AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS
AASHTO

PAUL TROMBINO III, PRESIDENT
DIRECTOR, IOWA DEPARTMENT OF TRANSPORTATION

BUD WRIGHT, EXECUTIVE DIRECTOR

444 NORTH CAPITOL STREET NW, SUITE 249, WASHINGTON, DC 20001
(202) 624-5800 • FAX: (202) 624-5806 • WWW.TRANSPORTATION.ORG

AASHTO IMPLEMENTATION PLAN FOR FAST ACT AND MAP-21

UPDATED EVERY MONTH / NOVEMBER 1, 2016, EDITION

INTRODUCTION

Federal aid programs for highway, transit, highway safety, and other transportation investment are already complex. To accelerate the public benefits of job creation, economic development, and improved safety that will follow from state investment of the transportation funds Congress has provided through the Fixing America's Surface Transportation (FAST) Act in December 2015, AASHTO strongly recommends that the US Department of Transportation (USDOT) implements statutes in a way that does not add to requirements to the provisions of the laws themselves.

Taking an approach of maximizing flexibility will also assist USDOT in promptly resolving issues and finalizing rules and guidance. AASHTO also emphasizes that each State Department of Transportation (State DOT) is a governmental entity and, in addition to following Federal requirements, must follow state requirements and be responsive to its Governor, legislature, municipalities, the general public and other stakeholders, all of whom are regularly commenting on State DOT plans and projects. As the requirements already governing State DOTs are extensive, it is appropriate for USDOT to provide states with more flexibility than ever in implementing the FAST Act and other statutes including the Moving Ahead for Progress in the 21st Century (MAP-21) Act from 2012, particularly in the critical areas of performance management and asset management.

On the following pages, AASHTO sets forth a number of issues that warrant USDOT's attention in implementing the FAST Act and other statutes. **As further information becomes available, this document is updated each month to include any clarifications to noted issues.**

AASHTO deeply appreciates USDOT's careful consideration of AASHTO's concerns regarding these matters, and stands ready to consult and work with USDOT to make implementation of the FAST Act as successful as possible.

IMPLEMENTATION ISSUE AREAS

1. Revenue and Financing: Page 2
2. Freight: Page 8
3. Program and Project Delivery: Page 10
4. Planning: Page 14
5. Performance Management: Page 17
6. Asset Management: Page 20
7. Bridge and Design Standards: Page 22
8. Research and Innovation: Page 24
9. Highway Safety: Page 25
10. Public Transportation: Page 26
11. Rail Transportation: Page 25

1. REVENUE AND FINANCE

FAST ACT PROVISIONS REQUIRING FURTHER CLARIFICATION

Interstate System Reconstruction and Rehabilitation Pilot Program

Question

For existing slot-holding states, what criteria will be used to determine demonstration of sufficient progress to allow them to extend their slot beyond the initial one-year limit? Criteria should be provided as soon as possible to allow existing slot-holding states adequate time to re-evaluate progress already made.

- The FAST Act sets time limits for a State with a provisionally-approved application for a pilot project to: (1) move from a provisionally-approved application to a complete application that fully satisfies the program's eligibility criteria and selection criteria; (2) complete the environmental review and permitting process under the National Environmental Policy Act (NEPA) for the pilot project; and (3) execute a toll agreement with DOT. These time limits are:
    - One year for provisional approvals in place prior to the enactment of the FAST Act (December 4, 2015); and
    - Three years for provisional approvals subsequent to enactment of the FAST Act.

  DOT may extend either provisional approval by an additional year if certain conditions are met. The State must demonstrate material progress toward the implementation of the project as evidenced by: (1) substantial progress in completing the environmental review and permitting process for the pilot project under NEPA; (2) funding and financing commitments for the pilot project; (3) expressions of support for the pilot project from State and local governments, community interests, and the public; and (4) submission of a facility management plan. [FAST Act § 1411(c); TEA-21 § 1216(b)(6)]

Railroad Rehabilitation & Improvement Financing (RRIF)

Questions

- Does a loan/guarantee of more than $75 million have to receive an investment grade rating from at least two rating agencies? The FAST Act states that an applicant *may* propose (as a basis for determining the amount of a credit risk premium) an investment-grade rating on the direct loan or loan guarantee, *except* if the total amount of the direct loan or loan guarantee is more than $75 million, in which case the applicant must receive an investment-grade rating from at least two rating agencies. How can the investment-grade rating for direct loans or loan guarantees of over $75 million be required if providing an investment-grade rating as a basis for determining the amount of a credit risk premium is optional?
- Can credit risk premiums no longer be returned upon the satisfaction of loan/cohort obligations? The FAST Act struck the provision requiring the Secretary of Transportation to return credit risk premiums plus interest to a cohort of loans once all obligations have been satisfied, yet page 513 of the Conference Report states that the FAST ACT "…requires the Secretary to pay back the credit risk premium, with interest, to a borrower that has repaid its RRIF loan, regardless of whether the loan is or was included in a cohort."
- How is the expanded eligibility to include commercial and residential economic development projects different from the newly-expanded TIFIA eligibility to support investments in transit oriented development?

National Surface Transportation and Innovation Finance Bureau

Questions

- Is the Bureau to "administer" the processes for the designated programs (TIFIA, State Infrastructure Banks (SIBs), Railroad Rehabilitation and Improvement Financing (RRIF) program, Private Activity Bonds (PABs), NSFHP, and what is the residual role of the currently-responsible offices and agencies (if any)?
    - The National Surface Transportation and Innovation Finance Bureau was launched on July 20th as the Build America Bureau (the Bureau). The Bureau combines the Build America Transportation Investment Center (BATIC), TIFIA and RRIF loan programs, PABs, and the new $800 million NSFHP, known as the FASTLANE grant program, under one roof within the Office of the Undersecretary for Transportation Policy. The Bureau will have three sections, Outreach and Project Development, Credit Programs, and FASTLANE Grants.
        - The Credit Programs section combines TIFIA, RRIF, and PABs, administers the application process for these programs, performs underwriting and negotiations for loans, manages the portfolio of active loans, and manages the risks of the loan portfolios.
        - The FASTLANE Grants section administers the application process for FASTLANE grants and provides guidance on the FASTLANE application process.
    - Will the TIFIA Joint Program Office be eliminated and absorbed into the Bureau?
        - The TIFIA Joint Program Office will be absorbed into the Bureau.
    - Will FRA have any residual role in managing the RRIF Program?
        - RRIF Program is expected to be entirely managed by the Bureau.
    - Will the MARAD Title XI credit program be run apart from the Bureau (not mentioned in the legislation)
        - The MARAD Title XI credit program will run apart from the Build America Bureau.
- How different or similar will the application processes be for TIFIA and RRIF? Since the legislative terms of the programs are now more alike, is the Bureau considering a single application, review, and approval process?
    - The Bureau is looking into streamlining the TIFIA and RRIF applications.
- How much of the Bureau will be devoted to public private partnership (P3) issues versus non-P3 finance?
    - P3 issues will still be a focus area of the Bureau. The Outreach and Project Development section of the Bureau will build upon the work of the BATIC, which has served as a point of contact for project sponsors exploring ways to access private capital in public private partnerships.
- How will the Bureau coordinate and facilitate environmental reviews and permitting (including its anticipated role as liaison to CEQ and tracker of project permit reviews and decisions)?
- How is the new Council different from the current Credit Council?

