

SAFETEA-LU
Planning and Environmental Issues

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Note: These summaries are works-in-progress and therefore are subject to change as additional issues are identified and as additional guidance is received from FHWA and FTA.

SAFETEA-LU

Statewide and Metropolitan Planning Process

OVERVIEW

Section 6001 includes numerous changes to the statewide and metropolitan transportation planning processes (as codified in 23 USC 134 and 135). The changes allow more time between plan updates, but increase the requirements that must be met in the planning process.

Sections 3005 and 3006 (in the transit title of SAFETEA-LU) amend the statewide and metropolitan planning provisions that are codified in 49 USC 5303 and 5304. These sections are virtually identical to 23 USC 134 and 135. The only substantive differences involve directives for the issuance of regulations and guidance, which are required in Sections 3005 and 3006, but not in Section 6001.

Key Changes in Legislation

- 1 Update Cycle for MPO Plans. Metropolitan plans in nonattainment and maintenance areas, must be updated at least once every four years (existing requirement is three years). Metropolitan plans in attainment areas must be updated at least once every five years (same as existing requirement).
- 2 Update Cycle for TIPs and STIPs. TIPs and STIPs must be updated at least once every four years, and must contain four years of projects. Previously, the maximum time period between updates was two years.
- 1 Changes to Planning Factors (for States and MPOs). Two noteworthy changes were made to the list of factors to be considered in statewide and metropolitan planning:
 - “safety” and “security” are now listed as separate planning factors, in order to give greater importance to “security” of transportation systems; and
 - the environmental factor was revised to include “promot[ing] consistency between transportation improvements and State and local planned growth and economic development patterns.”
- 3 Distinguishing Operations vs. Capital Investment (for MPOs Only). The required contents of the metropolitan transportation plan were modified. The plan now must:
 - identify “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”;

and

- identify “capital investment and other strategies to preserve the existing and projected future metropolitan transportation infrastructure and provide for multimodal capacity increases based on regional priorities and needs.”
- 4 Environmental Mitigation Activities (for States and MPOs). A statewide or metropolitan long-range plan must 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.”
 - 5 Consultation with Other Planning Officials (for MPOs Only). USDOT is required to “encourage” MPOs 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, environmental protection, airport operations, and freight movements) or to coordinate its planning process, to the maximum extent practicable, with such planning activities.”
 - 6 “Due Consideration” of Other Planning Activities (for MPOs Only). Metropolitan transportation plans and TIPs are required to be “developed with due consideration of other related planning activities within the metropolitan area.”
 - 7 Consultation with Resource Agencies (for States and MPOs). As part of statewide and metropolitan planning, States and 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.”
 - 8 Consideration of Resource Maps and Inventories (for States and MPOs). As part of the statewide and metropolitan planning process, States and MPOs must consider, if available, “conservation plans and maps” and “inventories of natural or historic resources.” (Note: Unlike earlier versions of the bill, the final version does not require consideration of wildlife crossing locations.)
 - 9 “Participation Plan” (for MPOs Only). The metropolitan planning process must now include a “participation plan” that provides reasonable opportunities for interested parties to comment on the development of the MPO’s long-range plan.
 - 10 Parties Involved in Planning (for States and MPOs). The parties required to be included in the planning process are expanded to include (1) users of pedestrian walkways, (2) users of bicycle transportation facilities, and (3) the disabled.
 - 11 Communication Methods (for States and MPOs). The statewide and metropolitan planning processes must, “to the maximum extent practicable,” utilize visualization techniques and make public information available on the internet.

- 12 Ability to Alter Interstate Compacts (for MPOs Only). Previously, the law had granted the consent of Congress to two or more States to enter into interstate compacts to facilitate metropolitan planning. This authorization was retained, but in the new law, “the right to alter, amend, or repeal interstate compacts entered into under this subsection is expressly reserved.” Thus, changes to existing compacts would require the consent of Congress.

