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METROPOLITAN
PLANNING
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Administrator James Ray
Federal Highway Administration
Room E87-314
1200 New Jersey Ave. S.E.
Washington, DC 20590-9898

Dear Administrator Ray:

I am writing on behalf of the member metropolitan planning organizations (“MPOs”) of the Association of Metropolitan Planning Organizations (“AMPO”) with regard to serious concerns about proposed rescissions of federal funds previously committed to metropolitan transportation planning. AMPO represents metropolitan planning organizations across the United States, of which there are 385 ranging in designated population size of 50,000 persons to several million.

Background

As you are aware, the Energy Independence and Security Act of 2007 (“EISA”), Pub. L. 110-140, established new rules for federal highway funding rescissions in federal fiscal years (FFY) 2008 and 2009. Section 1132(a) of EISA provides in pertinent part that:

Any unobligated balances of amounts that are appropriated from the Highway Trust Fund for a fiscal year, and apportioned under chapter 1 of title 23, United States Code [23 U.S.C. ch. 1] . . . and that are rescinded in fiscal year 2008 or fiscal year 2009 shall be distributed by the Secretary of Transportation within each State . . . *among all programs for which funds are apportioned* under [23 U.S.C. ch. 1] for such fiscal year, to the extent sufficient funds remain available for obligation, in the ratio that the amount of funds apportioned for each program under such chapter for such fiscal year, [sic] bears to the amount of funds apportioned for all such programs under such chapter for such fiscal year (emphasis added).

A companion provision in Section 1132(b) of EISA allows States to “make adjustments” to the distribution of rescissions by “transferring the amounts to be rescinded *among the programs* for which funds are apportioned under [23 U.S.C. ch. 1]” (emphasis added), as long as the adjusted amount does not exceed 110% of the funds to be rescinded from each program.

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...the transportation advocate for metropolitan regions...
committed to enhancing MPOs' abilities to improve metropolitan transportation systems...

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Some States have interpreted EISA to allow funds set aside for metropolitan planning (“PL” funds) under Title 23 to be proportionately rescinded on the same basis as funds for highway programs. Further, some States have proposed to upwardly adjust the rescission of PL funds to the maximum 110% of a proportionate share. It is our view that neither action by States would be legal under current federal highway law.

Metropolitan Planning Funds Are Not “Program” Funds Subject to Rescission

Chapter 1 of title 23 of the United States Code, 23 U.S.C. §§ 101-164, as amended by the 2005 SAFETEA-LU transportation law, consists of numerous sections controlling the use and distribution of federal highway funds. As mandated by Section 104(b), under the heading “Apportionments,” highway funds are allocated to states through five discrete funding programs, which are the “programs” referenced in the 2007 EISA energy bill: (1) the National Highway System (NHS) program; (2) the congestion mitigation and air quality (CMAQ) program; (3) the surface transportation (STP) program; (4) the interstate maintenance (IM) program; and (5) the highway safety improvement program.

In contrast, planning funds are not apportioned in the manner of highway “programs,” but rather are taken off the top of the overall Congressional appropriations pursuant to 23 U.S.C. § 104(f), which provides under the heading “Metropolitan planning” that: “the Secretary shall set aside 1.25 percent of the funds authorized to be appropriated for the interstate maintenance, national highway system, surface transportation, congestion mitigation and air quality improvement, and highway bridge replacement and rehabilitation *programs* authorized under this title to carry out the requirements of section 134 [relating to metropolitan planning]” (emphasis added).¹ Although the overall set-aside pool created by Section 104(f) is then sub-allocated to states, there is no indication in Section 104 that the PL set-aside is considered a “program” subject to rescission as that term is used in EISA.

Indeed, Section 104(b) itself recognizes that the planning set-aside is separate from the highway program allocation by requiring that the Secretary of Transportation “after making the set-asides authorized by subsections (d) and (f) [the set aside for planning] and section 130(e), shall apportion the remainder of the sums authorized to be appropriated for expenditure on the Interstate and National Highway System program, the Congestion Mitigation and Air Quality Improvement program, the highway safety improvement program, and the Surface Transportation program,” in other words, to the programs other than PL that are subject to rescission. We note that FHWA has determined that State Planning and Research funds (SPR) are not subject to rescission, and PL funds are by law on similar footing.

The consequences of improper rescission of PL funds could be dire. Among other repercussions, rescission of PL funds would result in unfunded federal and state mandates related to air quality, congestion management, transit planning, long range transportation planning, public involvement and other processes required to be undertaken prior to initiation and throughout the project development cycle. Similarly, completion of planning requirements is regularly mapped in the Unified Planning Work Programs adopted annually (or bi-annually) by local entities through local processes. The level of effort required to comply with the planning requirements is substantial and does not diminish whether the jurisdiction has 10 or 110 capital projects to be funded. Planning is done far in advance of actual construction and often planning dollars are already spent or committed for planning resources such as MPO staff and modeling. PL dollars are very limited under current funding. Funding for PL has increased a mere 0.25% over the past 3 years, and costs routinely exceed available funding. Rescission of PL funds will likely necessitate layoffs and inability to continue critical planning tasks.

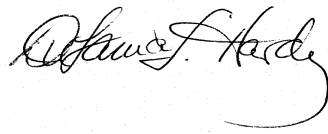
¹ This set aside for metropolitan planning is similar to the funding earmarked for USDOT administrative expenditures under 23 U.S.C. § 104(a). Prior to the 2005 SAFETEA amendments, funding for federal expenditures was accomplished through a similar off-the-top percentage set aside from various program funds; however, with the passage of SAFETEA, Pub. L. 109-59, Congress specified fixed dollar amounts as authorizations for federal administrative expenditures.

Conclusion

Based on federal law, planning funds set aside under 23 U.S.C. § 104(f) are not subject to EISA's provisions relating to rescissions or the allowed 10% adjustment of rescissions between the various highway programs. As a result, States may not distribute rescissions by reducing funding already committed for metropolitan planning purposes. Nor may States adjust rescissions directed at various highway programs by altering the level of funding for PL funds in any discretionary adjustment of rescissions among highway programs.

Because rescission of PL funds would be contrary to Congressional intent and would undermine the transportation planning process, we respectfully request that FHWA issue guidance to division offices and States clarifying the rescission mechanism and directing that PL funds shall not be reduced pursuant to the statutory mandate of EISA.

Sincerely,

A handwritten signature in black ink, appearing to read "DeLania Hardy". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

DeLania Hardy
Executive Director