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INVENTORY OF POTENTIAL ADMINISTRATIVE AND LEGISLATIVE IMPROVEMENTS

for Surface Transportation Program Investment and Project Delivery

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INTRODUCTION

After decades of adding layers upon layers of legislative and regulatory oversight for transportation, Moving Ahead for Progress in the 21st Century Act (MAP-21) and the Fixing America's Surface Transportation Act (FAST Act) have instituted major programmatic and policy reforms. AASHTO recognizes that we can continue the momentum of MAP-21 and the FAST Act by making further efficiency and effectiveness gains on transportation program and project delivery while continuing the state DOTs' responsible stewardship of taxpayer resources and both human and natural environments.

To identify specific improvements in how surface transportation projects are delivered, AASHTO developed and has regularly updated an Inventory of Potential Legislative and Administrative Improvements for Surface Transportation Program Investment and Project Delivery (Inventory). The Inventory was initially developed in February 2017 based on a simple question posed to various AASHTO committees composed of state DOT executives and technical leaders: "What are the legislative and regulatory barriers in your state that keep the federal program from functioning more effectively and efficiently?" As part of this exercise, AASHTO has reviewed areas ranging from permitting and environmental review, planning and performance management, assignment and delegation of various federal authorities to states, design and right-of-way approval, transit grant-making oversight, financing program adjustments, and other areas.

In the following pages is the current version of the Inventory, which is a comprehensive brainstorming list of ideas consistent with AASHTO's adopted policy. This Inventory does not show illustrative project examples, but readers are recommended to view comments from individual state DOTs under the USDOT docket entitled "Transportation Infrastructure; Review of Policy, Guidance, and Regulation." As owners and operators of a huge set of transportation assets around the country, AASHTO member departments are best positioned to highlight on-the-ground examples of policy, guidance, and regulatory challenges they face.

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ENVIRONMENT: Clarify Certain Air Quality Modeling Requirements

Under current regulations, quantitative hot-spot analysis – air quality modeling – is required for projects in CO nonattainment and maintenance areas that "affect" certain congested intersections, regardless of whether the project's effect on congestion is positive or negative. Since CO emissions are correlated with congestion, it makes sense to require a CO hot-spot analysis for a project that increases congestion. But if a project reduces congestion – as shown by an improved level of service (LOS) – it is wasteful and unnecessary to conduct a quantitative hot-spot analysis.

Recommendation

Amend the transportation conformity regulations (40 CFR § 93.123) to include an exception from the requirement for a quantitative CO hot-spot analysis. This exception would apply when the build alternative improves the Level-of-Service or otherwise reduces the amount of delay time compared to the no build alternative. This exception should be added to the end of the following subsections: 40 CFR § 93.123(a) (1) (ii), (iii), and (iv) and 93.123(b)(1)(ii).

ADMINISTRATIVE ACTION

ENVIRONMENT: Endangered Species Act, Advance Mitigation

Advance mitigation includes the development of large scale mitigation sites and allows project sponsors to pay into a fund or purchase credits to satisfy project-specific mitigation requirements. Advance mitigation lessens the need for time-consuming project-level mitigation decisions and allows for higher-value mitigation than would be provided in a piecemeal manner at the project level. Section 404 of the Clean Water Act has experienced great success with these advanced mitigation programs.

Recommendation

Provide greater flexibility for project sponsors to develop advanced mitigation programs and then receive credit for this mitigation at the project level in Section 7 consultation under the ESA. In addition, require FWS to give substantial weight to programmatic mitigation plans developed in accordance with 23 USC 169.

ADMINISTRATIVE ACTION

ENVIRONMENT: EPA Project-Level Air Quality Modeling ("Quantitative Analysis") Requirements for Particulate Matter

Conformity regulations require conformity determinations to be based on the "latest emissions model." These models are specified by EPA 40 CFR Part 51, Appendix W, which specifies the models to be used in preparing and developing SIPs. Under Appendix W, States currently have the option of using either of two air quality models in conducting hot-spot analyses for conformity determinations: the CALINE series of models, or AERMOD. In a final rule issued on January 17, 2017, EPA amended Appendix W to require the use of the AERMOD dispersion model for conducting hot-spot analyses as part of project-level conformity determinations. EPA has deferred the effective date of the final rule until May 22, 2017. AERMOD has not yet been shown to be sufficiently reliable for use in projecting emissions from transportation facilities, and the proposed rule was developed without sufficient transportation agency involvement.

Recommendation

- Continue to postpone the effective date final rule amending Appendix W to provide an opportunity for EPA to conduct additional stakeholder outreach and technical analysis before allowing any new modeling requirements to take effect.

- Provide for enhanced stakeholder involvement in the review, selection, and implementation of air quality models, including engagement with the Federal Highway Administration and State DOTs.

Amend the definition of "latest emissions model" in the conformity regulations so that the model specified in Appendix W is not automatically required for use in conformity determinations. The purpose of Appendix W is to specify the models used for developing SIPs, which is not necessarily appropriate for the project-level hot-spot analyses. The "latest emissions model" should be defined in the conformity regulations to mean any model determined by EPA, with FHWA and FTA concurrence, to be appropriate for use in a conformity analysis.

ADMINISTRATIVE ACTION

ENVIRONMENT: Floodplains

The recent Federal Emergency Management Agency (FEMA) regulations related to floodplain management require federal agencies to develop their own implementing guidance. As the regulations provide various options for defining floodplains, complications on projects involving multiple federal agencies will arise.

Recommendation

Clarify that the project lead agency makes floodplain determinations. This will require an amendment to 44 CFR 9.

ADMINISTRATIVE ACTION

ENVIRONMENT: National Academy of Sciences Study on Transportation Air Quality Conformity

Transportation conformity requirements prohibit any federally supported transportation agency from carrying out, approving, or otherwise supporting any action that does not "conform" to the applicable State plan for achieving or maintaining air quality standards. Transportation conformity requirements are complex and the conformity process is lengthy. The air has become cleaner in recent years, but much of the improvement has resulted from increasingly effective EPA regulations requiring a transition to clean vehicle engines and fuels. As the resources needed to comply with the conformity requirements are substantial, it should be determined if there is a better way to focus resources for cost effective opportunities to improve air quality.

