choose to give greater weight to any one of the five enumerated areas and determine that, notwithstanding its costs, a particular regulation is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Proposed Amendment will result in efficiency enhancements for the Commission and should have no effect on the following three enumerated areas: (1) Efficiency, competitiveness or the financial integrity of futures markets; (2) price discovery; and (3) sound risk management practices. Specifically, the Proposed Amendment, if adopted, will require all fully-registered FCMs, even those that are not required to be registered as FCMs, to become members of an RFA. This will make such FCMs subject to the self-regulatory jurisdiction and oversight programs of NFA.

After considering these factors, the Commission has determined to propose the amendment to Regulation 170.15 discussed above. The Commission invites public comment on its application of the cost-benefit provision. Commenters also are invited to submit any data that they may have quantifying the costs and benefits of the Proposed Amendment with their comment letters.

List of Subjects in 17 CFR Part 170

Authority delegations (Government agencies), commodity futures, reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Commission proposes to amend 17 CFR part 170 as follows:

PART 170—REGISTERED FUTURES ASSOCIATIONS

1. The authority citation for part 170 continues to read as follows:

Authority: 7 U.S.C. 6p, 12a and 21, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106-554, 114 Stat. 2763 (2000).

Subpart C—Membership in a Registered Futures Association

2. Section 170.15 is amended by revising paragraph (a) to read as follows:

§ 170.15 Futures commission merchants.

(a) Except as provided in paragraph (b) of this section, each person registered as a futures commission merchant must become and remain a member of at least one futures association that is registered under section 17 of the Act and that provides for the membership therein of such futures commission merchant, unless no such futures association is so registered.

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Issued in Washington, DC, on October 25, 2006, by the Commission.

Catherine D. Daniels,

Assistant Secretary of the Commission.

[FR Doc. E6-18270 Filed 10-31-06; 8:45 am]

BILLING CODE 6351-01-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 630

[FHWA Docket No. FHWA–2006–25203]

RIN 2125–AF10

Temporary Traffic Control Devices

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The FHWA proposes to supplement its regulation that governs work zone safety and mobility in highway and street work zones to include 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. The proposed changes are intended to decrease the likelihood of fatalities and injuries to workers who are exposed to motorized traffic (vehicles using the highway for purposes of travel) while working on Federal-aid highway projects. This proposal is in response to section 1110 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1227.

DATES: Comments must be received on or before January 2, 2007.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590, or submit electronically at *http://dmses.dot.gov/submit* or fax comments to (202) 493–2251. Alternatively, comments may be submitted via the Federal eRulemaking Portal at *http://www.regulations.gov.* All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination at the above address from 9 a.m. to 5 p.m. e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or print the acknowledgement page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). Persons making comments may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78) or may visit *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Chung Eng, Office of Transportation Operations, (202) 366–8043; or Mr. Raymond W. Cuprill, Office of the Chief Counsel, (202) 366–0791, U.S. Department of Transportation, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Document Management System (DMS) at: *http://dmses.dot.gov/submit.* The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: *http://www.archives.gov* and the Government Printing Office's Web page at: *http://www.access.gpo.gov/nara.*

Background

Increasingly, maintenance and reconstruction of the nation's highways are taking place while traffic is maintained on the facility under repair. This has resulted in an increase in the exposure of workers to high-speed traffic and a corresponding increase in the risk of injury or death for highway workers, adding to worker safety concerns within an industry where the fatality rate for highway construction workers is already more than double that of other construction workers.[1]

[1] Road Construction Hazards Fact Sheet—Laborers' Health and Safety Fund of North America, Continued

Over the last ten years, the number of fatalities in work zones has risen from 789 in 1995 to 1,068 in 2004.[2] Of the 1,068 fatalities in 2004, 89 percent, or 953 were either motorists or passengers. On average, more than 100 workers are killed and over 20,000 are injured each year in the highway and street construction industry.[3] According to the National Institute for Occupational Safety and Health, 55 percent of the work related fatalities in the U.S. highway construction industry between 1992 and 1998 were vehicle or equipment related incidents that occurred in a work zone. This same source indicated that highway worker fatalities where a worker on foot was struck by a vehicle were about equally likely to have been struck by a passing traffic vehicle versus a construction vehicle. Overall, highway worker safety represents a small but important and increasing part of the work zone safety problem.

Recognizing the growing concerns associated with injuries to workers resulting from work space intrusion crashes, the FHWA convened a task force of representatives from the highway industry in 2002 to further explore these concerns. This collaboration led to the publication of a brochure in 2003 that introduces the concept of positive protection as one approach to reducing injuries to workers and motorists.[4] The brochure recommended a three-step process to help reduce fatalities from intrusion crashes: (1) Increase awareness of the problem and the benefits of using positive protection by distributing the brochure; (2) synthesize available ''good practices'' information, including potential benefits, based on existing guidelines, practices, and safety data from individual agencies; and (3) initiate research to develop standardized guidelines for when to use positive protection in work zones. To date, steps one and two have been completed, and limited research has begun.

The synthesis, entitled ''Positive Protection Practices in Highway Work Zones'' and carried out as project 2–7(174) under the National Cooperative Highway Research Program (NCHRP), was completed in June 2005.[5] The synthesis indicated that while there have been numerous studies addressing the overall frequency and severity of work zone crashes, available information on work zone intrusion crashes and worker injuries remains very limited. Limited data available from two States indicate that intrusion crashes accounted for approximately 9 percent of all work zone crashes; 7 percent of fatal work zone crashes; and 8 percent of the fatal and serious injuries combined. This data also indicated that worker fatalities accounted for approximately 15 percent of fatal work zone intrusion crashes. While these numbers are relatively small, they represent an important component of the work zone safety picture. The synthesis found that because of the growing concern with work zone safety, State highway agencies are using a wide range of positive protection devices and other safety treatments. However, temporary barrier placement decisions were generally made on a case-by-case basis, and while worker safety is sometimes considered, no specific guidance on this subject was found.

