

g.4. Glass or glass lined (including vitrified or enameled coatings);

g.5. Tantalum or tantalum alloys;

g.6. Titanium or titanium alloys;

g.7. Zirconium or zirconium alloys; or

g.8. Niobium (columbium) or niobium alloys.

h. Multi-walled piping incorporating a leak detection port, in which all surfaces that come in direct contact with the chemical(s) being processed or contained are made from any of the following materials:

h.1. Alloys with more than 25% nickel and 20% chromium by weight;

h.2. Fluoropolymers;

h.3. Glass (including vitrified or enameled coatings or glass lining);

h.4. Graphite or carbon-graphite;

h.5. Nickel or alloys with more than 40% nickel by weight;

h.6. Tantalum or tantalum alloys;

h.7. Titanium or titanium alloys;

h.8. Zirconium or zirconium alloys; or

h.9. Niobium (columbium) or niobium alloys.

i. Multiple-seal and seal-less pumps with manufacturer's specified maximum flow-rate greater than 0.6 m³/hour, or vacuum pumps with manufacturer's specified maximum flow-rate greater than 5 m³/hour (under standard temperature (273 K (0 °C)) and pressure (101.3 kPa) conditions), and casings (pump bodies), preformed casing liners, impellers, rotors or jet pump nozzles designed for such pumps, in which all surfaces that come into direct contact with the chemical(s) being processed are made from any of the of the following materials:

i.1. Alloys with more than 25% nickel and 20% chromium by weight;

i.2. Ceramics;

i.3. Ferrosilicon;

i.4. Fluoropolymers;

i.5. Glass (including vitrified or enameled coatings or glass lining);

i.6. Graphite or carbon-graphite;

i.7. Nickel or alloys with more than 40% nickel by weight;

i.8. Tantalum or tantalum alloys;

i.9. Titanium or titanium alloys;

i.10. Zirconium or zirconium alloys; or

i.11. Niobium (columbium) or niobium alloys.

j. Incinerators designed to destroy chemical warfare agents, chemical weapons precursors controlled by 1C350, or chemical munitions having specially designed waste supply systems, special handling facilities and an average combustion chamber temperature greater than 1000 °C in which all surfaces in the waste supply system that come into direct contact with the waste products are made from or lined with any of the following materials:

j.1. Alloys with more than 25% nickel and 20% chromium by weight;

j.2. Ceramics; or

j.3. Nickel or alloys with more than 40% nickel by weight.

Technical Note: Carbon-graphite is a composition consisting primarily of graphite and amorphous carbon, in which the graphite is 8 percent or more by weight of the composition.

Dated: November 16, 2006.

Christopher A. Padilla,

Assistant Secretary for Export Administration.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 634

[FHWA Docket No. FHWA-2005-23200]

RIN 2125-AF11

Worker Visibility

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: Pursuant to Section 1402 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), this final rule establishes a policy for the use of high-visibility safety apparel. The FHWA establishes a new Part in title 23, Code of Federal Regulations (CFR) that requires the use of high-visibility safety apparel and provides guidance on its application. This rulemaking applies only to workers who are working within the rights-of-way of Federal-aid highways. The FHWA is taking this action to decrease the likelihood of fatalities or injuries to workers on foot who are exposed either to traffic (vehicles using the highway for purposes of travel) or to construction vehicles or equipment while working within the rights-of-way of Federal-aid highways.

DATES: *Effective Date:* This final rule is effective November 24, 2008. The incorporation by reference of the publication listed in this regulation is approved by the Director of the Office of the Federal Register as of November 24, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Hari Kalla, Office of Transportation Operations, (202) 366-5915; or Mr. Raymond W. Cuprill, Office of the Chief Counsel, (202) 366-0791, U.S. Department of Transportation, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

This document, the notice of proposed rulemaking (NPRM), and all

comments received may be viewed online through the Document Management System (DMS) at <http://dms.dot.gov>. The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

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

Background

On April 24, 2006, at 71 FR 20925, the FHWA published a NPRM proposing to establish a policy for the use of high-visibility safety apparel for workers who are working within the Federal-aid highway rights-of-way. This NPRM proposed regulations implementing the requirements of Section 1402 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59; August 10, 2005), which directed the Secretary of Transportation to, within one year, issue regulations to decrease the likelihood of worker injury and maintain the free flow of vehicular traffic by requiring workers whose duties place them on or in close proximity to a Federal-aid highway to wear high-visibility safety apparel. The comment period for the NPRM closed on June 23, 2006.

There has been an increase in the amount of maintenance and reconstruction of the nation's highways that is being accomplished in stages while traffic continues to use a portion of the street or highway for purposes of travel. This has resulted in an increase in the exposure of workers on foot to high-speed traffic and a corresponding increase in the risk of injury or death for highway workers.

High visibility is one of the most prominent needs for workers who must perform tasks near moving vehicles or equipment. The need to be seen by those who drive or operate vehicles or equipment is recognized as a critical issue for worker safety. The sooner a worker in or near the path of travel is seen, the more time the operator has to avoid an incident. The FHWA recognized this fact and included language in the 2000 Edition of the Manual on Uniform Traffic Control Devices (MUTCD)¹ to address this issue. This text in the 2000 MUTCD led

¹ Manual on Uniform Traffic Control Devices (MUTCD) is recognized as the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel. It is available at <http://www.mutcd.fhwa.dot.gov>.

some agencies to adopt policies and specifications requiring workers to wear high-visibility vests or shirts on their highway projects. The American National Standards Institute (ANSI) also released ANSI 107-1999,² a standard for high visibility garments.

