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VIA ELECTRONIC SUBMITTAL (www.regulations.gov)

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Ave. SE., W12-140
Washington, DC 20590-0001

Re: Comments on Draft Major Project Financial Plan Guidance
(Docket No. FHWA-2013-0042)

To the Federal Highway Administration:

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to submit these comments on the draft “Major Project Financial Plan Guidance” published by the Federal Highway Administration (FHWA) in the Federal Register on September 6, 2013. (78 Fed. Reg. 54949).

AASHTO is a nonprofit, nonpartisan association representing highway and transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents all transportation modes. AASHTO’s primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our members work closely with USDOT agencies to operate, maintain, and improve the nation’s transportation system.

Background

In the Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress amended the “financial plan” requirements in 23 U.S.C. 106 in two ways: (1) it allowed a project sponsor to prepare a “phased” financial plan, and provided that such a plan will satisfy the fiscal constraint requirements in the transportation planning process; and (2) it required a financial plan to include consideration of the appropriateness of using a public-private partnership (PPP).

In September 2012, following the enactment of MAP-21, FHWA issued interim guidance regarding the changes to the financial plan requirements.¹ FHWA also issued question-and-

¹ FHWA, “Interim Major Project Financial Plan Guidance” (Sept. 24, 2012).

answer guidance summarizing MAP-21 changes that affected “major projects,” including the new financial plan requirements.²

The draft guidance issued on September 6, 2013 (“draft guidance”) would implement the changes made in MAP-21, while also updating and replacing previous guidance. The draft guidance would supersede the following guidance documents:

- Major Project Financial Plans Guidance, issued January 2007 (“2007 Financial Plan Guidance”).
- Operational Independence and Non-Concurrent Construction Guidance, issued December 30, 2009 (“2009 OINCC Guidance”).
- Interim Major Project Financial Plan Guidance, issued September 24, 2012 (“2012 Interim Financial Plan Guidance”).

The draft guidance would *not* supersede the following guidance:

- Major Project Program Cost Estimating Guidance, issued in January 2007 (“2007 Cost Estimating Guidance”).
- Major Project Questions and Answers, issued September 25, 2012.

AASHTO Comments on the Draft Guidance

Overall, AASHTO supports the issuance of guidance to clarify the financial plan requirements for major projects and to implement the changes made to those requirements in the Moving Ahead for Progress in the 21st Century Act (MAP-21). In particular, AASHTO welcomes the provision in MAP-21 that gives States the flexibility to prepare a “phasing plan” as part of a financial plan and to use the phased plan to satisfy the fiscal constraint requirements in the statewide and metropolitan transportation planning process.

In these comments, we request that the draft guidance be revised as described below to improve clarity and to ensure consistency with the language and intent of the statute.

1. Phased Financial Plans

In MAP-21, Congress amended 23 U.S.C. § 106 to allow a financial plan for a major project to include a phasing plan that “identifies fundable incremental improvements or phases that will address the purpose and the need of the project in the short term in the event there are insufficient financial resources to complete the entire project.” The statute provides that if a phasing plan is adopted, it shall be deemed to satisfy the fiscal constraint requirements in the statewide and metropolitan transportation planning process under 23 U.S.C. §§ 134 and 135.

The draft guidance briefly summarizes the statutory provisions regarding phased financial plans. We recommend that guidance be revised to address the following issues:

² FHWA, “Major Project Questions and Answers” (Sept. 25, 2012).

(a) Timing of Phased Financial Plan

The financial plan required under 23 U.S.C. § 106 is typically prepared after the National Environmental Policy Act (NEPA) process has been completed. By contrast, the fiscal constraint requirement under 23 U.S.C. §§ 134 and 135 must be met *before* completion of NEPA. The fiscal constraint determination is made when the project is included in the applicable metropolitan long-range transportation plan and transportation improvement program (TIP) and/or statewide transportation improvement program (STIP), which must occur before FHWA issues its NEPA decision document.

