use an inflation rate(s) to reflect "year of expenditure dollars," based on reasonable financial principles and information, developed cooperatively by the MPO, State(s), and public transportation operator(s).

(v) For the outer years of the metropolitan transportation plan (i.e., beyond the first 10 years), the financial plan may reflect aggregate cost ranges/cost bands, as long as the future funding source(s) is reasonably expected to be available to support the projected cost ranges/cost bands.

(vi) For nonattainment and maintenance areas, the financial plan shall address the specific financial strategies required to ensure the implementation of TCMs in the applicable SIP.

(vii) For illustrative purposes, the financial plan may (but is not required to) include additional projects that would be included in the adopted transportation plan if additional resources beyond those identified in the financial plan were to become available.

(viii) In cases that the FHWA and the FTA find a metropolitan transportation plan to be fiscally constrained and a revenue source is subsequently removed or substantially reduced (i.e., by legislative or administrative actions), the FHWA and the FTA will not withdraw the original determination of fiscal constraint; however, in such cases, the FHWA and the FTA will not act on an updated or amended metropolitan transportation plan that does not reflect the changed revenue situation.

(g) The MPO shall consult, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of the transportation plan. The consultation shall involve, as appropriate:

(1) Comparison of transportation plans with State conservation plans or maps, if available; or

(2) Comparison of transportation plans to inventories of natural or historic resources, if available.

(h) The metropolitan transportation plan should include a safety element that incorporates or summarizes the priorities, goals, countermeasures, or projects for the MPA contained in the Strategic Highway Safety Plan required under *23 U.S.C. 148*, as well as (as appropriate) emergency relief and disaster preparedness plans and strategies and policies that support homeland security (as appropriate) and safeguard the personal security of all motorized and non-motorized users.

(i) The MPO shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on the transportation plan using the participation plan developed under § 450.316(a).

(j) The metropolitan transportation plan shall be published or otherwise made readily available by the MPO for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web.

(k) A State or MPO shall not be required to select any project from the illustrative list of additional projects included in the financial plan under paragraph (f)(10) of this section.

(l) In nonattainment and maintenance areas for transportation-related pollutants, the MPO, as well as the FHWA and the FTA, must make a conformity determination on any updated or amended transportation plan in accordance with the Clean Air Act and the EPA transportation conformity regulations (40 CFR part 93). During a conformity lapse, MPOs can prepare an interim metropolitan transportation plan as a basis for advancing projects that are eligible to proceed under a conformity lapse. An interim metropolitan transportation plan consisting of eligible projects from, or consistent with, the most recent conforming transportation plan and TIP may proceed immediately without revisiting the requirements of this section, subject to interagency consultation defined in 40 CFR part 93. An interim metropolitan transportation [*7277] plan containing eligible projects that are not from, or consistent with, the most recent conforming transportation plan and TIP must meet all the requirements of this section.

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EFFECTIVE DATE: March 16, 2007.

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23 C.F.R. § 450.324 Development and content of the transportation improvement program (TIP).

(a) The MPO, in cooperation with the State(s) and any affected public transportation operator(s), shall develop a TIP for the metropolitan planning area. The TIP shall cover a period of no less than four years, be updated at least every four years, and be approved by the MPO and the Governor. However, if the TIP covers more than four years, the FHWA and the FTA will consider the projects in the additional years as informational. The TIP may be updated more frequently, but the cycle for updating the TIP must be compatible with the STIP development and approval process. The

TIP expires when the FHWA/FTA approval of the STIP expires. Copies of any updated or revised TIPs must be provided to the FHWA and the FTA. In nonattainment and maintenance areas subject to transportation conformity requirements, the FHWA and the FTA, as well as the MPO, must make a conformity determination on any updated or amended TIP, in accordance with the Clean Air Act requirements and the EPA's transportation conformity regulations (40 CFR part 93).

(b) The MPO shall provide all interested parties with a reasonable opportunity to comment on the proposed TIP as required by § 450.316(a). In addition, in nonattainment area TMAs, the MPO shall provide at least one formal public meeting during the TIP development process, which should be addressed through the participation plan described in § 450.316(a). In addition, the TIP shall be published or otherwise made readily available by the MPO for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the World Wide Web, as described in § 450.316(a).

(c) The TIP shall include capital and non-capital surface transportation projects (or phases of projects) within the boundaries of the metropolitan planning area proposed for funding under 23 U.S.C. and 49 U.S.C. Chapter 53 (including transportation enhancements; Federal Lands Highway program projects; safety projects included in the State's Strategic Highway Safety Plan; trails projects; pedestrian walkways; and bicycle facilities), except the following that may (but are not required to) be included:

(1) Safety projects funded under *23 U.S.C. 402* and *49 U.S.C. 31102*;

(2) Metropolitan planning projects funded under *23 U.S.C. 104(f), 49 U.S.C. 5305(d)*, and *49 U.S.C. 5339*;

(3) State planning and research projects funded under *23 U.S.C. 505* and *49 U.S.C. 5305(e)*;

(4) At the discretion of the State and MPO, State planning and research projects funded with National Highway System, Surface Transportation Program, and/or Equity Bonus funds;

(5) Emergency relief projects (except those involving substantial functional, locational, or capacity changes);

(6) National planning and research projects funded under *49 U.S.C. 5314*; and

(7) Project management oversight projects funded under *49 U.S.C. 5327*.

(d) The TIP shall contain all regionally significant projects requiring an action by the FHWA or the FTA whether or not the projects are to be funded under title 23 U.S.C. Chapters 1 and 2 or title 49 U.S.C. Chapter 53 (e.g., addition of an interchange to the Interstate System with State, local, and/or private funds and congressionally designated projects not funded under *23 U.S.C. or 49* U.S.C. Chapter 53). For public information and conformity purposes, the TIP shall include all regionally significant projects proposed to be funded with Federal funds other than those administered by the FHWA or the FTA, as well as all regionally significant projects to be funded with non-Federal funds.

(e) The TIP shall include, for each project or phase (e.g., preliminary engineering, environment/NEPA, right-of-way, design, or construction), the following:

(1) Sufficient descriptive material (i.e., type of work, termini, and length) to identify the project or phase;

(2) Estimated total project cost, which may extend beyond the four years of the TIP;

(3) The amount of Federal funds proposed to be obligated during each program year for the project or phase (for the first year, this includes the proposed category of Federal funds and source(s) of non-Federal funds. For the second, third, and fourth years, this includes the likely category or possible categories of Federal funds and sources of non-Federal funds);

(4) Identification of the agencies responsible for carrying out the project or phase;

(5) In nonattainment and maintenance areas, identification of those projects which are identified as TCMs in the applicable SIP;

(6) In nonattainment and maintenance areas, included projects shall be specified in sufficient detail (design concept and scope) for air quality analysis in accordance with the EPA transportation conformity regulation (40 CFR part 93); and

(7) In areas with Americans with Disabilities Act required paratransit and key station plans, identification of those projects that will implement these plans.

(f) Projects that are not considered to be of appropriate scale for individual identification in a given program year may be grouped by function, work type, and/or geographic area using the applicable classifications under *23 CFR 771.117(c)* and (d) and/or 40 CFR part 93. In nonattainment and maintenance areas, project classifications must be consistent with the "exempt project" classifications contained in the EPA transportation conformity regulation (40 CFR part 93). In addition, projects proposed for funding under title 23 U.S.C. Chapter 2 that are not regionally significant may be grouped in one line item or identified individually in the TIP.

(g) Each project or project phase included in the TIP shall be consistent with the approved metropolitan transportation plan.

(h) The TIP shall include a financial plan that demonstrates how the approved TIP can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the TIP, and recommends any additional financing strategies for needed projects and programs. In developing the TIP, the MPO, State(s), and public transportation operator(s) shall cooperatively develop estimates of funds that are reasonably expected to be available to support TIP implementation, in accordance with § 450.314(a). Only projects for which construction or operating funds can reasonably be expected to be available may be included. In the case of new funding sources, strategies for ensuring their availability shall be identified. In developing the financial plan, the MPO shall take into account all projects and strategies funded under title *23 U.S.C., title 49* U.S.C. Chapter 53 and other Federal funds; and regionally significant projects that are not federally funded. For purposes of transportation operations and maintenance, the financial plan shall contain system-level estimates of costs and revenue sources that are reasonably expected to be available to adequately operate and maintain Federal-aid highways (as defined by *23 U.S.C. 101(a)(5)*) and [*7278] public transportation (as defined by title 49 U.S.C. Chapter 53). In addition, for illustrative purposes, the financial plan may (but is not required to) include additional projects that would be included in the TIP if reasonable additional resources beyond those identified in the financial plan were to become available. Starting [Insert date 270 days after effective date], revenue and cost estimates for the TIP must use an inflation rate(s) to reflect "year of expenditure dollars," based on reasonable financial principles and information, developed cooperatively by the MPO, State(s), and public transportation operator(s).

(i) The TIP shall include a project, or a phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project. In nonattainment and maintenance areas, projects included in the first two years of the TIP shall be limited to those for which funds are available or committed. For the TIP, financial constraint shall be demonstrated and maintained by year and shall include sufficient financial information to demonstrate which projects are to be implemented using current and/or reasonably available revenues, while federally supported facilities are being adequately operated and maintained. In the case of proposed funding sources, strategies for ensuring their availability shall be identified in the financial plan consistent with paragraph (h) of this section. In nonattainment and maintenance areas, the TIP shall give priority to eligible TCMs identified in the approved SIP in accordance with the EPA transportation conformity regulation (40 CFR part 93) and shall provide for their timely implementation.

(j) Procedures or agreements that distribute suballocated Surface Transportation Program funds or funds under *49 U.S.C. 5307* to individual jurisdictions or modes within the MPA by pre-determined percentages or formulas are inconsistent with the legislative provisions that require the MPO, in cooperation with the State and the public transportation operator, to develop a prioritized and financially constrained TIP and shall not be used unless they can be clearly shown to be based on considerations required to be addressed as part of the metropolitan transportation planning process.

(k) For the purpose of including projects funded under *49 U.S.C. 5309* in a TIP, the following approach shall be followed:

(1) The total Federal share of projects included in the first year of the TIP shall not exceed levels of funding committed to the MPA; and

(2) The total Federal share of projects included in the second, third, fourth, and/or subsequent years of the TIP may not exceed levels of funding committed, or reasonably expected to be available, to the MPA.

(l) As a management tool for monitoring progress in implementing the transportation plan, the TIP should:

(1) Identify the criteria and process for prioritizing implementation of transportation plan elements (including multimodal trade-offs) for inclusion in the TIP and any changes in priorities from previous TIPs;

(2) List major projects from the previous TIP that were implemented and identify any significant delays in the planned implementation of major projects; and

(3) In nonattainment and maintenance areas, describe the progress in implementing any required TCMs, in accordance with 40 CFR part 93.

(m) During a conformity lapse, MPOs may prepare an interim TIP as a basis for advancing projects that are eligible to proceed under a conformity lapse. An interim TIP consisting of eligible projects from, or consistent with, the most recent conforming metropolitan transportation plan and TIP may proceed immediately without revisiting the requirements of this section, subject to interagency consultation defined in 40 CFR part 93. An interim TIP containing eligible projects that are not from, or consistent with, the most recent conforming transportation plan and TIP must meet all the requirements of this section.

(n) Projects in any of the first four years of the TIP may be advanced in place of another project in the first four years of the TIP, subject to the project selection requirements of § 450.330. In addition, the TIP may be revised at any time under procedures agreed to by the State, MPO(s), and public transportation operator(s) consistent with the TIP development procedures established in this section, as well as the procedures for the MPO participation plan (see § 450.316(a)) and FHWA/FTA actions on the TIP (see § 450.328).

(o) In cases that the FHWA and the FTA find a TIP to be fiscally constrained and a revenue source is subsequently removed or substantially reduced (i.e., by legislative or administrative actions), the FHWA and the FTA will not withdraw the original determination of fiscal constraint. However, in such cases, the FHWA and the FTA will not act on an updated or amended TIP that does not reflect the changed revenue situation.

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ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of February 28, 2017

Title 23 → Chapter I → Subchapter H → Part 771 → §771.111

Title 23: Highways
PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

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§771.111 Early coordination, public involvement, and project development.

(a)(1) Early coordination with appropriate agencies and the public aids in determining the type of environmental review documents an action requires, the scope of the document, the level of analysis, and related environmental requirements. This involves the exchange of information from the inception of a proposal for action to preparation of the environmental review documents. Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified. When requested, the Administration will advise the applicant, insofar as possible, of the probable class of action and related environmental laws and requirements and of the need for specific studies and findings which would normally be developed concurrently with the environmental review documents.

(2) The information and results produced by, or in support of, the transportation planning process may be incorporated into environmental review documents in accordance with 40 CFR 1502.21, and 23 CFR 450.212(b) or 450.318(b). In addition, planning products may be adopted and used in accordance with 23 CFR 450.212(d) or 450.318(e), which implement 23 U.S.C. 168.

(b) The Administration will identify the probable class of action as soon as sufficient information is available to identify the probable impacts of the action.

(c) When both the FHWA and FTA are involved in the development of a project, or when the FHWA or FTA acts as a joint lead agency with another Federal agency, a mutually acceptable process will be established on a case-by-case basis.

(d) During the early coordination process, the lead agencies may request other agencies having an interest in the action to participate, and must invite such agencies if the action is subject to the project development procedures in 23 U.S.C. 139.[3] Agencies with special expertise may be invited to become cooperating agencies. Agencies with jurisdiction by law must be requested to become cooperating agencies.

[3]The FHWA and FTA have developed guidance on 23 U.S.C. Section 139 titled “SAFETEA-LU Environmental Review Process: Final Guidance,” November 15, 2006, and available at *http://www.fhwa.dot.gov* or in hard copy upon request.

(e) Other States, and Federal land management entities, that may be significantly affected by the action or by any of the alternatives shall be notified early and their views solicited by the applicant in cooperation with the Administration. The Administration will prepare a written evaluation of any significant unresolved issues and furnish it to the applicant for incorporation into the environmental assessment (EA) or draft EIS.

(f) In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, the action evaluated in each EIS or finding of no significant impact (FONSI) shall:

(1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;

(2) Have independent utility or independent significance, *i.e.*, be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and

(3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

(g) For major transportation actions, the tiering of EISs as discussed in the CEQ regulation (40 CFR 1502.20) may be appropriate. The first tier EIS would focus on broad issues such as general location, mode choice, and areawide air quality and land use implications of the major alternatives. The second tier would address site-specific details on project impacts, costs, and mitigation measures.

