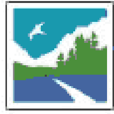

Center for Environmental Excellence by AASHTO
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SAFETEA-LU

This document provides information related to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) that was previously posted on the Center for Environmental Excellence by AASHTO website. The SAFETEA-LU website section on the Center website has been superseded by a new website topic on the Moving Ahead for Progress in the 21st Century Act, which was effective Oct. 1, 2012.

Overview

This section provides an overview and explanation of the environmental provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) as they apply to surface transportation programs. Topics covered in this section include:

- Background
- SAFETEA-LU Environmental Review Process
- Time Limits for Lawsuits
- Assignment of NEPA Responsibilities
- Section 4(f) Provisions
- Interstate Highway Exemption
- Air Quality Provisions
- Planning Provisions
- Other Environmental Provisions
- Links to SAFETEA-LU Laws, Regulations, and Guidance

Background

The latest federal legislation authorizing U.S. highway and transit programs was signed into law on August 10, 2005. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) provides $244.1 billion in funds over a five-year period through 2009. It represents the largest surface transportation investment in U.S. history.

SAFETEA-LU follows the same basic programmatic framework as its predecessor statutes, the Transportation Equity Act for the 21st Century (TEA-21) and the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Key themes addressed in SAFETEA-LU include highway safety, equity of funding provided to states, innovative financing options, congestion relief through road pricing and traffic management, improved mobility and productivity, improved efficiency of the nation's highways and bridges, as well as environmental stewardship and streamlining of reviews for transportation projects.

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The law provides some of the most significant changes to environmental provisions affecting transportation in decades. Provisions range from “environmental streamlining” measures aimed at expediting the National Environmental Policy Act (NEPA) review process for projects to new mandates and funding authority for environmental stewardship and better links between transportation and conservation planning.

The statute also revises the review procedures for impacts to historic resources and parkland under Section 4(f) of the Department of Transportation Act, revises the air quality conformity process, retains and increases funding for environmental programs of TEA-21, and adds important new initiatives, such as a pilot program for non-motorized transportation and Safe Routes to School.

SAFETEA-LU Environmental Review Process

Numerous provisions of the law are aimed at improving the environmental review process for transportation projects.

Section 6002 of SAFETEA-LU (23 U.S.C. § 139) establishes a new environmental review process, taking the place of the “environmental streamlining” provisions enacted under TEA-21.

Key elements of the new review process include the following:

- The U.S. DOT is designated as the lead agency for the environmental review process for any highway or transit project requiring U.S. DOT approval.
- The project sponsor, if a governmental entity, may serve as joint lead agency and prepare the NEPA document, under the direction of U.S. DOT.
- The direct recipient of Federal funds for a project (usually a State DOT) must serve as a joint lead agency.
- The lead agency must invite any federal or non-federal agency that may have an interest in the project to become a participating agency in the environmental review process. SAFETEA-LU thus defines a new category of “participating agencies.” Federal agencies that are invited must participate, unless they state in writing that all three conditions are true: 1) they lack jurisdiction or authorization, 2) they lack expertise, and 3) they have no intention to submit comments or participate in the process.
- Concurrent reviews are required “to the maximum extent practicable.”
- The lead agency must prepare a “coordination plan” for the project, which may include a schedule with deadlines. The schedule must be shared with the public and participating agencies, so that they know what to expect and so that any disputes can be surfaced as early as possible.
- The deadline for draft EIS 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.”
- 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.

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- Range of alternatives is determined by the lead agency, after "opportunity for involvement" by participating agencies and the public.
- Lead agencies must "collaborate" with participating agencies in deciding methodologies to be used and the level of detail to be used in analyses of alternatives.
- The preferred alternative may only be developed to higher level of detail to facilitate the development of mitigation measures or to facilitate concurrent compliance with other environmental laws and permitting requirements. This can only be done with the agreement of the joint lead agencies and the determination that the development of the preferred alternative to a higher level of detail will not prejudice the lead agencies' consideration of other alternatives.
- The 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.
- The project sponsor or a governor can trigger a dispute resolution process.
- Authority to provide transportation funding to federal and state agencies is retained and broadened. This funding now 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.).
- A new process establishes deadlines for decision under any Federal law relating to the project and for reporting to Congress failures to meet those deadlines by those agencies.

The new environmental review process is required for all highway and transit projects with Environmental Impact Statements (EISs) for which the notice of intent was published on or after Aug. 11, 2005. SAFETEA-LU includes a provision that allows highway agency processes that were approved under TEA-21 to be granted a grandfathering exemption. Only the Florida's Efficient Transportation Decision Making Process has been approved for this exemption.

More information on the review process is provided in FHWA's Section 6002 guidance, issued in November 2006. FHWA also issued proposed regulations on Aug. 7, 2007, to incorporate aspects of Section 6002 into its NEPA regulations at 23 CFR 771.

In addition, FHWA has developed an online Environmental Review Process Toolkit.

