LEGAL RESEARCH DIGEST
TCRP LRD 57
LEGAL RESEARCH DIGEST
NCHRP LRD 84
JULY 2021
TRANSIT COOPERATIVE RESEARCH PROGRAM
NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Fix It, Sign It or Close It: State of Good Repair in an Era of Budget Constraints

This digest was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," and NCHRP Project 20-06, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. Under TCRP Topic 18-05 and NCHRP Topic 24-05, Terri Parker, Parker Corporate Enterprises, Nixa, MO, prepared this digest. The opinions and conclusions expressed or implied in this digest are those of the researchers who performed the research and are not necessarily those of the Transportation Research Board; the National Academies of Sciences, Engineering, and Medicine; or the program sponsors. The responsible program officer is Gwen Chisholm Smith.

TCRP Background

The nation's 6,800 plus public transportation agencies need to have access to a program that can provide authoritatively researched, specific studies of legal issues and problems having national significance and application to the public transportation industry. Some legal issues and problems are unique to transit agencies. For example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by public transit attorneys to address legal concerns is not summarized in a single source. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the public transportation legal community.

The Legal Research Digest (LRDs) are developed to assist public transit attorneys in dealing with initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal works. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

NCHRP Background

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. The NCHRP Legal Research Digest and the Selected Studies in Transportation Law (SSTL) series are intended to keep departments up-to-date on laws that will affect their operations.

Foreword

The condition of the transportation infrastructure in the United States is an issue of national importance. State departments of transportation and transit agencies face tough choices as they make decisions about how and when to keep their assets safely open to the public. Agencies that receive federal formula grant dollars must work with their funding agencies, as well as local partners, to determine whether to repair, improve, rebuild or close their assets.

This digest addresses the legal ramifications to transportation agencies that have to decide whether to repair, improve, or rebuild assets that are in poor repair.

This digest provides a compendium of pertinent laws and practices related to achieving a state of good repair. In addition, it addresses the legal ramifications to transportation agencies when faced with prioritizing infrastructure planning decisions and whether to repair, improve, rebuild substandard assets, or close. The digest also includes a detailed discussion of an agency's requirements related to its assessment of risks.

State transportation administrators, planners, researchers, transportation consultants, transportation and tort lawyers, and students should find this digest beneficial and informative.

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FIX IT, SIGN IT OR CLOSE IT: STATE OF GOOD REPAIR IN AN ERA OF BUDGET CONSTRAINTS

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I. INTRODUCTION

Public transportation agencies are challenged with finding ways to achieve a state of good repair of their assets and facilities while conforming to an unyielding budget. The phrase "state of good repair" is commonly used to describe property or equipment that is in good working order. But the phrase is also a term of art, which has been incorporated into and defined by federal regulation as a basic element of the safe operation of a public transportation agency that owns, manages, or operates capital assets. Capital assets include motor coaches, trolley buses, light rail vehicles, cable cars, maintenance and administrative facilities, parking garages, and even street signs and paint. "State of good repair" is defined by federal regulation as "a condition sufficient for the asset to operate at a full level of performance."[1] Publicly funded transit agencies are required by federal law to keep their assets and infrastructure in a state of good repair. Similarly, state transportation agencies are obligated to keep their facilities and property in a "safe" or "reasonably safe" condition.[2] The phrase "reasonably safe" is defined by statute, caselaw, guidelines, and standards and includes the concept of maintaining a facility in a reasonably safe condition for people who obey the rules of the road. The agency must plan for and anticipate foreseeable risks.[3]

A transportation agency is not required to protect against all possible perils that the traveling public could encounter. However, once a condition that requires repair or replacement is identified, the agency must address it. The agency has multiple tools to address such conditions. The tools include issuing a warning or repairing the condition or taking the facility out of service temporarily or permanently. Decisions concerning the use of these tools are necessarily influenced by the amount of money the agency has in its budget.

The budgetary discretion of the agency is rarely disturbed by court ruling, since legislative appropriations and executive department decisions are discretionary functions, which are immune from judicial inquiry. This is because both processes concern the allocation of scarce resources between and among competing policy measures.[4] For example, in the case of *Coviello v. Mass. Bay Transp. Auth.*,[5] plaintiff was seriously injured when he fell on a train track. In his lawsuit, Coviello alleged that if the Massachusetts Bay Transportation Authority (MBTA) had been adequately staffed, his injuries could have been prevented. The court found that the decision of the agency to have a staff member on site at a particular station was within the discretion of the agency and noted that the agency had to consider its budget in determining how to and when to spend public funds. The court noted that decisions regarding the allocation of staff are a fundamental part of MBTA's obligation to apportion its limited resources and entered a judgment in favor of MBTA on that basis. Similarly, in *Edouard v. Bonner*,[6] a plaintiff passenger died after an intoxicated driver vaulted over a guardrail and struck the vehicle in which he had been riding. Plaintiffs sued the City of New York, claiming that the accident would have been prevented by a concrete median barrier at that location. After a jury decided in favor of plaintiffs, the city moved for a judgment as a matter of law, presenting evidence to the court that financing for the barrier had not been available and that other public works projects had taken precedence over the median barrier. The trial court denied the motion, but the appellate court found that the city had provided sufficient evidence of a legitimate ordering of its priorities and granted judgment as a matter of law to the city, thereby setting aside the jury verdict.

Regardless of budget constraints, public agencies are obligated to comply with different legal standards of care depending on the type of tasks undertaken by the agency. Transit agencies must keep their trains, bus fleet, railcars, and facilities in a state of good repair in order to provide basic services to the public and achieve compliance with federal regulations. Employees of public agencies are obligated to operate motor vehicles or rolling stock with an extremely high degree of care, and roads and highways must be reasonably safe. Regardless of the standard of care requirement, an agency is not at fault for an accident simply because an accident occurs on or in its facility.

This digest is intended to assist transportation agencies that struggle with difficult prioritization decisions due to budget constraints. Subsection III.A references legal authorities that support an agency decision to close or restrict access to a facility that cannot be safely operated. Subsection III.B provides a legal reasoning for choosing from hierarchy of treatments for potentially hazardous conditions such as whether to warn, mitigate, shield, or eliminating a hazard. Section IV provides an analysis

[1] State of good repair principles, 49 C.F.R. § 625.17(a) (20210.

[2] *See, e.g.*, Irion v. State, 760 So.2d 1220, 1228 (La. Ct. App. 2000), ("It is well settled that DOTD [Louisiana Department of Transportation and Development] owes a duty to ensure that highways are reasonably safe for persons exercising ordinary care and reasonable prudence.").

[3] Palloni v. Town of Attica, 278 A.D.2d 788, 723 N.Y.S.2d 582 (2000).

[4] *See*, Estate of Arrowwood v. State, 894 P.2d 642, 646 (Alaska 1995).

[5] 2019 Mass. App. Unpub. LEXIS 742, 96 Mass. App. Ct. 1108 (2019).

[6] 224 A.D.2d 575, 638 N.Y.S.2d 688 (1996).

of the tort liability the agency may experience if facilities are not closed or access restricted when a potentially hazardous condition is present. Subsection IV.C addresses civil rights issues relating to potential legal liability if facilities are closed or eliminated temporarily. It provides recommendations for mitigation of liability for closures through public outreach or providing access to alternative routes or services. Throughout the digest are other suggested processes that may reduce the potential for legal exposure.

II. LEGISLATIVE AND REGULATORY CONTEXT

Transportation agencies are governed by federal and state authorities and must conform to multiple statutory and regulatory requirements that relate to funding, safety, accessibility, and availability of service.

A. State Highway Transportation Agencies

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU),[7] which was signed into law on August 10, 2005, established the Highway Safety Improvement Program (HSIP)[8] as a core federal-aid program. SAFETEA-LU created resources and opportunities for public agencies to improve highway safety in a comprehensive and strategic manner. In 2012, Congress enacted the Moving Ahead for Progress in the 21st Century Act (MAP-21),[9] which was intended to further improve safety in the public transportation industry and provide a steady source of funds for that purpose. The Fixing America's Surface Transportation (FAST) Act[10] was authorized in 2015. The FAST Act provided further funding opportunities for state and local government transportation projects. The FAST Act continued the HSIP with only minor changes, including the requirement for state agencies to develop Strategic Highway Safety Plans (SHSPs).[11] SHSPs must be updated and evaluated regularly using methods that have been established by the Federal Highway Administration (FHWA). Both MAP-21 and the FAST Act included the requirements for performance management processes and the development of an Asset Management Plan (AMP).[12]

All the federal funding programs were intended to reduce fatalities and serious injuries on public roads. Included in the legislation was the requirement of identification and implementation of infrastructure related highway safety improvements based on objective criteria and establishing performance targets and requirements.

[7] Pub. L. No. 109-59, 119 Stat. 144 (2005).

[8] *Id.* § 1401, codified at 23 U.S.C. § 148 (2021).

[9] Pub. L. No. 112-141, 126 Stat. 405 (2012).

[10] Pub. L. No. 114-94, 129 Stat. 1312 (2015).

[11] Eligibility, 23 U.S.C. § 148(c) (2021).

[12] *See* FHWA, *Asset Management*, https://www.fhwa.dot.gov/asset/guidance.cfm.

B. Public Transportation Systems

SAFETEA-LU, MAP-21, and the FAST Act included provisions that required public transit agencies to develop and improve existing safety programs. Transit systems must use objective performance measures to determine funding and spending priorities, incorporating Congress' objective of using scientific principles and data analysis to determine the most appropriate allocation of funds. The National Transit Asset Management (TAM) System was outlined[13] in the legislation and the concept of "state of good repair" was defined by regulation.[14]

> A capital asset is in a state of good repair if it meets the following objective standards-
>
> (a) The capital asset is able to perform its designed function;
>
> (b) The use of the asset in its current condition does not pose an identified unacceptable safety risk; and
>
> (c) The life–cycle investment needs have been met or recovered, including all scheduled maintenance, rehabilitation, and replacements.[15]

The TAM is intended to assist the transit agency in developing a systematic "process of operating, maintaining, and improving its assets effectively throughout the life cycle of those assets."[16] The TAM plan includes capital asset inventories and condition assessments, decision-support tools, and investment prioritization.[17] The following items are required to be in the TAM:

> (1) An inventory of the number and type of capital assets. The inventory must include all capital assets that a provider owns, except equipment with an acquisition value under $50,000 that is not a service vehicle. An inventory also must include third-party owned or jointly procured exclusive-use maintenance facilities, passenger station facilities, administrative facilities, rolling stock, and guideway infrastructure used by a provider in the provision of public transportation. The asset inventory must be organized at a level of detail commensurate with the level of detail in the provider's program of capital projects; and
>
> (2) A condition assessment of those inventoried assets for which a provider has direct capital responsibility. A condition assessment must generate information in a level of detail sufficient to monitor and predict the performance of the assets and to inform the investment prioritization; and
>
> (3) A description of analytical processes or decision-support tools that a provider uses to estimate capital investment needs over time and develop its investment prioritization; and
>
> (4) A provider's project-based prioritization of investments, developed in accordance with § 625.33 of this part; and
>
> (5) A provider's TAM and SGR policy; and
>
> (6) A provider's TAM plan implementation strategy; and

[13] Transit Asset Management, 49 U.S.C. § 5326 (2020).

[14] State of good repair principles, 49 C.F.R. § 625.17 (2021).

[15] Standards for measuring the condition of capital assets, 49 C.F.R. § 625.41 (2021).

[16] Transit asset management, 49 U.S.C. § 5326(a)(3) 2020; *see also* Transit Asset Management Plan requirements, 49 C.F.R. § 625.25 (2021).

[17] Elements of the National Transit Management System, 49 C.F.R. § 625.15 (2021).

(7) A description of key TAM activities that a provider intends to engage in over the TAM plan horizon period; and

(8) A summary or list of the resources, including personnel, that a provider needs to develop and carry out the TAM plan; and

(9) An outline of how a provider will monitor, update, and evaluate, as needed, its TAM plan and related business practices, to ensure the continuous improvement of its TAM practices.[18]

A TAM is agency specific and developed and approved by the staff and management of the agency. TAMs are objective evaluation tools which can be used to establish performance measures, analyze available inventory, assess the condition of vehicles and facilities, and prioritize investments of the agency. Generally, asset management plans are used by the agency to track and maintain its assets and to determine which inventory needs to be repaired or replaced. The transit agency must annually certify that it has complied with the rules issued under 49 U.S.C.§ 5326. While compliance with the legal provisions is a requirement for transit agencies, once the agency has developed and established its TAM, that document becomes a policy or guideline. The finished document is publicly available and will likely be requested and used by counsel in litigation. The use of the TAM plan in a legal action is developed further in Section III.B.4 of this digest.

In 2018, the Federal Transit Administration (FTA) published the Public Transportation Agency Safety Plan (PTASP) Final Rule,[19] which required operators of public transportation systems to develop safety plans by July 2020, although due to the COVID-19 pandemic, the date was extended.[20] The rules require a detailed and rigorous analysis of agency assets so that capital investments can be prioritized to meet safety performance and state of good repair targets. Important components of the safety plan include the requirement to monitor operations of the agency, reduce risks, and make improvements that are necessary for the safety and well-being of the employees and users of the facilities. The safety plan must be updated and certified by the transit agency annually. This rule applies to operators of public transportation systems that receive federal financial assistance under the Urbanized Area Formula Grants Program.[21] Transit agencies are expected to modify safety plans and adjust performance targets as they collect data and implement their Safety Management Systems (SMS).

The Federal Railroad Administration (FRA) has promulgated similar regulations.[22] The regulations require rail operations to establish and implement a system safety program that "continually and systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities."[23] Rail operations must also participate in a risk reduction program.[24]

C. Protection of Data Collected in Safety Studies

Both state and local highway administrations and railroads enjoy statutory protection of the information they gather for safety studies.[25] The protected information includes plans, reports, documents, surveys, schedules, lists, or data, and (in the case of railroads) specifically includes a passenger rail operation's analysis of its safety risks under and a passenger rail operation's statement of mitigation measures. The information gathered by the agency is not subject to discovery, allowed to be admitted into evidence, or to be considered for other purposes in a federal or state court proceeding for damages involving personal injury, wrongful death, or property damage. Transit operations do not have the same protections under federal law at this time, although a change to the law has been considered by Congress.[26] This omission in protection is critical for the transit agency because federal law requires that all the federally funded transportation agencies keep track of and prioritize the need for repair and replacement of assets. This necessarily requires an examination and ranking of vehicles, facilities, and equipment, and the requirement to identify equipment and assets that need refurbishment or replacement. If a tort claim relates to the alleged malfunction or defect of equipment, and the agency itself has identified that equipment or property as in need of repair or refurbishment, that fact of the need for repair may become a critical part of a plaintiff's case against the transit agency.

[18] Transit Asset Management Plan requirements, 49 C.F.R. § 625.25 (2021).

[19] Public Transportation Safety Plan, 83 Fed. Reg. 34,418 (July 19, 1018), codified at 49 C.F.R. pt. 673 (2019).

[20] FTA, *Public Transportation Agency Safety Plans*, https://www.transit.dot.gov/PTASP, (last visited March 18, 2021). "In light of the extraordinary operational challenges presented by the COVID-19 public health emergency, FTA issued a Notice of Enforcement Discretion effectively extending the PTASP compliance deadline from July 20, 2020 to December 31, 2020," *id*. The deadline was later extended to July 20, 2021.

[21] The Urbanized Area Formula Grants program, 49 U.S.C. 5307 (2021), makes federal resources available to urbanized areas and to governors for transit capital and operating assistance in urbanized areas and for transportation-related planning.

[22] System Safety Program and Risk Reduction Program, 85 Fed. Reg. 12,826, 12,844 (Mar. 4, 2020), codified at 49 C.F.R. § 270.101 (2020).

[23] *Id.*

[24] Risk Reduction Program, 85 Fed. Reg. 9262 (Feb. 18, 2020), codified at 49 C.F.R. pt. 271 (2020).

