

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****Public Notice for Waiver of Aeronautical Land Use Assurance; Great Falls International Airport, Great Falls, MT**

**AGENCY:** Federal Aviation Administration, (FAA), DOT.

**ACTION:** Notice.

**SUMMARY:** Notice is being given that the FAA is considering a proposal from the Great Falls International Airport Authority to change certain portions of the airport from aeronautical use to non-aeronautical use at the Great Falls International Airport, Great Falls, MT. The proposal consists of 5 acres of surplus property shown on the Airport's Exhibit "A" as the portion of Parcel 4 east of the airport's access road.

**DATES:** Comments must be received by March 26, 2018.

**ADDRESSES:** Comments on this application may be mailed or delivered to the FAA at the following address: Mr. William C. Garrison, Manager, Federal Aviation Administration, Northwest Mountain Region, Airports Division, Helena Airports District Office, 2725 Skyway Drive, Suite 2, Helena, Montana 59602.

**FOR FURTHER INFORMATION CONTACT:** Mr. Joe Nye, Civil Engineer, Federal Aviation Administration, Northwest Mountain Region, Helena Airports District Office, 2725 Skyway Drive, Suite 2, Helena, MT 59602-1213.

The request to release deed restrictions may be reviewed, by appointment, in person at the same location.

**SUPPLEMENTARY INFORMATION:** The FAA invites public comment on the request to release the aeronautical use restriction of 5 acres at the Great Falls International Airport under the provisions of Title 49, U.S.C. Section 47153(c) and 47107(h)2.

The Great Falls International Airport Authority, referred to herein as the Authority, has requested release from the aeronautical use restrictions assigned to 5 acres donated by the U.S. Government as surplus property in 1948.

The 5 acres are a fragment of a larger 780-acre parcel identified on the Airport's Exhibit A as Parcel 4. The 5 acres proposed for non-aeronautical use are isolated from the airfield by the airport entry road to the south and west. The Authority has identified these 5 acres as no longer needed for aeronautical purposes.

The Authority proposes to lease the property for the construction and operation of a fueling station and restaurant. The revenue from the lease of this property will be used for airport purposes. The proposed use of this property is compatible with other airport operations and is in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in **Federal Register** on February 16, 1999.

Any person may inspect the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

Issued in Helena, Montana, on February 14, 2018.

**William C. Garrison,**

*Manager, Helena Airports District Office.*

[FR Doc. 2018-03658 Filed 2-21-18; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration**

**[FHWA Docket No. FHWA-2017-0018]**

**Transportation Asset Management Plan Development Processes Certification and Recertification Guidance; Transportation Asset Management Plan Consistency Determination Interim Guidance**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice.

**SUMMARY:** The FHWA is finalizing one guidance document and issuing one interim guidance document: Transportation Asset Management Plan Development Processes Certification and Recertification Guidance, and Transportation Asset Management Plan Consistency Determination Interim Guidance. These documents provide implementation guidance on provisions of the Moving Ahead for Progress in the 21st Century Act (MAP-21) and the Asset Management Final Rule, which requires a State department of transportation (State DOT) to develop and implement a risk-based asset management plan. Under these authorities, FHWA must certify that Transportation Asset Management Plan (TAMP) development processes established by a State DOT meet applicable requirements, and make an annual consistency determination, evaluating whether a State DOT has developed and implemented a State-approved TAMP that meets all applicable requirements. This notice finalizes the Transportation Asset

Management Plan Development Processes Certification and Recertification Guidance, issues interim guidance on transportation asset management plan consistency determinations, and summarizes the comments received on the drafts of both guidance documents. FHWA's response to those comments, and any changes that were made to the guidance documents issued with this notice.

