Practice under the Environmental Provisions of SAFTEA-LU

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PRACTICE UNDER THE ENVIRONMENTAL PROVISIONS OF SAFETEA-LU

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Larry W. Thomas, Attorney-at-Law, Washington, DC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report continues NCHRP's practice of keeping departments up-to-date on laws that will affect their operations.

Applications

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) adjusted the federal environmental statutes that control the development of highway and transit projects that are eligible for federal funding or need some form of federal approval. The statutes are the National Environmental Policy Act (NEPA) and Section 4f of the Department of Transportation Act (4f). Under NEPA, SAFETEA-LU prescribes an approach that combines the planning and project development process. SAFETEA-LU also prescribed new requirements for major projects that include a structured approach to participation by other agencies. Under Section 4f, Congress ordered rulemaking to standardize practice and codify a process for *de minimis* findings where the impacts to protected resources (e.g., parks, wildlife refuges, historic sites) are minor. Congress also shortened the statute of limitations to 180 days for challenges to NEPA decisions, and four states are allowed to pursue delegation of authority to make the decisions to authorize projects as categorical exclusions under NEPA.

- The Federal Highway Administration and the Federal Transit Administration have responded with guidance and rulemakings.
- Litigation has already been initiated on how to interpret the new statute of limitations.
- One state has pursued the delegation of authority to make categorical exclusion decisions.
- There have been variances on how to interpret these provisions.

This legal research digest summarizes the amendatory statutory provisions, guidance, and rulemakings and the judicial decisions that have interpreted them. The research reviews legislative history intended to explain why these provisions were enacted.

The digest provides a convenient source for determining how these provisions are being administered by the appropriate federal agencies and state departments of transportation. It should be useful to department of transportation administrators, attorneys, planners, contractors, financial officials, environmental specialists, community activists, and policy makers.

TRANSPORTATION RESEARCH BOARD
OF THE NATIONAL ACADEMIES

CONTENTS

PRACTICE UNDER THE ENVIRONMENTAL PROVISIONS OF SAFETEA-LU

By Larry W. Thomas, Esq.

INTRODUCTION

Because of concerns that the environmental review process for large, complex highway and transit projects is inefficient, leading to delays in the completion of projects,[1] Congress has acted to streamline the environmental review process and improve interagency cooperation.[2] Although Congress added "environmental streamlining" provisions to the Transportation Equity Act for the 21st Century (TEA-21), in 2005 Congress took another step toward streamlining with the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).[3]

The Act "establishe[d] a new environmental review process for transportation projects developed as environmental impact statements."[4] SAFETEA-LU seeks to avoid delay by addressing environmental issues at the planning stage of a project and by promoting increased interaction and cooperation among the Federal Highway Administration (FHWA) (or the Federal Transit Administration (FTA))[5] and its state and local counterparts. The Act requires that agencies responsible for gaining environmental approval invite resource agencies that have an interest in the project to participate in defining the purpose and need for the project, the range of alternatives to be considered, the methodology to be used, and the level of detail required in the analysis of each alternative.[6]

The principal sections of SAFETEA-LU discussed herein are as follows:

- Section 6001 of SAFETEA-LU, which amended 23 U.S.C. § 134, requires that transportation agencies consult with resource agencies having responsibility for statewide and metropolitan planning.
- Section 6002(a), which added 23 U.S.C. § 139, provides for more efficient environmental reviews, designates responsible agencies, and establishes a 180-day statute of limitations (SOL) on litigation beginning with publication of a notice in the *Federal Register* that a permit, license, or approval is final in regard to a highway project.
- Section 6004(a), which amended 23 U.S.C. § 326, provides that a state may be assigned the responsibility for determining whether certain activities qualify as categorical exclusions (CE).
- Section 6003(a), which added 23 U.S.C. § 325, established a pilot program whereby up to five states may assume the responsibility of the Secretary of the United States Department of Transportation (USDOT) for certain environmental reviews.
- Section 6009(a)(1), which amended 23 U.S.C. § 138, authorizes the Secretary to make *de minimis* findings under Section 4(f) of the Department of Transportation Act of 1966[7] that is applicable to historic sites or public parks, recreation areas, or wildlife and waterfowl refuges.[8]

The purposes of this digest are to discuss the statutory provisions; regulations, including the amendments effective in April 2009; and FHWA's Final Guidance on SAFETEA-LU,[9] as well as the few judicial decisions to date interpreting the environmental provisions of the Act. The digest discusses the responses of 27 state transportation departments (state DOT) to a survey conducted for the digest regarding the states' experience with SAFETEA-LU.

I. SAFETEA-LU AND THE STREAMLINING OF ENVIRONMENTAL REVIEW

A critical objective of SAFETEA-LU is to provide for increased coordination between federal and state agencies in statewide and metropolitan transportation planning and environmental review. Although there is limited legislative history for Section 6001,[10] the section

[1] *See* SAFETEA-LU Environmental Review Process Final Guidance (Nov. 15, 2006), available at http://www.fhwa.dot.gov/hep/section6002/index.htm, hereinafter cited as "FHWA Final Guidance."

[2] Congressional Research Service, CRS Report for Congress, *Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users (SAFETEA-LU or SAFETEA): Selected Major Provisions* (Oct. 18, 2005), at 28, available at: http://www.policyarchive.org/handle/10207/bitstreams/2597.pdf , last accessed on Feb. 11, 2010.

[3] Pub. L. No. 109-59 (Aug. 10, 2005).

[4] FHWA Final Guidance, *supra* note 1, at 9 (page numbers refer to the PDF version).

[5] Although SAFETEA-LU is applicable to the Federal Transit Administration, the report only addresses the issues from the perspective of state highway projects.

[6] General Accounting Office Reports & Testimony, Highway Safety: Preliminary Observations on Efforts to Implement Changes in the Highway Safety Improvement Program since SAFETEA-LU, No. 8 (Aug. 1, 2008).

[7] Pub. L. No. 89-574 § 15(a) (Sept. 13, 1966), 80 Stat. 771.

[8] 23 U.S.C. § 138 (West 2002, 2010 Supp.) (originally enacted as § 4(f) of the Department of Transportation Act of 1966).

[9] *Supra* note 1.

[10] Conference Report of the Committee of Conference on H.R. 3, H.R. REP. NO. 109-203, at 1039 (2005), hereinafter

modifies requirements for statewide and transportation planning and requires that transportation agencies consult with resource agencies having responsibility for such planning.[11]

SAFETEA-LU strengthens the link between the planning of transportation projects and the review of a project's environmental impacts. The Act establishes a new process for environmental review through new statutory provisions and regulations. The Act emphasizes early consideration of environmental issues during the planning of projects and improved communication among the involved agencies.

Although the legislative history also is limited in regard to Section 6002,[12] the section provides for more efficient environmental reviews for project decision-making.[13] Under SAFETEA-LU there is a modified environmental review process for environmental impact statements (EIS) involving highway projects, public transportation projects, and multimodal projects requiring federal approval.[14] The modifications are necessary for a more streamlined process to handle environmental concerns with major transportation projects. SAFETEA-LU introduced a new entity—the participating agency—in the environmental review process.[15]

The environmental review process in Section 6002 is mandated for EIS projects.[16] Section 6002 may be applied to a "project, class of projects, or program of projects."[17] In addition, the Secretary has the discretion to apply Section 6002 procedures "to other projects for which an environmental document is prepared…."[18] FHWA advises that USDOT may apply the requirements of Section 6002 to projects developed as environmental assessments (EA), but the department "does not intend to exercise the authority to apply the Section 6002 process to CEs through this guidance."[19] With the exception of those states that streamlined their decision-making under TEA-21 and timely requested to continue their program,[20] "[a]ll transportation projects requiring an EIS for which the original Notice of Intent was published in the *Federal Register* after August 10, 2005, must follow the procedures outlined in Section 6002."[21]

II. THE RESPONSIBLE AGENCIES INVOLVED IN STREAMLINING

SAFETEA-LU designates the responsible agencies for project-development procedures and efficient environmental reviews for decision-making. There are "lead agencies,"[22] "joint lead agencies,"[23] "participating agencies,"[24] and "cooperating agencies."[25] The Act imposes obligations on all of the foregoing agencies participating in the environmental process, but the lead agency is the one having the principal responsibilities under the Act.

A. The Lead Agency

Although the USDOT is the "Federal lead agency" in the environmental review process,[26] "one or more of the USDOT modal agencies will always be the Federal lead agency on a Federal transportation project...."[27] A project is defined as any "highway project, public transportation capital project, or multimodal project that requires the approval of the Secretary" of USDOT.[28] As provided in Section 6002, the term "lead agency" includes any state or local governmental entity serving as a joint lead agency.[29] FHWA may assign certain environmental responsibilities to a state under Section 6005 of SAFETEA-LU. In such instances, the term "USDOT" means the state DOT "to the extent the State has been delegated FHWA environmental responsibilities and authorities."[30] The term "Administration" also means a state when it "is functioning as the FHWA or FTA in carrying out responsibilities delegated to the State in

cited as the "Conference Committee Report." According to the report, changes were made to the "existing planning provisions for the highway…and transit programs…to form a unified planning title." *Id*. Additionally, there were "minor adjustments…to eliminate inconsistencies and to reflect updated terminologies and practices." *Id*. Section 6001 "extends the update cycle of transportation plans" and requires that a "state transportation improvement program…reflect the priorities for congestion relief activities that are included in the metropolitan TIPs." *Id*.

[11] 23 U.S.C. § 134. (All references to Title 23 U.S. Code Sections are to West 2002 U.S.C.A., 2010 Supplement unless stated otherwise).

[12] Conference Committee Report, *supra* note 10, at 1046. For example, the report states that the Conference Substitute provides for notice to the United States Senate Committee on Environment and Public Works and the United States House Committee on Transportation and Infrastructure of a failure of a federal agency to make decisions in the environmental review process; preserves current regulations under NEPA regarding agencies acting as Joint Lead Agencies under § 139(c)(2); and provides for a program to measure and report on progress toward improving and expediting the environmental review process. *Id*. at 1052. The Conference Substitute includes the Senate provisions on repeal of § 1309 of TEA-21 and the preservation of existing state environmental review processes, programs, agreements, or funding arrangements approved by the Secretary under § 1309 of TEA–21. *Id*.

[13] *Codified* in 23 U.S.C. § 139.

[14] 23 U.S.C. § 139(a)(3), (a)(6).

[15] *Id.* § 139(d).

[16] *Id.* § 139(b)(1).

[17] *Id.* § 139(b)(2).

[18] *Id.*

[19] FHWA Final Guidance, *supra* note 1, at 12.