[25] Discovery and admission as evidence of certain reports and surveys, 23 U.S.C. § 409 (2021); [FRA] Discovery and admission as evidence of certain information, 49 C.F.R. § 270.105(a) (2020), states "[A]ny information compiled or collected after August 14, 2017, solely for the purpose of planning, implementing, or evaluating a system safety program under this part shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage."

[26] Congress requested that TRB provide a recommendation as to whether legislation should be enacted that would bestow 23 U.S.C. § 409 type protections on transit agency safety studies and records. *See*, National Academies of Sciences, Engineering, and Medicine. 2018. *Admissibility and Public Availability of Transit Safety Planning Records*. Washington, DC: The National Academies Press.

D. Potential for Discriminatory Impact on Users of the Facilities

In addition to regulatory safety requirements, public agencies must consider the impact of their budgetary actions upon minority and other protected groups. Title VI of the 1964 Civil Rights Act[27] requires federal funds to be expended only on activities and programs that do not discriminate against people on the basis of their national origin, race, or color. This prohibition against discrimination applies to recipients of federal funds in two categories: 1) intentional discrimination and 2) procedures and criteria that do not appear to be discriminatory in nature but actually have a discriminatory effect on protected individuals. Section 601 of Title VI[28] prohibits discrimination by a state or local agency and allows a private right of action for individuals who have experienced intentional discrimination. Section 602[29] requires state and local agencies to ensure that their grantees do not engage in actions that have a disparate impact that results in discrimination. Agency policies with discriminatory effects cannot remain in place unless the agency can show the practices were necessary to achieve a legitimate non-discriminatory objective,[30] although there is no private right of action to enforce disparate-impact regulations that have been promulgated by federal agencies.[31] Such federal regulations are enforced by the grantor agency by the withholding of grantee funding.

Executive Order 12898[32], Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, was signed into law in 1994 and remains in effect today. The executive order required federally funded agencies to identify and address "disproportionately high and adverse human health or environmental effects"[33] on minority and low-income populations in their programs, policies, and activities. Policies of FHWA and FTA echo the language of the executive order and require agencies to identify and address adverse effects of their programs, policies, and activities on minority and low-income populations. The overlap between the statutory obligation placed on federal agencies under Title VI to ensure nondiscrimination in federally assisted programs administered by state and local entities, and the administrative directive to federal agencies under the executive order to address disproportionate adverse impacts of federal activities on minority and low-income populations explain why Title VI and environmental justice concepts are often paired.[34]

III. SCOPE OF LEGAL ISSUES

This section examines legal authority that would support an agency's closure or restriction of access to a facility if it cannot be safely operated. It also provides an analysis of the tort liability the agency may experience if facilities are not closed, or access is not restricted when a potentially hazardous condition is present. The section includes legal background on the hierarchy of treatments concerning whether to issue a warning, shield, or eliminate a potentially hazardous condition. The section also addresses civil rights issues relating to the agency's potential legal liability to the users of the facilities if those facilities are closed or eliminated temporarily and provides recommendations for mitigation of liability by public outreach or access to alternative routes or services. The section also suggests processes that may reduce the potential for legal exposure to the agency.

A. Authority to Close Facility and Limit Access to Facilities and Equipment for Safety Reasons

State and federal law often provide the framework for a transportation agency to close or restrict access to its highways.[35] The authority for a transit agency to close, restrict access to facilities, or withdraw funding may be found in state or federal law,[36] or regulation,[37] or the enabling legislation for a mass transit agency.

[27] Pub. L. No. 88-352, § 601, 78 Stat. 252 (1964), as amended, codified at 42 U.S.C. 2000(d)--2000(d)-7 (2021).

[28] *Id.* § 2000(d).

[29] Pub. L. No. 88-352, § 602, 78 Stat. 252 (1964), codified at 42 U.S.C. 2000(d)-1 (2021).

[30] U. S. Department of Justice, *Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000D ET. SEQ.,* https://www.justice.gov/crt/fcs/TitleVI-Overview (last updated June 26, 2020).

[31] Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 517 (2001).

[32] Exec. Order No. 12898, (February 11,1994), 3 C.F.R., 1994 Comp., p. 859, 32 C.F. R. 651,17 (2021).

[33] *Id.* § 1-101.

[34] FTA C. 4702.1B, *Title VI Requirements and Guidelines for Federal Transit Administration Recipients* (Oct. 1, 2012), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf.

[35] For instance, Mo. Rev. Stat. § 304.180.4. (2020), (Regulations as to weight — axle load, tandem axle defined—idle reduction technology, increase in maximum gross weight permitted—requirements during disasters), authorizes the Missouri Department of Transportation (MoDOT) to establish weight limits for bridges or close a bridge when the Commission finds that the public may be at risk if this action is not taken.

[36] Public transportation safety program, 49 U.S.C. § 5329 (2021), was the impetus for a national public transportation safety program.

Section 5329(h) provides

> (1) Restrictions and prohibitions. The Secretary shall issue restrictions and prohibitions by whatever means are determined necessary and appropriate, without regard to section 5334(c), if, through testing, inspection, investigation, audit, or research carried out under this chapter, the Secretary determines that an unsafe condition or practice, or a combination of unsafe conditions and practices, exist such that there is a substantial risk of death or personal injury.
>
> (2) Notice. The notice of restriction or prohibition shall describe the condition or practice, the subsequent risk and the standards and procedures required to address the restriction or prohibition.
>
> (3) Continued authority. Nothing in this subsection shall be construed as limiting the Secretary's authority to maintain a restriction or prohibition for as long as is necessary to ensure that the risk has been substantially addressed.

[37] Public Transportation Safety Program, 49 C.F.R. pt. 670 (2021) and State Safety Oversight, 49 C.F.R. pt. 674 (2020).

1. *State Law or Regulation*

In many cases, state law provides a basis for a transportation agency to close or restrict access to its highways. The Washington State Department of Transportation is authorized to close or restrict its roadways if it is deemed necessary due to the condition of the road.[38] Other transportation agencies, such as the Missouri Department of Transportation, have laws that require regular inspection of the bridges and allow weight and speed restrictions to be placed on the structures at the discretion of the agency.[39] The agency can close or reduce access to its facilities when it has determined that a safety issue is serious enough to warrant action. This action may be spurred by a sudden emergency or by a planned event.

2. *Federal Regulatory Agencies*

Regulatory agencies, such as FHWA and FTA may, in some circumstances, temporarily administer a safety oversight program or withdraw previously authorized funding for safety reasons.[40] For instance, in March 2015, in order to avoid a potential loss of funding, Washington Metropolitan Area Transit Authority (WMATA) was required to develop an action plan to address safety findings and recommendations that were issued by FTA following FTA's comprehensive inspection of the rail and bus transit systems.[41] In 2018, the Mississippi governor issued an emergency executive order requiring the closure of more than 100 bridges in Mississippi after structural inspections were performed by federal highway officials.[42] The emergency declaration was issued after the governor received a letter from FHWA, which warned that the Mississippi Department of Transportation was at risk of losing federal funds if the bridges remained open to traffic.

3. *Objective Criteria*

An agency has multiple tools available to determine whether action should be taken in response to a potential safety concern. Scientific studies, review of data, and the implementation of technological advances are normally the basis of the agency's decision-making process. The agency's own policies, equipment manuals, and vehicle service manuals also contain objective criteria that is used to guide the decision-making process. The following are examples of other objective criteria that may be used by the agency.

a. National Bridge Inspection Standards.[43]

b. The transit agency may rely on its state of good repair analysis. The federal regulation contains guidance for measuring the condition of capital assets.[44]

c. Asset Management Plan[45] or TAM. A plan includes categories such as inventory, inspection schedules, rating of condition of equipment and vehicles, budget, and risk.

d. Vehicle pre-trip inspection or mechanics inspection checklist.

e. Building inspection codes and criteria for inspection of new building construction.

f. Visual inspection of conditions such as flooding, or a roadway blocked by debris.

g. Internal processes which require the collection of accident data that assists in determining potential projects and infrastructure improvements.

h. Manual on Uniform Traffic Control Devices (MUTCD).[46]

Bridge inspection criteria, the MUTCD, building inspection codes, and other types of standard guidance have been developed through years of scientific and engineering studies. Some of these methods are nationally accepted industry standards.

4. *Discretion of Agency*

An action in tort is the basis for claims of damages due to property loss or injury allegedly caused by an act of an employee of the government or due to the condition of property that is owned or maintained by the government. In order to bring a claim, plaintiff must allege that the agency had a duty to him or her, that the duty was breached, the breach was the cause of injury, and that damages occurred.[47] One of the defenses to a tort claim made against a governmental agency is that the agency is exempt from liability because the action complained of was within the agency's discretion. The allocation of funds among competing interests such as safety, maintenance, long-term purchases, and expansion of the system is inherently a discretionary function of the agency.

The concept of discretionary and ministerial functions is incorporated into both federal and state law. The discretionary function defense exempts the governmental actor from liability for "[a]ny claim … based upon the exercise or performance or the failure to exercise or perform a discretionary function or

[38] Closure or restriction authorized—Restriction for urban public transportation system use, Wash. Rev. Code § 47.48.010 (2021).

[39] *See*, Inspections, when made—action to be taken, report of certain first class counties, Mo. Rev. Stat. § 61.071 (2020). Alabama and Alaska have similar statutes, *See*, Closing highways and roads; barricades; signs; notice, Ala Code. § 32-5-16 (2021); Closing highways, Alaska Stat. § 19.10.100 (2020).

[40] 49 U.S.C. § 5329(e)(8)(C) (2021). This subsection allows for temporary federal assumption of rail transit safety oversight.

[41] WMATA FTA Corrective Plan, https://wmata.com/rider-guide/safety/fta-cap.cfm, (last visited March 18, 2021).

[42] Cameron McWhirter, *Mississippi Gov. Bryant Orders More than 100 Bridges Closed*, The Wall Street Journal, (April 12, 2018), https://www.wsj.com/articles/mississippi-gov-bryant-orders-more-than-100-bridges-closed-1523541600.

[43] FHWA, National Bridge Standards, https://www.fhwa.dot.gov/bridge/nbis.cfm (last updated October 30, 2020).

[44] Standards for measuring the condition of capital assets, 49 C.F.R. 625.41 (2021).

[45] Transit Asset Management Plan requirements, 49 C.F.R. § 625.25 (2021).

[46] FHWA, MUTCD website, https://mutcd.fhwa.dot.gov. The MUTCD identifies the standards used by transportation agencies to install and maintain traffic control devices on public streets and highways. It contains instructions for road markings, highway signs, and traffic signals.

[47] *See e.g.*, Turner v. North Carolina Department of Transportation, 233 N.C. App. 90, 93, 733 S.E. 2d. 871, 874 (2012).

duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[48] The purpose of the discretionary exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions that have been reached . . . [based on] social, economic, and political policy of the agency."[49]

In contrast, if an action taken (or not taken) by the government is found to be ministerial, the government is not exempt from liability. A ministerial act is generally defined by the courts as an act that is required by statute, regulation, or policy. An agency does not have the discretion to act (or not) if a statute or policy directs mandatory and specific action.[50] An agency's actions do not involve policy decisions when the acts concern mundane, administrative, "garden-variety", housekeeping problems.[51] The employee who is performing a ministerial act has no option except to conform with the directive.[52] For example, an employee is performing a ministerial act if he performs an inspection of a restroom on the hour because agency policy requires the restroom to be inspected every hour.

Discretion of the agency as a defense to a lawsuit is discussed in depth in Subsection IV.B. of this digest.

B. Assessment of Risk for Tort Claims

The agency must seek to identify potential hazards to its facilities and mitigate or eliminate them, if possible. Risks such as harm to people or property, inconvenience, and loss of access to transportation systems should be ascertained. Once those risks are identified and evaluated, appropriate methods of mitigating or eliminating inconvenience to the public and potential injuries can be determined. The agency must consider the condition of equipment and facilities as well as the importance of the continuance of the use of the asset to the operation of the entire transportation system. A similar method of risk assessment has been adopted by the FRA, which is designed to eliminate, control, or mitigate all identified hazards where feasible.[53]

If a lawsuit is filed, and liability of the agency for its actions or inactions is questioned, the basis of the agency's defense of the claim will likely be a filed business record and witnesses that describe the thorough and thoughtful decision-making process of the agency. This documentation will be important so the agency can show the discretion it used in prioritizing the importance of repairs, upgrades, and funding allocations as part of a risk-benefit analysis. The process of determining which projects or repairs were selected and the reasons for the selection should be documented in a detailed manner. The business record may include copies of policies, agency program needs, the AMP or TAM, emails, reports, drawings, photographs and/or letters and directives from regulators. The agency should document its decision-making processes in a location and format that can be accessed for many years. The following analysis could be part of the decision-making process.

1. Hierarchy of Treatments

An agency may be criticized for the closure of a facility by those who depend on it for daily travel, simply due to the inconvenience caused by the closure. Governmental agencies have the ability to shut down their facilities when faced with a condition that mandates closure. It is unlikely that a legal challenge would be made to a decision based on an obvious hazard such as a sinkhole opening on a highway or improperly functioning brakes on a light rail car. However, an agency may face legal liability in the civil rights context once an immediate hazard is identified that results in the need for permanent closure of a roadway or facility.[54]

The hierarchy of treatment analysis is relevant to multiple layers of agency decisions, such as in the instance when a sinkhole suddenly appears on a heavily traveled highway. In that case, the agency would have to prepare a short-term and long-term plan to address the sinkhole. The short-term response would likely be to close the road and reroute traffic or close the lane of travel. It would not be sufficient to warn of the condition since the ground would be unstable. The longer-term response would likely be to fill in the sinkhole or permanently reroute or close a portion of the road. In the case of improperly functioning brakes on a railcar, the agency must immediately take the vehicle out of service. If there are no other available cars, service would be reduced until a substitute could be found. A mere warning of the condition of the brakes is clearly not sufficient. The agency must use its discretion and objective criteria to determine which conditions can be warned of, and which conditions must be temporarily or permanently fixed.

2. Warning of the Condition

Courts have ruled that there is no obligation to warn of an obvious condition. In *Smith v. Washington Metropolitan Area Transit Authority*,[55] the court found that WMATA was immune for its failure to warn patrons of the inoperative status of two escalators, noting that the agency was not obligated to warn of an obvious condition, and that decisions concerning the proper response to hazards are protected from tort liability by the discretionary function exception. Even though there may not be a legal obligation to warn of a condition, a transportation agency may choose to warn of it. For instance, an agency may become aware that its guardrail is damaged along an interstate. Typically,

[48] United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 808, 104 S. Ct. 2755, 2762, 81 L. Ed. 2d 660, 671 (1984) (citing 28 U.S.C. § 2680(a) (1984)).

[49] *Id.* at 814, 104 S. Ct. at 2765, 81 L. Ed. 2d at 674. *See also*, Risner v. Ohio DOT, 145 Ohio State 3d. 55, 46 N.E. 3d 687 (2015).

[50] Navarette v. United States, 500 F.3d 914, 916 (9th Cir. 2007).

[51] *See,* Aslakson v. United States, 790 F.2d 688 (8th Cir. 1986).

[52] Rothrock v. United States, 62 F.3d 196 (7th Cir. 1995).

[53] FRA, *The Collision Hazard Analysis Guide Federal Railroad Administration*, October 2007, https://railroads.dot.gov/elibrary/collision-hazard-analysis-guide-commuter-and-intercity-passenger-rail-service. The Guide provides a step-by-step procedure on how to perform a hazard analysis and how to develop effective mitigation strategies to improve passenger rail safety. The analysis can be conducted in conjunction with the passenger railroad's system safety program plan.

[54] *See* Section IV.C of this digest.

[55] 290 F.3d 201 (4th Cir. 2002).

guardrail repair cannot be completed immediately after a hit, and a guardrail may be out of service for a week or more. The Texas Department of Transportation installs a sign that warns motorists "guardrail out ahead" while some other states do not warn of the condition. A warning sign can be installed relatively quickly and inexpensively. However, the agency must be prepared to explain the reasons it chose to warn of a condition rather than take additional steps to address it.

