

## **Repayment of Preliminary Engineering Costs Questions and Answers**

**Background:** Federal-aid reimbursements for authorized preliminary engineering (PE) work that does not advance to right-of-way (ROW) acquisition or on-site construction by the end of the 10<sup>th</sup> fiscal year following the fiscal year that the PE funding was authorized must be repaid in accordance with 23 United States Code (U.S.C.) 102(b), 23 Code of Federal Regulations (CFR) §630.112 and Federal Highway Administration (FHWA) Order 5020.1A, Repayment of Preliminary Engineering Costs (Order). The recipient must identify and repay such PE costs, and the project must be withdrawn. These Questions and Answers refer to the requirements collectively as “PE repayment.”

### **Q1: Is a PE repayment evaluation to verify 23 U.S.C. 102(b) compliance required on every Federal-aid project authorization for PE?**

Yes. There must be an evaluation for every Federal-aid PE project that is the basis for FHWA’s determination whether the PE repayment requirement has been satisfied. The FHWA will determine whether:

- (1) the PE repayment requirement has been satisfied and identify how it was satisfied, including projects that are advanced to ROW or construction within the 10- year period or within the extension timeframe;
- (2) the PE repayment requirement has not been satisfied and repayment is required; or
- (3) the PE repayment requirement has not been satisfied and a reasonable time extension is justified and approved.

The recipient of Federal-aid funds is responsible for having adequate internal controls to provide reasonable assurance of compliance with Federal laws and regulations (2 CFR 200.303).

### **Q2: How and where should a PE repayment evaluation be documented?**

All PE repayment compliance should be documented in the Fiscal Management Information System 5.0 (FMIS) project authorization by use of the Related Projects and Remarks fields as described below. The documentation can also reside at the Federal-aid division office or at the State Department of Transportation (DOT), but should be readily available to the division office.

Document the PE repayment analysis in FMIS in one of the ways described below. If the PE project has been closed, it will be necessary to reopen the project to provide the documentation.

- 1) The PE project advanced to ROW acquisition or on-site construction under the same project number and within the time limit. No further action is required, and PE repayment is satisfied.

- 2) The PE project advanced to ROW acquisition or on-site construction under another Federal-aid project number. Verify that the related project has, in fact, advanced to ROW acquisition or on-site construction within the time limit. Add the new Federal-aid project number in the FMIS Related Projects field of the PE project authorization. The PE repayment is satisfied.
- 3) The PE project advanced to ROW acquisition or on-site construction with State or local funds within the time limit. Add a note in the State Remarks field that the project has advanced and provide the State or local project number. The PE repayment is satisfied.
- 4) The FHWA approved a time extension for the PE project. Add a note to the State Remarks field that a time extension was approved and provide the time extension expiration date, the date of the determination, and the time extension file location. The division office should reevaluate the project well in advance of the time extension expiration date.
- 5) The PE repayment is satisfied by other means described in section 6.c. of the Order. Add a note to the State Remarks field that PE repayment has been satisfied and briefly describe how the requirement was satisfied.
- 6) The PE project authorization was used to generate multiple construction projects. The manner of tracking these projects is necessarily specific to the recipient's procedures. Document resolution in the FMIS Remarks field. See Order section 8 for additional information on these types of projects.
- 7) The PE repayment requirement does not apply as described in section 6.g. (General Fund congressional earmarks) and 8.d. (bundled bridge projects) of the Order. Add a note to the State Remarks field that 23 U.S.C 102(b) does not apply and briefly describe why it does not apply.
- 8) If project data is no longer readily available for PE projects authorized prior to 2001 (i.e. ten years prior to Order 5020.1), then those pre-2001 PE project authorizations do not require documentation in FMIS. Compliance on these older projects may be documented in a separate file and outside of FMIS.

### **Q3: What documentation is required for a time extension?**

A State DOT request for a time extension should include a definite schedule to advance the project to ROW acquisition or on-site construction, a commitment by the State DOT to follow the schedule, and documentation of steps that the State DOT will take to advance the project. The division office must document its approval based on the division's evaluation of the State DOT's justification and a division determination that the length of the extension (the recipient's schedule) is reasonable and attainable. The division office will retain documentation of the time extension justification and approval. Examples of factors for the division office to consider for granting time extensions include: litigation resulting in delays to project development; complex project consultations involving Federal, State, local agencies, sovereign nations, or multistate project coordination; and situations where the public involvement process has altered the State DOT's plan for satisfying the project's purpose and need.

**Q4: What are valid reasons for a determination that the PE repayment requirement has been satisfied?**

The PE repayment is satisfied if the PE project advances to ROW acquisition or on-site construction by the close of the 10<sup>th</sup> fiscal year following the fiscal year when the PE project funding was authorized. The PE repayment is also satisfied when project termination is directly related to compliance with another Federal law. For instance, repayment of reimbursed PE costs would not be required if FHWA and a State DOT determine that a project should not be advanced as a result of findings during the National Environmental Policy Act (NEPA) process. To do otherwise could skew the NEPA process by causing a State DOT to favor a "build" alternative to avoid repaying PE costs incurred during the NEPA review.

