October 26, 2016

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

Re: Docket Number DOT-FHWA-2016-0018

Comments on Proposals for Legislation to Authorize Assumption of Federal Highway Administration Authorities by State Departments of Transportation

Dear Sir or Madam:

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to submit these comments to the Federal Highway Administration (FHWA) regarding recommendations on legislation to permit State Departments of Transportation (State DOTs) to assume additional authorities of FHWA in the Federal-aid highway program. AASHTO submits these comments in response to the notice issued by FHWA in the Federal Register on August 30, 2016 (81 FR 59715).

AASHTO is a nonprofit, nonpartisan association representing the State transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents the departments with respect to all five transportation modes: air, highways, public transportation, rail, and water. Its 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.

Since its inception, the Federal-aid highway program has been a federally assisted, State-administered program. Over time, the respective roles of FHWA and State DOTs have evolved, with FHWA’s role shifting from a “full oversight” model to a “risk-based” model. As part of this transition, State DOTs have assumed increased responsibility for project-level and program-level decisions with regard to the Federal-aid highway program. AASHTO strongly supports FHWA’s ongoing efforts to ensure that State DOTs may choose to assume FHWA responsibilities to the maximum extent permitted under Federal law.

Currently, under 23 USC 106(c), State DOTs may assume the responsibilities of FHWA for “design, plans, specifications, estimates, contract awards, and inspections” with respect to projects on the National Highway System (NHS), including the Interstate System, and States are required to assume those responsibilities for non-NHS projects. The specific responsibilities assumed by each State under 23 USC 106 must be documented in an agreement, commonly known as a Stewardship and Oversight Agreement.
Section 1316 of the FAST Act directed FHWA to use its existing authority under 23 USC 106 “to the maximum extent practicable” and also directed FHWA to submit recommendations for legislation to permit the assumption of additional authorities by States. In the Federal Register notice issued on August 30, 2016, FHWA has requested comments regarding proposal for legislation to allow assumption of additional authorities.

In anticipation of that directive, AASHTO surveyed its members in 2015 regarding authorities already assumed under existing Stewardship and Oversight Agreements, and regarding the additional authorities that State DOTs would like to assume if authorized under Federal law. We received responses from 35 States. The survey results confirmed that:

- States have extensively used the existing authority to assume FHWA responsibilities under 23 USC 106. A majority of the States reported that they had assumed (fully or with limitations) a majority of the activities that are currently eligible for assignment.

- There is broad support among State DOTs for allowing additional authorities to be assigned by FHWA, beyond those that already can be assigned under 23 USC 106. Again, the majority of States expressed an interest in assuming most or all of the additional authorities that currently cannot be assigned.

Based on the States’ responses to our survey, we support legislative authority to allow State DOTs to choose to assume the following additional authorities:

**Project-Level Air Quality Conformity for States with Full NEPA Assignment.** Under 23 USC 327, States may assume, by written agreement, the responsibilities of FHWA for full assignment of FHWA’s responsibilities under the National Environmental Policy Act (NEPA) and related federal laws. This statute excludes from assignment certain responsibilities, including FHWA’s authority to make air quality conformity determinations under the Clean Air Act. AASHTO has consistently supported amending this provision to allow, at a minimum, the assignment of project-level conformity determinations, which are made as part of the NEPA process. This change would require an amendment to 23 USC 327.

**Floodplains Determinations for States with Full NEPA Assignment.** FHWA has recently sought to exclude from full NEPA assignment certain determinations regarding floodplains protection, on the ground that these determinations involve engineering issues. AASHTO disagrees with this determination. Engineering considerations are an inherent part of any alternatives analysis, including the alternatives analyses conducted as part of compliance with NEPA and Section 4(f). AASHTO recommends clarifying that States can assume responsibility for any determinations normally made by FHWA as part of the NEPA process, even if those determinations involve consideration of engineering issues. This change would involve an amendment to 23 USC 327.

---

1 For example, Section 4(f) requires consideration of “feasible and prudent avoidance alternatives,” and the Section 4(f) regulations states that “[a]n alternative is not feasible if it cannot be built as a matter of sound engineering judgment.” 23 CFR 774.17.
**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 DOT 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. AASHTO believes that the intent of Section 111(e) was, in fact, to allow assignment of Interstate access point approvals to State DOTs. AASHTO recommends amending Section 111(e) to provide that, upon request of a State DOT, 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.

**Right-of-Way Acquisition.** Currently, there is no specific authorization in 23 USC 106 (or elsewhere in Title 23) for State DOTs 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.” AASHTO supports establishing new legislative authority 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 change would require an amendment to 23 USC 108, which currently requires FHWA authorization for early acquisitions.

**Project Agreements.** Currently, a State DOT 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. AASHTO supports establishing new legislative authority that would allow States to assume FHWA’s responsibilities for determining that all federal requirements have been met, without the need for an individual project-level authorization by FHWA prior to commencement of construction.

**Repayment of Preliminary Engineering Costs.** Currently, a State is required to repay all Federal-aid reimbursements for preliminary engineering (PE) 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. AASHTO supports amending this provision to allow States to approve a time...
extension, subject to criteria established in applicable Federal regulations or policies. This change would require an amendment of 23 USC 102(b).

**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.\(^7\) 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.\(^8\) AASHTO supports amending this provision 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(d) (discussed above).

**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). AASHTO supports broadening these provisions 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).

**Preventive 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. AASHTO supports amending this provision 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).

**Limitation in 23 USC 106 for Interstate Projects.** 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.” AASHTO recommends that FHWA collaborate with the State DOTs 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.

**Federal Funds Obligation Management.** Currently, a State DOT must obtain FHWA’s approval to obligate funds for a specific project. This step is completed in order to actually draw down specific federal funds so that the state can seek reimbursement from FHWA for actual

\(^7\) 23 CFR 630.112(c)(1).
\(^8\) The authority to approve an extension of the 20-year repayment deadline for right-of-way costs is listed under “Federal Approvals and Authorities that May Not be Assumed” in existing Stewardship and Oversight Agreements.
costs incurred. This approval is provided for a project only after FHWA determines that all applicable Federal requirements have been met. AASHTO supports establishing new legislative authority that would 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.

Other Responsibilities Listed in Attachment B. Attachment B to the standard Stewardship and Oversight Agreement requires FHWA approval for various policies and procedures, such as a State DOT’s standard specifications; pavement design policy; value engineering policy and procedures; liquidated damage rates; quality assurance program; and other matters. AASHTO recommends that States 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.

Thank you for the opportunity to submit comments. If you would like additional input, please contact Shannon Eggleston, Program Director for Environment at (202) 624-3649 or seggleston@aashto.org.

Sincerely,

Paul Trombino III, President  
Director, Iowa Department of Transportation