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November 10, 2014

VIA ELECTRONIC SUBMITTAL (www.regulations.gov)

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

Re: Comments on Notice of Proposed Rulemaking for Additional Authorities for Planning and Environmental Linkages (Docket No. FHWA–2014-0031)

To the Federal Highway Administration and Federal Transit Administration:

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to submit these comments on the notice of proposed rulemaking on Additional Authorities for Planning and Environmental Linkages, issued by the Federal Highway Administration and the Federal Transit Administration on September 10, 2014.

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.

The proposed rule would implement statutory authority under new 23 USC 168, which was created by section 1310 of the Moving Ahead for Progress in the 21st Century Act (MAP-21). The new provision would provide additional authority for transportation agencies to use decisions or analyses from transportation planning to inform the environmental review process for Federal Highway Administration and Federal Transit Administration projects. Current transportation planning regulations, adopted prior to MAP-21, authorize planning and environmental linkages (PEL). See 23 CFR 450, including 450.212, 450.318, and 450 Appendix A. The existing regulations allow a wide range of decisions and analyses to be adopted in the National Environmental Policy Act (NEPA) process.

AASHTO has consistently supported efforts to broaden the use of planning and environmental linkages. States can achieve many benefits, including expediting project delivery, by addressing

environmental and community issues and concerns in transportation planning and carrying these planning products into the NEPA process. In that spirit, AASHTO appreciates FHWA and FTA's efforts to maximize flexibility for carrying out planning and environmental linkages within the restrictive statutory language included in MAP-21. We also appreciate FHWA and FTA preserving pre-MAP-21 authorities for planning and NEPA linkage.

We do, however, have significant concerns with the PEL process established in MAP-21, which is far more restrictive than the process that existed prior to MAP-21 and that remains in effect. It is critically important to preserve the flexibility that exists under the pre-MAP-21 process for PEL. The complexities of the proposed MAP-21 process will deter states from undertaking PEL under the statutory process. As described below, we are recommending that Congress amend 23 USC 168 as part of the surface transportation reauthorization bill to provide the same level of flexibility that exists under the pre-MAP-21 process. Consistent with that recommendation, we ask that FHWA and FTA suspend this rulemaking until the legislative reauthorization process is complete. If this rulemaking does go forward, we recommend that the final rule include additional language to emphasize, even more strongly, that States can continue to use the pre-MAP-21 process for PEL and are not required to follow the new process established in 23 USC 168.

I. Recommended Statutory Changes

Current transportation planning regulations, adopted prior to MAP-21, allow a wide range of decisions and analyses to be adopted in the NEPA process. See 23 CFR 450.212 and 450.318, and 23 CFR Part 450, Appendix A. Under these existing procedures, the authority for deciding whether to adopt planning products for use in the NEPA process rests with the NEPA lead agencies, which include the federal lead agency (FHWA or FTA) as well as joint lead agencies, such as the State Department of Transportation.

In Section 1310 of MAP-21, Congress created new statutory authority for PEL, while also preserving the existing authority established in the planning regulations prior to MAP-21. Unfortunately, the new process created in MAP-21 is much more restrictive than the pre-MAP-21 process: it would require the Federal lead agency to obtain "concurrence" from all "participating agencies with relevant expertise" in a series of ten findings prior to adoption of the planning product. See 23 USC 168(d). This type of role is inconsistent with the consultative role generally played by participating agencies in other aspects of the NEPA process. It also is inconsistent with pre-MAP-21 PEL procedures.

Because of these concerns, AASHTO adopted a reauthorization policy recommending that the statutory process in 23 USC 168 be amended to ensure that that the authority provided in MAP-21 to adopt planning decisions in the NEPA process includes all of the flexibility previously provided in the planning regulations (23 CFR 450 Appendix A). We will continue to seek legislative changes to 23 USC 168, consistent with that policy.

Consistent with our legislative recommendation, we urge FHWA to suspend this rulemaking until such time as Congress acts on reauthorization. We make this request for two reasons:

- First, while we support rapid implementation of MAP-21 project delivery authorities, the implementation of 23 USC 168 simply is not needed. Sufficient authority already exists under the pre-MAP-21 process in the planning regulations, and that process actually provides greater flexibility than the MAP-21 process. Moreover, the pre-MAP-21 process is well-understood and is working in practice. The goal of advancing PEL can be achieved by continuing to use this well-established, existing process.

- Second, we are concerned that implementing two separate PEL processes – the pre-MAP-21 process and the 23 USC 168 process – will create needless confusion, which may inhibit States' ability to continue using the pre-MAP-21 process.