Regional Infrastructure Accelerator Demonstration Program

Question

How will the mission of the newly created regional infrastructure accelerator program intersect with the mission of new and preexisting entities that promote capacity building in project finance (e.g., the work of the National Surface Transportation and Innovation Finance Bureau and AASHTO's Build America Transportation Investment Center (BATIC) Institute: An AASHTO Center for Excellence)?

- The FAST Act authorized $12 million in General Funds for the newly created Regional Infrastructure Accelerator Demonstration Program; however, the funding was not appropriated. It is the intention that the Regional Accelerators will work with complementary entities such as the Build America Bureau and the BATIC Institute.

FAST ACT PROVISIONS OF CONCERN AND CORRESPONDING RECOMMENDATIONS

Rescission of Contract Authority

The FAST Act rescinds $7.6 billion of unobligated contract authority on July 1, 2020, which would be derived from Federal-aid Highway Program categories other than the Highway Safety Improvement Program (HSIP), Railway-Highway Crossings Program, Metropolitan Planning, and suballocated portions of the STBGP. In addition, non-exempt program dollars are required to be rescinded from unobligated balances remaining on that date on a proportional basis. As of the end of FY 2015, $15.2 billion of unobligated contract authority in all program categories was carried by all States.

- In addition to the FAST Act rescission, the Senate's FY 2017 Transportation, Housing and Urban Development Appropriations (THUD) bill would rescind an additional $2.2 billion, resulting in a total rescission of $9.8 billion by 2020. These rescissions, coming entirely from apportioned HTF programs used by State DOTs, would actually exceed the balance of $9 billion (as of 9/30/15) in the affected program categories.

Recommendations

- At a minimum, examine opportunities to increase administrative flexibility in implementing the rescission, and allow for states' optimization of contract authority balance well before the July 1, 2020 date.
    - AASHTO has requested the Senate to repeal the FY 2017 THUD rescission; if that is not possible, the Senate has been asked to provide as much administrative flexibility as possible, in addition to reducing the number of program categories exempt from the rescission.
- Provide annual reports starting on July 1, 2016 (and each year thereafter) with the unobligated balance and calculations of how the rescission would be implemented.

National Significant Freight and Highway Projects (NSFHP) Discretionary Grant Program

The FAST Act creates the NSFHP Discretionary Grant Program designed for major highway and freight projects funded at $4.5 billion over five years.

Recommendation

- DOT should be transparent in the criteria used to select projects to receive grants under this Program. In addition, USDOT should provide feedback on why projects were not selected.

Transportation Infrastructure Finance and Innovation Act (TIFIA)

The FAST Act funds TIFIA at $275 million in 2016, rising to $300 million in 2020. The TIFIA funding levels were greatly reduced from MAP-21 which funded TIFIA at $750 million in fiscal year 2013 and $1 billion for fiscal year 2014. MAP-21's redistribution of unobligated TIFIA dollars to STP/STBGP was eliminated. However, flexibility in "buying down" the TIFIA subsidy and administrative costs is increased, as National Highway Performance Program (NHPP) and NSFHP grant dollars can be applied. USDOT released the notice of funding availability (NOFA) for TIFIA on March 11, 2016. It states that "to ensure maximum leverage of TIFIA program funds and efficient allocation of TIFIA resources, the DOT encourages eligible recipients to consider use of the three sources of Federal-aid funds listed…[STBGP, NHPP, and NSFHP]…to cover the subsidy and administrative costs of the TIFIA credit assistance, as authorized in the FAST Act." Project sponsors will also be required to indicate in their Letters of Interest whether other Federal-aid funds are available to cover the subsidy and administrative costs of their requested TIFIA credit assistance.

Recommendations

- The determination by a project sponsor to consider or utilize other Federal funds in lieu of TIFIA program dollars to cover the subsidy and administrative costs should have no bearing on application evaluation and award of credit assistance.
    - On April 11, 2015, AASHTO submitted a comment letter to the docket in response to the TIFIA NOFA "Letters of Interest for Credit Assistance Under the Transportation Infrastructure Finance and Innovation Act (TIFIA) Program" (Docket Number DOT-OST-2016-0032) Notice of Funding Availability and Request for Comments (NOFA). In the letter, AASHTO stated that it, "believes that encouraging (or requiring) State DOTs to utilize their Federal-aid funds to pay for TIFIA loans while ample TIFIA subsidy funding remains available is neither efficient nor equitable….AASHTO believes the decision to utilize Federal-aid funding in lieu of or in conjunction with TIFIA subsidy to pay for credit assistance should be a decision of the project sponsor….In the event that a TIFIA program funding shortfall in a future year, a project sponsor with access to Federal-aid funding authorized to pay for credit assistance can decide whether to use its funding for that purpose or wait for additional subsidy funding to be provided by Congress (or decide to finance its project without TIFIA credit assistance)."
- Ensure timely and transparent processing of TIFIA applications.
    - In its comment letter to the docket, AASHTO stated that it supports the FAST Act requirement that the Secretary "make available an expedited application process or processes available at the request of entities seeking secured loans under the TIFIA program that use a set or sets of conventional terms." Furthermore, AASHTO stated that it "encourages the DOT to develop a simpler, faster and more reliable application process for all project sponsors but especially for the smaller projects with simpler terms."

National Surface Transportation and Innovation Finance Bureau Requirements for Public Private Partnerships

The FAST Act authorizes a new Finance Bureau, which requires project sponsors receiving credit assistance from DOT for public-private partnerships (P3s) to undergo a value for money analysis or a comparable analysis prior to deciding to advance the project as a P3. This analysis must be made publicly available and within three years project sponsors must review whether the private partner is meeting the terms of the agreement.

Recommendations

- State and local laws have different requirements for implementing P3s. As a result, project sponsors should have maximum flexibility to select an analysis for assessing whether to advance their project as a P3.
- Most transportation projects are still undergoing construction within three years of project commencement. Therefore, three years is not the ideal time to evaluate whether a private partner is meeting the terms of the agreement. Project sponsors should have maximum flexibility in determining when to assess whether the private partner is meeting the terms of the agreement.
- In developing guidance for this new requirement, USDOT should consult with State DOTs and other local project sponsors.
    - USDOT hired a consulting firm to interview and collect feedback from stakeholder groups to help develop recommendations to USDOT on how to organize the Build America Bureau (the designated name for the National Surface Transportation and Innovation Finance Bureau).