[20] *Id.* at 13.

[21] *Id.* at 12.

[22] 23 U.S.C. § 139(c)(1).

[23] *Id.* § 139(c)(2).

[24] *Id.* § 139(d).

[25] *Id.* § 139(d)(5).

[26] *Id.* § 139(c)(1).

[27] FHWA Final Guidance, *supra* note 1, at 9.

[28] 23 U.S.C. § 139(a)(6).

[29] *Id.* § 139(a)(4).

[30] FHWA Final Guidance, *supra* note 1, at 10.

accordance with 23 U.S.C. 325, 326, or 327, or other applicable law."[31] The lead agency by far has the most enumerated, and usually mandatory, duties and responsibilities.

Although there may be joint lead agencies, discussed below, the lead agency, first, has the "authority and responsibility…to take such actions as are necessary and proper, within the authority of the lead agency, to facilitate the expeditious resolution of the environmental review process for the project"[32] and "to prepare or ensure that any required environmental impact statement or other document required to be completed under the National Environmental Policy Act of 1969 is completed in accordance with this section and applicable Federal law."[33]

Second, the lead agency must "identify, as early as practicable in the environmental review process for a project, any other Federal and non-Federal agencies that have an interest in the project" and invite them to become participating agencies.[34] The lead agency must set a deadline for the prospective participating agencies to respond to the invitation.[35] Moreover, the lead agency is responsible for making information available to the participating agencies as early as is practicable.[36]

Third, the lead agency must work with participating agencies "to identify and resolve issues that could delay completion of the environmental review process" or cause required approvals to be denied.[37] See discussion in Part IV, *infra*. It is the lead agency's responsibility to establish a coordination plan for the involvement of the participating agencies and the public.[38] When other federal agencies are involved, they are required to carry out the environmental review under the National Environmental Policy Act of 1969 (NEPA) at the same time that the USDOT carries out its review.[39] After consulting with participating agencies and the state where the project is located, the lead agency *may* include in the coordination plan a schedule for completion of the environmental review process. See discussion in Part III.B, *infra*. Although the lead agency may lengthen a schedule for good cause, it may shorten it only when cooperating agencies concur.[40]

Fourth, as discussed in Part III, *infra*, the lead agency's responsibilities include defining a project's purpose and need,[41] including a statement of objectives[42] and the range of alternatives to be considered.[43] The lead agency is responsible for involving the participating agencies and the public in preparing the statement of purpose and need for a project[44] and the range of alternatives to be considered,[45] as well as in the environmental review process.[46]

Finally, the lead agency is responsible for establishing deadlines for comments. See discussion in Part III.C, *infra*.

B. Joint Lead Agencies

The FHWA serves as the lead agency with any joint lead agencies that are designated to serve as such under Section 6002 or the Council of Environmental Quality (CEQ) regulations.[47] A project sponsor also serves as a joint lead agency in the preparation of any environmental document under NEPA.[48] A project sponsor is a state or local government receiving funds under Title 23 or Title 49, Chapter 53,[49] or an agency or other entity that seeks the Secretary's approval for a project.[50] A project sponsor must notify the Secretary not only of certain details of the project but also of any federal approvals that are anticipated to be needed.[51]

Section 6002 allows a project sponsor to prepare any environmental document when the the federal lead agency furnishes guidance and independently evaluates it, and "the document is approved and adopted by the Secretary prior to the Secretary taking any subsequent action or making any approval based on such document, whether or not the Secretary's action or approval results in federal funding."[52] The Secretary also must ensure "that the project sponsor complies with all design and mitigation commitments made jointly by the Secretary and the project sponsor in any environmental document prepared by the project sponsor…."[53]

Section 6002 does not elaborate very much on the duties and responsibilities of a joint lead agency or agencies as distinguished from those of the lead agency. The statute provides that it does not "preclude another agency from being a joint lead agency in accordance with the regulations" under NEPA.[54] The regulations promulgated under SAFETEA-LU state that "[t]he lead agencies are responsible for managing the environmental review process and the preparation of the appropriate environmental review documents."[55]

[31] 23 C.F.R. § 771.107(d) (Mar. 24, 2009).
[32] 23 U.S.C. § 139(c)(6)(A).
[33] *Id.* § 139(c)(6)(B).
[34] *Id.* § 139(d)(2).
[35] *Id.*
[36] *Id.* § 139(h)(2).
[37] *Id.* § 139(h)(1).
[38] *Id.* § 139(g)(1)(A).
[39] *Id.* § 139(d)(7).
[40] *Id.* § 139(g)(1)(D)(i), (ii).
[41] *Id.* § 139(f)(1), (2).
[42] *Id.* § 139(f)(3).
[43] *Id.* § 139(f)(4)(A), (B).
[44] *Id.* § 139(f)(1).
[45] *Id.* § 139(f)(4)(A).
[46] *Id.* § 139(g)(1)(A).
[47] *See id.* § 139(c)(2), (3); 23 C.F.R. § 771.107(g).
[48] *Id.* § 139(c)(3).
[49] *Id.*
[50] *Id.* § 139(a)(7).
[51] *Id.* § 139(e).
[52] *Id.* § 139(c)(3).
[53] *Id.* § 139(c)(4).
[54] *Id.* § 139(c)(2) (Mar. 24, 2009).
[55] 23 C.F.R. § 771.109(c)(1).

FHWA explains that the "USDOT must serve as the Federal lead agency for a transportation project" and a direct recipient of federal funds for the project "must serve as a joint lead agency…."[56] A subrecipient designing and constructing a project usually will be invited to serve as a joint lead agency.[57] In the discretion of the federal and nonfederal lead agencies, local governmental subrecipients of federal funds may be invited to serve as joint lead agencies.[58]

Although participating agencies and the public are to be provided an opportunity to be involved, for example, in the development of a project's statement of purpose and need, the lead agencies determine the level of the other parties' involvement on a case-by-case basis as determined by a project's overall size and complexity.[59] See discussion in Part III.A.1, *infra*.

Finally, the lead agency and participating agencies are required to identify and resolve any issues that may result in a delay of the environmental review process.[60] See discussion in Part IV, *infra*.

C. Participating Agencies

In furtherance of the above objectives, the lead agency has the obligation to involve participating agencies, a category of agencies added by SAFETEA-LU. The addition of participating agencies is meant "to encourage governmental agencies at any level with an interest in the proposed project to be active participants in the NEPA evaluation."[61] The status of a participating agency may be on a programmatic or project-by-project basis.[62] An agency invited to participate may decline when it has no jurisdiction or authority regarding a project, lacks relevant expertise or information, or has no intention of submitting comments.[63]

A participating agency may be a "[f]ederal, state, local or federally-recognized Indian tribal governmental unit that may have an interest in the proposed project and has accepted an invitation to serve or in the case of a federal agency did not decline the opportunity to serve under 23 U.S.C. 139(d)(3)."[64] However, if a federal agency is designated as a participating agency, the designation does not mean that the agency either supports the project or has any jurisdiction over it or "special expertise" in evaluating it.[65] If an agency that is invited to become a participating agency does not participate but later decides to participate, FHWA recommends that the agency be reinvited.[66]

Every federal agency that is involved must "to the maximum extent practicable…formulate and implement administrative policy and procedural mechanisms to enable the agency to ensure completion of the environmental review process in a timely, coordinated, and environmentally responsible manner."[67] FHWA states that

> [n]othing in SAFETEA-LU prevents anyone from submitting comments to a Federal agency exercising its own jurisdictional authority over a project. However, the SAFETEA-LU requirements on Federal agency coordination should serve to encourage the early identification of issues of concern and thereby prevent the submission of unexpected or "first time" substantive comments by Federal agencies during the proceedings of non-USDOT agencies (such as the Corps of Engineers).[68]

Each federal agency must execute its obligations "to the maximum extent practicable" under other applicable laws in conjunction with the review required under NEPA.[69]

Participating agencies' responsibilities include the following:

- Participating in the NEPA process starting at the earliest possible time, especially with regard to the development of the purpose and need statement, range of alternatives, methodologies, and the level of detail for the analysis of alternatives.
- Identifying, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts. Participating agencies also may participate in the issue resolution process.
- Providing meaningful and timely input on unresolved issues.
- Participating in the scoping process.[70]

Because participating agencies are included in the environmental review process to allow for their early and timely input regarding issues of concern, they are expected "to provide meaningful input at appropriate opportunities."[71]

D. Cooperating Agencies

Lead agencies may request other agencies having an interest in the project to participate and must invite such agencies if the project is subject to the project-development procedures in Section 6002.[72] Section 6002 states that a participating agency also may be designated as a cooperating agency under 40 C.F.R. Part 1500.

[56] FHWA Final Guidance, *supra* note 1, at 15.

[57] *Id.* at 16.

[58] *Id.*

[59] *Id.* at 24.

[60] 23 U.S.C. § 139(h)(1).

[61] FHWA Final Guidance, *supra* note 1, at 9.

[62] *Id.* at 20.

[63] 23 U.S.C. § 139(d)(3)(A)–(C).

[64] 23 C.F.R. § 771.107(h).

[65] 23 U.S.C. § 139(d)(4).

[66] FHWA Final Guidance, *supra* note 1, at 20.

[67] 23 U.S.C. § 139(d)(7)(B).

[68] FHWA Final Guidance, *supra* note 1, at 21–22.

[69] 23 U.S.C. § 139(d)(7)(A). The federal agency must do so unless it "would impair" its ability to carry out its obligations. *Id*.

[70] FHWA Final Guidance, *supra* note 1, at 18–19.

[71] *Id.* at 21.

[72] 23 C.F.R. § 777.111(d) (Mar. 24, 2009).