The FHWA recognized the need for a more specific recommendation and included language to that effect in the 2003 Edition of the MUTCD. As a result of the text in the 2003 MUTCD, many agencies have revised their policies to require their employees to wear ANSI Class 2 safety apparel at all times and they are revising their specifications to require contractors' employees to wear compliant safety apparel also. Although the text was made more specific in the 2003 MUTCD, it was still a recommendation rather than a requirement and some agencies have, therefore, not incorporated the use of high-visibility safety apparel into their policies and contract documents.

Summary of Comments

The FHWA received 117 letters submitted to the docket, containing over 300 individual comments. We received comments from State and local police and sheriffs departments, State Departments of Transportation (DOTs), city and county government agencies, consulting firms, private industry, associations, other organizations, and individual private citizens. The FHWA has reviewed and analyzed all the comments received. The significant comments and summaries of the FHWA's analyses and determinations are discussed below. General comments are discussed first, followed by discussion of significant comments and adopted changes in each of the individual sections of Part 634.

Discussion of General Comments

The FHWA received many comments in agreement with the proposed rule to improve highway worker safety and the addition of Part 634 to title 23, CFR. The FHWA received positive comments from the Iowa, Missouri, Nebraska, Ohio, West Virginia, and Wisconsin State Departments of Transportation (DOTs), the legal counsel of the Western State DOTs (representing ID, MT, ND, SD, and WY DOTs), the City of Thornton, Colorado, and the Lake County, Illinois DOT. The American Association of State Highway Transportation Officials (AASHTO), the American Traffic Safety Services

Association (ATSSA), the Associated General Contractors of America, the International Safety Equipment Association (ISEA), the Laborers' Health and Safety Fund of North America, the International Union of Police Associations AFL-CIO, the Kansas Highway Patrol, the Henderson, North Carolina Police Department, the Southern Company (representing Alabama, Georgia, Gulf, and Mississippi electric utility companies), the Advocates for Highway and Auto Safety, the Alabama Struck-By Alliance, two sign manufacturers, and three private citizens also provided positive comments regarding the intent of the proposed rulemaking. The FHWA received one comment from the Associated General Contractors, New York State Chapter, strongly opposed to the proposed rulemaking, stating that it is overly broad.

Enforcing Compliance With the Rule

The Iowa, Minnesota, Virginia, West Virginia, and Wyoming DOTs, the legal counsel of the Western State DOTs, and AASHTO all provided comments opposed to the discussion in the NRPM regarding the withholding of payments to States of Federal funds on Federal-aid highway projects in order to achieve compliance with 23 CFR Part 634.

The discussion of FHWA's authority to withhold funds in the NPRM was intended to describe the agency's lack of direct authority to enforce high-visibility garment requirements on all workers on or in close proximity to a Federal-aid highway and to preserve the Occupational Safety and Health Administration's (OSHA's) authority over such workers. It was not meant to signal the desire of the FHWA to impose funding sanctions in all instances of possible non-compliance. Therefore, it is not the FHWA's intent to impose funding sanctions on Federal-aid recipients as a result of non-compliance with the high-visibility garment requirements by workers not subject to those recipients' control or jurisdiction. Also, the rule is not an unfunded mandate; it is a requirement or standard applicable to highways that receive Federal-aid, no different from other requirements or standards applicable to these highways.

A summary of the significant comments for each section of 23 CFR Part 634 is included in the following discussion.

Discussion of Comments Regarding Section 634.1 Purpose

Enhancing Worker Visibility Beyond the Use of High Visibility Clothing

The Virginia DOT commented that the proposed rule leaves out a key part of the Section 1402 SAFETEA-LU directive by leaving out language that addresses the requirement to " * * * maintain the free flow of vehicular traffic." The Virginia DOT believes that the wearing of high-visibility apparel does not prevent vehicles or equipment from striking workers in the roadway, and that other measures, such as engineering controls, administrative controls, and/or work practices provide greater opportunity for hazard mitigation and the free flow of traffic, and should be implemented prior to using protective clothing.

The FHWA agrees that engineering and work practice controls are important, and these are covered elsewhere in 23 CFR Part 630, Subpart J. Also, the FHWA is working on a separate NPRM that proposes to revise 23 CFR Part 630 in response to section 1110 of SAFETEA-LU. This proposed rule would address the use of law enforcement, positive protection measures, and the installation and maintenance of temporary traffic control devices. These measures should also improve worker safety during construction and maintenance operations. High visibility is one of the most prominent needs for workers who must perform tasks near moving vehicles or equipment. The need to be seen by those who drive or operate vehicles or equipment is recognized as a critical issue for worker safety. Since workers must devote their attention to completing their assigned tasks and might not completely focus on the hazardous surroundings in which they are working, it is imperative that the approaching motorist or equipment operator be able to see and recognize the worker.

The Laborers' Health and Safety Fund of North America suggested that worker visibility can also be enhanced by other means beyond high-visibility garments, such as proper illumination during night work, the use of back-up video cameras/radar systems on construction vehicles, internal traffic control plans within work zones, and spotters to improve the visibility of construction workers in work zones who could be backed over by construction vehicles.

The FHWA agrees that there are other methods that are good practice; however, it is appropriate to limit the scope of this rule to enhancing worker visibility by requiring use of high-

² ANSI 107-1999 is the nationally recognized standard for high-visibility garments developed in conjunction with the International Safety Equipment Association. Copies may be obtained at: <http://www.safetyequipment.org/hivisstd.htm>.

visibility garments. This rule applies to all workers (as defined in Section 634.2) in all situations within the public right-of-way and is not limited to work zone applications.