Recommendation

Require FHWA, FTA and EPA to commission an independent National Academies of Sciences study on transportation air quality conformity to evaluate the effectiveness of conformity requirements related to meeting the goals of the Clean Air Act, and provide recommendations for transportation conformity policy, legislative and regulatory changes related to transportation planning and air quality.

ADMINISTRATIVE ACTION

ENVIRONMENT: Programmatic Approaches

Currently, conformity determinations must be made when an MPO updates or amends its plan or TIP – regardless of whether the changes being made are likely to have any material effect on air quality. In addition, conformity determinations are required for every project (with the exemption of certain 'exempt' projects), even when there is no realistic chance that the project will cause the region to violate applicable air quality standards. Programmatic approaches have been used to help streamline many other types of environmental requirements, and they can be used in the conformity context as well. Programmatic conformity determinations could greatly reduce the time and cost needed to demonstrate compliance with conformity requirements, without changing in any way the underlying air quality standards that projects must meet.

Recommendation

Amend the transportation conformity regulations (40 CFR Part 93) to allow the USDOT, in consultation with EPA, to make programmatic conformity determinations that can be relied upon as the basis for demonstrating conformity for individual plans, programs, and projects. The programmatic conformity determinations could be made at a national, state or local level. Conditions could be specified in the regulations so that the programmatic determinations can be used only for plans, programs, and projects that meet specified criteria. Examples of programmatic conformity determinations include:

- Programmatic determinations for areas in which there is a substantial margin between modeled emissions – as reported in regional conformity analyses – and allowable emissions as defined in motor vehicle emission budgets. In these areas, the outcome of a conformity determination is normally a foregone conclusion. A programmatic determination would avoid the need to undertake a time-consuming modeling exercise when there is no realistic likelihood that the changes made in the plan or TIP would result in a violation of the NAAQS. The programmatic determination could be accompanied by monitoring and reporting requirements to ensure that the applicable emissions budgets continue to be met.
- Programmatic determinations for updates or amendments to transportation plans and programs that do not exceed "de minimis" criteria in terms of their expected effect on emissions. Currently, a conformity determination is required for an update or amendment to a plan or TIP (except for amendments solely involving exempt projects), regardless of whether the changes involved in that update or amendment have any realistic chance of materially increasing emissions. A programmatic determination could include a set of criteria for determining an update or amendment to have a de minimis effect on air quality. When those criteria are met, the programmatic determination would apply.
- Programmatic determinations for any newly designated marginal nonattainment area where EPA-approved data shows that the area will achieve the applicable NAAQS within three years through implementation of existing federal emission-control regulations applicable to motor vehicles.

Programmatic determinations for projects in maintenance areas where the applicable State or MPO has entered into an agreement with EPA and the applicable State air agency under which the State or MPO will annually report on emissions of the applicable criteria pollutants to demonstrate that applicable emissions budgets for that pollutant are being met. If emissions budgets are exceeded, the State and MPO would need to resume making individualized conformity determinations.

ADMINISTRATIVE ACTION

ENVIRONMENT: Programmatic Categorical Exclusion Agreements Under NEPA

FHWA may enter into programmatic agreements with States to allow States to make NEPA categorical exclusion (CE) determinations. Traditionally, FHWA Division Offices and the states included in their programmatic CE agreements (PCEs), CEs listed in regulation and additional CEs for actions specifically relevant to the state programs and practices that have been shown to not have significant impacts. The FAST Act provides that these PCE agreements may include the CEs listed in FHWA regulation as well as additional CEs that meet federal requirements. FHWA, through rule and guidance, implemented this provision to require that proposed new CEs be documented, published for public comment, and be approved by USDOT and CEQ.

Recommendation

Amend FHWA/FTA regulations and guidance to allow PCEs to include CEs listed in FHWA/FTA regulations in addition to other CEs that meet federal standards, as determined by FHWA and the States. This would require amending 23 CFR 771(g).

ADMINISTRATIVE ACTION

ENVIRONMENT: Wetlands, Outdated Executive Order

Executive Order 11990 was issued in 1977 to protect wetlands. Since this time, robust statutes and regulations have been developed to protect this important resource and the executive order is outdated and duplicative.

Recommendation

Repeal Executive Order 11990.

ADMINISTRATIVE ACTION

ENVIRONMENT: Wetlands, Permit Exemptions

Many transportation projects require permits under Section 404 of the Clean Water Act for the discharge of dredged or fill material into "waters of the United States." Section 404 permitting requirements can be a significant burden on transportation project development, especially for minor maintenance and construction activities that only impact man-made wetlands located adjacent to roads.

Recommendation

Clarify and expand exemptions for activities involving maintenance and/or construction of roadside ditches, emergency activities, and impacts on low-quality wetlands within the highway median. This would require an amendment to 33 CFR 325.

ADMINISTRATIVE ACTION

ENVIRONMENT AND PLANNING: Fiscal Constraint and Conformity

FHWA determined in guidance that it will not complete the NEPA process for any project unless the project is included in the MPO's fiscally constrained plan and 'at least one project phase' is included in the MPO's transportation improvement plan (TIP) and the State's transportation improvement plan (STIP). 40 CFR 93.108 requires projects located in air quality nonattainment and maintenance areas to conduct project level conformity analysis to show consistency with planning level regional conformity. FHWA can make the project-level air quality conformity determinations only if the project is included in the region's fiscally constrained plan and TIP. Project level conformity determinations are required prior to completion of the NEPA process, therefore requiring that projects be in the fiscally constrained plan and TIP prior to completion of the NEPA process.

This creates a Catch-22 for large projects, especially those that rely on discretionary grants, innovative financing or other funding sources that are difficult to confirm during the NEPA process. The dilemma for such projects is that the funding picture may not come into focus until NEPA is completed, but the NEPA process cannot be completed without at least a general definition of the funding plan for the project. This requirement also discourages States from including a list of ready-to-go projects for which funding has not been identified. If and when funding becomes available, States and MPOs must go through a months-long process of completing NEPA, and amending the plan and TIP/STIP to include the projects.

Recommendation

Allow the NEPA process to conclude prior to project level air quality conformity being conducted and projects being included in the fiscally constrained planning documents. For projects to progress beyond NEPA to project implementation, they would first have to complete project level air quality conformity and be included in a fiscally constrained planning documents. This approach does not change any substantive requirements related to fiscal constraint and project level conformity, it merely changes the timing of making these determinations. Air quality conformity reform requires legislative change.