Deadlines for Regulations and Guidance

- 13 Section 6001 does not require new planning regulations to be issued.
- 14 Section 3005 requires USDOT to issue regulations within 180 days setting forth the standards for the annual listing of projects for which funds have been obligated.
- 15 Sections 3005 and 3006 require USDOT to issue “guidance on a schedule for implementation” of the changes made by those sections to metropolitan and statewide planning processes. These sections do not set a deadline for issuing the guidance.
- 16 With regard to implementation, Sections 3005 and 3006 also state that:
- USDOT shall not require a State or MPO to deviate from its established planning update cycle to implement changes made by these sections.
 - Beginning July 1, 2007, any State or MPO updates to plans or programs must reflect changes made by these sections.

FHWA/FTA Interim Guidance (9/2/2005)

- 17 Changes to the planning process take effect immediately, but many require a rulemaking to implement the changes.
- 18 FHWA and FTA expect to initiate a “comprehensive rulemaking to update the statewide and metropolitan planning regulations” in the near future.
- 19 States and MPOs can continue to comply with existing planning regulations (i.e., pre-SAFETEA-LU requirements) for the current set of updates.

Plans, TIPS, and STIPs adopted after July 1, 2007 must comply with the new SAFETEA-LU requirements for the planning process.

SAFETEA-LU Environmental Review Process

OVERVIEW

Section 6002 creates a new “environmental review process” in 23 USC 139. This process must be followed for all projects requiring an EIS to be prepared by USDOT. It is similar to existing procedures, but includes some new elements and new terminology.

Section 6002 creates a 180-day statute of limitations for challenges to federal approvals of highway and transit projects. Triggered by publication of Federal Register notice announcing the decision.

Section 1503 requires the FHWA design-build regulations to be modified to allow States to seek proposals, enter contracts, and authorize some work under a design-build contract prior to completion of the NEPA process.

Key Changes in Legislation

Section 6002: Efficient Environmental Reviews for Project Decisionmaking

- 1 USDOT is designated as the lead agency for the environmental review process for any highway or transit project requiring USDOT approval.
- 2 Project sponsor, if a governmental entity, may serve as joint lead agency and prepare the NEPA document, under the direction of USDOT. This confirms existing practices, which had been called into question by a federal court decision in 2002.
- 3 Lead agency must invite/designate Federal and non-Federal “participating agencies” – essentially, a roster of all the other agencies that will be involved in the process. Federal agencies that are invited must participate, unless they state in writing that they have no intention to submit comments or participate in the process.
- 4 Concurrent reviews are required “to the maximum extent practicable.”
- 5 Lead agency must prepare a “coordination plan” for the project, which may include a schedule with deadlines.
- 6 Deadline for DEIS comments must be no more than 60 days, and for all other comments no more than 30 days, unless (1) a different period is set by agreement of the lead agency, project sponsor, and all participating agencies, or (2) the

deadline is extended by the lead agency “for good cause.”

- 7 Purpose and need is determined by the lead agency, after “opportunity for involvement” by participating agencies and the public. Purpose and need can include achieving goals defined in state and local transportation and land use plans.
- 8 Range of alternatives is determined by the lead agency, after “opportunity for involvement” by participating agencies and the public. Lead agency determines methodology and level of detail for alternatives analysis.
- 9 Preferred alternative may be developed to higher level of detail, to facilitate concurrent compliance with NEPA and permitting requirements.
- 10 Lead agency must provide information to participating agencies early in the process about resources in the project area and about the general locations of alternatives; participating agencies must identify any issues, if known, that have potential to cause significant delays or to result in the denial of permits or other approvals.
- 11 Project sponsor or Governor can trigger a dispute resolution process. (Under TEA-21, this could only be done by USDOT).
- 12 Authority to provide funding to Federal and State agencies is retained and broadened. Can be used to support activities outside the NEPA process that help to expedite the NEPA process (e.g., pre-NEPA planning activities, programmatic agreements, etc.).
- 13 Section 1309 of TEA-21 is repealed. Processes approved for a State under that law are grandfathered (e.g., ETDM process in Florida).

Section 6002: Statute of Limitations

- 1 Creates a 180-day statute of limitations for lawsuits challenging project approvals. Limitations period begins with publication of notice in Federal Register announcing a final decision – e.g., ROD or Section 404 permit.

