

2003, two percent of its FY 2004 Federal-aid highway apportionment under 23 U.S.C. 104(b)(1), 104(b)(3) and 104(b)(4) shall be withheld. These sections relate to the apportionments for the National Highway System, the Surface Transportation Program and the Interstate System (including resurfacing, restoring, rehabilitating and reconstructing the interstate system). The amount withheld would increase by two percent each year, until it reaches eight percent in FY 2007 and thereafter.

A. Compliance Criteria

In the NPRM, the agencies proposed that the same criteria that had been applied since 1998 to determine whether a State had enacted and made effective a conforming 0.08 BAC law under the Section 163 incentive grant program, be applied also to the Section 163 sanction program. *See* 64 FR 35568. To meet the Section 163 criteria, a conforming 0.08 BAC law must contain the following elements:

1. Any Person

A State must enact and enforce a law that establishes a BAC limit of 0.08 or greater that applies to *all persons*. The law can provide for no exceptions.

2. Blood or Breath Alcohol Concentration (BAC) of 0.08 Percent

A State must set a level of no more than 0.08 percent as the *per se* limit for blood or breath alcohol concentration, thereby making it an offense for any person to have a BAC of 0.08 or greater while operating a motor vehicle.

3. Per Se Law

A State must consider persons who have a BAC of 0.08 percent or greater while operating a motor vehicle in the State to have committed a *per se* offense of driving while intoxicated. In other words, States must establish a 0.08 "*per se*" law, that makes operating a motor vehicle with a BAC of 0.08 percent or above, in and of itself, an offense.

4. Primary Enforcement

A State must enact and enforce a 0.08 BAC law that provides for primary enforcement. Under a primary enforcement law, law enforcement officials have the authority to enforce the law without, for example, the need to show that they had probable cause or had cited the offender for a violation of another offense. Any State with a law that provides for secondary enforcement of its 0.08 BAC provision will not meet the requirements of this part.

5. Both Criminal and ALR Laws

A State must establish a 0.08 BAC *per se* level under its criminal code. In addition, if the State has an administrative license revocation or suspension (ALR) law, the State must establish an 0.08 BAC *per se* level under its *ALR law*, as well.

6. Standard Driving While Intoxicated Offense

The State's 0.08 BAC *per se* law must be deemed to be or be equivalent to the State's standard driving while intoxicated offense; that is, the State's non-BAC *per se* driving while intoxicated offense in the State.

A more detailed discussion of the six elements described above is contained in the rulemaking for the incentive grant program. *See* 64 FR at 46883–84.

B. Demonstrating Compliance

To demonstrate compliance with this rulemaking, the agencies proposed that States be required to submit conforming certifications to the appropriate NHTSA Regional Administrator on or before July 15, to receive an incentive grant in FY 2003; and on or before September 30, to avoid the withholding of funds in FY 2004 and subsequent fiscal years.

In addition, the NPRM proposed not to require States in compliance with the Section 163 incentive grant program in FY 2003 to submit additional certifications for FY 2004, unless their law/s had changed in the interim.

Each State initially determined to be in noncompliance would, under the proposal, have until September 30 to rebut the initial determination or to come into compliance. The State would be notified of the agencies' final determination of compliance or noncompliance and the amount of funds to be withheld as part of the final notice of apportionments (which normally is issued on October 1 of each year).

C. Period of Availability of Funds

The NPRM proposed an incremental approach to the withholding of funds apportionment for noncompliance. Specifically, the NPRM proposed that if a State is found to be in noncompliance on October 1, 2003, the State would be subject to a two percent withholding of its FY 2004 apportionment on that date. If a State is found to be in noncompliance on October 1 of any subsequent fiscal year, the withholding percentage would increase by two percent each year, until it reached eight percent in FY 2007 and thereafter. *See* Table 2.

In addition, the NPRM proposed that any State that comes into compliance with the requirements of Section 163 on

or before September 30, 2007, would have their withheld funds restored to them. However, if a State is not in compliance with the requirements of Section 163 on October 1, 2007, any funds withheld from apportionment to the State would begin to lapse and would no longer be available for apportionment.

TABLE 2.—EFFECTS OF THE 0.08 BAC SANCTION PROGRAM ON NON-COMPLYING STATES

Fiscal year	Withhold (percent)	Lapse
2004 ...	2	
2005 ...	4	
2006 ...	6	
2007 ...	8	
2008 ...	8	2% withheld in FY04.
2009 ...	8	4% withheld in FY05.
2010 ...	8	6% withheld in FY06.
2011 ...	8	8% withheld in FY07.
2012 ...	8	8% withheld in FY08.

III. Comments

The NPRM was published on February 6, 2003. The agencies received five comments in response to it. Comments were received from two State agencies and three concerned individuals. The State comments were submitted by Judy E. Brown, Chief of the Texas Department of Public Safety (TXDPS), Driver License Division, and Frank J. Busalacchi, Secretary for the Wisconsin Department of Transportation (WIDOT).

A. Federalism

To ensure that States had a full opportunity to raise any Federalism concerns, the agencies conducted an outreach program aimed at eliciting comments on the possible Federalism implications of this rule.

Since the incentive grant program was signed into law, States have had continuous contact with the agencies. States that were considering passing 0.08 BAC legislation were encouraged to submit copies of their proposals to the agencies' regional offices for review and initial comment. These legislative proposals were then forwarded to NHTSA's Office of Chief Counsel (OCC) to determine compliance with the requirements of Section 163. During this review process, OCC staff and staff from the Office of Injury Control Operations and Resources (ICOR) interacted with different State employees and officials by telephone and through electronic mail. These communications, both formal and informal, provided substantial opportunities for State and local officials to discuss and comment