Application to All Highways

The FHWA received several comments suggesting the requirement be extended to all workers on all roadways. The State DOTs of Missouri, Ohio, and Wisconsin, the Lake County, Illinois DOT, the National Committee on Uniform Traffic Control Devices (NCUTCD), ATSSA, ISEA, the International Union of Police Associations AFL-CIO, the Alabama Struck-By-Alliance, and three equipment manufacturers suggested that the language of this rule be added to the MUTCD in order to maintain consistency of the use of high-visibility apparel on all roadways, and to have broader access to the information.

The Wyoming DOT and the legal counsel of the Western State DOTs agreed with the proposed language that limits the rule to Federal-aid highways. The Iowa DOT suggested that the language of the rule only be included in the MUTCD, and not as a new Part 634 of 23 Title CFR.

This rule is merely implementing Section 1402 of SAFETEA-LU, which directed the Secretary of Transportation to issue regulations to decrease the likelihood of worker injury and maintain the free flow of vehicular traffic by requiring workers whose duties placed them on or in close proximity to a Federal-aid highway to wear high-visibility apparel. A revision to the MUTCD would be the appropriate process for extending this requirement to all roads. This would require a separate rulemaking effort. The FHWA will consider these comments as part of the process for proposing amendments to the next edition of the MUTCD.

Discussion of Comments Regarding Section 634.2 Definitions

Definition of "Close Proximity"

The Iowa DOT opposed including the entire Federal-aid highway right-of-way in the rule. It believes that some workers are at the extreme edges of the right-of-way when performing maintenance duties and are not in close proximity to moving traffic or construction or maintenance equipment, and that their duties could be more hazardous when wearing Class 2 apparel, since it might snag on structures or equipment.

The FHWA reinforces that the definition of "highway" in the MUTCD includes the entire area within the right-of-way. Therefore, for the purposes of

Part 634, the FHWA interprets the rule to apply to all workers who are within the public right-of-way of a Federal-aid highway, since they all deserve the same safety considerations. The rule does allow agencies the flexibility to add tear-away and/or other garment design features as deemed appropriate to address specific work environments. See additional discussion under Definition of "high-visibility safety apparel."

Definition of "Conspicuity"

Although originally included in the NPRM, the FHWA removes the definition of the word "conspicuity" in the language of 23 CFR 634, since the definition is not necessary as part of the rule. The word "conspicuity" as used in the definition of "high-visibility clothing" is no different than its generally accepted definition, which can be found in any dictionary.

Definition of "High-Visibility Safety Apparel"

The FHWA received 28 comments regarding the definition of "high-visibility safety apparel." The legal counsel of the Western State DOTs as well as ISEA, the Alabama Struck-By-Alliance, the Advocates for Highway and Auto Safety, and three equipment manufacturers agree that high-visibility garments that meet the ANSI/ISEA 107-2004³ Class 2 requirements provide the intended, appropriate visibility for highway workers.

Allowing Flexibility in Choice of Garment Type

The Iowa DOT opposed the definition of "high-visibility safety apparel," stating that State DOTs should have the flexibility to make their own determination of the specific work operations that require the wearing of ANSI Class 2 apparel. In addition, the Iowa DOT commented that the State DOTs should be allowed flexibility to make their own determination of the specification requirements.

The Associated General Contractors of America and the Associated General Contractors, New York State Chapter commented that the FHWA should allow more flexibility in the choice of garments and allow garments rated as less than Class 2. These commenters indicate that Class 2 garments have not been shown to increase worker visibility during the daytime, and the excessive heat conditions to which workers are

often exposed warrant the use of lighter-weight Class 1 garments.

The 2003 MUTCD requires all flaggers and recommends all other workers in work zones to wear Class 2 during daytime operations. The FHWA's discussions with State DOTs indicate that the majority of States, including southern States, require their workers to wear ANSI 107-1999 Class 2 or Class 3 high-visibility garments. The FHWA is not aware of any increase in heat-related illnesses due to Class 2 or Class 3 garments. The FHWA believes that Class 2 or Class 3 high-visibility garments are appropriate for work environments on Federal-aid highways.

The Southern Company, which represents electric utility companies in the south, opposes the proposed rule stating that the type of high-visibility garments that should be worn should depend upon the situation in which the work is being performed, because the time of day that the work is being performed, the exposure to various highway speeds, and the periods of poor visibility resulting from weather and nighttime work are quite variable. The company chose to adopt and use the ANSI 107-1999 Class 3 garments based upon the reference to the ANSI 107-1999 standard in the 2003 MUTCD.

The FHWA believes that garments meeting the requirements set forth in the ANSI 107-1999 Class 3 equal or exceed the requirements for the ANSI 107-2004 Class 2 garment, and therefore meet the minimum requirements contained in this rulemaking.

The Southern Company also requested that the FHWA recommend that the ANSI/ISEA standards committee provide the electric utility industry a forum to express its unique needs to protect utility personnel along roadways while still incorporating high-visibility into garments already required by other standards or to request consideration of other alternatives. This request is beyond the scope of this rulemaking.

Additionally, the Associated General Contractors (AGC) of America commented that there is an OSHA regulatory requirement for tear-away construction of vests so that workers do not get hung up on snags if they must jump clear of dangerous situations. Since most Class 2 vests do not meet the tear-away requirement, the AGC suggests there should be some flexibility to use Class 1 garments instead.