Section 1503: Changes to Design-Build Regulations

- 2 Requires USDOT to revise its design-build regulations (23 CFR 636) to allow a State DOT or local transportation agency to take the following actions prior to completion of the NEPA process for a project:
 - issue a request for proposals (RFP) for a design-build contract;
 - award a design-build contract; and

- allow the design-build contractor to proceed with preliminary engineering.
- 3 Note: The regulations define “design-build contract” as follows:

Design-build contract means an agreement that provides for design and construction of improvements by a contractor or private developer. The term encompasses design-build-maintain, design-build-operate, designbuild- finance and other contracts that include services in addition to design and construction. Franchise and concession agreements are included in the term if they provide for the franchisee or concessionaire to develop the project which is the subject of the agreement. (23 CFR 636.103).

Deadlines for Regulations and Guidance

- 1 Section 6002: does not require the issuance of new regulations or guidance.
- 2 Section 1503: requires the new design-build regulations to be issued within 90 days.

FHWA/FTA Interim Guidance (9/2/2005)

Section 6002: Environmental Review Process

- 3 Section 6002 process *must* be followed for all highway and transit EISs for which the Notice of Intent is published in the Federal Register on or after August 11, 2005.
- 4 FHWA Division Office and State DOTs “may wish to transition” ongoing EISs to the new process “if advantageous to the project” and if they can demonstrate that the requirements of the new process have been met.
- 5 Section 6002 grandfathers any State process “approved by the Secretary under Section 1309 of TEA-21.” Any State wishing to proceed under this authority must obtain approval of the FHWA Division Office, with written concurrence from Headquarters. This grandfathering option exists only for highway projects, not for transit projects.
- 6 Additional guidance on the Section 6002 process is anticipated within 90 days.

Section 6002: Statute of Limitations

- 7 The 180-day statute of limitations is effective immediately and can be exercised for a project, even if the project did not follow the new Section 6002 process.

- 8 Additional guidance on the process for publishing notices in the Federal Register is anticipated within 30 days. (This guidance is expected to address the mechanics of publishing the notice – who pays, what the notice says, where to send it, etc.)
- 9 If multiple federal approvals are received for a project, they can be announced in a single notice in the Federal Register, unless there is a significant time lag between the first approval and the later approval.
- 10 Issuing a notice of decision in the Federal Register is discretionary. If a notice is not issued for a decision, the decision would be subject to the general six-year statute of limitations for civil actions against federal agencies.

Section 1503: Changes to Design-Build Regulations

- 11 Not addressed in the Interim Guidance.
- 12 FHWA has indicated informally that it has established a work group for this task, and will move forward with a rulemaking, but may not be able to complete the rulemaking within 90 days.

SAFETEA-LU State DOT Assumption of USDOT Responsibilities

OVERVIEW

Section 6003 authorizes USDOT to create a five-State pilot program under which a State DOT may assume the responsibilities of USDOT under NEPA and other Federal laws for recreational trails and transportation enhancement projects.

Section 6004 authorizes USDOT to assign its responsibilities to State DOTs for (1) determining whether a project qualifies for a categorical exclusion (CE) under NEPA, and (2) complying with other Federal laws applicable to a project that qualifies for a CE.

Section 6005 requires USDOT to establish a five-State pilot program under which a State may assume USDOT responsibilities under NEPA and other Federal environmental laws for all projects (including those requiring an EIS or an EA/FONSI).

Key Changes in Legislation

Section 6003: Assumption of Responsibilities for Rec Trails and TEs (Pilot)

- 1 Pilot program for up to five States. Application process is required.
- 2 USDOT may assign its NEPA responsibilities and certain responsibilities under

other Federal laws.

- 3 Delegation of USDOT's tribal consultation role is not allowed.
- 4 State must accept jurisdiction of federal court to review State's compliance with federal requirements.

Section 6004: Assumption of Responsibilities for Categorical Exclusions (CEs)

- 5 Not a pilot; available to all 50 States.
- 6 USDOT may assign its NEPA responsibilities (for CE projects) and certain responsibilities under other Federal laws.
- 7 Delegation of USDOT's tribal consultation role is not allowed.
- 8 Must be documented in an MOU between the State and USDOT.
- 9 State must accept jurisdiction of federal court to review State's compliance with federal requirements.