FHWA explains that the term "cooperating agency" "means any Federal agency, other than a lead agency, that has jurisidiction by law or special expertise with respect to any environmental impact involved in a proposed project or project alternative."[73] "Participating agencies are those with an interest in the project," whereas "cooperating agencies have a higher degree of authority, responsibility, and involvement in the environmental review process."[74] FHWA's Final Guidance discusses some of the other distinctions between a participating and a cooperating agency based on 40 C.F.R. § 1501.6[75] but specifically identifies "permitting agencies, such as the U.S. Army Corps of Engineers, who, as cooperating agencies, routinely adopt USDOT environmental documents."[76]

Although the lead agency may invite agencies with special expertise to become cooperating agencies, agencies with jurisdiction by law *must* be requested to become cooperating agencies.[77] Section 6002 provides that a participating agency also may be designated by a lead agency as a cooperating agency.[78] If a federal agency qualifies as a cooperating agency it should be invited to serve as both a participating and cooperating agency.[79] When a cooperating agency declines to serve as a cooperating agency it should be treated as a participating agency.[80]

III. SPECIFIC FEATURES OF THE STREAMLINED ENVIRONMENTAL REVIEW PROCESS

A. Early Identification of a Project's Purpose and Need, Objectives, Range of Alternatives, Methodology, and Preferred Alternative

1. Purpose and Need

The lead agency must "define the project's purpose and need for purposes of any document which the lead agency is responsible for preparing for the project"[81] and provide the participating agencies and the public with an opportunity to be involved in defining the project's purpose and need.[82] As explained by FHWA, "[i]f a cooperating or participating agency has permit or other approval authority over the project, it would be useful, though not required, for the lead agencies and that permitting agency to develop jointly a purpose and need statement that can be utilized for all applicable environmental reviews and requirements."[83] After considering the other agencies' and the public's input, the lead agencies must resolve any differences and agree on the project's purpose and need, because "other activities that depend on the statement of purpose and need will be stalled until the lead agencies agree."[84]

2. Statement of Objectives

As part of a project's statement of purpose and need there must be a clear statement of objectives for the project.[85] The objectives may include "(A) achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan; (B) supporting land use, economic development, or growth objectives established in applicable Federal, State, local, or tribal plans; and (C) serving national defense, national security, or other national objectives, as established in Federal laws, plans, or policies."[86]

For example, in regard to Item B above, an objective could be that high-density land use planned for an area will require improved infrastructure.[87]

3. Range of Alternatives

The lead agency, with the involvement of participating agencies and the public, must identify a range of alternatives to be considered for the project.

First, the lead agency as early as practicable must provide an opportunity for participating agencies and the public to be involved in determining the range of alternatives.[88] The input for a project's purpose and need and range of alternatives may be "concurrent or sequential."[89] However, if the two steps are performed concurrently and "the purpose and need statement is substantially altered as a result of the public and participating agency involvement, then the lead agencies must consider whether an opportunity for involvement in the range of alternatives that derive from the new purpose and need is warranted."[90]

Second, the lead agencies should coordinate and decide on a case-by-case basis regarding when and how the participating agencies' and the public's involvement will occur.[91]

Third, after considering the agencies' and the public's input, the lead agencies must resolve any differences and decide on the range of alternatives for analysis because other activities that depend on the alternatives will be "halted until the lead agencies

[73] FHWA Final Guidance, *supra* note 1, at 22.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] 23 C.F.R. § 777.111(d).

[78] 23 U.S.C. § 139(d)(5).

[79] FHWA Final Guidance, *supra* note 1, at 22.

[80] *Id.*

[81] 23 U.S.C. § 139(f)(2).

[82] *Id.* § 139(f)(1).

[83] FHWA Final Guidance, *supra* note 1, at 23.

[84] *Id.*

[85] 23 U.S.C. § 139(f)(3).

[86] *Id.* § 139(f)(3)(A)–(C); *see* FHWA Final Guidance, *supra* note 1, at 24.

[87] FHWA Final Guidance, *supra* note 1, at 23.

[88] 23 U.S.C. § 139(f)(4)(A).

[89] FHWA Final Guidance, *supra* note 1, at 25.

[90] *Id.*

[91] *Id.*

agree."[92] FHWA again suggests that if a cooperating or participating agency has permit or other approval authority with respect to a project, it would be useful for the lead agencies and the permitting agency to develop jointly the range of alternatives.[93]

4. Methodology

The lead agency must "determine, in collaboration with participating agencies…the methodologies to be used and the level of detail required in the analysis of each alternative for a project"[94] and resolve any differences.[95] After the aforesaid collaboration and agreement, the lead agencies make the decision on the methodology and level of detail to be used.[96]

FHWA points out that

> [g]iven the track record of interagency disagreements over methodology late in project development, the lead agencies should aggressively use the scoping process as described in 40 CFR 1501.7 to solicit public and agency input on methodologies and to reach closure on what methodologies will be used to evaluate important issues. This approach is particularly important on issues, such as the analysis of indirect and cumulative effects, for which questions of methodology are very open.[97]

Some of FHWA's observations or recommendations regarding the process are as follows:

- Consensus is not required, but lead agencies should consider the views of participating agencies with relevant interests before making a decision on a particular methodology.[98]
- If a participating agency "criticizes the proposed methodology to be used in the analysis of an alternative," the participating agency "should describe the alternate methodology that it prefers and state why."[99]
- The lead agencies should document their decisions on methodologies and share those decisions with participating agencies so that disputes will be identified as early as possible.[100]
- "Well-documented, widely accepted methodologies, such as those for noise impact assessment and Section 106 (historic preservation) review, should require minimal collaboration."[101]
- "The project's coordination plan…will establish the timing and form of the required collaboration with participating agencies in developing the methodologies."[102]
- The lead agencies may provide for a period to comment on the methodology.[103]
- Methodologies may be developed incrementally.[104]

5. Preferred Alternative

After the preferred alternative for a project is identified officially, in the lead agency's discretion the preferred alternative may be developed to a higher level of detail.[105] The purpose of the provision in part is to facilitate the lead agency's "development of mitigation measures or concurrent compliance with other applicable laws…."[106] At the same time, the lead agency must decide whether developing the preferred alternative to a higher level of detail would prevent the agency from being impartial in deciding whether to accept another alternative being considered.[107] FHWA states that "[a]pplied appropriately, this provision will be an effective tool for achieving the concurrent reviews called for in SAFETEA-LU."[108]

B. Coordination Plan and Scheduling

Under SAFETEA-LU, it is the lead agency's responsibility to establish a coordination plan regarding the participation of the public and the agencies in the environmental review process for a project.[109] The lead agency must consult with the participating agencies and the state in which the project is located or the project sponsor if the state is not the sponsor. A coordination plan should be developed early in the environmental review process after the initiation of a project.[110] Although the lead agencies decide how detailed a coordination plan should be,[111] the plan should outline how the lead agencies have divided the responsibility for compliance and how the plan provides for input from other agencies and the public, as well as identify "coordination points."[112] An example of a coordination point is

[92] *Id.*

[93] *Id.*

[94] 23 U.S.C. § 139(f)(4)(C).

[95] FHWA Final Guidance, *supra* note 1, at 26.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] 23 U.S.C. § 139(f)(4)(D); FHWA Final Guidance, *supra* note 1, at 29. FHWA advises that

> USDOT, as Federal lead agency, will not accept the identification of a preferred alternative until completion of sufficient scoping and analysis of the alternatives to support the identification. The scoping process is not complete until the lead agencies have provided the opportunity for the involvement of the public and participating agencies in the development of purpose and need and the range of alternatives, and have considered their input and comments.

[106] 23 U.S.C. § 139(f)(4)(D).

[107] *Id.*

[108] FHWA Final Guidance, *supra* note 1, at 28.

[109] 23 U.S.C. § 139(g)(1)(A). *See also* FHWA Final Guidance, *supra* note 1, at 32.

[110] FHWA Final Guidance, *supra* note 1, at 33.

[111] *Id.*

[112] *Id.*

the development of the project's statement of purpose and need.[113]

A coordination plan *may* establish as part of the plan a schedule for the completion of the environmental review process.[114] (The Act encourages but does not require the inclusion of a project schedule.[115]) If a lead agency establishes a schedule, the agency should consider five factors: "(I) the responsibilities of participating agencies under applicable laws; (II) resources available to the cooperating agencies; (III) overall size and complexity of the project; (IV) the overall schedule for and cost of the project; and (V) the sensitivity of the natural and historic resources that could be affected by the project."[116]

The lead agency must disseminate any schedule to the participating agencies and the state or project sponsor[117] and make it available to the public.[118]

C. Deadlines for Comment

The lead agency must establish deadlines for comment.[119] Unless a different deadline is established by agreement of the agencies, or unless there is an extension for good cause,[120] the lead agency must establish a period of not more than 60 days for comments by agencies and the public on a draft environmental impact statement (DEIS) after publication in the *Federal Register* of notice of the date of its availability to the public.[121]

The comment period is no more than 30 days "from availability of the materials on which comment is requested" for all other comment periods.[122] As with the 60-day period, the lead agency, project sponsor, and all participating agencies may establish a different deadline, or the lead agency may extend the period for good cause.[123] A special provision applies when there are deadlines for decisions under other laws that are applicable to the project.[124] Finally, the comment periods do not reduce any time period for the public to comment as provided "under existing Federal law, including a regulation."[125]

D. Involvement of the Public

The law embraces public participation, but there have been some changes to streamline and expedite the environmental review process. The policy is that "[p]ublic involvement and a systematic interdisciplinary approach [are] essential parts of the development process for proposed actions."[126] FHWA states that "[t]he opportunity for involvement must be publicized and may occur in the form of public workshops or meetings, solicitations of verbal or written input, conference calls, postings on Web sites, distribution of printed materials, or any other involvement technique or medium."[127]

Prior to SAFETEA-LU, there was not a specific requirement to give the public an opportunity to be involved in commenting on the purpose and need for a project and on the range of alternatives prior to the DEIS.[128] Under Section 6002 of SAFETEA-LU, there are other opportunities for public participation and comment. Now the lead agency must provide the public with an opportunity to participate in defining the purpose and need for a project[129] and in determining the range of alternatives to be considered for a project.[130] According to FHWA, public involvement may occur early in "the transportation planning process or later during the scoping process" as the lead agencies may determine on a case-by-case basis.[131] The lead agency's coordination plan must allow for the public's participation in and comment on the environmental review process.[132] The public must have an opportunity to comment on the DEIS[133] and to comment on other "materials on which comment is requested."[134]

Public involvement must be coordinated with the entire NEPA process, must provide for early and continuing opportunities for public involvement, and must provide for one or more convenient public hearings with prior reasonable notice.[135] The regulations require that each state have "procedures approved by the FHWA to carry out a public involvement/public hearing program…."[136] FHWA has advised that the states should review and update their procedures to incorporate the requirements not only of the participating agencies' involvement but also of the public's involvement "in determining purpose and need and the range of alternatives to be considered," as discussed in Parts III.A.2 and A.3, *supra*.[137]

E. Funding to Expedite the Environmental Review

Section 6002 provides for assistance to affected state and federal agencies regarding projects subject to the

[113] *Id.*

[114] 23 U.S.C. §§ 139(g)(1)(B)(i).

[115] FHWA Final Guidance, *supra* note 1, at 34.

[116] 23 U.S.C. § 139(g)(1)(B)(ii) (I)–(V).

[117] *Id.* § 139(g)(1)(E)(i).

[118] *Id.* § 139(g)(1)(E)(ii).