The FHWA uses the Class 2 garment as a minimum based on the conditions where they will be worn. The ANSI 107-2004 Class 2 standard does not prohibit a tear-away feature on the garment. The standard specifies the

³ "American National Standard for High-Visibility Safety Apparel and Headwear", published by the International Safety Equipment Association, 1901 N. Moore Street, Arlington, VA 22209 (<http://www.safetyequipment.org>).

amount of background and retro-reflective material required for each class of garment, but leaves other design features open for agencies to specify to meet special needs. The Illinois DOT, for example, has a specification for a tear-away ANSI 107–2004 Class 2 garment that uses Velcro fasteners on the shoulder and side seams to enable the wearer to quickly remove the garment if it becomes tangled or snagged on equipment.

The International Union of Police Associations AFL–CIO stated that the ANSI Class 2 vest is not designed for the specific needs of law enforcement personnel, and that the vest generally interferes with police officers' unique needs to access articles on their duty belt while on duty.

The FHWA recognizes this concern and has modified the final rule to include an exemption for law enforcement officers engaged in law enforcement activities, such as traffic stops and pursuit and apprehension of suspects. See additional discussion under Definition of "Worker"—Law Enforcement.

The New York State DOT (NYSDOT) opposes the use of Class 3 apparel and is a strong proponent of Class 2 apparel for night work and for those who perform traffic control. The NYSDOT states that it is not practical to wear Class 3 apparel at all times, especially near specialized equipment and during extreme hot weather conditions where workers are not exposed to traffic or night conditions, and that Class 2 provides very good conspicuity. The NYSDOT suggests that high-visibility apparel be defined as clothing that meets the Performance Class 2 requirements of ANSI 107–2004 colors of yellow-green, orange-red, or red. The NCUTCD also recommended that the language be revised to "all apparel with a minimum of Class 2 risk exposure."

The FHWA reiterates that the final rule requires Class 2 or Class 3 type garments. The requirement in the rule is not limited to only Class 3.

Class 2 Garments With Supplemental Features

The Laborers' Health and Safety Fund of North America agreed with the proposed definition, but felt that the rule should extend to include Class 2 garments supplemented by active illumination.

The FHWA believes that it is appropriate to reference the ANSI standard, since it is currently the only recognized standard for high-visibility garments. There are no performance standards for garments containing active illumination technologies at this time.

The Laborers' Health and Safety Fund of North America also suggested that the FHWA should require that workers wear reflective material on arms, hands, or legs that continually move in order to easily identify them as persons, as opposed to barrels or cones.

The FHWA agrees that added retroreflective material on arms, hands or legs could increase the visibility of workers in some cases and believes the rule provides agencies with the flexibility to use Class 3 garments, or additional reflective bands for arms and legs.

Class 3 Garments

The Caltrans Safety in Work Zones Task Force suggested that ANSI Class 3 safety vests and apparel should be required for all employees at all times working in the dynamic transportation environment.

The FHWA believes that Class 2 or Class 3 high-visibility garments are appropriate for work environments on Federal-aid highways. These are minimum requirements and do not prohibit agencies from adopting more stringent requirements.

Impending ANSI/ISEA Standard for a Public Safety Vest

The National Traffic Incident Management Coalition, the Florida Highway Patrol, and the International Safety Equipment Association (ISEA) strongly recommend that the policy recognize the impending ANSI/ISEA standard for a Public Safety Vest (ANSI 107–200x). The proposed Public Safety Vest standard, which is currently open for public comment, maintains a similar amount of visible material prescribed by the ANSI 107–2004 Class 2, but allows for specific public safety responder needs and will help facilitate the procurement process for State and local agencies.

The FHWA appreciates the on-going development of the ANSI/ISEA Standard for a Public Safety Vest; however, a proposed standard cannot be referenced in this rulemaking. However, the FHWA might consider revising this rule once these standards go into effect.

Enhancements to Garments and Color Choice

The City of Thornton, Colorado suggested that several enhancements be included in the definition of "high-visibility safety apparel" that include placing identification panels and different color-coded reflective stripes on the high-visibility apparel to help identify the wearer's agency, especially at incident management scenes where multiple agencies respond.

The FHWA reiterates that this rule is to improve worker visibility. The addition of identification panels does not have an impact on worker visibility. Furthermore, agencies have flexibility to add reflective identification panels on Class 2 or Class 3 high-visibility garments.

An equipment manufacturer suggested that the color "lime green" be used for all safety apparel.

ANSI Standard 107–2004 for Class 2 or Class 3 permits lime green, orange, or a combination of these two colors. Agencies have flexibility to specify either of these colors or a combination.

Definition of "Workers"

The FHWA received many comments regarding the definition of "workers," including requests that certain classes of individuals be included or excluded in the definition.

The Advocates for Highway and Auto Safety (AHAS) generally agree with the definition; however, it also recommended that the definition be expanded to include a serial listing of examples of vulnerable workers within highway rights-of-way in order to reduce doubts or remove ambiguity concerning the classes of individuals who are required to wear high-visibility apparel. The AHAS suggests adding vehicle service responders such as tow truck drivers or other roadside vehicle service responders, media representatives when covering news events or similar actions within highway rights-of-way, military personnel when on foot, and commercial drivers on foot within the right-of-way who are with disabled trucks or motor coaches.

The FHWA believes that the term "responders to incidents" is inclusive of a majority of the groups identified in this comment, including media representatives.

The Ohio DOT suggests that the definition of "workers" be refined, since there are various jobs that workers might have within the right-of-way, such as working with wood chippers or other equipment with moving parts, where a loose garment such as a safety vest could pose a potential hazard.