Additional explanation is available in the AASHTO Practitioner's Handbook #9, Using the SAFETEA-LU Environmental Review Process (23 U.S.C. 139), produced by the Center for Environmental Excellence by AASHTO.

Time Limits for Lawsuits

Section 6002 also includes a provision intended to encourage faster resolution of any litigation after the NEPA decision or the final action by a federal agency that is required for the project (i.e., permits). The new statute of limitations provision creates a 180-day time limit for lawsuits challenging final federal agency approvals of highway and transit projects. Claims made after that time limit are barred.

The limitations period begins with publication of a notice in the Federal Register announcing a final decision, such as a record of decision (ROD) or a Clean Water Act Section 404 permit.

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Issuing a notice of limitation on claims in the Federal Register is discretionary. If a notice is not issued, the NEPA approval or decision remains subject to the general six-year statute of limitations for civil actions against federal agencies.

Detailed guidance and procedures for issuing statute of limitations Federal Register notices is included in Appendix E to FHWA's Section 6002 guidance.

Assignment of NEPA Responsibilities

SAFETEA-LU includes several provisions that would allow state transportation agencies to assume the U.S. DOT's responsibilities and liabilities under NEPA and other federal environmental laws. Under these provisions, the state must accept the jurisdiction of federal courts to review the state's compliance with federal requirements and must meet other procedural requirements.

Section 6004 provides for assignment of federal responsibility for certain categorical exclusions (CEs) under NEPA to any of the 50 states. A State may assume federal responsibility and liability for determining whether a project qualifies for a CE and for complying with other federal laws for CE projects. The provisions for the assignment of authority must be documented in a Memorandum of Understanding between the state and the U.S. DOT. The specific responsibility for government-to-government consultation with Indian tribes may not be assigned to a State. Additional details regarding CE delegation are provided in FHWA's Section 6004 guidance, issued in April 2006.

Assignment of federal NEPA responsibilities for one or more highway projects is available to five states under a pilot program established by Section 6005. The five states designated in the statute were Alaska, California, Ohio, Oklahoma, and Texas. Since enactment of the provision, California has applied for and received authority to participate in the program. Ohio and Texas have withdrawn from the delegation pilot program. Alaska and Oklahoma still express interest in participating in the pilot. FHWA solicited interest from other states to participate in the program through a July 2007 Federal Register notice. Additional details on the procedural requirements of the pilot program are available in FHWA's Section 6005 final rule, issued in February 2007.

A separate pilot program under Section 6003 allows five states to assume environmental responsibilities for Recreational Trails and Transportation Enhancement projects. FHWA currently is assessing whether any states have interest in the pilot program.

Section 4(f) Provisions

SAFETEA-LU also provides more flexibility in the review process for transportation project impacts to historic properties, parks, and refuges under Section 4(f) of the DOT Act.

Section 4(f) prohibits the approval of federal projects that use publicly owned parks, recreation areas, wildlife and waterfowl refuges, or historic sites unless there is no feasible and prudent alternative and the project includes all possible planning to minimize harm.

Section 6009 of SAFETEA-LU included a provision that changed the law to allow the requirements of Section 4(f) to be satisfied if U.S. DOT makes a determination that the project will have a "de minimis" impact on the Section 4(f) property. Once a de minimis determination is made, it is not necessary to demonstrate that no prudent and feasible alternatives exist. However, it is still necessary to implement

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measures to minimize harm (which must be taken into account when determining whether the impact is de minimis). SAFETEA-LU applies slightly different standards for the de minimis findings for historic resources versus those for historic resources, parks, and refuges.

For historic sites, a finding of “de minimis impact” can be made if:

(1) The process required by Section 106 of the National Historic Preservation Act results in the determination of "no adverse effect" or "no historic properties affected" with the concurrence of the SHPO and/or THPO, and ACHP if participating in the Section 106 consultation;

(2) The SHPO and/or THPO, and ACHP if participating in the Section 106 consultation, is informed of FHWA’s or FTA’s intent to make a de minimis impact finding based on their written concurrence in the Section 106 determination; and

(3) FHWA or FTA has considered the views of any consulting parties participating in the Section 106 consultation.

If a finding of de minimis impact is made for an historic site, Section 4(f) public involvement requirements are fully met through compliance with Section 106 of the National Historic Preservation Act.

For parks, recreation areas, and refuges, a finding of “de minimis impact” can be made if:

(1) The transportation use of the Section 4(f) resource, together with any impact avoidance, minimization, and mitigation or enhancement measures incorporated into the project, does not adversely affect the activities, features, and attributes that qualify the resource for protection under Section 4(f);

(2) The official(s) with jurisdiction over the property are informed of FHWA’s or FTA’s intent to make the de minimis impact finding based on their written concurrence that the project will not adversely affect the activities, features, and attributes that qualify the property for protection under Section 4(f); and

(3) The public has been afforded an opportunity to review and comment on the effects of the project on the protected activities, features, and attributes of the Section 4(f) resource. 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. The avoidance requirement would be satisfied. The minimization-of-harm requirement still would apply, however compliance would not include an alternatives analysis.

