

HIGH-VISIBILITY VEST RULE FINALIZED GOOD NEWS FOR THE FIRE SERVICE COMMUNITY

OFPC is pleased to report that with very little fanfare on June 15, 2009 the Federal Highway Administration (FHWA) published a notice of Final Rule that adopts as final the Interim Final Rule that amends its regulations to address safety concerns raised by the firefighting community regarding high-visibility safety apparel.

Back in November of 2008, there was a lot of confusion about the use of high-visibility vests at roadway incidents due to a new Federal Highway Administration (FHWA) Rule. The new regulation, Rule 634, stated that “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.”

That regulation created a dilemma for fire departments who were truly interested in protecting their personnel. The training classes and material used by the Emergency Responder Safety Institute (ERSI) for years has suggested the use of high-visibility garments for public safety personnel when working around traffic. NFPA 1500, the Firefighter Health and Safety Standard has included a requirement for firefighters to wear safety vests at traffic incidents in the last two most recent editions. NIOSH Line of Duty Death Investigations have also included recommendations for responders to wear highly visible flagger vests when exposed to moving traffic. In the fire service community it was generally understood that the vests were not appropriate personal protective equipment (PPE) for personnel who were actively engaged in firefighting operations because those garments are not designed for exposure to fire, heat flame or hazardous materials. Rule 634, as originally published however did not outline any exemptions for firefighters engaged in direct firefighting operations and that created the dilemma.

A cooperative effort was initiated by ERSI together with several national fire service organizations including the IAFC, NVFC, USFA, and IAFF to petition the FHWA to provide an official exemption for firefighters and other responders from wearing high-visibility vests when directly exposed to fire, flame, heat or hazardous materials. ERSI suggested that FHWA should allow firefighters to wear turnout gear that complies with NFPA standards when fighting fires. The organizations working together did a great job of educating and motivating other fire service groups and personnel to write to the FHWA about the problem and to submit similar comments to the national committee working on revisions for the Manual of Uniform Traffic Control Devices (MUTCD) to head off a similar problem in that document.

Just hours before Rule 634 took effect in November of 2008, the FHWA published a Tentative Interim Rule that provided the necessary exemption for personnel engaged in active firefighting activities. Now, effective as of June 15, 2009 the FHWA has published the Final Rule that permanently adopts the wording in the Interim Rule that addressed the safety concerns raised by the firefighting community regarding high-visibility safety apparel.

The final version of Rule 634.3 states “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. Firefighters or other emergency responders working within the right-of-way of a Federal-aid highway and engaged in emergency operations that directly expose them to flame, fire, heat, and/or hazardous materials may wear retro reflective turn-out gear that is specified and regulated by other organizations, such as the National Fire Protection Association. Firefighters or other emergency responders working within the right-of-way of a Federal-aid highway and engaged in any other types of operations shall wear high-visibility safety apparel.”

Several fire service and emergency organizations have tried to circumvent Rule 634 by stating that if the roadway has been closed by Fire Police, Law Enforcement, or by fire department personnel, the use of the high visibility safety apparel is not needed. The use of high visibility safety vests is two-fold. First, the traffic safety vests are to make the responders more visible to vehicular traffic moving through or around the incident scene. The second use is to make the emergency responder more visible to other emergency apparatus and vehicles moving into or out of the emergency scene. Closing the road to non-emergency vehicular traffic does not make the scene as safe as possible. Fire apparatus, law enforcement vehicles, ambulances and tow vehicles will likely be moving in and around the incident scene during operations. Emergency responders on-the-ground need to be visible to operators of these emergency and necessary vehicles.

The original federal documents related to this Rule and the final rulemaking process can be reviewed here:

<http://tinyurl.com/nwxu3p>

OFPC continues to monitor the revision process for the MUTCD and will keep you informed of any changes that affect emergency responders. We have been told that the goal is to publish that revised document before the end of the calendar year. When it comes to highway incident safety, we've got your Six!



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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 634

[FHWA Docket No. FHWA-2008-0157]

RIN 2125-AF28

Worker Visibility

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA adopts as final an Interim Final Rule that amends its regulations to address safety concerns raised by the firefighting community regarding high-visibility safety apparel. The purpose of adopting the Interim Final Rule as final is to reflect the exemption of firefighters from the requirement to use high-visibility safety apparel, as defined in this rule, when they are exposed to hazardous conditions where the use of such apparel may increase the risk of injury to firefighter personnel.