Section 6005: Assumption of Responsibilities for All Projects (Pilot)

- 10 Pilot program with up to five States. Specifies AK, CA, OH, OK, and TX..
- 11 Does not allow assumption of USDOT responsibilities for conformity, planning process, or rulemaking. (Tribal consultation not mentioned.)
- 12 State must submit application specifying responsibilities that it seeks to assume; it can assume some responsibilities but not others.
- 13 State must accept jurisdiction of federal court to review State's compliance with federal requirements.

Deadlines for Regulations and Guidance

- 1 Section 6003: None.
- 2 Section 6004: None.
- 3 Section 6005: Must issue regulations within 270 days defining the information that must be submitted in an application to assume USDOT responsibilities.

FHWA/FTA Interim Guidance (9/2/2005)

Section 6003

- 4 FHWA "will assess State interest in using this provision; if the interest is there, [FHWA] will develop application procedures and more information in the future."

Section 6004

- 5 FHWA and FTA will develop guidance and a template MOU within 3-4 months.
- 6 States may not use this authority until a specific MOU is in place.
- 7 FHWA Divisions should begin discussions with State DOTs about which responsibilities the State wishes to assume under this provision (i.e., just NEPA or also responsibilities under other federal laws).
- 8 This section only allows delegation to States, not to transit agencies. FTA must be involved if State wishes to assume responsibility for CEs for transit projects.
- 9 FHWA Divisions should discuss with the State the procedures that will be used to assure that this authority is properly exercised (i.e., what type of oversight, etc.)

Section 6005

- 10 FHWA interprets Section 6005 to preclude delegation of federal responsibility for tribal consultation (even though Section 6005 does not specifically preclude it).
- 11 FHWA has begun discussions with the five States, other affected Federal agencies, and the five FHWA Division Offices about how to implement this provision.
- 12 FHWA expects to hold individual meetings with each of the five States in September to assess their interest and discuss obligations and requirements that would apply.
- 13 FHWA Divisions and States are encouraged to begin discussions about which responsibilities the States would seek to assume under this provision.

SAFETEA-LU Section 4(f) Provisions

OVERVIEW

Section 6007 exempts the Interstate System, except for some individual elements that have historic significance, from being treated as a historic resource for purposes of Section 4(f).

Section 6009 allows Section 4(f) requirements to be satisfied, without an alternatives analysis, for projects that have a “de minimis impact” on a Section 4(f) resource. A study

is required to assess the implementation of this provision.

Section 6009 requires USDOT to issue new regulations, within one year, clarifying the “prudent and feasible” standard under Section 4(f).

Key Changes in Legislation

6007 – Exemption of Interstate System

- 2 Exempts the Interstate System, with the exception of some individual elements, from being treated as a historic resource for purposes of Section 4(f).
- 3 Individual elements of the Interstate System that possess historic significance – e.g., bridges with historically significant features – will be identified by FHWA in cooperation with State DOTs, SHPOs, and others.
- 4 Individual elements that are exempted from Section 4(f) will also be exempted from Section 106 of the National Historic Preservation Act pursuant to an administrative exemption issued by the Advisory Council on Historic Preservation.
- 5 Important note: This section does *not* exempt all projects on the Interstate System from Section 4(f) and Section 106. It only means that the Interstate System itself, except for a few individual elements, will not be treated as a historic resource.

6009(a) – De Minimis Finding

- 6 Allows USDOT to comply with Section 4(f) by making a finding that a project will have a “de minimis impact” on a Section 4(f) resource.
- 7 Requires “avoidance, minimization, mitigation, and enhancement measures” to be considered in making this finding, if those measures are incorporated into the project.
- 8 For historic sites, a finding of “de minimis impact” can be made if:
 - (1) USDOT makes a finding of “no adverse effect” for a specific historic site, or makes a finding of “no historic properties affected” for an entire project, as part of the Section 106 process; and
 - (2) USDOT obtains the written concurrence of the SHPO or THPO in that finding (and from the ACHP if it is participating in the 106 process).
- 9 For parks, recreation areas, and refuges, a finding of “de minimis impact” can be made if:
 - (1) USDOT makes a finding that the project “will not adversely affect” the “activities, features, or attributes” that make the property eligible for

protection under Section 4(f);

- (2) USDOT has provided “public notice and an opportunity for public review and comment” before making that finding; and
- (3) USDOT has obtained concurrence of the officials with jurisdiction over the park, recreation area, or refuge.