Where positive protection is used, the portable concrete barrier was found to be the temporary barrier most widely used by highway agencies. In fact, it was found to be used to some extent by nearly every State highway agency. In spite of this, the review found that there are few specific situations where agencies require the use of portable concrete barriers in work zones, and these situations are limited almost exclusively to the protection of motorists from drop-offs, opposing traffic, and work space hazards rather than for the protection of workers. In current practice, the decision on portable concrete barrier use typically includes some element of engineering judgement or analysis.

In addition to portable concrete barriers, the synthesis review found that the combination of shadow vehicles equipped with truck mounted attenuators (SV/TMA) is also widely used by highway agencies. Information on their use was located for all but 11 States. While worker exposure is not frequently mentioned as a specific factor to be considered in the use of SV/TMAs, it is frequently considered indirectly based on the type of work operations and the overall characteristics of the roadways and work zones where agencies recommend its use. The overwhelming commonality in the use of SV/TMAs was found to be for moving and mobile operations, and work zones of short duration. In addition to specific factors to be considered, the decision on SV/TMA use also includes some elements of engineering judgement or analysis on occasion.

Besides portable concrete barriers and SV/TMAs, several other types of positive protection devices were also found to be in use by some State highway agencies, although to a much lesser extent. These include moveable concrete barriers, water-filled barriers, temporary guardrails, arrestor nets, and finally, a highly mobile longitudinal barrier that is characterized as an emerging technology.

The synthesis found that positive protection is generally considered by the State highway agencies to be very effective in improving work zone safety, particularly where workers are concerned. This was supported by limited crash data identified in the synthesis that clearly show TMAs as being highly effective in stopping errant vehicles with relatively few serious injuries to occupants of the impacting vehicles or the shadow vehicle driver. Limited crash data was also found confirming that portable concrete barriers are highly effective in terms of preventing intrusions into the work space or other hazardous areas.

The synthesis concluded that while positive protection provides a highly effective means of protecting workers and road users from risks associated with work space intrusions, this technique is not feasible or practical for all work zone situations. Based on serious and fatal injuries to vehicle occupants resulting from a number of crashes involving portable concrete barriers, it was recommended that these barriers should always be installed according to accepted design guidelines and only where needed to shield work zone hazards.

While the primary focus of the synthesis was on positive protection, the author also looked at other measures that are being used to reduce exposure and reduce intrusion risks. The synthesis found that the combined use of various measures involving other than positive means to reduce worker exposure or reduce intrusion risks, particularly police enforcement and

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Washington, DC. It is available at the following URL: *http://wzsafety.tamu.edu/files/factsheet.stm.*

[2] Fatality Analysis Reporting System (FARS) maintained by the National Highway Traffic Safety Administration (NHTSA) and is available at the following URL: *http://www.fars.nhtsa.dot.gov/.*

[3] Department of Health and Human Services (DHHS), National Institute for Occupational Safety and Health (NIOSH) Publication No. 2001–128; Building Safer Highway Work Zones: Measures to Prevent Worker Injuries from Vehicles and Equipment. It is available at the following URL: *http://www.cdc.gov/niosh/2001128.html.*

[4] Federal Highway Administration (FHWA) Brochure on Positive Protection: Reducing Risk, Protecting Workers and Motorists. This brochure can be obtained from the AASHTO Bookstore through the following URL: *https://bookstore.transportation.org/Item_details.aspx?id=247.*

[5] Transportation Research Board (TRB), National Cooperative Highway Research Program (NCHRP) Project 20–7(174), A Synthesis of Highway Practice—Positive Protection Practices in Highway Work Zones, June 17, 2005. Available in the docket.

reduced work zone speed limits, may be more common than positive protective measures. Common usage of police in work zones to help enhance safety is supported by findings from a 2001 FHWA study indicating that a majority of States use uniformed police officers in at least some work zones where there are particular safety concerns.[6] However, this study also identified a number of key issues related to the use of police officers in work zones and provided several policy recommendations that would help improve the process as follows:

1. State transportation agencies using Federal-aid funds to assign uniformed police officers to highway work zones should coordinate with State law enforcement agencies to develop written policies and guidelines addressing the following:

a. Situations where uniformed police officers are recommended;

b. The work zone traffic control planning process; and

c. Officer pay, work procedures supervision, *etc.*

2. Police officers assigned to federally funded highway work zones should receive training on the requirements contained in the Manual on Uniform Traffic Control Devices (MUTCD).[7]

3. Agencies are encouraged to gather data on traffic safety incidents at federally funded highway work zones to better assess the effectiveness of work zone traffic control techniques.

4. In addition to uniformed police officers, agencies should also consider using new traffic control technologies such as automated enforcement and intrusion alarms to improve safety at highway work zones.

Related research that is currently under way includes the following:

1. National Cooperative Highway Research Program (NCHRP) study on the Design of Construction Work Zones on High-Speed Highways (Study details and status can be found at the following URL: *http://www4.trb.org/trb/crp.nsf/All+Projects/NCHRP+3-69*); and

2. NCHRP study on Traffic Enforcement Strategies in Work Zones (Study details and status can be found at the following URL: *http://www4.nationalacademies.org/trb/crp.nsf/All+Projects/NCHRP+3-80*).

