

on program compliance and policy issues. Following a full review of all applicable State laws and implementing regulations, OCC notified States of their compliance with Section 163 by letter. Any State found not to be in compliance with Section 163 was notified of the reasoning behind this determination and reminded of the impending sanction program becoming effective in FY 2004.

The agencies also solicited comments in the NPRM, and following its publication, sent letters requesting comments on possible Federalism implications to several National organizations representing State and local officials. The six organizations included: The National Governors Association, National Conference of State Legislatures, International Association of Chiefs of Police, Governors Highway Safety Association, National Sheriff's Association, and the American Association of State Highway and Transportation Officials. NHTSA has not received any indication of concerns about the Federalism implications of this rulemaking from these representatives. In addition, none of these groups submitted comments in response to the NPRM.

In sum, the agencies have considered the impact of this action on State and local agencies. We have concluded that the effects on States and local agencies will be minimal and consist of changes that States make as a matter of course when amending a State law. Furthermore, the agencies received no comments from State or local agencies to indicate otherwise. Accordingly, the agencies do not believe that this final rule raises any Federalism issues and no changes to this document are required.

B. Comments Regarding Compliance Criteria

The agencies received few comments to the NPRM. In particular, the agencies received no comments or objections to the compliance criteria proposed in the NPRM. Accordingly, these portions of the NPRM are being adopted without change.

C. Comments Regarding Procedures

The agencies received some comments and questions regarding procedural aspects of the NPRM. Texas, which has had a conforming 0.08 BAC law since September 1, 1999, commented on the proposed certification process. Specifically, the TXDPS commented favorably on the proposed certification process, stating that the "proposed certifications will legitimately serve NHTSA's goal of ascertaining state compliance for the

purpose of Federal-aid highway and grant funds distribution." Accordingly, TXDPS indicated that it has no objections or additional comments regarding the agencies' proposal.

WIDOT requested clarification regarding "the mechanics and timeline of the process to restore withheld funding." Specifically, WIDOT noted that Section 1225.9 of the proposed rule did not specify "the manner in which withheld funds would be restored to a state that comes into compliance following September 30, 2003." In its comments, WIDOT indicated that it presumed that the certification process detailed in Section 1225.7 of the proposed rule would be used for restoration of withheld funds. However, WIDOT noted that the rule did not specify that this would be the case. In addition, it remarked that the NPRM did not indicate "how quickly the restored funding will be available to a compliant state."

In response to these comments, the agencies have decided to modify the regulation by adding new provisions to the sections regarding "Certification requirements for sanction program" and "Period of availability of withheld funds." The agencies have determined that no other changes to the regulation are needed.

These new provisions specify the certification process that should be followed for States that comply with the requirements of Section 163 in FY 2004 or thereafter. These new provisions also clarify that States that are seeking compliance with Section 163, following a withholding of funds under Section 1225.8, should contact their appropriate NHTSA Regional Administrator and inform them that they have enacted a 0.08 BAC law they believe to be conforming. The new law and subsequent certification of compliance will be reviewed by NHTSA. If NHTSA determines, based on the State's law and its certification, that the State is now in compliance with Section 163 and these implementing regulations, NHTSA will inform the FHWA of its determination and the FHWA will restore all withheld apportionment funds to the State's appropriate apportionment categories as quickly as possible.

Three individuals also commented on the proposal, expressing support and opposition to the federal policy underlying the Congressional mandate and raising concerns about the constitutionality of the proposal and the ability of States to receive incentive grants in FY 2003.

Similar programs, such as the National Minimum Drinking Age and the National Maximum Speed Limit

programs, have been found constitutional in the past and we consider this program to fall within the ambit of those judicial rulings. *See, South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding the withholding of funds from States without a conforming minimum drinking age act under the spending clause and the Twenty-first Amendment) and *The People v. Williams*, 175 Cal. App. 3d Supp. 16 (1985) (finding that the Federal withholding of funds from States without a conforming maximum speed limit was an appropriate exercise of Congress' authority under the spending clause and that the authority was not limited by the Tenth Amendment).

The agencies also note that a commenter from Texas expressed concern about this rulemaking because of "a potential Procedural Due Process problem." She asserted that, "according to a literal reading of § 1225.5(a)(1), Louisiana's 0.08 BAC law must be enforced (and therefore must also be effective) when Louisiana sends in its certification letter * * * [yet] [t]he last day that Louisiana can send a certification letter is July 15, 2003—a full 2½ months before its 0.08 BAC law will be effective and enforced."

To address this concern, the commenter suggested certain revisions to the certification statements to allow Louisiana to qualify for an incentive grant fund in FY 2003. Specifically, the commenter suggested that the agencies amend the certification statement contained in Section 1225.5(a)(1) to allow States to submit certifications by July 15, 2003, if the newly enacted laws become effective before the end of the fiscal year.

While it is clear that States have no property interest in receiving TEA-21 funds, the comment raises a legitimate question regarding the manner in which States, such as Louisiana, are to certify that they qualify for an incentive grant if they enact a law prior to July 15 (when certifications are due to be submitted), and their law becomes effective on or before September 30, but after July 15. This issue had already been addressed in the 0.08 incentive grant regulations. *See* 64 FR at 35572.

In particular, the regulations provide that, "If the State's 0.08 BAC *per se* law is not currently in effect, but will become effective and be enforced before the end of the current fiscal year, the certification shall be worded as follows:

(Name of certifying official), (position title), of the (State or Commonwealth) of _____, do hereby certify that the (State or Commonwealth) of _____ has enacted a 0.08 BAC *per se* law that conforms to 23 U.S.C. 163 and 23 CFR 1225.4, (citations to