ADMINISTRATIVE ACTION

FEDERAL OVERSIGHT: Assignment of Various Federal Authorities

Stewardship and Oversight Agreements

Attachment B to the standard Stewardship and Oversight Agreement requires FHWA approval for various policies and procedures, such as a States' standard specifications; pavement design policy; value engineering policy and procedures; liquidated damage rates; quality assurance program; and other matters.

Recommendation

States should be authorized to approve modifications to these procedures without pre- approval by FHWA, subject to FHWA's ongoing oversight of the State's compliance with federal requirements.

Interstate Access Point Approval

Under 23 USC 111, States normally are required to obtain FHWA approval for adding or modifying any access points on the Interstate System. This statute was amended in MAP-21 to include a new provision, section 111(e), which allows FHWA to authorize a State to approve the Interstate access change report. However, FHWA has interpreted this provision to mean that the State can approve the report, but FHWA itself must retain the ultimate approval authority over the change in the Interstate System.

Recommendation

Given the intent of Section 111(e) to allow assignment of Interstate access point approvals to States, Section 111(e) should be amended to provide that, upon request of a State, FHWA shall assign to a State the full responsibility for approving a new or modified access point on the Interstate System under 23 USC 111.

Interstate Projects Limitation

Currently, there is a limitation on assignment of FHWA responsibilities under 23 USC 106 with regard to projects on the Interstate System that have been designated as "high risk" by FHWA. The statute does not define the term "high risk."

Recommendation

FHWA should collaborate with the States to develop a definition for "high risk" that allows States to assume the full range of responsibilities specified in 23 USC 106 for all projects on the Interstate System, subject to safeguards established as appropriate in each State's individual Stewardship and Oversight Agreement.

ADMINISTRATIVE ACTION

FEDERAL OVERSIGHT: Develop Uniform Federal Compliance Review/Audit Standards and Streamline/Coordinate Federal Transportation Audits

State DOTs are routinely subject to a multitude of federal audits across all modal administrations, often performed by consulting auditors on behalf of USDOT's modal administration personnel, which lack homogeneity from audit to audit and/or from auditor to auditor, i.e. many auditors have dissimilar goals, objectives, and differing levels of acceptance in terms of documentation that complies with the findings of an audit. Many of these audits have little regard to the schedules (peak vs. non-peak periods) of the auditee and are conducted consecutively (back-to-back) or concurrently. Often, the scheduling of audits does not allow time to implement new programs or processes that may have been recommended from a previous review/audit; consequently, many audits appear to be capricious, random and arbitrary. Even in cases where an auditee attempts to establish contact early to express concerns about the schedule, adjustments to the schedule are not accepted. Ill-timed and numerous audits, are lengthy, costly and hamper the ability of staff to properly perform regular duties. Understanding these reviews must be conducted to ensure proper oversight, balance must be shown in both the number of reviews

and scheduling to ensure that the business of the Department is not unduly impacted. The sheer number of documents utilized during the audit process amongst auditors and the number and scheduling of audits, all lead to misunderstandings and confusion to transportation professionals on both sides of the audit. In some instances, schedules are so constrained that there is little time to implement the audited recommendation before the beginning of a follow-up review. Finally, the frequency and length of the federal audits and oversight reviews interfere with required/mandatory operations, particularly when multiple reviews are scheduled consecutively or concurrently.

Recommendation

It is recommended that federal audits and oversight reviews conducted by USDOT's modal administrations convey their respective schedule(s) of audits/oversight reviews to the auditee in advance by at least 30 days, but ideally three months prior to initiation of said audit/oversight review. Moreover, that auditors have the flexibility to re-scheduled audits/oversight reviews, within a three-month window, provided the auditee can validate sufficient cause for postponement of said audit/oversight review. Most importantly, auditors shall not commence a secondary or ensuing audit/oversight review until a final report from a prior (and related) audit has been issued, reviewed by the auditee and allows the auditee no less than a six-month period to implement corrective actions before the initiation of a secondary audit/oversight review. It is further recommended that USDOT issue clarifying guidance to all modal administrations (perhaps an addendum to an audit circular) detailing exact protocol in terms as to how contractual auditors and their findings will be evaluated by the host federal administration. Supplementary guidance should provide insights into the range and constraints of an audit and/or the latitude given amongst its auditors. Guidance should also establish standards for supporting documentation. Auditees should be allowed a forum to appeal specific findings and to defend documentation supplied to an auditor to satisfy compliance. Finally, USDOT should acknowledge that variances exist between auditors and solicit solutions to minimize these variances.

ADMINISTRATIVE ACTION

FEDERAL OVERSIGHT: Modify the Copeland Act

The Department of Labor (DOL) requires that every contractor or subcontractor engaged in a federally-funded project (for contracts over $2,000) furnish a weekly employee wage statement covering the preceding weekly payroll within seven days after the payroll ending date. The seven-day regulation, which dates back to 1934 with the passage of the "Copeland Act," is onerous and burdensome to contractors (especially small businesses). State DOTs and contractors are exacerbated with the rules and find monitoring and complying with the requirements often unattainable. Hence, repeat audit findings are perennial for state DOTs.

It is extremely difficult for state DOTs to verify that payrolls are certified/submitted within seven days of the preceding payroll when one considers the vast number of projects, contractors, and contractor employees that comprise a construction season. Allowing contractors a reasonable timeframe to submit certified payrolls would certainly ease the regulatory burden on contractors and state DOTs. The cycle of dealing with an impossible regulatory timeline that triggers audit findings would be eliminated or greatly curtailed with this modification. The Copeland Act was enacted during a different era (after the Great Depression and nearly 83 years ago) when there were valid concerns about un-checked public-works corruption, but those specific concerns have been alleviated with passage of the Fair Labor Standards Act of 1938 and other federal labor standards laws.

Recommendation

It is recommended that 29 CFR Section 3.3/3.4 be modified through a DOL regulatory change or through Congressional action if needed. (italic type represents the proposed changes):

- 3.3 (b) Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building or public work, or building or work financed in whole or in part by loans

or grants from the United States, shall furnish each week a statement with respect to the wages paid each of its employees engaged on work covered by this part 3 and part 5 of this title during the ~~*preceding*~~ weekly payroll period.