In California, a transportation agency is not responsible for harm caused by the lack of a warning device unless a reasonably careful person would not notice or anticipate a dangerous condition of the property without a warning of it. California courts have held that the government agency should warn of conditions that are not "reasonably apparent" to motorists. If a failure to post a warning sign results in a "concealed trap" for motorists who are using due care, the agency will not enjoy immunity.[56] In *Chowdhury v. City of Los Angeles*,[57] the court suggested that liability could occur in the following circumstances: the failure to "warn of a sharp or poorly banked curve" or "a hidden intersection" or the failure to warn of a location known to the agency to "freeze and create an icy road surface."[58] In the instance of the agency warning of a known location that freezes, the agency can warn of a condition, but must make plans to fix the condition itself within a reasonable period of time.

Analysis. In some cases, a condition should be remediated but the work cannot be done immediately. Mitigation or reduction of a risk should be considered when the risk cannot be immediately eliminated. Mitigation should also be considered when the condition cannot be fixed at all, whether due to practical implementation problems or budget restrictions. An example of this problem is a slippery road surface. The surface condition should be remediated as it is a potential hazard to the traveling public. While the agency may be able to warn of the condition rather than immediately expend funds for a roadway improvement, it still should address the condition. If a construction project is required, months or even years may pass before the project can be funded and programmed. The agency must keep close watch on the condition of the road in case it deteriorates, which could necessitate acceleration of the repair or the installation of additional warning signs.

It may not be possible to remediate the condition immediately or even in the immediate future due to budget considerations. A sign warning of the condition rather than a resurfacing might not be the preferred treatment, but it may be acceptable after the agency has considered factors such as traffic volume on the road and other needs on the system. The agency should also consider whether it has warned of similar conditions on other parts of its system. The agency can always consider other less permanent treatments such as scraping the surface of the pavement to provide additional friction or other treatments. The decision to warn of a condition rather than shield or fix it requires careful, logical, and documented analysis.

3. Decision to Remove the Hazard

The application of engineering judgment may require that a condition be immediately remediated or removed. The agency simply does not have a choice and cannot keep a facility open if it is dangerous to the public. The agency has the authority to close or restrict access to a facility in this situation. Once an emergency or critical situation has been resolved, the agency must determine the means of restoring services or providing alternative services to the traveling public. In the case of a highway or road agency, detoured routes are almost always available although they can cause inconvenience to the public if the detour is lengthy in distance or duration. Transit operations face the same challenges in maintaining consistent services. Both types of agencies are subject to discrimination claims for these decisions.[59]

4. Reliance on Asset Management Plan and State of Good Repair Principles

The AMP assists the agency in determining the continuing usefulness and viability of an asset. It also provides the agency with data that may assist it in reducing costs, extending the useful life of vehicles, increasing equipment availability, optimizing inventory levels, and ensuring regulatory compliance. The AMP requires replacement and/or maintenance of equipment on a regular scheduled basis. When defending a claim that a malfunctioning asset was left in service due to negligence of the agency, the agency can rely on the objective criteria and data found in its AMP as a basis for its defense and to assist it in explaining the reasons for its actions and choices. While few reported legal opinions discuss the AMP as a component of a defense to a claim, cases that discuss the discretionary aspects of the agency budget, such as the *Coviello* case, supra, where the court noted that the decision-making process of the agency, including the allocation of its limited resources, was a discretionary decision and not subject to legal review, are helpful to the agency's budget-based defense.

IV. LIABILITY FOR CONDITION OF AND ACCESS TO FACILITIES AND ASSETS

The following topics are analyzed in detail in this section: liability based on tort and discrimination theories and potential defenses to those claims; standards of care; governmental immunities; and the consideration by the agency of cost of repair or replacement of a facility as a defense to a complaint.

A. Tort Claims

In a tort claim, a plaintiff seeks a civil remedy—typically money damages for personal injury and/or property loss—claiming negligence by the public agency or its employees. The lawsuit is based on a claim by a plaintiff that he or she has

[56] *See,* Kessler v. State of California, 206 Cal. App.3d 317, 253 Cal. Rptr. 537 (1988), *cited* in Lakireddy v. City of Oakland, 2008 Cal. Super LEXIS 96 at *2 (2008).

[57] 38 Cal. App. 4th 1187, 45 Cal. Rptr. 2d 657 (1995).

[58] *Id.* at 1197, 45 Cal. Rptr. 2d at 663 (citations omitted).

[59] *See* Section IV.C of this digest.

been injured by a wrongful or negligent act or failure to act. Plaintiff must prove (1) a duty to act in a non-negligent manner; (2) breach of that duty; (3) a causal relationship between the breach of the duty; and (4) damages. Several potential defenses may be used in support of the agency that is defending a tort claim.

1. Standards of Care

There is not a precise standard of care for every situation. Generally, standards of care are established by governmental regulations and industry guidelines. For a plaintiff to recover damages under a negligence theory, he or she must prove the existence of a duty to that plaintiff as well as a connection between the duty that was breached and the injury that occurred. Whether the duty exists is a question of law, which will be decided by a judge, and whether the duty was breached is a question of fact, which will be decided by fact finding judge or a jury[60] When there are no guidelines in place at the time of an allegedly negligent engineering action, the proper standard of care is that of a reasonable engineer using accepted practices at the time of the act.[61] If an agency is governed by laws, rules, or policies, and fails to comply with them, the failure to comply with those standards, without adequate explanation, generally indicates that an agency has been negligent in its actions.

Discussed in the next section are standards of care that are typically applicable to agents and employees of transportation agencies, as well as the agencies themselves. The law varies by jurisdiction. Some jurisdictions enjoy governmental or other immunities and defenses, which will be considered by a court in conjunction with its analysis of the duty of the agency toward the plaintiff.

2. Reasonable or Ordinary Care

The "reasonable person" standard of care refers to the degree of attentiveness, caution, and prudence that a reasonable person in similar circumstances would exercise. If a person has exercised reasonable care, he or she is not negligent. Many state laws require the government to keep its roadways in a "reasonably safe" condition to protect the motoring public.[62] An agency can be held responsible for defects in its equipment if it knew, or with reasonable care, should have known, of a defect.[63]

a. Obligation to Upgrade

The duty of reasonable care does not include the obligation to upgrade facilities with the newest or best equipment if the equipment the agency has in use is in good working order. In *MARTA v. Rouse*,[64] plaintiff was injured when her foot was trapped under the plate of an escalator in a rail station in Atlanta, Georgia. She filed a negligence action naming the Metropolitan Rapid Transit Authority (MARTA) as a defendant, alleging that a piece of equipment that was designed to prevent foot trapping should have been installed at the station. After examining factually similar cases in other jurisdictions, the court dismissed plaintiff's claim, reasoning that a common carrier does not have an obligation to supply the "latest and best devices in situations requiring greater than ordinary care."[65] Referencing a decision in another jurisdiction, the court stated, "The court concluded that [the transit authority] does not have a duty to design and build a subway system that is completely accident-proof, nor is [the transit authority] required to constantly improve its subway system by incorporating every new safety device that may become available." (Citations omitted)[66]

Analysis. The fact that new products or designs are available does not mean that existing facilities that use older versions of those products or designs are not safe. In fact, the Policy on Geometric Design of Highways and Streets, a guide used by engineers to design highways, provides: "… the fact that new design values are presented herein does not imply that existing streets and highways are unsafe, nor does it mandate the initiation of improvement projects."[67] A frequently used defense is based upon the concept that while systems or facilities can always be made safer, if the facility is in compliance with the rules or practices that were in place at the time it was installed, it is safe, or in a state of good repair. A finding of a state of good repair frequently equates to compliance with safety and maintenance standards. In *City of Moorehead v. Bridge Co.,*[68] the court remarked that the bridge at issue should be maintained "in a state of good repair in accordance with the generally accepted standards by the Highway Departments for the States of North Dakota and Minnesota for similar structures."[69]

3. Very High Degree of Care

In many jurisdictions, a common carrier such as a bus or train is required by law to convey its passengers with extraordinary care or the very highest degree of care and protect passengers from foreseeable harm. Many states have established a common carrier standard of care through statutes or caselaw, while others, such as California, use a statutory definition. According to California Civil Code Section 2100, "A carrier of persons for reward must use utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."[70] This

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[60] *See,* Broussard v. State ex rel. Office of State Bldgs., 113 So. 3d 175, 185 (La. 2013).

[61] *See*, Lunar v. Ohio Dept. of Transp., 61 Ohio App.3d 143, 147 (1989).

[62] *See*, Reynolds v. Kansas Department of Transportation, 273 Kan. 261, 43 P. 3d 799 (2002), Knickel v. Ohio Dept. of Transportation, 49 Ohio App.2d 335, 361 N.E. 2d 486 (10th Dist. 1976), and Irion v. State, 760 So. 2d 1220 (La. Ct. App. 2000).

[63] Boyd v. Manhattan & Bronx Surface Transit Operating Authority, 9 N.Y. 3d 89, 876 N.E. 2d 1197, 845 N.Y.S. 2d 781 (2007).

[64] 279 Ga. 311, 612 S.E. 2d 308 (2005).

[65] *Id.* at 314, 612 S.E. 2d at 310.

[66] *Id.* at 314, (*citing*, Jones v. Washington Metropolitan Transit Auth., 742 F. Supp. 24. 26 (D. D.C. 1990)).

[67] AASHTO Roadside Design Guide, 4th ed. 2011, p. xliii.

[68] 2015 ND 189, 867 N.W. 2d 339 (2015).

[69] *Id.* at p. 2, 867 N.W.2d at 341; *See also*, Rommel v. Illinois State Toll Highway Authority, 405 Ill. App.3d 1124, 938 N.E. 2d 1163 (2010).

[70] General duties of carrier, Cal. Civ. Code § 2100 (2021).

duty is further outlined in the California common carrier jury instruction:

> 902. Duty of Common Carrier. Common carriers must carry passengers [or property] safely. Common carriers must use the highest care and the vigilance of an extremely cautious person. They must do all that human care, vigilance, and foresight reasonably can do under the circumstances to avoid harm to passengers [or property].
>
> While a common carrier does not guarantee the safety of its passengers [or property that it transports], it must use reasonable skill to provide everything necessary for safe transportation, in view of the transportation used and the practical operation of the business.[71]

A common carrier is not responsible for injuries suffered by a passenger unless all of the elements of a tort can be established, including a breach of the duty to use the highest degree of care, which is the actual or proximate cause of the injury.

a. Abandonment of "Highest Degree of Care" Requirement

In *Bethel v. New York City Transit Authority*,[72] New York had established a less restrictive standard of care for its common carriers in some situations. Bethel, who was wheelchair bound, was injured on a bus when the wheelchair-accessible chair that he was using collapsed. When Bethel's claim of negligence went to trial, the judge instructed the jury that the bus company "had a duty to use the highest degree of care that human prudence and foresight can suggest in the maintenance of its vehicles and equipment for the safety of its passengers."[73]

Bethel did not produce any evidence at trial that the bus company actually knew the seat was subject to collapse. Instead, he relied upon a theory of constructive notice, arguing that a thorough inspection during or after a recent repair would have exposed the defect that caused the seat to collapse. The jury found in favor of plaintiff on the basis of the constructive notice theory. The bus company appealed, arguing that a common carrier's duty of extraordinary care was at odds with the concept of negligence in torts and that a common carrier should be held to the same duty of care as any ordinary tortfeasor in a suit related to maintenance of a vehicle. The court agreed, thereby establishing a less restrictive standard of care in circumstances involving maintenance of equipment in New York.

New York has a law that protects its "hazard operators" from liability except when the operator exhibits reckless behavior. New York Vehicle and Traffic Law Section 1103[74] is an exception to the general rule that vehicle drivers and owners are responsible for damages proximately caused by their negligent acts. Street sweepers and snowplow operators are not held to the ordinary negligence standard while performing work on a publicly owned and maintained thoroughfare. The protection applies when such operators are engaged in "hazardous operations" on or adjacent to a highway. The reasoning behind this law is to protect work vehicle drivers against liability arising from their hazardous surroundings. If a work vehicle driver is operating in a snowstorm or clearing debris, there is greater potential for an accident.[75]

4. Agency Not an Insurer of Safety

While a common carrier must operate with an extremely high degree of care, the courts have established that a common carrier is not an insurer or guarantor of its passengers' safety and that negligence cannot be inferred simply because an accident occurred on a government facility. Proximate cause must always be established.[76] A carrier is responsible to its passengers for injuries that are caused by its negligence. It is not responsible for injuries that result from a cause that is outside its control.[77] For instance, passengers may experience jolts or jerks while riding on a bus or train. These are normal occurrences for passengers that use these modes of transportation and are not a legitimate basis for a cause of action.

5. Negligence Per Se

Negligence per se is a doctrine that requires an entity or agency to be found negligent if: 1) a law or a regulation adopted by it is violated and 2) the law or regulation was intended to provide a private remedy to the person harmed by the violation. "A per se negligence rule substitutes a statutory standard of care for the ordinary prudent person standard of care, such that a violation of a statute … is conclusive evidence of duty and breach."[78] For a statutory violation to satisfy the duty and breach elements, the person harmed by the violation must be among those the legislature intended to protect, and the harm must be of the type the legislature intended to prevent by enacting the statute.[79] This doctrine is useful to the plaintiff who alleges that an agency has violated its own policies or guidance.

In Idaho, state law requires that the state highway department adopt a manual that is in substantial compliance with the MUTCD. In *Jorstad v. City of Lewiston*,[80] the court determined that the agency manual had the "force of law" and its contents and requirements applied to all state and local highways, further finding that failure by the city to follow the manual was negligence per se.[81]

Analysis. If a plaintiff can prove that a manual such as the MUTCD, which was adopted by the agency, was violated, and

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[71] Judicial Council of California Civil Jury Instructions (2020 edition).

[72] 92 N.Y. 2d 348, 703 N.E.2d 1214, 681 N.Y.S.2d 201 (1998).

[73] *Id.* at 352, 703 N.E 2d. at 1215, 681 N.Y.S.2d at 202.

[74] Public officers and employees to obey title; exceptions, N.Y. Veh. & Traf. Law § 1103 (2021),

[75] *See,* Riley v. County of Broome, 95 N.Y.2d 455, 742 N.E. 2d 98, 719 N.Y.S. 2d 623 (N.Y. 2000).

[76] *See*, Tomassi v Town of Union, 46 N.Y.2d 91, 97, 385 N.E.2d 581, 582, 412 N.Y.S.2d 842, 844 (1978). *See also*, Morris v. Chicago Transit Authority, 28 Ill. App.3d 183, 185, 328 N.E.2d 208, 209-10 (1975).

[77] *See*, Gaines v. Chicago Transit Authority, 346 Ill. App. 3d 346, 349, 804 N.E.653, 655 (2004). *See also*, Rhodus v. Ohio Department of Transportation, 67 Ohio App. 3d 723, 588 N.E.2d 864 (10th Dist. 1990).

[78] Gradjelick v. Hance, 646 N.W.2d 225, 231 n.3 (Minn. 2002).

[79] *See*, Anderson v. Anoka Hennepin Ind. Sch. Dist. 11, 678 N.W.2d 651, 662-63 (Minn. 2004).

[80] 93 Idaho 122, 456 P.2d 766 (1969), *overruled on other grounds by* Independent Sch. Dist. v. Callister, 97 Idaho 59, 539 P.2d 987 (1975).

[81] *Id.* at 129-30, 456 P.2d at 773-74.

that the violation is proximately related to the harm that occurred, the agency will have a difficult time defending the claim. So that plaintiff's success on a negligence per se claim can be avoided, agency employees must be trained and competent in the operating practices of the agency. If a railcar operator is supposed to take certain steps every day, such as make a pre-trip inspection, and that inspection does not occur, a plaintiff can successfully argue that the agency was negligent if the injuries relate to the negligence. If the pre-trip inspection is part of a regulatory requirement, the agency will likely be found to be negligent as a matter of law.

B. Governmental Immunities and Defenses for Tort Claims

Defenses and immunities that are available to governmental agencies are discussed in this section.