National Surface Transportation and Innovation Finance Bureau Requirements for Procurement Benchmarks

The FAST Act authorizes a new Finance Bureau which is directed to promote best practices in procurement for projects receiving credit assistance from USDOT, including the development of procurement benchmarks to ensure accountable expenditure of Federal assistance over the life of the project. The

FAST Act states that to the extent possible, the benchmarks should establish maximum thresholds for accountable project cost increases and delays in project delivery, establish uniform methods for states to measure cost and delivery changes over the life cycle of a project, and be tailored to various types of project procurements. The Bureau will collect data on the benchmarks and make them publicly accessible.

Recommendation

- Due to the varying nature of procurements and varying state and local laws surrounding procurement, it is critical that USDOT consult with project sponsors in the development of procurement benchmarks.

User-Based Alternative Revenue Mechanisms Demonstration Program

The FAST Act authorizes $95 million for five years for demonstration of user-fee based alternative revenue mechanisms to sustain the Highway Trust Fund over the long term ($15 million in FY16 and $20 million per year for FY17 through FY20). Grants may be awarded to states to test the design, acceptance, and implementation of user-based alternative revenue mechanisms. States must provide a 50 percent match. If USDOT does not award FY16 grant funds by August 1, 2016, the funding will revert to the research program under 23 USC 503.

- On August 30, 2016, USDOT announced the recipients of the FY 2016 grant funds. $14.2 million in grants were provided to eight projects that will pilot a variety options to raise revenue.

Recommendations

- Given that the NOFO for this grant program was released almost halfway into FY 2016, the NOFO's expression of DOT's "[interest] in funding larger scale pilots, rather than smaller scale proof of concept projects" will be a challenge. USDOT should consider smaller scale applications as they will not only obligate grant dollars faster, but also increase the likelihood of more robust and mature applications in the future years.
    - On March 22, 2016, USDOT issued a Notice of Funding Opportunity (NOFO) for the "Surface Transportation System Funding Alternatives (STSFA) Program." On July 1, 2016, AASHTO submitted a comment letter to the docket from the perspective of improving the implementation of the program. In soliciting comments from State DOTs, AASHTO did not identify USDOT's approach to funding larger scale projects as opposed to smaller scale proof of concept projects as a major issue. However, AASHTO did comment on USDOT's solicitation approach after the FY 2016 solicitation. The USDOT program guidance "Notice of Funding Opportunity (NOFO) Number DTFH6116RA00013, 'Surface Transportation System Funding Alternatives' issued on March 22, 2015, states that "USDOT anticipates issuing a second solicitation and making a second round of awards in FY 2017 that will commit the remaining anticipated funds for FY 2017-2020 (up to $80 million subject to availability), focused on demonstration projects.

      In its comment letter, AASHTO expressed concerns that given the challenges of a user-fee based pilot, some interested applicants may not be fully prepared to participate in the program in FY 2017, but given additional time and resources may be ready in subsequent years. AASHTO stated that "USDOT should evaluate whether disturbing the remaining $80 million of funding in FY 2017 versus through multi-year solicitations (FY 2017- FY 2020) may put some potential applications at a disadvantage. As a federally-supported effort, STSFA should be implemented in a way that facilitates strong proposals and geographic diversity throughout the nation."
- State resources already expended on the development of state user-fee based alternative revenue pilots should be eligible towards meeting the 50% match requirement. This would make the demonstration program more accessible for states and increase participation in the program.

- The USDOT program guidance for the STSFA program states that “funds already expended (or otherwise encumbered” cannot be considered as contributions towards the match. However, non-federal funds, toll credits under 23 U.S.C., and soft match and in-kind services can be considered as contributions to the local match. In its comment letter to the docket, AASHTO “encourages USDOT to provide maximum flexibility in the consideration of these match options [toll credits, soft match] through the duration of the STSFA program.”

2. FREIGHT

FAST ACT PROVISIONS REQUIRING FURTHER CLARIFICATION

Freight Planning

The FAST Act includes new provisions on freight planning. To access Highway Freight funding, within two years, State DOTs will have to develop multimodal state freight plans that are coordinated with the performance-based planning process.

Questions

- Determining if a State Freight Plan Meets the FAST Act Criteria Both in the Short and Long Term
  - Will USDOT issue guidance or a rulemaking on the development of the multimodal state freight plan including contents and scope?
    - Guidance has been released on State Freight Plans, visit https://www.federalregister.gov/documents/2016/10/14/2016-24862/guidance-on-state-freight-plans-and-state-freight-advisory-committees
  - Will USDOT issue interim guidance as final guidance or rulemaking is developed?
    - Guidance has been released on State Freight Plans, visit https://www.federalregister.gov/documents/2016/10/14/2016-24862/guidance-on-state-freight-plans-and-state-freight-advisory-committees
  - For State DOTs with an existing State Freight Plan, what will be required to show compliance?
    - Guidance has been released on State Freight Plans, visit https://www.federalregister.gov/documents/2016/10/14/2016-24862/guidance-on-state-freight-plans-and-state-freight-advisory-committees
  - Will the approval of a State Freight Plan take place at the Division level?
    - For consideration of compliance with FAST Act provisions of State Freight Plans, States should submit their State Freight Plans to the Federal Highway Division Office in their State.
- Identification of Critical Urban and Rural Freight Corridors
  - The FAST Act limits the number of miles that can be designated as part of the Critical Urban Freight Corridors in a state. In urban areas of 500,000 or more in population, this network is identified by the MPO in consultation with the State. For larger states with more MPOs of 500,000 or more, there is the possibility that the total mileage identified will be greater than the total mileage allowed. Even though each MPO must consult with the State DOT, the State DOT cannot make the decision on the identification of Critical Urban Freight Corridors in these very large MPOs. What guidance can USDOT provide should this situation arise?
  - What is the process USDOT envisions State DOTs and MPOs will use for designating critical urban and rural freight corridors?
    - The FHWA Administrator certifies critical urban and critical rural freight corridors. The FHWA Division Office is responsible for reviewing the certification and forwarding it to FHWA Headquarters (HOFM-1) within 10 business days of receiving certification documentation. In accordance with 23 U.S.C. 167(g)(2), each State or MPO that designates a corridor as a CRFC or CUFC must certify to the FHWA Administrator that the corridor meets the requirements of 23 U.S.C. 167(e) or 167(f), respectively. There is no deadline for designating and certifying CRFCs and CUFCs. These designations may occur at any time, may be full or partial designations of the CUFCs or CRFCs mileage, and the two types do not need to be designated at

the same time. Designations and certification may be provided to FHWA on a rolling basis. For more information, please refer to the guidance released in April 2016.

- Will MPOs have to develop a separate MPO-specific freight plan in order to spend funding associated with the Critical Urban Freight Corridors?
- FHWA needs to clarify the definition of *urbanized area* as the term is being used for "Critical Urban Freight Corridors". For transportation planning purposes, an urbanized area has a population threshold of 5,000. In the Highway Freight Program, the term *urbanized* is left open for areas with a population of less than 500,000, although there is a need to "consult with the representative metropolitan planning organization". Can areas between 5,000 and 49,999 be considered rural corridors?
  - USDOT released guidance on April 26, 2016 (and updated on May 23, 2016) regarding Critical Urban and Rural Freight Corridors. "The minimum population for an urbanized area is 50,000, as defined by the Census Bureau. Being located inside or outside an adjusted urbanized boundary determines whether the public road can be designated as a CRFC or a CUFC. CUFC routes must be within the adjusted boundaries of an urbanized area. CRFC routes must be outside the adjusted boundaries of any urbanized area." For more information, read the guidance released in April 2016.