- 3.4 (a) Each weekly statement required under § 3.3 shall be delivered by the contractor or subcontractor, within ~~*seven*~~ *30* days after the regular payment date of the payroll period..(all text through "United States Department of Labor" remains unchanged).

ADMINISTRATIVE ACTION

FINANCE: TIFIA Administration

Project Cost Share

Though statutorily allowable, USDOT has not provided TIFIA loans that cover beyond 33 percent of total project cost.

Recommendation

Given the substantial balance in TIFIA subsidy funding, expanding TIFIA cost share to 49 percent should further increase demand for this credit program.

Fully Utilize TIFIA Subsidy Funding

USDOT has encouraged eligible recipients to consider use of Federal-aid funds to cover the subsidy and administrative costs of TIFIA credit assistance. Encouraging or requiring states to utilize their federal-aid funds to pay for TIFIA loans while ample TIFIA subsidy funding remains available is neither efficient nor equitable.

Recommendation

The decision to utilize Federal-aid funding in lieu of or in conjunction with TIFIA subsidy funding to pay for credit assistance should be a decision of the project sponsor.

Improve Rural Access to TIFIA

In addition to lower cost thresholds and interest rates, the rural project provisions of TIFIA are intended to improve access by streamlining the application process for such projects – to the extent they satisfy criteria established by the FAST Act.

Recommendation

Rural projects should be accommodated by the streamlined application process the USDOT is required to develop under the FAST Act.

ADMINISTRATIVE ACTION

PASSENGER RAIL: FRA System Safety Program

The FRA's System Safety Program (SSP) needs to be revised to disallow service sponsors from being classified as railroads. This is due to the fact that service sponsors are planning organizations and are not organized nor staffed with railroad-qualified personnel needed to fulfill the requirements of the SSP rule; service sponsors do not have the legal authority to compel host railroads nor Amtrak to comply with the SSP rule, and designating service sponsors as railroads exposes service sponsors to other, broader railroad operating requirements for which public agencies are ill-equipped; and there is no Congressional intent that service sponsors be railroads.

Recommendation

Determining service sponsors as railroads is not based on any data nor will it do anything to improve safety, and thus should be reversed in the SSP.

ADMINISTRATIVE ACTION

PLANNING AND PERFORMANCE MANAGEMENT: Establish One Common Effective Date for Statewide and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning Final Rule

State DOTs, Metropolitan Planning Organizations (MPOs), and public transportation providers are required to develop specific written provisions for sharing information related to transportation performance data, as well as the selection/reporting of performance targets to track and attain certain critical outcomes for MPO regions according to three separate rulemakings, all with different effective dates. This requires excessive amounts of staff time and processing, as well as duplicative efforts while developing the written procedures. Each performance measure is similar yet unique, and the development of the written procedures will require extensive coordination. Because of the staggered rulemaking process for the three performance measures, the aforementioned entities are required to develop procedures addressing each performance measure rule two years after the effective date of each final rule. Hence, state DOTs, MPOs and public transportation providers will be required to develop written procedures on three separate occasions for three very different data sets, targets, and reports even though they all will use very similar processes.

Recommendation

It is recommended that FHWA consider establishing one common effective date for its three performance measure final rules. Title 23 CFR Section 450.340(f) should be amended to read as follows. By striking the word "each" in the sentence, "Two years on or after the effective date of each rule establishing performance measures" and inserting "the last." Coordinating the deadline for all three rules to apply two years after the last rule is finalized will allow state DOTs the ability to work through one data sharing and target setting exercise (as opposed to three) to shape the written procedures for the remaining rules.

ADMINISTRATIVE ACTION

SAFETY: Clearview Font Usage for Positive Contrast Legends on Highway Signs

The Clearview font was designed to be easier to read at long distances and at night on positive-contract highway signs (i.e., white letters on a dark background), as compared to the Standard Alphabets that are currently used on most highway signs. In 2004, the Federal Highway Administration gave interim approval for states to use the Clearview font. Under the interim approval, states could request permission to use the Clearview font on signs along their roadways. 26 states received interim approval from FHWA to try Clearview and, of these, 16 states had adopted it prior to its termination. Despite the use of Clearview across several states, FHWA terminated the font's interim approval in 2016 without soliciting public comment. Many states strongly objected to the termination and have voiced their support for the flexibility to use Clearview. These states point to research demonstrating the font has a positive impact on roadway safety.

Recommendation

FHWA should reconsider its termination of the Interim Approval for the Use of Clearview Font on Positive Contrast Legends on Guide Signs. If necessary, FHWA could develop a task force to conduct analysis of highway font research with a specific focus on Clearview; however, this research has been conducted. Final approval for the Clearview Font would ultimately resolve the issue.

ADMINISTRATIVE ACTION

TRANSIT: Better Coordinate Federal Transit Program Reviews

Grantee review preparation is often lengthy and costly. To minimize the impact on the organization when reviews take place the sequencing of the reviews should be done to take advantage of preparation work that has already be done.

Recommendation

FTA should improve coordination of federal transit program reviews (Triennial, Drug and Alcohol, other) and reduce the frequency and level of scrutiny of FTA reviews of States that are not also transit providers to rely more of the capacity of States to be good stewards of federal funds.

ADMINISTRATIVE ACTION

TRANSIT: Buy America

Current law requires all FTA recipients purchasing vehicles to verify that the manufacturer has complied with Buy America program requirements (49 CFR 661). This verification may include costly pre- and post- award inspections.

Recommendation

In order to increase the efficiency of the 500-1,000 urban and rural systems that must comply annually, the Buy America rule should be amended to allow the limited number of vehicle manufactures to self-certify to the FTA that the applicable requirements are being met.

ADMINISTRATIVE ACTION

TRANSIT: FTA Grant Making Process

The current federal grant approval process should be further expedited and streamlined to speed project delivery and reduce costs of projects. Under current practice, all FTA-aided activities are required to be included in and approved as part of a "grant" before any expenses may be incurred. This practice is inconsistent with the process used by other modal administrations, including FHWA.

Recommendation

The FTA process should be amended so that routine and recurring activities such as the replacement of buses, preventive maintenance, facility components (e.g., doors, lifts, HVAC), and other transit related equipment are automatically approved and are not required to go through the grant approval process. The procurement of these routine and recurring activities will remain subject to FTA triennial/state management reviews. The federal grant review process should be targeted towards more complicated projects; projects that require right-of-way or involve construction.