(h) For the Federal-aid highway program:

(1) Each State must have procedures approved by the FHWA to carry out a public involvement/public hearing program pursuant to 23 U.S.C. 128 and 139 and CEQ regulation.

(2) State public involvement/public hearing procedures must provide for:

(i) Coordination of public involvement activities and public hearings with the entire NEPA process.

(ii) Early and continuing opportunities during project development for the public to be involved in the identification of social, economic, and environmental impacts, as well as impacts associated with relocation of individuals, groups, or institutions.

(iii) One or more public hearings or the opportunity for hearing(s) to be held by the State highway agency at a convenient time and place for any Federal-aid project which requires significant amounts of right-of-way, substantially changes the layout or functions of connecting roadways or of the facility being improved, has a substantial adverse impact on abutting property, otherwise has a significant social, economic, environmental or other effect, or for which the FHWA determines that a public hearing is in the public interest.

(iv) Reasonable notice to the public of either a public hearing or the opportunity for a public hearing. Such notice will indicate the availability of explanatory information. The notice shall also provide information required to comply with public involvement requirements of other laws, Executive orders, and regulations.

(v) Explanation at the public hearing of the following information, as appropriate:

(A) The project's purpose, need, and consistency with the goals and objectives of any local urban planning,

(B) The project's alternatives, and major design features,

(C) The social, economic, environmental, and other impacts of the project,

(D) The relocation assistance program and the right-of-way acquisition process.

(E) The State highway agency's procedures for receiving both oral and written statements from the public.

(vi) Submission to the FHWA of a transcript of each public hearing and a certification that a required hearing or hearing opportunity was offered. The transcript will be accompanied by copies of all written statements from the public, both submitted at the public hearing or during an announced period after the public hearing.

(vii) An opportunity for public involvement in defining the purpose and need and the range of alternatives, for any action subject to the project development procedures in 23 U.S.C. 139.

(viii) Public notice and an opportunity for public review and comment on a Section 4(f) *de minimis* impact finding, in accordance with 49 U.S.C. 303(d).[4]

[4]The FHWA and FTA have developed guidance on Section 4(f) de minimis impact findings titled “Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources,” December 13, 2005, which is available at *http://www.fhwa.dot.gov* or in hard copy upon request.

(3) Based on the reevaluation of project environmental documents required by §771.129, the FHWA and the State highway agency will determine whether changes in the project or new information warrant additional public involvement.

(4) Approvals or acceptances of public involvement/public hearing procedures prior to the publication date of this regulation remain valid.

(i) Applicants for capital assistance in the FTA program:

(1) Achieve public participation on proposed projects through activities that engage the public, including public hearings, town meetings, and charettes, and seeking input from the public through the scoping process for environmental review documents. Project milestones may be announced to the public using electronic or paper media (e.g., newsletters, note cards, or emails) pursuant to 40 CFR 1506.6. For projects requiring EISs, an early opportunity for public involvement in defining the purpose and need for action and the range of alternatives must be provided, and a public hearing will be held during the circulation period of the draft EIS. For other projects that substantially affect the community or its public transportation service, an adequate opportunity for public review and comment must be provided.

(2) May participate in early scoping as long as enough project information is known so the public and other agencies can participate effectively. Early scoping constitutes initiation of NEPA scoping while local planning efforts to aid in establishing the purpose and need and in evaluating alternatives and impacts are underway. Notice of early scoping must

be made to the public and other agencies. If early scoping is the start of the NEPA process, the early scoping notice must include language to that effect. After development of the proposed action at the conclusion of early scoping, FTA will publish the Notice of Intent if it is determined at that time that the proposed action requires an EIS. The Notice of Intent will establish a 30-day period for comments on the purpose and need and the alternatives.

(3) Are encouraged to post and distribute materials related to the environmental review process, including but not limited to, NEPA documents, public meeting announcements, and minutes, through publicly-accessible electronic means, including project Web sites. Applicants are encouraged to keep these materials available to the public electronically until the project is constructed and open for operations.

(4) Are encouraged to post all environmental impact statements and records of decision on a project Web site until the project is constructed and open for operation.

(j) Information on the FTA environmental process may be obtained from: Director, Office of Human and Natural Environment, Federal Transit Administration, Washington, DC 20590. Information on the FHWA environmental process may be obtained from: Director, Office of Project Development and Environmental Review, Federal Highway Administration, Washington, DC 20590.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24469, May 9, 2005; 74 FR 12528, Mar. 24, 2009; 78 FR 8982, Feb. 7, 2013; 81 FR 34164, May 27, 2016]

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Title 23 → Chapter I → Subchapter H → Part 771 → §771.113

Title 23: Highways
PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

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§771.113 Timing of Administration activities.

(a) The lead agencies, in cooperation with the applicant (if not a lead agency), will perform the work necessary to complete a finding of no significant impact (FONSI) or a record of decision (ROD) and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination and public involvement. However, final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed, except as otherwise provided in law or in paragraph (d) of this section:

(1)(i) The action has been classified as a categorical exclusion (CE), or

(ii) A FONSI has been approved, or

(iii) A final EIS has been approved and available for the prescribed period of time and a record of decision has been signed;

(2) For actions proposed for FHWA funding, the Administration has received and accepted the certifications and any required public hearing transcripts required by 23 U.S.C. 128;

(3) For activities proposed for FHWA funding, the programming requirements of 23 CFR part 450, subpart B, and 23 CFR part 630, subpart A, have been met.

(b) Completion of the requirements set forth in paragraphs (a)(1) and (2) of this section is considered acceptance of the general project location and concepts described in the environmental review documents unless otherwise specified by the approving official.

(c) Letters of Intent issued under the authority of 49 U.S.C. 5309(g) are used by FTA to indicate an intention to obligate future funds for multi-year capital transit projects. Letters of Intent will not be issued by FTA until the NEPA process is completed.

(d) The prohibition in paragraph (a)(1) of this section is limited by the following exceptions:

(1) Exceptions for hardship and protective acquisitions of real property are addressed in paragraph (d)(12) of §771.117 for FHWA. Exceptions for the acquisitions of real property are addressed in paragraphs (c)(6) and (d)(3) of §771.118 for FTA.

(2) Paragraph (d)(4) of §771.118 contains an exception for the acquisition of right-of-way for future transit use in accordance with 49 U.S.C. 5323(q).

(3) FHWA regulations at 23 CFR 710.503 establish conditions for FHWA approval of Federal-aid highway funding for hardship and protective acquisitions.

(4) FHWA regulations at 23 CFR 710.501 address early acquisition of right-of-way by a State prior to the execution of a project agreement with the FHWA or completion of NEPA. In paragraphs (b) and (c) of §710.501, the regulation establishes conditions governing subsequent requests for Federal-aid credit or reimbursement for the acquisition. Any State-funded early acquisition for a Federal-aid highway project where there will not be Federal-aid highway credit or reimbursement for the early acquisition is subject to the limitations described in the CEQ regulations at 40 CFR 1506.1 and other applicable Federal requirements.

(5) A limited exception for rolling stock is provided in 49 U.S.C. 5309(h)(6).

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988, as amended at 70 FR 24469, May 9, 2005; 74 FR 12528, Mar. 24, 2009; 78 FR 8983, Feb. 7, 2013]

ELECTRONIC CODE OF FEDERAL REGULATIONS

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Title 23: Highways
PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

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§771.130 Supplemental environmental impact statements.

(a) A draft EIS, final EIS, or supplemental EIS may be supplemented at any time. An EIS shall be supplemented whenever the Administration determines that:

(1) Changes to the proposed action would result in significant environmental impacts that were not evaluated in the EIS; or

(2) New information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS.

(b) However, a supplemental EIS will not be necessary where:

(1) The changes to the proposed action, new information, or new circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS; or

(2) The Administration decides to approve an alternative fully evaluated in an approved final EIS but not identified as the preferred alternative. In such a case, a revised ROD shall be prepared and circulated in accordance with §771.127(b).

(c) Where the Administration is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies or, if the Administration deems appropriate, an EA to assess the impacts of the changes, new information, or new circumstances. If, based upon the studies, the Administration determines that a supplemental EIS is not necessary, the Administration shall so indicate in the project file.

(d) A supplement is to be developed using the same process and format (*i.e.*, draft EIS, final EIS, and ROD) as an original EIS, except that scoping is not required.

(e) A supplemental draft EIS may be necessary for major new fixed guideway capital projects proposed for FTA funding if there is a substantial change in the level of detail on project impacts during project planning and development. The supplement will address site-specific impacts and refined cost estimates that have been developed since the original draft EIS.

(f) In some cases, a supplemental EIS may be required to address issues of limited scope, such as the extent of proposed mitigation or the evaluation of location or design variations for a limited portion of the overall project. Where this is the case, the preparation of a supplemental EIS shall not necessarily:

(1) Prevent the granting of new approvals;

(2) Require the withdrawal of previous approvals; or

(3) Require the suspension of project activities; for any activity not directly affected by the supplement. If the changes in question are of such magnitude to require a reassessment of the entire action, or more than a limited portion of the overall action, the Administration shall suspend any activities which would have an adverse environmental impact or limit the choice of reasonable alternatives, until the supplemental EIS is completed.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24470, May 9, 2005; 74 FR 12530, Mar. 24, 2009]

Need assistance?

ELECTRONIC CODE OF FEDERAL REGULATIONS

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Title 23 → Chapter I → Subchapter H → Part 774 → §774.3

Title 23: Highways
PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(f))

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§774.3 Section 4(f) approvals.

The Administration may not approve the use, as defined in §774.17, of Section 4(f) property unless a determination is made under paragraph (a) or (b) of this section.

(a) The Administration determines that:

(1) There is no feasible and prudent avoidance alternative, as defined in §774.17, to the use of land from the property; and

(2) The action includes all possible planning, as defined in §774.17, to minimize harm to the property resulting from such use; or

(b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact, as defined in §774.17, on the property.

(c) If the analysis in paragraph (a)(1) of this section concludes that there is no feasible and prudent avoidance alternative, then the Administration may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that:

(1) Causes the least overall harm in light of the statute's preservation purpose. The least overall harm is determined by balancing the following factors:

(i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);

(ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;

(iii) The relative significance of each Section 4(f) property;

(iv) The views of the official(s) with jurisdiction over each Section 4(f) property;

(v) The degree to which each alternative meets the purpose and need for the project;

(vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and

(vii) Substantial differences in costs among the alternatives.

(2) The alternative selected must include all possible planning, as defined in §774.17, to minimize harm to Section 4(f) property.

(d) Programmatic Section 4(f) evaluations are a time-saving procedural alternative to preparing individual Section 4(f) evaluations under paragraph (a) of this section for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by the Administration based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of avoidance alternatives.[1] An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in the programmatic evaluation are met

[1]FHWA has issued five programmatic Section 4(f) evaluations: (1) Final Nationwide Programmatic Section 4(f) Evaluation and Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property; (2) Nationwide Section 4(f) Evaluations and Approvals for Federally-Aided Highway Projects With Minor Involvement With Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges, and Historic Sites; (3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites; (4) Historic Bridges; Programmatic Section 4(f) Evaluation and Approval; and (5) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects.

(1) The determination whether a programmatic Section 4(f) evaluation applies to the use of a specific Section 4(f) property shall be documented as specified in the applicable programmatic Section 4(f) evaluation.

(2) The Administration may develop additional programmatic Section 4(f) evaluations. Proposed new or revised programmatic Section 4(f) evaluations will be coordinated with the Department of Interior, Department of Agriculture, and Department of Housing and Urban Development, and published in the FEDERAL REGISTER for comment prior to being finalized. New or revised programmatic Section 4(f) evaluations shall be reviewed for legal sufficiency and approved by the Headquarters Office of the Administration.

(e) The coordination requirements in §774.5 must be completed before the Administration may make Section 4(f) approvals under this section. Requirements for the documentation and timing of Section 4(f) approvals are located in §§774.7 and 774.9, respectively.

[73 FR 13395, Mar. 12, 2008, as amended at 73 FR 31610, June 3, 2008]

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Title 23: Highways
PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(f))

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§774.9 Timing.

(a) The potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.

(b) Except as provided in paragraph (c) of this section, for actions processed with EISs the Administration will make the Section 4(f) approval either in the final EIS or in the ROD. Where the Section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its Section 4(f) approval in the ROD. Actions requiring the use of Section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until notification by the Administration of Section 4(f) approval.

(c) After the CE, FONSI, or ROD has been processed, a separate Section 4(f) approval will be required, except as provided in §774.13, if:

(1) A proposed modification of the alignment or design would require the use of Section 4(f) property; or

(2) The Administration determines that Section 4(f) applies to the use of a property; or

(3) A proposed modification of the alignment, design, or measures to minimize harm (after the original Section 4(f) approval) would result in a substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm.

(d) A separate Section 4(f) approval required under paragraph (c) of this section will not necessarily require the preparation of a new or supplemental NEPA document. If a new or supplemental NEPA document is also required under §771.130 of this chapter, then it should include the documentation supporting the separate Section 4(f) approval. Where a separate Section 4(f) approval is required, any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis, consistent with §771.130(f) of this chapter.

(e) Section 4(f) may apply to archeological sites discovered during construction, as set forth in §774.11(f). In such cases, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, will be shortened as appropriate.

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Title 23: Highways
PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(f))

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§774.17 Definitions.

The definitions contained in 23 U.S.C. 101(a) are applicable to this part. In addition, the following definitions apply:

Administration. The FHWA or FTA, whichever is making the approval for the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

All possible planning. All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.

(1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to): design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways.

(2) With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 CFR part 800.

(3) In evaluating the reasonableness of measures to minimize harm under §774.3(a)(2), the Administration will consider the preservation purpose of the statute and:

(i) The views of the official(s) with jurisdiction over the Section 4(f) property;

(ii) Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with §771.105(d) of this chapter; and

(iii) Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property.

(4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under §774.3(a)(1), or is not necessary in the case of a *de minimis* impact determination under §774.3(b).

(5) A *de minimis* impact determination under §774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a *de minimis* level.

Applicant. The Federal, State, or local government authority, proposing a transportation project, that the Administration works with to conduct environmental studies and prepare environmental documents. For transportation actions implemented by the Federal government on Federal lands, the Administration or the Federal land management agency may take on the responsibilities of the applicant described herein.

CE. Refers to a Categorical Exclusion, which denotes an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and §771.117 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

De minimis impact. (1) For historic sites, *de minimis* impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have "no adverse effect" on the historic property in question.