10 If a finding of de minimis impact is made for a *historic site*, Section 4(f) requirements are *fully met* for that site.

11 If a finding of de minimis impact is made for a *park, recreation area, or refuge*, the requirements of Section 4(f)(1) are *partially met*. Specifically:

- The avoidance requirement would be satisfied.
- The minimization-of-harm requirement still would apply, *but* compliance with that requirement “shall not include an alternatives analysis.”

Section 6009(b) – Rulemaking on Prudence and Feasibility

12 USDOT must issue regulations to “clarify the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives” under Section 4(f).

13 The regulations must clarify the application of the prudent-and-feasible standard to “variety of different types of transportation programs and projects depending on the circumstances of each case.”

14 The regulations may include “examples to facilitate clear and consistent interpretation” of this standard.

15 Legislative history indicates that the sponsors of this legislation did not intend to alter the basic legal standard for prudence (as defined in the *Overton Park* case.)

Section 6009(c) – Implementation Study

16 Implementation study by USDOT is required; to be reviewed by TRB. Must report on usage of “de minimis” finding.

Deadlines for Regulations and Guidance

17 Section 6007: None. However, the Section 106 exemption for the Interstate System requires individual elements of historic significance to be identified by June 30, 2006.

18 Section 6009(a): No regulations or guidance required for “de minimis”

provisions.

- 19 Section 6009(b): Regulations on prudence/feasibility must be issued within 1 year.
- 20 Section 6009(c): Implementation study be submitted to Congress no earlier than 3 years after enactment and no later than March 1, 2010.

FHWA/FTA Interim Guidance (9/2/2005)

Section 6007

- 21 FHWA is retaining a consultant to assist in identifying the individual elements of the Interstate System that possess historic significance. This should be done “soon.”
- 22 The consultant will conduct phone interviews with State DOTs, SHPOs, FHWA Division Offices, and others to compile a list of candidate elements for consideration at the national level.
- 23 FHWA Division Offices should begin discussions with State DOTs about sections in a State that may warrant consideration.

Section 6009

- 24 For historic properties, “de minimis” findings can be made right away, as long as the draft 4(f) evaluation has not yet been distributed. If relying on a finding of “no adverse effect,” that finding must be made on a property-by-property basis, not a general finding for the entire project.
- 25 For parks, recreation areas, and refuges, USDOT is developing guidance and expects to issue it within one month, but it could take longer. Until it is issued, findings of de minimis impact for parks, recreation areas, and refuges should not be made.

SAFETEA-LU Air Quality

OVERVIEW

Section 6011 makes several changes to the air quality conformity requirements under Section 176 of the Clean Air Act. In general, the changes provide greater flexibility in meeting conformity requirements.

Section 1808 makes changes to the Congestion Mitigation and Air Quality (CMAQ) program. In general, the changes expand eligibility for CMAQ funding, while requiring priority to be given to diesel retrofit and other cost-effective projects in the use of CMAQ program.

Key Changes in Legislation

Section 6011 – Transportation Conformity

- 1 **Frequency.** Conformity determinations must be made at least once every 4 years. Conforming changes have been made to the metropolitan planning requirements in 23 USC 134; the update cycle for metropolitan long-range plans is now 4 years as well.
- 2 **Redeterminations.** Conformity redeterminations must be within within 2 years after approval of a new or revised motor vehicle emissions budget in a SIP.
- 3 **Time Horizon.** Conformity determinations may, in some cases, be based on a time horizon that is shorter than the 20-year horizon of the long-range transportation plan.
 - The shorter time horizon would be: (1) the 10th year of the plan; (2) the latest year for which there is an emissions budget in the SIP; or (3) the year of completion of a regionally significant project – whichever is latest.
 - The option of using a shorter time horizon can be used only after consultation with the applicable air quality agency and an opportunity for public comment.
 - If this option is used, the conformity finding must be accompanied by a “regional emissions analysis” for the out-years of the plan – e.g., if conformity is based on Year 10, an analysis is required for emissions in Years 11-20.
- 4 **TCM Substitution.** Transportation control measures (TCMs) that are specified in a SIP may be replaced with TCMs that provide “equivalent or greater emissions

reductions” without amending the SIP, as long as certain conditions are met.