The FHWA believes the definition of workers includes all workers whose duties place them within the right-of-way. The high-visibility garments can be fitted properly and be designed with tear-away features to minimize the risk of becoming entangled in equipment. See previous discussion under the heading "*Allowing Flexibility in Choice of Garment Type*"

Volunteers Working Within the Right-of-Way of Federal-Aid Highways

The Virginia DOT opposes the definition of "worker" encompassing both personnel being paid for duties as well as personnel volunteering for duties along the highway, such as Adopt-A-Highway volunteers picking up litter. Extending the definition to include volunteers would significantly increase the cost of safety vests that the Virginia DOT supplies to volunteers.

The FHWA reiterates that the rule applies to all workers, whether paid or volunteer, who are within the rights-of-way of Federal-aid highways. The Adopt-A-Highway volunteers are exposed to traffic while doing the cleanup duties within the right-of-way and should be afforded the same measure of safety as other workers. These workers should already have high visibility garments, therefore, compliance with this rule would require upgrading of the existing garments. The two-year compliance period has been provided to minimize the financial impacts to the agencies. Additionally, States and local agencies may use funding available under Section 402 of Chapter 4 of Title 23, the State and Community Highway Safety Grant Program, to purchase or replace high-visibility garments for worker safety when this purchase is part of an eligible Section 402 highway safety project included in the State's approved highway plan.

Scheduled Workers

The legal counsel for the Western State DOTs recommended specific wording to change the definition of "workers" to focus the rule on those who use the highway right-of-way on a planned and scheduled basis, not on an erratic basis. The legal counsel's opinion is that this would alleviate some of the concerns expressed by the law enforcement community, and would be consistent with Section 6D.03 of the MUTCD.

The FHWA believes that the rule should also encompass those workers whose duties cannot be scheduled, such as responders to incidents. High visibility is one of the most prominent safety needs for workers who must perform tasks near moving vehicles or equipment. The sooner a worker in or near the path of travel is seen, the more time the operator has to avoid an incident.

Postal Carriers and Delivery Truck Drivers

The National Traffic Incident Management Coalition and a private

citizen opposed the definition of "worker," stating that it would have the unintended consequence of applying the rule to persons who are not intended to be covered, such as postal letter carriers, delivery truck drivers, etc. They suggested specific language to reword the definition, including deleting the last phrase of the definition, "any other personnel whose duties put them on Federal-aid highway right-of-way," and substituting "such as" for "including."

The FHWA agrees with these editorial changes, and revises the text in the final rule to specify more clearly the types of workers that are covered by the definition.

Government Employees and Contractors

The Nebraska Department of Roads supports the rule for their own employees and contractors; however, it opposes extending the rule to those workers not under the Department's direct authority, such as utility crews, responders to incidents, and law enforcement personnel.

The FHWA believes that all workers within the public right-of-way of Federal-aid highways deserve the same safety considerations. Additionally, Section 1402 of SAFETEA-LU, directed the Secretary of Transportation to issue regulations requiring workers whose duties place them on or in proximity to a Federal-aid highway to wear high-visibility apparel. The SAFETEA-LU provision does not distinguish between State DOT workers or utility crews or law enforcement officers.

Surveyors

The California DOT commented that retroreflective material used near survey prisms as part of Electronic Distance Meter (EDM) technology can result in erroneous measurements, and therefore increase the time required for surveyors to perform their work while exposed to traffic conditions. As a result, the California DOT suggests adding language to the rule to exempt surveyors from wearing retroreflective material during daylight hours that causes interference with survey instruments, otherwise surveyors must comply with the high-visibility safety apparel specifications.

Surveying activities often occur well in advance of other work zone activities. The surveyors are often on or near the roadway without the benefit of extensive temporary traffic control devices. They will normally use one advance warning sign and strobe lights on their vehicle to alert approaching vehicles of their presence. Therefore, the FHWA believes that surveyors

should be subjected to the same regulations as other workers within the public right-of-way of Federal-aid highways. The FHWA recognizes that the retroreflective material on high-visibility garments, in some cases, might cause operational difficulty. The FHWA believes, however, that surveying procedures can be modified that will minimize the chance of the reflective stripe on the garment introducing errors in the measurements taken with these instruments.

Responders to Incidents

The Lake County, Illinois DOT, the Blue Township, Kansas Fire-Rescue, and a fire equipment company all supported including first responders, such as emergency medical services (EMS) and fire department personnel in the definition of "workers."

The Iowa DOT opposed this inclusive definition, stating that the requirement to wear an additional layer of apparel over their existing apparel might be hazardous to some professionals, such as fire fighters. The Missouri and Wisconsin DOTs also opposed this inclusive definition, stating that the policy should not be mandatory for incident responders, and that there might be some justifiable reasons as to why some entities do not wear high-visibility apparel. Similarly, the Virginia DOT opposed the definition, since it interprets the policy to encompass both personnel being paid for duties as well as personnel volunteering for duties along the roadway, such as a rescue volunteer.

AASHTO suggested adding flexibility to the rule to encourage EMS personnel to wear high-visibility clothing when in work zones and in proximity to construction vehicles or equipment, but not mandate it for all occasions whenever they are outside of their vehicle.

The FHWA believes that all workers within the public right-of-way of Federal-aid highways deserve the same safety considerations. High visibility is one of the most prominent needs for workers who must perform their tasks near moving vehicles or equipment. The need to be seen by those who drive or operate vehicles or equipment is recognized as a critical issue for worker safety. Workers, including responders to incidents, must devote their attention to completing their assigned tasks and might not completely focus on the hazardous surroundings where they are working. It is imperative that the approaching motorist or equipment operator be able to see and recognize the worker. The sooner a worker in or near

the path of travel is seen, the more time the operator has to avoid an accident.