(2) For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

EA. Refers to an Environmental Assessment, which is a document prepared pursuant to 40 CFR parts 1500-1508 and §771.119 of this title for a proposed project that is not categorically excluded but for which an EIS is not clearly required.

EIS. Refers to an Environmental Impact Statement, which is a document prepared pursuant to NEPA, 40 CFR parts 1500-1508, and §§771.123 and 771.125 of this chapter for a proposed project that is likely to cause significant impacts on the environment.

Feasible and prudent avoidance alternative. (1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.

(2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

(i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority or low income populations; or

(D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

(v) It causes other unique problems or unusual factors; or

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

FONSI. Refers to a Finding of No Significant Impact prepared pursuant to 40 CFR 1508.13 and §771.121 of this chapter.

Historic site. For purposes of this part, the term "historic site" includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register.

Official(s) with jurisdiction. (1) In the case of historic properties, the official with jurisdiction is the SHPO for the State wherein the property is located or, if the property is located on tribal land, the THPO. If the property is located on tribal land but the Indian tribe has not assumed the responsibilities of the SHPO as provided for in the National Historic Preservation Act, then a representative designated by such Indian tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the ACHP is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource for purposes of this part. When the Section 4(f) property is a National Historic Landmark, the National Park Service is also an official with jurisdiction over that resource for purposes of this part.

(2) In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction are the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.

(3) In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers (section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)), the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

ROD. Refers to a Record of Decision prepared pursuant to 40 CFR 1505.2 and §771.127 of this chapter.

Section 4(f) evaluation. Refers to the documentation prepared to support the granting of a Section 4(f) approval under §774.3(a), unless preceded by the word “programmatic.” A “programmatic Section 4(f) evaluation” is the documentation prepared pursuant to §774.3(d) that authorizes subsequent project-level Section 4(f) approvals as described therein.

Section 4(f) Property. Section 4(f) property means publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance.

Use. Except as set forth in §§774.11 and 774.13, a “use” of Section 4(f) property occurs:

(1) When land is permanently incorporated into a transportation facility;

(2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in §774.13(d); or

(3) When there is a constructive use of a Section 4(f) property as determined by the criteria in §774.15.

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e-CFR data is current as of February 28, 2017

Title 25: Indians
PART 169—RIGHTS-OF-WAY OVER INDIAN LAND
Subpart A—Purpose, Definitions, General Provisions

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§169.3 To what land does this part apply?

(a) This part applies to Indian land and BIA land.

(b) We will not take any action on a right-of-way across fee land or collect compensation on behalf of fee interest owners. We will not condition our grant of a right-of-way across Indian land or BIA land on the applicant having obtained a right-of-way from the owners of any fee interests. The applicant will be responsible for negotiating directly with and making any payments directly to the owners of any fee interests that may exist in the property on which the right-of-way is granted.

(c) We will not include the fee interests in a tract in calculating the applicable percentage of interests required for consent to a right-of-way.

Need assistance?

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Title 36: Parks, Forests, and Public Property
PART 800—PROTECTION OF HISTORIC PROPERTIES
Subpart C—Program Alternatives

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§800.14 Federal agency program alternatives.

(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the FEDERAL REGISTER and take other appropriate steps to seek public input during the development of alternate procedures.

(2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the FEDERAL REGISTER.

(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic agreements.* The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of programmatic agreements.* A programmatic agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing programmatic agreements for agency programs.* (i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) *Developing programmatic agreements for complex or multiple undertakings.* Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow §800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

(4) *Prototype programmatic agreements.* The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) *Exempted categories*—(1) *Criteria for establishing.* The Council or an agency official may propose a program or category of undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as “undertakings” as defined in §800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

(2) *Public participation.* The proponent of the exemption shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The proponent of the exemption shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The proponent of the exemption shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council review of proposed exemptions.* The Council shall review an exemption proposal that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/THPOs, the public, and any others consulted. Unless it requests further

information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the relevant agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) *Notice.* The proponent of the exemption shall publish notice of any approved exemption in the FEDERAL REGISTER.

(d) *Standard treatments*—(1) *Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the FEDERAL REGISTER.

(2) *Public participation.* The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interested. Where an agency official has proposed a standard treatment, the Council may request the agency official to arrange for public involvement.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Termination.* The Council may terminate a standard treatment by publication of a notice in the FEDERAL REGISTER 30 days before the termination takes effect.

(e) *Program comments.* An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) *Agency request.* The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council action.* Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the FEDERAL REGISTER of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§800.3 through 800.6 for the individual undertakings.

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed program alternative has nationwide applicability, the agency official shall identify an appropriate government to government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda, and applicable provisions of law.

(2) *Results of consultation.* The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40554, July 6, 2004]

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Title 40: Protection of Environment
PART 93—DETERMINING CONFORMITY OF FEDERAL ACTIONS TO STATE OR FEDERAL IMPLEMENTATION PLANS
Subpart A—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws

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§93.110 Criteria and procedures: Latest planning assumptions.

(a) Except as provided in this paragraph, the conformity determination, with respect to all other applicable criteria in §§93.111 through 93.119, must be based upon the most recent planning assumptions in force at the time the conformity analysis begins. The conformity determination must satisfy the requirements of paragraphs (b) through (f) of this section using the planning assumptions available at the time the conformity analysis begins as determined through the interagency consultation process required in §93.105(c)(1)(i). The “time the conformity analysis begins” for a transportation plan or TIP determination is the point at which the MPO or other designated agency begins to model the impact of the proposed transportation plan or TIP on travel and/or emissions. New data that becomes available after an analysis begins is required to be used in the conformity determination only if a significant delay in the analysis has occurred, as determined through interagency consultation.

(b) Assumptions must be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO or other agency authorized to make such estimates and approved by the MPO. The conformity determination must also be based on the latest assumptions about current and future background concentrations.

(c) The conformity determination for each transportation plan and TIP must discuss how transit operating policies (including fares and service levels) and assumed transit ridership have changed since the previous conformity determination.

(d) The conformity determination must include reasonable assumptions about transit service and increases in transit fares and road and bridge tolls over time.

(e) The conformity determination must use the latest existing information regarding the effectiveness of the TCMs and other implementation plan measures which have already been implemented.

(f) Key assumptions shall be specified and included in the draft documents and supporting materials used for the interagency and public consultation required by §93.105.

[62 FR 43801, Aug. 15, 1997, as amended at 69 FR 40077, July 1, 2004]

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Title 40: Protection of Environment
PART 93—DETERMINING CONFORMITY OF FEDERAL ACTIONS TO STATE OR FEDERAL IMPLEMENTATION PLANS
Subpart A—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws

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§93.115 Criteria and procedures: Projects from a transportation plan and TIP.

(a) The project must come from a conforming plan and program. If this criterion is not satisfied, the project must satisfy all criteria in Table 1 of §93.109(b) for a project not from a conforming transportation plan and TIP. A project is considered to be from a conforming transportation plan if it meets the requirements of paragraph (b) of this section and from a conforming program if it meets the requirements of paragraph (c) of this section. Special provisions for TCMs in an applicable implementation plan are provided in paragraph (d) of this section.

(b) A project is considered to be from a conforming transportation plan if one of the following conditions applies:

(1) For projects which are required to be identified in the transportation plan in order to satisfy §93.106 (“Content of transportation plans”), the project is specifically included in the conforming transportation plan and the project's design concept and scope have not changed significantly from those which were described in the transportation plan, or in a manner which would significantly impact use of the facility; or

(2) For projects which are not required to be specifically identified in the transportation plan, the project is identified in the conforming transportation plan, or is consistent with the policies and purpose of the transportation plan and will not interfere with other projects specifically included in the transportation plan.

(c) A project is considered to be from a conforming program if the following conditions are met:

(1) The project is included in the conforming TIP and the design concept and scope of the project were adequate at the time of the TIP conformity determination to determine its contribution to the TIP's regional emissions, and the project design concept and scope have not changed significantly from those which were described in the TIP; and

(2) If the TIP describes a project design concept and scope which includes project-level emissions mitigation or control measures, written commitments to implement such measures must be obtained from the project sponsor and/or operator as required by §93.125(a) in order for the project to be considered from a conforming program. Any change in these mitigation or control measures that would significantly reduce their effectiveness constitutes a change in the design concept and scope of the project.

(d) *TCMs.* This criterion is not required to be satisfied for TCMs specifically included in an applicable implementation plan.

(e) Notwithstanding the requirements of paragraphs (a), (b), and (c) of this section, a project must meet the requirements of §93.104(f) during the 12-month lapse grace period.

[62 FR 43801, Aug. 15, 1997, as amended at 73 FR 4440, Jan. 24, 2008]

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Title 40 → Chapter V → Part 1501 → §1501.2

Title 40: Protection of Environment
PART 1501—NEPA AND AGENCY PLANNING

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§1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by §1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

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Title 40 → Chapter V → Part 1502 → §1502.9

Title 40: Protection of Environment
PART 1502—ENVIRONMENTAL IMPACT STATEMENT

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§1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in §1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

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Title 40 → Chapter V → Part 1502 → §1502.13

Title 40: Protection of Environment
PART 1502—ENVIRONMENTAL IMPACT STATEMENT

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§1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

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Title 40 → Chapter V → Part 1502 → §1502.14

Title 40: Protection of Environment
PART 1502—ENVIRONMENTAL IMPACT STATEMENT

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§1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

Need assistance?

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Title 49 → Subtitle B → Chapter I → Subchapter C → Part 177

Title 49: Transportation

PART 177—CARRIAGE BY PUBLIC HIGHWAY

Contents

AUTHORITY: 49 U.S.C. 5101-5128; sec. 112 of Pub. L. 103-311, 108 Stat. 1673, 1676 (1994); sec. 32509 of Pub. L. 112-141, 126 Stat. 405, 805 (2012); 49 CFR 1.81 and 1.97.

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Subpart A—General Information and Regulations

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§177.800 Purpose and scope of this part and responsibility for compliance and training.

(a) *Purpose and scope.* This part prescribes requirements, in addition to those contained in parts 171, 172, 173, 178 and 180 of this subchapter, that are applicable to the acceptance and transportation of hazardous materials by private, common, or contract carriers by motor vehicle.

(b) *Responsibility for compliance.* Unless this subchapter specifically provides that another person shall perform a particular duty, each carrier, including a connecting carrier, shall perform the duties specified and comply with all applicable requirements in this part and shall ensure its hazmat employees receive training in relation thereto.

(c) *Responsibility for training.* A carrier may not transport a hazardous material by motor vehicle unless each of its hazmat employees involved in that transportation is trained as required by this part and subpart H of part 172 of this subchapter.

(d) *No unnecessary delay in movement of shipments.* All shipments of hazardous materials must be transported without unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination.

[Amdt. 177-79, 57 FR 20954, May 15, 1992, as amended by Amdt.177-86, 61 FR 18933, Apr. 29, 1996]

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§177.801 Unacceptable hazardous materials shipments.

No person may accept for transportation or transport by motor vehicle a forbidden material or hazardous material that is not prepared in accordance with the requirements of this subchapter.

[Amdt. 177-87, 61 FR 27175, May 30, 1996]

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§177.802 Inspection.

Records, equipment, packagings and containers under the control of a motor carrier, insofar as they affect safety in transportation of hazardous materials by motor vehicle, must be made available for examination and inspection by a duly authorized representative of the Department.

[Amdt. 177-71, 54 FR 25015, June 12, 1989]

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§177.804 Compliance with Federal Motor Carrier Safety Regulations.

(a) *General.* Motor carriers and other persons subject to this part must comply with 49 CFR part 383 and 49 CFR parts 390 through 397 (excluding §§397.3 and 397.9) to the extent those regulations apply.

(b) *Additional prohibitions.* A person transporting a quantity of hazardous materials requiring placarding under 49 CFR part 172 or any quantity of a material listed as a select agent or toxin in 42 CFR part 73:

(1) Must comply with the safe clearance requirements for highway-rail grade crossings in §392.12 of this title;

(2) May not engage in, allow, or require texting while driving, in accordance with §392.80 of this title; and

(3) May not engage in, allow, or require the use of a hand-held mobile telephone while driving, in accordance with §392.82 of this title.

[78 FR 58923, Sept. 25, 2013]

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§177.810 Vehicular tunnels.

Except as regards Class 7 (radioactive) materials, nothing contained in parts 170-189 of this subchapter shall be so construed as to nullify or supersede regulations established and published under authority of State statute or municipal ordinance regarding the kind, character, or quantity of any hazardous material permitted by such regulations to be transported through any urban vehicular tunnel used for mass transportation.

[Amdt. 177-52, 46 FR 5316, Jan. 19, 1981, as amended by Amdt. 177-78, 55 FR 52710, Dec. 21, 1990; 62 FR 51561, Oct. 1, 1997]

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§177.816 Driver training.

(a) In addition to the training requirements of §177.800, no carrier may transport, or cause to be transported, a hazardous material unless each hazmat employee who will operate a motor vehicle has been trained in the applicable requirements of 49 CFR parts 390 through 397 and the procedures necessary for the safe operation of that motor vehicle. Driver training shall include the following subjects:

(1) Pre-trip safety inspection;

(2) Use of vehicle controls and equipment, including operation of emergency equipment;

(3) Operation of vehicle, including turning, backing, braking, parking, handling, and vehicle characteristics including those that affect vehicle stability, such as effects of braking and curves, effects of speed on vehicle control, dangers associated with maneuvering through curves, dangers associated with weather or road conditions that a driver may experience (e.g., blizzards, mountainous terrain, high winds), and high center of gravity;

(4) Procedures for maneuvering tunnels, bridges, and railroad crossings;

(5) Requirements pertaining to attendance of vehicles, parking, smoking, routing, and incident reporting; and

(6) Loading and unloading of materials, including—

(i) Compatibility and segregation of cargo in a mixed load;

(ii) Package handling methods; and

(iii) Load securement.

(b) *Specialized requirements for cargo tanks and portable tanks.* In addition to the training requirement of paragraph (a) of this section, each person who operates a cargo tank or a vehicle with a portable tank with a capacity of 1,000 gallons or more must receive training applicable to the requirements of this subchapter and have the appropriate State-issued commercial driver's license required by 49 CFR part 383. Specialized training shall include the following:

(1) Operation of emergency control features of the cargo tank or portable tank;

(2) Special vehicle handling characteristics, including: high center of gravity, fluid-load subject to surge, effects of fluid-load surge on braking, characteristic differences in stability among baffled, unbaffled, and multi-compartmented tanks; and effects of partial loads on vehicle stability;

(3) Loading and unloading procedures;

(4) The properties and hazards of the material transported; and

(5) Retest and inspection requirements for cargo tanks.