1. Budget Constraints as a Component of the Defense

In *ARA Leisure Services v. United States*,[82] plaintiffs brought suit against the federal government after a tour bus left the road in a national park and multiple passengers were injured. Plaintiffs claimed that the National Park Service's decision to design and construct the park road without guardrails was negligent. Plaintiffs also claimed that the Park Service negligently maintained the park road because, over time, the road had become narrower due to lack of maintenance. The lower court granted summary judgment in favor of the government on the issues of both negligent design and maintenance. The appellate court found that the decision to design and construct the road without guardrails was grounded in social and political policy, and therefore a discretionary act. The court based its ruling upon the Park Service policy that required roads to be designed "to be 'esthetically pleasing [and to] … lie [] lightly upon the land utilizing natural support whenever possible.'"[83] The court found the agency decision to allow the condition of the road to shrink from an original width of 28 feet to a width of 14.6 feet at the accident site was not protected under the doctrine since it was a ministerial decision. The court relied upon evidence that Park Service standards required park roads to conform to original road grades and alignments, finding the fact that personnel were required to work within a budget did not make their failure to maintain the road a discretionary function, noting that budgetary considerations underlie virtually all government activity. The case was remanded so that plaintiffs could proceed with a cause of action based on the failure of the Park Service to follow its own maintenance policy.

In the case of *Butler v. State*,[84] plaintiffs were injured when their motor home left the road, and the vehicle was "speared" by a nearby guardrail. Plaintiffs sued the State of Iowa, alleging that the Iowa Department of Transportation (Iowa DOT) negligently designed, located, and failed to upgrade the guardrail. Iowa DOT provided evidence to the court that the design and placement of guardrail standards changed rapidly between 1965 when the guardrail in question was installed and 1974 when the accident occurred. In that time, the state made five major guardrail changes. The trial court noted that it would be impossible to keep up with the ever-changing state of the art in guardrail design and that the cost of those changes would be great. Iowa DOT proved that the cost would have been $25,725 per guardrail to upgrade all 200 existing guardrails to conform to each major design revision. The trial court found, and the Iowa Supreme Court agreed, that Iowa DOT's decision to focus on completion of the interstate highways, decreasing traffic on primary, two-lane highways, was reasonable and within its discretion. The state's motion for summary judgment was sustained.

In determining that the agency acted reasonably, the *Butler* court observed that

> [A]t any one time, the DOT may be aware of many facets of the State's highway network which have become outdated due to recent design changes or advancements. At the same time, however, the DOT will have a limited budget with many competing demands placed on it. The DOT acts as a reasonable agency when it attempts to prioritize the needs of the entire highway system and make maximum use of its limited resources to best serve all of the traveling public.[85]

The issue, as framed in the *Butler* case, was whether the agency met the standard of care of a reasonable agency, prioritizing the needs of the entire highway system to maximize use of its limited resources.

In *Abdulwali v. Wash. Metro. Area Transit Auth*,[86] plaintiff alleged that WMATA did not provide adequate signing to warn of the dangers of moving between train cars, causing the death of a six-year-old boy who fell from the train after opening a bulkhead door. The only warning of the danger of traveling between cars was a sign on the door that read "No Passage—Except in Emergency."[87] Plaintiff challenged the adequacy of the sign's warning. The court found that the text of the sign fit within the discretionary function exception to liability, noting "[t]he Transit Authority doubtless considered matters such as safety, aesthetics, cost, and a desire to alert passengers to the danger of moving between cars without discouraging them from so moving during emergencies."[88]

Analysis. Decisions relating to which facilities to budget repair or maintenance funds are distinguishable from negligent design cases. Maintenance can generally be seen as a more ministerial function of the agency, where a design function is viewed as a discretionary function. For instance, once an agency has purchased equipment, it will have a manual for that equipment that contains checklists, maintenance schedules, and instructions for upkeep. Maintenance of that equipment is a ministerial function of the agency employee, since there is little discretion

[82] 831 F. 2d 193 (9th Cir. 1987).

[83] *Id.* at 195, *quoting* U. S. Dept. of Interior, National Park Service, Compilation of Administrative Policies for National Parks and National Monuments of Scientific Significance, 65, U.S. Government Printing Office (1970).

[84] 336 N.W.2d 416 (Iowa 1983).

[85] *Id.* at 421.

[86] 315 F.3d 302 (D.C. Cir. 2003).

[87] *Id.* at 303.

[88] *Id.* at 305.

involved with following the equipment manual. Design decisions are by their nature discretionary and involve the balancing of important policy considerations such as availability of funds and personnel.

Budget constraints can be built into the defense of a claim or serve as the basis of the defense of a claim. Documentation of the process used to determine a course of action, after consideration of items such as budget, availability of and skill of employees, and equipment capabilities all serve to support the defense of a claim that is based upon the discretion of the agency.

2. Sovereign Immunity

Many government agencies enjoy sovereign immunity. This means that the government can only be sued under limited circumstances such as when a dangerous condition of government property is alleged, or when constitutional rights are alleged to have been violated. The government is not subject to unlimited liability when it is sued, and damages are frequently capped by statute. State statutory caps are subject to change by the legislature but range generally from $100,000 to $500,000.

Analysis. Sovereign immunity is a budget constraint that has been placed upon a governmental agency by the state legislature or Congress. It is not negotiable. In the context of a serious tort claim, plaintiff's damages will likely exceed the statutory cap. If liability is not at issue, defense counsel can use the statutory cap as a basis to obtain a favorable and quick settlement. If liability is contested, plaintiff's counsel should be aware of the existence of the cap and the futility of obtaining a settlement or judgment in excess of the cap. The fact that the cap exists can be a powerful negotiating tool for both plaintiff and defendant.

3. Evidence of Decision-Making Process

Evidence of the decision-making process can be persuasive to a jury or other finder of fact as noted in the *Butler* case, supra. When the agency can show the logic of its decision-making process, it is more likely to prevail in a negligence claim. An agency can base its defense on its plan to spend funds. The decision-making process can be project specific, perhaps including an explanation as to why a particular step in a process was changed, or the decision-making process can be explained as part of a statewide or agency-wide plan. The plan may include a cost-benefit analysis, data from accident or incident studies, trends, recommendations from federal authorities and any other information that supports or explains the reasons for the decisions of the agency. Documentation of the decision-making process of the agency can be particularly important to the defense of a case when the agency claims that it appropriately spent limited funds. Frequently, the public agency engages in this type of analysis when devising and updating its list of upcoming transportation projects. Such lists are found in a State Transportation Improvement Program (STIP), which is required of the state transportation department, or Transportation Improvement Program (TIP) which is compiled by a metropolitan planning organization (MPO) and requires input and cooperation from state and local transit providers.

4. Adequacy of Policy

An agency may argue, in defense of a suit, that its compliance with policies or standards relieves it of liability. A finding of a state of good repair frequently equates to compliance with highway safety and maintenance standards. However, the plan or policy itself must be logical and defensible. It is not sufficient to simply have a plan. This issue was discussed in *Combellack v. State*,[89] in a hearing involving injuries relating to the State of New York's alleged negligent removal of snow. The state had moved for summary judgment based on a qualified immunity defense. The court heard evidence that the state had a snow fighting plan and that its employees complied with the plan. The court, however, examined the plan and found it to be inadequate. The court commented that the state did not present any evidence of the studies, analysis, or reviews that were used to formulate the guidelines, including whether the possibility of a vehicle vaulting over the attenuator barrels was considered. The court ultimately found that the state was not entitled to dismissal of the claim.

In *Turner v. State*,[90] the court considered the Oregon Department of Transportation's (ODOT) STIP, which was used in support of its defense to a dangerous road condition claim. The court noted that the STIP was a capital improvement plan that determined the prioritization, funding, and scheduling of transportation projects over a four-year period. As part of the agency's motion for summary judgment, an ODOT traffic engineer attested that the agency prioritized transportation safety improvements under a Safety Priority Index System (SPIS), "primarily on crash history as reflected in SPIS safety statistics and the projected safety benefit that a project will have on that crash history."[91] According to the engineer, "it is ODOT policy to include the worst 5 percent SPIS-rated accident sites, as well as other high accident rated sites based on a cost/benefit analysis, in a list of potential highway safety construction improvement projects"[92] in the STIP safety budget. The intersection that was at issue in the case was not listed on the top five percent of crash sites at the time of the accident, nor was it considered to be a high accident site. Because the intersection did not fit into either of those categories, the state did not add intersection improvements to its STIP.

The court ruled against the state's summary judgment motion, noting that ODOT did not show that modifications to the intersection were considered and rejected in the STIP process or that other available processes were used to decide against those changes. On appeal, the Supreme Court of Oregon agreed with the analysis of the court of appeals but noted that ODOT might have been able to develop the discretionary defense with additional testimony and data.[93]

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[89] # 2019-040-043 (N.Y. Ct. Cl. June 17, 2019).

[90] 270 Or. App. 353, 348 P. 3d 253 (2015).

[91] *Id.* at 366, 348 P.3d at 261.

[92] *Id.*

[93] *See*, Turner v. State, 359 Or. 644, 375 P.3d 508 (2016).

Similarly, in *Paget v. State*,[94] the court was critical of the Utah Department of Transportation's decision to omit the installation of barrier at a location along I-80 in Utah, because the design standard relied upon by the agency did not provide adequate guidance to the designing engineer. The court noted

> Unfortunately, the Roadside Design Guide does not state any factors or unusual circumstances that should be considered in evaluating necessity. Given the confusing nature of what should be the more predictable categories on either side of it, the 'Barrier Optional' category appears to countenance little more than a free-for-all, affording highway designers carte blanche discretion to build or not to build barriers based, apparently, on little more than whim.[95]

Analysis. Most transportation agencies use an investment prioritization process that assigns a value to projects based on certain criteria, then ranks projects based on their value to develop a prioritized list. The agency may revise the prioritized list multiple times, with leadership making the revisions fit in with the agency's missions and goals. While agencies may refine their ranking systems over time on data, the budget, and ultimately, the goals of the agency, the process should always be driven by analysis of carefully gathered and accurate data**.** Any plan developed by the transportation agency should be logical and carefully considered**.**

A typical asset management framework uses measures such as age and condition to determine asset-specific impacts such as reliability and service quality, along with system impacts, which include system performance and safety. Some agencies use software tools to aid staff in the decision-making process, while others conduct a more informal investment prioritization process, using asset inventories, condition assessments, and observations to make decisions. In either case, analysis of the data provides the agency with an overview of the condition of its assets and an understanding of potential investment priorities. Collaboration and information sharing among agency staff can ensure that all competing priorities of the agency are considered, such as improving access for wheelchair bound patrons, improving service reliability, and mitigating safety risks.

5. Alleged Violation of Regulation or Policy

Governmental discretion does not include the ability of personnel to violate the safety policies or rules of the agency regardless of whether money to change the condition of the property is in the budget. If a "challenged government activity involves safety considerations . . . rather than the balancing of competing policy considerations, the rationale"[96] for an exception to tort liability does not exist. In Ohio, the standard has been articulated as follows: "ODOT's engineers, when undertaking and constructing a highway project, must adhere to current written standards in order to fulfill their duty of care."[97] An agency will usually be considered to have acted with ordinary care if it has complied with the policies or guidelines that it has adopted, although the standards must be based on scientific studies and data. In other words, once a safety policy or requirement is established, the agency cannot fail or refuse to follow its own requirements due to lack of budget.

Practice Tip: Change the Policy. The agency may have the ability to change an internal policy or guideline as long as compliance with it is not required by law. If the agency does not choose to change a policy significantly, language in the policy itself can be changed to provide more flexibility. Language such as "as soon as practical" or "as determined by engineering judgment" can be helpful to the defense of a claim.

6. Restriction of Use of Safety Data

23 U.S.C. § 409[98] protects information such as safety studies and hazard rankings that have been collected by the highway or rail agency to develop a federally funded safety construction improvement. The information gathered by the agency cannot be obtained in discovery or used in litigation against the agency. Some agencies, however, choose to use the data gathered in those studies to support their defense of a lawsuit. Section 409 contains a privilege that can be waived. The court in *Renfro v. Burlington Northern and Santa Fe R.R.*,[99] stated "we see no compelling reason that the State cannot waive the privilege afforded it by Section 409. Section 409 merely affords the state a disclosure and evidentiary privilege regarding certain materials."[100] In trial practice, if accident or safety data are favorable to the agency, counsel may consider using the data in support of its defense to a lawsuit. For instance, a speed study may explain an increase or decrease in the posted speed of a road and counsel may want the jury to hear about the engineering methodology and judgment used to determine an appropriate speed.

7. Application of Discretionary Function Analysis in Facility Maintenance Claims

In *Smith v. Washington Metropolitan Area Transit Authority*, supra, plaintiffs sued WMATA after their son died from a heart attack that occurred as he climbed a stopped escalator at a subway station. Two out of the three of the escalators had been placed out of service for safety reasons and agency personnel made the decision to stop the third escalator and allow patrons to walk up and down as they chose. WMATA did not have a statutory or regulatory mandate or any policy that applied to this set of circumstances. The appellate court found that the breakdown of the escalators at the same time was unforeseen, and there were no specific statutory or policy directives for the employees to follow. The court concluded that the decision to allow entering and exiting passengers to choose between walking on a stationary escalator or riding an elevator was a decision that was discretionary, as the decision implicated the agency's ability to fulfill its mission in a safe and efficient manner. Ul-

[94] 2013 Utah App. 161 (2013), *overruled on other grounds by* Paget v. DOT, 2014 UT App. 62, 322 P.3d 1180 (2014).

[95] *Id*. at *P.19.

[96] Summers v. United States., 905 F 2d 1212, 1215 (9th Cir. 1990).

[97] Lunar v. Ohio DOT, 61 Ohio App.3d 143, 146, 572 N.E.2d 208, 211 (1989).

[98] Discovery and admission as evidence of certain reports and surveys, 23 U.S.C. § 409 (2021)

[99] 945 So.2d 857 (La. App. 3rd Cir. 2006)

[100] *Id*. at 860.

timately, the appellate court remanded the case to the district court to dismiss the allegations that were protected by discretionary immunity and determine whether Smith could make a *prima facie* showing of negligent repair and maintenance. The court also noted that there might not be a sufficient proximate cause nexus between the alleged negligence and Smith's death.

8. Consideration of Cost of Anti-Crime Measures

In *Lopez v. Southern Cal. Rapid Transit Dist.*,[101] plaintiffs brought suit against Southern California Rapid Transit District (RTD) after they were injured during a fight on a bus owned by RTD. RTD argued that it could not protect passengers from assaults by fellow passengers due to the high cost of security. RTD presented evidence that it operated 220 bus lines over an area of 2,200 square miles with approximately 2,000 buses running during peak hours. It contended that imposing the cost of trying to prevent third-party assaults would create a "colossal" financial burden on the district, and "nothing short of an armed security force could be expected to effectively curb criminal violence" on board its buses.[102] The court did not find that argument persuasive, reasoning that RTD, as a public carrier, "has a duty" to use utmost care and diligence—whatever that may require in a particular case—"to protect its passengers from assaults by fellow passengers."[103] The court noted that multiple actions could satisfy the common carrier's obligation of care and diligence in transporting its passengers. The court suggested that the bus driver might warn unruly passengers to quiet down or get off the bus; alert the police and summon their assistance, or, if necessary, eject the unruly passengers. The court also suggested that RTD could provide communication links between the bus driver and local police or bus headquarters to enable the driver to call for assistance when needed, and buses could be equipped with alarm lights to alert nearby police of criminal activity taking place on board the bus. The court further suggested that bus drivers, especially those on routes with a history of criminal activity, could be trained to recognize and deal with potentially volatile situations. The court stated that it did not mean to suggest that the actions it suggested were the only actions a carrier could or should take to meet its duty to passengers or that, in a particular case, a carrier would necessarily breach its duty if it failed to take any or all of these actions. The court simply suggested, for illustrative purposes, that there were a number of measures that RTD might take, which would impose little, if any, financial burden upon the district and could improve the safety of the bus system. The court did not find RTD's budget restriction argument persuasive.

