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November 20, 2023

VIA ELECTRONIC SUBMISSION

Hon. Shailen Bhatt
Administrator
Federal Highway Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: Work Zone Safety and Mobility and Temporary Traffic Control Devices (Docket No. FHWA-2022-0017).

Dear Administrator Bhatt:

The Laborers' Health and Safety Fund of North America (LHSFNA) appreciates the opportunity to present the following comments in response to the proposed rule by the Federal Highway Administration titled "Work Zone Safety and Mobility and Temporary Traffic Control Devices." These remarks are on behalf of over 500,000 members of the Laborers' International Union of North America (LIUNA) who are actively engaged in the construction and heavy highway industries.

In its Notice of Proposed Rulemaking (NPRM), the Federal Highway Administration (FHWA) seeks to revise its regulations governing traffic safety and mobility within highway and street work zones. The existing regulations have not undergone substantial updates in over 15 years (last modified in 2004 for Subpart J and 2006 for Subpart K). The LHSFNA acknowledges and supports FHWA's initiative to enhance these rules, prioritizing the safety of workers.

However, the LHSFNA is concerned that FHWA's proposed language is insufficient to protect highway workers and is not in line with Congress' direction to FHWA to "do all within its power to protect workers in highway work zones." Consequently, the LHSFNA strongly advocates for FHWA to further fortify its proposed rules, ensuring a comprehensive approach to guarantee the safety of workers within work zones. The following discussion outlines specific recommendations for strengthening the proposed rules.



Background

The LHSFNA is a joint labor-management fund that is built around the common interests of LIUNA members and their signatory employers. It is dedicated to enhancing jobsite safety and working conditions for LIUNA members. The LHSFNA prioritizes the safety of LIUNA members working in and around work zones as a matter of utmost importance.

According to the United States (U.S.) Bureau of Labor Statistics, roadway construction stands out as one of the most hazardous construction activities. Despite efforts to reduce work zone fatalities and injuries, work zone fatalities have increased significantly over the past decade. Every year, tens of thousands of workers, motorists, vehicle occupants, cyclists and pedestrians suffer injuries or fatalities in roadway work zones. Such incidents not only jeopardize the lives of those involved but also elevate the risks of additional vehicular and worker-related incidents, which also cause roadway congestion and delays.

As highlighted in the NPRM, the unfortunate trend is that incidents on our roadways have been on the rise in recent years. In 2015, 35 percent of all highway worker fatalities at road construction sites resulted from a vehicle striking a worker. By 2021, this alarming figure had increased to 63 percent. Recognizing this escalating concern, the LHSFNA supports the FHWA, a division of the U.S. Department of Transportation (DOT), in its mission to enhance safety and mobility on our roads and within our work zones.

This commitment to creating safer roadways is particularly crucial as work zone activities are expected to increase significantly following the passage of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (Pub. L. 117–58) on November 15, 2021.

Positive Protection Requirements

The LHSFNA advocates for a heightened emphasis on positive protective measures to foster safer interactions between workers and motorists, with the goal of mitigating fatalities, injuries, vehicular incidents and delays. The urgent need to take decisive action is underscored by the latest U.S. DOT statistics, which reported 106,000 work zone-related crashes, including 42,000 injuries and 956 fatalities in 2021 alone. Disturbingly,

over the past decade, fatalities stemming from work zone-related crashes have surged by an alarming 62%.

The LHSFNA fully supports the FHWA's initial NPRM for Subpart K, as published on November 1, 2006, at 71 FR 64173. The proposal states that positive protective measures must be mandated to separate workers from motorized traffic in all work zones conducted under traffic, particularly in areas where workers lack means of escape (e.g., tunnels, bridges, etc.), unless an engineering analysis determines otherwise. The LHSFNA firmly believes that this requirement is crucial and should not be subject to deferral through an engineering study. Allowing individual state DOTs to arbitrarily opt out of such countermeasures based on financial considerations poses a risk to the safety of workers and motorists. The protection of workers and the public must take precedence over financial decisions.

The LHSFNA strongly endorses FHWA's decision to mandate State DOTs to assess the application of positive protection. This requirement is particularly crucial in situations where such devices can significantly enhance safety for both workers and road users. The specified conditions outlined in the 2006 NPRM serve as examples, emphasizing instances where the consideration of positive protection is imperative. This includes scenarios involving added roadside hazards like drop-offs or unfinished bridge decks that will be present overnight or for an extended duration.

The LHSFNA is pleased to note that FHWA has proposed language akin to the initially offered provisions in the 2006 Subpart K NPRM and Moving Ahead for Progress in the 21st Century Act (MAP-21). This proposed language mandates the utilization of positive protective devices in work zones characterized by high anticipated operating speeds, where workers lack viable means of escape, unless an engineering study concludes otherwise. The shift in presumption regarding when an engineering study should be furnished represents a significant stride toward guaranteeing the application of positive protection in hazardous scenarios.

American National Standards Institute (ANSI)/American Society of Safety Professionals (ASSP) A10.47-2021, Work Zone Safety for Roadway Construction Standard

The heightened risks underscore the specific vulnerability of highway workers, a concern acknowledged by Congress through the categorization

of pedestrians, inclusive of workers operating on or along roadways, as Vulnerable Road Users (VRUs) in the BIL. This legislative move amended the Highway Safety Improvement Program to incorporate safeguards for VRUs. The DOT similarly recognizes highway workers as among the most vulnerable in its 2022 VRU Safety Assessment Guidance.