(c) The training required by paragraphs (a) and (b) of this section may be satisfied by compliance with the current requirements for a Commercial Driver's License (CDL) with a tank vehicle or hazardous materials endorsement.

(d) Training required by paragraph (b) of this section must conform to the requirements of §172.704 of this subchapter with respect to frequency and recordkeeping.

[Amdt. 177-79, 57 FR 20954, May 15, 1992, as amended by Amdt. 177-79, 58 FR 5852, Jan. 22, 1993]

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§177.817 Shipping papers.

(a) *General requirements.* A person may not accept a hazardous material for transportation or transport a hazardous material by highway unless that person has received a shipping paper prepared in accordance with part 172 of this subchapter or the material is excepted from shipping paper requirements under this subchapter. A subsequent carrier may not transport a hazardous material unless it is accompanied by a shipping paper prepared in accordance with part 172 of this subchapter, except for §172.204, which is not required.

(b) *Shipper certification.* An initial carrier may not accept a hazardous material offered for transportation unless the shipping paper describing the material includes a shipper's certification which meets the requirements in §172.204 of this

subchapter. Except for a hazardous waste, the certification is not required for shipments to be transported entirely by private carriage and for bulk shipments to be transported in a cargo tank supplied by the carrier.

(c) *Requirements when interlining with carriers by rail.* A motor carrier shall mark on the shipping paper required by this section, if it offers or delivers a freight container or transport vehicle to a rail carrier for further transportation:

(1) A description of the freight container or transport vehicle; and

(2) The kind of placard affixed to the freight container or transport vehicle.

(d) This subpart does not apply to a material that is excepted from shipping paper requirements as specified in §172.200 of this subchapter.

(e) *Shipping paper accessibility—accident or inspection.* A driver of a motor vehicle containing hazardous material, and each carrier using such a vehicle, shall ensure that the shipping paper required by this section is readily available to, and recognizable by, authorities in the event of accident or inspection. Specifically, the driver and the carrier shall:

(1) Clearly distinguish the shipping paper, if it is carried with other shipping papers or other papers of any kind, by either distinctively tabbing it or by having it appear first; and

(2) Store the shipping paper as follows:

(i) When the driver is at the vehicle's controls, the shipping paper shall be: (A) Within his immediate reach while he is restrained by the lap belt; and (B) either readily visible to a person entering the driver's compartment or in a holder which is mounted to the inside of the door on the driver's side of the vehicle.

(ii) When the driver is not at the vehicle's controls, the shipping paper shall be: (A) In a holder which is mounted to the inside of the door on the driver's side of the vehicle; or (B) on the driver's seat in the vehicle.

(f) *Retention of shipping papers.* Each person receiving a shipping paper required by this section must retain a copy or an electronic image thereof, that is accessible at or through its principal place of business and must make the shipping paper available, upon request, to an authorized official of a Federal, State, or local government agency at reasonable times and locations. For a hazardous waste, the shipping paper copy must be retained for three years after the material is accepted by the initial carrier. For all other hazardous materials, the shipping paper copy must be retained for one year after the material is accepted by the carrier. Each shipping paper copy must include the date of acceptance by the carrier. A motor carrier (as defined in §390.5 of subchapter B of chapter III of subtitle B) using a shipping paper without change for multiple shipments of one or more hazardous materials having the same shipping name and identification number may retain a single copy of the shipping paper, instead of a copy for each shipment made, if the carrier also retains a record of each shipment made that includes shipping name, identification number, quantity transported, and date of shipment.

[Amdt. 177-35, 41 FR 16130, Apr. 15, 1976, as amended by Amdt. 177-35A, 41 FR 40691, Sept. 20, 1976; Amdt. 177-48, 45 FR 47670, Nov. 10, 1980; Amdt. 177-65, 50 FR 11055, Mar. 19, 1985; Amdt. 177-72, 53 FR 17160, May 13, 1988; 67 FR 46128, July 12, 2002; 67 FR 66574, Nov. 1, 2002; 68 FR 19277, Apr. 18, 2003; 68 FR 57633, Oct. 6, 2003; 70 FR 73165, Dec. 9, 2005]

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§177.823 Movement of motor vehicles in emergency situations.

(a) A carrier may not move a transport vehicle containing a hazardous material unless the vehicle is marked and placarded in accordance with part 172 or as authorized in §171.12a of this subchapter, or unless, in an emergency:

(1) The vehicle is escorted by a representative of a state or local government;

(2) The carrier has permission from the Department; or

(3) Movement of the transport vehicle is necessary to protect life or property.

(b) *Disposition of contents of cargo tank when unsafe to continue.* In the event of a leak in a cargo tank of such a character as to make further transportation unsafe, the leaking vehicle should be removed from the traveled portion of the highway and every available means employed for the safe disposal of the leaking material by preventing, so far as practicable, its spread over a wide area, such as by digging trenches to drain to a hole or depression in the ground, diverting the liquid away from streams or sewers if possible, or catching the liquid in containers if practicable. Smoking, and any other source of ignition, in the vicinity of a leaking cargo tank is not permitted.

(c) *Movement of leaking cargo tanks.* A leaking cargo tank may be transported only the minimum distance necessary to reach a place where the contents of the tank or compartment may be disposed of safely. Every available means must

be utilized to prevent the leakage or spillage of the liquid upon the highway.

[Amdt. 177-35, 41 FR 16130, Apr. 15, 1976, as amended by Amdt. 177-67, 50 FR 41521, Oct. 11, 1985; Amdt. 177-86, 61 FR 18933, Apr. 29, 1996]

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Subpart B—Loading and Unloading

NOTE: For prohibited loading and storage of hazardous materials, see §177.848.

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§177.834 General requirements.

(a) *Packages secured in a motor vehicle.* Any package containing any hazardous material, not permanently attached to a motor vehicle, must be secured against shifting, including relative motion between packages, within the vehicle on which it is being transported, under conditions normally incident to transportation. Packages having valves or other fittings must be loaded in a manner to minimize the likelihood of damage during transportation.

(b) Each package containing a hazardous material bearing package orientation markings prescribed in §172.312 of this subchapter must be loaded on a transport vehicle or within a freight container in accordance with such markings and must remain in the correct position indicated by the markings during transportation.

(c) *No smoking while loading or unloading.* Smoking on or about any motor vehicle while loading or unloading any Class 1 (explosive), Class 3 (flammable liquid), Class 4 (flammable solid), Class 5 (oxidizing), or Division 2.1 (flammable gas) materials is forbidden.

(d) *Keep fire away, loading and unloading.* Extreme care shall be taken in the loading or unloading of any Class 1 (explosive), Class 3 (flammable liquid), Class 4 (flammable solid), Class 5 (oxidizing), or Division 2.1 (flammable gas) materials into or from any motor vehicle to keep fire away and to prevent persons in the vicinity from smoking, lighting matches, or carrying any flame or lighted cigar, pipe, or cigarette.

(e) *Handbrake set while loading and unloading.* No hazardous material shall be loaded into or on, or unloaded from, any motor vehicle unless the handbrake be securely set and all other reasonable precautions be taken to prevent motion of the motor vehicle during such loading or unloading process.

(f) *Use of tools, loading and unloading.* No tools which are likely to damage the effectiveness of the closure of any package or other container, or likely adversely to affect such package or container, shall be used for the loading or unloading of any Class 1 (explosive) material or other dangerous article.

(g) [Reserved]

(h) *Precautions concerning containers in transit; fueling road units.* Reasonable care should be taken to prevent undue rise in temperature of containers and their contents during transit. There must be no tampering with such container or the contents thereof nor any discharge of the contents of any container between point of origin and point of billed destination. Discharge of contents of any container, other than a cargo tank or IM portable tank, must not be made prior to removal from the motor vehicle. Nothing contained in this paragraph shall be so construed as to prohibit the fueling of machinery or vehicles used in road construction or maintenance.

(i) *Attendance requirements*—(1) *Loading.* A cargo tank must be attended by a qualified person at all times when it is being loaded. The person who is responsible for loading the cargo tank is also responsible for ensuring that it is so attended.

(2) *Unloading.* A motor carrier who transports hazardous materials by a cargo tank must ensure that the cargo tank is attended by a qualified person at all times during unloading. However, the carrier's obligation to ensure attendance during unloading ceases when:

(i) The carrier's obligation for transporting the materials is fulfilled;

(ii) The cargo tank has been placed upon the consignee's premises; and

(iii) The motive power has been removed from the cargo tank and removed from the premises.

(3) A qualified person “attends” the loading or unloading of a cargo tank only if, throughout the process:

(i) Except for unloading operations subject to §§177.837(d) and 177.840(p) and (q), the qualified person is within 7.62 m (25 feet) of the cargo tank. The qualified person attending the unloading of a cargo tank must be alert and have an unobstructed view of the cargo tank and delivery hose to the maximum extent practicable during the unloading operation; or

(ii) The qualified person observes all loading or unloading operations by means of video cameras and monitors or instrumentation and signaling systems such as sensors, alarms, and electronic surveillance equipment located at a remote control station, and the loading or unloading system is equipped as follows:

(A) For a video monitoring system used to meet the attendance requirement, the camera must be mounted so as to provide an unobstructed view of all equipment involved in the loading or unloading operations, including all valves, hoses, domes, and pressure relief devices;

(B) For an instrumentation and signaling system used to meet the attendance requirement, the system must provide a surveillance capability at least equal to that of a human observer;

(C) Upon loss of video monitoring capability or instrumentation and signaling systems, loading or unloading operations must be immediately terminated;

(D) Shut-off valves operable from the remote control station must be provided;

(E) In the event of a remote system failure, a qualified person must immediately resume attending the loading or unloading of the cargo tank as provided in paragraph (i)(3)(i) of this section;

(F) A containment area must be provided capable of holding the contents of as many cargo tank motor vehicles as might be loaded at any single time; and

(G) A qualified person must personally conduct a visual inspection of each cargo tank motor vehicle after it is loaded, prior to departure, for any damage that may have occurred during loading; or

(iii) Hoses used in the loading or unloading operations are equipped with cable-connected wedges, plungers, or flapper valves located at each end of the hose, able to stop the flow of product from both the source and the receiving tank within one second without human intervention in the event of a hose rupture, disconnection, or separation.

(A) Prior to each use, each hose must be inspected to ensure that it is of sound quality, without defects detectable through visual observation; and

(B) The loading or unloading operations must be physically inspected by a qualified person at least once every sixty (60) minutes.

(4) A person is “qualified” if he has been made aware of the nature of the hazardous material which is to be loaded or unloaded, has been instructed on the procedures to be followed in emergencies, and except for persons observing loading or unloading operations by means of video cameras and monitors or instrumentation and signaling systems such as sensors, alarms, and electronic surveillance equipment located at a remote control station and persons inspecting hoses in accordance with paragraph (i)(3)(iii) of this section, is authorized to move the cargo tank, and has the means to do so.

(j) Except for a cargo tank conforming to §173.29(b)(2) of this subchapter, a person may not drive a cargo tank motor vehicle containing a hazardous material regardless of quantity unless:

(1) All manhole closures are closed and secured; and

(2) All valves and other closures in liquid discharge systems are closed and free of leaks, except external emergency self-closing valves on MC 338 cargo tanks containing the residue of cryogenic liquids may remain either open or closed during transit.

(k) [Reserved]

(l) *Use of cargo heaters when transporting certain hazardous material.* Transportation includes loading, carrying, and unloading.

(1) *When transporting Class 1 (explosive) materials.* A motor vehicle equipped with a cargo heater of any type may transport Class 1 (explosive) materials only if the cargo heater is rendered inoperable by: (i) Draining or removing the cargo heater fuel tank; and (ii) disconnecting the heater's power source.

(2) *When transporting certain flammable material*—(i) *Use of combustion cargo heaters.* A motor vehicle equipped with a combustion cargo heater may be used to transport Class 3 (flammable liquid) or Division 2.1 (flammable gas) materials only subject to the following conditions:

(A) The combustion cargo heater is powered by diesel fuel or propane and each of the following requirements are met:

(*1*) Electrical apparatus in the cargo compartment is non-sparking or explosion proof.

(*2*) There is no combustion apparatus in the cargo compartment.

(*3*) There is no connection for return of air from the cargo compartment to the combustion apparatus.

(*4*) The heating system will not heat any part of the cargo to more than 54 °C (130 °F).

(*5*) Heater requirements under §393.77 of this title are complied with.

(*6*) The heater unit and its fuel supply must be externally mounted on the truck or trailer.

(*7*) The heater unit must retain combustion in a sealed combustion chamber.

(*8*) The heater unit must utilize outside air for combustion (air from the cargo space cannot be used for combustion).

(*9*) Heater unit combustion gases must be exhausted to the outside of the truck or trailer.

(B) The combustion cargo heater is a catalytic heater and each of the following requirements are met:

(*1*) The heater's surface temperature cannot exceed 54 °C (130 °F)—either on a thermostatically controlled heater or on a heater without thermostatic control when the outside or ambient temperature is 16 °C (61 °F) or less.

(*2*) The heater is not ignited in a loaded vehicle.

(*3*) There is no flame, either on the catalyst or anywhere in the heater.

(*4*) The manufacturer has certified that the heater meets the requirements under paragraph (l)(2)(i)(B) of this section by permanently marking the heater *"MEETS DOT REQUIREMENTS FOR CATALYTIC HEATERS USED WITH FLAMMABLE LIQUID AND GAS."*

(*5*) The heater is also marked "*DO NOT LOAD INTO OR USE IN CARGO COMPARTMENTS CONTAINING FLAMMABLE LIQUID OR GAS IF FLAME IS VISIBLE ON CATALYST OR IN HEATER."*

(*6*) *Heater requirements under §393.77 of this title are complied with.*

(ii) [Reserved]

(iii) *Restrictions on automatic cargo-space-heating temperature control devices.* Restrictions on these devices have two dimensions: Restrictions upon use and restrictions which apply when the device must not be used.

(A) *Use restrictions.* An automatic cargo-space-heating temperature control device may be used when transporting Class 3 (flammable liquid) or Division 2.1 (flammable gas) materials only if each of the following requirements is met:

(*1*) Electrical apparatus in the cargo compartment is nonsparking or explosion proof.

(*2*) There is no combustion apparatus in the cargo compartment.

(*3*) There is no connection for return of air from the cargo compartment to the combustion apparatus.

(*4*) The heating system will not heat any part of the cargo to more than 54 °C (129 °F).

(*5*) Heater requirements under §393.77 of this title are complied with.