The ISEA is in the final stages of publishing a new standard that establishes performance criteria for high-visibility vests for the public safety sector. Accordingly, the ISEA requests that the FHWA consider permitting the use of garments that meet an equivalent standard to ANSI/ISEA 107–2004 for workers in the fire service only while working on Federal-aid highways.

An equipment manufacturer opposes the ruling, stating that there are some Class 1 garments that would be more compatible with the occupational environment faced by some emergency responders than the Class 2 or Class 3 apparel mandated in the proposed rule. In addition, the equipment manufacturer suggests that due to the competing hazards that exist for workers, such as heat and flame, that the FHWA consider incorporating worker categories, or at a minimum, exempt fire services responders, and instead encourage best practices in the use of high-visibility apparel in emergency situations in accordance with hazard assessments or specific environments.

The FHWA acknowledges that the incident response community has been working with the ANSI staff to develop a garment that will meet both the visibility requirements and allow access to the necessary equipment carried by incident responders. The ANSI/ISEA Standard for Public Safety Vest (ANSI 207–200X) is under development at this time. Therefore this impending standard cannot be referenced in this rule. However, the FHWA might consider revising this rule once these standards go into effect. Additionally, the ANSI 107–2004 standard specifies the amount of background and retroreflective material required for each class of garment, but leaves other design features open for agencies to specify to meet special needs. If an agency determines that the material must be fire resistant, it can include a provision in the specification for the garments that they purchase.

Law Enforcement

The FHWA received 175 comments to the docket regarding the implications of this rule on law enforcement personnel. The Advocates for Highway and Auto Safety, the Northern Kentucky University Police, and an equipment manufacturer supported the inclusion of law enforcement personnel who are working on Federal-aid highways as workers who should wear high-visibility apparel. The Advocates for Highway and Auto Safety's comments state that

law enforcement personnel who are involved in situations involving criminal activity should be included in the policy, since claims that high-visibility garments would cause them to be a greater target are not documented, and that law enforcement should have the same protection as other professions when working adjacent to a highway where the risk of being struck by a vehicle is high.

Overarching comments from State and local police, national police organizations, and State DOTs indicated a strong need for recognizing the many roles that law enforcement personnel serve when working on highways. In particular, the commenters were concerned about law enforcement officers wearing high-visibility clothing while performing duties (such as routine traffic stops or searches and manhunts) that often place them in an adversarial or confrontational role, such as apprehending suspects, stolen vehicles, illicit drugs, or a vehicle occupant who turns out to be wanted for a serious felony and is armed and dangerous. As a result, many of these organizations commented that the rulemaking needed to allow more flexibility for law enforcement to determine, based on their own standard operating procedures, when it was appropriate to use high-visibility clothing. Their primary concern was that a highly-reflective garment would make them a better target if a gunfight develops, especially in nighttime conditions.

The FHWA agrees with the law enforcement comments' assertion that the role of police differs significantly from that of other persons whose duties require them to work in and around the highway. Therefore, the FHWA modifies the definition of worker to limit the high-visibility garment requirement for law enforcement personnel to those duties that involve directing traffic, investigating crashes, and handling lane closures, obstructed roadways, and disasters within the right-of-way of a Federal-aid highway.

Other Governmental Departments

The City of Thornton, Colorado suggested that the definition of "worker" be expanded to include the Department of Homeland Security, since responders that are part of the National Incident Management System and the Incident Command System are called into duty during certain incidents, and should have the same visibility on Federal-aid highways.

The FHWA believes that this rule applies to all workers whose duties place them within the right-of-way,

including responders to incidents and disasters within the right-of-way of a Federal-aid highway.

Temporary Traffic Control Zones

The NCUTCD agreed with the definition of "workers" that includes all persons at a traffic incident scene or within a traffic control zone, including, but not limited to, police, fire, EMS, utility, media, and tow operators exposed to risks of moving roadway traffic or construction equipment.

Virginia DOT expressed confusion with the proposed rule, stating there was inconsistency in the proposed rule because it was unclear as to whether it applied only to workers in temporary traffic control zones or to all workers who are outside of their vehicle on a Federal-aid highway. The Virginia DOT believes that the definition of the word "workers," should only apply to workers within temporary traffic control zones.

The FHWA reiterates that the purpose of this rule is to improve the visibility of all workers to motorists using the facility, so the garments should be worn any time the workers could be exposed to traffic. The FHWA revises the language in the final rule to clarify that the requirement applies to all workers within the right-of-way on Federal-aid highways and is not limited to temporary traffic control areas.

Discussion of Comments Regarding Section 634.3 Rule

Financial Impact

Although one private citizen agreed that wearing high-visibility safety apparel is an inexpensive and proven technique to aid in the protection of road workers, the Associated General Contractors (New York State Chapter), the West Virginia DOT, the Tennessee Highway Patrol, and the New York State Police all commented that the financial impact of the rulemaking would be more expensive than outlined in the NPRM.

States and local agencies may use funding available under Section 402 of Chapter 4 of Title 23, the State and Community Highway Safety Grant Program, to purchase or replace high-visibility garments for worker safety when this purchase is part of an eligible Section 402 highway safety project included in the State's approved highway plan.

In order to minimize the financial impacts of this new part, the FHWA establishes an effective date of two years from the date the final rule is published in the **Federal Register**. The two-year compliance period should provide

agencies, incident responders, and contractors sufficient time in most cases to react to the adoption of these new requirements by purchasing garments that comply with the new standard as they replace garments that have already reached the end of their useful service life. The FHWA research into the service life of the high-visibility garments that are currently in use indicates that the useful service life of the vests depends greatly on the type of activities in which the workers are engaged while wearing the garments. The useful life of garments that are worn on a daily basis is approximately six months. Garments that are not worn on a daily basis are expected to have a useful service life of up to three years. The FHWA realizes that there might be some variation in the useful service life of these garments based on the care provided.