ADMINISTRATIVE ACTION

TRANSIT: NTD Reporting Requirements for State Sub-recipients

In the July 26, 2016 rulemaking, FTA finalized the expansion of the National Transit Database (NTD) Asset Inventory, providing additional requirements of State sub-recipients. These reporting requirements, like other reporting requirements, are overly prescriptive, administratively burdensome and costly.

Recommendation

FTA should reverse the NTD reporting requirements for State sub-recipients, eliminating the need for Section 5310 and Section 5311 NTD reporting at the sub-recipient level.

ADMINISTRATIVE ACTION

TRANSIT: Public Agency Safety Plan

With the final Public Agency Safety Plan rule still pending completion, FTA should not issue the final rule.

Recommendation

The agency should pull back it from the Office of Management and Budget and reengage the industry to develop less prescriptive, administratively burdensome and costly rules than those envisioned in the February 5, 2016, Notice of Proposed Rulemaking. Any final rule needs to better consider the long-standing safety record of the nation's bus systems and the capabilities of States to guide sub-recipients in the area of safety with a less prescriptive and rational approach to transit agency safety planning.

In addition, FTA may also need to rescind the National Public Transportation Safety Plan issued on January 18, 2017, and the final Public Transportation Safety Program rule issued on August 11, 2016, to provide the opportunity for FTA and the industry to develop a more rational overall approach to implementing the safety provisions of MAP-21/FAST.

ADMINISTRATIVE ACTION

TRANSIT: Separate Grants for STBGP Flex or CMAQ Transfers

FHWA's Surface Transportation Block Grant Program (STBGP) flex and Congestion Mitigation and Air Quality Improvement (CMAQ) program transfers to FTA involve the same approval process as traditional FTA eligible activities. The administrative requirement to develop and submit separate grants adds unnecessary review and approval resulting in project delay and increased costs.

Recommendation

As a result, FTA should review its policy on requiring separate grants for STBGP flex or CMAQ transfers from FHWA to FTA programs such as Section 5307 and Section 5311.

ADMINISTRATIVE ACTION

TRANSIT: Transit Asset Management

Our Nation's public transportation systems must be maintained in a state of good repair. Implementation of performance and asset management principles within the transportation industry will be a positive step toward this goal. However, the approach taken by FTA in its final Transit Asset Management rule is overly prescriptive, administratively burdensome and costly.

Recommendation

FTA should rescind the July 26, 2016, Transit Asset Management rule and reengage the industry, in particular States, to develop rules that take into account both the capabilities of States to guide their sub-recipients in the area of asset management and of transit agencies to manage their assets.

LEGISLATIVE ACTION

ENVIRONMENT: Application of Initial Transportation Conformity

After a new NAAQS is established, nonattainment areas are designated. One year after this designation, transportation conformity applies. State Implementation Plans (SIPs) however, are not due for three years after nonattainment areas are designated. The SIPs establish the pollutant budgets and determine the percentages attributable to various contributors (including transportation). Due to the timing requirement related to transportation conformity, conformity must occur two years before the SIP is developed and budgets and contributors are established. To conduct transportation conformity, MPOs must conduct complicated analysis and build vs. no build scenario evaluations to predict future emissions. If transportation conformity were not required until after a SIP is developed, MPO's could use the actual SIP budgets rather than conducting complicated and sometimes unnecessary analysis.

Recommendation

Require that initial transportation conformity does not apply until six months after EPA approves the SIP motor vehicle emissions budgets. This would require an amendment to 42 USC 7506.

LEGISLATIVE ACTION

ENVIRONMENT: Clarification and Expansion of NEPA Assignment Authorities

Under 23 USC 327, States may assume, by written agreement, responsibilities of the U.S. Department of Transportation under NEPA and related federal laws for surface transportation projects. The NEPA assignment application, audit and MOU development and renewal processes are burdensome and complicated. In addition, clarification and expansion of the authorities that may be assigned to the states are needed to fully achieve the project delivery streamlining benefits through NEPA assignment.

Recommendation

- Clarify that states with NEPA assignment are the NEPA federal lead agency for state transportation projects.
- Establish that States with NEPA assignment may participate at the initial stages of drafting proposed USDOT NEPA-related federal rulemakings and guidance (prior to the publication of proposed rulemakings).
- Simplify the assignment application process by requiring states to submit a letter of interest to USDOT with a reasonable amount of information to apply for the NEPA assignment program; a checklist approach where states certify to meet certain requirements.
- Reduce the items covered in the MOU to priority substantive issues and streamline the MOU renewal process.
- Require that the term of NEPA MOUs be a minimum of ten years.
- Provide states the opportunity to update MOUs as needed.
- Clarify and simplify the assignment audit process to focus on compliance with the substantive areas of the assignment MOU. Audits are currently held yearly and require extensive preparation time by the states. After the first 4 years of audits, require audits every 3 to 5 years.
- FHWA has excluded many actions from assignment to the states. It should be stated in 23 USC 327 that all USDOT responsibilities related to environmental review, consultation, permitting or other actions required under any Federal environmental law for review or approval of a specific project may be assigned to the states; including the following:
    - Flood plains determinations, including whether there is no alternative to significant encroachment in the floodplain.
    - Noise policy determinations. Clarify that all aspects of 23 CFR 772 are included in the NEPA Assignment program.

- USCG Bridge Permit determinations and related consultation; 23 CFR 144(c) and 23 CFR 650 Subpart H.
- Project level air quality conformity determinations. Requires amendment to 23 USC 327.

- State in 23 USC 327 that States should be solely responsible for the development of State policies and procedures.
- State public involvement procedures do not require USDOT/FHWA approval as required in 23 CFR 771.111(h).
- Amend 23 USC 327(a)(2)(G) so that state attorneys' fees may be paid with federal funding, including court ordered payments of opposing council.
- Do not require states to develop written processes when FHWA itself does not have those processes documented. (Example- training plan, escalation procedures, legal sufficiency review guidance, etc.)
- Allow states to include the notice statement regarding assignment of federal responsibilities only on the website and in draft and final NEPA decision documents- rather than every document. Also, no date should be required as this creates great administrative burden.

LEGISLATIVE ACTION

ENVIRONMENT: Endangered Species Act Special Rules

Endangered Species Act section 4(d) allows the FWS to establish special rules that are more flexible and limit the burden associated with ESA Section 7 consultation – but only for threatened species.