In order for a financial plan to be used to satisfy the fiscal constraint requirement, the financial plan would need to be prepared during the NEPA process, at the time when the project is included in the metropolitan plan and TIP and/or the STIP. This approach would involve preparing the financial plan much earlier than would otherwise be done.

While it is possible to prepare a financial plan during the NEPA process, the content of the plan would likely be less specific than a plan prepared after the completion of NEPA. For example, the issue of whether to use tolling as a revenue source often is not resolved until the NEPA process is completed. In addition, private-sector investors often are reluctant to commit to specific financial terms until the NEPA process is completed. The availability of State and local funds also may be uncertain during the NEPA process, because elected officials often wait until the process is concluded before committing to revenue increases that are needed for the project.

To address this timing issue, the financial plan guidance should explicitly recognize that:

- At the State DOT's option, a financial plan under 23 U.S.C. § 106 can be prepared prior to completion of NEPA, in order to be used as the basis for meeting fiscal constraint requirements.
- It is appropriate for a financial plan that is prepared during the NEPA process to have a lower level of detail than a financial plan that is prepared at a later stage of project development.

(b) Relationship of "Phase" to "Operationally Independent" Project

The concept of a "phasing" could easily be confused with a similar but distinct concept discussed in the guidance - i.e., building a single project in a series of distinct segments, each of which is "operationally independent and non-concurrent." We believe it would be useful for the guidance to clarify the distinction between these concepts. Specifically, we urge FHWA to clarify the following points:

- A finding of "operational independence and non-concurrence" is required only if the project as defined in the NEPA document will be divided into smaller projects, each of which will be covered in a separate financial plan.
- A finding of "operational independent and non-concurrence" is not required for each "phase" of the project that is covered in a single phased financial plan.

In other words, the financial plan guidance should ensure that a State DOT has the flexibility to prepare a phased financial plan for a large project, without needing to demonstrate that each phase is operationally independent and non-concurrent.

(c) Phased Plans for \$100 to 500 Million Projects

The provision that allows a phased financial plan to satisfy fiscal constraint requirements is included in 23 U.S.C. § 106(h), which defines the financial plan requirements for projects with an estimated cost of \$500 million or more. This provision is not repeated in 23 U.S.C. § 106(i), which requires financial plans to be prepared for projects with an estimated cost of \$100 million to \$500 million.

In the context of the statute, it is reasonable to infer that the definition of “financial plan” in 23 U.S.C. § 106(h) is also applicable to a “financial plan” prepared under 23 U.S.C. § 106(i). Therefore, we recommend that FHWA clarify that:

- A State DOT has the option of preparing a phased financial plan for a project with an estimated cost of \$100-500 million.
- If a phased financial plan is prepared for a project with an estimated cost of \$100-500 million, that plan will be deemed to satisfy fiscal constraint requirements for that project.

(d) Terminology - “Phase” vs. “Project”

In order to avoid confusion, the term “phase” should not be used to refer to a project stage that is determined to be “operationally independent and non-concurrent.” For example, page 3 of the draft guidance states that in some cases “it is reasonable to treat the phases as separate and independent projects”; page 4 refers to FHWA’s decision on “whether it will treat the phases of an overall project as operationally independent projects.”. The word “phase” should be used in the guidance only in the sense that it is used in the statute - that is, in the context of a “phased” financial plan.

2. Definition of “Operationally Independent and Non-Concurrent”

The draft guidance proposes to define “operationally independent and non-concurrent” to mean a project stage that meets three criteria. Two of the criteria relate to timing: (1) there must be at least five years between completion of one project stage and the start of the next; and (2) there must be at least 20 years between commencement of construction of the first project stage and commencement of construction of the last project stage.

These criteria are similar to those established in a 2009 guidance document for determining operational independence and non-concurrence (“2009 OINCC Guidance”).³ However, the 2009 OINCC Guidance was more flexible. It allowed periods of less than five years between stages, stating that “[t]ime periods of less than 5 years between projects will be approved by the FHWA on a case-by-case basis.” In addition, it did not specifically require a 20-year gap between the start of the first stage and the start of the last.

³ Memorandum from R. McElroy, FHWA, Office of Innovative Program Delivery, “Operational Independence and Non-Concurrent Construction Guidance” (Dec. 30, 2009).

