

Engineering Sciences, to the Commission, May 27, 2004.

2. Petition CP 02-1 from the Lighter Association, Inc. to Adopt ASTM F-400 as a Consumer Product Safety Standard, November 27, 2001.

3. Memorandum from Charles L. Smith, CPSC, Directorate for Economic Analysis, "Lighter Petition (Petition CP 02-1): Economic Considerations," March 10, 2004.

4. Memorandum from Joe Vogel, CPSC, Office of Compliance, "Petition to Adopt ASTM F-400 for Cigarette Lighters as a Consumer Product Safety Standard under the Consumer Product Safety Act," February 26, 2004.

5. Memorandum from Risana Chowdhury, CPSC, Division of Hazard Analysis, "Hazards Associated with Cigarette Lighter Malfunctions," January 13, 2004.

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## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### 23 CFR Part 650

[FHWA Docket No. FHWA-2001-9182]

RIN 2125-AE75

#### Highway Bridge Program

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Withdrawal of proposed rulemaking and closing of public docket.

**SUMMARY:** This document withdraws a proposed rulemaking action developed to revise the regulations governing the highway bridge replacement and rehabilitation program (HBRRP). The FHWA proposed to clarify ambiguous language, incorporate long-standing FHWA policies, and provide flexibility by including an alternate program applicable to all bridges, both on and off the Federal-aid system. However, during the comment period, we received comments questioning the legal authority for the alternative program as well as the quantitative benefits and impacts of the program. To evaluate these questions and issues, the FHWA is withdrawing the proposed rulemaking and intends to consider establishment of a special experimental program to quantitatively evaluate the benefits of the approach proposed in the alternative program.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas Everett, Federal Highway

Administration, Office of Bridge Technology, HIBT-30, 400 Seventh Street, SW., Washington, DC 20590-0001 or Mr. Robert Black, Office of the Chief Counsel, HCC-30, (202) 366-1359, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

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##### Background

Section 204 of the Federal-aid Highway Act of 1970 (Pub. L. 91-605, 84 Stat. 1713, Dec. 31, 1970) established the Special Bridge Replacement Program (SBRP) codified in 23 U.S.C. 144. Through subsequent legislation, the SBRP was expanded to create the Highway Bridge Replacement and Rehabilitation Program (HBRRP) applicable for both on and off-system structures. The FHWA has recognized that the current regulation is in need of revision to incorporate and clarify past policies as well as accommodate the flexibility allowed by law to enable State and local governments to manage their bridge assets in the most effective manner. Accordingly, the FHWA published an advanced notice of proposed rulemaking (ANPRM) on September 26, 2001 (66 FR 49152), requesting public comments on the current regulation. A team of Federal Highway Administration engineers addressed the comments received and a notice of proposed rulemaking (NPRM) was published on June 21, 2004 (69 FR 34314).

The NPRM proposed to change the name of the program from the Highway Bridge Replacement and Rehabilitation Program (HBRRP) to the Highway Bridge Program (HBP) reflecting program flexibility provided through highway legislation and increasing emphasis on preventative maintenance. Definitions were added to the legislation to address past ambiguities. Eligible and ineligible activities were specified in the proposed regulation and guidance was provided on the types of bridges to which the eligible and ineligible activities could be applied. To take advantage of project selection flexibility,

the proposed rule included an alternate program. Through this program, States would have the flexibility to select projects involving eligible activities on any bridge, irrespective of the eligibility criteria under the traditional program, given that an approved bridge management system (BMS) and/or systematic process was employed. Guidance for the approval of bridge management systems and for the development of a systematic process was provided as supplemental documents on the docket for public review. Development and implementation of a bridge performance plan was proposed as a prerequisite for use of the alternate program.

#### Comments Received in Response to the ANPRM and NPRM

The FHWA received 41 sets of comments in response to the ANPRM from 31 State Departments of Transportation, 1 Federal Agency, 3 Counties, 1 Private Citizen, 2 Trade Associations and 1 Public Interest Group. The majority of these commenters believed that the HBRRP regulation should be revised. The comments received were summarized and discussed in detail in the NPRM.

In response to the NPRM, the FHWA received 25 sets of comments from 15 State Departments of Transportation, 4 Counties, 1 City, 3 Trade Associations, 1 Public Interest Group and 1 Private Citizen.

Four commenters suggested that the name be changed to something other than the Highway Bridge Program (HBP) or the Highway Bridge Replacement and Rehabilitation Program (HBRRP). The National Association of County Engineers (NACE), the Illinois Association of County Engineers (IACE) and the Illinois DOT suggested changes to avoid confusion between the HBP and other Federal programs. Alcona County, Michigan, expressed concern that the name change would diminish the priority of replacement and rehabilitation.

Commenters from DOTs, NACE, IACE, and several County Highway Departments suggested changes to the definitions. Suggestions were made to modify or enhance the definitions for: Bridge, Cost Effective, Rehabilitation, Eligible Highway Bridge, Bridge Management System, Construction Unit Cost, Bridge Performance Goals, Bridge Performance Plan, and Systematic Process.