**Q5: Is repayment required if the “no build” alternative is selected during the NEPA process?**

No. If the “no build” alternative is selected in the NEPA Record of Decision (ROD) or Finding of No Significant Impact (FONSI), then repayment is not required. If the “no build” alternative is selected as the NEPA decision, this NEPA documentation may be used in the PE repayment determination, but it does not serve as the PE repayment determination. Document the determination in the project file and state in the FMIS Remarks field that PE repayment is satisfied by selection of the “no build” alternative as the NEPA decision.

**Q6: Is repayment required when a PE project does not complete the NEPA process?**

Repayment is generally required if the PE project does not complete the NEPA process. However, if the project is re-scoped as a result of substantial controversy, public opposition, and/or extraordinary impacts to the natural and/or human environment caused by the proposed action, etc., then a time extension may be justified. Re-scoping of a PE project due to the above reasons to otherwise address project Purpose and Need, or public or agency comments, may provide an acceptable justification for a time extension. Add a note to the Remarks field that a time extension was approved and provide the time extension expiration date. The division office should reevaluate the project well in advance of the time extension expiration date. In cases where the re-scoped project is pursued under a different project number, the extended time period for the original project applies to the rescope project. Document the time extension in FMIS for the original PE project and note the related project in the FMIS Related Projects field. Both the original project, and the new rescope project, will need to be tracked for compliance with the PE repayment requirement. Should the re-scoped project not meet PE repayment time requirements, repayment of both the original PE project and re-scoped PE project will be required unless project termination is directly related to compliance with another Federal law (see Q4).

**Q7: What are examples of when PE must be repaid?**

Repayment is required if the State DOT decides to discontinue a project without proper justification, as provided in the Order and discussed above. For example, repayment is required if the State DOT abandons a project for the following reasons: shifting priorities, leadership changes, insufficient transportation budgets, and staffing issues.

**Q8: Is a related construction project authorization sufficient to meet PE repayment?**

The authorization of a construction project in FMIS without award of a contract and commencement of on-site construction will not satisfy the PE repayment requirements. The preliminary engineering repayment evaluation, discussed in Q1, should be done far enough in advance of the 10-year limit to account for the normal time period between project authorization and commencement of on-site construction. Should on-site construction not begin within this 10-year period, the State must request a time extension.

**Q9: Is a related ROW project authorization sufficient to meet PE repayment?**

The authorization of a ROW project in FMIS without award of a contract and commencement of ROW acquisition will not satisfy the PE repayment requirements. The preliminary engineering repayment evaluation, discussed in Q1, should be done far enough in advance of the 10-year limit to account for the normal time period between project authorization and commencement of ROW acquisition. Should ROW acquisition not begin within this 10-year period, the State must request a time extension.

**Q10: Can ROW acquisition or on-site construction be completed with either State or local funds?**

Yes. Under 23 U.S.C.145, States decide which projects are federally-financed and manage Federal-aid obligations within the State DOT's allotted obligation limitation. For PE repayment purposes, the source of funding for ROW acquisition or on-site construction is not relevant. Document the use of non-Federal funds for these purposes in the PE project file and the FMIS PE project Remarks field. See Q2 above.

State DOT project record retention policies may not provide for a 10-year record retention period. Therefore, the division office should work with the State DOT to identify and document these projects for PE repayment purposes and ensure that State DOT records are retained for an adequate period to document PE repayment requirements.

**Q11: What are the coding parameters for PE projects in FMIS?**

Guidance on PE coding in FMIS is contained in a March 11, 2015, memorandum, *Guidance on Preliminary Engineering Authorizations in FMIS* (<http://www.fhwa.dot.gov/federalaid/150311.cfm>). As discussed in the memo, only

projects and activities that directly prepare a project to advance to physical construction should be coded as PE in FMIS. Examples of projects and activities that have sometimes been *incorrectly* coded as PE include: NBI bridge inspections; workforce development; safety education programs; inventory and condition studies; feasibility studies conducted prior to NEPA to determine if and when a project should begin project development; and other planning activities.

**Q12: How does FHWA track the 10-year limit for PE projects?**

To assist the division offices in actively monitoring PE authorizations as projects approach the 10-year limit, a standard Business Objects (BO) report has been developed and is accessible from FMIS. Divisions should run the BO report, or otherwise obtain a list of PE project authorizations nearing the 10-year limit, and document a PE repayment analysis for each PE project authorization. If the division relies on the State DOT to provide that list of PE project authorizations nearing the 10-year limit, the division must have adequate controls in place to provide reasonable assurance that the information provided by the State DOT is accurate and complete. This reasonable assurance may be accomplished by verification of the State DOT-provided list against the BO report.