This research is expected to yield additional design guidance that can be used to supplement what currently exists in the MUTCD and the American Association of State Highway and Transportation Officials (AASHTO) Roadside Design Guide.[8]

Legislation

Section 1110 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Public Law 109–59; August 10, 2005), directed the Secretary of Transportation to 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.

The FHWA is proposing to add a new subpart K to part 630 in title 23, Code of Federal Regulations (CFR) to implement this statutory requirement. The FHWA is proposing to emphasize the need to appropriately consider and manage worker safety by establishing conditions under which consideration for the appropriate use of, and expenditure of funds for, uniformed law enforcement officers, and positive protective measures between workers and motorized traffic would be required on all Federal-aid highway projects.

Section-by-Section Discussion of Proposed Rule

The FHWA proposes to emphasize the need to appropriately consider and manage worker safety as part of the project development process by providing guidance on key factors to consider in reducing worker exposure and risk from motorized traffic. The FHWA proposes to require that each agency's policy for the systematic consideration and management of work zone impacts, to be established in accordance with the recently updated 23 CFR part 630 subpart J (effective October 12, 2007), address the consideration and management of worker safety as follows:

1. Avoid or minimize worker exposure to motorized traffic through the application of appropriate positive protective strategies including, but not limited to, full road closures; ramp closures; crossovers; detours; and rolling road blocks during work zone setup and removal;

2. Where exposure cannot be adequately managed through the application of the above strategies, reduce risk to workers from being struck by motorized traffic through the use of appropriate positive protective devices;

3. Where exposure and risk reduction is not adequate, possible, or practical, manage risk through the application of appropriate intrusion countermeasures including, but not limited to, the use of uniformed law enforcement officers; and

4. Assure that the quality and adequacy of deployed temporary traffic control devices are maintained for the project duration.

This proposed rule would require that each agency develop and implement procedures for considering the need for positive protective measures between workers and motorized traffic; and a policy addressing the use of uniformed law enforcement on Federal-aid projects. The proposed subpart K would also require that each agency develop and implement quality standards for work zone traffic control devices to help ensure that the quality and adequacy of temporary traffic control devices on construction, utility, and maintenance operations is maintained for the project duration.

Section 630.1102 Purpose

This section would explain that the FHWA is taking this action to establish requirements and provide guidance for addressing worker exposure and risk from motorized traffic in order to decrease the likelihood of fatalities or injuries to workers who are exposed to motorized traffic while working on Federal-aid highway projects.

By emphasizing worker safety, the proposed rule would attempt to enhance the safety of both the motorist and worker during the project.

Section 630.1104 Definitions

This section would provide six definitions to assist in the proper understanding of the proposed rule.

A definition of ''agency'' would be provided to clarify that the term includes State and local highway agencies that receive Federal-aid highway funding.

A definition of ''Federal-aid highway project'' would be provided to clarify that the term includes construction, maintenance, and utility projects that are funded in whole or in part with Federal-aid highway funds.

[6] FHWA Study on the Use of Uniformed Police Officers on Federal-aid High Construction Projects, October 2001. This document can be found at the following URL: *http://safety.fhwa.dot.gov/wz/nwzaw/toc.htm.*

[7] The Manual on Uniform Traffic Control Devices (MUTCD) is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel. It can be found at the following URL: *http://mutcd.fhwa.dot.gov/index.htm.*

[8] The American Association of State Highway and Transportation Officials (AASHTO) Roadside Design Guide presents a synthesis of current information and operating practices related to roadside safety and is intended for use as a resource document from which individual highway agencies can develop standards and policies. It can be purchased from AASHTO thru the following URL: *https://bookstore.transportation.org/item_details.aspx?ID=148.*

A definition of ''intrusion countermeasures'' would be provided to differentiate between positive protective measures and other than positive protective measures.

A definition of ''motorized traffic'' would be provided to differentiate between the motorized traveling public versus motorized construction traffic.

A definition of ''positive protective measures'' would be included because the term is defined in section 1110 of SAFETEA–LU. This definition of positive protective measures would be further refined to differentiate between ''positive protective devices'' and ''positive protective strategies.''

''Positive protective devices'' would be defined as devices that contain and redirect vehicles and meet the crashworthiness evaluation criteria contained in National Cooperative Highway Research Program (NCHRP) report 350.[9]

''Positive protective strategies'' would be defined as traffic management strategies that would help avoid crashes involving workers and motorized traffic by eliminating or diverting traffic from the vicinity of the activity area. Such strategies would include the use of full road closures, detours, crossovers, and ramp/interchange closures.

Section 630.1106 Positive Protective Measures

This section would require that each agency's policy for the systematic consideration and management of work zone impacts, to be established in accordance with the recently updated 23 CFR part 630 subpart J, address the consideration and management of worker safety as part of the overall work zone safety analysis on Federal-aid highway projects. To implement this aspect of the policy, the agency would need to develop procedures that begin with the consideration of positive protective strategies that would avoid or minimize worker exposure to motorized traffic including, but not limited to, full road closures, ramp closures, crossovers, detours, and rolling road blocks during work zone setup and removal. Where the application of positive protective strategies is not possible, practical or adequate to manage exposure, the procedures would consider the use of appropriate positive protective devices, basing need on the project characteristics, the MUTCD, the AASHTO Roadside Design Guide, and factors including, but not limited to, the following:

- Project exposure and duration;
- Traffic speed;
- Traffic volume;
- Distance between traffic and workers;
- Geometrics (that adversely impact exposure—*e.g.*, poor sight distance, sharp curves);
- Vehicle mix;
- Type of work (as related to worker exposure);
- Time of day (*e.g.*, night work);
- Roadway classification;
- Consequences from/to motorists resulting from roadway departure;
- Potential hazard to traffic presented by device itself, and to workers and traffic during device placement;
- Access to/from work zone; and
- Work area restrictions (including impact on worker exposure).