(B) *Protection against use.* Class 3 (flammable liquid) or Division 2.1 (flammable gas) materials may be transported by a vehicle, which is equipped with an automatic cargo-space-heating temperature control device that does not meet each requirement of paragraph (l)(2)(iii)(A) of this section, only if the device is first rendered inoperable, as follows:

(*1*) Each cargo heater fuel tank, if other than LPG, must be emptied or removed.

(2) Each LPG fuel tank for automatic temperature control equipment must have its discharge valve closed and its fuel feed line disconnected.

(m) Tanks constructed and maintained in compliance with Spec. 106A or 110A (§§179.300, 179.301 of this subchapter) that are authorized for the shipment of hazardous materials by highway in part 173 of this subchapter must be carried in accordance with the following requirements:

(1) Tanks must be securely chocked or clamped on vehicles to prevent any shifting.

(2) Equipment suitable for handling a tank must be provided at any point where a tank is to be loaded upon or removed from a vehicle.

(3) No more than two cargo carrying vehicles may be in the same combination of vehicles.

(4) Compliance with §§174.200 and 174.204 of this subchapter for combination rail freight, highway shipments and for trailer-on-flat-car service is required.

(n) Specification 56, 57, IM 101, and IM 102 portable tanks, when loaded, may not be stacked on each other nor placed under other freight during transportation by motor vehicle.

(o) *Unloading of IM and UN portable tanks.* No person may unload an IM or UN portable tank while it remains on a transport vehicle with the motive power unit attached except under the following conditions:

(1) The unloading operation must be attended by a qualified person in accordance with the requirements in paragraph (i) of this section. The person performing unloading functions must be trained in handling emergencies that may occur during the unloading operation.

(2) Prior to unloading, the operator of the vehicle on which the portable tank is transported must ascertain that the conditions of this paragraph (o) are met.

(3) An IM or UN portable tank equipped with a bottom outlet as authorized in Column (7) of the §172.101 Table of this subchapter by assignment of a T Code in the appropriate proper shipping name entry, and that contains a liquid hazardous material of Class 3, PG I or II, or PG III with a flash point of less than 100 °F (38 °C); Division 5.1, PG I or II; or Division 6.1, PG I or II, must conform to the outlet requirements in §178.275(d)(3) of this subchapter.

[29 FR 18795, Dec. 29, 1964. Redesignated at 32 FR 5606, Apr. 5, 1967]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §177.834, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

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§177.835 Class 1 materials.

(See also §177.834 (a) to (j).)

(a) *Engine stopped.* No Class 1 (explosive) materials may be loaded into or on or be unloaded from any motor vehicle with the engine running, except that the engine of a multipurpose bulk truck (see paragraph (d) of this section) and the engine of a cargo tank motor vehicle transporting a single bulk hazardous material for blasting may be used for the operation of the pumping equipment of the vehicle during loading or unloading.

(b) *Care in loading, unloading, or other handling of Class 1 (explosive) materials.* No bale hooks or other metal tools shall be used for the loading, unloading, or other handling of Class 1 (explosive) materials, nor shall any package or other container of Class 1 (explosive) materials, except barrels or kegs, be rolled. No packages of Class 1 (explosive) materials shall be thrown or dropped during process of loading or unloading or handling of Class 1 (explosive) materials. Special care shall be exercised to the end that packages or other containers containing Class 1 (explosive) materials shall not catch fire from sparks or hot gases from the exhaust tailpipe.

(1) Whenever tarpaulins are used for covering Class 1 (explosive) materials, they shall be secured by means of rope, wire, or other equally efficient tie downs. Class 1 (explosive) materials placards or markings required by §177.823 shall be secured, in the appropriate locations, directly to the equipment transporting the Class 1 (explosive) materials. If the vehicle is provided with placard boards, the placards must be applied to these boards.

(2) [Reserved]

(c) *Class 1 (explosive) materials on vehicles in combination.* Division 1.1 or 1.2 (explosive) materials may not be loaded into or carried on any vehicle or a combination of vehicles if:

(1) More than two cargo carrying vehicles are in the combination;

(2) Any full trailer in the combination has a wheel base of less than 184 inches;

(3) Any vehicle in the combination is a cargo tank which is required to be marked or placarded under §177.823; or

(4) The other vehicle in the combination contains any:

(i) Substances, explosive, n.o.s., Division 1.1A (explosive) material (Initiating explosive),

(ii) Packages of Class 7 (radioactive) materials bearing “Yellow III” labels,

(iii) Division 2.3, Hazard Zone A or Hazard Zone B materials or Division 6.1, PG I, Hazard Zone A materials, or

(iv) Hazardous materials in a portable tank or a DOT specification 106A or 110A tank.

(d) *Multipurpose bulk trucks.* When §172.101 of this subchapter specifies that Class 1 (explosive) materials may be transported in accordance with §173.66 of this subchapter (per special provision 148 in §172.102(c)(1)), these materials may be transported on the same vehicle with Division 5.1 (oxidizing) materials, or Class 8 (corrosive) materials, and/or Combustible Liquid, n.o.s., NA1993 only under the conditions and requirements set forth in IME Standard 23 (IBR, see §171.7 of this subchapter) and paragraph (g) of this section. In addition, the segregation requirements in §177.848 do not apply.

(e) *No sharp projections inside body of vehicles.* No motor vehicle transporting any kind of Class 1 (explosive) material shall have on the interior of the body in which the Class 1 (explosive) materials are contained, any inwardly projecting bolts, screws, nails, or other inwardly projecting parts likely to produce damage to any package or container of Class 1 (explosive) materials during the loading or unloading process or in transit.

(f) *Class 1 (explosive) materials vehicles, floors tight and lined.* Motor vehicles transporting Division 1.1, 1.2, or 1.3 (explosive) materials shall have tight floors; shall have that portion of the interior in contact with the load lined with either non-metallic material or non-ferrous metals, except that the lining is not required for truck load shipments loaded by the Departments of the Army, Navy or Air Force of the United States Government provided the Class 1 (explosive) materials are of such nature that they are not liable to leakage of dust, powder, or vapor which might become the cause of an explosion. The interior of the cargo space must be in good condition so that there will not be any likelihood of containers being damaged by exposed bolts, nuts, broken side panels or floor boards, or any similar projections.

(g) No detonator assembly or booster with detonator may be transported on the same motor vehicle with any Division 1.1, 1.2 or 1.3 material (except other detonator assemblies, boosters with detonators or detonators), detonating cord Division 1.4 material or Division 1.5 material. No detonator may be transported on the same motor vehicle with any Division 1.1, 1.2 or 1.3 material (except other detonators, detonator assemblies or boosters with detonators), detonating cord Division 1.4 material or Division 1.5 material unless—

(1) It is packed in a specification MC 201 (§178.318 of this subchapter) container; or

(2) The package conforms with requirements prescribed in §173.62 of this subchapter, and its use is restricted to instances when—

(i) There is no Division 1.1, 1.2, 1.3 or 1.5 material loaded on the motor vehicle; and

(ii) A separation of 61 cm (24 inches) is maintained between each package of detonators and each package of detonating cord; or

(3) It is packed and loaded in accordance with a method approved by the Associate Administrator. One approved method requires that—

(i) The detonators are in packagings as prescribed in §173.63 of this subchapter which in turn are loaded into suitable containers or separate compartments; and

(ii) That both the detonators and the container or compartment meet the requirements of the IME Standard 22 (IBR, see §171.7 of this subchapter).

(h) *Lading within body or covered tailgate closed.* Except as provided in paragraph (g) of this section, dealing with the transportation of liquid nitroglycerin, desensitized liquid nitroglycerin or diethylene glycol dinitrate, all of that portion of the

lading of any motor vehicle which consists of Class 1 (explosive) materials shall be contained entirely within the body of the motor vehicle or within the horizontal outline thereof, without overhang or projection of any part of the load and if such motor vehicle has a tailboard or tailgate, it shall be closed and secured in place during such transportation. Every motor vehicle transporting Class 1 (explosive) materials must either have a closed body or have the body thereof covered with a tarpaulin, and in either event care must be taken to protect the load from moisture and sparks, except that subject to other provisions of these regulations, Class 1 (explosive) materials other than black powder may be transported on flat-bed vehicles if the explosive portion of the load on each vehicle is packed in fire and water resistant containers or covered with a fire and water resistant tarpaulin.

(i) *Class 1 (explosive) materials to be protected against damage by other lading.* No motor vehicle transporting any Class 1 (explosive) material may transport as a part of its load any metal or other articles or materials likely to damage such Class 1 (explosive) material or any package in which it is contained, unless the different parts of such load be so segregated or secured in place in or on the motor vehicle and separated by bulkheads or other suitable means as to prevent such damage.

(j) *Transfer of Class 1 (explosive) materials en route.* No Division 1.1, 1.2, or 1.3 (explosive) material shall be transferred from one container to another, or from one motor vehicle to another vehicle, or from another vehicle to a motor vehicle, on any public highway, street, or road, except in case of emergency. In such cases red electric lanterns, red emergency reflectors or red flags shall be set out in the manner prescribed for disabled or stopped motor vehicles. (See Motor Carrier Safety Regulations, part 392 of this title.) In any event, all practicable means, in addition to these hereinbefore prescribed, shall be taken to protect and warn other users of the highway against the hazard involved in any such transfer or against the hazard occasioned by the emergency making such transfer necessary.

(k) *Attendance of Class 1 (explosive) materials.* Division 1.1, 1.2, or 1.3 materials that are stored during transportation in commerce must be attended and afforded surveillance in accordance with 49 CFR 397.5. A safe haven that conforms to NFPA 498 (IBR, see §171.7 of the subchapter) constitutes a federally approved safe haven for the unattended storage of vehicles containing Division 1.1, 1.2, or 1.3 materials.

[29 FR 18795, Dec. 29, 1964. Redesignated at 32 FR 5606, Apr. 5, 1967]

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§177.837 Class 3 materials.

(See also §177.834 (a) to (j).)

(a) *Engine stopped.* Unless the engine of a cargo tank motor vehicle is to be used for the operation of a pump, Class 3 material may not be loaded into, or on, or unloaded from any cargo tank motor vehicle while the engine is running. The diesel engine of a cargo tank motor vehicle may be left running during the loading and unloading of a Class 3 material if the ambient atmospheric temperature is at or below −12 °C (10 °F).

(b) *Bonding and grounding containers other than cargo tanks prior to and during transfer of lading.* For containers which are not in metallic contact with each other, either metallic bonds or ground conductors shall be provided for the neutralization of possible static charges prior to and during transfers of Class 3 (flammable liquid) materials between such containers. Such bonding shall be made by first connecting an electric conductor to the container to be filled and subsequently connecting the conductor to the container from which the liquid is to come, and not in any other order. To provide against ignition of vapors by discharge of static electricity, the latter connection shall be made at a point well removed from the opening from which the Class 3 (flammable liquid) material is to be discharged.

(c) *Bonding and grounding cargo tanks before and during transfer of lading.* (1) When a cargo tank is loaded through an open filling hole, one end of a bond wire shall be connected to the stationary system piping or integrally connected steel framing, and the other end to the shell of the cargo tank to provide a continuous electrical connection. (If bonding is to the framing, it is essential that piping and framing be electrically interconnected.) This connection must be made before any filling hole is opened, and must remain in place until after the last filling hole has been closed. Additional bond wires are not needed around All-Metal flexible or swivel joints, but are required for nonmetallic flexible connections in the stationary system piping. When a cargo tank is unloaded by a suction-piping system through an open filling hole of the cargo tank, electrical continuity shall be maintained from cargo tank to receiving tank.

(2) When a cargo tank is loaded or unloaded through a vapor-tight (not open hole) top or bottom connection, so that there is no release of vapor at a point where a spark could occur, bonding or grounding is not required. Contact of the closed connection must be made before flow starts and must not be broken until after the flow is completed.

(3) Bonding or grounding is not required when a cargo tank is unloaded through a nonvapor-tight connection into a stationary tank provided the metallic filling connection is maintained in contact with the filling hole.

(d) *Unloading combustible liquids.* For a cargo tank unloading a material meeting the definition for combustible liquid in §173.150(f) of this subchapter, the qualified person attending the unloading operation must remain within 45.72 meters (150 feet) of the cargo tank and 7.62 meters (25 feet) of the delivery hose and must observe both the cargo tank and the receiving container at least once every five minutes during unloading operations that take more than five minutes to complete.

[29 FR 18795, Dec. 29, 1964]

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§177.838 Class 4 (flammable solid) materials, Class 5 (oxidizing) materials, and Division 4.2 (self-heating and pyrophoric liquid) materials.

(See also §177.834 (a) to (j).)

(a) *Lading within body or covered; tailgate closed; pick-up and delivery.* All of that portion of the lading of any motor vehicle transporting Class 4 (flammable solid) or Class 5 (oxidizing) materials shall be contained entirely within the body of the motor vehicle and shall be covered by such body, by tarpaulins, or other suitable means, and if such motor vehicle has a tailboard or tailgate, it shall be closed and secured in place during such transportation: *Provided, however,* That the provisions of this paragraph need not apply to “pick-up and delivery” motor vehicles when such motor vehicles are used in no other transportation than in and about cities, towns, or villages. Shipment in water-tight bulk containers need not be covered by a tarpaulin or other means.

(b) *Articles to be kept dry.* Special care shall be taken in the loading of any motor vehicle with Class 4 (flammable solid) or Class 5 (oxidizing) materials which are likely to become hazardous to transport when wet, to keep them from being wetted during the loading process and to keep them dry during transit. Special care shall also be taken in the loading of any motor vehicle with Class 4 (flammable solid) or Class 5 (oxidizing) materials, which are likely to become more hazardous to transport by wetting, to keep them from being wetted during the loading process and to keep them dry during transit. Examples of such dangerous materials are charcoal screenings, ground, crushed, or pulverized charcoal, and lump charcoal.

(c) *Lading ventilation, precautions against spontaneous combustion.* Whenever a motor carrier has knowledge concerning the hazards of spontaneous combustion or heating of any article to be loaded on a motor vehicle, such article shall be so loaded as to afford sufficient ventilation of the load to provide reasonable assurance against fire from this cause; and in such a case the motor vehicle shall be unloaded as soon as practicable after reaching its destination. Charcoal screenings, or ground, crushed, granulated, or pulverized charcoal, in bags, shall be so loaded that the bags are laid horizontally in the motor vehicle, and so piled that there will be spaces for effective air circulation, which spaces shall not be less than 10 cm (3.9 inches) wide; and air spaces shall be maintained between rows of bags. Bags shall not be piled closer than 15 cm (5.9 inches) from the top of any motor vehicle with a closed body.