In short, we believe that FHWA and FTA should continue to embrace the pre-MAP-21 process as the primary means for carrying out PEL, while deferring action on this rulemaking until after the surface transportation reauthorization process has been completed. Nonetheless, we recognize that FHWA and FTA may proceed with this rulemaking; therefore, the remainder of this letter provides our comments for consideration in developing a final rule.

II. Areas of Agreement with the Notice of Proposed Rulemaking

If the rule is finalized, we urge FHWA and FTA to retain the following specific provisions in the preamble and text of the proposed rule because they provide important flexibility and clarification within the constraints of the statutory language in 23 USC 168.

1. Flexibility in Adopting Planning Products

- The preamble to the proposed rule recognizes that a planning product can be adopted in whole or in part. For example: "The introduction also emphasizes that the Agencies may adopt a planning product in its entirety or may choose to only adopt and use portions of these planning products. See 23 USC 168(b)(3)." 79 Fed. Reg. 53676. We agree with this language and ask that it be included in the preamble to the final rule.

2. Flexibility in the Timing of Adopting Planning Products

- The preamble allows planning products to be adopted early in the NEPA process or at a later stage. For example: "The introduction establishes that the timing of adoption could be at the time the Agencies and other joint lead agencies (like non-Federal lead agencies) are deciding the appropriate NEPA class of action or later when the Agencies are developing the NEPA documents. See 23 USC 168(b)(4)." 79 Fed. Reg. 53676. We agree with this language and ask that it be included in the preamble to the final rule.

3. Explicit or Implicit Approvals and Concurrences

- The proposed rule confirms that approvals (by State, local and tribal governments) and concurrences (by participating agencies) can be explicit or implicit:

- With regard to State, local, and tribal approvals of planning products, the proposed rule states that these entities "Implicitly approved the planning product by remaining silent, failing to object, or failing to explicitly disapprove the planning product within the specified time." Proposed 23 CFR 450.212(d)(1)(iii)(B) and 23 CFR 450.318(f).

- With regard to participating agencies' concurrence that conditions for use of a planning product have been met, the proposed rule states that agencies "Implicitly concurred with the determination by remaining silent, failing to object, or failing to explicitly nonconcur with the determination within the specified time." Proposed 23 CFR 450.212(d)(4)(ii)(B) and 23 CFR 450.318(f).

We agree that the rule should allow for approvals and concurrences to be granted explicitly or implicitly, and request that this language be retained in the final rule.

4. Length of Review Period

- The proposed rule allows a 60-day review period for documents that are submitted for approval or concurrence. We would support changing the review period to 45 days, which would be more consistent with the goal of expediting project delivery, and also would be consistent with the 45-day review period normally provided for a draft environmental impact statement under 23 USC 139. In any event, the review period should not be longer than 60 days.

5. Flexibility in the Planning Decisions Carried Forward

- The proposed rule interprets 23 USC 168 to allow for the adoption of planning decisions and analyses that are not specifically listed in the statute. For example, the preamble to the proposed rule states that:

> "Planning decisions and planning analyses are described through the **list of illustrative examples** in section 23 USC 168(c)(1)-(2). The Agencies note that **this is not an exhaustive list** of what could be considered a planning decision or planning analysis, but provides an illustration of the types of decisions or analyses that may be considered under this authority." Proposed 23 CFR 450.212(d)(1)(iii)(B) and 23 CFR 450.318(f).

We support this interpretation of 23 USC 168 and request that it be retained in the final rule. It is important to ensure that the full range of transportation planning studies and analyses can be adopted for use in the NEPA process.

III. Comments on the Proposed Rule

If the proposed rule is finalized, we recommend that the final rule include a strong, unequivocal statement that States have the ability to continue using the pre-MAP-21 process for PEL. We also recommend several other clarifications to the proposed rule.

1. Avoiding Confusion Between Existing and New PEL Authorities

The proposed rule would implement the new MAP-21 authority for PEL by adding paragraphs (d) through (f) to Section 450.212 and by adding paragraphs (f) through (g) to Section 450.318. The proposed rule would leave Appendix A unchanged. We are concerned that these revisions to the planning regulations will create confusion about the distinction between the two methods for carrying out PEL.

The potential for confusion arises because the proposed rule includes the "old" and "new" versions of PEL authority in the same sections (450.212 and 450.318), without clearly distinguishing between them. For example, in Section 450.212, the proposed rule would add new paragraphs – (d), (e) and (f) – to implement the new authority, but it is not clear from the text of the proposed rule whether (e) and (f) apply generally, or just apply to PEL authority exercised under 23 USC 168. The same approach is used in Section 450.318. Moreover, the rule would retain Appendix A, which refers in general terms to linking the transportation planning and NEPA processes; it is unclear whether, and to what extent, Appendix A applies to PEL conducted under 23 USC 168.