No Escape Routes—The FHWA proposes that at a minimum, positive protective measures shall be required to separate workers from motorized traffic in all work zones conducted under traffic in areas that offer workers no means of escape (*e.g.*, tunnels, bridges, *etc.*), unless an engineering analysis determines otherwise. Work zones involving no escape areas generally present a higher level of risk for workers and therefore justify special consideration for applying positive protective measures. Rather than the typical approach of determining the need for positive protective measures based on an engineering analysis, the proposed language would emphasize the need to appropriately assess work zones involving no escape areas by requiring that positive protective measures be applied unless an engineering analysis determines that this would not be necessary or feasible based on other project characteristics.

The FHWA also proposes that the following minimum criteria for positive protective devices shall apply:

Temporary Longitudinal Traffic Barriers—Temporary longitudinal traffic barriers would be required to protect workers in stationary work zones lasting 2 weeks or more when the project design speed is 45 mph or greater, and the nature of the work requires workers to be less than a lane-width from the edge of an open travel lane, unless an engineering analysis determines otherwise.

While available information on work zone intrusion crashes and worker injuries is limited, there are two especially critical conditions where common sense would indicate a strong need for consideration of temporary longitudinal traffic barriers. The first is speed, specifically, speeds that are 45 mph or greater. Of the 1,068 highway fatalities in 2004 that occurred in work zones, 888, or 83 percent, occurred where the speed limit was 45 mph or greater.[10] The second is the proximity of workers to live traffic. In the presence of speeds of 45 mph and greater, common sense would indicate that workers within a lane-width of a live travel lane would be at high risk in terms of exposure, particularly in light of the many distractions that the average driver faces on a daily basis. A national survey of more than 4,000 drivers in 2002 showed that about 14 percent of drivers that have been involved in a crash in the past 5 years attribute the crash to their being distracted at the time.[11] This projects to an estimated 7.2 million distracted driver crashes over a 5 year period.

In addition to the critical conditions described, a determination of whether or not to use temporary longitudinal traffic barriers must also consider the work zone duration. The act of placing, relocating, and removing the barriers themselves poses a risk to the workers involved, as well as to the motorists. By their nature, temporary longitudinal traffic barriers tend to be heavy, bulky and time consuming to maneuver. While there is no data pointing to a specific duration as being an ideal ''tipping point'', the previously cited synthesis on Positive Protection Practices in Highway Work Zones indicates that three States specified a threshold value, all of which were two weeks or more, as one factor in considering the need for temporary longitudinal traffic barriers.

While the preceding are considered to be a critical combination of characteristics, the FHWA recognizes that consideration of other factors and project characteristics as part of an engineering analysis may determine the best solution to be something other than temporary longitudinal traffic barriers. Similar to the proposed approach for addressing work zones involving no escape areas, the intent is to emphasize the need to appropriately assess work zones with the specified critical combination of characteristics by requiring that temporary longitudinal

[9] Transportation Research Board (TRB), National Cooperative Highway Research Program (NCHRP) Report 350, Recommended Procedures for the Safety Performance Evaluation of Highway Features. This document is available at the following URL: *http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_350-a.pdf.*

[10] Fatality Analysis Reporting System (FARS) maintained by the National Highway Traffic Safety Administration (NHTSA) and is available at the following URL: *http://www-fars.nhtsa.dot.gov/.*

[11] Findings Report for National Survey of Distracted and Drowsy Driving Attitudes and Behaviors: 2002 submitted to NHTSA March 2003. The report can be found at the following URL: *http://www.nhtsa.dot.gov/people/injury/drowsy_driving1/survey-distractive03/index.htm.*

traffic barriers be applied unless an engineering analysis determines that this would not be necessary or feasible based on other project characteristics.

Shadow Vehicles and Truck Mounted Attenuators—The FHWA proposes that the determination of need and the priorities for application of protective shadow vehicles and truck-mounted attenuators shall be consistent with the guidance included in chapter 9 of the AASHTO Roadside Design Guide. The AASHTO Roadside Design Guide is a widely recognized document that is intended for use as a resource from which individual highway agencies can develop standards and policies, making modifications to fit local conditions as appropriate. The guidance in chapter 9 includes suggested priorities for the application of protective vehicles and truck mounted attenuators that appear to be very well thought out. Accordingly, the FHWA is proposing that these suggested priorities serve as the basis upon which decisions on need are made.

Other Requirements—When positive protective devices are required by an agency, the FHWA proposes to require that these devices shall be paid for on a unit pay basis, unless doing so would create a conflict with innovative contracting approaches such as design-build or some performance based contracts where the contractor is paid to assume a certain risk allocation, and payment is generally made on a lump sum basis.

