U.S. DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Order

Subject:

Repayment of Preliminary Engineering Costs

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1. **What is the purpose of this directive?** This directive provides policy and procedures concerning the repayment of Federal-aid funds expended on preliminary engineering (PE) projects when on-site construction or right-of-way (ROW) acquisition does not commence within 10 years of the date on which Federal funds were first made available.

2. **Is this a new directive?** No. This directive cancels and replaces Federal Highway Administration (FHWA) Order 5020.1, Repayment of Preliminary Engineering Costs, dated April 26, 2011.

3. **What is the background of this directive?** Repayment of PE costs for projects that do not proceed to construction or acquisition of ROW has been a requirement since the early 1960's. Prior to the Intermodal Surface Transportation Efficiency Act (ISTEA) (P.L. 102-240), repayment of PE costs if the project had not advanced to ROW acquisition or construction after 5 years was a condition on the PR-2 Project Agreement form. ISTEA

codified the provision in Title 23, but established a 10-year period to advance a project to ROW acquisition or construction. In 1997, FHWA revised Part 630 of Title 23, Code of Federal Regulations (CFR) to mirror the statutory requirement that ROW acquisition or construction begin by the end of the 10th fiscal year following PE project authorization, unless extended by FHWA.

4. **What is the scope of this directive?** The provisions of this directive are only applicable to PE projects funded from the Highway Trust Fund under Chapter 1 of Title 23.

5. **What authorities govern this directive?**

   a. Title 23 United States Code (U.S.C.) 102(b), Engineering Cost Reimbursement;

   b. Title 23 CFR 630.112(c)(2), Agreement Provisions; and

   c. Title 2 CFR Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

6. **What is FHWA's policy on repayment of PE costs?**

   a. The law requires repayment of Federal-aid reimbursements for PE projects, including those authorized under the Advance Construction provision, when ROW acquisition or on-site construction has not started by the end of the 10th fiscal year following the fiscal year when the Federal-aid funds for PE first were authorized.

   b. The FHWA cannot grant a waiver of 23 U.S.C. 102(b), but it may approve a State DOT request, on behalf of itself or a subrecipient, for a reasonable time extension on a project that has been delayed for valid reasons, as discussed below.

   c. The FHWA does not require repayment of PE funds 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.

   d. The FHWA Division Administrator may grant reasonable time extensions to a State DOT if the State DOT submits to the division

office sufficient justification. The delay must be reasonable and beyond the State DOT's control. Shifting priorities, insufficient transportation budgets, State appropriation constraints, and staffing levels are not valid justification for granting time extensions. Delay determinations must be documented by the division office and be a part of the project records. Examples of factors for the division office to consider for granting time extensions include:

(1) litigation resulting in delays to project development;

(2) complex project consultations involving Federal, State, and local agencies; sovereign nations; or multi-state project negotiations; and

(3) situations where the public involvement process has altered the State DOT's plan for satisfying the project's purpose and need.

e. Time extensions should only be approved with a definite schedule, 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 time extension request should include an evaluation of the time needed to advance the project to ROW acquisition or on-site construction, and should provide support for a reasonable time extension that reflects the State DOT's commitment to advance the project.

f. 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 associated obligation authority) are re-obligated within the fiscal year of recovery. In cases where the funding category no longer exists, the division office should contact the Office of the Chief Financial Officer for guidance.

If the State DOT does not have available appropriations to immediately repay reimbursed PE funds, and a funding hardship exists, the division office 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 were to be made immediately.

g. Congressional earmarks funded from a General Fund appropriation are not subject to 23 U.S.C. 102(b). Congressional earmarks funded from the Highway Trust Fund (HTF) are subject to 23 U.S.C. 102(b). Recovered budget authority from congressional earmarks funded from the HTF may be re-obligated within the current fiscal year, or indefinitely depending upon whether the earmarked funding had definite or indefinite availability, respectively, only for a project that falls within the statutory language of the earmark.

h. Costs repaid by the State DOT under 23 U.S.C. 102(b) are not eligible for subsequent reimbursement if the project is later advanced to ROW acquisition or on-site construction. Also, the provisions of 23 CFR 1.9(b) and section 1440 of the Fixing America's Surface Transportation Act (FAST Act) (P.L. 114-94) are not available to reinstate repaid reimbursements. However, should the project at some time be resumed, the State DOT may initiate a new project authorization to conduct further PE. Costs would be eligible from the date the new project authorization is executed.

7. What activities demonstrate that ROW acquisition for a highway project has commenced?

a. The ROW acquisition is a multi-step process that culminates in the agency taking title to or possession of real property. Pursuant to 23 CFR 710.105(b), "*Acquisition* means activities to obtain an interest in, and possession of, real property." Further, 23 CFR 710.203(a) provides detail on the activities required to acquire property, which include preliminary acquisition activities such as title search and appraisal completion.

b. For PE repayment purposes, there is no single action, process, or activity that will demonstrate in all cases that ROW acquisition has commenced. If a project requires multiple parcels, the acquisition of one parcel would likely not satisfy the PE repayment requirement if none of the preliminary acquisition activities such as title search and valuation for the other required parcels have started. If a Federal-aid recipient has initiated negotiations or has acquired some parcels necessary for the project, and the agency is following a reasonable schedule that will lead to timely acquisition of necessary parcels, the PE repayment requirement is likely to be satisfied.

c. If it is unclear whether ROW acquisition has commenced, the State DOT may request a brief extension to provide time to more clearly

determine if acquisition activities have commenced. If it is clear that ROW acquisition has not commenced and a time extension is not justified by the project-specific facts, then repayment is required within 90 days.

d. The authorization of a ROW acquisition project alone, without follow-up action will not satisfy the PE repayment requirement.