**FOR FURTHER INFORMATION CONTACT:** For questions about this notice contact Mr. Stephen Gaj, FHWA Office of Infrastructure, (202) 366-1336, Federal Highway Administration, 1200 New Jersey Ave. SE, Washington, DC 20590, or via email at [Stephen.Gaj@dot.gov](mailto:Stephen.Gaj@dot.gov). For legal questions, please contact Ms. Janet Myers, FHWA Office of the Chief Counsel, (202) 366-2019, Federal Highway Administration, 1200 New Jersey Ave. SE, Washington, DC 20590-0001, or via email at [Janet.Myers@dot.gov](mailto:Janet.Myers@dot.gov). Business hours for FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:****Electronic Access**

Copies of the proposed Transportation Asset Management Plan Development Processes Certification and Recertification Guidance; and Transportation Asset Management Plan Consistency Determination Interim Guidance are available online for download and public inspection online under the docket at the Federal eRulemaking portal at: <http://www.regulations.gov>. An electronic copy of this notice may be downloaded from the Office of the Federal Register's home page at: [http://www.archives.gov/federal\\_register](http://www.archives.gov/federal_register) and the Government Publishing Office's web page at: <https://www.gpo.gov/fdsys/>.

**Background**

Under the asset management provisions enacted in MAP-21, codified at 23 U.S.C. 119, State DOTs must develop and implement a risk-based TAMP. This TAMP must include all National Highway System (NHS) pavements and bridges, regardless of whether the State or some other entity owns the relevant NHS facility.

The FHWA Division Offices (Divisions) must take two actions with respect to State DOT asset management activities. The first is TAMP development process certification/recertification. Under 23 U.S.C. 119(e)(6), FHWA must certify at least every 4 years that the State DOT's processes for developing its TAMP are consistent with applicable

requirements. The FHWA also must recertify whenever the State amends its TAMP development processes, in accordance with 23 CFR 515.13(c). The Transportation Asset Management Plan Development Processes Certification and Recertification Guidance (Development Processes Certification Guidance) provides a framework for Divisions to undertake and complete this process certification. The second FHWA action, under 23 U.S.C. 119(e)(5), is an annual consistency determination, which evaluates whether the State DOT has developed and implemented a TAMP that is consistent with the requirements of 23 U.S.C. 119. The Transportation Asset Management Plan Consistency Determination Interim Guidance (Consistency Determination Interim Guidance) assists Divisions on evaluating whether a State DOT has developed and implemented its TAMP in accordance with provisions in 23 CFR 515.13(b). Note that best practices in guidance may be revised as the state of asset management practices advance and the asset management rule is further implemented.

Draft versions of guidance were made available for public review and comment June 6, 2017, at 82 FR 25905. The FHWA received seven comment letters from the following organizations: Alaska Department of Transportation and Public Facilities, Georgia DOT, Maryland DOT, Michigan DOT, New Jersey DOT, Wyoming DOT, and joint comments from the DOTs of Idaho, Montana, New York, North Dakota, South Dakota, and Wyoming. A summary of the comments received and FHWA's response, including any changes made in response to comments, is provided below. Based on the comments received, as well as FHWA's experience to date as it implements the certification and consistency determination requirements, FHWA concluded it is appropriate to issue final certification guidance. However, FHWA believes that issues that may affect FHWA consistency determinations are less well-defined at this time. Accordingly, FHWA is issuing the guidance on consistency determinations as interim guidance, with the expectation of finalizing that guidance later in 2018.

#### *Concern That the Guidance Would Impose New Requirements*

Several commenters (Alaska, Wyoming, and the joint commenters) expressed concern that these guidance documents would impose new requirements without undergoing the required notice and comment procedures. In response to these

concerns, FHWA notes that the guidance does not impose any new requirements. Any requirements discussed in the guidance are imposed by existing statute or regulation, and those requirements can be changed only by revising these underlying authorities. Recommended best practices are clearly described as not required, and may be revised as practices advance and asset management is further implemented. The FHWA revised the introduction of both documents to clarify this point.

