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Questions & Answers on Economic Stimulus Issues Raised by the State DOTs

Question 1: Can the State and MPOs do public involvement; demonstrate fiscal constraint; determine conformity and other planning process steps that are needed for various scenarios prior to passage by Congress so MPOs can vote approval literally hours after the President signs the bill?

Answer 1: Yes, the State and the MPOs can do the necessary planning work such as model runs for the various scenarios; analysis work needed for conformity, if necessary; public involvement; and any other planning support work to get prepared. These planning activities are eligible for SPR and PL funds. The technical work can begin now, however, the MPO board cannot act (approve) on the amendments or the conformity determination until after the stimulus bill is passed and signed.

Question 2: Is it possible for FHWA/FTA to make conditional STIP approvals?

Answer 2: No, FHWA/FTA cannot make conditional STIP approvals, since conditional STIP approvals are not allowed under existing regulations. The planning regulations (23 CFR 450.218(b)) do allow FHWA/FTA to:

- (i) Approve the entire STIP;
- (ii) Approve the STIP subject to certain corrective actions being taken; or
- (iii) Under special circumstances, approve a partial STIP covering only a portion of the State.

However if the States and MPOs complete the steps detailed in question #1, FHWA/FTA can approve the STIP amendments immediately.

Question 3: How should Federal Lands Highway (FLH) Program projects be handled?

Answer 3: FLH projects will need to follow the state STIP process as well. Work with your FLH Division offices as part of your early outreach efforts described in Question #1. In most cases, FLH program projects are in addition to the lists provided by the states. The FLH Divisions, working with the federal partners, have identified approximately \$400-500 million in potential projects nationally.

Question 4: Can FHWA adopt “Emergency” rules with regard to environmental processing to save time? Can 404/401 permits be expedited or Nationwide or Regional permits be expanded by USACE for these projects?

Answer 4: No, FHWA cannot adopt emergency procedures. The emergency action procedures referred to in 23CFR771.131 only apply to emergency circumstances addressed in the CEQ regulations 40CFR1506.11. CEQ is unlikely to consider all

Qs & As on Economic Stimulus Issues Raised by the State DOTs

economic stimulus projects as emergency, unless they are true emergencies under unique circumstances.

As for Clean Water Act Section 404 permits and 401 authorizations, many minor projects do not require permits or already qualify under Nationwide permits. Many states have funding arrangements and agreements with the Corps of Engineers and the State environmental agencies, and they can address expedited processes for projects in the stimulus package through prioritization. It will not be practical to get Section 404 processes altered solely for the economic stimulus package.

Question 5: Can all Categorical Exclusions be delegated to the States?

Answer 5: No. We will have to stay within the bounds of the statutory provisions. CE delegation is addressed in SAFETEA-LU, and most States did not see an advantage in pursuing such delegation. Many minor projects may already be covered under the Programmatic Categorical Exclusions as per agreements with the States. For the remaining projects, the documentation preparation is more time consuming than the FHWA approvals at the Division office.

Question 6: What if FHWA or the States are challenged on the cumulative impacts of such a large investment package like this? Are we prepared to address this issue?

Answer 6: The stimulus package provides funding for delivering the “ready to go” projects. The package itself cannot be challenged under NEPA, as it will be an Act of Congress. Individual projects are subject to legal provisions and can be challenged like any other project that is outside of the stimulus package. “Ready to go” may have been advanced through environmental processes already or do not require any major environmental review. For these reasons, they are unlikely to be challengeable solely because they are part of a large investment package.

Question 7: Will the economic stimulus funds be 100% Federal share?

Answer 7: We will not know the response to this question until the Congress acts. AASHTO has made it clear that it would like to see a 100% federal share.

Question 8: Do MPOs have the capacity to help with the oversight and management of these projects if funding is provided directly to the locals within MPO boundaries without passing through the State?