If this rule is finalized, we strongly recommend making the following changes to avoid confusion. First, the "old" and "new" sources of PEL authority should be presented in **separate sections** of the final rule. Assuming that the rule maintains separate sections for statewide and metropolitan planning, this would mean four sections, an old and a new for each. Second, Appendix A should be retained without change, but the rule should explicitly state that **Appendix A applies only to the pre-MAP-21 PEL authority** as established in existing Section 450.212 and Section 450.318.

2. Preserving Existing Planning and Environmental Linkage Authorities

The first sentence of both proposed new 450.212(d) and 450.318(f) begin with an affirmation of the continued ability of States to utilize the current PEL processes: "In addition to the process for incorporation directly or by reference outlined in paragraph (b) of this section, a Federal lead agency may follow the process in this paragraph to adopt and use planning products in support of a determination that a project qualifies for a categorical exclusion, in the preparation of an environmental assessment or environmental impact statement, or in the development of other documents prepared under NEPA." In addition, the preamble to the proposed rule confirms the continued ability of States to utilize current PEL processes, stating that "the introduction and the text of the proposed rule would make it clear that the authority granted in section 168 is a PEL authority 'in addition' to other existing authorities for PEL such as 23 CFR sections 450.212(b) and 450.318(b) ...." 79 Fed. Reg. 53676. This language is consistent with the intent of Congress as expressed in 23 USC 168, which provides that this new authority for PEL "shall not be

construed to affect the use of planning products in the environmental review process pursuant to other authorities under any other provision of law … .” 23 USC 168(f)(3). If the rule is finalized, we strongly support retaining the language that expressly preserves States’ ability to continue using the pre-MAP-21 process.

Nonetheless, we are concerned that the process enacted in MAP-21 could be viewed in practice as the preferred approach and that, over time, the ability to continue relying on the pre-MAP-21 procedures could be undermined. States need assurance that if a consultation, coordination or other step in the pre-MAP-21 process differs in some respect from the processes and particulars of 23 USC 168 and new regulatory provisions implementing it, that their ability to use a planning product in the NEPA process would not be invalidated. FHWA and FTA have correctly noted in the proposed rule that courts have upheld pre-MAP-21 PEL processes. 79 Federal Register at 53676. Therefore, we recommend modifying the final rule to state, even more clearly, that the pre-MAP-21 process is an equally acceptable option for PEL, and can be used at the discretion of States and MPOs.

As such, we suggest including the following paragraph at the end of the new sections (one for statewide planning and one for metropolitan planning) that implement 23 USC 168:

> **(xx) Nothing in this section [implementing 23 USC 168] shall be construed to limit in any way the continued use of the process established in Section 450.212 [or 450.318] of this rule. Either process may be used, at the request of the project sponsor, provided that all applicable requirements are met.**

If the PEL language is retained as one section, we suggest adding the following sentences to both proposed new 450.212(d) and 450.318(f), immediately after the first sentence of those new subsections:

> **Nothing in this subsection shall be construed to limit in any way the continued use of the process established in this section but not in this subsection. Either process may be used, at the request of the project sponsor.**

In addition, we recommend adding language to the preamble to affirm that FHWA and FTA recognize the continued validity of the pre-MAP-21 process and do not intend to require any changes in that pre-existing process. These clarifications are essential to ensure that the availability of the new process does not undermine the continued availability of the much more flexible pre-MAP-21 process.

3. Role of the Federal Lead Agency

The preamble states that “Section 168 makes clear that the Federal agency leading the NEPA review process **bears the responsibility for taking some of the steps in the PEL adoption process** pursuant to this authority.” 79 Fed. Reg. 53676. The phrase “taking some of the steps” is unnecessarily vague and could imply a broader role for the Federal lead agency than defined in the statute. We recommend using language that more closely follows the statutory text, such as

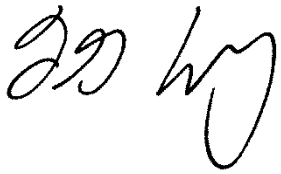
the following: "... the Federal agency leading the NEPA review process **bears the responsibility for determining whether to adopt and use a planning product** ...."

4. Concurrence vs. Approval

The preamble states that "If one or more participating agencies do not concur, the statutory prerequisites for the use and adoption of the planning product through section 168 would not be met and the planning product cannot be used and adopted pursuant to the section 168 authority." 79 Fed. Reg. 53678. We believe it is important to make clear that the participating agencies' are being asked to concur that specific conditions have been met. Therefore, we recommend changing this language as follows: "If one or more participating agencies do not concur **that the conditions specified in 23 USC 168(d) have been satisfied**, the statutory prerequisites for the use and adoption of the planning product through section 168 would not be met ...."

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,



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