#### *TAMP Consistency Determination Requirements*

Alaska asked for more information on the factors that Divisions will use to determine that State DOT funding allocations are "reasonably consistent" with 23 U.S.C. 119. Under that section, the Secretary must determine annually that a State has developed and implemented an acceptable TAMP. As indicated in 23 CFR 515.13(b)(2), each State DOT may determine the most suitable approach for demonstrating implementation of its TAMP, so long as the information is current, documented, and verifiable. The FHWA considers the best evidence of plan implementation to be that, for the 12 months preceding the consistency determination, the State DOT funding allocations are reasonably consistent with the investment strategies in the State DOT's TAMP. This demonstration takes into account the alignment between the actual and planned levels of investment for various work types (*i.e.*, initial construction, maintenance, preservation, rehabilitation, and reconstruction (CFR 515.13(b)(2)(i))). The FHWA believes the draft guidance (page 2, third paragraph) discussion of "reasonably consistent" is sufficiently detailed to inform FHWA Divisions and stakeholders about this issue.

Alaska also asked for more information about how the Division will communicate its consistency determination to the State DOT. As provided in 23 CFR 515.13(b), FHWA will notify the State DOT, in writing, whether the State DOT has developed and implemented a TAMP consistent with applicable requirements. The FHWA does not believe it is necessary to further specify how the notice is delivered to the State DOT.

#### *Declining Targets and Asset Conditions*

Joint commenters and Wyoming noted that the performance management regulations in 23 CFR part 490 allow a State DOT to adopt targets for NHS bridge and pavement conditions that reflect conditions that decline at faster rates than previously was the case. The

FHWA recognizes that, due to the fiscal conditions and the need for trade-offs across assets, conditions of an asset may improve, stay constant, or decline. In response to this comment, FHWA added clarifying language to the Consistency Determination Interim Guidance regarding such declining targets and asset conditions. However, the State DOT should explain in its TAMP how these improvements or declines affect long-term goals of achieving and sustaining a state of good repair. The TAMP investment strategies must, during the life of the long-term TAMP, be designed to support or make progress toward (1) achieving and sustaining a desired state of good repair over the life cycle of the assets, (2) improving or preserving the condition of the assets and the performance of the NHS relating to physical assets, and (3) achieving the national goals identified in 23 U.S.C. 150(b).

#### *Relationship Between TAMP and Existing Transportation Planning Processes*

Michigan asked for clarification on the relationship between existing transportation processes and TAMP requirements, specifically on page 20 of the draft Development Processes Certification Guidance. The requirement to integrate the State-approved TAMP into the transportation planning process calls for consideration of TAMP information and investment strategies when making programming and project selection decisions during transportation planning. The asset management rule, at 23 CFR 515.9(h), clearly describes the interaction between the TAMP and STIP: "the State DOT must integrate its TAMP into the State DOT's planning processes that lead to the STIP, to support the State DOT's efforts to achieve the goals in 23 CFR 515.9(f)." The FHWA encourages (but does not require) that such integration extend to including, in the STIP performance management target achievement discussion under 23 CFR 450.218(q), information about how TAMP investment strategies have been used when programming projects into the STIP. In contrast, the draft Development Processes Certification Guidance addresses the appropriate role of STIPs when State DOTs are developing their TAMPs.

The statement noted by the commenter does not contradict 23 CFR 515.9(h). The TAMPs are the product of analyses and data requirements that do not necessarily apply to other documents, such as STIPs. The guidance emphasizes the long-term nature of the TAMP. A short-term

program, like the STIP, should be used only as background information given this difference in relevant time periods. For example, hard coding STIP projects into Bridge Management Systems to impact development of investment strategies for bridge assets is not considered the use of STIP as background information. However, if a major project with significant amount of funding is delayed for some reason, then the State DOT needs to determine if this delay could have any impact on their TAMP and if so, whether the impact is significant enough to require an update. For these reasons, importing a STIP directly into a TAMP as a substitute for TAMP analysis and investment decision-making does not fulfill TAMP requirements. The FHWA concluded no change is needed to the Development Processes Certification Guidance.

#### *TAMP Life Cycle Planning (LCP) Process and Modeling Requirements*

Georgia asked for clarification on the extent and detail it should include in its TAMP submission regarding the LCP process and modeling. In response, FHWA clarifies that States do not need to include their deterioration models in detail in their TAMPs. However, the deterioration models are required to perform the required analysis, and a State DOT must identify the model(s) that are part of the State DOT's process for developing its TAMP. The State DOTs should include, as part of their process description, an explanation of how the selected model(s) provide insight into LCP, and why a certain type of management strategy is the most appropriate strategy at the time of TAMP development.

