




U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Subject: **ACTION:** November 20, 2018, Penalty Decision
Pursuant to MAP-21 Section 1106(b) and 23 CFR
515.15(b)

Date: July 10, 2018

In Reply
Refer to: HISM-1

From: Peter Stephanos 
Director, Office of Stewardship, Oversight, and
Management

To: Division Administrators

The purpose of this memorandum is to ensure Division Offices are aware of actions needed prior to November 20, 2018, relating to performance management targets for Interstate and Non-Interstate NHS pavement conditions and NHS bridge conditions and development and implementation of transportation asset management plans (TAMPs). The required actions relate to the penalty provision in MAP-21 section 1106(b). Nothing in this memorandum changes the established deadlines for actions required by performance management and asset management statutes and regulations.

Division Offices are encouraged to share and discuss this information with their State DOT.

Background

MAP-21 section 1106(b) established a transition period for the National Highway Performance Program (NHPP). At the end of the transition period, FHWA cannot approve NHPP funds for projects unless a State DOT has established the NHS pavement and bridge condition targets required under 23 U.S.C. 150(d) and has developed and implemented an asset management plan in accordance with 23 U.S.C. 119. The statutory transition period ends on November 20, 2018.¹ However, the statute authorizes FHWA to extend the transition period for a State DOT if FHWA finds the State DOT has made a good faith effort to meet the section 1106(b) requirements. During an extension period, FHWA may continue to approve NHPP funds for projects.

¹ That date is 18 months after the effective date of the 23 U.S.C. 150(c) final rule for NHS pavements and bridges, as provided in 23 CFR 515.15(b).

The FHWA adopted implementing regulations for section 1106(b) that appear in 23 CFR 515.15(b)(2). This memorandum discusses implementation of the penalty provision, including requests for extension of the transition period.

Summary of Section 1106(b) Actions and Key Dates

State DOT Actions and Key Dates

- ***Not later than April 30, 2018:*** Have submitted initial TAMP to FHWA Division Office.
- ***May 20, 2018:*** Have established 23 U.S.C. 150(d) targets for Interstate and non-Interstate NHS pavement conditions and NHS bridge conditions, as well as measures established by 23 CFR 490 subparts E-H.
- ***October 1, 2018:*** Report non-safety targets for the performance period to FHWA in State DOT Baseline Performance Period Report.
- ***Not later than November 1, 2018:*** Request, in writing, an extension of transition period for TAMP, if needed.
- Complete actions needed to comply with section 1106(b) by extension deadline.
- ***Not later than June 30, 2019:*** Submit a State-approved asset management plan meeting all the requirements of 23 U.S.C. 119 and 23 CFR part 515, together with documentation demonstrating implementation of the asset management plan.

FHWA Actions and Key Dates

- ***Not later than 90 days after receipt of State DOT initial TAMP:*** Make certification decision for State DOT TAMP development processes and provide recommendations on TAMP content for the State DOT's consideration as it develops its fully compliant TAMP (due no later than June 30, 2019).
- ***Not later than November 20, 2018:*** If State DOT requests extension of section 1106(b) transition period for its TAMP, the Division Office must decide whether the State DOT made a good faith effort to develop and implement its TAMP. If an extension is granted by the Division Office, determine the appropriate extension period(s) for State DOT compliance with section 1106(b).
- Work with State DOT to help ensure it meets extended TAMP deadline(s).
- ***Not later than August 31, 2019:*** Make first annual TAMP consistency determination.

Section 1106(b) Extension Criteria

Section 1106(b), and the implementing regulation at 23 CFR 515.15(b), allow FHWA to extend the time for State DOTs to comply with the transition provision's requirements. If the State DOT requests an extension, the FHWA Division must decide:

1. whether the State DOT has established its targets for Interstate and non-Interstate NHS pavement conditions and NHS bridge conditions, and has reported them to FHWA;
2. whether the State DOT has met the “good faith effort” requirement with respect to developing and implementing its TAMP; and
3. the appropriate length of the extension, if granted.