[119] *Id.* § 139(g)(2).

[120] *Id.* § 139(g)(2)(A)(i)–(ii).

[121] *Id.* § 139(g)(2)A).

[122] *Id.* § 139(g)(2)(B).

[123] *Id.* § 139(g)(2)(B)(i)–(ii).

[124] *See id.* § 139(g)(3).

[125] *Id.* § 139(g)(4).

[126] 23 C.F.R. § 771.105(c).

[127] FHWA Final Guidance, *supra* note 1, at 24.

[128] *Id.* at 9.

[129] 23 U.S.C. § 139(f)(1).

[130] *Id.* § 139(f)(4)(A). *See* 23 C.F.R. § 771.111(h)(2)(vii).

[131] FHWA Final Guidance, *supra* note 1, at 24.

[132] 23 U.S.C. § 139(g)(1)(A).

[133] *Id.* § 139(g)(2)(A).

[134] *Id.* § 139(g)(2)(B).

[135] *See* 23 C.F.R. § 771.111(h)(2) (Mar. 24, 2009).

[136] *Id.* § 771.111(h)(1).

[137] FHWA Final Guidance, *supra* note 1, at 34.

section's environmental review process.[138] When there is a project or an approved project, the Secretary may approve a request for funds for "affected Federal agencies (including the Department of Transportation), State agencies, and Indian tribes participating in the environmental review process…."[139] Such funds are "*only* to support activities that directly and meaningfully contribute to expediting and improving transportation project planning and delivery for projects in that State"[140] and to assist agencies in meeting the time limits for environmental review.[141] The funds may be provided for "transportation planning activities that precede the initiation of the environmental review process, dedicated staffing, training of agency personnel, information gathering and mapping, and development of programmatic agreements."[142]

IV. IDENTIFICATION AND RESOLUTION OF ISSUES OF CONCERN

SAFETEA-LU requires the lead agency and participating agencies to cooperate in identifying issues that could delay environmental review or that could result in the denial of approvals needed for a project.[143] One of the lead agency's responsibilities is to "make information available to the participating agencies as early as practicable in the environmental review process regarding the environmental and socioeconomic resources located within the project area and the general locations of the alternatives under consideration."[144]

Thereafter it is the participating agencies' responsibility to identify "as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts."[145] An issue of concern includes one "that could substantially delay or prevent an agency from granting a permit or approval" needed for a project.[146] When an issue of concern is resolved, the agreement should be reflected in a signed document.[147]

If requested by a project sponsor or the governor of a state where a project is located, the lead agency must "promptly convene a meeting with the relevant participating agencies, the project sponsor, and the governor (if the meeting was requested by the governor) to resolve any issues that could delay completion of the environmental review or the denial of needed approvals."[148] If there is no resolution of an issue within 30 days of the meeting, the lead agency must notify all participating agencies, the project sponsor, the governor, the Committee on Environment and Public Works of the Senate, the Committee on Transportation and Infrastructure of the House of Representatives, and the Council on Environmental Quality and publish a notice in the *Federal Register*.[149]

V. STATE ASSUMPTION OF RESPONSIBILITY FOR CATEGORICAL EXCLUSIONS

As noted, Section 6004 amended 23 U.S.C. § 326. Although SAFETEA-LU did not make any changes with respect to the classes of environmental action, the Act does provide that states may be assigned the responsibility for determining whether certain activities qualify as CEs. As observed in the Conference Committee Report, CEs

> are projects that "do not individually or cumulatively have a significant effect on the human environment." Approximately 90% of all surface transportation projects are processed as CEs. So, while CEs take significantly less time to prepare than environmental impact statements, a slight improvement in processing time for each CE can result in a large improvement system wide.[150]

As stated in the regulations, CEs "are actions which meet the definition contained in 40 C.F.R. Section 1508.4, and, based on past experience with similar actions, do not involve significnt environmental impacts."[151] Actions that do not involve significant environmental damage include actions, *inter alia*, that "do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people"; and "do not have a significant impact on any natural, cultural, recreational, historic or other resource…."[152]

When an action normally would be classified as a CE but involves "unusual circumstances," it may be necessary to "conduct appropriate environmental studies to determine if the CE classification is proper."[153] The regulations clarify that such unusual circumstances include:

> (1) Significant environmental impacts;
>
> (2) Substantial controversy on environmental grounds;
>
> (3) Significant impact on properties protected by section 4(f) of the DOT Act or section 106 of the National Historic Preservation Act; or

[138] 23 U.S.C. § 139(j).

[139] *Id.* § 139(j)(1).

[140] *Id.* (emphasis supplied).

[141] *Id.* § 139(j)(4).

[142] *Id.* § 139(j)(2).

[143] *Id.* § 139(h)(1).

[144] *Id.* § 139(h)(2). *See* FHWA Final Guidance, *supra* note 1, at 32.

[145] *Id.* § 139(h)(3).

[146] *Id. See* FHWA Final Guidance, *supra* note 1, at 41.

[147] FHWA Final Guidance, *supra* note 1, at 41.

[148] 23 U.S.C. § 139(h)(4)(A).

[149] *Id.* § 139(h)(4)(B).

[150] Conference Committee Report, *supra* note 10, at 1052–53.

[151] 23 C.F.R. § 771.117(a).

[152] *Id.*

[153] *Id*. § 771.117(b).

> (4) Inconsistencies with any federal, state, or local law, requirement or administrative determination relating to the environmental aspects of the action.[154]

The regulations list actions that meet the criteria for CEs and that "normally do not require any further NEPA approvals,"[155] as well as other actions that meet the criteria for a CE but only after administration approval.[156] Finally, if "a pattern emerges of granting CE status for a particular type of action, the Administration [must] initiate rulemaking proposing to add this type of action to the list of categorical exclusions…."[157]

Under SAFETEA-LU, a state may assume the "responsibility for determining whether certain designated activities are included within classes of action identified in regulation [sic] by the Secretary that are categorically excluded from requirements for" EAs or EIS's.[158] A state's decisions regarding CEs must be made in accordance with the criteria for the types of activities allowed by the Secretary.[159]

If a state assumes the responsibility discussed above for CEs, the Secretary may assign and the state may

> assume all or part of the responsibilities of the Secretary for environmental review, consultation, or other related actions required under any Federal law applicable to activities that are classified by the Secretary as categorical exclusions, with the exception of government-to-government consultation with Indian tribes, subject to the same procedural and substantive requirements as would be required if that responsibility were carried out by the Secretary.[160]

Whenever a state assumes the foregoing responsibilities, the Secretary and the state must enter into a memorandum of understanding (MOU) "after providing public notice and opportunity for comment…setting forth the responsibilities to be assigned…and the terms and conditions under which the assignments are made, including establishment of the circumstances under which the Secretary would reassume responsibility for categorical exclusion determinations."[161] When a state assumes such responsibilities, the state becomes "solely liable for complying with and carrying out" the laws.[162]

Although they are renewable, such MOUs are limited to 3-year terms.[163] When a state is assigned a responsibility under an MOU, the state must consent to the jurisdiction of federal courts,[164] and the state is deemed to be a federal agency for purposes of federal law concerning the responsibility exercised by the state.[165] If the Secretary determines that a state is not performing its assigned responsibilities adequately, the Secretary may terminate the state's assumption of a responsibility under the MOU.[166]

VI. TIMING AND LIMITATION ON JUDICIAL REVIEW

As part of the environmental review process established by SAFETEA-LU, Section 6002 bars judicial review of decisions made by USDOT (and other federal agencies) after the expiration of 180 days from the date of publication of a notice in the *Federal Register* that a permit, license, or approval is final.[167] See discussion of *Shenandoah Valley Network v. Capka,*[168] *Highland Village Parents Group v. United States Fed. Highway,*[169] and *Sierra Club N. Star Chptr. v. Peters*[170] in Part IX, *infra*.

The SOL provides:

> Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project shall be barred unless it is filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed. Nothing in this subsection shall create a right to judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.[171]

If an SOL notice is not published, then other applicable federal law applies; if no other federal law specifies an SOL, then the SOL is 6 years.[172]

The SOL notice may be "used for a highway project regardless of the category of documentation used under NEPA"[173] and for any final action by a federal agency that is required for a highway project and that is subject to judicial review.[174] However, FHWA expects that such SOL notices will be published for most EIS projects and many EA projects but not for projects that are CEs.[175] As provided in Section 6002, a supplemental EIS is considered to be a separate, final agency action subject to the 180-day limitation period.[176]

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[154] *Id*. § 771.117(b) (1)–(4).

[155] *Id.* § 771.117(c).

[156] *Id.* § 771.117(d).

[157] *Id.* § 771.117(e).

[158] 23 U.S.C. § 326(a)(1).

[159] *Id.* § 326(a)(2).

[160] *Id.* § 326(b)(1).

[161] *Id.* § 326(c)(1).

[162] *Id.* § 326(b)(2).

[163] *Id.* § 326(c)(2)(A), (B).

[164] *Id.* § 326(c)(3).

[165] *Id.* § 326(e).

[166] *Id.* § 326(d).

[167] 23 U.S.C. § 139(l)(1).

[168] 2009 U.S. Dist. LEXIS 80435, at *1, *44 (W.D. Va. 2009) (Unrept.)

[169] 562 F. Supp. 2d 857 (E.D. Tex. 2008).

[170] 2008 U.S. Dist. LEXIS 39966, at *1 (D. Minn. 2008).

[171] 23 U.S.C. § 139(l)(1).

[172] FHWA Final Guidance, *supra* note 1, at 44.

[173] *Id.*

[174] *Id.* at 61.

[175] *Id.* at 44.

[176] 23 U.S.C. § 139(l)(2).

The purpose of the 180-day SOL is "to expedite the resolution of issues affecting transportation projects."[177] Some of the FHWA's observations and recommendations regarding the SOL are as follows:

- "The FHWA Divisions should work closely with their FHWA field counsel when determining whether and when to publish a SOL notice, and when preparing SOL notices."[178]
- FHWA will arrange for publication of the notice in the *Federal Register* for states assigned responsibilities under Section 6004 or Section 6005.[179]
- A decision not to publish a notice does not prevent an action from being final for other purposes.[180]
- "If the statute in question has a judicial review provision that contains a time period greater than 180 days, then the 180-day time limit applies."[181]
- "If the claim is for review of a Federal action under NEPA, then the limitation on claims that applies is 28 U.S.C. § 2401."[182]

The use of an SOL notice depends on the circumstances. FHWA advises that the issue of whether to publish a notice is a "risk management decision" based on a "consideration of the nature of the Federal laws under which decisions were made for the project, the actual risk of litigation, and the potential effects if litigation were to occur several years" later.[183] For example, "[t]he laws and procedures under which Federal agency decisions were made for the project may affect the decision whether to publish a SOL notice," or "[i]f there are known interested parties threatening to file a lawsuit, then the notice may serve to ensure that such action occurs quickly."[184]

Finally, it may be appropriate not to publish a notice when it may "prompt some parties to sue merely to preserve their claims until they are more certain whether their interests are adversely affected by the Federal action, or until they know whether dispute resolution efforts will be successful."[185] Part IX.J, *infra*, of this digest discusses what the state DOTs report has been their experience with the SOL in SAFETEA-LU.