Analysis. *Lopez* illustrates the importance of the agency decision-making process. The court did not discuss any processes used by the agency to deter crime on its bus routes, which indicates that such evidence was not provided. In the defense of a claim, if the agency is able to provide proof to the court of its efforts to deter crime, such as alarm systems, training, or a method that was developed as part of an SMS, a court may find that the agency acted reasonably and met the required standard of care.

a. *FTA's Safety Management System Initiative*[104]

FTA's Safety Management System Initiative requires transit operators to manage safety risks through the implementation of an SMS. An SMS requires the continuous collection and analysis of information, which can be used to address risks such as criminal behavior. Measures in the SMS could include additional training for transit employees, a means of quickly contacting law enforcement, a list of riders who are banned from traveling in the system, and many other options that could be developed by the agency as it works through the SMS process.

C. Assessment of Risk for a Civil Rights Claim and Strategies to Challenge the Claim

Transportation agencies must provide a safe environment for the traveling public. Such agencies must also allocate public funds without discriminating, or appearing to discriminate, against protected groups. The framework for a decision-making process that can help the transportation agency allocate funds and avoid litigation is outlined in this section. This section also discusses methods that can be used to challenge a discrimination claim.

1. Federal Regulations

Section 601 of Title VI prohibits discrimination by a state or local agency and allows a right of legal action for individuals for intentional discrimination. Section 602 requires state and local agencies to ensure that their grantees do not engage in actions that have a disparate impact that results in discrimination. Pursuant to Section 602, the U.S. Department of Transportation promulgated a disparate-impact regulation, which prohibits funding recipients from undertaking activities that have racially discriminatory effects. Recipients of federal funds must not

> utilize criteria or methods of administration that have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.[105]

Agency policies that have a discriminatory effect must be eliminated unless the agency can show the practices were necessary to achieve a legitimate non-discriminatory objective. In 2012, FTA issued a publication to explain rights and remedies created by Title VI and environmental justice addressed in E.O. 12898.[106] FTA clarified Title VI requirements as follows:

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[101] 40 Cal.3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985).

[102] *Id*. at 787, 710 P.3d at 910, 221 Cal. Rptr. at 843.

[103] *Id*. at 796, 710 P.3d at 917, 221 Cal. Rptr. at 850.

[104] FTA, *National Public Transportation Safety Plan*, https://cms7.fta.dot.gov/regulations-and-guidance/safety/national-public-transportation-safety-plan, (last visited March 18, 2021). *See also*, Public Transportation Agency Safety Plans, 49 C.F.R. pt. 673 (2021)

[105] Discrimination prohibited, 49 C.F.R. § 21.5(b)(2).

[106] FTA C 4702.1B, *Title VI Requirements and Guidelines for Federal Transit Administration Recipients*, Oct. 1, 2012, https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf.

> Title VI allows persons alleging discrimination based on race, color, or national origin by recipients of Federal funds to file administrative complaints with the Federal departments and agencies that provide financial assistance. Persons alleging intentional discrimination (i.e., disparate treatment) may bring an action seeking to enforce Title VI but cannot do so with regard to allegations of discrimination based on agency disparate impact regulations. Disparate impact claims may be filed with the Federal agency.[107]

a. *Application of the Rules*

The public agency is charged with the practical application of Title VI and environmental justice, balancing many different issues and concerns in the allocation of its funds. Reduction of bus routes solely in minority neighborhoods could be the basis of a review. The placement of new and zero emissions vehicles in wealthy neighborhoods but not lower-income neighborhoods might also be scrutinized by a regulatory agency. Similarly, if the nature and quantity of bus service in an area is permanently changed, a service equity analysis must be conducted to determine whether the change results in a disparate impact on the basis of race, color, or national origin.[108] A similar analysis should be conducted when the decision is made to close a facility, whether temporarily or permanently, regardless of the reason for the change in service. The agency must explore options to provide the same or similar service to the public during the period of closure. Potential impacts to the populations it serves must influence the agency's decision to perform tasks or repairs relating to the condition of its infrastructure, service outages, changes in service routes, or the frequency of service. This type of analyses is required for recipients of federal funds.[109]

b. *Landmark Case*

The case of *Darensburg v. Metropolitan Transp. Corporation*,[110] illustrates the concept of discrimination in the context of availability of service. *Darensburg* was filed on behalf of minority bus riders who alleged that the Metropolitan Transportation Commission (MTC), the San Francisco Bay Area's surface transportation planning organization, placed an unequal and discriminatory emphasis on railway expansion to the detriment of bus riders. Plaintiffs alleged that MTC discriminated against them by selecting and funding Bay Area Rapid Transit (BART) rail projects rather than bus projects. Both MTC and BART are subject to Title VI. Plaintiffs used bus services for transportation to and from work, school, shopping, and other destinations. Plaintiffs complained that they were harmed by cuts to the frequency and reliability of bus service, fare increases, and the failure of the agency to make service improvements. Plaintiffs also alleged that the MTC plan had a disparate impact on minority riders and that the agency had a history of providing service that predominantly benefited white riders.

Darensburg alleged that MTC used facially neutral funding mechanisms that resulted in decisions that disproportionally favored rail service over bus service. After a bench trial, the district court found that plaintiffs had stated a prima facie claim of disparate impact discrimination, but that MTC had rebutted the presumption by showing that it had a substantial legitimate justification for the plan and granted MTC's motion for summary judgment. The court also found that plaintiffs were not able to prove the existence of a less discriminatory, equally effective alternative plan. On appeal, the 9th Circuit again found in favor of MTC, finding that plaintiffs had used faulty reasoning in their statistical disparate impact study.

While the *Darensburg* plaintiffs did not obtain a favorable court ruling in their legal action, supporters of their cause brought the funding issue to the attention of FTA in an administrative complaint. That complaint alleged that BART, the recipient of more than $70 million in funding that was to be distributed by MTC, failed to evaluate the equity impacts of its expansion project and therefore failed to comply with civil rights and environmental justice requirements. According to the complaint, one of the alternatives that BART had failed to evaluate was a bus rapid transit system that would have provided fast service with a low fare to minority neighborhoods.

In response to the complaint, FTA conducted an on-site investigation of BART's Title VI compliance. In a January 15, 2010 letter to BART and MTC, the FTA Administrator stated that he believed the complaint's allegations were true, and told BART and MTC that FTA would withhold the $70 million in funding unless BART could quickly provide an adequate plan to correct multiple deficiencies, including an equity analysis.[111] At the conclusion of the investigation, $70 million in FTA funds was redistributed to all Bay Area transit systems and used to address budget deficits and mitigate the effect of services cuts and fare hikes.

Analysis. While a plaintiff must show discriminatory intent by an agency to prevail in a suit and recover monetary damages, even when discriminatory intent is not proven, administrative agencies such as FTA, FRA, and FHWA may act on those allegations, as illustrated in the *Darensburg* matter. When a federal regulatory agency investigates claims that federal funds are not being used by recipients as intended by Congress, the outcome for the recipient state or local agency can be severe. A regulatory response can include withholding of future funds, a consent order, and/or increased scrutiny of the agency's actions. The loss of planned funding from FTA or FHWA can be catastrophic to a state or local agency's budget. Additionally, an unfavorable audit by a regulatory agency could be used by a plaintiff in a separate lawsuit to show a pattern of discrimination.

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[107] *Id*. ch. 1-9.

[108] *Id*. ch. 1-10.

[109] The effect of the distinction between a temporary and a permanent change is discussed in Section IV.E of this digest.

[110] 636 F 3d. 511 (9th Cir. 2011).

[111] Peter Rogoff, FTA Administrator, January 15, 2010 letter, https://www.bart.gov/sites/default/files/docs/BART_MTC_Letter_On_OAC.pdf; *See also*, Denis Cuff, *Feds deny $70 million in stimulus money for BART rail extension to Oakland airport*, EAST BAY TIMES, https://www.eastbaytimes.com/2010/02/12/feds-deny-70-million-in-stimulus-money-for-bart-rail-extension-to-oakland-airport-2/ (last updated Aug. 15, 2016).

c. Agency Forecasting and Planning for Budget Reductions

Transportation agencies are required to develop and implement agency safety plans, state of good repair reports, and asset management plans. The plans, once adopted by the agency, are both policy and guidance for the agency. The San Francisco Municipal Transportation Agency (SFMTA) State of Good Repair report indicates that in 2019, San Francisco's transportation system was generally in a state of good repair.[112] The report detailed investments in critical and non-critical assets and identified the work it had done on infrastructure such as facilities, stations, and technology. The report noted that the 2020 pandemic would have long-term effects on the ability of the agency to invest in state of good repair projects. The SFMTA planned to address the deficit by prioritizing capital investments to maximize asset conditions and meet replacement and rehabilitation cycles and provided detail within the report as to how and why the changes would occur.[113]

Similarly, MARTA published a set of service standards in 2017 that outlined the steps it planned to take should unplanned budget reductions occur.[114] The plan specifically requires staff to consider the issues of service equity, vehicle availability, vehicle storage capabilities, and vehicle and operator availability when considering contraction of services. The standards, which were effective prior to the pandemic of 2020 or the need for budget reduction, provide guidance to the agency when and if it is faced with major operating budget shortfalls. In the event of budget contraction, MARTA intends to continue to provide core services, such as transport to health centers, major employers, and lifeline services, even if the frequency of those services must be reduced.[115]

Analysis. The MARTA and SFMTA policies are highlighted as examples of the ability of the agency to plan in advance for budget reductions so that it does not have to make important decisions rashly or during emergencies. The agency with a plan in place for budget restrictions can demonstrate that its actions were part of a carefully considered strategy that was developed over time and not in response to a situation that required quick action.

2. Compliance Reviews

Compliance reviews relating to civil rights, equal employment opportunities, Americans with Disabilities (ADA)[116] and disadvantaged business enterprises,[117] are conducted by regulatory agencies pursuant routine scheduling or after a complaint or incident. When FTA conducts a Title VI Compliance Review, several items are typically audited: public outreach and participation; evaluation of service and fare changes; use of multiple languages in outreach; documentation of Title VI complaints; service and equity analyses; records of investigations of Title VI complaints; notification of protection to beneficiaries of the program; and evaluation of potential adverse effects of service or fare changes in review of the program.[118]

If an agency is found to be deficient, it may be placed on a Corrective Action Plan (CAP),[119] which requires strict compliance and periodic re-evaluations by the regulatory agency. A CAP will identify the actions that must be performed by the agency, which may include: a milestone schedule for completing the actions; the responsible parties for the actions; and the strategy for ensuring the completion of required work. The regulatory agency monitors the agency's progress in completing each required action. After the audit is concluded, a report is issued. The report identifies any deficiencies noted by the auditors and may recommend policy or procedure changes for the agency. A negative report, or one that requires multiple corrective actions, may be used by a plaintiff in a civil rights-based lawsuit as an indication that the agency has not complied with equal justice or constitutional requirements and principles.

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[112] *2019 SFMTA Annual State of Good Repair Report*,

https://www.sfmta.com/reports/2019-sfmta-annual-state-good-repair-report (follow link to "Supporting Documents 2019 SFMTA Annual State of Good Repair Report").

[113] *Id.* at 43.

[114] MARTA *Service Standards*, FY 2017, https://www.itsmarta.com/uploadedFiles/SERVICE_STANDARDS%20_FY_2017_Final.pdf. The standards provide

> In times of national or regional economic distress, cost containment and/or revenue generating actions taken by the Authority will include a multiple of alternative considerations. These options are listed as follows:
>
> - Implementing internal productivity-cost containment initiatives;
> - Seeking new revenue sources;
> - Considering and proposing fare increases; and
> - Reducing service as needed.
>
> Depending on the severity of the particular fiscal crisis, a significant contraction of service may be required to align the provision of service with expected revenues. The initial step in this process will be the identification of unproductive service, as outlined previously. However, this section serves to provide guidance for considering a systemic contraction of service when faced with major operating budget shortfalls. When faced with the certainty of severely reducing transit services, the Authority must specifically define the types and levels of core services that will be preserved given the Authority's complex multi-modal characteristics. *Id.* at. 22.

[115] *Id.*

[116] Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327.

[117] U. S. DOT, *Definition of a Disadvantage Business Enterprise*, https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise (last updated Nov. 22, 2017).

[118] FTA, *Title VI Compliance Review Final Reports*, https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/title-vi-compliance-review-final-reports (last updated Dec. 31, 2020).

[119] FTA, *Corrective Action Plans*, https://www.transit.dot.gov/regulations-and-programs/safety/corrective-action-plans-caps-management (last visited March 18, 2021).

3. Strategies for the Defense of Title VI Disparate Impact Complaints

A transportation agency can face a discrimination complaint for many of the actions it undertakes, including reduction of services due to budget restrictions. The agency can prepare in advance to defend against a complaint by documenting that it is actively engaging the public, for instance, considering the impact of its actions on lower-income and minority groups, and making its services accessible while considering its budget limitations. Actions that the agency can take to prepare for a compliance review or public complaint, depending on the circumstances, are:

- Develop procedures for investigating and tracking Title VI complaints filed against it and make its procedures for filing a complaint available to members of the public. This will enable the agency to show that it has a plan in place to address complaints and that meritorious complaints are addressed.
- Prepare and maintain a list of active investigations, lawsuits, or complaints that allege discrimination based on race, color, or national origin. This list should include the date that the investigation, lawsuit, or complaint was filed; a summary of the allegation(s); the status of the investigation, lawsuit, or complaint; and actions taken by the agency in response to the allegations. Maintenance of the list demonstrates the commitment of the agency to investigation and resolution of complaints.
- Seek out and consider the viewpoints of minority, low-income, and "Limited English Proficient" (LEP) populations while conducting public outreach and involvement activities. Offer multiple opportunities for the public to be involved in the identification of social, economic, and environmental impacts of proposed transportation decisions such as websites, posters or flyers and town hall meetings. This step ensures transparency of the decision-making steps of the agency and the inclusion of multiple viewpoints in the process.
- Complete an equity analysis when new facility locations are under consideration. Reach out to people who may be impacted by a change to the location of a facility, both positively and negatively. Compare the equity impacts of alternatives and conduct the analysis before selection of the preferred site.
- Evaluate fare changes and all major service changes during planning and programming stages to determine whether those changes may have a discriminatory impact.[120]

The following strategies and approaches are viable defenses to administrative complaints and challenges:

- Attack the complaint itself: focus on the complaint's failure to show or allege specific discriminatory intent or effect; discuss the complaint's failure to identify any discrimination; the absence of proof of any alleged disparity; and/or the complaint's failure to prove a causal connection between the alleged discriminatory behavior and the impact on the complainant or community.
- If the allegation relates to a change or reduction in level of service or disparity in existing level of service, explain the basis for the agency decision; explain the adequacy of existing service or of new service; explain the provision (if applicable) of alternative service or the need to reduce emissions as part of an emissions reduction program.
- Show that a decision was part of a systematic and scientific study and that multiple options were considered, public hearings were conducted, and that public input was reviewed. Explain that some factors are beyond the control of the agency such as a reduction in funding, or other administrative difficulties.
- Use statistics, demographic information, and other objective measurements to rebut allegations of disparate impact.
- Explain the source of agency funding and any statutory requirements or restrictions that relate to the funding, or the reason for a lack of funding, including a lack of federal funding or loss of subsidies or tax base.
- Compare types of funding and explain the reasons for funding allocations.
- Provide of an overview of the agency's operations and facilities and be prepared to discuss capital replacement needs and/or explain preventative maintenance requirements of the systems which require additional funding.[121]

Analysis. In summary, if faced with a complaint, the agency should explain that the foundation for its decision is based upon the documented non-discriminatory evaluation conducted by the agency. This approach can include a defense to the complaint that relates to the agency's reliance on state of good repair principles, its asset management plan, and other documents. When the agency can prove that it has conducted a thorough, equitable, and systematic analysis of its equipment, facilities, and vehicles, based upon the careful, scientific analysis, it can explain the reasons that changes have been made to the system.