The application of specific positive protective devices would be required to be in accordance with the work zone hardware recommendations in Chapter 9 of the AASHTO Roadside Design Guide: Traffic Barriers, Traffic Control Devices, and Other Safety Features for Work Zones' 2002, which is incorporated by reference into 23 CFR 630.1012(b)(1) in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, effective October 12, 2007, and is on file at the National Archives and Record Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal regulations/ibr_locations.html.* The entire document is available for purchase from the American Association of State Highway and Transportation Officials (AASHTO), 444 North Capitol Street, NW., Suite 249, Washington, DC 2001 or thru the following URL: *https://bookstore.transportation.org/item_details.aspx?ID=148.*

Section 630.1108 Intrusion Countermeasures

This section would promote the consideration and use of other than positive protective measures to reduce the risk of motorized traffic intrusion into the work space where the provision of positive protective measures is not adequate, possible or practical. A wide range of motorized traffic intrusion countermeasures would be suggested for consideration including, but not limited to the following:

- Effective, credible signing;
- Variable message signs;
- Arrow boards;
- Warning flags and lights on signs;
- Longitudinal and lateral buffer space;
- Trained flaggers and spotters;
- Enhanced flagger station setups;
- Intrusion alarms;
- Rumble strips;
- Pace or pilot vehicle;
- High quality work zone pavement markings and removal of misleading markings;
- Channelizing device spacing reduction;
- Longitudinal channelizing barricades;
- Work zone speed limit reduction;
- Law enforcement;
- Automated speed enforcement (where permitted by State/local laws);
- Drone radar;
- Worker and work vehicle/equipment visibility; and
- Worker training.

It would be noted that these countermeasures are not mutually exclusive and should be considered in combination as appropriate.

This section would specifically recognize that the countermeasure of using uniformed law enforcement officers to maintain an appropriate speed through work zones is a common practice in many States. Law enforcement presence in work zones is generally recognized as an element that helps enhance safety.[12] The presence of a uniformed law enforcement officer and marked law enforcement vehicle in view of the traveling public on a highway project can affect driver behavior, helping to maintain the appropriate speeds and increasing driver awareness through the work zone. This is particularly important given the large number of distracted driver crashes cited previously, and that almost one out of every three traffic fatalities have been found to be related to speeding.[13]

This section would suggest conditions that should be considered in determining the need for uniformed law enforcement presence in work zones. These include, but are not limited to, the following:

- Operations occurring on high speed, high volume facilities where workers on foot are exposed to traffic;
- Operations, including temporary traffic control device set-up and removal, that occur closely adjacent to traffic without positive protection;
- Operations that require temporary or frequent shifts in traffic patterns;
- Night operations that may cause special concerns;
- Locations where traffic conditions and crash history indicate substantial problems may be encountered during the project;
- Operations that require brief closure of all lanes in one or both directions;
- Operations where traffic queuing is expected; and
- Other work sites where traffic conditions present a high risk for workers and the traveling public.

While full-time uniformed law enforcement presence in every work zone is not a reasonable expectation, policies that result in an increased driver expectancy for encountering law enforcement officers in work zones should help improve safety. This may be achieved through a combination of active enforcement (issuing citations) at selected work zones, law enforcement presence during high-risk activities, and occasional law enforcement presence at all major work zones. The previously cited FHWA study on the use of uniformed police officers recognized that a majority of States already use uniformed police officers in at least some work zones. However, this study also identified a number of issues that hinder more widespread and consistent use of uniformed police officers in work zones including:

- Some agencies had no policies regarding the use of officers;
- Where policies existed, they vary widely regarding the circumstances where officers are used;
- A majority of the agencies did not have a training program for officers assigned to work zones;
- It was not clear whether police officers were familiar with the MUTCD in all cases;
- Chain of command varied widely;

[12] FHWA Study on the Use of Uniformed Police Officers on Federal-aid Highway Construction Projects, October 2001. This document can be found at the following URL: *http://safety.fhwa.dot.gov/wz/nwzaw/toc.htm.*

[13] FHWA Safety Facts Flyer, which can be found at the following URL: *http://ntl.bts.gov/lib/23000/23100/23121/12SpeedCountsNumbers.pdf.*

• Conflicts exist between an officer's routine mission versus work zone duties;
• Nearly half of the agencies do not include the police when planning a project;
• Funding is not always available when officers are needed; and
• Officers are not always available when needed.

To address these issues, this section would require that each agency, in cooperation with the FHWA, develop a policy, or update an existing policy where appropriate, to address the use of uniformed law enforcement on work zone operations occurring on Federal-aid highways. The policy would address the following:

1. Law enforcement involvement during major project planning and development;
2. Situations where uniformed law enforcement officers are recommended;
3. Duties/expectations of the officers (and how they differ according to different situations);
4. Active enforcement versus presence;
5. Appropriate work zone safety and mobility training for the officers;
6. Communications and chain of command; and
7. Officer pay.

This section would emphasize that when uniformed law enforcement officers are used, they are to be used as a supplement to, and not a replacement for, temporary traffic control devices required by the MUTCD. The conditions regarding Federal-aid eligibility for using uniformed law enforcement officers would be clarified in this section. This section would also address the issue of funding shortfalls where payment for officers is part of an agency-wide program budget by requiring appropriate consideration of anticipated projects to more accurately estimate budget needs, and the establishment of contingency provisions to provide for instances when the initial budget proves insufficient.

Section 630.1110 Installation and Maintenance of Temporary Traffic Control Devices

The focus of this section would be to ensure that the proper temporary traffic control devices are installed and adequately maintained throughout the life of the project. Part 6 of the MUTCD includes requirements for temporary traffic control. The recently updated regulation in 23 CFR part 630 subpart J will require the development of a Temporary Traffic Control plan, in accordance with Part 6 of the MUTCD, as a component of a broader Transportation Management Plan (TMP) in order to facilitate the continuity of reasonably safe and efficient road user flow and highway worker safety when a work zone is necessary. Subpart J will also require that both the agency and the contractor each designate a trained person at the project level with the responsibility for implementing the TMP.