- 5 Grace Period for Conformity Lapse. If a conformity determination is not made by an applicable deadline, a conformity lapse used to occur immediately. Under the new law, there is a 12-month grace period before the conformity lapse takes effect. This effectively allows an additional year to achieve conformity.

Section 1808 – CMAQ Eligibility and Priority

- 6 Expansion of Eligibility. Eligibility under the CMAQ program is expanded to include projects and programs that:
 - establish or operate advanced truck stop electrification systems;
 - improve transportation systems management and operations that mitigate congestion and improve air quality;
 - involve the purchase of integrated, interoperable emergency communications equipment;
 - involve the purchase of diesel retrofits that are for motor vehicles or non-road vehicles and non-road engines used in construction projects located in ozone or particulate matter nonattainment or maintenance areas and funded under 23 USC;
 - conduct outreach activities that provide assistance to diesel equipment and vehicle owners and operators regarding the purchase and installation of diesel retrofits.
- 7 Prioritization of Cost-Effective Measures. States and MPOs that receive CMAQ funds must give priority to diesel retrofits and other cost-effective emission reduction activities. The priority requirement does not apply to CMAQ minimum apportionment funds and, in any event, the priority requirement is not absolute, as existing authorities regarding project selection are not to be disturbed. EPA is required to issue guidance that includes a list of diesel retrofit technologies and information regarding the cost-effectiveness of emission-reduction technologies, “taking into account air quality and health effects.”
- 8 Improved Inter-Agency Consultation. USDOT is required to “encourage” States and MPOs to consult with State and local air quality agencies in nonattainment and maintenance areas regarding the “estimated emission reductions from proposed congestion mitigation and air quality improvement programs and projects.”
- 9 Evaluation and Assessment. USDOT, in consultation with EPA, is required to “evaluate and assess a representative sample of projects” funded under the CMAQ program to determine “direct and indirect of the projects on air quality

and congestion levels” and “ensure the effective implementation of the program.”

10 Cumulative Database. USDOT must “maintain and disseminate a cumulative database” with information describing the impacts of CMAQ-funded projects on congestion and air quality. The database must include the results of the assessment required under the statute as well as the results of other research.

11 State-by-State Flexibility. State-specific eligibility provisions are included for Illinois, Indiana, Iowa, Montana, Michigan, Maine, Missouri, Minnesota, Ohio, Oregon, and Wisconsin. For example, the law allows CMAQ funds to be used in Montana for public transit activities that serve nonattainment or maintenance areas.

Section 1103 – CMAQ Funding.

12 Formula. CMAQ funds are distributed according to a formula that takes into account population and severity of air pollution in *ozone* and *carbon monoxide* areas. PM status does not affect the formula.

Deadlines for Regulations and Guidance

13 Section 6011: EPA is required to issue revised conformity regulations within 2 years to implement the changes required by SAFETEA-LU.

14 Section 1808: EPA is required, in consultation with USDOT, to issue guidance on cost-effective emission reduction strategies, including a list of diesel retrofit technologies. No deadline is provided for issuing this guidance.

FHWA/FTA Interim Guidance (9/2/2005)

Section 6011

15 FHWA and FTA are working with EPA to develop interim guidance that will apply prior to the revision of EPA’s conformity regulations.

16 The interim guidance on conformity will be issued “as soon as possible.”

Section 1808

17 Changes to CMAQ eligibility are effective immediately.

18 FHWA, in coordination with FTA, will update its guidance to reflect the changes to CMAQ eligibility.

19 EPA will be developing guidance on obtaining conformity credit for diesel retrofits. Until that guidance is issued, conformity credit for diesel retrofits can only be obtained through a SIP revision.