4. Discrimination Claims

Frequently allegations of discrimination and lack of safety are combined in suits against governmental agencies. This section is a summary and analysis of cases that involve claims related to the government's alleged failure to maintain or construct facili-

[120] *See*, FTA C. 4702.1B, "Title VI Requirements and Guidelines for Federal Transit Administration Recipients", October 1, 2012; *see also,* Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act of 1964, 29 C.F.R., part 21 (2021); *see also*, U.S. DOT, Office of Civil Rights, *Best Practices for Addressing Title VI in Transportation Projects, Speaking With One Voice*, Lecture, Civil Rights Virtual Symposium, May 17-18, 2017.

[121] Larry Thomas, Civil Rights Implications of the Allocation of Funds Between Bus and Rail, TCRP LRD 27, Transportation Research Board, the National Academies of Sciences, Engineering, and Medicine of Washington, D.C., (2007), p.11.

ties appropriately, allegedly resulting in discrimination against minorities, wheelchair bound individuals, and others.

a. Intentional Discrimination Against Minority Community

In *Erie CPR v. Pennsylvania Department of Transportation (PennDOT)*,[122] plaintiffs challenged the decision of the City of Erie and PennDOT to close a bridge during the construction of a new bridge, filing a lawsuit that alleged constitutional and environmental justice violations. Plaintiffs claimed that PennDOT discriminated against the primarily minority community by failing to adequately examine feasible alternatives for bicyclists and pedestrians during the time a new bridge was under construction. Plaintiffs alleged that leaving an existing bridge in place would have provided a safer and preferable corridor for pedestrian travel, and that defendants did not seek to communicate with people with limited English skills prior to the bridge closure. The court found that the conduct of the defendants did not show the discriminatory intent required to support a claim of intentional discrimination. The court explained that in order to prove intentional discrimination through the application of a facially neutral policy (such as the one at issue in this case) the plaintiffs must have shown that the relevant decision maker adopted the policy at issue "because of, not merely in spite of, its adverse effects on an identifiable group.[123] The court further pointed out that the mere fact of disparate impact was not sufficient to sustain a Title VI challenge to a facially neutral policy.[124]

Analysis. In *Erie CPR*, plaintiffs alleged that PennDOT discriminated against them by closing a bridge to pedestrian traffic. The city and state provided the court with documentation of the decision-making process, including the feasibility study, which contained a cost-benefit analysis of eleven different alternatives. According to the study, the alternative of leaving the bridge in place during construction served fewer needs of the neighborhood than the selected alternate. In further support of its position, the agency noted that it had held three public meetings, four citizen advisory meetings, and obtained approval of the plan from regulatory agencies. The project had its own public website which provided graphic information, links to reports and publications, and contact information for the project. The court concluded that defendants undertook adequate public outreach methods during the decision-making process and provided multiple avenues for public input. This case illustrates the benefits of careful documentation of decision-making efforts and planning, which can lead to a successful defense of a discrimination claim.

b. Lack of Access to Sidewalks

The ADA was enacted to ensure that pedestrians with disabilities are able to access the public transportation system in a safe manner. The ADA requires public agencies to upgrade their sidewalks, curb cuts, and parking lots to be wheelchair accessible at the same time road improvements, such as resurfacing or overlay, are done.[125] Additionally, the agency is required to compile a transition plan, which identifies routes and locations that will be upgraded and the timeframe in which the upgrade will occur. The court in *Schonfeld v. City of Carlsbad*,[126] found that the city was in compliance with the ADA after examining the transition plan it prepared. The city provided evidence to the court that it had conducted a timely self-evaluation, solicited input from appropriate groups and individuals, indexed every street, inventoried existing and missing curb ramps, and then set up a procedure and budget to install 900 curb ramps over a four-year period. The court also noted that the city had set up an action plan, prepared an inventory report, and established a sidewalk installation prioritization process with appropriate budget allocations. The transition plan is an important sign to the public and a reviewing court that the agency is making progress in complying with ADA requirements.

Sidewalks may be closed during construction, impassable due to lack of maintenance or snowfall, or improperly constructed. Each of these conditions pose a specific safety risk for people who suffer from physical disabilities. Large cities including Philadelphia,[127] Los Angeles,[128] New York,[129] Seattle,[130] and Atlanta[131] have faced lawsuits based upon the ADA where individuals and groups allege that they have been discriminated against due to defects in sidewalks, curb cuts, and public buildings, which are impassable and therefore inaccessible for disabled persons. As a result of these suits, each of these cities have been ordered by courts to devote substantial funds to sidewalk improvements.

If an agency is sued for non-compliance with the ADA, its defenses are limited. 28 C.F.R. § 35.150 allows an agency to determine that the cost of compliance is unduly burdensome, but in order to prove that work required is "unduly burdensome" the agency must show that the decision was made by the head of a public entity or his or her designee, not an individual project manager or other lower-level employee.[132] In order to meet the regulatory criteria, the agency must prove that it has considered all resources that are available in the funding and operation of its services and programs and that it has determined that funding is unavailable for a project.

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[122] 343 F. Supp.3d 531 (3rd Cir. 2018).

[123] *Id*. at 550 (*citing* Pryor v. NCAA, 288 F.3d 548, 562 (3rd Cir. 2002)).

[124] *Id*. (*quoting* S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 265 (3d Cir. 2013)).

[125] *See*, Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002).

[126] 978 F. Supp. 1329 (S.D. Cal. 1997).

[127] Jason Laughlin, *Philly's sidewalks are so bad they violate federal law protecting people with disabilities, lawsuit contends*, The Philadelphia Inquirer, August 26, 2019.

[128] Emily Alpert Reyes, *L.A. agrees to spend $1.3 billion to fix sidewalks in ADA case*, Los Angeles Times, April 1, 2015.

[129] Clayton Guse, *NYC sidewalk curbs still behind on Americans with Disabilities Act requirements: report*, New York Daily News, July 26, 2020.

[130] Adina Solomon, *Crumbling Sidewalks Become a Legal Battleground*, Bloomberg City Lab, August 16, 2018.

[131] *Id.*

[132] Existing facilities, 28 C.F.R. § 150(a) (2021).

Compliance with the law and/or the adoption and implementation of an adequate ADA transition plan are the only true and viable defenses to a claim of discrimination in this context.

c. ADA Requirements for Buildings and Vehicles

Accessibility features such as elevators at train stations and lifts or ramps on fleet vehicles can be the source of discrimination claims. Budget restrictions, without adequate explanation, are not adequate defenses to such discrimination claims.

Access to Buildings. Failure to make facilities accessible to wheelchair users when facilities are upgraded can result in claims against the agency. The court in *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transp. Authority*,[133] considered the language of 49 C.F.R. § 37.43(a)(2) in a case involving the failure of the agency to install an elevator during a facility renovation. The first sentence of section 37.43(a)(2) provides:

> When a public entity undertakes an alteration that affects or could affect the usability of or access to an area of a facility containing a primary function , the entity shall make the alteration in such a manner that, to the **maximum extent feasible** the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of the alterations. (emphasis added)

The court found that infeasibility can only be "'occasional and arises from the nature of the existing facility'—not from the budget limitations of a transportation authority."[134] The court noted that "ADA and U.S. DOT regulations define feasibility in relation to technical, rather than economic concerns."[135]

Similarly, the court in *Roberts v. Royal Atlantic Corp*.,[136] observed that "'the maximum extent feasible' requirement does not ask the court to make a judgment involving costs and benefits. … The statute and regulations require that such facilities be made accessible even if the cost of doing so—financial or otherwise—is high."[137]

A similar issue was considered in *Bronx Independent Living v. Metropolitan Transp*ortation Authority.[138] In this case, plaintiffs challenged the New York Metropolitan Transportation Authority's (MTA) decision to replace staircases, renovate floors, reconstruct platform edges, replace concrete platforms, and install new lighting, without constructing an elevator as part of the renovation. Plaintiffs sought a determination that the construction work triggered the accessibility requirements in the federal regulations.[139] "Section 12147 of Title II (of the ADA) regulates the accessibility obligations of public entities making alterations to public transit facilities like subway stations."[140] The section states that when a public entity makes alterations to an existing public transportation facility that affect or could affect the "usability" of a station or a part of the station,

> [I]t shall be considered discrimination, for purposes of section 12132 of this title and section 794 of title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.[141]

"This provision is known as the 'Accessible Alterations Rule'"[142]

The court found that the replacement of a stairway at a subway station was "an alteration affecting the station's usability"[143] as contemplated by the rule and granted the motion for summary judgment in favor of plaintiff.

Analysis. *Bronx Independent Living* brought suit based on 49 C.F.R. § 37.43(a)(1), while MTA argued that the applicable regulation was 49 C.F.R. § 37.43(a)(2), not (a)(1). The difference in the wording of the rules was important because under § 37.43(a)(1), MTA had made alterations to increase accessibility regardless of cost, while under § 37.43(a)(2), MTA had to make those alterations only if the cost of the alterations would not be disproportionately expensive. Because of the complexity of this analysis, the agency must carefully review the regulatory structure to ensure compliance with and understanding of the requirements of the rules before committing to a facility renovation.

In *Forsee v. Metro. Transp. Auth*.,[144] another accessibility case, plaintiffs, *inter alia*, argued that the City of New York had "historically stymied efforts to increase accessibility."[145] The plaintiffs cited *Bronx Independent Living*, stating that the city's opposition to installing elevators as part of the Middletown Road station renovation in 2013 "was illustrative of the city's failure to increase accessibility in the city."[146] The plaintiffs survived the city's motion to dismiss. Agencies that consistently fail to perform accessibility upgrades may find that plaintiffs use examples of prior inactivity as evidence of discrimination.

Access to Vehicles and Services. Public entities that provide designated public transportation must make reasonable modifications in policies, practices, or procedures when those modifications are necessary either to avoid discrimination based on disability or to provide accessibility to their services. 49 C.F.R. § 37.169(c)[147] identifies only three justifications a transportation provider can use to deny a request for a modification to a fleet route or service. The justifications do not include budget. These grounds apply to both advance requests for accommodation and on-the-spot requests: 1) granting the request for a modifica-

[133] 635 F.3d 87 (3rd Cir. 2011).

[134] *Id*. at 95.

[135] *Id*.

[136] 542 F.3d 363 (2nd Cir. 2008).

[137] *Id*. at 371.

[138] 358 F. Supp.3d 324 (S.D.N.Y. 2019).

[139] Discrimination, 42 U.S.C. § 12132 (2021).

[140] 358 F. Supp.3d at 328.

[141] *Id*. (referencing 42 U.S.C. § 12147(a) (2019)).

[142] *Id*.

[143] *Id*. at 331 n.7 (citation omitted).

[144] No. 19 Civ. 4406 (ER), 2020 U.S. Dist. LEXIS 56672 (S.D.N.Y. Mar. 31, 2020).

[145] *Id*. at *8.

[146] *Id*.

[147] Process to be used by public entities providing designated public transportation service in considering requests for reasonable modification, 49 C.F.R. § 37.169 (2021).

tion would fundamentally alter the provider's services (such as a request for a fixed route bus to deviate from its normal route); 2) granting the request for a modification would create a direct threat to the health or safety of others (such as a request that would require a driver to park a vehicle in a no parking zone); or 3) the requested modification is not necessary to allow the passenger to use the entity's services, programs, or activities for their intended purpose (for instance, the modification might make transportation more convenient for one passenger, but that passenger could nevertheless use the service successfully to get where he or she is going without the modification).

An example of the application of these concepts can be found in *Frogge v. Fox*.[148] Plaintiff alleged that the Mountain Line Transit Authority (MLTA) failed to provide her with a reasonable accommodation when she requested a new bus stop in her neighborhood. After evaluation and a site inspection, MLTA determined that the roads in the apartment complex were too small and did not have an acceptable place for a full-sized bus to turn around, and that the route required a full-sized bus due to the number of passengers who used it. MLTA also determined that the requested changes would have significantly impacted other passengers on the route, and for that reason denied the request. The court granted MLTA's request for summary judgment.

d. Access Management

Access management can be accomplished in many ways. Access management is "the coordinated planning, regulation, and design of access between roadways and land development … transportation professionals are tasked with optimizing facilities and the configuration of facilities in a way that will address the needs of the community without adversely compromising access to the system."[149] Commonly used methods are consolidation or elimination of driveways, installation of median barriers, the prohibition of left turns and the inclusion of controlled access designations in roadway plans. Access management can also be accomplished with a plan which allows new access points only through a permitting process. These decisions are a source of administrative and judicial challenges since access management practices may be perceived as unequal or discriminatory. The cases summarized in this subsection illustrate examples of litigation against public agencies when access to a roadway was restricted or permanently changed.

In *Slater v. State*,[150] suit was filed after the Wisconsin Department of Transportation (WisDOT) notified the Slaters that their driveway permit was being revoked and their driveway was going to be removed.[151] WisDOT appealed the circuit court's decision to reverse the agency decision. WisDOT had decided to remove several driveways, including the Slaters' driveway, after consideration of an access management plan and a safety assessment of the area. The access management plan recommended eliminating numerous driveways because the presence of the driveways conflicted with established engineering guidelines and created a risk of high crash rates. The appellate court reviewed the evidence and reversed the circuit court's ruling, concluding that the decision to revoke the Slaters' driveway permit was based upon documented safety concerns and evidence that the Slaters would have reasonable alternative access to the highway without their driveway.

e. Temporary vs. Permanent Service Reductions

According to FTA C. 4702.1B,[152] transit operators that operate 50 or more fixed route vehicles in peak services and are located in an urbanized area with a population of 200,000 or more must perform a service equity analysis whenever they make a major service change. The analysis must evaluate the impacts of the proposed service changes on Title VI protected populations and low-income populations. Temporary service changes (those which do not exceed one year) do not rise to the level of a major service change.[153] The emergency service cuts that occurred during the pandemic of 2020 fit into this category. Comments on the FTA website indicate that even though the service equity analysis is not required for temporary changes, FTA expects temporary services or fare changes to be implemented equitably.[154] If temporary changes become permanent, the service equity analysis must be conducted. FTA recommended, even for temporary changes, that transit agencies document the rationale for specific reductions and the steps taken to ensure equitable reductions in service in case of a challenge to the process.

V. ADMINISTRATIVE SAFETY ENFORCEMENT EFFORTS

This section highlights safety investigations performed by FTA and the National Transportation Safety Board (NTSB). The goal of the agency oversight process is to make transportation safer through policy development, hazard investigation, data collection, risk analysis, oversight programs, and information sharing.[155] FTA is authorized to temporarily and quickly assume the role of a State Safety Oversight Agency (SSOA) when

[148] No. 1:17cv155, 2019 U.S. Dist. LEXIS 96,606, (N. D.W. Va. June 10, 2019).

[149] The Transportation Research Board, Access Management Manual, 2nd Edition, Transportation Research Board of the National Academies of Sciences, Engineering, and Medicine, Washington, D.C., (2015).

[150] 884 N.W.2d 535 (Wis. Ct. App. 2016).

[151] Wis. Stat. § 86.073(1) (2021) allows a request for review of a denial of a driveway permit.

[152] FTA C. 4702.1B, Title VI Requirements and Guidelines for Federal Transit Administration Recipients, October 1, 2012.

[153] *Id*. at Chap. IV-13.

[154] *See*, FTA, *Frequently Asked Questions from FTA Grantees Regarding Coronavirus Disease 2019 (COVID-19)*, https://www.transit.dot.gov/frequently-asked-questions-fta-grantees-regarding-coronavirus-disease-2019-covid-19 (last updated: Tuesday, March 23, 2021).

[155] FTA, *Transit Safety Oversight*, https://www.transit.dot.gov/regulations-and-guidance/safety/transit-safety-oversight-tso, (last visited March 18, 2021).

the state agency is not functioning properly.[156] It can withhold financial assistance or direct the use of federal funding for safety purposes.[157] The NTSB has the authority to investigate all highway accidents and incidents, including incidents at railway grade crossings "in cooperation with a State."[158]

A. WMATA Incident Review

The following section provides a review of federal regulatory agency responses to an incident that occurred at the WMATA facilities in 2015. WMATA was created by an interstate compact in 1967 to plan, develop, build, finance, and operate a regional transportation system in the Washington D.C. metro area.[159] The agency provides rail, bus, and paratransit services. In 2015, FTA conducted a safety management inspection of WMATA in response to an accident involving a short circuit on the rail system, which caused smoke to fill a stranded train, killing one passenger and injuring 91 people.