- Will MPOs representing the larger urban areas that identify Critical Urban Freight Corridors within their planning boundaries have to report on making progress towards freight performance targets?

Nationally Significant Freight and Highway Projects

- FAST Act established this discretionary program—named FASTLANE grants by USDOT—funded from the Highway Trust Fund to provide financial assistance in the form of grants or credit assistance to nationally and regionally significant freight and highway projects. FASTLANE grant awards for FY 2016, totaling $759 million, were notified to Congress on July 1, 2016; the awards were finalized following the subsequent 60-day Congressional review period.
- On October 28, 2016, USDOT opened solicitation for applications to FASTLANE II grant program, which is authorized at $850 million in FY 2017. Applications are due on December 15, 2016, and projects selected by USDOT are subject to the 60-day Congressional review period before grants are finalized.

Data Limitations

Question

For the multimodal network, is waterborne data the only data used to classify ports? This leaves out rail-truck, rail-rail, truck-truck, truck-rail, and pipeline moves in which the goods never use the waterway.

- Yes, for the Interim NMFN is using the USACE's Waterborne Commerce Statistics Center data, specifically tonnage for US ports in 2014. USDOT determined that 113 US ports satisfy the 2,000,000 short ton threshold criterion and has also included three additional ports as strategic freight assets. In total, the Interim NMFN has identified 116 ports.

FAST ACT PROVISIONS OF CONCERN AND CORRESPONDING RECOMMENDATIONS

Primary Highway Freight System

Recommendation

USDOT should provide maps and shapefiles that have specific and accurate route listing of the Primary Highway Freight System in order for State DOTs to establish their respective portions of the PHFS.

- USDOT has provided maps for the National Highway Freight Network, which shows the primary highway freight system, plus remaining Interstates not on the PHFS.
  - National Highway Freight Network
  - National Highway Freight Network Shapefile and Data Description
  - National Highway Freight Network- Individual State Maps and Tables

Fiscally Constrained State Freight Plan

Recommendation

A State should be given maximum flexibility to meet this requirement by certifying that, after State consideration, the projects and programs included in the State's freight plan represent a fiscally constrained list. USDOT should allow a State to utilize other planning documents for purposes of satisfying fiscal constraint, such as by providing to FHWA/USDOT a list of projects already on its fiscally constrained Statewide Transportation Improvement Program (STIP) that it is incorporating into its State Freight Plan.

3. PROGRAM AND PROJECT DELIVERY

PROVISIONS NEEDING CLARIFICATION AND CORRESPONDING RECOMMENDATIONS

Coordinated and Concurrent Environmental Review and Permitting Process
FAST directs USDOT, in coordination with a steering committee consisting of various federal agencies, to develop within 1 year of enactment of the FAST Act, a coordinated and concurrent environmental review and permitting process for transportation projects initiating an EIS. The process must require "early concurrence or issue resolution" during the scoping process on purpose and need, and during the development of the environmental impact statement, on the range of alternatives for analysis.
Question
Clarify that this new process to be developed for USDOT in Title 49 does not apply to Title 23 projects as Title 23 contains a very specific environmental review process (23 USC 139). Alternatively, USDOT should construe that resolution of an issue under 23 USC 139 constitutes "issue resolution" within the meaning of 49 USC 310. The Title 23 process provides the lead agency discretion over purpose and need and range of alternatives. This clarification eliminates the conflict between these two provisions.

- As AASHTO requested, USDOT clarified in a meeting with AASHTO staff on May 13, 2016 that the new Title 49 process developed by USDOT will not apply to Title 23 projects.

Federal Permitting Improvement
FAST establishes the Federal Permitting Improvement Steering Counsel consisting of various federal agencies, including USDOT, to develop a new environmental review process.
Question
Clarify that this new process does not apply to Title 23, 26 and 49 projects (as provided in FAST Section 11503(b)).

- As requested by AASHTO, FHWA states in its *NEPA Implementation Q&As* that this new environmental review process does not apply to Title 23, 26, or 49 projects.

Planning and Environmental Linkages
FAST provides more *statutory* flexibility to adopting planning products and decisions in NEPA. Planning documents must be approved within 5 years of incorporation into NEPA.
Questions

- Clarify that the separate *planning and environmental linkages regulations* developed prior to Map-21 and FAST statutory authority may also be used to adopt planning products in NEPA.
- Clarify that the 5 year period applies to the date of initiation of NEPA. As such, if a NEPA study extends beyond 5 years, planning decisions adopted into NEPA would not need to be revisited.
- As requested by AASHTO, the FHWA/FTA planning regulations published May 27, 2016, recognize the FAST Act statutory authority as an additional authority for planning and environmental linkages, and states that the previously established planning and environmental linkages regulations may still be used. Although the final regulation has been published, AASHTO is requesting that FHWA clarify that the 5 year period applies to the date of NEPA initiation.

FAST ACT PROVISIONS OF CONCERN AND CORRESPONDING RECOMMENDATIONS

Alignment and Streamlining of Historical Analysis and NEPA

FAST requires USDOT, in coordination with the Department of Interior (DOI) and the Advisory Council on Historic Preservation (ACHP), to develop procedures to better align NEPA, Section 4(f) of the Department of Transportation Act and section 106 of the National Historic Preservation Act processes. USDOT must coordinate with DOI and ACHP to establish procedures within 90 days of enactment of the FAST Act.

Recommendations

- Clarify that USDOT has 90 days to initiate the coordination process, and then establish a reasonable later deadline for development of the procedures.
- Coordinate with state DOTs in the development of the procedures.
- Once the procedures are established, work with the Center for Environmental Excellence by AASHTO to develop a 106/NEPA/Section 4(f) Practitioner Handbook to provide states DOTs a procedural roadmap.
- As requested by AASHTO, USDOT clarified in its *Section 1301 Overview* that the 90 day requirement was to begin coordination with DOI and ACHP. Also, AASHTO has offered to collaborate with USDOT and its modal administrations on better aligning these processes.

FAST provides an alternative process for evaluating historic resources. If USDOT determines through the NEPA process that there is no prudent and feasible alternative to using the historic property, and the State Historic Preservation Office (SHPO), ACHP and DOI concur, 4(f) requirements are satisfied.

Recommendations

- Highlight that this alternative process is optional, not required.
- Clarify how notice of these determinations will be handled for categorical exclusions.
- Track the use of this provision, including challenges and opportunities for future streamlining.
- As requested by AASHTO, USDOT clarified in its *Section 1301 Overview* and related *Q & As*, that the alternative process for evaluating historic resources is optional. AASHTO is requesting that USDOT further clarify how these determinations will be handled for categorical exclusions and recommending that USDOT track the use of this alternative process.