(d)-(e) [Reserved]

(f) Nitrates, except ammonium nitrate having organic coating, must be loaded in closed or open type motor vehicles, which must be swept clean and be free of any projections capable of injuring bags when so packaged. When shipped in open type motor vehicles, the lading must be suitably covered. Ammonium nitrate having organic coating must not be loaded in all-metal vehicles, other than those made of aluminum or aluminum alloys of the closed type.

(g) A motor vehicle may only contain 45.4 kg (100 pounds) or less net mass of material described as “Smokeless powder for small arms, Division 4.1” or “Black powder for small arms, Division 4.1.”

(h) *Division 4.2 (pyrophoric liquid) materials in cylinders.* Cylinders containing Division 4.2 (pyrophoric liquid) materials, unless packed in a strong box or case and secured therein to protect valves, must be loaded with all valves and safety relief devices in the vapor space. All cylinders must be secured so that no shifting occurs in transit.

(i) Division 4.2 (self-heating liquid) material. Notwithstanding the segregation requirements of §177.848(d), the following Division 4.2 (self-heating) materials may be transported on the same transport vehicle with Class 8 (corrosive) materials. The hazardous materials must be palletized with a minimum height of 100 mm (4 inches) off the floor of the vehicle, and the self-heating material must be separated from the corrosive material by a minimum horizontal distance of 1.2 m (4 feet).

(1) Sodium hydrosulfite *or* sodium dithionite, UN1384, in PG II or III packaged in UN 1A2 steel drums that meet the Packing Group II performance requirements of subpart M of part 178 of this title.

(2) Thiourea dioxide, UN3341, in PG II or III packaged in UN 1G fiber drums meeting packing group II performance requirements of subpart M of part 178 of this subchapter.

(3) Self-heating, solid, organic, n.o.s., UN3088, in PG II or III packaged in UN 1G fiber drums meeting the Packing Group II performance level requirements of subpart M of part 178 of this subchapter.

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EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §177.838, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

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§177.839 Class 8 (corrosive) materials.

(See also §177.834(a) through (j).)

(a) *Nitric acid.* No packaging of nitric acid of 50 percent or greater concentration may be loaded above any packaging containing any other kind of material.

(b) *Storage batteries.* All storage batteries containing any electrolyte must be so loaded, if loaded with other lading, that all such batteries will be protected against other lading falling onto or against them, and adequate means must be provided in all cases for the protection and insulation of battery terminals against short circuits.

[Amdt. 177-87, 61 FR 27175, May 30, 1996]

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§177.840 Class 2 (gases) materials.

(See also §177.834 (a) to (j).)

(a) *Floors or platforms essentially flat.* Cylinders containing Class 2 (gases) materials shall not be loaded onto any part of the floor or platform of any motor vehicle which is not essentially flat; cylinders containing Class 2 (gases) materials may be loaded onto any motor vehicle not having a floor or platform only if such motor vehicle be equipped with suitable racks having adequate means for securing such cylinders in place therein. Nothing contained in this section shall be so construed as to prohibit the loading of such cylinders on any motor vehicle having a floor or platform and racks as hereinbefore described.

(1) *Cylinders.* Cylinders containing Class 2 gases must be securely restrained in an upright or horizontal position, loaded in racks, or packed in boxes or crates to prevent the cylinders from being shifted, overturned or ejected from the motor vehicle under normal transportation conditions. A pressure relief device, when installed, must be in communication with the vapor space of a cylinder containing a Division 2.1 (flammable gas) material.

(2) *Cylinders for hydrogen, cryogenic liquid.* A Specification DOT-4L cylinder containing hydrogen, cryogenic liquid may only be transported on a motor vehicle as follows:

(i) The vehicle must have an open body equipped with a suitable rack or support having a means to hold the cylinder upright when subjected to an acceleration of 2 “g” in any horizontal direction;

(ii) The combined total of the hydrogen venting rates, as marked, on the cylinders transported on one motor vehicle may not exceed 60 SCF per hour;

(iii) The vehicle may not enter a tunnel; and

(iv) Highway transportation is limited to private and contract carriage and to direct movement from point of origin to destination.

(3) *Cylinders containing material classed as Division 2.3, Hazard Zone A.* (i) Notwithstanding the segregation requirements of §177.848(d), a cylinder containing a Division 2.3, Hazard Zone A materials may be transported on the same transport vehicle with materials classed as Division 2.1, Class 3, Class 4, Class 5, and Class 8 if all of the following requirements are met:

(A) The Division 2.3, Hazard Zone A material must be packaged as authorized by this subchapter. In addition, each package must be must be placed in a plastic bag which is taped closed and then overpacked in a UN 1A2 steel drum tested and marked for a PG II or higher performance level with insulation material inside to protect the cylinders from fire. The outside of the overpack must be marked with an indication that the inner packagings conform to the prescribed specifications.

(B) A Division 2.1 material requiring strong non-bulk outer packagings in accordance with §173.301(a)(9) of this subchapter must be overpacked in a UN 1A2 steel or 1H2 plastic drum tested and marked for a PG II or higher performance level. The outside of the overpack must be marked with an indication that the inner packagings conform to the prescribed specifications.

(C) Packages containing Division 2.3 Hazard Zone A material must be separated within the transport vehicle from packages containing Division 2.1, Class 3, Class 4, Class 5, and Class 8 materials by a minimum horizontal distance of 1.2 m (4 feet). In addition, all steel or plastic overpacks containing packages of Division 2.3, Hazard Zone A or Division 2.1 material must be placed on pallets within the transport vehicle.

(ii) Notwithstanding the segregation requirements of §177.848(d), Division 2.3, Hazard Zone A material may be transported on the same transport vehicle with non-bulk packagings and IBCs meeting a UN performance standard containing only the residue of Division 2.1, 4.3, 5.1, and Class 3 and 8 materials if all of the following requirements are met:

(A) The materials are transported in enclosed trailers equipped with inlet and outlet vent openings with a minimum total area of one square foot per 1,000 cubic feet of trailer volume. Electrical systems within the trailer's interior must be non-sparking or explosion proof.

(B) Cylinders must be transported in an upright position and securely restrained within the trailer, or loaded into racks, secured to pallets, or packed in wooden or fiberboard boxes or crates to prevent the cylinders from shifting or overturning within the motor vehicle under normal transportation conditions. If cylinders are secured to a pallet, the pallet must be designed to transport 1,590 kg (3,500 lbs.) per pallet and the cylinders must be secured within the pallet by a web strap rated at 4,545 kg (10,000 lbs.).

(C) A cylinder containing Division 2.3 Hazard Zone A materials must be separated from non-bulk packagings and IBCs meeting a UN performance standard containing the residue of materials in Division 2.1, 4.3, or 5.1, or Class 3 or 8 by a minimum horizontal distance of 3 m (10 feet). The maximum gross weight of Division 2.3 Hazard Zone A material carried on one vehicle must not exceed 3,636 kg (8,000 lbs.).

(D) Motor carriers must have a satisfactory safety rating as prescribed in 49 CFR part 385.

(4) *Cylinders for acetylene.* Cylinders containing acetylene and manifolded as part of a mobile acetylene trailer system must be transported in accordance with §173.301(g) of this subchapter.

(b) Portable tank containers containing Class 2 (gases) materials shall be loaded on motor vehicles only as follows:

(1) Onto a flat floor or platform of a motor vehicle.

(2) Onto a suitable frame of a motor vehicle.

(3) In either such case, such containers shall be safely and securely blocked or held down to prevent shifting relative to each other or to the supporting structure when in transit, particularly during sudden starts and stops and changes of direction of the vehicle.

(4) Requirements of paragraphs (1) and (2) of this paragraph (b) shall not be construed as prohibiting stacking of containers provided the provisions of paragraph (3) of this paragraph (b) are fully complied with.

(c) [Reserved]

(d) *Engine to be stopped in cargo tank motor vehicles, except for transfer pump.* No Division 2.1 (flammable gas) material shall be loaded into or on or unloaded from any cargo tank motor vehicles with the engine running unless the engine is used for the operation of the transfer pump of the vehicle. Unless the delivery hose is equipped with a shut-off valve at its discharge end, the engine of the motor vehicle shall be stopped at the finish of such loading or unloading operation while the filling or discharge connections are disconnected.

(e) Chlorine cargo tank motor vehicles shall be shipped only when equipped:

(1) With a gas mask of a type approved by the National Institute of Occupational Safety and Health (NIOSH) Pittsburgh Research Center, U.S. Department of Health and Human Services for chlorine service; and

(2) With an emergency kit for controlling leaks in fittings on the dome cover plate.

(f) A cargo tank motor vehicle used for transportation of chlorine may not be moved, coupled or uncoupled, when any loading or unloading connections are attached to the vehicle, nor may it be left without the power unit attached unless the vehicle is chocked or equivalent means are provided to prevent motion. For additional requirements, see §173.315(o) of this subchapter.

(g) Each liquid discharge valve on a cargo tank motor vehicle, other than an engine fuel line valve, must be closed during transportation except during loading and unloading.

(h) The driver of a motor vehicle transporting a Division 2.1 (flammable gas) material that is a cryogenic liquid in a package exceeding 450 L (119 gallons) of water capacity shall avoid unnecessary delays during transportation. If unforeseen conditions cause an excessive pressure rise, the driver shall manually vent the tank at a remote and safe location. For each shipment, the driver shall make a written record of the cargo tank pressure and ambient (outside) temperature:

(1) At the start of each trip,

(2) Immediately before and after any manual venting,

(3) At least once every five hours, and

(4) At the destination point.

(i) No person may transport a Division 2.1 (flammable gas) material that is a cryogenic liquid in a cargo tank motor vehicle unless the pressure of the lading is equal to or less than that used to determine the marked rated holding time (MRHT) and the one-way travel time (OWTT), marked on the cargo tank in conformance with §173.318(g) of this subchapter, is equal to or greater than the elapsed time between the start and termination of travel. This prohibition does not apply if, prior to expiration of the OWTT, the cargo tank is brought to full equilibration as specified in paragraph (j) of this section.

(j) Full equilibration of a cargo tank transporting a Division 2.1 (flammable gas) material that is a cryogenic liquid may only be done at a facility that loads or unloads a Division 2.1 (flammable gas) material that is a cryogenic liquid and must be performed and verified as follows:

(1) The temperature and pressure of the liquid must be reduced by a manually controlled release of vapor; and

(2) The pressure in the cargo tank must be measured at least ten minutes after the manual release is terminated.

(k) A carrier of carbon monoxide, cryogenic liquid must provide each driver with a self-contained air breathing apparatus that is approved by the National Institute of Occupational Safety and Health; for example, Mine Safety Appliance Co., Model 401, catalog number 461704.

(l) *Operating procedure.* Each operator of a cargo tank motor vehicle that is subject to the emergency discharge control requirements in §173.315(n) of this subchapter must carry on or within the cargo tank motor vehicle written emergency discharge control procedures for all delivery operations. The procedures must describe the cargo tank motor vehicle's emergency discharge control features and, for a passive shut-down capability, the parameters within which they are designed to function. The procedures must describe the process to be followed if a facility-provided hose is used for unloading when the cargo tank motor vehicle has a specially equipped delivery hose assembly to meet the requirements of §173.315(n)(2) of this subchapter.

(m) *Cargo tank motor vehicle safety check.* Before unloading from a cargo tank motor vehicle containing a liquefied compressed gas, the qualified person performing the function must check those components of the discharge system, including delivery hose assemblies and piping, that are readily observed during the normal course of unloading to assure that they are of sound quality, without obvious defects detectable through visual observation and audio awareness, and that connections are secure. This check must be made after the pressure in the discharge system has reached at least equilibrium with the pressure in the cargo tank. Operators need not use instruments or take extraordinary actions to check components not readily visible. No operator may unload liquefied compressed gases from a cargo tank motor vehicle with a delivery hose assembly found to have any condition identified in §180.416(g)(1) of this subchapter or with piping systems found to have any condition identified in §180.416(g)(2) of this subchapter.

(n) *Emergency shut down.* If there is an unintentional release of product to the environment during unloading of a liquefied compressed gas, the qualified person unloading the cargo tank motor vehicle must promptly shut the internal self-closing stop valve or other primary means of closure and shut down all motive and auxiliary power equipment.

(o) *Daily test of off-truck remote shut-off activation device.* For a cargo tank motor vehicle equipped with an off-truck remote means to close the internal self-closing stop valve and shut off all motive and auxiliary power equipment, an operator must successfully test the activation device within 18 hours prior to the first delivery of each day. For a wireless transmitter/receiver, the person conducting the test must be at least 45.72 m (150 feet) from the cargo tank and may have the cargo tank in his line of sight.

(p) *Unloading procedures for liquefied petroleum gas and anhydrous ammonia in metered delivery service.* An operator must use the following procedures for unloading liquefied petroleum gas or anhydrous ammonia from a cargo tank motor vehicle in metered delivery service:

(1) For a cargo tank with a capacity of 13,247.5 L (3,500 water gallons) or less, excluding delivery hose and piping, the qualified person attending the unloading operation must remain within 45.72 meters (150 feet) of the cargo tank and 7.62 meters (25 feet) of the delivery hose and must observe both the cargo tank and the receiving container at least once every five minutes when the internal self-closing stop valve is open during unloading operations that take more than five minutes to complete.

(2) For a cargo tank with a capacity greater than 13,247.5 L (3,500 water gallons), excluding delivery hose and piping, the qualified person attending the unloading operation must remain within 45.72 m (150 feet) of the cargo tank and 7.62 m (25 feet) of the delivery hose when the internal self-closing stop valve is open.

(i) Except as provided in paragraph (p)(2)(ii) of this section, the qualified person attending the unloading operation must have an unobstructed view of the cargo tank and delivery hose to the maximum extent practicable, except during short periods when it is necessary to activate controls or monitor the receiving container.

(ii) For deliveries where the qualified person attending the unloading operation cannot maintain an unobstructed view of the cargo tank, when the internal self-closing stop valve is open, the qualified person must observe both the cargo tank and the receiving container at least once every five minutes during unloading operations that take more than five minutes to complete. In addition, by the compliance dates specified in §§173.315(n)(5) and 180.405(m)(3) of this subchapter, the cargo tank motor vehicle must have an emergency discharge control capability that meets the requirements of §173.315(n)(2) or §173.315(n)(4) of this subchapter.