The asset management rule does not specifically require State DOTs to break assets into sub-groups; however, asset inventories normally break assets into sub-groups (for example a pavement inventory distinguishes between asphalt and concrete pavements), including appropriate condition data for each asset sub-group that are used to predict how each sub-group deteriorates. The State DOTs typically have agency-specific deterioration curves for different pavement types and components/elements of bridges by bridge type. The FHWA believes the Consistency Determination Interim Guidance, the interim document "Using a Life Cycle Planning Process to Support Asset Management," and the final asset management rule adequately cover this information. No change was made to the guidance.

#### *Update or Amendment of TAMPs*

Georgia and Maryland requested clarification on the TAMP update and amendment timelines. The State DOTs must update or amend TAMPs at least every 4 years (23 CFR 515.13(c)). The State DOTs are otherwise free to update or amend plans whenever such revision is warranted.<sup>1</sup> The FHWA will consider annually the most recent TAMP submitted by the State DOT, along with any separate documentation submitted by the State DOT to demonstrate implementation of the plan. Thus, the State DOT should consider updating its plan whenever there is a change that has material impact on the accuracy and validity of the processes, analyses, or investment strategies in the plan. If the State DOT amends its TAMP, including any amendments to TAMP development processes, the State DOT must submit the amended document to FHWA for review. The FHWA will make the applicable determination(s) (a new process certification, consistency determination, or both). The State DOT must make such submissions at least 30 days prior to the deadline for the next FHWA consistency determination, except in the case of non-material revisions as defined in 23 CFR 515.13(c). The FHWA believes the Consistency Determination Interim Guidance and the final asset management rule adequately cover this information; thus, no change was made to the guidance.

#### *Initial TAMP Requirements*

Michigan and Maryland requested further information on the requirements for the initial TAMP. The initial TAMP must include a description of all the required TAMP development processes described in 23 CFR 515.7. The scope of this requirement includes policies, procedures, documentation, and an implementation approach that satisfy the requirements of 23 CFR part 515. The FHWA process certification is based on those aspects of the initial TAMP. Separate from the information required for the TAMP development process certification, there are requirements for additional types of information in the initial TAMP. Those requirements are discussed in Question and Answer #1 in FHWA's "Asset Management Initial Plan Guidance," available on FHWA's Asset Management web page (Initial TAMP Q&A #1), at <https://www.fhwa.dot.gov/asset/>.

Specifically, Maryland asserts that the Development Processes Certification

Guidance contains requirements for the initial plans that falls outside the scope of the asset management rule. The FHWA does not agree with the commenter's interpretation. Section 515.11(b) of the rule establishes flexibility for State DOTs, when preparing their initial TAMPs, to deviate in certain respects from 23 CFR 515.7 and 515.9 requirements by eliminating certain analyses from the plans. In response to the comment, FHWA added language to the Development Processes Certification Guidance clarifying that (1) certification of the State DOT's TAMP development processes is based on meeting the process requirements described in 23 CFR 515.7; and (2) the initial TAMP must provide all the information specified in 23 CFR 515.7 and 515.9, except the analyses in the three areas listed as exclusions under 515.11(b). For a detailed discussion of the initial TAMP requirements, see Initial TAMP Q&A #1, discussed above.

Further, Michigan requested that FHWA add a list of processes required for the initial TAMP to the Development Processes Certification Guidance. Because this information goes beyond the scope of the guidance documents that are the subject of this notice, FHWA did not revise the documents based on this comment. The requested information appears in the Initial TAMP Q&A #1, discussed above.

#### *Performance Gap Analysis*

Georgia and Michigan requested clarification on how to conduct the performance gap analysis, particularly, whether to use current asset condition targets given that the targets required under 23 U.S.C. 150(d) are not due until May 20, 2018.