USDOT Project Dashboard

FAST requires that within 18 months of enactment, USDOT must make publicly available on the dashboard, information related to progress and status of environmental reviews and permitting on projects requiring either an environmental impact statement or an environmental assessment. DOT must also issue reporting standards for the dashboard within this timeframe.

Recommendation

Ensure that these new reporting requirements are not burdensome to the state DOTs. Reporting should only be required for a few major project milestones- notice of intent, public hearing, DEIS, FEIS, ROD, permit issuance.

- FHWA issued Q & As on the environmental process changes. The environmental process changes will implemented through rulemaking.

Project Schedules

FAST requires lead agencies to establish project schedules for the completion of the environmental review processes for environmental impact statements and environmental assessments after *consultation with and the concurrence of each participating agency for the project*; MAP-21 made development of these project schedules optional. FAST also requires concurrence of participating agencies for changes to project schedules.

Recommendations

- As environmental processes are only one of many components in project schedules, require that only the environmental portion of the schedule needs participating agency concurrence.
- Coordination plans should contain only major project milestones and provide states the flexibility to establish schedule deadline ranges.
- Establish that schedule changes require the concurrence of only the affected federal agencies, not all participating agencies.
- Establish a deadline for agency responses; lack of response indicates concurrence.
- FHWA issued Q & As on the environmental process changes. The environmental process changes will be implemented by rulemaking.

Environmental Checklist

FAST requires that within 90 days of enactment USDOT must develop, in consultation with participating agencies, a new checklist of potential natural, cultural and historic resources in the area of the project and provide such list to the project sponsor.

Recommendations

- As most states already have databases and GIS data in cooperation and partnership with resource agencies, USDOT should collect and build upon this information, in coordination with state DOTs to develop the new checklist.
- Confirm that existing checklists may satisfy this requirement.
- The checklist should be developed on a program, rather than project basis, be flexible and allow for adaptability in each state.
- FAST contains two separate requirements for the development of an environmental checklist, one for Title 23 projects and one for Title 49 projects. USDOT developed an environmental checklist to fulfill the Title 49 requirement, and this checklist does not apply to Title 23 projects. The Title 23 checklist will likely be included in environmental process rulemaking.

Programmatic Categorical Exclusions

FAST requires USDOT to revise its regulations related to programmatic categorical exclusion (PCE) agreements and develop a template programmatic agreement. The regulations shall contain that programmatic agreements may include the CEs listed in FHWA regulation *as well as additional CEs that meet federal requirements.* Although MAP-21 provided the same flexibility, FHWA limited PCE agreements to only CEs listed in FHWA regulations.

Recommendations

- As the state DOTs already have functioning PCEs, USDOT should confirm that the states may solely determine whether to use the new template agreement or use an existing agreement.
- Ensure that FHWA/FTA regulations are updated to allow PCEs to include CEs listed in FHWA/FTA regulations *in addition to other CEs that meet federal standards.*
- USDOT should coordinate with the state DOTs in the development of additional categorical exclusions.
- This provision was implemented in a May 31 final rulemaking. The final rule indicates that States are not required to use the model agreement. Also, new CEs may be included in the agreements, however proposed new CEs must be documented, published for public comment, and be approved by USDOT and CEQ. FHWA posted a memorandum, Practitioner's Guide and model programmatic agreement on its website.

Coordination with State DOTs

In addition to the specific topics highlighted in this program and project delivery section, the State Departments of Transportation wish to collaborate with USDOT on FAST implementation more broadly

to ensure that the FAST act is implemented to maximize streamlining measures. Such coordination should take place *prior to issuance of a proposed rules, guidance or procedures*. Also, coordination is particularly important for developing implementation strategies for the following FAST Act sections:

Recommendations

- Section 1304: USDOT must complete a rulemaking regarding programmatic compliance within 1 year of enactment of the FAST Act. USDOT must consult with federal and state resource agencies and state DOTs, Indian tribes and the public on appropriate use and scope of agreements.
- Section 1308: Requires USDOT to amend federal NEPA assignment audit and assignment termination processes.
- Section 1309: Requires USDOT, in consultation with CEQ, to establish a pilot program within 270 days of enactment of the FAST Act for states with NEPA assignment to allow these states to either substitute their State environmental review law(s) for NEPA or allow NEPA to substitute for their state environmental review law(s).
- Section 1313: Directs USDOT to convene inter-agency collaboration sessions to coordinate business plans, workload planning and workforce management. The collaboration shall ensure that agency staff is utilizing the flexibility in existing regulations, policy and guidance, identifying additional efficiencies, and working with local transportation agencies to improve processes and engaging stakeholders early in the permitting process.
- Section 1316: Requires USDOT to allow states to assume federal responsibility for project design, plans, specifications, estimates, contract awards and inspection of projects. In addition, DOT is required to work with the states to develop legislative recommendations for the delegation of additional authorities to the states, including real estate acquisition and project design.
    - On August 30, 2016, FHWA published in the Federal Register a request for input on additional Title 23 authorities that may be assigned to the states. Comments are due by October 31, 2016.

PENDING MAP-21 IMPLEMENTATION ISSUES AND RECOMMENDATIONS

There are currently pending at USDOT a number of proposed rules developed to implement MAP-21. AASHTO filed detailed, common-sense comments pointing out many areas where aspects of the proposed rules were unduly burdensome and/or not required by statute.

Recommendations

USDOT should promptly incorporate AASHTO's recommendations on these proposed rules and then issue final rules. Below are some of those pending rulemakings:

- Section 1113: Prioritization of CMAQ funds; requires rulemaking on weighting factors. Proposed regulations issued on August 4, 2014.
- Section 1302: Allows greater flexibility for ROW acquisition prior to the completion of NEPA. Proposed regulations issued on November 24, 2014.
- Section 1303: Requires amending contracting requirements to allow CM/GC contracting. Proposed regulations issued on June 29, 2015.
- Section 1305: Amends the environmental review process. Proposed regulations issued on November 20, 2015.
    - Status: will be supplemental NPRM to add FAST requirements.
- Section 1310: Allows for planning decisions to be carried forward into NEPA. Proposed regulations issued on September 10, 2014.
    - Status: FHWA/FTA issued the final planning regulations on May 27, 2016.

- Section 1311: Amends the planning statute to allow programmatic mitigation plans. Proposed regulations issued on June 2, 2015.
    - Status: FHWA/FTA issued the final planning regulations on May 27, 2016.

4. PLANNING

FAST ACT PROVISIONS REQUIRING FURTHER CLARIFICATION

Freight Planning
See *Section 2. Freight.*

FAST ACT PROVISIONS OF CONCERN AND CORRESPONDING RECOMMENDATIONS

Performance Data Support Program
The FAST Act includes new provisions to enable the USDOT to better support the State DOTs, MPOs, and FHWA in the collection and management of data for performance-based planning and programming. These data-related activities are funded at $10m per year over the five year duration of the FAST Act.
Recommendation
AASHTO encourages USDOT to spend the money necessary to obtain the best data and tools possible for these programs as data collection and management is one of the biggest concerns of the State DOTs when it comes to implementing the MAP-21 performance management and performance-based planning provisions. AASHTO also encourages USDOT to work collaboratively with both the State DOTs and MPOs as the data and tool needs are identified and the program is implemented.