Recommendation

Amend 16 USC 1533 to allow Section 4(d) of the ESA to be used for endangered species, not just threatened species.

LEGISLATIVE ACTION

ENVIRONMENT: Endangered Species Recovery Plans

The Endangered Species Act (ESA) requires recovery plans for all species listed as threatened or endangered, however for most listed species recovery plans are out of date or have not been developed. This creates numerous challenges for project sponsors in addressing threatened or endangered species as there is no guidance regarding species recovery goals or acceptable mitigation tools.

Recommendation

Amend 16 USC 1533 to Fish and Wildlife Services (FWS) and National Marine Fisheries Service (NMFS) to issue guidelines at the time of listing to assist the FWS, federal action agencies, and project sponsors in making effect determinations and in determining appropriate measures to avoid, minimize, and mitigate for impacts to the species; the guidelines should remain in effect until the full recovery plan is developed. Such guidance should include general species recovery goals and acceptable species survey protocols and mitigation.

LEGISLATIVE ACTION

ENVIRONMENT: Emergency Replacement and Permanent Restoration Projects

Certain federal requirements slow the delivery of projects using Emergency Relief funds in declared emergencies.

Recommendation

Streamline federal requirements for transportation projects related to declared emergencies. A committee should be established to review current procedures and recommend changes to streamline projects consistent with the goals of the Emergency Relief Program.

LEGISLATIVE ACTION

ENVIRONMENT: Land and Water Conservation Fund Act (LWCFA) Streamlining

Section 6(f) prohibits the conversion of property acquired or developed with LWCF grants to a non-recreational purpose without the approval of the National Park Service. Section 6(f) further directs NPS to assure that replacement lands of equal fair market value, location, and usefulness. As State and local governments often obtain grants through LWCFA to acquire or make improvements to recreation areas, these grants convert the entire property into Section 6(f) land, even if the grant is used only for improvements to a small portion of the property. Consequently, where conversions of Section 6(f) lands are proposed for highway projects, no matter how small the conversion, replacement lands are necessary. Often, local officials would prefer for the State to make improvements to the existing property rather than finding replacement property; however, LWCFA requires property replacement.

Recommendation

The LWCF should be amended to create a de minimis exemption for certain 6(f) actions with self-determination by States, provide flexible mitigation measures rather than requiring land acquisition, and limit LWCF coverage to only the actual investments made with LWCF funds. This would require amending 54 USC 2003.

LEGISLATIVE ACTION

ENVIRONMENT: Migratory Bird Treaty Act

The Migratory Bird Treaty act prohibits taking or possessing of any migratory birds, its nest or eggs without a U.S. Fish and Wildlife Services (FWS) permit. The FWS does not have regulations that provide for issuing incidental-take permits under the MBTA and there is a lack of clarity on whether incidental take is prohibited.

Recommendation

Clarify whether the MBTA applies to incidental take or, in the alternative, direct USFWS to establish a streamlined process for approving incidental take permits under the MBTA.

LEGISLATIVE ACTION

ENVIRONMENT: Most Recently Issued National Ambient Air Quality Standard (NAAQS)

Currently, there are three standards for particulate matter—1997, 2006 and 2012 and three standards for ozone—1997 and 2008 and 2015. Each successive standard tightens air quality standards. MPOs that are in nonattainment must document how they plan to achieve cleaner air for all applicable existing standards.

Recommendation

Require that when a new standard is established, transportation agencies only need to conform to the most recent standard. This would require an amendment to 42 USC 7506.

LEGISLATIVE ACTION

ENVIRONMENT: Project Schedules

The FAST Act requires lead agencies to establish project schedules for the completion of the environmental review processes for environmental impact statements and environmental assessments after consultation with and the concurrence of each participating agency for the project; MAP-21 made development of these project schedules optional. FAST also requires concurrence of participating agencies for changes to project schedules. Environmental processes are only one of many components in project schedules.

Recommendation

Establish that only the environmental portion of the schedule needs participating agency concurrence, coordination plans need only contain major project milestones and may contain deadline ranges,

schedule changes require the concurrence of only the affected federal agencies, not all participating agencies, and deadlines be set for agency responses; lack of response indicates concurrence. This would require amending 23 USC 139(g).

LEGISLATIVE ACTION

ENVIRONMENT: Relocation of Utility Facilities

23 USC 123 provides that states may be reimbursed with federal funds when the state pays for utility relocation for project construction.

Recommendation

Amend 23 USC 123 to and allow utility relocation to take place after a preferred alternative is identified but prior to NEPA completion with appropriate limitations to ensure the integrity of the NEPA process, and allow federal funds to be used for the relocation.

LEGISLATIVE ACTION

ENVIRONMENT: Section 4(f) Streamlining

Section 4(f) of the Department of Transportation Act establishes requirements and considerations for USDOT to use land from a historic site, publicly owned park, recreation area, or wildlife and water fowl refuge. Implementing regulations require USDOT to coordinate and seek comments from "officials of jurisdiction" prior to making a 4(f) determination. Depending upon the resource, this could include the State Historic Preservation Office (SHPO), the Tribal Historic Preservation Office (THPO), the Advisory Council on Historic Preservation (ACHP), the National Parks Service, and/or the Fish and Wildlife Services (FWS). After coordination with these entities and public review, the evaluation is then required to be reviewed by the Department of the Interior (DOI), and sometimes the Department of Agriculture (DOA) and/or Department of Housing and Urban Development (HUD). This last level of review slows down project delivery and adds little value to the 4(f) determinations.

Recommendation

Remove DOI, DOA and HUD review for individual 4(f) evaluations. This would require amending 49 USC 303 and 23 CFR 774.5(a).

LEGISLATIVE ACTION

ENVIRONMENT AND PLANNING: Planning and Environmental Linkages

Planning and environmental linkages (PEL) allow for planning decisions to be carried forward into NEPA without having to revisit these decisions in NEPA. PEL was first established in 23 CFR 450 Appendix A. MAP-21 developed and then the FAST Act updated PEL in statute. However, the statutory language contains ten stringent conditions that must be met prior to carrying a planning decisions forward into NEPA, including resource agency concurrence. It is confusing to states to have two different PEL authorities with two different processes and requirements.

Recommendation

Amend 23 USC 168 to ensure that the statutory authority provided to adopt planning decisions in the NEPA process includes all of the flexibility previously provided in the planning regulations (23 CFR 450 Appendix A).