Since enactment of SAFETEA-LU, many states have used de minimis findings to comply with Section 4(f). FHWA has been monitoring use of the provision in preparation for a report to Congress which is required no earlier than 3 years after enactment with a second report due no later than March 1, 2010.

The law also requires the department to 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). FHWA and FTA issued proposed regulations in July 2006 and are still in the process of considering comments and drafting a final rule.

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Interstate Highway Exemption

An exemption that excludes the vast majority of the 46,700-mile Interstate system from review as a historic property under Sections 4(f) was enacted in Section 6007 of SAFETEA-LU, operating in conjunction with a separate administrative exemption issued by the Advisory Council on Historic Preservation. The exemption makes a provision to exclude certain individual elements of the Interstate Highway System that possess national or exceptional historic significance that would continue to be subject to Section 4(f). Those elements were identified by FHWA in a final rule issued in December 2006.

Without such an exemption, the entire Interstate Highway System could have been deemed historic property on its 50th anniversary on June 29, 2006, causing a potentially huge administrative burden for highway agencies. It is important to note that the provision exempts the Interstate System from being treated as a historic resource; it does not exempt all projects on the Interstate System from the need to comply with Section 4(f) and Section 106. For example, a widening project on the Interstate System still must comply with Section 4(f) and Section 106 if the project has impacts on adjacent properties – e.g., parks or historic homes.

More information is available in FHWA's Section 6007 guidance, issued in January 2006, or in the Final List of Nationally and Exceptionally Significant Features of the Interstate System.

More information on implementation of Section 4(f) is available in the Section 4(f) topic on this website.

Air Quality Provisions

SAFETEA-LU provisions addressing transportation impacts on air quality include modifications to provide flexibility in transportation planning and air quality conformity.

Section 6011 established a four-year cycle for conformity determinations (unless the metropolitan planning organization revises the transportation improvement program more frequently). It also allows conformity findings to be based on a 10-year horizon under certain circumstances.

The law also establishes a 12-month grace period before a conformity lapse takes effect, effectively allowing an additional year to achieve conformity.

SAFETEA-LU also makes changes to the Congestion Mitigation and Air Quality (CMAQ) program to 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. (See FHWA CMAQ program guidance issued Oct. 31, 2006.)

Additional information on the air quality conformity provision is available in FHWA's Section 6011 interim guidance, and in the Environmental Protection Agency's proposed conformity rule amendments, issued on May 2, 2007.

Additional details on air quality issues are available by linking to the Air Quality topic of this website.

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Planning Provisions

SAFETEA-LU includes numerous changes related to transportation planning, including significant new opportunities for consideration of environmental issues in the statewide and metropolitan transportation planning processes.

Under Section 6001, statewide or metropolitan long-range plans 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."

In addition, as part of the planning process, 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." They also must consider, if available, "conservation plans and maps" and "inventories of natural or historic resources."

Information on implementation of these provisions, including guidance on linking transportation planning and NEPA, is provided in FHWA's final regulations for metropolitan and statewide planning, issued on Feb. 14, 2007.

Additional details on air quality issues are available by linking to the Environmental Considerations in Planning topic of this website.

Other Environmental Provisions

The following lists some of the additional ways SAFETEA-LU addresses environmental issues:

- Expands funding eligibilities to include environmental restoration and pollution abatement; control of noxious weeds and establishment of native species; advanced truck stop electrification systems; and high accident/high congestion intersections.
- Encourages design-build contracting by eliminating the $50 million floor on the size of eligible contracts and requiring regulations allowing transportation agencies to proceed with certain actions prior to receiving final NEPA approval (see FHWA final rule issued Aug. 14, 2007).
- Continues the Transportation Enhancements Program, funded through a set-aside of 10 percent from surface transportation program funds.
- Continues the Recreational Trails Program; the Transportation, Community, and System Preservation Program (TCSP); the Scenic Byways Program; and the National Historic Covered Bridge Preservation Program.
- Establishes a new Nonmotorized Transportation Pilot Program, authorized at a total of $100 million through 2009, to fund pilot projects to construct a network of nonmotorized transportation infrastructure facilities in four designated communities.
- Requires the U.S. DOT to conduct a Wildlife Vehicle Collision Reduction Study of methods to reduce collisions between motor vehicles and wildlife, followed by a report to Congress, a manual of best practices, and a training course for transportation professionals.
- Authorizes a range of research programs and initiatives including FHWA's Surface Transportation Environment and Planning Cooperative Research Program (STEP) and the

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Strategic Highway Research Program II, a targeted, short-term program to advance highway performance and safety.

Links to SAFETEA-LU Laws, Regulations, and Guidance

- SAFETEA-LU Legislation, Summary Information, Fact Sheets, Funding Tables, and Cross Reference
- For a complete list of SAFETEA-LU environment-related guidance and information see FHWA's SAFETEA-LU Environmental Provisions and Related Information website.

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