VII. STATE PILOT PROGRAM

SAFETEA-LU established a pilot program for delivery of surface transportation projects.[186] The program is intended to provide information regarding "whether delegation of the Secretary's environmental review responsibilities will result in more efficient environmental reviews that are performed according to the same procedural and substantive requirements as would apply if the Secretary were conducting the reviews."[187] Section 6005 authorizes the Secretary to establish a pilot program for up to five states—Alaska, California, Ohio, Oklahoma, and Texas—to assume the Secretary's environmental responsibilities under NEPA, as well as other environmental laws, but not including provisions under the Clean Air Act or "any responsibility imposed on the Secretary by section 134 or 135 [of Title 23 of the U.S. Code]."[188] The "delegation does not extend to conformity determinations, planning requirements, or rulemaking authority."[189]

For approval of a state's application, the Secretary must determine that the state has "the capability, including financial and personnel, to assume the responsibility."[190] Approval of an application also requires that the Secretary and "the head of the State agency having primary jurisdiction over highway matters" enter into a written agreement.[191] Under the pilot program, only the state of California has chosen to participate.[192] According to AASHTO, both Ohio and Texas have withdrawn from the program because of inability to obtain the required waiver of sovereign immunity from the state legislature.[193] AASHTO reports that Alaska has secured the necessary waiver of sovereign immunity and that although Oklahoma has not secured a waiver, the state has not withdrawn from the program.[194]

VIII. SAFETEA-LU AND *DE MINIMIS* FINDINGS UNDER SECTION 4(F)

Section 4(f) is "one of the most stringent environmental laws related to transportation."[195] The requirements under Section 4(f) "involve judgments that elude easy explanation and are often difficult to interpret with a great deal of confidence."[196] Consequently, it has "become the most frequently litigated environmental statute in the Federal Highway

[177] FHWA Final Guidance, *supra* note 1, at 44.

[178] *Id.* at 61.

[179] *Id.* at 62.

[180] *Id.* at 61.

[181] *Id.*

[182] *Id.*

[183] *Id.* at 44.

[184] *Id.* at 64.

[185] *Id.*

[186] 23 U.S.C. § 325.

[187] Conference Committee Report, *supra* note 10, at 1053.

[188] 23 U.S.C. § 327(a)(2)(B)(ii).

[189] Conference Committee Report, *supra* note 10, at 1053.

[190] 23 U.S.C. § 327(b)(4)(B).

[191] *Id.* § 327(b)(4)(C).

[192] *See* Special Report: AASHTO Standing Committee on Environment that discusses California's implementation of SAFETEA-LU, available at: http://scoe.transportation.org/Documents/Meeting_Overview.doc, last accessed on Feb. 10, 2010.

[193] *Id.*

[194] *Id.*

[195] Section 4(f) Final Rule: New Guidance on a Complex Regulation, FTA NEWSLETTER (Mar. 2008), hereinafter cited as "FTA Newsletter," available at http://environment.fhwa.dot.gov/strmlng/newsletters/mar08nl.asp.

[196] FTA Newsletter, *supra* note 195.

Program aside from the National Environmental Policy Act" and "is also the most frequent cause of court injunctions delaying highway projects."[197] If a project comes under Section 4(f), then compliance can result in additional time to receive project approval.[198]

Section 4(f) applies to programs or projects having an impact on certain resources, namely

> any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials….[199]

Section 6009 of SAFETEA-LU amended the 4(f) requirements appearing in 49 U.S.C. § 303 and 23 U.S.C. § 138 to permit the Secretary to find that a project will have a *de minimis* impact on a § 4(f) resource. Under Section 6007 of SAFETEA-LU, the Interstate highway system is exempted so that its highways are not considered historic sites under the provisions of § 4(f) unless the Secretary determines that individual elements possess national or exceptional historic significance and should receive protection.[200]

Under § 138 the Secretary may not approve a program or project that

> requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is *no feasible and prudent alternative* to the use of such land, and (2) such program includes *all possible planning* to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.[201]

The first requirement, thus, is that it must be shown that there is no feasible or prudent alternative. The April 2009 regulations explain what is meant by a "feasible and prudent avoidance alternative."

> (1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.[202]

If a project may not be built as a matter of sound engineering judgment, then the alternative being considered is not "feasible."[203] As provided in the regulations, an alternative is not "prudent" when:

> (i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;
>
> (ii) It results in unacceptable safety or operational problems;
>
> (iii) After reasonable mitigation, it still causes:
>
> (A) Severe social, economic, or environmental impacts;
>
> (B) Severe disruption to established communities;
>
> (C) Severe disproportionate impacts to minority or low income populations; or
>
> (D) Severe impacts to environmental resources protected under other Federal statutes;
>
> (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
>
> (v) It causes other unique problems or unusual factors; or
>
> (vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.[204]

The second requirement is that such a program must "include all possible planning to minimize harm to" such protected resources.[205] As provided in the regulations, "[a]ll possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project."[206] For public parks, recreation areas, and wildlife and waterfowl refuges, such measures may involve "design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways."[207] As for historic sites, "the measures normally serve to preserve the historic activities, features, or attributes of the site…."[208]

Notwithstanding the foregoing requirements, under § 138, the "no feasible and prudent alternative" requirement applicable to parks, recreation areas, and wildlife or waterfowl refuges is "satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a *de minimis* impact on the area."[209] Paragraph 3 provides that as to such protected areas, a *de minimis* impact finding may be made only when "(A) the Secretary has

[197] *Id*.

[198] *Id*.

[199] 23 U.S.C. § 138(a).

[200] 23 U.S.C. § 103(c)(5)(B).

[201] *Id*. § 138(a) (emphasis supplied).

[202] 23 C.F.R. § 774.17 (unnumbered or unlettered section defining "[f]easible and prudent avoidance alternative").

[203] *Id*. (subsection 2).

[204] *Id*. (subsection 3).

[205] 23 U.S.C. § 138(a).

[206] 23 C.F.R. § 774.17 (unnumbered or unlettered section defining "[a]ll possible planning").

[207] *Id*. (subsection 1).

[208] *Id*. (subsection 2).

[209] 23 U.S.C. § 138(b)(1)(B).

determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of" the eligible park, area, or refuge and when "(B) the finding of the Secretary has received concurrence from the officials with jurisdiction" over the protected area at issue.[210]

With respect to historic sites, the "no feasible and prudent alternative" requirement is met when a transportation program or project is determined by the Secretary to "have a *de minimis* impact on the area."[211] For a finding of *de minimis* impact, the Secretary must determine in accordance with Section 106 of the National Historic Preservation Act that "(i) the transportation program or project will have no adverse effect on the historic site; or (ii) there will be no historic properties affected by the transportation program or project…."[212]

As similarly stated in the regulations, the term "*de minimis* impact" "means that the Administration has determined, in accordance with 36 C.F.R. Part 800 that no historic property is affected by the project or that the project will have 'no adverse effect' on the historic property in question."[213] Other requirements are that the Secretary must receive written concurrence from the applicable state historic preservation office or tribal historic preservation office and that the Secretary's finding be developed in consultation with certain parties as required by Section 106 of the National Historic Preservation Act.

It should be noted that in the case of a *de minimis* finding for a historic site, an opportunity for public notice and comment beyond what is required by 36 C.F.R. Part 800 is not required.[214] However, for a public park, recreation area, or wildlife and waterfowl refuge, "the Adminstration must inform the official(s) with jurisdiction of its intent to make a *de minimis* finding" and, after an opportunity for public review and comment, "the official(s) with jurisdiction over the Section 4(f) resource must concur in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection."[215]

Some of FHWA's observations regarding when the *de minimis* provisions are applicable or may be used are as follows:

- A *de minimis* impact finding may be made regardless of the type of environmental document required for a project.[216]
- Because Section 6009 took effect immediately upon enactment, the "*de mimimis* criteria may be applied to projects that were in the project development process."[217]
- If a transportation project will affect multiple Section 4(f) resources, a *de minimis* finding has to be made for each Section 4(f) resource.[218]

IX. JUDICIAL DECISIONS RELATING TO SAFETEA-LU

A. Introduction

Judicial decisions interpreting SAFETEA-LU primarily have concerned the 180-day SOL. First, it has been held that when FHWA has chosen to utilize a two-tiered process in the preparation of an EIS it may not be necessary to wait for the completion of a separate state study, particularly when it has been determined that the study would not meet the purpose and need of the project. Second, the giving of a notice of a Record of Decision (ROD) subject to the SOL was held to be appropriate to permit work in Tier 2 to proceed based on decisions made in the Tier 1 EIS and ROD.[219] Third, in a case involving a reevaluation of a project after the issuance of a Finding of No Significant Impact (FONSI), the court held that the reevaluation did not reopen issues barred by the SOL simply because of the necessity for the agency to consider additional information.[220] Finally, in regard to technical compliance with the SOL, if there is a mistake in the notice given in the *Federal Register* regarding the deadline for filing a claim, the doctrines of equitable tolling and equitable estoppel apply, and the plaintiff initiating an action is entitled to rely on the erroneous date in the notice.[221]

B. Shenandoah Valley Network v. Capka

At issue in *Shenandoah Valley Network v. Capka*[222] was a study of "'current and projected deficiencies and needs along the I-81'" corridor in Virginia.[223] The defendants entered into a streamlining agreement in 2003 "to tier the NEPA process."[224] The agreement

> set forth the decisions that would be made at the conclusion of each tier, established time lines, established a conflict resolution process, and affirmed that the Tier 1 process would require selecting an improvement concept,

[210] *Id*. § 138(b)(3)(A) and (B).

[211] *Id*. § 138(b)(1)(A).

[212] *Id.* § 138(b)(2)(A)(i)–(ii).

[213] 23 C.F.R. § 774.17.

[214] *Id.* § 774.5(b)(1)(iii).

[215] *Id.* § 774.5(b)(2)(ii).