If a State DOT combines multiple project locations under a single PE authorization as a single scope of work, PE project charges must be segregated and tracked by project location in a manner that identifies each project location's PE costs. The PE projects must be tracked and evaluated as they approach the 10-year limit. Order section 8 provides additional information on different scopes of PE projects. The division should work with its State DOT to develop a procedure and controls to verify all construction project locations funded by the multi-project PE authorization satisfy the PE repayment requirement.

**Q13: What is the Federal-aid division office role and responsibility for consistent oversight and enforcement of PE requirements before and after the 10-year limit?**

The division role is to establish a process with its State DOT, whereby the State DOT or division documents how the PE repayment requirement is satisfied on every PE project authorization. This process should include tracking those projects that are nearing the 10-year limit and ensuring that repayment is made when required. The division should have an assurance and verification process in place, with frequency determined by risk analysis. Divisions should ensure that their State DOTs have adequate controls to assure compliance with PE repayment.

As discussed in the Order, divisions will:

- 1) work with the State DOT to implement effective procedures that regularly, and at a minimum annually, identify those PE projects that are nearing or are beyond the 10-year limit;
- 2) work with the State DOT to develop adequate controls to assure compliance with PE repayment, including repayment when required;

- 3) annually assess the State DOT's compliance with the overall objective of the Order through the division's Risk Assessment Process;
- 4) document the PE repayment determination on every PE project; and
- 5) report PE statistics to the Office of Infrastructure, Office of Stewardship, Oversight and Management (HISM) as requested.

**Q14: What is the FHWA Federal-aid headquarters role and responsibility for consistent oversight and enforcement of PE requirements before and after the 10-year limit?**

HISM, in coordination with the Office of the Chief Financial Officer (HCF), will:

- 1) develop and maintain implementation guidance on PE payback, and respond to questions concerning the implementation;
- 2) request PE repayment monitoring statistics (as described in Q13) from divisions; and
- 3) develop tools for divisions/State DOTs to monitor PE obligations and compliance.

**Q15: What is FHWA's policy on repayment and resolving differences arising between division offices and State DOTs regarding required PE repayment actions?**

The State DOT must reimburse PE costs for the project within 90 days after a final determination is made by FHWA that repayment is required. As a result of repayment, the Federal-aid funding category from which the PE funds originated should be credited and the project should be withdrawn. The funds and obligation authority that are withdrawn are typically available to the State DOT for use on other Federal-aid projects that meet the eligibility requirements of the original Federal-aid category, provided that the funds and accompanying obligation authority are re-obligated within the fiscal year of recovery. In cases where the funding category no longer exists (e.g., cancelled), the division office should contact HCF for guidance.

Under 23 CFR 1.36, if FHWA determines that a State DOT has violated or failed to comply with Federal laws or regulations with respect to a project, FHWA may withhold payment to the State DOT of Federal funds on account of such project, withhold approval of further projects in the State, and take such other action that FHWA deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State DOT to the satisfaction of FHWA.

If the State DOT does not have the funds to immediately repay reimbursed PE funds and a funding hardship exists, the division may approve a repayment schedule that it determines is reasonable, but not to exceed 2 years. A funding hardship must be evidenced by the potential substantial delay of Federal-aid projects if the repayment was made immediately. If timely repayment would result in the delay of the scheduled letting of projects and require those projects to be let in a subsequent fiscal year, then this may be considered a substantial delay warranting consideration of a repayment schedule.

**Q16: A State receives Federal-aid reimbursement for PE for a noise wall project. The NEPA noise analysis determines that the cost of the construction project exceeds the allowable dollar threshold and the noise walls are not constructed. Is repayment of the PE required?**

No. Repayment is not required because the noise analysis followed procedures and reached a documented NEPA decision not to advance the project to construction. Satisfaction of PE repayment requirements should be documented in the PE project files and in FMIS Remarks field of the PE project.

**Q17: A PE project advances to ROW and purchase of required ROW within the 10-year required timeframe, but never moves to the construction phase. Is repayment of the PE required?**

No. PE repayment is satisfied by the project advancing to ROW acquisition. Satisfaction of the PE repayment requirement should be documented in the PE project files and in the FMIS Remarks field of the PE project. However, Federal funds reimbursed for ROW acquisition also are subject to the ROW 20-year rule (23 U.S.C. 108), and repayment of the right-of-way costs reimbursement may be required.

**Q18: Federal-aid funds were expended on a PE project for construction of a drainage structure, but an emergency event required the State to make an emergency replacement of the drainage structure by State force account. Construction of the drainage structure occurred within 10 years of the PE funds being made available. Is repayment of the PE required?**

No. The State DOT constructed a replacement drainage structure and the project purpose and need were satisfied, though not exactly as originally envisioned by the PE project authorization. Satisfaction of PE repayment by the construction project should be documented in the PE project files and in FMIS Remarks field of the PE project.