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April 1, 2011

Mr. Robert S. Rivkin
General Counsel
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590-0001

RE: Docket No. DOT-OST-2011-0025 Regulatory Review of Existing DOT Regulations

Dear Mr. Rivkin:

The American Association of State Highway and Transportation Officials (AASHTO) represents the departments of transportation (DOTs) in the fifty States, the District of Columbia and Puerto Rico. Based on information received from our State DOTs, the following are key regulations that were identified as ones which are outmoded, ineffective, insufficient or excessively burdensome. We respectfully urge your review of our recommendations for modification or elimination of these regulations.

In addition, I have attached a supplemental list of additional regulations that are worthy of your consideration for modification or elimination.

TIP Amendment Process

- Title 23 USC §134 and 135

The TIP/STIP amendment/modification process is excessively lengthy and creates voluminous paperwork even when making only a minor change for project costs or funding sources. Furthermore, TIP information tends to be at least a year old by the time the federal reviewer approves each individual project.

Recommendation:

Eliminate the modification process for projects where the cost changes or funding source changes are minor. For example, allow cost/funding source changes within 20% of the TIP/STIP-approved project cost, without triggering the TIP/STIP amendment/modification process.

Maximize the Opportunity to Overlap Processes: Planning and NEPA Linkages

- 23 CFR Part 450, Appendix A.

A long-standing dilemma for transportation agencies is the tendency for decisions made in the planning process to be re-opened in the NEPA process – in essence, starting over – rather than using the planning decisions as the starting point for the NEPA review. Although some progress was made in SAFETEA LU and FHWA regulations, there remains a deeply engrained reluctance to adopt the mode and corridor decisions from the planning process as the basis for the Purpose and Need in NEPA documents.

Recommendation:

FHWA should establish a presumption that decisions made in the planning process on corridor, facility type, and mode will be adopted in the NEPA process.

Programmatic approaches

- 23 CFR 771

The development and application of programmatic solutions to replace project by project analysis, documentation and decision making supports efficient project delivery and environmental stewardship. While extensive progress has been made by states to implement programmatic solutions, the opportunity to achieve major streamlining benefits by stronger promotion of programmatic solutions shows great promise. For example, programmatic criteria for categorical exclusions are often not broad enough to cover all undertakings with a demonstrated history of not having significant environmental impacts.

Recommendations:

- Include clear regulatory language indicating that programmatic approaches are the standard way of conducting business.
- Provide maximum flexibility in the development of programmatic categorical exclusions.
- Expand funding and support for “in-lieu” fees for conservation banking and programmatic mitigation for natural and cultural resource impacts.
- Allow the states, through programmatic agreements, to conduct legal sufficiency reviews.

Remove barriers to delegation of the Environmental review process

- 23 CFR 773

The delegation programs have been implemented by USDOT in a way that makes many States highly reluctant to seek delegation. There is one major factor that discourages States from seeking delegation under the existing programs. FHWA has determined that States can only assume USDOT’s responsibilities if the State gives up the ability to undertake design and right-of-way activities during the NEPA process on an at-risk basis (i.e., with their own funds). For many States, the flexibility to advance these activities in parallel with NEPA is a critical project-delivery tool; because they are unwilling to give up that flexibility, they do not pursue delegation.

Recommendation:

FHWA should allow States to assume USDOT responsibilities without reducing flexibility to acquire right-of-way and perform design work prior to the completion of the NEPA process.

Advanced Right-of-Way Acquisition

- 23 CFR 710.501; 23 CFR 710.503; 23 CFR 710.203; 23 CFR 710.305

Current federal environmental restrictions make it extremely difficult to identify and preserve potential future transportation corridors. Until the NEPA process is completed for a transportation project, Federal funds can only be used to acquire individual parcels that meet the definition of “hardship” or “protective” acquisitions. Because these exceptions are narrow, it is difficult to protect a continuous corridor – or even to simply acquire strategic parcels from willing sellers – until after the NEPA process is completed for the entire project, which is not nearly enough time to take full advantage of the potential for reduced cost and reduced community disruption.

In addition, corridors must be part of a fiscally-constrained Long-Range Plan in order to use corridor preservation funds. However, due to the large size, scope, and cost of some corridors, State DOTs find it very difficult to include entire corridors in their Long-Range Plan while keeping it fiscally constrained. Requiring entire corridors to be included in a fiscally-constrained Long-Range Plan creates a burden for the State DOTs resulting in limited use of corridor preservation.