DATES: *Effective Date:* June 15, 2009. The interim rule became effective November 24, 2008.

FOR FURTHER INFORMATION CONTACT: For technical information: Mr. Hari Kalla, Office of Transportation Operations, (202) 366-5915. For legal information: Mr. Raymond Cuprill, Office of Chief Counsel, (202) 366-0791, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document, the Interim Final Rule, and all comments received may be viewed online through <http://www.regulations.gov>. Electronic submission and retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days each year. 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

The FHWA published an Interim Final Rule on 23 CFR Part 634 on November 21, 2008, at 73 FR 70593. Interested persons were invited to submit comments to FHWA Docket No. FHWA-2008-0157. The Interim Final Rule revised existing regulations to address safety concerns raised by the firefighting community in order to provide an exemption for firefighters actively engaged in emergency operations where they are directly exposed to flame, fire, heat and/or hazardous materials. This rule has been in effect since November 24, 2008.

Summary of Comments

The FHWA received three comments to the docket from private individuals. The first commenter expressed his opinion that a statement contained in the background information of the Interim Rule created confusion and the false impression that a firefighter does not need to comply with the regulation if he is wearing an NFPA 1971 standard compliant garment. He recommended that this language be clarified to ensure the rule is interpreted correctly by all firefighters. The FHWA disagrees with this comment. The background information was included to justify the issuance of the Interim Final Rule due to safety concerns expressed by the firefighting community. However, the language in the Interim Final Rule is accurate and does not require modification.

The second commenter supported the concept of the Interim Final Rule, but also expressed concern about the confusion that has resulted from the existence of several standards for high visibility garments and how they are being referenced in this rulemaking as well as a separate rulemaking in Docket No. FHWA-2007-28977. This rulemaking proposes to revise the 2003 edition of the Manual on Uniform Traffic Control Devices. This comment does not require any response to this docket, but rather it will be considered in the analysis of comments to Docket No. FHWA-2007-28977.

The third commenter expressed the opinion that the Interim Final Rule should not have provided any

exemptions for firefighters under any circumstances. In his opinion, the requirements contained in 23 CFR 634 should, in the interest of safety, apply to all firefighters all the time. Prior to the issuance of this Interim Final Rule, the FHWA was made aware of several competing safety issues that could develop under certain conditions with the high visibility garments that are currently available, such as having the background material either catch fire or melt when exposed directly to fire. The FHWA, therefore, did issue the exemption for firefighters and other emergency workers when they are working under the conditions specifically listed in the Interim Final Rule. This exemption should provide a balance of increasing the visibility of the workers under most conditions, but not create a condition that could endanger them with other hazards.

Conclusion

For the reasons stated above, the FHWA adopts as final the Interim Final Rule published on November 21, 2008, at 73 FR 70593.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT

Regulatory Policies and Procedures

The FHWA has determined that this final rule is not a significant regulatory action within the meaning of Executive Order 12866 and is not significant within the meaning of U.S. Department of Transportation regulatory policies and procedures. The economic impact of this rulemaking will be minimal. The final rule would not adversely affect, in a material way, any sector of the economy. In addition, the final rule would 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 (Pub. L. 96-354, 5 U.S.C. 601-612) the FHWA has evaluated the effects of this action on small entities and has determined that the action would not have a significant economic impact on a substantial number of small

entities. This action does not affect any funding distributed under any of the programs administered by the FHWA. For these reasons, the FHWA certifies that this action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This final rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This rule would 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 (2 U.S.C. 1532).

Executive Order 13132 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has determined that this action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 13211 (Energy Effects)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, dated May 18, 2001. We have determined that it is not a significant energy action under that order since it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects 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), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this rule does not contain collection

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

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this action would not cause any environmental risk to health or safety that might disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this rule under Executive Order 12630, Governmental Actions and Interface with Constitutionally Protected Property Rights. The FHWA does not anticipate that this action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) and has determined that this action would 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, Traffic regulations, Workers.

■ In consideration of the foregoing, and under the authority of 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), the Interim Final Rule amending 23 CFR Part 634 that was published on November 21, 2008 at 73 FR 70593, is adopted as a final rule without change.

Issued on: May 14, 2009.

Jeffrey F. Paniati,

Acting Deputy Federal Highway Administrator.

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