(q) *Unloading procedures for liquefied petroleum gas and anhydrous ammonia in other than metered delivery service.* An operator must use the following procedures for unloading liquefied petroleum gas or anhydrous ammonia from a cargo tank motor vehicle in other than metered delivery service:

(1) The qualified person attending the unloading operation must remain within 7.62 m (25 feet) of the cargo tank when the internal self-closing stop valve is open.

(2) The qualified person attending the unloading operation must have an unobstructed view of the cargo tank and delivery hose to the maximum extent practicable, except during short periods when it is necessary to activate controls or monitor the receiving container.

(r) *Unloading using facility-provided hoses.* A cargo tank motor vehicle equipped with a specially designed delivery hose assembly to meet the requirements of §173.315(n)(2) of this subchapter may be unloaded using a delivery hose assembly provided by the receiving facility under the following conditions:

(1) The qualified person monitoring unloading must visually examine the facility hose assembly for obvious defects prior to its use in the unloading operation.

(2) The qualified person monitoring unloading must remain within arm's reach of the mechanical means of closure for the internal self-closing stop valve when the internal self-closing stop valve is open except for short periods when it is necessary to activate controls or monitor the receiving container. For chlorine cargo tank motor vehicles, the qualified person must remain within arm's reach of a means to stop the flow of product except for short periods when it is necessary to activate controls or monitor the receiving container.

(3) If the facility hose is equipped with a passive means to shut off the flow of product that conforms to and is maintained to the performance standard in §173.315(n)(2) of this subchapter, the qualified person may attend the unloading operation in accordance with the attendance requirements prescribed for the material being unloaded in §177.834 of this section.

(s) *Off-truck remote shut-off activation device.* For a cargo tank motor vehicle with an off-truck remote control shut-off capability as required by §173.315(n)(3) or (n)(4) of this subchapter, the qualified person attending the unloading operation must be in possession of the activation device at all times during the unloading process. This requirement does not apply if the activation device is part of a system that will shut off the unloading operation without human intervention in the event of a leak or separation in the hose.

(t) *Unloading without appropriate emergency discharge control equipment.* Until a cargo tank motor vehicle is equipped with emergency discharge control equipment in conformance with §§173.315(n)(2) and 180.405(m)(1) of this subchapter, the qualified person attending the unloading operation must remain within arm's reach of a means to close the internal self-closing stop valve when the internal self-closing stop valve is open except during short periods when the qualified person must activate controls or monitor the receiving container. For chlorine cargo tank motor vehicles unloaded after December 31, 1999, the qualified person must remain within arm's reach of a means to stop the flow of product except for short periods when it is necessary to activate controls or monitor the receiving container.

(u) *Unloading of chlorine cargo tank motor vehicles.* Unloading of chlorine from a cargo tank motor vehicle must be performed in compliance with Section 3 of the Chlorine Institute Pamphlet 57, “Emergency Shut-off Systems for Bulk Transfer of Chlorine” (IBR, see §171.7 of this subchapter).

(Approved by the Office of Management and Budget under control number 2137-0542)

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§177.841 Division 6.1 and Division 2.3 materials.

(See also §177.834 (a) to (j).)

(a) *Arsenical compounds in bulk.* Care shall be exercised in the loading and unloading of “arsenical dust”, “arsenic trioxide”, and “sodium arsenate”, allowable to be loaded into sift-proof, steel hopper-type or dump-type motor-vehicle bodies equipped with water-proof, dust-proof covers well secured in place on all openings, to accomplish such loading with the minimum spread of such compounds into the atmosphere by all means that are practicable; and no such loading or unloading shall be done near or adjacent to any place where there are or are likely to be, during the loading or unloading process assemblages of persons other than those engaged in the loading or unloading process, or upon any public highway or in any public place. Before any motor vehicle may be used for transporting any other articles, all detectable traces of arsenical materials must be removed therefrom by flushing with water, or by other appropriate method, and the marking removed.

(b) [Reserved]

(c) *Division 2.3 (poisonous gas) or Division 6.1 (poisonous) materials.* The transportation of a Division 2.3 (poisonous gas) or Division 6.1 (poisonous) material is not permitted if there is any interconnection between packagings.

(d) [Reserved]

(e) A motor carrier may not transport a package:

(1) Except as provided in paragraph (e)(3) of this section, bearing or required to bear a POISON or POISON INHALATION HAZARD label or placard in the same motor vehicle with material that is marked as or known to be foodstuffs, feed or edible material intended for consumption by humans or animals unless the poisonous material is packaged in accordance with this subchapter and is:

(i) Overpacked in a metal drum as specified in §173.25(c) of this subchapter; or

(ii) Loaded into a closed unit load device and the foodstuffs, feed, or other edible material are loaded into another closed unit load device;

(2) Bearing or required to bear a POISON, POISON GAS or POISON INHALATION HAZARD label in the driver's compartment (including a sleeper berth) of a motor vehicle; or

(3) Bearing a POISON label displaying the text “PG III,” or bearing a “PG III” mark adjacent to the POISON label, with materials marked as, or known to be, foodstuffs, feed or any other edible material intended for consumption by humans or animals, unless the package containing the Division 6.1, Packing Group III material is separated in a manner that, in the

event of leakage from packages under conditions normally incident to transportation, commingling of hazardous materials with foodstuffs, feed or any other edible material would not occur.

(f) Notwithstanding the segregation requirements of §177.848(d), when transported by highway by private or contract motor carrier, Division 6.1 PG I, Hazard Zone A toxic-by-inhalation (TIH) materials meeting the definition of a hazardous waste as provided in §171.8 of this subchapter, may be transported on the same transport vehicle with materials classed as Class 3, Class 4, Class 5, and Class 8. The Division 6.1 PG I, Hazard Zone A materials must be loaded on pallets and separated from the Class 3, Class 4, Class 5, and Class 8 materials by a minimum horizontal distance of 2.74 m (9 feet) when in conformance with the following:

(1) The TIH materials are packaged in combination packagings as prescribed in §173.226(c) of this subchapter.

(2) The combination packages containing TIH materials must be:

(i) Filled and packed by the offeror's hazmat employees;

(ii) Be placed on pallets, when in a transport vehicle; and

(iii) Separated from hazardous materials classed as Class 3, Class 8 or Divisions 4.1, 4.2, 4.3, 5.1, or 5.2 by a nine-foot (minimum distance) buffer zone, when in a transport vehicle. The buffer zone maybe established by:

(A) A load lock;

(B) Empty drums;

(C) Drums containing hazardous materials (e.g., Class 9) that are compatible with materials in all other drums immediately around them; or

(D) Drums containing non-hazardous materials that are compatible with materials in all other drums immediately around them.

[29 FR 18795, Dec. 29, 1964]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §177.841, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

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§177.842 Class 7 (radioactive) material.

(a) The number of packages of Class 7 (radioactive) materials in any transport vehicle or in any single group in any storage location must be limited so that the total transport index number does not exceed 50. The total transport index of a group of packages and overpacks is determined by adding together the transport index number on the labels on the individual packages and overpacks in the group. This provision does not apply to exclusive use shipments described in §§173.441(b), 173.457, and 173.427 of this subchapter.

(b) Packages of Class 7 (radioactive) material bearing “RADIOACTIVE YELLOW-II” or “RADIOACTIVE YELLOW-III” labels may not be placed in a transport vehicle, storage location or in any other place closer than the distances shown in the following table to any area which may be continuously occupied by any passenger, employee, or animal, nor closer than the distances shown in the table to any package containing undeveloped film (if so marked), and must conform to the following conditions:

(1) If more than one of these packages is present, the distance must be computed from the following table on the basis of the total transport index number determined by adding together the transport index number on the labels on the individual packages and overpacks in the vehicle or storeroom.

(2) Where more than one group of packages is present in any single storage location, a single group may not have a total transport index greater than 50. Each group of packages must be handled and stowed not closer than 6 m (20 feet) (measured edge to edge) to any other group. The following table is to be used in accordance with the provisions of paragraph (b) of this section:

Total transport index	Minimum separation distance in meters (feet) to nearest undeveloped film in various times of transit					Minimum distance in meters (feet) to area of persons, or minimum distance in meters (feet) from dividing partition of cargo compartments
	Up to 2 hours	2-4 hours	4-8 hours	8-12 hours	Over 12 hours	
None	0.0 (0)	0.0 (0)	0.0 (0)	0.0 (0)	0.0 (0)	0.0 (0)
0.1 to 1.0	0.3 (1)	0.6 (2)	0.9 (3)	1.2 (4)	1.5 (5)	0.3 (1)

1.1 to 5.0	0.9 (3)	1.2 (4)	1.8 (6)	2.4 (8)	3.4 (11)	0.6 (2)
5.1 to 10.0	1.2 (4)	1.8 (6)	2.7 (9)	3.4 (11)	4.6 (15)	0.9 (3)
10.1 to 20.0	1.5 (5)	2.4 (8)	3.7 (12)	4.9 (16)	6.7 (22)	1.2 (4)
20.1 to 30.0	2.1 (7)	3.0 (10)	4.6 (15)	6.1 (20)	8.8 (29)	1.5 (5)
30.1 to 40.0	2.4 (8)	3.4 (11)	5.2 (17)	6.7 (22)	10.1 (33)	1.8 (6)
40.1 to 50.0	2.7 (9)	3.7 (12)	5.8 (19)	7.3 (24)	11.0 (36)	2.1 (7)

NOTE: The distance in this table must be measured from the nearest point on the nearest packages of Class 7 (radioactive) material.

(c) Shipments of low specific activity materials and surface contaminated objects, as defined in §173.403 of this subchapter, must be loaded so as to avoid spillage and scattering of loose materials. Loading restrictions are set forth in §173.427 of this subchapter.

(d) Packages must be so blocked and braced that they cannot change position during conditions normally incident to transportation.

(e) Persons should not remain unnecessarily in a vehicle containing Class 7 (radioactive) materials.

(f) The number of packages of fissile Class 7 (radioactive) material in any non-exclusive use transport vehicle must be limited so that the sum of the criticality safety indices (CSIs) does not exceed 50. In loading and storage areas, fissile material packages must be grouped so that the sum of CSIs in any one group is not greater than 50; there may be more than one group of fissile material packages in a loading or storage area, so long as each group is at least 6 m (20 feet) away from all other such groups. All pertinent requirements of §§173.457 and 173.459 apply.

(g) For shipments transported under exclusive use conditions the radiation dose rate may not exceed 0.02 mSv per hour (2 mrem per hour) in any position normally occupied in the motor vehicle. For shipments transported as exclusive use under the provisions of §173.441(b) of this subchapter for packages with external radiation levels in excess of 2 mSv (200 mrem per hour) at the package surface, the motor vehicle must meet the requirements of a closed transport vehicle (see §173.403 of this subchapter). The sum of criticality safety indices (CSIs) for packages containing fissile material may not exceed 100 in an exclusive use vehicle.

[Amdt. 177-85, 60 FR 50334, Sept. 28, 1995, as amended at 63 FR 52850, Oct. 1, 1998; 66 FR 45385, Aug. 28, 2001; 69 FR 3696, Jan. 26, 2004]

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§177.843 Contamination of vehicles.

(a) Each motor vehicle used for transporting Class 7 (radioactive) materials under exclusive use conditions in accordance with §173.427(b)(4), §173.427(c), or §173.443(b) of this subchapter must be surveyed with radiation detection instruments after each use. A vehicle may not be returned to Class 7 (radioactive) materials exclusive use transport service, and then only for a subsequent exclusive use shipment utilizing the provisions of any of the paragraphs §173.427(b)(4), §173.427(c), or §173.443(b), until the radiation dose rate at every accessible surface is 0.005 mSv/h (0.5 mrem/h) or less and the non-fixed contamination is not greater than the level prescribed in §173.443(a) of this subchapter.

(b) This section does not apply to any vehicle used solely for transporting Class 7 (radioactive) material if a survey of the interior surface shows that the radiation dose rate does not exceed 0.1 mSv per hour (10 mrem per hour) at the interior surface or 0.02 mSv per hour (2 mrem per hour) at 1 meter (3.3 feet) from any interior surface. These vehicles must be stenciled with the words “For Radioactive Materials Use Only” in lettering at least 7.6 cm (3 inches) high in a conspicuous place, on both sides of the exterior of the vehicle. These vehicles must be kept closed at all times other than loading and unloading.

(c) In case of fire, accident, breakage, or unusual delay involving shipments of Class 7 (radioactive) material, see §§171.15, 171.16 and 177.854 of this subchapter.

(d) Each transport vehicle used to transport Division 6.2 materials must be disinfected prior to reuse if a Division 6.2 material is released from its packaging during transportation. Disinfection may be by any means effective for neutralizing the material released.

[Amdt. 177-3, 33 FR 14933, Oct. 4, 1968, as amended by Amdt. 177-35, 41 FR 16131, Apr. 15, 1976; Amdt. 177-57, 48 FR 10247, Mar. 10, 1983; Amdt. 177-78, 55 FR 52712, Dec. 21, 1990; Amdt. 177-85, 60 FR 50335, Sept. 28, 1995; 63 FR 52850, Oct. 1, 1998; 65 FR 58631, Sept. 29, 2000; 67 FR 53142, Aug. 14, 2002; 75 FR 53597, Sept. 1, 2010; 79 FR 40618, July 11, 2014]

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Subpart C—Segregation and Separation Chart of Hazardous Materials

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§177.848 Segregation of hazardous materials.

(a) This section applies to materials which meet one or more of the hazard classes defined in this subchapter and are:

(1) In packages that must be labeled or placarded in accordance with part 172 of this subchapter;

(2) In a compartment within a multi-compartmented cargo tank subject to the restrictions in §173.33 of this subchapter; or

(3) In a portable tank loaded in a transport vehicle or freight container.

(b) When a transport vehicle is to be transported by vessel, other than a ferry vessel, hazardous materials on or within that vehicle must be stowed and segregated in accordance with §176.83(b) of this subchapter.

(c) In addition to the provisions of paragraph (d) of this section and except as provided in §173.12(e) of this subchapter, cyanides, cyanide mixtures or solutions may not be stored, loaded and transported with acids if a mixture of the materials would generate hydrogen cyanide; Division 4.2 materials may not be stored, loaded and transported with Class 8 liquids; and Division 6.1 Packing Group I, Hazard Zone A material may not be stored, loaded and transported with Class 3 material, Class 8 liquids, and Division 4.1, 4.2, 4.3, 5.1 or 5.2 materials.