- AASHTO continues to encourage FHWA to develop robust performance data support program. AASHTO has included in its PM3 NPRM comments the need to develop a national-level tool.

Eligibility and Use of Freight Funds
While the State and national freight plans are required to be multimodal, the FAST Act provides core freight funding only for the Highway portion of the freight network (with limited exceptions for rail or intermodal connectors), and has established some specific provisions of where such funding can be used. The Nationally Significant Freight and Highway Projects grants are geared primarily towards the very large freight projects.
Recommendations

- Until the start of FY2018 or until a State DOT has a FAST Act State Freight Plan, any project located on an eligible facility should be able to use freight formula funds.
- Freight funding should be eligible for any project that is prioritized within a FAST Act State Freight Plan.
- The eligibility to use Highway Freight Program funding is determined, in part, by what percentage of the overall Primary Highway Freight network a state has. All states should be eligible to use the funding on any portion of the Highway Freight Network.

PENDING MAP-21 IMPLEMENTATION ISSUES AND RECOMMENDATIONS

Publication of the Updated FHWA/FTA Metropolitan and Statewide Planning Regulations
MAP-21 made significant changes to the metropolitan and statewide planning requirements. While USDOT has published a draft of the new regulations, a final version has not been published and continues to be delayed. In fact, the FAST Act requires that the new multimodal state freight plans be

coordinated with the performance-based planning process established under MAP-21. These new performance-based planning regulations will have a significant effect on the planning process.

Recommendation

AASHTO encourages USDOT to continue to focus on the publication of the final regulations concerning the updates to the metropolitan and statewide planning process that were significantly changed as a result of MAP-21. Much of the FAST Act freight planning requirements are tied back to the MAP-21 planning changes which have not yet been published. As AASHTO filed extensive, common-sense comments on the proposed planning rules, USDOT is encouraged to promptly incorporate AASHTO's recommendations into its proposed rules and then issue final rules.

- The updated planning rule has been published. In addition, FHWA published an MPO coordination NPRM that significantly changes the MPO boundary requirements. AASHTO is commenting at this time.

Pavement and Bridge Measures Final Rule (PM2)

Recommendation

AASHTO filed extensive, common-sense comments on these proposed rules. As such, USDOT is encouraged to promptly incorporate AASHTO's recommendations into its proposed rules and then issue final rules.

- The final rule has not been published.

System Performance Measures Final Rule (PM3)

Recommendation

AASHTO encourages USDOT to continue to focus on the publication of both the Notice of Proposed Rulemaking and then the final rule concerning the establishment of national-level system performance measures. The performance measure provisions of MAP-21 are new and will significantly affect State DOTs. AASHTO looks forward to working with FHWA in the implementation of the performance measure rules.

- AASHTO submitted the final PM3 comments on August 15, 2016.

Publication of the Risk-based Asset Management Plan Regulations

Recommendation

AASHTO filed extensive, common-sense comments on these proposed rules. As such, USDOT is encouraged to promptly incorporate AASHTO's recommendations into its proposed rules and then issue final rules.

- The final rule has not been published.

Implementation Timeframe of Performance Management Provisions

AASHTO has stated in previous comments on the PM1, PM2, Risk-based Asset Management Plans and updated Joint Planning Regulation NPRMs that all of these rules implementing the performance management provisions of MAP-21 should be implemented using one effective date.

Recommendations

- AASHTO continues to recommend that FHWA implement these new requirements with one common effective date. However, AASHTO would like for FHWA to finalize and publish the rules as they are ready such that State DOTs can begin to prepare to implement the requirements. Moreover, given the complexity of integrating these new requirements into an already complex process, the rule should include a provision to allow a state to ask for and receive an extension of time to comply with the requirements so long as the state is able to show that it has made progress towards compliance and is working to achieve compliance.

- If a single effective date of implementation is not feasible, enough time needs to be made available to phase in the requirements before any penalties to go into effect. AASHTO proposed a phased-in approach that is laid out in more detail in AASHTO comments regarding the NPRM *National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program* submitted on April 23, 2015.
- AASHTO continues to monitor the publication of the final rules. FHWA is implementing the rules as they are finalized. AASHTO continues to request a phased-in implementation such that States are given enough time to develop targets and procedures.

5. PERFORMANCE MANAGEMENT

FAST ACT PROVISIONS OF CONCERN AND CORRESPONDING RECOMMENDATIONS

Reporting Cycle and Penalties

The FAST Act changes from two to one the number of reporting cycles after which penalties are imposed. The impact varies based upon the performance measure area. If a State DOT does not achieve or make significant progress toward achieving targets after one reporting cycle, they are required to provide a description of the actions they will undertake to achieve their targets in the future. In addition, the penalty for falling below the minimum condition levels for pavements on the interstate system is imposed after the first reporting cycle.

Recommendation

AASHTO supported the two reporting cycle provisions in MAP-21 and was disappointed to see it reduced to one as part of the FAST Act. The MAP-21 performance management provisions are new and it will take time for these provisions to be implemented. It is important that FHWA allow State DOTs flexibility to implement the provisions in such a way as to support success.

Performance Data Support Program

The FAST Act includes new provisions to enable the USDOT to better support the State DOTs, MPOs, and FHWA in the collection and management of data for performance-based planning and programming. These data-related activities are funded at $10m per year over the five year duration of the FAST Act.

Recommendation

AASHTO encourages USDOT to spend the money necessary to obtain the best data and tools possible for these programs as data collection and management is one of the biggest concerns of the State DOTs when it comes to implementing the MAP-21 performance management and performance-based planning provisions. AASHTO also encourages USDOT to work collaboratively with both the State DOTs and MPOs as the data and tool needs are identified and the program is implemented.

- AASHTO continues to encourage FHWA to develop robust performance data support program. AASHTO has included in its PM3 NPRM comments the need to develop a national-level tool.

PENDING MAP-21 IMPLEMENTATION ISSUES AND RECOMMENDATIONS

FHWA Transportation Performance Management Technical Assistance Program

Recommendation

AASHTO fully supports FHWA's current efforts to implement a TPM Technical Assistance Program that will provide support to State DOTs and MPOs as the new performance management provisions are implemented. Already, the development of the TPM Toolbox as well as the TPM peer exchanges and workshops have been well received.

- AASHTO continues to work with FHWA in developing and implementing the TPM technical assistance program.

Implementation Timeframe of Performance Management Provisions

AASHTO has stated in previous comments on the PM1, PM2, Risk-based Asset Management Plans and updated Joint Planning Regulation NPRMs that all of these rules implementing the performance management provisions of MAP-21 should be implemented using one effective date.