The 2009 OINCC Guidance included hypothetical examples to illustrate scenarios that would and would not meet be considered operationally independent and non-concurrent. Those examples are not included in the draft guidance, which would supersede the 2009 guidance.

We encourage FHWA to ensure that the financial plan guidance includes a flexible, pragmatic approach for determining operational independence and non-concurrence; at a minimum, it should be no less flexible than the 2009 OINCC Guidance. Specifically, we request the following changes:

- The 20-year and five-year time periods are to be used as general guides, not rigid requirements. Operational independence and non-concurrence can be found even construction is not spaced that far apart.
- The new financial plan guidance should include examples to describe the types of projects that would (and would not) be considered operationally independent and non-concurrent.

3. Methodology for Cost Estimate Reviews

The draft guidance states that “Each major project submitting an Initial Financial Plan should have already received at least one FHWA Cost Estimate Review (CER), which will have evaluated the cost estimate range for each proposed phase identified in the plan.”

We agree with the need for a rigorous cost estimate review, but would like to ensure that the new financial plan guidance preserves States’ existing flexibility regarding the methodologies used in that review. Specifically, we urge FHWA to clarify the following points:

- The project sponsor can participate in the cost-estimate review. As described in FHWA’s 2007 Cost-Estimating Guidance, the review should be carried out by a “multi-agency, multi-functional team that may consist of Federal, State, and consultant personnel.”⁴
- The project sponsor, in consultation with FHWA, has discretion to determine the specific methodology used for the cost-estimate review. The new financial plan guidance should recognize that cost-estimate review methodologies already in use by State DOTs, such as the “CEVP” approach, are appropriate for use.
- The project sponsor, in consultation with FHWA, has discretion to determine the threshold used for determining whether the cost estimate in the financial plan is consistent with the results of the cost-estimate review. The new financial plan guidance should not mandate the use of the 70th percentile as the basis for determining consistency.

4. Level of Detail for \$100-500 Million Projects

The 2007 Financial Plan Guidance specifically recognized that financial plans for projects with a cost of \$100-500 million could be less detailed than financial plans for projects with a cost of

⁴ FHWA, “Major Project Program Cost Estimating Guidance” (Jan. 2007), p. 11.

more than \$500 million. Referring to projects with a cost of \$100-500 million, the 2007 Financial Plan Guidance stated that “[i]t is anticipated that the level of detail will be more straightforward for these plans. Also, optional reporting formats for these projects that present multiple projects within the Project Owners’ geographical area will be considered on a case-by-case basis.” The draft guidance does not include this language.⁵

We urge FHWA to clarify the following points in the financial guidance:

- Financial plans for projects with a cost of \$100-500 million can be less detailed than the financial plans for projects with a cost of \$500 million or more.
- For projects with a cost of \$100-500 million, States have the option of submitting a single financial plan that covers multiple projects in a single geographical area, as allowed under the 2007 Financial Plan Guidance.

5. Public Private Partnerships

The draft guidance implements a provision in MAP-21 that requires a financial plan to include consideration of whether to use a public-private partnership for the project. It states that the contents of the financial plan should include “a narrative describing the process used to assess the appropriateness of a public private partnership (P3) to deliver the project.”

We concur that the statutory requirement can be met by describing, in the past tense, the process used to determine the appropriateness of a PPP for delivering the project. We recommend clarifying the following points in the financial plan guidance:

- The decision on whether to use a PPP normally will have been made by the time the initial financial plan is submitted. In those cases, the discussion of a PPP is intended to document the reasons for using or not using a PPP.
- The consideration of a PPP can be brief if it is obvious that a PPP is not viable - e.g., if state law does not allow use of a PPP, and there is no reasonable basis for expecting that law to change.
- Annual updates to a financial plan are not required to revisit the appropriateness of a PPP. It is sufficient for the annual updates to summarize the assessment that was included in the initial financial plan.