Division Offices must make their decisions about extensions based on the circumstances applicable to their respective State DOT. Division Offices must consider both elements of the requirements: that the State DOT has established and reported targets and has made a good faith effort to develop a fully compliant TAMP.

Incomplete Target-Establishment

The FHWA will not grant an extension to the deadline for establishing targets. Division Offices should verify that Interstate and non-Interstate NHS pavement condition and NHS bridge condition targets have been submitted to FHWA using the State DOT Baseline Performance Period Report. The FHWA will not grant any section 1106(b) extension unless this has occurred, regardless of the efforts by the State DOT to establish its TAMP.

TAMP Development and Implementation

With respect to TAMP development and implementation, FHWA recognizes that it may not be feasible for State DOTs to meet section 1106(b) requirements by November 20, 2018. The initial TAMP was due on **April 30, 2018**.² Following that filing deadline, there is a 90-day review period for certification of TAMP development processes. States are required to establish targets by May 20, 2018. As such, State DOTs may not have sufficient time to fully implement the established targets into their TAMPs, develop a complete TAMP, and implement their TAMP investment strategies by November 20, 2018. As a result, many State DOTs may request an extension for the TAMP under section 1106(b)(2).

Division Offices should consider what TAMP activities the State DOT has undertaken, and the reasons the State DOT has not completed development and implementation of its TAMP. As discussed below, FHWA has identified a set of conditions that will automatically qualify a State DOT for a section 1106(b)(2) extension of time. If a State DOT does not meet the criteria for the programmatic determination (see below), the Division Offices should consider the State DOT's overall efforts to develop and implement its TAMP in accordance with the statute and regulations.

Programmatic Extension Determination

The FHWA will use a programmatic approach to address the likelihood that most State DOTs will need an extension for the TAMP under section 1106(b). The FHWA identified a set of conditions that it concluded clearly demonstrate a State has made a good faith effort. If a State DOT meets the conditions listed below, the Division Office

² For details on initial plan requirements, please see “Questions and Answers (Q&As) on Asset Management Initial Plans” available online at https://www.fhwa.dot.gov/asset/guidance/faqs_initial_plans.cfm.

Office will approve an extension. To qualify for the programmatic extension, a State DOT will have:

1. established its Interstate and non-Interstate NHS pavement condition and NHS bridge condition performance targets by May 20, 2018, and have reported these targets to FHWA by October 1, 2018;
2. received FHWA certification for its initial TAMP development processes; and
3. made progress after April 30, 2018, in addressing FHWA comments on the State DOT's initial TAMP, and in developing a complete TAMP for submittal by June 30, 2019.

State DOT Submission

The State DOT should submit its extension request in an email or letter to the Division Office. The State DOT request should specify the reason(s) the extension is needed, and the proposed length of the extension. The Division Office may request additional information from the State DOT, as needed.

The State DOT may submit a request for an extension at any time. However, FHWA will not act on a request until after it has made its initial certification decision on the State DOT's TAMP development processes and the October 1, 2018 deadline for reporting targets has passed. To ensure FHWA has time to make an extension decision before November 20, 2018, State DOTs should submit extension requests not later than November 1, 2018.

Extension Period

Division Offices must document extension decisions in a letter or email sent to the State DOT. The length of time for an extension may vary, depending on the reasons the State DOT gives for needing an extension but may not be later than August 31, 2019. This time period reflects the fact that fully compliant State-approved TAMPs are not due until June 30, 2019, and FHWA's consistency determination of full compliance will be made not later than August 31, 2019.

The FHWA interprets the applicability of the section 1106(b) TAMP provisions to a State DOT to terminate upon the Division Office's issuance of its final 2019 TAMP consistency determination under 23 CFR 515.13(b).

Multiple Extension(s)

The Division Office may grant a State DOT more than one extension, as appropriate. However, granting one extension for the full extension period could avoid the burden associated with granting multiple extensions.