1. Factual Background

On January 12, 2015, a train on the Metrorail system stopped after encountering heavy smoke in a tunnel between stations. The train filled with smoke and the conductor attempted to return to the station, but power to the train was lost before the return trip could be completed and the train was stranded. A following train was also affected by the heavy smoke. Passengers in both trains, as well as passengers on the station platforms, were exposed to heavy smoke. Some passengers evacuated the trains on their own, while others were assisted by first responders and firefighters. After the incident, FTA and NTSB evaluated WMATA's operations and maintenance programs, safety management capabilities, and organizational structure. One of the key findings of the investigation was that the agency had "organizational deficiencies" and "operational methodologies" that limited its ability to recognize and resolve safety issues.[160] The probable cause of the incident was determined to be a prolonged short circuit in the wiring, which resulted from ineffective inspection and maintenance practices.[161]

2. National Transportation Safety Board Investigation

The final report of the NTSB indicated that it had investigated 12 WMATA accidents previously and had issued 101 safety recommendations to WMATA since 1979. The NTSB outlined the following safety issues and conditions:

- Initial response to report of smoke. A smoke detector activated but the activation was not displayed at the operations center due to a loose wire. Once the other detectors were activated, the standard operating procedure of stopping all trains did not occur.
- The tunnel where the fire occurred was not appropriately ventilated. Emergency smoke removal procedures had previously been identified as a need for the agency.
- Train operators did not know how to shut down the railcar ventilation systems and smoke was pulled into the railcars through the fresh air ventilators.
- Emergency communications were not prompt and first responders were directed to the wrong tunnel. Passengers who evacuated the train had a difficult time traversing the safety walkway as lighting was dim and obstacles blocked the walkway.
- The Tri-State Oversight Committee, which was responsible for safety oversight, lacked sufficient resources, technical

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[156] MAP-21 enhanced FTA's safety authority, including allowing it to assume SSO responsibilities in the absence of an effective SSOA. Pursuant to 49 C.F.R. § 1.91(a), the Secretary of Transportation's (the Secretary) authority to carry out 49 U.S.C. § 5329 is delegated to the Federal Transit Administrator.

[157] According to the State Safety Oversight Program Certification Process, 49 U.S. Code § 5329(e)(7):

> (C). (Disapproval)
>
> If the Secretary determines that a State safety oversight program does not meet the requirements of this subsection and denies certification, the Secretary shall transmit to the eligible State a written explanation and allow the eligible State to modify and resubmit the State safety oversight program for approval.
>
> (D). Failure to correct. —If the Secretary determines that a modification by an eligible State of the State safety oversight program is not sufficient to certify the program, the Secretary—
>
> (i)shall notify the Governor of the eligible State of such denial of certification and failure to adequately modify the program, and shall request that the Governor take all possible actions to correct deficiencies in the program to ensure the certification of the program; and
>
> (ii)may—
>
> (I)withhold funds available under paragraph (6) in an amount determined by the Secretary;
>
> (II)withhold not more than 5 percent of the amount required to be appropriated for use in a State or urbanized area in the State under section 5307 of this title, until the State safety oversight program has been certified; or
>
> (III)require fixed guideway public transportation systems under such State safety oversight program to provide up to 100 percent of Federal assistance made available under this chapter only for safety-related improvements on such systems, until the State safety oversight program has been certified.

[158] General Authority, 49 U.S.C. § 1131(a)(1)(B). Safety recommendations are issued by the NTSB following the investigation of transportation accidents and the completion of safety studies.

[159] Washington Metropolitan Area Transit Authority Compact of 1966 (Compact), Va. Code Ann. § 33.2-3100 (2020). The states of Maryland and Virginia, and the District of Columbia are part of the Compact.

[160] FTA, SMS, *Gap Analysis Report*, Washington Metropolitan Area Transit Authority, June 17, 2015, https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/WMATA_SMS_Gap_Analysis_Final_Report.pdf.

[161] NTSB, *Washington Metropolitan Area Transit Authority L'Enfant Plaza Station Electrical Arcing and Smoke Accident,* Washington, D.C., January 12, 2015, https://www.ntsb.gov/investigations/AccidentReports/Reports/RAR1601.pdf.

capacity, and enforcement authority to ensure safety at the facility.

- NTSB was also critical of FTA's lack of safety oversight and WMATA's failure to comply with the rigorous MAP-21 safety assessment requirements.[162]

3. Litigation

Lawsuits were filed by or on behalf of more than eighty people who were on the train. WMATA, in court filings, defended against the suit by asserting governmental and discretionary immunity and claiming that the fire department, which responded to the incident, was responsible for the injuries rather than WMATA's actions and inactions. The basis of their defense was the following language from the agency Compact:

> The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable Signatory (including rules on conflict of laws) but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.[163]

Settlements of the claims were reached but details of the settlements were not made public.[164]

After the accident, WMATA was placed on a CAP and temporary and direct safety oversight of the Metrorail system was taken over by FTA. The FTA WMATA Safety Oversight Team's role was to verify WMATA's progress on implementing the CAP and other remedial actions, and to ensure that WMATA was effectively carrying out its own critical maintenance, operations, and training programs.[165] The CAP identified safety issues such as ineffective training, inadequate staffing and procedures, and system-wide maintenance issues. The WMATA website contains the following statement about the CAP:

> In collaboration with the Federal Transit Administration, Metro has developed an action plan to address the safety findings and recommendations issued by the FTA following its organization-wide Safety Management Inspection (SMI) of the WMATA rail and bus transit systems. Ninety-one different actions have been identified to address 44 safety findings in eight categories regarding WMATA's Metrorail system and 10 safety findings in five categories regarding WMATA's Metrobus system.[166]

[162] *Id.*

[163] Compact para. 80 (Liability for Contracts and Torts).

[164] *See e.g.,* Max Smith, *Many L'Enfant smoke lawsuits dismissed; victim's family presses on*, WTOP news, (Oct. 15, 2017), https://wtop.com/tracking-metro-24-7/2017/10/many-lenfant-smoke-lawsuits-settled-family-woman-died-presses.

[165] FTA, *FTA Safety Oversight of the Washington Metropolitan Area Transit Authority (WMATA) Metrorail System*, https://www.transit.dot.gov/regulations-and-guidance/safety/fta-safety-oversight-washington-metropolitan-area-transit-authority (last updated April 26, 2019).

[166] WMATA, *FTA Corrective Action Plan*, www.wmata.com/rider-guide/safety/fta-cap.cfm#main-content, (last visited March 18, 2021).

Analysis. The Tri-State Oversight Committee was until recently responsible for managing the federally required oversight program for the system with the authority to conduct inspections, training, testing, and repair functions on the system. The new safety oversight committee, Washington Metrorail Safety Commission (WMSC) was established in 2017 and was certified to assume direct oversight responsibility for Metrorail in March 2019.[167]

WMSC has the ability to close facilities for repair and new construction, perform investigations, direct the safety activities of the agency, and generally provide oversight and direction to WMATA. Multiple investigations were launched after the leadership change. Those investigations related to claims of a work environment allowed harassment of employees who reported safety issues, and lack of employee training on safety protocols. Other investigations included continued structural integrity and load assessment of bridges, track maintenance and training, and worker protection and training.

Acceptance and implementation of investigation and audit results can prove to a judge or jury that the agency has a reasoned plan to allocate its resources wisely and address important safety and budget problems. Lawsuits involving alleged dangerous conditions and harassment can be defended in the manner described in this digest, using data and documentation to support and explain the choices and actions of the agency.

B. New Jersey Transit Hoboken Terminal Accident

New Jersey Transit Corporation (NJT) is a state-owned public transportation system that serves New Jersey, portions of New York, and Pennsylvania. It operates bus, light rail, and commuter rail services. NJT is the largest statewide public transit system and the third-largest provider of bus, rail, and light rail transit by ridership in the United States.[168]

1. Factual Background

On September 29, 2016, a train that was approaching the Hoboken terminal failed to stop, overrode a bumping post at the end of the track, and struck a wall of the terminal. NTSB investigated the incident. According to the NTSB report, the train was traveling about 21 mph at the time of the accident and carrying approximately 250 passengers and three crewmembers. One person on the passenger platform was struck by falling debris and died, and 110 passengers and crewmembers were injured. The total cost of damage to the train, track, and facility was estimated to be $6 million. Of the multiple lawsuits filed as a result of the accident, one reported settlement was in the amount of $1.5 million.[169]

[167] Washington Metrorail Safety Commission, *Who We Are*, www.wmsc.gov/about-us/who-we-are, (last visited March 18, 2021).

[168] William C. Vantuono, *Jersey Transit Strong*, Railway Age, (Nov. 4, 2015), www.railwayage.com/passenger/commuterregional/jersey-transit-strong.

[169] Associated Press, Woman injured in N. J. Transit Hoboken crash settles for $1.5 million, NorthJersey.com, (Nov. 13, 2019, 7:27 p.m. ET), https://www.northjersey.com/story/news/transportation/2019/11/13/woman-injured-nj-transit-hoboken-crash-settles-1-5-million/4186361002.

2. National Transportation Safety Board Investigation

The NTSB determined that the probable cause of the accident was the failure of the engineer to stop the train after entering the terminal due to fatigue, which resulted from undiagnosed sleep apnea. The report concluded that other causes were NJT's failure to follow its sleep apnea screening guidance as well as the FRA's failure to require railroads to screen employees in safety-sensitive positions for sleep disorders. The NTSB further found that a safety system, if in use, could have intervened to stop the train before the collision.[170]

3. Litigation

Not only was NJT sued as a result of the 2016 incident, it has been sued for multiple other safety related incidents. Lawsuits have been filed against NJT by former and current employees who alleged that due to scheduling constraints, trains are not thoroughly inspected for brakes, lights, and other safety equipment deficiencies. One suit alleged that a mechanical inspection that takes 40 minutes to conduct must occur before a train is taken out of the station, but train engineers' schedules did not allow enough time between trains to conduct the required inspections.[171] Another suit was based on a former employee's allegations that he reported safety violations to federal authorities and was terminated for that reason. In the suit, plaintiff claimed that other employees would not report safety violations due to their fears of recourse from the agency.[172]

In June 2019, the New Jersey Transit Corporation Employee Protection Act[173] was established. The law provides employees with the ability to obtain recourse against the agency for injuries suffered on the job, unemployment, whistleblowing, discrimination, and prohibits NJT from raising a defense of sovereign immunity in those instances.

Analysis. NJT had been investigated by FRA and NTSB prior to the 2016 accident. Testimony by NJT officials after the Hoboken incident and investigations of the agency led the legislature to conclude that financial limitations had caused the agency to focus on day-to-day operations rather than making safety improvements and obtaining compliance with safety regulations and requirements. Earlier investigations had reached similar conclusions and recommendations to improve safety had been in those reports.

Delayed, and inadequate maintenance can lead to incidents, accidents, lawsuits, and new and restrictive legislation. The agency that does not conduct safety and process audits, or change its practices after deficiencies have been noted, document its reasons for budget expenditures, or comply with generally accepted industry practices has difficulty defending tort and other claims against it.

VI. CURRENT PRACTICES

This section provides a summary of practices and methodologies of state and local transportation agencies. These responses are highlighted as they give practical and current examples of the concepts that are discussed in this digest.

A. Summary of Resources

Data for this section was drawn from survey responses, interviews with state and local transportation agency officials, review of responses to FOIA requests, and internet research. The interview questions used by the panel during the research period can be found at Appendices A and B of this digest.

1. Litigation

Issues examined included: Potential or actual litigation regarding closure of facilities or limitations on service; potential or actual litigation relating to civil rights complaints; and responses to civil rights complaints about the closure of a facility, or restriction of a route or fleet size.

a. Civil Rights Complaints

Several transit agencies acknowledged that they had received complaints relating to discrimination. One agency indicated that when its Equal Employment Opportunity department investigated the complaint, and the complaint was substantiated, the agency would address and mitigate the issues. The agency explained that its goal is always safety for customers, employees, and the community. Another agency explained that any discrimination complaints would be referred to a compliance and civil rights officer. Legal counsel would be consulted, if necessary.

2. Standards of Care

Each of the responding agencies indicated that they were required to comply with the standards of care that were identified in this digest.

3. Public Involvement and Outreach Efforts

The following topics were examined: public involvement relating to temporary or permanent closure of facilities; public involvement during the closure of a facility or access decision-making process; and languages used in communications to ensure inclusion of diverse cultures. Additionally, several Letters of Finding issued by FHWA in response to civil rights complaints were reviewed. After review of the Title VI complaints, FHWA

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[170] NTSB, *Railroad Accident Brief: New Jersey Train Strikes Wall*, https://ntsb.gov/investigations/AccidentReports/Pages/RAB1801.aspx, (last visited March 18, 2021).

[171] Colleen Wilson, *Engineer says in lawsuit she was fired after raising N.J. Transit train safety concerns*, NorthJersy.com (Aug. 14, 2019, updated 8:44 pm), https://www.northjersey.com/story/news/transportation/2019/08/14/whistleblower-lawsuit-engineer-fired-raising-nj-transit-train-safety-concerns/2007437001.

[172] Brenda Flanagan, *Legal precedent shields N.J. Transit from federal safety lawsuits*, NJ Spotlight News, (Feb. 14, 2019), https://www.njtvonline.org/news/video/legal-precedent-shields-nj-transit-from-federal-safety-lawsuits/.

[173] New Jersey Transit Corporation Employee Protection Act, S3164, Pub. L. 2019, ch. 137, approved June 26, 2019 (prohibits NJT from asserting sovereign immunity in certain situations and subjects NJT to certain federal statutes and regulations).

found that the public outreach efforts in the following examples were adequate and not discriminatory.

a. Santa Clara Valley CA Valley Transportation Authority

Notice to the public on their web page is provided in Amharic, Arabic, Croatian, English, Farsi, French, German, Gujarati, Hindi, Cambodian, Japanese, Korean, Portuguese, Punjabi, Serbian, Spanish, Russian, Chinese (simplified and traditional) Vietnamese, and Somali.

b. TxDOT project

TxDOT prepared a plan to replace a bridge on U.S. 181 near Corpus Christi after it identified critical structural and design deficiencies in the bridge. According to the design documents, replacement of the bridge was the only way to continue to safely use U.S. 181. Bridge inspections had revealed broken rivets and bolts, corrosion, sagging bracing, and rusting. In its report, TxDOT stated that the bridge did not meet current bridge or roadway standards and that it posed a safety risk to the traveling public. A complaint was made by minority groups that public participation procedures were not followed during the environmental impact analysis of the project. FHWA determined that public outreach efforts had not been discriminatory and identified the following actions that had been taken by TxDOT: workshops (called livability summits) that provided opportunities for residents to apply for three different types of sustainability grants; community meetings, which involved a 29-member panel of community members; dozens of public involvement meetings, which included open houses, formal public meetings and hearings, and stakeholders' meetings. Meetings had originally been planned to be held on Wednesdays, but when TxDOT was informed that many residents attended church on Wednesday they changed the day of the week to accommodate more public participation. Meetings were advertised in English and Spanish, and interpreters were available at those meetings.

c. North Carolina Department of Transportation (NCDOT) project

NCDOT proposed a project to alleviate congestion and improve capacity on NC 147 and US 70. The department's accident analysis determined that the local roadways had extremely high crash rates and that the probability of more frequent crashes would continue to increase due to an increase in traffic. NCDOT examined multiple alternative routes in its environmental assessment. Public outreach attempts included distributing information through workshops, newsletters, neighborhood meetings, a toll-free phone number, e-mail, a telephone hotline, and a project website. The agency also created a mailing list of 5000 recipients that included state, local, federal, and private entities. FHWA determined that there was insufficient evidence to determine that NCDOT's public involvement activities resulted in adverse or disparate impacts to the neighborhood.

4. Limitations on Access

The following issues were examined: Whether the agency closed a road or limited access to it for safety reasons permanently or temporarily; and a description of the decision-making process for that restriction.