[216] FHWA, Guidance for Determining *De Minimis* Impacts to Section 4(f) Resources (Dec. 13, 2005), hereinafter cited as "FHWA *De Minimis* Guidance," available at: http://www.fhwa.dot.gov/hep/qasdeminimus.htm, at 1.

[217] *Id*.

[218] *Id*. at 2.

[219] Shenandoah Valley Network v. Capka, 2009 U.S. Dist. LEXIS 80435, *48 (W.D. Va. 2009) (Unrept.).

[220] Highland Village Parents Group v. Fed. Highway Admin., 562 F. Supp. 2d 857, 865 (E.D. Tex. 2008).

[221] Sierra Club N. Star Chapter v. Peters, 2008 U.S. Dist. LEXIS 39966, at *1 (D. Minn. 2008) (Unrept.).

[222] 2009 U.S. Dist. LEXIS 80435, at *1 (W.D. Va. 2009) (Unrept.)

[223] *Id*. at *12.

[224] *Id*. at *14.

> …while the follow up Tier 2 process would involve approval of "conceptual design features of the improvements…for the components identified in Tier 1."[225]

The FHWA published a Notice of Intent in 2003 to inform the public of the preparation of a Tier 1 EIS for the I-81 corridor study.[226] The court observed that the defendants, in accordance with NEPA, had "chose[n] to utilize a two-step, 'tiered' process;"[227] that "[t]he first tier involves the preparation of an [EIS]…which examines a large land area or a broad set of issues such as 'general location, mode choice, and area-wide air quality and land use implications of the major alternatives;'" and that "the second tier is more particularized and addresses 'site-specific details on project impacts, costs, and mitigation measures.'"[228] In March 2007, FHWA issued the Tier 1 Final EIS (FEIS),[229] which, *inter alia*, proposed that the I-81 corridor in Virginia be divided into eight sections of independent utility (SIU) for which "detailed Tier 2 environmental studies would be initiated" and that each SIU would "stand on its own merits as an independent Tier 2 project."[230] FHWA issued a Tier 1 ROD on June 6, 2007. The plaintiffs alleged that the Tier 1 ROD's issuance violated NEPA, because the defendants issued the ROD on June 6, 2007, rather than postpone the ROD and await the completion of an I-81 Freight Rail Study that had been initiated by the Virginia Department of Rail and Public Transportation (DRPT) and was still ongoing.[231]

Nevertheless, the court granted the defendants' motion for summary judgment based on the 180-day SOL, holding that "[t]he decision not to await the completion of the Virginia DRPT's I-81 Freight Rail Study is well-within the bounds of reasoned decision-making."[232] The court stated that there was "nothing in NEPA and no precedent that suggest that Defendants are required to wait for a state agency to complete its completely separate study before issuing a ROD"[233] and that "the Tier 1 NEPA studies have already established that a multi-state freight rail concept will not meet the purpose and need of the Study."[234] The court rejected the plaintiffs' claim that "that Defendants' invocation of the 180-day SOL was an improper attempt to circumvent NEPA by barring them from challenging the Tier 1 decisions until the conclusion of Tier 2 studies."[235] The court stated that "[i]t was appropriate for FHWA to invoke the 180-day SOL because the detailed work in Tier 2 can be accomplished effectively only if that work can rely on certain key decisions made, including those regarding mode choice and corridor location, in the Tier 1 FEIS and ROD."[236] In part, the court relied on the joint guidance issued by FHWA and FTA that "explains that publication of an SOL notice is appropriate for Tier 1 decisions that the 'agency does not expect to revisit during Tier 2 proceedings in the absence of substantial new and relevant information that may affect the outcome of the agency's decision.'"[237]

C. Highland Village Parents Group v. Federal Highway Administration

Highland Village Parents Group v. Federal Highway Administration[238] also concerned the SOL. The FHWA and other defendants approved the construction of a federally-funded 4.7-mile segment of road, identified as FM 2499, in Denton County, Texas. In August 2005, FHWA adopted draft EA and Section 4(f) statements regarding the chosen design, concluded that an EIS was not warranted, and issued a formal FONSI.[239] After a reevaluation of the project that examined new information and a decision that revisiting the FONSI was unnecessary, the FHWA approved the reevaluation in October 2007.[240] Because the claims of the Highland Village Parents Group (HVPG) were time-barred in regard to the 2005 FONSI, the issue was whether the October 2007 revaluation reopened "the agencies' actions to judicial scrutiny of the otherwise barred claims."[241] FHWA issued the 2005 FONSI prior to the SOL enacted as part of SAFETEA-LU. However, the court held that the new 180-day (rather than the previous 6-year) limitations period applied because the newer SOL was in effect at the time the HVPG filed its complaint.[242]

The court rejected the HVPG's argument that "the agencies' second look at the environmental concerns posed by FM 2499 reopens those issues to litigation."[243] The HVPG's objections concerned the effects of Mobile Source Air Toxics (MSAT) and the reevaluation's incorporation of additional Section 4(f) land. However, as to the first objection, the court held that the plaintiff should have raised it "when the FHWA did not include specific findings regarding MSATs in the EA."[244] As for the second objection, "the reevaluation merely firms up and finalizes certain design elements in the face of limited information."[245] The court observed elsewhere in the opinion that the FM 2499 project "contained a Section 4(f) statement evaluating the use of that land

[225] *Id*.
[226] *Id*.
[227] *Id*. at *4–5.
[228] *Id*. at *5 (citation omitted).
[229] *Id*. at *17.
[230] *Id*. at *21.
[231] *Id*. at *33.
[232] *Id*. at *34.
[233] *Id*. at *37.
[234] *Id*. at *38.
[235] *Id*. at *46.
[236] *Id*. at *47–48.
[237] *Id*. at *49.
[238] 562 F. Supp. 2d 857 (E.D. Tex. 2008).
[239] *Id.* at 861.
[240] *Id.*
[241] *Id*. at 862.
[242] *Id*. at 863.
[243] *Id*. at 864.
[244] *Id*.
[245] *Id*. at 865.

and specifying measures taken to mitigate consequences."[246]

As for all claims, the court's rationale, expressed more than once, was that when a "reevaluation makes minor changes pursuant to design elements specifically called for in the FONSI, a plaintiff's reliance on such a document as the basis for filing suit is inappropriate."[247]

> Although new information justifies the reassessment of previous conclusions, not every datum can possibly justify the reopening of prior valid agency judgments. In this regard, the Supreme Court has stated that "requir[ing] otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made."[248]

Thus, a reevaluation does not necessarily furnish a plaintiff with a fresh opportunity to challenge an agency decision because of the necessity of considering additional information.

D. Sierra Club North Star Chapter v. Peters

In *Sierra Club North Star Chapter v. Peters,*[249] the FHWA in November 2006 issued an ROD on the St. Croix River Crossing Project and in December 2006 published a notice in the *Federal Register* stating that a number of related projects were final.[250] The FHWA notice advised that any claim seeking judicial review would be barred if not filed on or before June 6, 2007. The notice, however, misstated the deadline by 2 days. The Sierra Club filed its claim by the deadline specified in the notice; FHWA argued thereafter that the notice should have been filed 2 days earlier in compliance with the 180-day SOL in § 139(l)(1).[251]

In denying the FHWA's motion to dismiss for lack of jurisdiction, the court held that the doctrines of equitable tolling and equitable estoppel applied to the 180-day SOL; thus, "'[t]he same rebuttable presumption of equitable tolling applicable to suits against private defendants…apply to suits against the United States.'"[252] The SOL at issue was not a complex statute and contained no language or exceptions indicating that Congress meant "to foreclose the availability of equitable tolling."[253] The court held that the inaccurate notice "lulled Sierra Club into inaction,"[254] that the FHWA "had a federally-mandated duty to review this *Federal Register* notice and ensure that any errors were corrected,"[255] that the Sierra Club acted reasonably and in good faith, and that there was no prejudice to FHWA.[256] The court denied the motion to dismiss.[257]

E. Audubon Naturalist Society of Central Atlantic States, Inc. v. United States Department of Transportation

Lastly, in *Audubon Naturalist Society of Central Atlantic States, Inc. v United States Department of Transportation,*[258] environmental organizations alleged that the USDOT and FHWA failed to comply with 42 U.S.C. § 7506(c)(1) when approving a highway project. The court held that 23 U.S.C. § 139(a)(3)(A) did not apply to the court's review of whether the highway project conformed to the implementation plan, because the EIS was initiated more than 2 years before Section 6002 was enacted.[259] Moreover, Section 6002 did not present any inconsistency that required the court to reevaluate the analysis of conformity.[260]

X. STATE TRANSPORTATION DEPARTMENTS' RESPONSES TO SURVEY QUESTIONS

A. Overall Experience with SAFETEA-LU

For the purpose of the preparation of this digest, a survey of transportation departments was conducted to obtain information regarding their experience with and their comments on the environmental provisions of SAFETEA-LU. A copy of the survey is attached as Appendix A. In November 2009, 27 transportation departments, identified in Appendix B, responded to the survey.

Most departments described their experience with the Act's requirements as "positive," "good," "very positive and successful," "relatively smooth," or "satisfactory." Several of the DOTs described their working relationship with FHWA and the participating and other agencies in positive terms; for example, stating that the relationship "has progressed very smoothly."

One state described its experience as "satisfactory," specifically with regard to expedited environmental reviews and the 180-day SOL. Another agency stated that its experience has been positive; that issues have been identified earlier in the NEPA process; that changes to alignments have been made earlier; and that resource agencies have a better understanding why the project is needed and why some alternatives have been chosen.

On the other hand, several DOTs commented as follows: SAFETEA-LU represented no major change from what the department had been doing; the Act duplicates existing coordination procedures; the DOT had

[246] *Id*. at 866.

[247] *Id*. at 865.

[248] *Id*. at 864 (citations omitted).

[249] 2008 U.S. Dist. LEXIS 39966 (D. Minn. 2008).

[250] *Id.* at *13.

[251] *Id.*

[252] *Id.* at *19–20.

[253] *Id.* at *21–22.

[254] *Id.* at *25 (citation omitted).

[255] *Id.* at *26.

[256] *Id.* at *28.

[257] *Id.* at *38.

[258] 524 F. Supp. 2d 642 (D. Md. 2007).

[259] *Id*. at 704.

[260] *Id*.

already "involved the agencies prior to § 6002"; the department has had "a positive working relationship for decades" with other agencies; and the department for many years prior to the Act has had periodic interagency and scoping meetings. Another DOT noted that it already had a streamlining process that incorporated many of Section 6002's provisions, as well as a positive working relationship with agency partners. One department stated that SAFETEA-LU has increased the department's focus but did not "fundamentally change" the department's process. One DOT said that its relationship with agencies involved in NEPA documentation and permitting has improved because of "political and personnel changes," not because of SAFETEA-LU.