Recommendations:

1. Allow states to use Federal or state funds to acquire right-of-way well in advance of project construction if the viability of a project would otherwise be threatened. Having appropriate right-of-way in advance does not compel a project to be built—but not having the necessary right-of-way can create significant disruption and/or kill a project.
 - Modify 23 CFR 710.501 and/or expand 23 CFR 710.503 to allow more flexibility for the use of federal funds “at risk” for corridor preservation, which could then be paid back if the land is not used for the anticipated project. In addition, modify language in 23 CFR 710.203 and 23 CFR 710.305 to allow for the use of federal funding prior to the NEPA document being completed. Since this funding is “at risk” and will be paid back if the acquired land is not used in the final project, 23 USC 108(2)(c)(2)(F) could be interpreted broadly that actual Federal “participation” does not occur until after the NEPA document is complete.
2. Specify that entire corridors do not need to be part of a fiscally constrained Long-Range Plan in order for corridor preservation funds to be used.

Use of Proprietary Products

- 23 CFR 635.411

AASHTO, as well as a number of other organizations (ATSSA, ARTBA, AGC, etc.) have concerns that current federal regulations in 23 CFR 635.411, “Material or product selection,” and the current law in 23 USC 112, “Letting of contracts,” impose broad restrictions on the states’ ability to utilize proprietary methods, materials, and equipment on federal-aid projects and, as a result, limit the development of new products and discourage innovation. As currently regulated, proprietary products are only allowed on federal-aid construction contracts under specific circumstances. The State DOTs’ hands are tied when trying to use these products because of “low-bid” requirements. Currently, a new proprietary product that is developed and placed on the market cannot easily be used in highway construction until a “comparable” product is produced. The inability of government agencies to specify a particular product which currently has no “equal” limits innovation by essentially “lowering the bar” for all products in order to artificially produce competition within the market. Often, engineering judgment in the areas of safety and technology is trumped by an accounting policy that is being administered across-the-board without consideration for potential safety improvements and returns on the investment.

Recommendation:

Amend 23 CFR 635.411 to allow greater flexibility for using proprietary products in Federal-aid contracts by allowing the Secretary of Transportation to approve the use of Federal funds in the payment of patented or proprietary items when the State DOT certifies, based on the documented analysis and professional judgment of qualified State transportation officials, that:

- the patented or proprietary item will provide safety, economic, or other benefits along one or more sections of roadway;
- no equally suitable alternative item exists; and
- any patented or proprietary item specified pursuant to this certification will be available in sufficient quantity to complete the project identified in bid documents.

MUTCD Revisions

AASHTO is concerned with several provisions of the most recent version of the MUTCD. We appreciate that FHWA has been open to hearing the states' views regarding their concerns with these provisions.

Specifically, the flexibility granted to states and local agencies to use "engineering judgment" in the field has been significantly reduced. Previous versions of the MUTCD recognized the need for flexibility by allowing deviation from a standard on the relatively rare occasion when engineering study and judgment determined that the safety and movement of road users would be improved by such deviation. Such is not the case with the 2009 MUTCD.

In addition, AASHTO is concerned that the standards are significantly more prescriptive than in prior versions. The 2009 MUTCD includes approximately 44% more mandatory provisions than the previous edition. This can lead to millions of dollars in excess costs for state and local governments and some private entities, such as shopping mall operators. Examples of problematic requirements include:

- Resizing of overhead sign structures to handle questionable message modifications;
- Increasing the number of studies prior to changes in horizontal curve warning signs;
- Creation of miscellaneous regulatory sign requirements (e.g., "Higher Fines" sign/plaque);
- Adaption of new procedures for the evaluation and measurement of sign retro-reflectance and, subsequently, meet minimum values.

In addition, the FHWA has demonstrated a recent trend of imposing increasingly specific compliance dates for various rules that will subject states to increased cost without necessarily improving safety.

Recommendations:

- Allow states the ability to use "Engineering Judgment" by restoring the definitions of "Engineering Judgment," "Engineering Study," and "Standard" to the definitions used before the 2009 MUTCD.
- Delete the statement added to Section 1 A.13: "Standard statements shall not be modified or compromised based on engineering judgment or engineering study." In addition, restore the statement previously contained in Section 1A.09, "...while this Manual

provides Standards, Guidance, and Options for design and application of traffic control devices, this Manual should not be considered a substitute for engineering judgment."

- Either eliminate, or at least reduce to Guidance Provisions, those Standards that are nonessential or overly prescriptive.
- Eliminate or, at a minimum, significantly extend compliance dates in the MUTCD, which require replacement of traffic features before the end of their useful life.

I appreciate the opportunity to provide these comments and recommendations on behalf of AASHTO.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John Horsley". The signature is written in a cursive, flowing style.

John Horsley