LEGISLATIVE ACTION

FEDERAL OVERSIGHT: Allow States to Exit the Bonus Act Program Without Penalty

There are 23 State Department of Transportations (DOTs) that must still comply with the antiquated outdoor advertising control regulations of the "Bonus Act (BA) of 1958." The BA is incongruent to the Highway Beautification Act (HBA) in many aspects and disrupts a national uniformity in the erection and maintenance of outdoor advertising of signs/displays in areas adjacent to the Interstate -- a basic

program objective of the HBA. States that voluntarily participated in the BA (for an additional ½ of 1 percent of funding) are currently afforded only one avenue of exit from the program – the repayment of federal funds received during the early years of the program, as is stated in BA agreements signed between State DOTs and FHWA. Repealing the BA provisions of federal law/regulations will allow State DOTs a graceful exit from the BA program, which is outdated and causes problems for state DOTs in their regulation and control of outdoor signs along the Interstate.

Recommendation

It is understood that an FHWA Division Office administrative waiver could nullify the BA stipulations on a case-by-case basis (unless a nationwide blanket waiver was issued); however, it is recommended that federal law and regulations be amended so that the remedy would apply to all states seeking an exit from the BA agreement. The following sections should be amended as such: Section 131(j) of Title 23, United State Codes, is amended – by striking "shall be entitled to receive the bonus payments" and all that follows through "provided in this section" and by inserting "shall no longer be bound by such agreement." Moreover, 23 CFR 750.713 should be amended – by striking § (j) and by inserting, "Specifically provides that any State which had entered into a bonus agreement before June 30,1965, will no longer be bound by such agreement."

LEGISLATIVE ACTION

FEDERAL OVERSIGHT: Assignment of Various Federal Authorities

Federal Funds Obligation Management

Currently, a State must obtain FHWA's approval to obligate funds for a specific project. This is required to allow states to actually draw down specific Federal funds so that the State can seek reimbursement from FHWA for actual costs incurred. This approval is provided for a project after FHWA determines that all applicable Federal requirements have been met.

Recommendation

A new legislative authority should be provided to allow States to assume FHWA's responsibilities for determining that all federal requirements have been met, without the need for an individual project-level obligation approval by FHWA.

Project Agreements

Currently, a State must obtain FHWA's authorization to proceed before beginning work on any Federal-aid project, including an advance construction project. This authorization can be provided by FHWA for a project or a group of projects through or after the execution of a formal project agreement with the State, only after FHWA determines that all applicable Federal requirements have been met.

Recommendation

States should be provided new legislative authority to assume FHWA's responsibilities for determining that all federal requirements have been met prior to commencement of construction.

Right-of-Way Acquisition

Currently, there is no specific authorization in 23 USC 106 (or elsewhere in Title 23) for States to assume FHWA's responsibilities for authorizing federally funded right-of-way acquisitions. In addition, FHWA's right-of-way regulations state that "as a condition of Federal funding under Title 23, the grantee shall obtain FHWA authorization in writing or electronically before proceeding with any real property acquisition using title 23 funds, including early acquisitions under §710.501(e) and hardship acquisition and protective buying under §710.503."

Recommendation

New legislative authority should be established for States to assume some or all of FHWA's responsibilities for approval of right-of-way acquisitions, subject to the same legal protections that currently apply to the right-of-way acquisition process. This would require an amendment to 23 USC 108.

Preventative Maintenance Projects

Under 23 USC 116(e), a State may use Federal-aid highway funds for a preventive maintenance project "if the State demonstrates to the satisfaction of the Secretary that the activity is a cost-effective means of extending the useful life of a Federal-aid highway." Because this is a statutory requirement, FHWA cannot currently assign to States the authority to determine that a preventive maintenance project qualifies for federal reimbursement.

Recommendation

This provision should be amended to allow States to determine that a preventive maintenance project meets the applicable criteria for federal reimbursement. This change would require an amendment to 23 USC 116(e).

Repayment of Preliminary Engineering Costs

Currently, a State is required to repay all Federal-aid reimbursements for preliminary engineering costs on a project that has not advanced to right-of-way acquisition or construction within 10 years after Federal-aid funds were first made available, unless FHWA has granted a time extension. FHWA cannot grant an outright waiver of this requirement; it can only grant an extension based on reasons that FHWA deems valid. The repayment of these costs is administratively burdensome and funds are ultimately returned to the state for obligation on other federal-aid eligible projects.

Recommendation

Eliminate the 23 USC 102(b) requirement that a state repay federal funding if a project does not advance to right-of-way acquisition or construction within 10 years.

Repayment of Right-of-Way Costs

The FHWA right-of-way regulations require repayment of right-of-way costs if actual construction of the project has not begun within 20 years after the year in which the project was authorized, unless FHWA has granted a time extension. While this is not a statutory requirement, current FHWA policy precludes assignment of this decision to States as part of a Stewardship and Oversight Agreement.

Recommendation

This provision should be amended to allow States to approve a time extension, subject to criteria established in applicable Federal regulations or policies. This change would not require legislation, but legislation could be enacted to ensure that this change is implemented consistent with the amendments to 23 USC 102(b).

Credits Toward Non-Federal Share

Under 23 USC 323, a State may receive credit toward the non-federal share of project costs for the fair market value of early acquisitions, donations of property, or other contributions made to the project. Currently, FHWA must approve any such credits based on a finding that all applicable criteria have been met. In addition, FHWA must approve any credits toward the non-federal share for costs incurred prior to a project agreement, based on criteria defined in 23 CFR 1.9(b).

Recommendation

These provisions should be broadened as appropriate so that States can approve the crediting of these costs toward the non-federal share, subject to criteria established in applicable Federal regulations or policies. This change would require an amendment to 23 USC 323 and revision of 23 CFR 1.9(b).

LEGISLATIVE ACTION

FINANCE: Expanding Tax-credit and Tax-exempt Bonding Tools

The Build America Bonds program was a financing tool used between 2009 and 2010 to allow state and local governments to obtain much-needed funding at lower borrowing costs for projects such as construction of schools and hospitals, development of transportation infrastructure, and water and sewer upgrades. They were designed to appeal to a broader set of investors than traditional tax-exempt bonds, including pension funds that traditionally do not hold tax exempt bonds and foreign investors. There were more than $181 billion of BABs issuances by every state in the nation; and up to 29 percent of BABs issued were utilized for transportation purposes.