Recommendations

- AASHTO continues to recommend that FHWA implement these new requirements with one common effective date. However, AASHTO would like for FHWA to finalize and publish the rules as they are ready such that State DOTs can begin to prepare to implement the requirements. Moreover, given the complexity of integrating these new requirements into an already complex process, the rule should include a provision to allow a state to ask for and receive an extension of time to comply with the requirements so long as the state is able to show that it has made progress towards compliance and is working to achieve compliance.
- If a single effective date of implementation is not feasible, enough time needs to be made available to phase in the requirements and for the penalties to go into effect. AASHTO proposed a phased-in approach that is laid out in more detail in AASHTO comments regarding the NPRM *National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program* submitted on April 23, 2015.
- AASHTO continues to monitor the publication of the final rules. FHWA is implementing the rules as they are finalized. AASHTO continues to request a phased-in implementation such that States are given enough time to develop targets and procedures.

Pavement and Bridge Measures Final Rule (PM2)

Recommendation

AASHTO filed extensive, common-sense comments on these proposed rules. As such, USDOT is encouraged to promptly incorporate AASHTO's recommendations into its proposed rules and then issue final rules.

- The final rule has not been published.

System Performance Measures Final Rule (PM3)

Recommendation

AASHTO encourages USDOT to continue to focus on the publication of both the Notice of Proposed Rulemaking and then the final rule concerning the establishment of national-level system performance measures. The performance measure provisions of MAP-21 are new and will significantly affect State DOTs. AASHTO looks forward to working with FHWA in the implementation of the performance measure rules.

- AASHTO submitted the final PM3 comments on August 15, 2016.

Publication of the Updated FHWA/FTA Metropolitan and Statewide Planning Regulations

MAP-21 made significant changes to the metropolitan and statewide planning requirements. While USDOT has published a draft of the new regulations, a final version has not been published and continues to be delayed. In fact, the FAST Act requires that the new multimodal state freight plans be coordinated with the performance-based planning process established under MAP-21. These new performance-based planning regulations will have a significant effect on the planning process.

Recommendation

As AASHTO filed extensive, common-sense comments on the proposed planning rules, USDOT is encouraged to promptly incorporate AASHTO's recommendations into its proposed rules and then issue final rules.

- The updated planning rule has been published. In addition, FHWA published an MPO coordination NPRM that significantly changes the MPO boundary requirements. AASHTO is commenting at this time.

Publication of the Risk-based Asset Management Plan Regulations

Recommendation

AASHTO filed extensive, common-sense comments on these proposed rules. As such, USDOT is encouraged to promptly incorporate AASHTO's recommendations into its proposed rules and then issue final rules.

- The final rule has not been published.

Provide Immediate Guidance on Effective Date of Penalties Associated with Bridge Condition Performance Measures

MAP-21 clearly articulated the penalties that would be imposed if a State DOT did not meet the minimum threshold for the condition of bridges on the National Highway System. Under section 1106 (23 U.S.C. 119(f)(2), MAP-21 § 1106(a)), the secretary establishes a date of determination for when the penalty would be imposed, if warranted. Through the FHWA MAP-21 fact sheets, FHWA established October 1, 2016 as the date when the penalty will be imposed and would use the preceding three federal fiscal year worth of bridge date to determine if the minimum condition threshold had been met.

AASHTO has significant concerns that this self-imposed date is not realistic for two reasons. First, given the fact that the regulations that would define the criteria for determining structurally deficient bridges (proposed CFR 490.411) has not been published and likely will not be published until July 2016 at the earliest. Second, the date of determination affords State DOTs no opportunity to implement a maintenance or rehabilitation program to effectively meet the minimum condition threshold.

Recommendation

AASHTO strongly recommends that the 3-year period be modified such that it is based upon the effective date of the Pavement and Bridge Measure Final Rule (PM2) such that State DOTs have enough time to assess the condition of their bridges (based upon the criteria to be defined in proposed CFR 490.411) and implement a maintenance and rehabilitation program in order to meet the minimum thresholds, if needed.

6. ASSET MANAGEMENT

PENDING MAP-21 IMPLEMENTATION ISSUES AND RECOMMENDATIONS

Publication of the Risk-based Asset Management Plan Regulations

Recommendation

AASHTO filed extensive, common-sense comments on these proposed rules. As such, USDOT is encouraged to promptly incorporate AASHTO's recommendations into its proposed rules and then issue final rules.

- The final rule has not been published.

Implementation Timeframe of Performance Management Provisions

AASHTO has stated in previous comments on the PM1, PM2, risk-based asset management plans and updated planning regulation NPRMs that the performance management provisions should be implemented using one effective date.

Recommendations

- AASHTO continues to recommend that FHWA implement these new requirements with one common effective date. However, AASHTO would like for FHWA to finalize and publish the rules as they are ready such that State DOTs can begin to prepare to implement the requirements. Moreover, given the complexity of integrating these new requirements into an already complex process, the rule should include a provision to allow a state to ask for and receive an extension of time to comply with the requirements so long as the state is able to show that it has made progress towards compliance and is working to achieve compliance.
- If a single effective date of implementation is not feasible, enough time needs to be made available to phase in the requirements and for the penalties to go into effect. AASHTO proposed a phased-in approach that is laid out in more detail in AASHTO comments regarding the NPRM *National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program* submitted on April 23, 2015.
- AASHTO continues to monitor the publication of the final rules. FHWA is implementing the rules as they are finalized. AASHTO continues to request a phased-in implementation such that States are given enough time to develop targets and procedures.

Pavement and Bridge Measures Final Rule (PM2)

Recommendation

AASHTO filed extensive, common-sense comments on these proposed rules. As such, USDOT is encouraged to promptly incorporate AASHTO's recommendations into its proposed rules and then issue final rules.

- The final rule has not been published.

System Performance Measures Final Rule (PM3)

Recommendation

AASHTO encourages USDOT to continue to focus on the publication of both the Notice of Proposed Rulemaking and then the final rule concerning the establishment of national-level system performance measures. The performance measure provisions of MAP-21 are new and will significantly affect State DOTs. AASHTO looks forward to working with FHWA in the implementation of the performance measure rules.

- AASHTO submitted the final PM3 comments on August 15, 2016.

Publication of the Updated FHWA/FTA Metropolitan and Statewide Planning Regulations
MAP-21 made significant changes to the metropolitan and statewide planning requirements. While USDOT has published a draft of the new regulations, a final version has not been published and continues to be delayed. In fact, the FAST Act requires that the new multimodal state freight plans be coordinated with the performance-based planning process established under MAP-21. These new performance-based planning regulations will have a significant effect on the planning process.
Recommendation
As AASHTO filed extensive, common-sense comments on the proposed planning rules, USDOT is encouraged to promptly incorporate AASHTO's recommendations into its proposed rules and then issue final rules.

- The updated planning rule has been published. In addition, FHWA published an MPO coordination NPRM that significantly changes the MPO boundary requirements. AASHTO is commenting at this time.