Length of Compliance Period

The legal counsel of the Western State DOTs agrees with the compliance date of two years from the date the final rule is published in the **Federal Register**. The legal counsel suggests that the compliance date be included in the text of Part 634. The FHWA agrees and the compliance date is included in the text of Part 634.

Because of the serious nature and number of fatal and non-fatal accidents, ISEA requests that the compliance date not exceed one year from the effective date of the final rule.

The FHWA believes that the two-year compliance period is appropriate to allow all agencies and contractors, including those who have not already upgraded their safety apparel, time to react to the regulation.

FHWA Action

The FHWA adds a new part to the CFR to implement this statutory requirement. The FHWA adds a new part to Title 23, CFR that requires workers whose duties place them on or in close proximity to a Federal-aid highway to wear high-visibility safety apparel rather than to include such a requirement in the MUTCD. The FHWA is also considering whether to propose to include these requirements in the next edition of the MUTCD. Although the MUTCD is incorporated by reference at 23 CFR 655.601(a), it applies to all streets and highways open to the public, which is much broader than the requirement in SAFETEA-LU, which applies only to workers whose duties place them on or in close proximity to Federal-aid highways.

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

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 or significant within the meaning of the U.S. Department of Transportation regulatory policies and procedures. The economic impact of this rulemaking is minimal.

As a result of the text in the 2003 MUTCD, many agencies have revised their policies to require their employees to wear ANSI Class 2 safety apparel at all times when they are working within the Federal-aid highway right-of-way and are revising their specifications to also require contractors' employees to wear compliant safety apparel when working within the right-of-way. In addition, in recognition of its risk management value, many contractors have begun to provide their workers with high-visibility safety apparel and to require its use on their projects, regardless of whether it is required by the contract language.

The FHWA has researched the current practice regarding the use of high-visibility safety apparel in construction and maintenance work zones in 30 States. This research revealed that more than 90 percent (28 out of 30) of these State DOTs have already adopted policies that require highway construction and maintenance workers (including their own employees and contractors' employees) in highway work zones to wear high-visibility safety apparel. Most of these agencies specify the ANSI Class 2 standard and are furnishing them for their own employees. Therefore, a large majority of the State DOTs are already in compliance with the requirements of this regulation.

According to the U.S. Department of Labor, Bureau of Labor Statistics, there are approximately 350,000 workers involved in highway construction activities nationwide at any given time.⁴ The FHWA's research indicates that a large majority (more than 90 percent) of States have already adopted high-visibility garment policies in accordance with the 2003 MUTCD. Therefore, the estimated economic impact for contractors will be the purchase of approximately 35,000 garments at \$25.00⁵ each for a total of \$875,000.

⁴ U.S. Department of Labor Bureau of Labor Bureau Statistics maintains records on the numbers of workers involved in the highway construction industry. The statistics may be viewed at: <http://www/bls.gov>.

⁵ The FHWA researched the price of high-visibility garments with manufacturers. This figure

This cost will be borne across many agencies, and the impact to each agency individually would be minimal. In order to further minimize the financial impacts of this new part, the FHWA establishes a compliance date for Part 634 that is two years from the date the final rule is published in the **Federal Register**.

Each year more than 100 workers are killed and over 20,000 are injured in the highway and street construction industry. The FHWA believes that this rule will help reduce these numbers. Improved visibility of workers within the Federal-aid highway right-of-way would reduce these numbers. The FHWA research into the service life of the high-visibility garments that are currently in use has shown that the useful service life of the vests depends greatly on the type of activities in which the workers are engaged while wearing the garments. The useful service life of garments that are worn on a daily basis is approximately six months. Garments that are not worn on a daily basis are expected to have a useful service life of up to three years. Therefore, the two-year compliance period should provide agencies and contractors sufficient time in most cases to react to the adoption of these new requirements by purchasing garments that comply with the new standard as they replace garments that have already reached the end of their useful service life.

The FHWA believes there will also be a minimal economic impact to the incident responder community, such as law enforcement agencies and fire departments. This regulation requires these agencies to supply their personnel with high-visibility safety apparel for use on Federal-aid highway rights-of-ways. The FHWA sought comments during the public comment period in order to fully assess the magnitude of the economic impact that this new part will have on the incident response and law enforcement communities. The Tennessee Highway Patrol and the New York State Police both commented that the financial impact of the rulemaking would be more expensive than outlined in the NPRM. The majority of comments received from the law enforcement community, including the International Chiefs of Police, indicated that most law enforcement agencies have furnished patrol officers with high-visibility garments and have established policies and procedures for their use.

Therefore, the FHWA believes that the two year compliance period will allow

represents an average cost that an agency or contractor can expect to pay for an ANSI Class 2 garment.

these agencies to, if needed, replace their existing garments to comply with the new standard. Additionally, States and local agencies may use funding available under Section 402 of Chapter 4 of Title 23, the State and Community Highway Safety Grant Program, to purchase high-visibility garments for worker safety when this purchase is part of an eligible Section 402 highway safety project included in the State's approved highway plan.