Some of the states responding to the survey identified what they believe to be issues or problems. Two departments stated that agencies often indicate a lack of funds or staff as a reason for not participating. One DOT reported that it had "[d]ifficulties in getting all the coordinating and participating agencies to sign and participate." Another department commented that although the agencies like getting involved in the planning phase, the level of information required is not developed until later.

Some of the other comments of the DOTs included the following: there are "[d]ifficulties in getting agencies to sign off as coordinating or participating agencies," thus resulting in project delay; the "requirements of § 6002 have often led to confusion and lengthened the Phase I process"; there are delays because of "[s]tartup and on-going issues…educating MPO's [metropolitan planning organizations], LPA's [local planning agencies] and their consultants about the requirements" of SAFETEA-LU; and the Act initially delayed some projects because the districts were not prepared for the additional up-front work and coordination. One state reported that it "does not realize much benefit from project initiation letters."

Other agencies stated that Section 6002 has resulted in more steps and processes; that the requirement to coordinate methodologies has resulted in "complicated and obscure documents with an over-emphasis on quantitative assessments of resources"; and that the "[r]eporting requirements…are onerous" and "[o]ther factors (*i.e.* political, financial, agency) interfere with streamlining."

In contrast to the above comments, one department's response was that

> [p]rior to SAFETEA-LU, we had an intensive environmental agency coordination plan in effect (NEPA/Section 404 Merger Process), which is basically more restrictive than Section 6002 requirements. We made some minor modifications to that process post-Section 6002, and FHWA has approved it as our programmatic coordination plan per Section 6002.

Another DOT said that planning decisions are now bolstered by a broader consideration of environmental factors and impacts. Finally, one state said that one of the Act's benefits is that the department's "FONSIs and RODs are much more comprehensive" and that the department now "summarize[s] the impacts or lack of impacts and mitigation before getting a decision from FHWA."

B. Preventing or Reducing Delay

Nine departments replying to the survey stated that SAFETEA-LU has been effective in preventing or reducing delays. Sixteen departments, however, reported that in their experience the Act has not been effective in preventing or reducing delays. Two departments did not respond to the inquiry.

Table 1.
SAFETEA-LU's Effectiveness in Preventing or Reducing Delays

DOTs reporting that SAFETEA-LU prevented or reduced delays	9
DOTs reporting that SAFETEA-LU has not prevented or reduced delays	16
DOTs not responding	2

One DOT stated that

> early involvement and dialog has lead to earlier issue identification and discussion to resolve important issues collaboratively with partnering agencies. Critically flawed projects are identified and have been removed from consideration, thus saving funds and reducing costs…. Early coordination also has identified minor or non-issues on a project…. In addition, early collaboration has identified the type and level of environmental studies needed on a project during project development.

Other departments' responses included statements such as: there was "[n]o large scale change, but more a fine tuning of [the] existing process"; there is "better resource agency input earlier into the development of alternative alignments that might have delayed the project in the permitting phase"; and "[i]t is hard to say but…getting local entities, state, federal and the public engaged early and often has got to reduce delays later in a project."

Finally, one state reported that features of SAFETEA-LU such as the *de minimis* provision under Section 4(f), the 180-day SOL, and the "agency-review timeframes are all very helpful in reducing delays in project delivery."

C. Staffing and Funding

Eleven DOTs stated that they have been challenged by a lack of funding and staffing in implementating SAFETEA-LU. However, 16 departments reported that funding and staffing have not been a problem in implementing the Act.

Table 2.
Sufficiency of Funding and Staffing to Implement SAFETEA-LU

DOTs reporting a lack of staffing or funding	11
DOTs reporting no lack of staffing or funding	16

The responses included the statements that an intensive effort is needed to integrate environmental concerns into the planning phase and that "coordination between local agencies and the state [is] challenged by reductions in staffing and increases in federal requirements." Three resource agencies asked a DOT to fund positions for them; however, the DOT responded by lengthening the time for project development to accommodate the resource agencies.

One department stated that "SAFETEA-LU requirements seem to run counter to streamlining initiatives in creating additional requirements for EIS-type projects" and that the requirements have a negative impact on schedules and budgets. One DOT stated that a lack of staffing in its environmental management office was not the result of the implementation of SAFETEA-LU. Another department said that the 180-day limitations period "created additional work, but is worth it." Furthermore, the same agency stated that "[t]here have been some challenges with the non-regulatory aspects of § 6001 in that integrating planning and environmental review processes does not necessarily align with current organizational structures, functions, and processes."

D. Training

Twenty-two of the 27 DOTs reported that they had received training, information, or assistance directly from the FHWA in implementing SAFETEA-LU. The departments reported meetings with or briefings by FHWA, workshops sponsored by FHWA, assistance and guidance from an FHWA divison office, and information via Webinars and telecommunications. One department stated that the greatest benefit has been the liaison program.

E. Consistency in Interpretation of SAFETEA-LU

Six departments stated that in their experience, FHWA's division offices have differed in their interpretation of SAFETEA-LU. However, 17 departments have not found there to be any difference in interpretation. Four departments did not respond to the inquiry.

The states' responses included the following: "[i]t appears that 6009 is interpreted or applied differently"; "[t]hrough both peer exchanges and joint development of projects with adjacent states, consistency among FHWA offices is an issue"; and Statewide Transportation Improvement Program (STIP) requirements vary from state to state. Another DOT stated that "[t]here was a difference in the recommendations regarding the utilization of the 180-day period outlined in 6002. The FHWA's…Division direction differed from advice we received from an FHWA HQ representative." On the other hand, one DOT said that, based on its experience with the *de minimis* process, it was unaware of any variance in interpretation among FHWA division offices.

F. Effect of SAFETEA-LU on State DOT Practices

Twenty departments reported that they had revised their practices in response to SAFETEA-LU, whereas seven departments said they had not.

Table 3.
DOT Changes in Practice Because of SAFETEA-LU

DOTs reporting changes in practice	20
DOTs reporting no changes in practice	7

The states reported, for example, that because of Section 6001 the environmental, land management, and natural resource agencies are now routinely invited to participate in all planning studies; that the Act increased the internal environmental planners' involvement in pre-NEPA planning studies; that the department had modified its coordination of NEPA and long-range planning "to enhance the process"; and that the department had "initiated an Efficient Transportation Decision Making (ETDM) tool, the state's streamlining initiative for early involvement of environmental resource and permitting agencies in planning and project development."

Other DOTs reported having increased public participation through a context sensitive solution (CSS); the incorporation of Section 6002 in the DOT's manual and the issuance of guidance to its districts on procedures; the modification of the department's agency and public coordination processes to make them consistent with Section 6002; the creation of staff positions to streamline environmental reviews sent to the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers; or the revision of an existing interagency agreement to include Section 6002 provisions.

Other replies were that the department had established a Section 6002 EIS process outline and coordination plan template, that in response to Section 6004 it had delegated programmatic categorical exclusions (PCE) to the districts and established a PCE program with standards of uniformity and standard operating procedures, and that "practices have been modified by [the department's] Planning and Environmental Services to expand efforts with outside agencies during the long-range planning process."

G. Documentation of Decisions and Actions

Fourteen departments stated that there had been a change in how the department documents actions or decisions as a result of SAFETEA-LU, but 13 DOTs said that for their department there had been no change.

Table 4.
Effect on Documentation of Actions or Decisions Because of SAFETEA-LU

DOTs reporting a change in documentation	14
DOTs reporting no change in documentation	13

One department stated that the Act "adds additional steps to the process," but another DOT said that "[o]verall, § 6002 may be a plus because it gives our agency a timeline…." Other states noted that there is more record-keeping and documentation, for example, "especially regarding CSS and public participation"; that the department has "documented all interaction and input resulting from the implementation of § 6001, in accordance with our long-standing practices"; and that there is an "increased focus on environmental coordination and documentation earlier in the process." One state reported that it is documenting how it communicates with the public; moreover, it has better documentation on the public's views on the purpose and need for a proposed action. One department wrote that its documents are more reader-friendly and that it uses a Web site to communicate with the public.

H. Effect on Public Involvement

Sixteen of 27 departments responding to the survey reported that the department had experienced a change in public involvement or participation since SAFETEA-LU. Ten departments said they had not experienced a change; one department did not respond to the question.

Table 5.
SAFETEA-LU and Public Involvement or Participation in the Environmental Review Process

DOTs reporting an increase in public involvement or participation	16
DOTs reporting no increase in public involvement or participation	10
DOTs not responding	1

The DOTs' responses varied but included the following statements: the department has a new process that seeks "public input on purpose and need during NEPA scoping"; the public is more aware of the issues; Section 6009 has streamlined the review and approval process for projects that involve minimal involvement with cultural resources and recreational resources; the DOT has established "community liaison coordinators" in each DOT district and each MPO to identify community issues and provide input during both the MPO planning phase and project development; and the DOT is using CSS principles and citizen advisory groups. However, one DOT responded that its changes were prompted by state law, not SAFETEA-LU.

One DOT reports that it is using Web-based, virtual public meetings to increase public participation. Another agency said it is soliciting public input on purpose and need but that the *de minimis* process for parks has not resulted in meaningful feedback from the public or factored into the decision-making process. Finally, one agency stated that it is "more deliberate in engaging the public" before it finalizes the purpose and need for a project but that it is not clear that the department receives "more or better public input as a result of these efforts."

I. State Assumption of Federal Duties

Six DOTs reported that the department had assumed or recommended that it assume some federal duties pursuant to SAFETEA-LU. Twenty-one departments said they had not.

Table 6.
State DOT Assumption of Federal Duties Pursuant to SAFETEA-LU

DOTs assuming federal duties pursuant to SAFETEA-LU	6
DOTs not assuming federal duties pursuant to SAFETEA-LU	21

Four of the six DOTs reporting an assumption of federal duties provided additional information. One state reported that prior to SAFETEA-LU it had exe-

cuted an agreement in 2003 with the FHWA division office that essentially allows the state DOT to determine if two projects qualify as a CE. A second department stated that since 1981, in partnership with the FHWA division office, it had assumed responsibility for minor CE-type projects. A third DOT reported that prior to SAFETEA-LU it had an agreement with FHWA to process PCE compliance work for a number of years. Finally, one agency stated that it has delegated PCEs to its districts/regions, that it will soon delegate CEs, and that it has established a program to ensure consistency and compliance.