6. Financing Costs

The draft guidance states that a financial plan should include financing costs - that is, interest payments or other costs of borrowing funds for the project. This new requirement is based on a recommendation in a report issued by the Government Accounting Office (GAO) in 2009.⁶ The statute itself does not require a financial plan to include financing costs.

⁵ FHWA. “Financial Plans Guidance” (Jan. 2007), p. 3.

⁶ Government Accounting Office, “FHWA Has Improved Its Risk Management Approach, but Needs to Improve Its Oversight of Project Costs” (July 2009).

There are several practical difficulties with requiring a financial plan to include the total financing costs for a project. In many cases, specific financing terms are not yet determined at the time the initial financial plan is adopted. In addition, the funds used for a particular project are not necessarily drawn from a single project-specific bond issuance; a State may use funds from one or more bond issuances that support multiple projects. Moreover, in cases where a PPP is used, there may not be a clear distinction between financing costs and construction costs - e.g., where a State agrees to make “availability payments” to a private partner.

In light of these concerns, we recommend that the financial plan guidance allow States discretion to determine the appropriate level of detail for discussing financing costs. Where a State is not proposing project-specific borrowing, it should not be required to quantify borrowing costs. Where a State is proposing to issue bonds specifically for the project, it should be sufficient for the financial plan to provide an estimate of annual payments and revenues that will be used to make those payments.

7. FHWA Approval

The draft guidance calls for FHWA “approval” of financial plans for projects with an estimated cost of \$500 million or more. While this requirement also appeared in the 2007 Financial Plan Guidance, it is not supported by the language of the statute. The statute requires only that the project sponsor “submit” the financial plan to the USDOT. *See* 23 U.S.C. § 106(h)(1).

We urge FHWA to modify the financial plan guidance so that it conforms to the language of the statute, by requiring only that States “submit” their financial plans to FHWA for projects with an estimated cost of \$500 million or more. The USDOT would, of course, still need to approve the financial plan as part of the loan application process for any project that is seeking a TIFIA loan.

9. Relationship to TIFIA Loan Requirements

The draft guidance notes that “[a]ll TIFIA loan agreements require the borrower ... to submit annual financial plans in accordance with this guidance” and that “[t]he TIFIA agreements further require the submission of Annual Updates throughout the life of the loan, which can extend up to 35 years after substantial completion of the project.”

The statutory requirement for a major project financial plan and the contractual requirement for a TIFIA financial plan are related, but distinct. In the guidance for major project financial plans, we recommend clarifying the following points:

- It is permissible, but not required, to submit a single document that serves as both the major project financial plan and the TIFIA financial plan.
- The entity submitting the major project financial plan may be different from the entity submitting the TIFIA financial plan. For example, in some cases where a PPP is used, the State DOT may be responsible for submitting the major project financial plan, while a private entity applies for the TIFIA loan and thus submits the TIFIA financial plan.
- The requirement to submit annual updates under a TIFIA loan agreement extends for the duration specified in that agreement. The requirement to submit annual updates under 23 U.S.C. 106 extends only through the completion of construction.

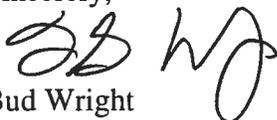
9. Other Issues

We also recommend that following changes or clarifications in the guidance:

- Add a statement at the beginning of this document clarifying that, because it is guidance, it does not impose any binding legal requirements.
- Clarify that, when there are multiple project sponsors, it is permissible for each project sponsor to submit a separate financial plan, covering the portion of the project for which it is responsible. *See* page 5 of the draft guidance.
- Clarify that the project description in the financial plan is not required to “outline” the entire environmental review process for the project; it should be sufficient simply to describe the components of the project as they are defined in the applicable NEPA document. *See* page 7 of the draft guidance.
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- Clarify that any requirements in this guidance (e.g., a deadline for submitting annual updates) can be superseded by provisions in TIFIA loan agreements or other project agreements with FHWA and/or USDOT.

We appreciate the opportunity to comment on this draft guidance. If you have any questions regarding these comments, please contact Matt Hardy, Program Director for Planning and Policy, at (202) 624-3625.

Sincerely,



Bud Wright
Executive Director