(d) Except as otherwise provided in this subchapter, hazardous materials must be stored, loaded or transported in accordance with the following table and other provisions of this section:

Segregation Table for Hazardous Materials

Class or division		Notes	1.1 1.2	1.3	1.4	1.5	1.6	2.1	2.2	2.3 gas zone A	2.3 gas Zone B	3	4.1	4.2	4.3	5.1	5.2	6.1 liquids PG I zone A	7	8 liquids only
Explosives	1.1 and 1.2	A	*	*	*	*	*	X	X	X	X	X	X	X	X	X	X	X	X	X
Explosives	1.3		*	*	*	*	*	X		X	X	X		X	X	X	X	X		X
Explosives	1.4		*	*	*	*	*	O		O	O	O		O				O		O
Very insensitive explosives	1.5	A	*	*	*	*	*	X	X	X	X	X	X	X	X	X	X	X	X	X
Extremely insensitive explosives	1.6		*	*	*	*	*													
Flammable gases	2.1		X	X	O	X				X	O							O	O	
Non-toxic, non-flammable gases	2.2		X			X														
Poisonous gas Zone A	2.3		X	X	O	X		X				X	X	X	X	X	X			X
Poisonous gas Zone B	2.3		X	X	O	X		O				O	O	O	O	O	O			O
Flammable liquids	3		X	X	O	X				X	O					O		X		
Flammable solids	4.1		X			X				X	O							X		O
Spontaneously combustible materials	4.2		X	X	O	X				X	O							X		X
Dangerous when wet materials	4.3		X	X		X				X	O							X		O
Oxidizers	5.1	A	X	X		X				X	O	O						X		O
Organic peroxides	5.2		X	X		X				X	O							X		O
Poisonous liquids PG I Zone A	6.1		X	X	O	X		O				X	X	X	X	X	X			X
Radioactive materials	7		X			X		O												
Corrosive liquids	8		X	X	O	X				X	O		O	X	O	O	O	X		

(e) Instructions for using the segregation table for hazardous materials are as follows:

(1) The absence of any hazard class or division or a blank space in the table indicates that no restrictions apply.

(2) The letter “X” in the table indicates that these materials may not be loaded, transported, or stored together in the same transport vehicle or storage facility during the course of transportation.

(3) The letter “O” in the table indicates that these materials may not be loaded, transported, or stored together in the same transport vehicle or storage facility during the course of transportation unless separated in a manner that, in the event of leakage from packages under conditions normally incident to transportation, commingling of hazardous materials would not occur. Notwithstanding the methods of separation employed, Class 8 (corrosive) liquids may not be loaded above or adjacent to Class 4 (flammable) or Class 5 (oxidizing) materials; except that shippers may load truckload shipments of such materials together when it is known that the mixture of contents would not cause a fire or a dangerous evolution of heat or gas.

(4) The "*" in the table indicates that segregation among different Class 1 (explosive) materials is governed by the compatibility table in paragraph (f) of this section.

(5) The note "A" in the second column of the table means that, notwithstanding the requirements of the letter "X", ammonium nitrate (UN1942) and ammonium nitrate fertilizer may be loaded or stored with Division 1.1 (explosive) or Division 1.5 materials, unless otherwise prohibited by §177.835(c).

(6) When the §172.101 table or §172.402 of this subchapter requires a package to bear a subsidiary hazard label, segregation appropriate to the subsidiary hazard must be applied when that segregation is more restrictive than that required by the primary hazard. However, hazardous materials of the same class may be stowed together without regard to segregation required for any secondary hazard if the materials are not capable of reacting dangerously with each other and causing combustion or dangerous evolution of heat, evolution of flammable, poisonous, or asphyxiant gases, or formation of corrosive or unstable materials.

(f) Class 1 (explosive) materials shall not be loaded, transported, or stored together, except as provided in this section, and in accordance with the following table:

Compatibility Table For Class 1 (Explosive) Materials

Compatibility group	A	B	C	D	E	F	G	H	J	K	L	N	S
A		X	X	X	X	X	X	X	X	X	X	X	X
B	X		X	X(4)	X	X	X	X	X	X	X	X	4/5
C	X	X		2	2	X	6	X	X	X	X	3	4/5
D	X	X(4)	2		2	X	6	X	X	X	X	3	4/5
E	X	X	2	2		X	6	X	X	X	X	3	4/5
F	X	X	X	X	X		X	X	X	X	X	X	4/5
G	X	X	6	6	6	X		X	X	X	X	X	4/5
H	X	X	X	X	X	X	X		X	X	X	X	4/5
J	X	X	X	X	X	X	X	X		X	X	X	4/5
K	X	X	X	X	X	X	X	X	X		X	X	4/5
L	X	X	X	X	X	X	X	X	X	X	1	X	X
N	X	X	3	3	3	X	X	X	X	X	X		4/5
S	X	4/5	4/5	4/5	4/5	4/5	4/5	4/5	4/5	4/5	X	4/5	

(g) Instructions for using the compatibility table for Class 1 (explosive) materials are as follows:

(1) A blank space in the table indicates that no restrictions apply.

(2) The letter "X" in the table indicates that explosives of different compatibility groups may not be carried on the same transport vehicle.

(3) The numbers in the table mean the following:

(i) "1" means an explosive from compatibility group L shall only be carried on the same transport vehicle with an identical explosive.

(ii) "2" means any combination of explosives from compatibility groups C, D, or E is assigned to compatibility group E.

(iii) "3" means any combination of explosives from compatibility groups C, D, or E with those in compatibility group N is assigned to compatibility group D.

(iv) "4" means see §177.835(g) when transporting detonators.

(v) "5" means Division 1.4S fireworks may not be loaded on the same transport vehicle with Division 1.1 or 1.2 (explosive) materials.

(vi) "6" means explosive articles in compatibility group G, other than fireworks and those requiring special handling, may be loaded, transported and stored with other explosive articles of compatibility groups C, D and E, provided that explosive substances (such as those not contained in articles) are not carried in the same transport vehicle.

(h) Except as provided in paragraph (i) of this section, explosives of the same compatibility group but of different divisions may be transported together provided that the whole shipment is transported as though its entire contents were of the lower numerical division (i.e., Division 1.1 being lower than Division 1.2). For example, a mixed shipment of Division 1.2 (explosive) materials and Division 1.4 (explosive) materials, both of compatibility group D, must be transported as Division 1.2 (explosive) materials.

(i) When Division 1.5 materials, compatibility group D, are transported in the same freight container as Division 1.2 (explosive) materials, compatibility group D, the shipment must be transported as Division 1.1 (explosive) materials, compatibility group D.

[Amdt. 177-78, 55 FR 52712, Dec. 21, 1990]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §177.848, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

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Subpart D—Vehicles and Shipments in Transit; Accidents

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§177.854 Disabled vehicles and broken or leaking packages; repairs.

(a) *Care of lading, hazardous materials.* Whenever for any cause other than necessary traffic stops any motor vehicle transporting any hazardous material is stopped upon the traveled portion of any highway or shoulder thereof, special care shall be taken to guard the vehicle and its load or to take such steps as may be necessary to provide against hazard. Special effort shall be made to remove the motor vehicle to a place where the hazards of the materials being transported may be provided against. See §§392.22, 392.24, and 392.25 of this title for warning devices required to be displayed on the highway.

(b) *Disposition of containers found broken or leaking in transit.* When leaks occur in packages or containers during the course of transportation, subsequent to initial loading, disposition of such package or container shall be made by the safest practical means afforded under paragraphs (c), (d), and (e) of this section.

(c) *Repairing or overpacking packages.* (1) Packages may be repaired when safe and practicable, such repairing to be in accordance with the best and safest practice known and available.

(2) Packages of hazardous materials that are damaged or found leaking during transportation, and hazardous materials that have spilled or leaked during transportation, may be forwarded to destination or returned to the shipper in a salvage drum in accordance with the requirements of §173.3(c) of this subchapter.

(d) *Transportation of repaired packages.* Any package repaired in accordance with the requirements of paragraph (c)(1) of this section may be transported to the nearest place at which it may safely be disposed of only in compliance with the following requirements:

(1) The package must be safe for transportation.

(2) The repair of the package must be adequate to prevent contamination of or hazardous admixture with other lading transported on the same motor vehicle therewith.

(3) If the carrier is not himself the shipper, the consignee's name and address must be plainly marked on the repaired package.

(e) *Disposition of unsafe broken packages.* In the event any leaking package or container cannot be safely and adequately repaired for transportation or transported, it shall be stored pending proper disposition in the safest and most expeditious manner possible.

(f) *Stopped vehicles; other dangerous articles.* Whenever any motor vehicle transporting Class 3 (flammable liquid), Class 4 (flammable solid), Class 5 (oxidizing), Class 8 (corrosive), Class 2 (gases), or Division 6.1 (poisonous) materials, is stopped for any cause other than necessary traffic stops upon the traveled portion of any highway, or a shoulder next thereto, the following requirements shall be complied with during the period of such stop:

(1) For motor vehicles other than cargo tank motor vehicles used for the transportation of Class 3 (flammable liquid) or Division 2.1 (flammable gas) materials and not transporting Division 1.1, 1.2, or 1.3 (explosive) materials, warning devices must be set out in the manner prescribed in §392.22 of this title.

(2) For cargo tanks used for the transportation of Class 3 (flammable liquid) or Division 2.1 (flammable gas) materials, whether loaded or empty, and vehicles transporting Division 1.1, 1.2, or 1.3 (explosive) materials, warning devices must be set out in the manner prescribed by §392.25 of this title.

(g) *Repair and maintenance of vehicles containing certain hazardous materials*—(1) *General.* No person may use heat, flame or spark producing devices to repair or maintain the cargo or fuel containment system of a motor vehicle

required to be placarded, other than COMBUSTIBLE, in accordance with subpart F of part 172 of this subchapter. As used in this section, “containment system” includes all vehicle components intended physically to contain cargo or fuel during loading or filling, transport, or unloading.

(2) *Repair and maintenance inside a building.* No person may perform repair or maintenance on a motor vehicle subject to paragraph (g)(1) of this section inside a building unless:

(i) The motor vehicle's cargo and fuel containment systems are closed (except as necessary to maintain or repair the vehicle's motor) and do not show any indication of leakage;

(ii) A means is provided, and a person capable to operate the motor vehicle is available, to immediately remove the motor vehicle if necessary in an emergency;

(iii) The motor vehicle is removed from the enclosed area upon completion of repair or maintenance work; and

(iv) For motor vehicles loaded with Division 1.1, 1.2, or 1.3 (explosive), Class 3 (flammable liquid), or Division 2.1 (flammable gas) materials, all sources of spark, flame or glowing heat within the area of enclosure (including any heating system drawing air therefrom) are extinguished, made inoperable or rendered explosion-proof by a suitable method. *Exception:* Electrical equipment on the vehicle, necessary to accomplish the maintenance function, may remain operational.

(h) *No repair with flame unless gas-free.* No repair of a cargo tank used for the transportation of any Class 3 (flammable liquid) or Division 6.1 (poisonous liquid) material, or any compartment thereof, or of any container for fuel of whatever nature, may be repaired by any method employing a flame, arc, or other means of welding, unless the tank or compartment shall first have been made gas-free.

[29 FR 18795, Dec. 29, 1964. Redesignated at 32 FR 5606, Apr. 5, 1967]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §177.854, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

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Subpart E—Regulations Applying to Hazardous Material on Motor Vehicles Carrying Passengers for Hire

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§177.870 Regulations for passenger carrying vehicles.

(a) *Vehicles transporting passengers and property.* In addition to the regulations in parts 170-189 of this subchapter the following requirements shall apply to vehicles transporting passengers and property.

(b) *No Class 1 (explosive) materials or other hazardous materials on passenger-carrying vehicles, exceptions.* No hazardous materials except small-arms ammunition, emergency shipments of drugs, chemicals and hospital supplies, and the accompanying munitions of war of the Departments of the Army, Navy, and Air Force of the United States Government, are authorized by parts 170-189 of this subchapter to be transported on motor vehicles carrying passengers for hire where other practicable means of transportation is available.

(c) *Class 1 (explosive) materials in passenger-carrying space forbidden.* No Class 1 (explosive) material, except small-arms ammunition, may be carried in the passenger-carrying space of any motor vehicle transporting passengers for hire.

(d) *Hazardous materials on passenger carrying vehicles; quantity.* Where no other practicable means of transportation is available the following articles in the quantities as shown may be transported in motor vehicles carrying passengers for hire in a space other than that provided for passengers: Not to exceed 45 kg (99 pounds) gross weight of any or all of the kinds of Class 1 (explosive) materials permitted to be transported by passenger-carrying aircraft or rail car may be transported on a motor vehicle transporting passengers: *Provided, however,* That samples of Class 1 (explosive) materials for laboratory examination, not to exceed two samples, or a total of no more than 100 detonators, Division 1.4 (explosive) materials at one time in a single motor vehicle, may be transported in a motor vehicle transporting passengers.

(e) *Articles other than Class 1 (explosive) materials on passenger-carrying vehicles.* The gross weight of any given class of hazardous material other than Class 1 (explosive) materials shall not exceed 45 kg (99 pounds), and the aggregate weight of all such other dangerous articles shall not exceed 225 kg (496 pounds). This provision does not apply to nontoxic, nonflammable refrigerants, when such refrigerant is for servicing operations of a motor carrier on whose motor

vehicles the refrigerant is used. A cylinder secured against shifting while in transit and not exceeding 113 kg (250 pounds) gross weight may be transported.

(f) *Division 6.1 (poisonous) or Division 2.3 (poisonous gas) materials on passenger-carrying vehicles.* No motor carrier may transport any extremely dangerous Division 6.1 (poisonous) or Division 2.3 (poisonous gas) material, or any paranitroaniline, in any amount, in or on any bus while engaged in the transportation of passengers; or any less dangerous Division 6.1 (poisonous) material, which is other than a liquid, in any amount exceeding an aggregate of 45 kg (99 pounds) gross weight in or on any such bus.

(g) *Class 7 (radioactive) materials.* In addition to the limitations prescribed in paragraphs (b) and (e) of this section, no person may transport any Class 7 (radioactive) material requiring labels under §§172.436, 172.438, and 172.440 of this subchapter in or on any motor vehicle carrying passengers for hire except where no other practicable means of transportation is available. Packages of Class 7 (radioactive) materials must be stored only in the trunk or baggage compartment of the vehicle, and must not be stored in any compartment occupied by persons. Packages of Class 7 (radioactive) materials must be handled and placed in the vehicle as prescribed in §177.842.

[29 FR 18795, Dec. 29, 1964. Redesignated at 32 FR 5606, Apr. 5, 1967]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §177.870, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 17, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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