These changes will not adversely affect, in any material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this final rule on small entities. This action requires all workers to wear high-visibility safety apparel when on the right-of-way of Federal-aid highways. The results of the FHWA's research indicated that more than 90 percent of the States have adopted policies that require the use of high-visibility safety apparel in construction and maintenance (including their own employees and contractors' employees) in highway work zones. Most of these agencies specify the ANSI Class 2 standard and are furnishing them for their own employees. The FHWA believes that many local agencies have also adopted this policy because the FHWA's research indicates that usually local agencies follow States' policies with respect to MUTCD standards and guidance. Also, the rule only applies to Federal-aid highway rights-of-way and the FHWA's research shows that the number of miles of Federal-aid highways that are under the jurisdiction of small entities makes up only approximately 25 percent of the total number of miles on the Federal-aid highway system.⁶

Therefore, the FHWA has determined that the rule will not have a significant economic impact on a substantial number of small entities.

The majority of comments received from the law enforcement community, including the International Chiefs of Police, indicated that most law

enforcement agencies have furnished patrol officers with high-visibility garments and have established policies and procedures for their use. Therefore, the FHWA believes that the 2-year compliance period will allow these agencies to, if needed, replace their existing garments to comply with the new standard. Additionally, States and local agencies may use funding available under Section 402 of Chapter 4 of Title 23, the State and Community Highway Safety Grant Program, to purchase high-visibility garments when this purchase is part of an eligible Section 402 highway safety project included in the State's approved highway plan. Therefore, the economic impact to the law enforcement community will be minimal.

Unfunded Mandates Reform Act of 1995

This rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This rule does not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$128.1 million or more in any one-year period to comply with these requirements.

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

Executive Order 13132 (Federalism)

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

promote the safe and efficient use of highways.

Executive Order 13175 (Tribal Consultation)

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

Executive Order 13211 (Energy Effects)

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

Executive Order 12372 (Intergovernmental Review)

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

Paperwork Reduction Act

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

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in Sections 3(a) and 3(b)(2) of

⁶ U.S. Department of Transportation, Federal Highway Administration Highway Statistics. This information is available at: <http://www/fhwa.dot.gov/policy/ohim/hs03>.

Executive Order 12988, Civil Justice Reform, to minimize litigation, to eliminate ambiguity, and to reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This is not an economically significant action and does not concern an environmental risk to health or safety that might disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

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

National Environmental Policy Act

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

Regulation Identification Number

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

List of Subjects in 23 CFR Part 634

Design standards, Highways and roads, Incorporation by reference, Workers, Traffic regulations.

Issued on: November 18, 2006.

J. Richard Capka,

Federal Highway Administrator.

■ In consideration of the foregoing, the FHWA adds part 634 to Title 23, Code of Federal Regulations, as follows:

PART 634—WORKER VISIBILITY

- Sec.
634.1 Purpose.
634.2 Definitions.
634.3 Rule.
634.4 Compliance date.

Authority: 23 U.S.C. 101(a), 109(d), 114(a), 315, and 402(a); Sec. 1402 of Pub. L. 109-59; 23 CFR 1.32; and 49 CFR 1-48(b).

§ 634.1 Purpose.

The purpose of the regulations in this part is to decrease the likelihood of worker fatalities or injuries caused by motor vehicles and construction vehicles and equipment while working within the right-of-way on Federal-aid highways.

§ 634.2 Definitions.

Close proximity means within the highway right-of-way on Federal-aid highways.

High-visibility safety apparel means personal protective safety clothing that is intended to provide conspicuity during both daytime and nighttime usage, and that meets the Performance Class 2 or 3 requirements of the ANSI/ISEA 107-2004 publication entitled "American National Standard for High-Visibility Safety Apparel and Headwear." This publication is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51 and is on file at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. It is available for inspection and copying at the Federal Highway Administration, 400 Seventh Street, SW., Room 4232, Washington, DC, 20590, as provided in 49 CFR Part 7. This publication is available for purchase from the International Safety Equipment Association (ISEA) at 1901 N. Moore Street, Suite 808, Arlington, VA 22209, <http://www.safetysafetyequipment.org>.

Workers means people on foot whose duties place them within the right-of-way of a Federal-aid highway, such as highway construction and maintenance forces, survey crews, utility crews, responders to incidents within the highway right-of-way, and law enforcement personnel when directing traffic, investigating crashes, and handling lane closures, obstructed roadways, and disasters within the right-of-way of a Federal-aid highway.

§ 634.3 Rule.

All workers within the right-of-way of a Federal-aid highway who are exposed either to traffic (vehicles using the highway for purposes of travel) or to construction equipment within the work area shall wear high-visibility safety apparel.

§ 634.4 Compliance date.

States and other agencies shall comply with the provisions of this Part no later than November 24, 2008.

[FR Doc. E6-19910 Filed 11-22-06; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD05-06-106]

RIN 1625-AA00

Safety Zone: Fireworks Display, Motts Channel, Wrightsville Beach, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a 1000 foot safety zone around a fireworks display for the North Carolina Holiday Flotilla occurring on November 25, 2006, on Motts Channel, Wrightsville Beach, NC. This action is intended to restrict vessel traffic on Motts Channel. This safety zone is necessary to protect mariners from the hazards associated with fireworks displays.

DATES: This rule is effective from 6 p.m. to 8 p.m. on November 25, 2006.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket CGD05-06-106 and are available for inspection or copying at the Coast Guard Marine Safety Unit Wilmington, North Carolina between 8 a.m. and 4 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: LTJG Adam Schmid, Port Safety and Security Branch, Coast Guard Marine Safety Unit Wilmington, North Carolina at (910) 772-2217.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. Any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest since immediate action is needed to prevent traffic from transiting the waters in the vicinity of 34 deg-12'-17.0" N 077 deg-48'-18.0" W, the southeastern portion of Spoils Island in Motts