8. **What activities demonstrate that on-site construction has commenced?** Demonstration that on-site construction has commenced varies depending on the scope of the PE project as demonstrated by the following examples:

a. The scope of the PE project authorization aligns directly with the subsequent construction project. In this scenario, a PE project authorization funds design activity that leads directly to a construction project with consistent scope of work and project limits as envisioned in the PE project. Award of a construction contract and commencing on-site construction, or the start of force account construction, demonstrates that on-site construction has started and that PE cost repayment is satisfied. The authorization of a construction project without award of a contract and commencement of on-site construction will not satisfy the PE cost repayment requirement.

b. A PE project authorization funds a NEPA document where phased construction of the project is anticipated, such as for a highway corridor reconstruction project. Since PE cost repayment only requires the commencement of ROW acquisition or on-site construction, award of a construction contract and commencing on-site construction for the first construction phase satisfies the PE cost repayment requirement.

c. A PE project authorization funds multiple subsequent construction projects for a specific type of work across a State or portion of a State, such as preventive maintenance, bridge preventive maintenance, or pavement resurfacing. In such cases, two scenarios are acceptable:

(1) Where multiple activities are authorized as part of one PE authorization, the on-site construction or ROW acquisition of each distinct element under the PE authorization must commence in order to satisfy the PE repayment requirement. Repayment of PE costs for those locations where on-site construction or ROW acquisition has not begun within the 10-year period is required. Therefore, it is necessary for the

State DOT to account for the PE cost for each individual project location, if multiple locations are contained in the same PE project authorization.

(2) Alternatively, if the division office has a recent documented risk assessment of certain types of projects that demonstrates a low risk of non-compliance with the PE repayment requirements, then the division office does not need to verify that each construction or ROW acquisition project has commenced at every project location. The recent documented risk assessment should be based on monitoring as discussed in paragraph 9.c. Projects that present a low risk may include striping, guardrail, preventive maintenance, and pavement overlay projects. If the State DOT cannot accurately identify which PE costs are associated with a specific construction project, and a low risk of non-compliance has not been sufficiently documented for the type of project involved, then a project-by-project assessment is necessary.

d. Bundled bridge projects carried out under 23 U.S.C. 144(j) are exempt from the PE repayment provisions (23 U.S.C. 144(j)(6)).

e. Finally, if a State DOT otherwise combines multiple project locations under a single PE authorization as a single scope of work, other than provided for in paragraphs 8.b. through 8.d. above, 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. Proceeding with construction of one of those project locations does not satisfy the PE repayment requirement for other project locations in the consolidated PE project authorization.

If the State requests PE authorization based on some method other than those described in paragraphs 8.a. through 8.d. above, such as one PE project authorization covering multiple construction authorizations, the division office must seek the concurrence of Office of the Chief Financial Officer, Financial Management and Policy Team (HCFB-31) and the Office of Infrastructure, Federal-aid Program Team (HISM-10). The division office's request must provide assurance of the following:

(1) The State DOT written procedures sufficiently describe the process and internal controls for complying with PE repayment.

(2) The State DOT segregates and allocates PE costs by construction project, in case a construction project does not meet the 10-year requirement and repayment is required.

(3) The division office has conducted a recent documented risk assessment to determine the likelihood and impact of repayment as a result of the State DOT process.

(4) The division office has evaluated whether the State DOT process and related internal controls appear to be effective as designed to identify all PE costs associated with individual construction authorizations in the event of the need for repayment.

(5) The division office has verified that the process, as written, has been implemented by the State DOT.

(6) The division office will monitor the process on an ongoing basis to verify the State DOT is consistently following the process and meeting the PE repayment requirements.

Prior to authorizing an alternate method single PE project described in this paragraph, the division office must determine that:

(1) The PE project authorization has a clear scope of work.

(2) The State DOT has a documented basis for estimating the cost of the project authorization that represents the State's best estimate of cost.

(3) The PE project cost is reflected in the Statewide Transportation Improvement Program (STIP) and shows the clear relationship between individual construction authorizations and PE costs.

9. **What are the responsibilities of the FHWA Federal-aid division offices?** The Federal-aid division offices will:

a. 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.

b. Work with their State DOT to develop effective controls to assure compliance, including repayment of preliminary engineering costs when required.

c. Annually assess the State DOT's compliance with the overall objective of this Order through the division office's Risk Assessment Process.

d. Document the PE repayment determination on every PE project.

e. Report PE statistics to the Office of Infrastructure, Office of Program Administration (HISM) as requested.

10. **What are the responsibilities of the FHWA Federal-aid headquarters offices?** The HISM, in coordination with the Office of the Chief Financial Officer (HCF), will:

a. Develop and maintain implementation guidance on PE payback, and respond to questions concerning the implementation.

b. Request from division offices PE repayment monitoring statistics as described in paragraph 9.e.

c. Develop tools for division offices/State DOTs to monitor PE obligations and compliance.

11. **Where can I obtain additional guidance?** Frequently-asked questions have been developed to provide further detail about the provisions of this Order. For additional guidance, contact FHWA's Office of Infrastructure Federal-aid Program Team (HISM-10) or Office of the Chief Financial Officer, Financial Management and Policy Team (HCFB-31).

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