One midwestern agency described a situation where a city that the agency partnered with decided to eliminate routes near the town square, causing a complaint to be filed with the federal regulatory agency. The dispute was resolved after the city made the decision to allow the resumption of the routes that had been eliminated, and consultation with FTA, which confirmed that the agency would have to return funds that had already been expended.

5. Prioritization of Repairs

The processes that are described in this section are typical of the practices of a transit agency. Processes such as these are required under the federal regulations. The following topics were examined: the criteria used to prioritize the repairs or replacement of infrastructure or assets; and a description of the decision-making process.

One transit agency stated that its Asset Management Team analyzes classes of the agency's assets to determine specific assets in need of repair or replacement based on the age of the asset and its estimated useful life, and/or a condition assessment of the asset. The team provides the analysis to its capital program managers and the budget and analysis teams. These groups develop a five-year capital improvement program by allocating available funding against its state of good repair needs and expansion. The budget goes through a public review process, and public outreach events are held in the community to reach a great number of diverse communities. The community activities are held before the budget is presented to the agency's board of directors. The agency stated that Title VI and environmental justice matters are always considered during this process.

Another agency indicated that one of its state of good repair priorities was to update its facilities to meet ADA requirements, and that it performed quarterly and annual inspections with its safety committees in order to meet its safety program recommendations.

The following charts and explanations are typical of agency analysis in prioritizing repairs.

The Regional Transit Authority of Northeastern Illinois (RTA) adopted a five-level condition rating based on FTA's condition assessment philosophy[174].

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[174] *See* RTA/FTA Transit Asset Management (TAM) Pilot Program, *Vol. 1 – Asset Inventory and Condition Assessment Guide*, Ch. 4, "How to Guide to" Conduct a Condition Assessment (2013), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/RTA_Final_Rpt._COMBINED_TAM_Pilot_Grant_v1.pdf.

Condition	RTA Definition
Excellent 4.8 to 5.0	New asset No visible defects
Good 4.0 to 4.7	Asset showing minimal signs of wear Some (slightly) defective or deteriorated components
Adequate 3.0 to 3.9	Asset has reached its mid-life condition (3.5) Some moderately defective or deteriorated components
Marginal 2.0 to 2.9	Asset reaching or just past the end of its useful life (typically between condition 2.75 and 2.5) Increasing number of defective or deteriorated components and increasing maintenance needs
Worn 1.0 to 1.9	Asset is past its useful life and should be prioritized for repair or replacement.

The Utah Transit Authority (UTA) uses a condition rating breakdown that rates equipment and vehicles on a scale of one to ten.[175]

10 Excellent	New asset, no visible defects. Only preventative maintenance has been performed. Asset has completed less than approximately 15% of its useful life.
9 Very Good	Only minor adjustment repair work completed. Asset as completed approximately 15%-30% of its minimum useful life.
8 Good	Asset showing minimal signs of wear; some (slightly) defective or deteriorated components(s). Asset has completed approximately 30-45% of its minimum useful life.
7 Satisfactory	Asset has past repair maintenance history, but no current noted items. Asset has completed approximately 45% - 60 % of its original useful life.
6 Adequate	Asset has some moderately defective or deteriorated components. Asset has completed approximately 60% - 75% of its minimum useful life.
5 State of Good Repair	An asset is in the state of good repair when the physical condition of that asset is at or above a condition rating of 5. The level of investment required to attain and maintain a state of good repair is therefore that amount required to rehabilitate and replace all assets with an estimated condition of 5 or less. Asset performs its assigned function without any limitations. Asset has past repair maintenance history and may have current repair items noted that do not limit the asset function. Asset has completed approximately 75%-90% of its minimum useful life.
4 Marginal	Asset reaching or just past the end of its useful life; increasing number of defective or deteriorated components and increasing maintenance needs. Maintenance and reliability costs begin to become more expensive. Continued maintenance program required to bring up to the level of state of good repair. Asset has completed approximately 90%-105% of its minimum useful life.
3 Concern	Asset performs its assigned function with limitations. Asset cannot function without limitations unless maintenance is performed.
2 Poor	Asset is past its useful life and is need of immediate repair or replacement; May have critically damaged components.
1 Critical	Imminent failure or safety risk. Asset out of service.

6. Funding Concerns

The following issues were examined: in the event that a facility is planned to be closed, and federal funding was expended for it, whether the federal funding agency is involved in the decision-making process; and whether the agency returned funds to its funding agency.

Survey responses indicated that when agencies were concerned that they might have to return money to a funding agency, the funding agencies were consulted and involved in the decision-making process. Frequently, consultation confirmed that funds would have to be returned if the projects were not completed or were changed substantially. One agency noted that that the agency risked return of funds for violation of grant agreements or for early retirement of equipment, but that it had obtained authorization to allow an amount owed to FTA to be debited from future grants.

[175] *See e.g.* UTA/Bentley Final Report, *Transit Asset Management*, (April 2012), p.12 (Condition Rating Module), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/UTA_TAM_Final_Report_April_2013_%282%29.pdf.

a. Authority for request to return funds to federal agencies

Typically, the federal agency that is providing funds for a transportation project will enter into a funding agreement with the agency that is receiving funds. The agreement requires that the receiving agency comply with conditions such as completion of the identified project on a schedule and repayment of the funds if the project is not completed on schedule.

7. Response to Conditions which Require Repair or Replacement

The following issues were examined: when an agency has knowledge of a potential "dangerous condition" on a road or bridge, what measures are taken to address it; following the hierarchy of signing for it, fixing it, or closing, how the agency works through decision-making steps; whether the agency considered the possibility of a civil rights complaint during the closure evaluation process; what public outreach was done.

One transit agency described a situation where a structural retaining wall in a rail corridor was damaged during a heavy rainstorm and the agency, upon recommendation of its engineering firm, closed the route while the wall was fixed. The agency supplemented rail service with extra bus service for the 88 days that the closure and repair required. Press releases and internet outreach was done.

Missouri Department of Transportation (MoDOT): On-site MoDOT bridge inspection staff determines whether a failure of rebar in concrete girders has occurred. In one instance, staff observed a propane truck cross a bridge and saw a bridge girder deflect approximately 3" under an estimated load of twenty tons. The bridge could not be repaired, so it was closed until it could be replaced. Detour routes were provided to the public.

Colorado Department of Transportation (CDOT): In 2019, CDOT staff closed Colorado State Highway 145 after a significant rock fall that contained an 8.5-million-pound boulder blocked the highway. The state rerouted the highway around the boulder, saving $200,000 over the cost to repair the road and keep it in the same location. The cost to reroute the portion of the road was $1.3 million, a savings to the organization. This decision resulted in the added benefit of opening the road earlier than it would have been opened if the rock had been removed.

Mississippi Department of Transportation (MDOT): In 2018, Mississippi's governor issued an emergency executive order requiring the closure of more than 100 bridges in Mississippi after structural inspections were performed by federal highway officials. The emergency declaration was issued after the governor received a letter from FHWA warning that MDOT was at risk of losing federal funds if the bridges remained open to traffic.

Southeast Pennsylvania Transportation Authority (SEPTA): In July 2016, SEPTA removed 120 cars from its fleet after inspections detected cracks on the beams of the rail cars. All 120 of the rail cars, about a third of SEPTA's fleet, were taken out of service, and the regional rail system ran exclusively with its older rail cars. With 13,000 fewer seats, the trains were able to carry only 35,000 to 40,000, one third, of their normal riders. Many commuters switched to buses or passenger vehicles.

8. Lessons Learned

If closures or restrictions in service have been made, what lessons were learned by the agencies as they worked through the decision-making process? The following bullet points summarize the comments of the responding agencies:

- One of the agency spokespeople expressed their lessons learned/mission as follows: "[I]f we find a problem, we fix it. We hold our own feet to the fire."
- Any decisions regarding long-term closures are vetted internally and subjected to public outreach and citizen advisory committees.
- A ninety-day comment period can be utilized prior to making final decision on route or facility changes.
- Changes in resource use occur after independent planning studies, public comment periods, open forums, and local input.
- Use multiple languages in publications when seeking public input.
- Policy and procedures have evolved over the years as required by practices and changing laws. Best practices change over time as individual and community needs change.
- Document the decision-making process.
- Use liability neutral language in correspondence, policy letters. and manuals.

VII. CONCLUSION

Public agencies have the authority and discretion to make decisions that affect the safety of their employees and the traveling public. Balancing funding, budget, and safety needs requires the agency to carefully evaluate the risks and benefits of its spending choices. Many times, documentation of the well-reasoned decision-making process of the agency is the best defense the agency can make in a lawsuit involving allegations of discrimination or negligence.

APPENDIX A
TRANSIT INTERVIEW QUESTIONS

The National Cooperative Highway Research Program (NCHRP) has initiated a legal research study which will review current practices of transit agencies and state DOTs which are addressing budget limitations. If funds are unavailable for repair of infrastructure or equipment, agencies may need to consider whether to limit services or restrict access to them. The research project is intended to provide guidance which will assist transportation agencies that are faced with decisions about the potential repercussions of repairing, improving, re-building or simply closing a facility. The attached survey is part of this effort. Results will be reviewed and compiled for the publication of a research document which is tentatively titled "Fix It, Sign It, or Close It: State of Good Repair in an Era of Budget Constraints." Please provide the following Background Information:

Name and Title

Name of Agency

E-mail Address

Phone Number

Does your state have a law or rule that identifies the standard of care that must be used by the agency for vehicles and equipment? The agency may rely on the federal definition of "State of Good Repair." Please provide a citation or the text of the law if different than the federal rule. Does your agency have its own definition of "State of Good Repair? Please provide the text or a link to the document that defines "State of Good Repair" to the agency if applicable.

A different standard of care may apply to property or the care taken by people who operate motor vehicles. Please identify if applicable.

When the agency has knowledge of a potential "dangerous condition" or condition that is less than optimal on its property, what measures are taken to address it? Is the hierarchy of signing for it, fixing it, or closing it followed? How does the agency work through those decision-making steps?

Has the agency been involved with any litigation that relates to closing a facility or route or restricting access to a facility or route? If yes, please provide details and contact information for the attorney that handled the matter.

Have bus stops, rail stations or parking lots or other facilities been closed due to disrepair? If so, what alternatives are provided, if any? Has the agency stopped providing routes based on safety of vehicles or inability to secure drivers with the proper qualifications? Please explain if the answer is yes.

If a facility or route is under consideration for closure, is the public notified? If not, when is the public notified? If the public has concerns or complaints relating to the potential closure, how are they addressed? i.e. town hall meetings, press releases, posters? When public outreach is done, are multiple languages used? Have complaints about changes been made by minority groups? If so, how are those complaints addressed? How do you ensure that appropriate public outreach efforts are being done? How are Environmental Justice concepts considered during the planning process?

If the facility or equipment that is under consideration for closure was provided via funding by a federal agency, is the federal funding agency involved in the decision-making process? How is that the decision made? Might funds need to be returned to the funding agency? Has the agency returned funds to its funding agency in this situation?

Are other sources of funding sought from partner agencies or federal or state channels? If outside funding is sought and provided, has the agency faced a legal challenge or other obstacles to that funding?

Has the agency changed or eliminated routes as a result of its asset management process? If yes, did the agency consider the possibility of a civil rights complaint while it considered the closure or change in access? Has the agency ever responded to a civil rights complaint about the closure or restriction of a route or fleet size? Or anything else? If so, please provide details.

Are plans, such as an asset management plan, used to determine the priority of the infrastructure or asset repair? Is the public involved in the process? How?

If closures or restrictions in service have been made for safety reasons, what lessons were learned by the agencies as they worked through the decision-making process? Have any policies or best practices been established that allow or require review by management and/or a governing Commission?

APPENDIX B
DEPARTMENT OF TRANSPORTATION INTERVIEW QUESTIONS (HIGHWAY)

The National Cooperative Highway Research Program (NCHRP) has initiated a legal research study which will review current practices of transit agencies and state DOTs which are addressing budget limitations. When funds are unavailable for repair of infrastructure or equipment, agencies must decide whether to limit services or restrict access to them. The research paper is intended to assist transportation agencies that are faced with decisions about repairing, improving, re-building or simply closing a facility that cannot be safely operated. The attached survey is part of this effort. Results will be reviewed and compiled for the publication of a research document which is tentatively titled "Fix It, Sign It, or Close It: State of Good Repair in an Era of Budget Constraints."

Name and Title

Name of Agency

Physical and E-mail Address

Phone Number

Does the state have a law or rule that identifies the standard of care for the operation of vehicles or equipment that must be used by the DOT? It is generally a law that requires a certain standard of care such as "reasonably safe" or "very highest degree of care." There may be a different standard of care for property such as highways, bridges, or facilities such as sidewalks or buildings. Please provide a citation or the text of the law if available. If a certain guideline, such as the Roadside Design Guide, or a bridge safety publication are used to determine when access to a facility should be limited or completely closed, please provide that information.

Has the state been involved with any litigation that relates to closing a road or bridge or restricting access to any state bridges, roads, or other facility? If yes, please provide details and contact information for the attorney that handled the matter.

Has the DOT closed a road or limited access to it for safety reasons? Permanently or temporarily during repair? How long did the decision to close or restrict the route take and what was the decision-making process? How were Environmental Justice concepts considered during the planning process?

Did the DOT consider the possibility of a civil rights complaint during the closure evaluation process? What public outreach was done? Has the agency ever responded to a civil rights complaint about the closure or restriction of a road or other facility? If so, how did the agency respond?

What criteria are used to prioritize the repairs or replacement of equipment or vehicles? Has a matrix or other means of analysis been devised to assist with the process?

When an agency has knowledge of a potential "dangerous condition" or condition that is less than optimal on a road or bridge, what measures are taken to address it? Is the hierarchy of signing for it, fixing it, or closing it followed? How does the agency work through those decision-making steps?

If a road or bridge is under consideration for permanent closure, is the public notified? If not, how, and when is the public notified? If funding to build or maintain the structure was provided via a federal agency, is the federal funding agency involved in the decision-making process? Might funds need to be returned to the funding agency? Has the agency returned funds to its funding agency in this situation?

If closures or restrictions in service have been made, what lessons were learned by the agencies as they worked through the decision-making process? Have any best practices or policies been established that will allow or require review by management and/or a governing Commission?

TCRP ACKNOWLEDGMENTS

This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by SHERYL KING BENFORD, Greater Cleveland Regional Transit Authority, Cleveland, Ohio. Members are ROLF G. ASPHAUNG, Consultant, Denver, Colorado; JAYME BLAKESLEY, Hayes Godfrey Bell, P.C., Holladay, Utah; DARRELL BROWN, Consultant, New Orleans, Louisiana; APRIL GREENHOUSE, Metropolitan Transit Authority of Harris County, Houston, Texas; JAMES P. LARUSCH, Raul V. Bravo +Associates, Inc., Reston, Virginia; TERESA J. MOORE, South Florida Regional Transportation Authority, Pompano Beach, Florida; ELIZABETH M. O'NEILL, Metropolitan Atlanta Rapid Transit Authority, Atlanta, Georgia; ROBIN M. REITZES, San Francisco City Attorney's Office, San Francisco, California; JAMES S. THIEL, Madison, Wisconsin; and ALAN S. ZIMMET, Tampa, Florida.

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NCHRP ACKNOWLEDGMENTS

This study was performed under the overall guidance of the NCHRP Project Committee SP 20-6. The Committee is chaired by MICHAEL E. TARDIF, Friemund, Jackson and Tardif, LLC. Members are JAMES R. "JIM" BAILEY, Texas DOT; CARMEN D. TUCKER BAKARICH, Kansas DOT; RICHARD A. CHRISTOPHER, HDR Engineering; JOANN GEORGALLIS, California Department of Transportation; MARCELLE SATTIEWHITE JONES, Stantec Consulting Services, Inc.; RODNEY M. LOVE, Mississippi DOT; SID SCOTT, III, HKA-Global; FRANCINE T. STEELMAN, Consultant.

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ISBN-13: 978-0-309-67411-9
ISBN-10: 0-309-67411-5

Subscriber Categories: Law • Highway

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