Commenters from several State DOT's, the American Association of State Highway and Transportation Officials (AASHTO), NACE, and several County Highway Agencies suggested

expanding the list of eligible activities to include the following: Painting programs and preventative maintenance for off-system structures, scour countermeasures on all bridges, safety improvements, additional sets of load posting signs, activities related to load rating and analysis, activities for development and implementation of bridge management systems, and specific preventative maintenance activities. Ionia County, Michigan, suggested the removal of historical inventory activities from eligibility. The Wyoming DOT, NACE, Ionia County and Alcona County suggested the removal or clarification of calcium magnesium acetate and other deicing chemicals from eligibility.

Many State DOTs recommended that activities be made applicable for all structures irrespective of eligibility. The California and Iowa DOTs also suggested clarifying and specifically restricting HBP funds for structures carrying automobile traffic. The Virginia DOT and AASHTO suggested applicability of the funds for safety improvements irrespective of bridge eligibility. The Wyoming and Illinois DOT's, and NACE suggested applicability of funds for load posting signs irrespective of eligibility criteria. The AASHTO and the Kansas DOT recommended that historic bridge activities should be eligible regardless of bridge eligibility status.

County agencies and trade associations expressed concerns that the additional flexibility added through the alternate program favored State agencies at the expense of local agency bridge owners. Concerns focused on whether the alternate program would divert funds from localities. The NACE and IACE urged that the proposed regulation be amended to ensure that the alternate program be applicable for State and local agencies independently and that additional flexibility be given to localities independent of the policies of State bridge owning agencies. The AASHTO, Kansas DOT, and Delaware County, New York also suggested addressing issues that are not currently part of the regulation, including the ten-year rule<sup>1</sup> and the sufficiency rating formula.<sup>2</sup> The California DOT, Wyoming DOT and AASHTO also suggested removing FHWA approval of bridge

management systems and systematic processes, requirements for conformance of preventative maintenance with design standards, requirements of funds to be used on Federal-aid structures, modification of the unit cost criteria, and sufficiency rating eligibility assessment.

The Advocates for Highway and Automotive Safety (AHAS) expressed concern as to whether the alternate program proposed violated the provisions of 23 U.S.C. 144, which it states "was established to ensure that funds are dedicated to improving the nation's aging bridge infrastructure \* \* \* [limiting] the use of funds for the replacement or rehabilitation of bridges." The AHAS argued that FHWA does not have the legal authority to approve the expenditure of HBRRP funds for activities involving routine maintenance and repair, deck repaving, safety improvements and preventative maintenance activities determined using a BMS. The authority for preventive maintenance activities is set forth in 23 U.S.C. § 116(d). Preventive maintenance activities shall be eligible for Federal assistance under title 23 if the State demonstrates that the activity is a cost-effective means of extending the useful life of a Federal aid highway. The agency has interpreted that the authority of § 116(d) extends to all formula funding programs, including the HBRRP program to the extent that the activity funded extends the useful life of a Federal aid highway, including bridges, on the Federal-aid system. The alternate program applied preventive maintenance to both Federal-aid bridges and non Federal-aid bridges. The legal authority of 23 U.S.C. 116(d) does not apply to the off-system structures and the proposed rulemaking contravened current provision of law. If pursued, the alternate program would have to be constrained to Federal-aid bridges only, which constitutes roughly half of the bridges in the national inventory.

The FHWA has evaluated AHAS's concerns. The authority for preventive maintenance is clearly established in 23 U.S.C. 116(d) for highways (which by definition includes bridges) on the Federal-aid system. Permitting the application of the alternate program for these bridges does not violate the legal authority of the FHWA. The NPRM, however, proposed to apply the provisions of the alternate program to both the Federal-aid and non Federal-aid system.

#### Determination

The NPRM proposed to clarify ambiguous language, incorporate long-standing FHWA policies and, through

the alternate program, include flexibility provided to the States through the Intermodal Surface Transportation Efficiency Act (ISTEA) and the Transportation Equity Act for the 21st Century (TEA-21).

While the FHWA is aware of the benefits that would result from the alternate program proposed in the NPRM, there is no quantitative information to validate this assumption. With a proven record, benefits can be clearly demonstrated. Therefore, further evaluation of the issues raised by the NPRM comments, along with the collection of quantitative information, is warranted.

#### Conclusion

For the reasons stated above, the FHWA withdraws the NPRM and closes the docket for this rulemaking. The FHWA intends to consider the establishment of a special experimental program to document the benefits of the alternative program. The program will likely evaluate a small sample of States participating on a voluntary, experimental basis in order to gather data necessary to determine the success and need for innovative bridge management solutions, such as the alternate bridge program. The FHWA plans to initiate a separate rulemaking to include language that would eliminate ambiguities and incorporate long-standing policies after the reauthorization of the surface transportation program.

**Authority:** 23 U.S.C. 144 and 315; 49 CFR 1.48.

Issued on: March 31, 2005.

**Mary E. Peters,**

*Federal Highway Administrator.*

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[CGD01-05-017]

RIN 2115-AA97

**Safety Zone; Macy's July 4th Fireworks, East River and Upper New York Bay, NY**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to modify the permanent safety zone for the annual Macy's July 4 fireworks

<sup>1</sup> The FHWA "10-year rule" policy prevents a bridge from remaining eligible for HBRRP funding for a period of 10 years after construction or major reconstruction has taken place.

<sup>2</sup> The sufficiency rating is a method of evaluating highway bridge data considering structural condition, functionality and essentiality for public use to obtain a numeric value which is indicative of bridge sufficiency to remain in service.