The FHWA urges states and other funding recipients to prioritize safety for VRUs in all federal highway investments and relevant projects.

In pursuit of this objective and in alignment with FHWA's Manual on Uniform Traffic Control Devices for streets and highways, Section 1405 of the MAP-21 and Section 1427 of the Fixing America's Surface Transportation Act, the LHSFNA strongly advocates for FHWA to fortify its rulemaking to meet prevailing industry safety standards. This includes adherence to guidelines like those outlined in ANSI A10.47-2021 Standard, which is a recognized national consensus standard. The standard provides guidance and establishes the minimum standards for employees engaged in construction, utility work and maintenance or repair activities on any area of a roadway.

Specifically, in section **4.4, Positive Protection Measures of the standard**, states:

Positive Protection shall be used (unless determined unnecessary) in a case in which the work zone provides workers no means of escape (e.g., tunnels, bridges, etc.) from external motorized traffic intruding into the work space, or any combination of:

1. Long duration work zones (e.g., two weeks or more) resulting in substantial worker exposure to motorized traffic.
2. Projects with high anticipated operating speeds (e.g., ≥ 45 miles per hour, 72 kilometers per hour) especially when combined with high traffic volumes ($> 20,000$ vehicles per day).
3. Work operations that place workers within one lane-width to travel lanes open to traffic.

Positive Protection shall be considered in any other cases involving:

1. Roadside hazards, such as drop-offs or unfinished bridge decks, that will remain in place overnight or longer.
2. Other circumstances not listed that merit the use of positive protection.

4.4.1 Positive Protection may only be determined unnecessary if (a) there is a written analysis by the project sponsor supporting such a conclusion, and (b) the project is outside an urban area and the average daily traffic load of the applicable road is less than 100 vehicles per hour.

4.4.2 Where Positive Protection has been determined unnecessary, alternative methods shall be used to protect from work area intrusions. The alternative methods shall be implemented before work begins and workers shall be instructed on the methods to be used.

Definition of Positive Protection Devices

The LHSFNA expresses concern regarding the potential adverse effects on worker and motorist safety resulting from the proposed modification to the definition of positive protection devices. The FHWA proposed definition suggests removing the reference to crashworthiness evaluation criteria in the current definition, which is as follows:

Proposed definition: *Positive Protection Devices means devices that contain or redirect vehicles.*

Current definition: *Positive Protection Devices means devices that contain and/or redirect vehicles and meet the crashworthiness evaluation criteria contained in the National Cooperative Highway Research Program (NCHRP) Report 350, Recommended Procedures for the Safety Performance Evaluation of Highway Features, 1993, Transportation Research Board, National Research Council.*

The LHSFNA is apprehensive that state agencies might use this revised definition as a basis for employing positive protection devices that fail to meet crashworthiness criteria for the intended speed/situation. The qualifier "meet crashworthiness evaluation criteria" is crucial as it explicitly

underscores that positive protection devices must undergo crash testing and be suitable for relevant speeds to fulfill crashworthiness criteria.

Furthermore, there is concern that removing the crashworthiness evaluation criteria may prompt agencies to consider using exposure control measures or other traffic control methods that lack physical separation between workers and motorized traffic or fail to meet crashworthiness criteria, instead of recognized positive protection.

The inclusion of the reference to crashworthiness criteria is significant, especially because some states incorporate these regulations into their official guidelines for positive protection devices rather than directly citing NCHRP 350 or the Manual for Assessing Safety Hardware (MASH). The LHSFNA believes that the proposed revision may lead to unnecessary confusion. If the FHWA intends for positive protection devices to adhere to crashworthiness evaluation criteria, as suggested, it should explicitly state this in the definition, potentially updating it to reflect the MASH criteria. Otherwise, eliminating crashworthiness criteria from the definition may imply that positive protection devices are exempt from such requirements or may encompass devices and technologies that do not ensure the separation of workers from motor traffic.

Definition of Mobility

In this NPRM, FHWA proposes removing the phrase "while not compromising the safety of highway workers or road users" from the definition of mobility. The LHSFNA disagrees with this proposed alteration. The LHSFNA asserts that any definition pertaining to the movement of motor vehicles, public transportation modes and VRUs within work zones must have safety as its foundational principle. Often, there is a conflict between worker safety and mobility considerations, and the LHSFNA contends that such a conflict should not exist. Emphasizing that worker safety must always take precedence, the LHSFNA respectfully urges FHWA not to proceed with the proposed change to the current definition.

Conclusion

The LHSFNA appreciates the opportunity to comment on this proposed rule and asks that the DOT/FHWA consider the above modifications. These comments reflect the LHSFNA's commitment to worker safety and offer specific suggestions to enhance the proposed rule. Since the enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) in 2005, which introduced 23 U.S.C. 109(e) and 112(g), Congress has increasingly stressed the necessity of safeguarding highway workers. However, the escalating

count of vehicular incidents, injuries and fatalities underscores the pressing need for more robust regulations, particularly those addressing positive protection. The LHSFNA encourages FHWA to further strengthen its protections of highway workers consistent with current industry safety standards mentioned above. The emphasis on positive protection measures and considerations aligned with recognized national standards demonstrates the organization's dedication to improving safety for everyone in roadway construction work zones.

If you have any questions or would like to discuss this further, please contact Travis Parsons, at tparsons@lhsfna.org.

Respectfully Submitted,

Travis M. Parsons

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Director, Occupational Safety & Health
Laborers' Health & Safety Fund of North America

Sources for data referenced

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