Recommendation

Reinstituting direct-pay tax credit bonds would expand municipal financing options depending on the interest subsidy rate. Additionally a volume-capped, transportation-focused qualified tax credit bond (QTCB) program and/or proposals such as Qualified Public Infrastructure Bonds and Move America Bonds can add more financing tools for project sponsors.

LEGISLATIVE ACTION

FINANCE: Financial Planning Requirement for Major Projects

An annual financial plan is required for any project with an estimated cost exceeding $100 million. Updating these plans requires a considerable amount of time and may cause delays in the advancement of a project. This statute was created to avoid a situation where a state would start the construction of a large transportation facility and not be able to complete the facility due to the cost and available resources, creating a financial liability to the project sponsor. While the intent of the statute is well-meaning, there is no known empirical data to show that the requirement of a financial plan for a project over $100 million has added value to the funding or delivery of that project.

Recommendation

Given the financing accountability that currently exists through the fiscal constraint requirement for planning documents, 23 USDC 106 (h) and (i) should be rescinded.

LEGISLATIVE ACTION

FINANCE: Pilot the Commercialization of Interstate Rest Areas

Federal law limits commercial activity at rest areas located along the Interstate Highway System. Expanding allowable commercial activity at Interstate rest areas would generate additional revenue to help offset maintenance and operating costs at rest area facilities and support increased investment in surface transportation infrastructure.

Recommendation

23 USC 111 should be amended to pilot the commercialization of rest areas on the Interstate Highway System.

LEGISLATIVE ACTION

FINANCE: Provide Flexibility to Toll Federal-aid Highways

In most cases, federal law restricts states from tolling Federal-aid Highways, which eliminates a potential source of revenue. The Interstate System Reconstruction and Rehabilitation Pilot Program (ISRRPP) was authorized under Section 1216(b) of TEA-21 to permit up to three existing Interstate facilities to be

tolled to fund needed reconstruction or rehabilitation on Interstate corridors that could not otherwise be adequately maintained or functionally improved without the collection of tolls.

Recommendation

In order to maximize user fee-based revenue options for states, provide tolling flexibility to states—including on the Interstate Highway System—by eliminating the general tolling prohibition in 23 USC 301. This will enable states, if so desired, to collect toll revenue to be used towards surface transportation infrastructure investments.

LEGISLATIVE ACTION

INNOVATION: Project Delivery Innovation Pilot Program

To foster the development and testing of new, innovative practices and approaches aimed at expediting project delivery while maintaining environmental protections, establish a project delivery innovation pilot program. This pilot program would allow USDOT modal administrations and federal environmental agencies to waive or otherwise modify their own requirements to develop innovative practices to streamline project delivery and achieve positive environmental outcomes. The flexibility provided under this framework would include appropriate safeguards to ensure adherence to federal environmental policy goals. For example, all federal agencies required to consult on a project would need to agree to the inclusion of the project in the pilot program, consulting resource agencies would need to determine that equal or improved environmental outcomes would be achieved, and no agency would be allowed to override or modify requirements that fall within another agency's authority.

Recommendation

A new legislative authority should be provided to federal transportation and regulatory agencies to allow them to modify their own requirements to develop innovative practices that streamline project delivery and achieve positive environmental outcomes.

LEGISLATIVE ACTION

OPERATIONS: Revoke SAFETEA-LU Real-Time System Management Information Program

The Real-Time System Management Information Program (RTSMIP) directed all states to establish, in a real-time, a program to provide traffic and travel conditions of the major U.S. highways in order to address congestion/traffic incidents, improve security and address weather events, has become obsolete due to the private sector's dominance in this sector. In the nearly 13 years since the enactment of SAFETEA-LU, the exponential evolution of technology has allowed private sector companies to advance and achieve the goals of the RTSMIP program beyond the capabilities of state DOTs. State DOTs across the nation, simply cannot compete with private traffic data management companies and the revolutionary innovations they offer the traveling public. Moreover, as the pace of technology continues to accelerate and private companies flush with capital and manpower continue to innovate and deploy new generations of traffic data management technology, it is anachronistic for state DOTs to continue to delve into this field of technology when those technologies can be procured at minimal cost. State DOTs are unproductively expending important and limited resources into these required areas at the expense of failing roadway infrastructure and safety infrastructure improvements.

Recommendation

It is recommended that Section 1201 of SAFETEA-LU (RTSMIP) be repealed and that the accompanying regulations, found under 23 C.F.R. §511, be repealed. It is further recommended that, in the interim period between the repeal of these sections, FHWA issue guidance to lessen the financial and reporting burdens of said regulations upon state DOTs provided they can meet the requirements of the regulations by partnering with private corporations.

LEGISLATIVE ACTION

PLANNING: Fiscal Constraint on Long-range Transportation Plans

Programming of federal transportation dollars is based on the shorter four-year window through the statewide transportation improvement program (STIP) while the long range transportation plan (LRTP) looks at a 20-year timeframe. Currently, both LRTPs and STIPs are required to be financially constrained by future funding estimated to be available and committed. Especially over longer time horizons covered under the LRTP, fiscal constraint estimates become less reliable. Yet determining fiscal constraint requires a large amount of time and cost not just for development of the LRTP but also for public involvement meetings and amendments to the LRTP after initial completion.

Recommendation

Fiscal constraint requirement for LRTPs should be eliminated for any year that falls outside of the four-year STIP timeframe.

LEGISLATIVE ACTION

SAFETY: Flexibility for Highway Safety Improvement Program

FAST Act amended 23 USC Section 148(a) to take away funding eligibility under the Highway Safety Improvement Program (HSIP) for States' efforts that promote highway safety awareness, educate the public concerning highway safety matters including motorcycle safety, enforce highway safety laws, and provide for infrastructure and infrastructure-related equipment to support emergency services. States are required to develop and update Strategic Highway Safety Plans, and these plans have to include multidisciplinary approaches to addressing safety priorities in the state, not just infrastructure countermeasures. The non-infrastructure safety activities are an important part of states' safety efforts and support their ability to implement their federally-required safety plans.

Recommendation

Legislative flexibility should be restored under HSIP to allow states determine how to most effectively invest their federal HSIP funds to support strategic safety efforts.