In response to the commenter's specific questions about the use of targets in initial TAMPs, pursuant to 23 CFR 515.11(b), State DOTs are not required to include 23 U.S.C. 150(d) targets in the Initial TAMPs because the deadline for setting those targets is less than 6 months before the deadline for submission of the initial TAMP on April 30, 2018. However, FHWA encourages (but does not require) State DOTs that have performance targets, whether developed to meet 23 U.S.C. 150(d) requirements or for other reasons, to include those targets if possible. This will provide the State DOT with more experience in analysis and implementation. A State DOT that includes targets can test the effectiveness of its proposed TAMP development processes. The State DOTs may wish to establish "temporary targets" for use in the initial TAMP. For

<sup>1</sup> Note that there are provisions in 23 CFR part 490 that affect the timing and procedures for amending 23 U.S.C. 150(d) targets.

example, State DOTs may use the minimum condition requirements for NHS bridges and Interstate pavements, as established under 23 CFR part 490. Also, States are encouraged to set targets for non-Interstate pavements to get full coverage for NHS pavements. The State DOT can use various sources of information for temporary targets, such as strategic plans and other State plans.

As discussed above, State DOT may amend its TAMP at any time to add section 150(d) targets, or to revise or remove any other targets. Procedures applicable to TAMP amendments appear in 23 CFR 515.13(c). Note, however, that 23 CFR part 490 contains separate procedures that govern the amendment of part 490 targets.

The FHWA believes this information is adequately addressed in the guidance, the final asset management rule, and FHWA's "Asset Management Initial Plan Guidance," available on FHWA's Asset Management web page, at <https://www.fhwa.dot.gov/asset/>.

Michigan noted that the examples of good practices for the performance gap analysis would be better suited for the portion of the Development Processes Certification Guidance entitled "Process for Ensuring Use of Best Available Data and Use of Bridge and Pavement Management Systems" on page 20. The FHWA agrees, and revised the final guidance as suggested.

#### *Long-term Targets, Vision, and State of Good Repair (SOGR)*

Michigan and Georgia requested additional guidance on the role of long-term targets and the State DOT's long-term vision. Michigan commented that the Consistency Determination Guidance should be expanded to clarify how the long-term vision under the performance gap analysis should fit with other TAMP requirements. Michigan is concerned that Federal and some States' performance management pavement categories may not be in alignment, and that the 10-year period for the financial plan may not align with time periods some States use for asset management.

In response to the comments concerning the use of "long-term targets" and "long-term vision," FHWA notes that neither the rule, nor the Development Processes Certification Guidance, specifically requires the State DOT's performance gap process to include identification of long-term targets. However, it is good practice for a State DOT's performance gap process to include identification of long-term targets and performance goals. The purpose of the TAMP is to achieve or maintain the State DOT's desired SOGR,

which is a long-term goal and typically will look forward more than 10 years. Identification of long-term targets is inherent in defining SOGR.

Each State DOT is required to define asset management objectives and SOGR for itself. The asset management objectives of the State DOT's TAMP should align with the State DOT's mission. The objectives must be consistent with the purpose of asset management, which is to achieve and sustain the desired SOGR over the life cycle of the assets at minimum practicable cost (23 CFR 515.9(d)(1)). In fact, to achieve this goal, the performance gap, life-cycle plan, and risk management analyses should cover periods longer than 10 years. For example, life cycle plans for bridges may cover a period of 70–100 years; however, the TAMP must include the information that covers the immediate next 10 years, not the entire 70–100 years (see 23 CFR 515.9(e)). The minimum 10-year period was established to acknowledge the uncertainty surrounding the validity of the assumptions that State DOTs must make to conduct analyses for periods longer than 10 years. The FHWA concluded the draft Development Processes Certification Guidance already reflects this link between the State DOT's long-term vision for SOGR and the TAMP process for performance gap analysis. No change was made in response to this comment.