Typically, the installation and maintenance of temporary traffic control devices are both part of a basic contract item such as ''traffic control and protection,'' or ''protection and maintenance of traffic.'' Such items generally also cover maintenance. Requiring a separate pay item for the installation and maintenance of temporary traffic control devices would not be substantially different from current practice. The FHWA believes that section 1110 of SAFETEA–LU advocates a requirement that each agency develop and adopt a quality standard to help maintain the quality and adequacy of the temporary traffic control devices for the duration of the project.

The FHWA proposes to emphasize the maintenance aspect to ensure that quality is sustained throughout the life of the project by requiring that each agency develop and implement a quality standard to help maintain the quality and adequacy of the temporary traffic control devices for the duration of the project. Some agencies are already doing this, either by developing a variation of, or through direct reference to quality guidelines for work zone traffic control devices such as those developed by the American Traffic Safety Services Association (ATSSA).[14] This section would also require that there be an appropriate level of inspection to assure compliance with the quality standards.

Compliance Date

The FHWA proposes to establish a compliance date of October 12, 2008, for subpart K. Subpart K is proposed as a supplement to subpart J, which governs work zone safety and mobility in highway and street work zones, and has an effective date of October 12, 2007. Since subpart K is tied to the specific components of Subpart J, the proposed compliance date for subpart K would provide one year from the effective date of subpart J to implement the proposed requirements through revisions and/or additions to elements developed under subpart J.

National Congestion Initiative

The proposed rule includes measures that could further the goals of the Secretary of Transportation's new National Strategy to Reduce Congestion on America's Transportation Network, announced on May 16, 2006.[15] By requiring the development and implementation of a standard to help maintain the quality and adequacy of temporary traffic control devices on Federal-aid highway projects, we anticipate that the proposed rule will help reduce congestion by assuring that motorists are always provided with positive guidance while traveling through work zones.

Rulemaking Analysis and Notices

All comments received on or before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable, but the FHWA may issue a final rule at any time after the close of the comment period. In addition to late comments, the FHWA will also continue to file in the docket relevant information that becomes available after the comment closing date, and interested persons should continue to examine the docket for new material.

Executive Order 12866 (Regulatory Planning and Review) and U.S. DOT Regulatory Policies and Procedures

The FHWA has determined preliminarily that this action would not be a significant regulatory action within the meaning of Executive Order 12866 or significant within the meaning of U.S. Department of Transportation regulatory policies and procedures. A recent synthesis of positive protection practices in highway work zones indicates that a wide range of positive protective devices and other safety treatments are already being used by

[14] The American Traffic Safety Services Association's (ATSSA) Quality Guidelines for Work Zone Traffic Control Devices uses photos and written descriptions to help judge when a traffic control device has outlived its usefulness. These guidelines are available for purchase from ATSSA through the following URL: *http://www.atssa.com/store/bc_item_detail.jsp?productId=1.*

[15] Speaking before the National Retail Federation's annual conference on May 16, 2006, in Washington, DC, U.S. Transportation Secretary Norman Mineta unveiled a new plan to reduce congestion plaguing America's roads, rail, and airports. The National Strategy to Reduce Congestion on America's Transportation Network includes a number of initiatives designed to reduce transportation congestion. The transcript of these remarks is available at the following URL: *http://www.dot.gov/affairs/minetasp051606.htm.*

State highway agencies.[16] This synthesis found that among positive protective devices, portable concrete barriers and SV/TMAs were being used by nearly every State highway agency. The proposed regulatory action would emphasize the need to consider worker safety as an integral part of each State highway agency's process for considering and managing the overall impacts due to work zones. As such, any additional usage of positive protective devices resulting from the proposed action would be incremental to what many State highway agencies are already using to address work zone safety. In addition, the emphasis on first considering strategies that would avoid or minimize worker exposure to motorized traffic may decrease the overall need for positive protective devices. Accordingly, it is anticipated that the economic impact of this rulemaking would be minimal.

The proposed action is not anticipated to adversely affect, in a material way, any sector of the economy. In addition, the proposed action is not likely to interfere with any action taken or planned by another agency or to materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Based on the information received in response to this NPRM, the FHWA intends to carefully consider the costs and benefits associated with this rulemaking. Accordingly, comments, information, and data are solicited on the economic impact of the changes described in this document or any alternative proposal submitted.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of these proposed changes on small entities. This rule applies to all State and local highway agencies that use Federal-aid highway funding in the execution of their highway program. The proposed regulatory action would emphasize the need to consider worker safety as an integral part of each agency's process for considering and managing the overall impacts due to work zones on Federal-aid highway projects. As noted previously, a recent synthesis of positive protection practices in highway work zones indicates that a wide range of positive protective devices and other safety treatments are already being used by State highway agencies. This synthesis found that among positive protective devices, portable concrete barriers and SV/TMAs were being used by nearly every State highway agency. The FHWA believes that positive protective devices and other safety treatments are also widely used by many local agencies because the FHWA's research indicates that local agencies usually follow State practice with respect to MUTCD guidance. As such, any additional usage of positive protective devices resulting from the proposed action would be incremental to what many local highway agencies are already using to address work zone safety. In addition, the emphasis on first considering strategies that would avoid or minimize worker exposure to motorized traffic may decrease the overall need for positive protective devices. Accordingly, the FHWA has determined that the proposed regulation would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This notice of proposed rulemaking would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Public Law 104–4, 109 Stat. 48, March 22, 1995). This proposed action would not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $128.1 million or more in any one year period to comply with these changes.