J. Effect of 180-Day Statute of Limitation

In regard to the 180-day SOL established in 23 U.S.C. § 139(1)(1), DOTs reported on whether the SOL has had 1) any effect on the department or projects in respect to the filing of challenges to announcements that a permit, license, or approval is final; 2) any evidence of premature litigation because of the limitation period; and/or 3) any effect on a decision whether or when to publish a notice that a permit, license, or approval is final. Six agencies reported that the limitation period has had an effect, but 20 departments said there had been no effect. One department did not respond to the inquiry.

Table 7.
Effect of SAFETEA-LU's 180-Day Limitation Period

DOTs reporting an effect	6
DOTs reporting no effect	20
DOTs not responding	1

One DOT replied that it had "filed for one 180-day limitation period for a project where it needed certainty that no litigation would occur before beginning construction. Otherwise, there has been no effect." A second DOT said that at least in one project a lawsuit was filed on the last day of the period based on a notice of an ROD. A third DOT wrote that it "publish[es] notices on all EIS projects and [has] received a challenge on one—filed on the last day of the 180-day period." A fourth department stated that the SOL has avoided substantial delay of a project because the parties were required "to file…within 180 days rather than wait until mid-construction and too late to make changes." Although one department said that the limitation period has affected decisions regarding whether to publish a notice, another DOT stated that there was no evidence of premature litigation and that it has "considered publishing more often to give [the] public notice." Finally, one DOT's response was that the SOL had had a "positive effect…by preventing last minute litigation."

K. SAFETEA-LU and Unresolved Problems or Issues

Six DOTs reported that there were problems or unresolved issues with respect to SAFETEA-LU. Twenty departments stated that there were none; one department did not respond.

Table 8.
SAFETEA-LU and Unresolved Problems or Issues

DOTs reporting problems or unresolved issues	6
DOTs reporting no problems or unresolved issues	20
DOTs not responding	1

One department wrote that 49 C.F.R. Part 774 needs clarification:

> [The…mitigation of a historic property that satisfies our SHPO [state historic preservation office] does not relieve the Department of its responsibility for the 4(f) requirements because a historic property is affected (especially if it is destroyed) as per the definition of *de minimis* impact. If it is the intent of the Federal Highway Administration to allow *de minimis* 4(f) processing if the mitigation of a historic structure is accepted by our SHPO, then this intent needs clarification.

One department stated that Section 6004 would require a change to its state's constitution that was unlikely; therefore, in the agency's opinion, Section 6004 "will not be of value here." One department questions why toll authorities or other public entities may not be leads of their own projects without state involvement. Another department's view is that the "process and invitations for agencies to be cooperating or participating occur too early" and "[a]dds [an] unnecessary level of coordination and process, which we are already doing through our streamlined process." The same DOT stated that "[i]n most cases, agencies do not provide meaningful input on coordination plans…." However, another state reported that Section 6001 had strengthened the department's "planning process and broadened its outreach."

In summary, the DOTs in their responses to the survey indicated a level of general satisfaction with the environmental provisions of SAFETEA-LU. A clear majority of respondents reported that there had not been a problem with a lack of staffing or funding for the department, that there had been an increase in public involvement or participation, and that there were no problems or unresolved issues. A clear majority reported that the 180-day SOL had not had any effect, for example, on the department's decisions regarding whether or when to publish a notice of final action. However, a clear majority also responded both that their department had revised their practices in response to SAFETEA-LU and that the Act had not pre-

vented or reduced delays. The DOTs were almost evenly divided on whether their department had made changes in how the department documents actions or decisions.

CONCLUSION

With the enactment of SAFETEA-LU, Congress streamlined the process for environmental review of highway projects. The Act's features address environmental issues at the planning stage of a project by requiring cooperation among the lead agency, joint lead agencies, participating agencies, and cooperating agencies as discussed in more detail in this digest. The DOTs responding to the survey were generally favorable regarding the Act's requirements, but in particular approved of the 180-day SOL and the *de minimis* provisions added to Section 4(f).

APPENDIX A—SURVEY QUESTIONS

NCHRP 20-6, STUDY TOPIC 16-1: PRACTICE UNDER THE ENVIRONMENTAL PROVISIONS OF SAFETEA-LU

Please provide the following information for the person or persons responding to this survey:

Agency Name: _____

Title/Position: _____

Job Title: _____

Contact Telephone / cell phone number: _____

E-mail address: _____

NOTE: The environmental provisions of SAFETEA-LU referred to herein include:

§ 6001 of SAFETEA-LU that amended 23 U.S.C. § 134 (which requires that transportation agencies consult with resource agencies having responsibility for statewide and metropolitan planning);

§ 6002 that added 23 U.S.C. § 139 (which provides for more efficient environmental reviews, designates responsible agencies, and provides for a 180-day period within which challenges must be made to DOT's approval of highway or transit projects);

§ 6004 that amended 23 U.S.C. § 326 (which provides that a state may be assigned the responsibility for determining whether certain designated activities qualify as categorical exclusions);

§ 6005 that added 23 U.S.C. § 325 (which established a pilot program whereby a participating state may assume the responsibilities for other environmental laws pertaining to the review and approval of a specific project); and

§ 6009 that amended 23 U.S.C. § 138 (which permits the Secretary of the U.S. Department of Transportation more flexibility to make exceptions to § 4(f) requirements).

1. Does your agency have experience with the environmental provisions noted above of SAFETEA-LU so that you are able to evaluate the effect of the procedures mandated by the Act?

(please circle) YES or NO

If your answer is '**NO,**' please **STOP** and return the Survey with your response.

If your answer is '**YES,**' please provide the following information to the extent possible.

(If sufficient space is not provided for your responses below, please feel free to place your responses on additional sheets of paper and attach them to the survey.)

2. What has been your agency's experience when coordinating or working with other agencies to comply with the processes mandated by §§ 6001, 6002, and 6004 or other environmental provisions of SAFETEA-LU?

_____
_____
_____

3. Has your agency established, modified, or terminated any practices as a result of §§ 6001, 6002, 6004, and 6005 or other environmental provisions of SAFETEA-LU?

(please circle) YES NO

If your answer is 'YES,' please identify and explain them.

_____

_____

_____

4. Has your agency had any actual or threatened litigation regarding the implementation of §§ 6001, 6002, 6004, 6005, and 6009 or other environmental provisions of SAFETEA-LU and/or any project subject to SAFETEA-LU?

(please circle) YES NO

If your answer is '**YES,**' please explain and provide, if possible, copies of any relevant documents (e.g., letter and/or complaint).

_____

_____

_____

5. Has your agency been challenged in any way (e.g., lack of staffing, funding) in its implementation of §§ 6001, 6002, and 6004 or other environmental provisions of SAFETEA-LU?

(please circle) YES NO

If your answer is '**YES,**' please explain.

_____

_____

_____

6. Has your agency or department assumed or recommended that it assume any federal duties pursuant to § 6004 or other environmental provisions of SAFETEA-LU?

(please circle) YES NO

If your answer is '**YES,**' please explain.

_____

_____

_____

7. Based on your experience with § 6002 and other environmental provisions of SAFETEA-LU has the approach now mandated during the planning of transportation projects been effective in preventing or reducing delays that possibly would have been caused later for environmental reasons?

(please circle) YES NO

If your answer is '**YES,**' please describe.

_____

_____

_____

8. Has your agency received training, information or assistance directly from the U.S. Department of Transportation (or other departments or agencies) on how to implement the requirements of §§ 6001, 6002, and 6004 or other environmental provisions of SAFETEA-LU regarding the planning of projects and environmental issues?

(please circle) YES NO

If your answer is '**YES,**' please describe.

_____

_____

_____

9. To the extent not already covered by your previous answers, have there been other benefits and/or any issues or problems that your agency has experienced or is experiencing as a result of the requirements of §§ 6001, 6002, and 6004 or other environmental provisions of SAFETEA-LU.

(please circle) YES NO

If your answer is '**YES,**' please describe.

_____
_____
_____

10. Has your agency experienced any change in public involvement or participation in the environmental review process since the enactment of §§ 6001, 6002, 6004, and 6009 or other environmental provisions of SAFETEA-LU?

(please circle) YES NO

If your answer is '**YES,**' please explain.

_____
_____
_____

11. In regard to the 180-day limitation period established in 23 U.S.C. § 139(l)(1) has there been: (a) any effect on your agency or projects in respect to the filing of challenges to announcements that a permit, license, or approval is final; (b) any evidence of premature litigation because of the limitation period; and/or (c) any effect on a decision whether or when to publish a notice that a permit, license, or approval is final.

(please circle) YES NO

If your answer is '**YES,**'please identify and explain.

_____
_____
_____

12. To the extent not already covered by your answers, have there been any other benefits, issues and/or problems of which your agency is aware in connection with the procedures mandated by § 6002 of SAFETEA-LU.

(please circle) YES NO

If your answer is '**YES,**'please identify and explain.

_____
_____
_____

13. Are there any issues or problems with respect to §§ 6001, 6002, and 6004 or other environmental provisions of SAFETEA-LU that your agency believes are still unresolved?

(please circle) YES NO

If your answer is '**YES,**'please identify and provide details, and if possible, provide your evaluation of such issues.

_____
_____
_____

14. Based on your agency's awareness or experience has practice among FHWA's division offices varied regarding the interpretation of §§ 6001, 6002, 6004, and 6009 or other environmental provisions of SAFETEA-LU?

(please circle) YES NO

If your answer is '**YES,**' please explain.

_____
_____
_____

15. Has there been any change in how your agency documents actions or decisions as a result of §§ 6001 and/or 6002 or other environmental provisions of SAFETEA-LU?

(please circle) YES NO

16.
If your answer is '**YES,**' please explain.

_____
_____
_____

Respond to:

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APPENDIX B—TRANSPORTATION DEPARTMENTS RESPONDING TO THE SURVEY

Alabama Department of Transportation

Arizona Department of Transportation

Arkansas Highways & Transportation Department

District of Columbia Department of Transportation

Florida Department of Transportation

Georgia Department of Transportation

Hawaii Department of Transportation Highways Division

Illinois Department of Transportation

Indiana Department of Transportation

Iowa Department of Transportation

Kansas Department of Transportation

Louisiana Department of Transportation & Development

Maine Department of Transportation

Maryland State Highway Administration

Michigan Department of Transportation

Missouri Department of Transportation

Nebraska Department of Roads

New Hampshire Department of Transportation

North Carolina Department of Transportation

Oregon Department of Transportation

Rhode Island Department of Transportation

South Carolina Department of Transportation

Tennessee Department of Transportation

Texas Department of Transportation

Vermont Agency of Transportation

Wisconsin Department of Transportation

Wyoming Department of Transportation

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