Michigan specifically noted that it uses freeway and non-freeway categories for its long-term vision, rather than Interstate and NHS (excluding the Interstate) categories. The State DOT TAMPs must specifically address the Interstate and NHS (excluding the Interstate) as required under the performance management and asset management rules. State DOTs have flexibility in how they make the needed adjustments. For example, if the State DOT is managing all its freeways and the Interstate the same way, with the same SOGR goals, the State DOT should explain this in its asset management plan. No change was made in response to this comment.

Michigan also asked how it should treat assets other than NHS pavements and bridges in its long-term vision, specifically, whether it could include other assets without making those other assets subject to all TAMP requirements. If the State DOT wants to address other assets without subjecting those assets to section 515.7 or 515.9(l) analyses, the State DOT can group such assets and identify them as assets outside the TAMP (e.g., "other assets," "non-TAMP assets", "other safety related assets,"

etc.). A State DOT may identify these other types of assets with its respective funding needs in a separate table or general discussion, but must clearly note that the TAMP framework was not used to arrive at the estimated funding needs/allocations for those non-TAMP assets. This issue is addressed in Question #11 of FHWA's "Asset Management Initial Plan Guidance," available on FHWA's Asset Management web page, at <https://www.fhwa.dot.gov/asset/>. In response to this comment, FHWA added information to the Consistency Determination Interim Guidance.

#### *Deviation From the TAMP Under Extenuating Circumstances*

Michigan asked FHWA for clarification or examples of "extenuating circumstances" that would allow a State to deviate from its TAMP investment strategies, pursuant to 23 CFR 515.13(b)(2)(ii). In response to these comments, FHWA revised the Consistency Determination Interim Guidance, to better describe the case-by-case, extenuating circumstances determination and the information that the State DOT should provide to support deviation from the TAMP.

The FHWA may find that a State DOT has implemented its TAMP even if the State DOT has deviated from the TAMP investment strategies (23 CFR 515.13(b)(2)(ii)). To support such finding, the State DOT's deviation from its TAMP investment strategies must be the result of circumstances beyond its reasonable control. If major changes in available funding or program costs are due to natural disasters or third party (non-State) actions, those circumstances likely will qualify.<sup>2</sup> Circumstances caused by State action outside the State DOT, such as major State funding changes or changes in State program priorities due to State legislative or executive leadership action, may qualify as extenuating circumstances if the State DOT shows it was unable to either prevent those changes, or to offset their effects on achievement of the TAMP investment strategies. Changes in plans or priorities produced solely as a result of the transportation planning process would not typically be considered extenuating circumstances due to the State DOT's role in transportation planning and the regulatory requirements that call for integration of

<sup>2</sup> In the asset management final rule preamble (81 FR 73245), FHWA provided the following example of extenuating circumstances: A sudden increase in material prices that has an impact on delivery of the entire program, forcing the State DOT to divert more funds to projects already underway.

the TAMP into the transportation planning process.

If the State believes extenuating circumstances apply, it should provide an explanation of the extenuating circumstances, the impacts, the State DOT's efforts to avoid or offset the changes and impacts, and program changes that will be undertaken to account for the changed conditions. In addition, State DOT should consider updating or amending its TAMPs whenever there is a material impact on the accuracy and validity of the processes, analysis, or investment strategies in the plan. Updates and other amendments may require FHWA review (see 23 CFR 515.13(c)).

#### *Best Available Data*

New Jersey asked whether State DOTs could use adjusted historical data to analyze NHS bridge and pavement conditions. The State DOT must use the best available data (23 CFR 515.7(g)). If changes are made to historic data, the State DOT needs to explain what it has done, and why the State DOT believes that the quality of the historic data is improved by the changes. However, any changes in historical data will not be used to revise reporting submitted pursuant to 23 U.S.C. 150(e) or to change determinations made under 23 U.S.C. 119(e)(7) or 119(f). No change was made to either document based on this comment.

**Authority:** 23 U.S.C. 119; 23 CFR part 515; 49 CFR 1.85.

Issued on: February 14, 2018.