Additionally, the definition of ''Federal mandate'' in the Unfunded Mandate Reform Act excludes financial assistance of the type in which State, local or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal government. The Federal-aid highway program permits this type of flexibility to the States.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and the FHWA has determined that this proposed action would not have a substantial direct effect or sufficient federalism implications on States that would limit the policymaking discretion of the States and local governments. The FHWA has also determined that this proposed rulemaking would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions and does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The proposed amendments are in keeping with the Secretary of Transportation's authority under 23 U.S.C. 109(d), 315, and 402(a) to promulgate uniform guidelines to promote the safe and efficient use of highways.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this proposed action under Executive Order 13175, dated November 6, 2000, and believes that it would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal law. The purpose of this proposed rule is to improve worker safety on Federal-aid highway projects, and would not impose any direct compliance requirements on Indian tribal governments and will not have any economic or other impacts on the viability of Indian tribes. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this proposed action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that it is not a significant energy action under that order because it is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this proposed action does not contain collection

[16] Transportation Research Board (TRB), National Cooperative Highway Research Program (NCHRP) Project 20–7(174), A Synthesis of Highway Practice—Positive Protection Practices in Highway Work Zones, June 17, 2005. Available in the docket.

information requirements for purposes of the PRA.

Executive Order 12988 (Civil Justice Reform)

This proposed action meets applicable standards in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this proposed action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this proposed action would not cause an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This proposed action would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

National Environmental Policy Act

The agency has analyzed this proposed action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that it would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 630

Government contracts, Grant programs—transportation, Highway safety, Highways and roads, Project agreement, Traffic regulations.

Issued on: October 25, 2006.

J. Richard Capka,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA proposes to add Subpart K to title 23, Code of Federal Regulations, Part 630, as follows:

Subpart K—Temporary Traffic Control Devices

Sec.

630.1102 Purpose.
630.1104 Definitions.
630.1106 Positive Protective Measures.
630.1108 Intrusion Countermeasures.
630.1110 Installation and Maintenance of Temporary Traffic Control Devices.

Authority: 23 U.S.C. 109(c) and 112; Sec. 1110 of Pub. L. 109–59; 23 CFR 1.32; and 49 CFR 1.48(b).

Subpart K—Temporary Traffic Control Devices

§ 630.1102 Purpose.

To establish requirements and provide guidance for addressing worker safety by limiting the exposure and risk from motorized traffic in order to decrease the likelihood of fatalities or injuries to workers on Federal-aid highway projects. This subpart is applicable to all State and local highway agencies that receive Federal-aid highway funding.

§ 630.1104 Definitions.

For the purposes of this subpart, the following definitions apply:

Agency means a State or local highway agency that receives Federal-aid highway funding.

Federal-aid Highway Project means highway construction, maintenance, and utility projects funded in whole or in part with Federal-aid funds.

Intrusion Countermeasures means strategies involving the use of other than positive protective measures to reduce the likelihood of motorized traffic intrusion into the work space.

Motorized Traffic means the motorized traveling public. This term does not include motorized construction or maintenance traffic.

Positive Protective Devices means the devices that contain and redirect vehicles and meet the crashworthiness evaluation criteria contained in NCHRP report 350.

Positive Protective Measures means the positive protective devices and positive protective strategies used to avoid motorized traffic crashes in work zones that can lead to worker injuries and fatalities through work space intrusions.

Positive Protective Strategies means the traffic management strategies that would help avoid crashes involving workers and motorized traffic by eliminating or diverting traffic from the vicinity of the activity area.

§ 630.1106 Positive Protective Measures.

(a) Each agency's policy for the systematic consideration and management of work zone impacts, to be established in accordance with 23 CFR 630.1006, shall include the consideration and management of highway worker safety on Federal-aid highway projects. These procedures should begin with the consideration of positive protective strategies that would avoid or minimize worker exposure to motorized traffic including, but not limited to, full road closures; ramp closures; crossovers; detours; and rolling road blocks during work zone setup and removal. Where these strategies are not possible, practical, or adequate to manage exposure, the procedures shall consider the use of appropriate positive protective devices, basing need on the project characteristics, the MUTCD, chapter 9 of the AASHTO Roadside Design Guide, and factors including, but not limited to, the following:

(1) Project exposure and duration;

(2) Traffic speed;

(3) Traffic volume;

(4) Distance between traffic and workers;

(5) Geometrics (that adversely impact exposure—*e.g.*, poor sight distance, sharp curves);

(6) Vehicle mix;

(7) Type of work (as related to worker exposure);

(8) Time of day (*e.g.*, night work);

(9) Roadway classification;

(10) Consequences from/to motorists resulting from roadway departure;

(11) Potential hazard to traffic presented by device itself, and to workers and traffic during device placement;

(12) Access to/from work zone; and

(13) Work area restrictions (including impact on worker exposure).

(b) At a minimum, positive protective measures shall be required to separate workers from motorized traffic in all work zones conducted under traffic in areas that offer workers no means of escape (*e.g.*, tunnels, bridges, etc.) unless an engineering analysis determines otherwise. In addition, the following minimum criteria for positive protective devices shall apply:

(1) Temporary longitudinal traffic barriers shall be used to protect workers in stationary work zones lasting two weeks or more when the project design speed is 45 mph or greater, and the nature of the work requires workers to be within one lane-width from the edge of a live travel lane, unless an engineering analysis determines otherwise.