Answer 8: The MPOs in nearly all cases do not have the capacity to help with the oversight and management of projects as the MPO's primary function is almost always limited to planning and programming, not project management. They simply don't have the experience or expertise. The responsibility for oversight and management of individual projects resides with the State DOT and the designated recipient transit agencies. In some cases, a larger local government may have some ability to oversee and

Qs & As on Economic Stimulus Issues Raised by the State DOTs

administer a federal-aid highway project; however it is ultimately the responsibility of the State DOT to see that federal requirements are being met on a highway project.

Question 9: Will FHWA have the ability to advance economic stimulus funds to States and local governments to accommodate States that don't have the cash up front to proceed?

Answer 9: Federal-aid program funds are provided to the State only on a reimbursement basis.

Question 10: Can States use these funds for winter or other maintenance?

Answer 10: Federal-aid funds may not be used for routine maintenance activities. However, activities considered to be preventative maintenance are eligible for Federal-aid funding. The term "preventative maintenance" is defined as those activities that are a cost-effective means of extending the useful life of a Federal-aid highway

Question 11: What design elements or standards can be waived or streamlined?

- Pavement rehabilitation without safety or signage being addressed. (applying less than 3R/4R standards on the Interstate)
- Not addressing design exceptions for a "pavement" only type project.
- Can Finance Plan and Project Management Plan requirements be waived or streamlined?
 - Can the Divisions or the States conduct an independent cost estimate reviews for major projects instead of HQ?

Answer 11:

Unless the Economic Stimulus bill specifies otherwise, the projects funded under the bill will need to be developed and designed in a manner that complies with the design standards adopted by the State DOT and approved by FHWA. Current law and regulations does not allow for design standards or design exceptions to be waived.

All new construction, reconstruction and resurfacing, restoration, and rehabilitation (3R) type of projects that use Federal-aid funding for projects on multilane limited access (freeways including Interstates) on the National Highway System (NHS) must comply with the FHWA adopted design standards. For non-freeway 3R projects, they may be constructed in accordance with FHWA-approved AASHTO standards for new and reconstruction projects, or in accordance with FHWA-approved individual State standards developed pursuant to 23 U.S.C. 109(o) and 23 CFR 625. Americans with Disabilities Act requirements are applicable.

The Interstate System, which is included as part of the NHS, has a special set of design standards (as specified in 23 USC 109 and 23 CFR 625). The standards, *A Policy on Design Standards -- Interstate System*, are also published by AASHTO and available at their web site. For projects that are not on the NHS, Title 23 USC 109 provides that these projects shall be designed, constructed, operated, and maintained in accordance with

Qs & As on Economic Stimulus Issues Raised by the State DOTs

State laws, regulations, directives, safety standards, design standards, and construction standards. The design standards adopted by the FHWA can be found at [23 CFR 625](#). For preventive maintenance projects, no design exceptions are needed for the retention of existing substandard features. In effect, the State is maintaining the project as built, and as it was agreed upon in the project agreement. However, any new substandard features created, or existing ones made worse, must be covered by an exception since such actions in effect change the project as built.

Current law does not allow the Finance Plan and Project Management requirements for major projects to be waived. FHWA HQ will work closely with the Division Offices to insure a quick approval. With a few exceptions, Division Office personnel do not currently have the capability to complete a risk based probabilistic cost review. The States could hire a consultant to complete an independent review but it must be a risk based probabilistic cost review. FHWA HQ would expect Division personnel to participate in the review so they could make a determination that the cost review was equivalent to the risk based probabilistic review that FHWA HQ and/or Resource Center personnel would complete. FHWA HQ will work with Division personnel to insure cost reviews are completed in a timely manner.

Question 12: Will FHWA consider waiving or expediting any steps in the consultant contracting process to help States move these projects more quickly?

Answer 12: Unless the Economic Stimulus bill specifies otherwise, the projects funded under the bill will need to be procured, negotiated and managed in a manner that complies with the Federal laws and FHWA regulations. In addition these projects will also need to comply with the adopted State laws and procurement policies and procedures (as per the provisions specified in the Uniform Administration Requirements for Grants and Cooperative Agreements to State and Local Governments" (49 CFR 18)) as previously approved by FHWA. Current Federal laws and FHWA regulations do not allow for the normal waiving of procurement and contracting requirements.