**Brandye L. Hendrickson,**

*Acting Administrator, Federal Highway Administration.*

[FR Doc. 2018-03618 Filed 2-21-18; 8:45 am]

**BILLING CODE 4910-22-P**

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Highway Administration**

[FHWA Docket No. FHWA-2017-0006]

#### **Fixing America's Surface Transportation (FAST) Act; Equal Access for Over-the-Road Buses Guidance**

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

**ACTION:** Notice.

**SUMMARY:** This Notice announces and outlines the final guidance for requirements contained in Section 1411(a) and (b) of the FAST Act regarding the treatment of over-the-road buses (OTRBs).

**DATES:** This guidance is effective February 22, 2018.

**Electronic Access:** This document, the request for comments, and the comments received may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. Electronic submission and retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. Please follow the instructions. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at: <http://www.archives.gov/federalregister> and the Government Publishing Office's website at: <http://www.gpo.gov/fdsys>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cynthia Essenmacher, Federal Tolling Program Manager, Center for Innovative Finance Support, Office of Innovative Program Delivery, Federal Highway Administration, 315 W. Allegan St., Ste. 201, Lansing, MI 48913, (517) 702-1856. For legal questions: Mr. Steven Rochlis, Office of the Chief Counsel, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 366-1395. Office hours are from 8:00 a.m. to 4:30 p.m. E.T., Monday through Friday, except for Federal holidays.

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##### *A. Background*

The FHWA published a **Federal Register** Notice on April 28, 2017, at 82 FR 19784, seeking public comment for the FAST Act OTRB provisions related to high-occupancy vehicle (HOV) facilities and toll highways. In preparing this guidance to assist in the implementation of Section 1411 of the FAST Act, FHWA considered all public comments submitted to the **Federal Register** Notice.

Section 1411(a) and (b) of the FAST Act contained new requirements regarding the treatment of OTRBs that access toll highways and HOV facilities. Specifically, the FAST Act amended 23 U.S.C. 129 and 23 U.S.C. 166 to address equal access to toll or HOV facilities for OTRBs. The FAST Act amendments defined certain key terms but did not define other terms. The FHWA considered how to define the terms that were not defined under Section 1411

(Section C) as well as enumerating the toll facilities subject to the OTRB requirements (Section D), as the OTRB amendment related to toll facilities that received or will receive Federal participation under 23 U.S.C. 129. In addition, FHWA believes that Congress intended that the OTRB equal access provisions be effective beginning on December 4, 2015, the enactment date of the FAST Act, in contrast to the FAST Act effective date of October 1, 2015, as noted further in Sections B and F. Application of the OTRB requirements retroactive to the FAST Act enactment date raised potential constitutional implications associated with the application prior to the enactment date, particularly for those toll facilities operated by private taxpayers under agreement with a public authority that may have assessed different toll rates to OTRBs during this period between October 1, 2015, and December 4, 2015, without notice of the change in law.

For HOV facilities, 23 U.S.C. 166 (b)(3) was amended by the FAST Act, adding subparagraph (C) to grant HOV authorities an exception to allow public transportation vehicles (which FHWA interprets to include all public transportation vehicles, including public transportation buses) that do not meet the minimum occupancy requirements to use HOV lanes, but only if the HOV authority also gives equal access to OTRBs that serve the public. Under this exception, HOV authorities may allow all public transportation vehicles to use HOV lanes, whether they meet the minimum occupancy requirements or not, if they provide equal access to OTRBs serving the public, under the same rates, terms, and conditions as all other public transportation vehicles.

Additionally, 23 U.S.C. 166(b)(4)(C) was amended by the FAST Act, adding subparagraph (iii), to grant HOV authorities the alternative to toll vehicles not meeting the minimum occupancy requirements in HOV lanes. In that case, HOV authorities are required to provide access to OTRBs that serve the public under the same rates, terms, and conditions as public transportation buses (which FHWA interprets to exclude other types of public transportation vehicles, which may be treated differently by the HOV authority). Similarly, on toll facilities subject to 23 U.S.C. 129, the FAST Act amended 23 U.S.C. 129(a) by adding paragraph (9) to also require that OTRBs that serve the public be provided access to the toll facility under the same rates, terms, and conditions as public transportation buses.