(2) The determination of need and the priorities for application of protective shadow vehicles and truck-mounted attenuators shall be consistent with the guidance included in chapter 9 of the AASHTO Roadside Design Guide.

(c) When positive protective devices are necessary, these devices shall be paid for on a unit pay basis, unless doing so would create a conflict with innovative contracting approaches such as design-build or some performance based contracts where the contractor is paid to assume a certain risk allocation, and payment is generally made on a lump sum basis. Application of specific positive protective devices shall be in accordance with chapter 9 of the AASHTO Roadside Design Guide.

§ 630.1108 Intrusion Countermeasures.

(a) In situations where the provision of positive protective measures is not adequate, possible or practical, appropriate consideration should be given to the use of intrusion countermeasures to reduce the risk of motorized traffic intrusion into the work space. These countermeasures are not mutually exclusive and should be considered in combination as appropriate. A wide range of motorized traffic intrusion countermeasures should be considered including, but not limited to:

(1) Effective, credible signing;
(2) Variable message signs;
(3) Arrow boards;
(4) Warning flags and lights on signs;
(5) Longitudinal and lateral buffer space;
(6) Trained flaggers and spotters;
(7) Enhanced flagger station setups;
(8) Intrusion alarms;
(9) Rumble strips;
(10) Pace or pilot vehicle;
(11) High quality work zone pavement markings and removal of misleading markings;
(12) Channelizing device spacing reduction;
(13) Longitudinal channelizing barricades;
(14) Work zone speed limit reduction;
(15) Law enforcement;
(16) Automated speed enforcement (where permitted by State/local laws);
(17) Drone radar;
(18) Worker and work vehicle/equipment visibility; and
(19) Worker training.

(b) Among the intrusion countermeasures, uniformed law enforcement presence in work zones is generally recognized as an element that enhances safety. The presence of a uniformed law enforcement officer and marked law enforcement vehicle in view of the motorized traffic on a highway project can affect driver behavior, helping to maintain appropriate speeds and increase driver awareness through the work zone. Conditions that should be considered in determining the need for uniformed law enforcement presence in work zones include, but are not limited to, the following:

(1) Operations occurring on high speed, high volume facilities where workers on foot are exposed to traffic;
(2) Operations, including temporary traffic control device set-up and removal, that occur closely adjacent to traffic without positive protection;
(3) Operations that require temporary or frequent shifts in traffic patterns;
(4) Night operations that may cause special concerns;
(5) Locations where traffic conditions and crash history indicate substantial problems may be encountered during the project;
(6) Operations that require brief closure of all lanes in one or both directions;
(7) Operations where traffic queuing is expected; and
(8) Other work sites where traffic conditions present a high risk for workers and the traveling public.

(c) Each agency, in cooperation with the FHWA, shall develop a policy addressing the use of uniformed law enforcement on operations occurring on Federal-aid highways. The policy shall address the following:

(1) Law enforcement involvement during major project planning and development;
(2) Situations where uniformed law enforcement officers are recommended;
(3) Duties/expectations of the officers (and how they differ according to different situations);
(4) Active enforcement versus presence;
(5) Appropriate work zone safety and mobility training for the officers, consistent with the training requirements in 23 CFR 630.1008(d);
(6) Communications and chain of command; and
(7) Officer pay

(d) Uniformed law enforcement officers shall not be used in lieu of temporary traffic control devices required by the Part 6 of the MUTCD. Costs associated with the provision of uniformed law enforcement to help protect workers and maintain safe and efficient travel through highway work zones are eligible for Federal-aid participation. Federal-aid eligibility excludes law enforcement activities that would normally be expected in and around highway problem areas requiring management of traffic. Payment for the services of uniformed law enforcement in work zones may be included as part of the project budget, or be accommodated as part of an agency-level program budget. Payment for the use of uniformed law enforcement included as part of the project budget shall be on a unit pay basis. The process for establishing an agency-level program budget shall include:

(1) Appropriate consideration of anticipated projects to estimate budget needs; and
(2) Contingency provisions to address identified needs should the budget prove insufficient.

§ 630.1110 Installation and Maintenance of Temporary Traffic Control Devices.

To help ensure that the integrity of the temporary traffic control is sustained after implementation, each agency shall develop and implement quality standards to help maintain the quality and adequacy of the temporary traffic control devices for the duration of the project. Agencies may choose to adopt quality standards such as those developed by the American Traffic Safety Services Association (ATSSA).[1] A level of inspection necessary to assure compliance with the quality standards shall be provided.

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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Parts 15, 18, 150, 152, and 179

Office of the Secretary

43 CFR Parts 4 and 30

RIN 1076–AE59

Indian Trust Management Reform

AGENCY: Bureau of Indian Affairs, Office of the Secretary, Interior.

ACTION: Notice of reopening of comment period for proposed rule.

SUMMARY: On August 8, 2006, the Bureau of Indian Affairs (BIA) and the Office of the Secretary proposed to amend several of their regulations related to Indian trust management (see 71 FR 45173). The purpose of the amendments is to further fulfill the Secretary's fiduciary responsibilities to federally recognized tribes and individual Indians and to meet the Indian trust management policies in the

[1] The American Traffic Safety Services Association's (ATSSA) Quality Guidelines for Work Zone Traffic Control Devices uses photos and written descriptions to help judge when a traffic control device has outlived its usefulness. These guidelines are available for purchase from ATSSA through the following URL: *http://www.atssa.com/store/bc_item_detail.jsp?productId=1.*