Generally State DOTs have consultant services procurement and contracting policies, process and procedures which our FHWA Division Offices have already approved. As a result, FHWA is typically not involved in or required to approve the procurement documents or contracts related to consultant services related projects. Many State DOTs have already put in place and our FHWA Division Offices have previously approved procurement methods which have streamlined their procurement processes, allowing for substantial improvements to be realized with how they can procure the engineering and other types of services that may be required to meet the needs of each specific project.

Question 13: Will FHWA provide assistance to the States to address the need to use consultants to do materials testing QA/QC without detailed State oversight?

Answer 13: Based on our understanding of the question, we offer the following. Funding for consultant services should be from the State's Federal aid dollars related to each project. As always, States have been able to hire consultants to manage their QA

Qs & As on Economic Stimulus Issues Raised by the State DOTs

program, however, 23 CFR 637 requires that the States are ultimately responsible. As such, the State has to sign off on the materials conformance document at the end of the project. The State's consultant lab must meet the same requirements as the state lab and the State has to provide oversight of consultant lab and review their data. In addition, these labs have to be included in the states IA program. The state will need someone responsible for QA but they themselves do not have to do the testing or the analysis only the review.

We realize that this may be a new role for many States. FHWA can support to States through the Pavement and Materials Technical Service Team which has recently increased their staff resource assignments to better support QA. In addition, several recently developed training courses have been developed and can be provided by FHWA quickly to States to help with the potential increased use of consultants to manage QA programs. The Office of Pavement Technology within FHWA can assist States to identify the most appropriate course that can be delivered quickly to support the accelerated delivery of these projects.

Question 14: Does FHWA have Design/Build procedures ready and in place that States could use to help deliver projects using this mechanism, especially for States that have little or no experience in this area?

Answer 14: The FHWA removed the design-build project delivery method from the experimental status in December 2002. It is now fully operational and it is no longer necessary to request FHWA Headquarters' approval under Special Experimental Project No. 14 - Innovative Contracting. The AASHTO and the Design-build Institute of America have both published guidance for developing design-build procurement documents and contracts. Approximately 40 of the 50 states have some level of design-build experience and the use of design-build continues to grow at a steady pace.

Question 15: Are FHWA and the States considering local projects in this call?

Answer 15: In general terms, local projects are eligible for Federal-aid funds. As the grantee, however, the State has the sole prerogative in determining if such projects will be funded.

Question 16: Are the projects being proposed by the States really "ready to go"?

Answer 16: We have asked each division to do the analysis to answer this question. Therefore, this response is dependent on each division's distinct review.

Question 17: If these are General Fund dollars, what specific Title 23 requirements apply? Will FHWA "relax" other Title 23 federal requirements in order to move these projects quickly?

Answer 17: Unless the Economic Stimulus bill specifies otherwise, the projects funded under the bill will be required to follow all normal Federal-aid funding requirements.

Qs & As on Economic Stimulus Issues Raised by the State DOTs

Question 18: Section 101 of Title 23 provides a specific list of eligible construction activities. Can you provide a similar list for the Economic Recovery Program? Are preliminary engineering and ROW eligible for recovery dollars?

Answer 18: Unless the Economic Stimulus bill specifies otherwise, the list of eligible construction activities in Section 101 of Title 23 will apply, including projects for preliminary engineering, rights-of-way acquisition, intelligent transportation systems, traffic signalization, and signage.

Question 19: Is there a requirement that last year's special bridge funding be obligated before Economic Recovery funds are used for bridge work?

Answer 19: No

Question 20: What happens to Economic Recovery funds that have not been obligated by the due date?

Answer 20: We will not know the response to this question until the Congress acts and the parameters for using and managing the funds are known.

Question 21: Can funds be used to convert AC balances, particularly when a state is experiencing or anticipating cash flow problems?

Answer 21: No