7. BRIDGE AND DESIGN STANDARDS

FAST ACT PROVISIONS REQUIRING FURTHER CLARIFICATION

- What constitutes "current guidance and regulation" and how does the flexibility associated with design standards provisions of the FAST Act impact the design exception process and the value engineering requirements for projects greater than $25 million?
- What is the mechanism for a state to allow the use of a differing design publication? (Sec 1404(b))
- Which local jurisdictions are direct recipients of federal funds under Sec 1404.b.1, and/or which programs would Sec 1404(b)(1) apply to?
- What roadway design publications are "recognized by the Federal Highway Administration?" (Sec 1404(b)(2)(A))
- What constitutes adoption of a roadway design publication by a local jurisdiction? (Sec 1404(b)(2)(B))

FAST ACT PROVISIONS OF CONCERN AND CORRESPONDING RECOMMENDATIONS

Design Standards

The FAST Act amended 23 USC 109, which provides general guidance on the design of roadways on the National Highway System and requires FHWA to establish specific design criteria. FHWA meets this requirement through periodic rulemakings that adopt various design standards and specifications from AASHTO and other organizations. This includes *A Policy on Geometric Design of Highways and Streets* (the Green Book) and the *LRFD Bridge Design Specifications*, among others. The most recent rulemaking was completed in October 2015.

<u>Recommendations</u>

- As the provisions in Sec 1404 have direct impact on the state DOTs and the safety of the traveling public, AASHTO requests that proposed changes be developed in consultation and coordination with the appropriate AASHTO committees.
- The FAST Act adds to the general guidance provided in 23 USC 109 by requiring that designs consider "cost savings by utilizing flexibility that exists in current guidance and regulations". Further clarification will be required to determine what form the consideration will have to take and what makes up "current guidance and regulations". AASHTO recommends a State be allowed to certify that it considered the matter; should USDOT insist on more, USDOT should require minimal documentation of this consideration.
- The FAST Act also requires that the FHWA specifically consider the *AASHTO Highway Safety Manual* and NACTO's *Urban Street Design Guide* when establishing design criteria. These publications were considered during the most recent rulemaking process, and neither were formally adopted. We anticipate that it will be at least a couple of years before FHWA conducts another design standards rulemaking. Until that happens, the standards adopted in October 2015 remain the official design standards for NHS roadways. FHWA has recognized and encouraged the use of other publications, including the NACTO Urban Street Design Guide, as design guidance, intended to supplement those standards and specifications adopted through rulemaking. For official standards and specifications, AASHTO recommends that FHWA continue its support of "the use of guides that national organizations develop from peer-reviewed research, or equivalent guides developed in cooperation with State or local officials…" – *Design Standards for Highways, FHWA Final Rule, 80 Federal Register 197 (October 13, 2015), p 61302*

- The FAST ACT provides for local jurisdictions to use different design standards than those used by the state on federally funded projects, provided certain provisions are met. These provisions require that the local jurisdiction be a direct recipient of federal funds for that project, and that the roadway standards to be used are recognized by FHWA and adopted by the local jurisdiction. While we are trying to locate a list of local jurisdictions who are direct recipients of federal funds, it appears to be a limited number who receive funds mainly through certain programs, such as TIFIA and TIGER. This provision does not appear to apply to localities serving as sub-recipients for receiving federal aid funds. Further clarification will be required to determine which roadway standards are "recognized" by FHWA and thus meet this requirement. AASHTO recommends that the local jurisdictions allowed use of different design standards be familiar with the FHWA requirements that normally fall to the states, and that the recognized roadway standards consist of published or easily accessible documents developed by national organizations from peer-reviewed research.

PENDING MAP-21 IMPLEMENTATION ISSUES AND RECOMMENDATIONS

Bridges

See *Section 5. Performance Management*.

8. RESEARCH AND INNOVATION

FAST ACT PROVISIONS OF CONCERN AND CORRESPONDING RECOMMENDATIONS

Reduction in Funding for Existing Research Activities at the Federal level

While the FAST Act provides a slight increase in federal research and technology funding, it reduces the flexibility of that funding by designating three new efforts to be funded from Highway Research and Development (R&D) funds, the Technology and Innovation Deployment Program (TIDP), and/or the ITS Research program. These efforts include:

- Establishment of a program to deploy advanced transportation and congestion management technologies ($60 million per year);
- Grants to States to demonstrate user-fee-based alternative revenue mechanisms to ensure the long-term solvency of the Highway Trust Fund ($15 million in FY 2016, $20 million per year thereafter); and
- A study by TRB on needed upgrades and repairs to the Interstate Highway System to meet the demands of the next 50 years (up to $5 million).

In addition, USDOT is authorized to use *up to* $10 million per year to develop, use, and maintain data sets and data analysis tools to assist State and MPO performance management activities. (This was requested in GROW America, but was not intended to be funded from R&D.)

Because these new activities are mandated in the research title of the FAST Act without a commensurate increase in funding, existing federal research programs, as well as some programmatic efforts funded with research funding, will face funding constraints. After accounting for the three research funding emphasis areas newly specified by the Congress, the FAST Act reduces the level of discretionary funding in the R&D, TIDP, and ITS programs by approximately 25%, or from about $265 million per year to about $200 million per year.

Recommendation

Given the potential for the elimination or significant reduction in funding of current federal efforts funded through R&T programs (and their secondary impacts on related state research or other programmatic efforts), AASHTO recommends that FHWA coordinate with States prior to deciding which programs to delay, reduce, or eliminate funding for to help ensure that priority research and programmatic activities are not adversely impacted or can be accommodated through alternate means.

PENDING MAP-21 IMPLEMENTATION ISSUES AND RECOMMENDATIONS

Higher Federal Cost Share

23 USC 120(c)(3) allows USDOT to permit a higher Federal match (lower non-Federal match) for a project utilizing innovative project delivery. There have been instances where a project approach has been denied treatment as innovative, even though the approach is rarely used in the state, because it had been tried before, though hardly institutionalized.

Recommendation

USDOT should not discourage broader use of innovative project delivery through narrow application of its authority under 23 USC 120(c)(3) to increase project match for innovative delivery approaches.

9. HIGHWAY SAFETY

FAST ACT PROVISIONS OF CONCERN AND CORRESPONDING RECOMMENDATIONS

Certain HSIP Eligibilities

Recommendation

Though Section 1113(a)(1)(B) eliminates eligibility for projects to provide infrastructure and infrastructure-related equipment to support emergency services, given that 23 USC 148(a)(4)(B)(xi) "installation of a priority control system for emergency vehicles at signalized intersections" and 23 USC 148(a)(4)(B)(xv) "planning integrated interoperable emergency communications equipment, operational activities, or traffic enforcement activities (including police assistance) related to work zone safety," these activities should be considered eligible under the HSIP.

Non-infrastructure Eligibilities Under the Highway Safety Improvement Program

The FAST Act (section 1113) amended 23 USC 148 to revise the definitions of what is a Highway Safety Improvement Project. The change effectively restricts HSIP eligibility to only 28 strategies, activities or projects listed in the legislation, eliminating the ability to use HSIP funds for public awareness and education efforts, infrastructure and infrastructure-related equipment to support emergency services, and enforcement of traffic safety laws that are identified in the states' Strategic Highway Safety Plans. SAFETEA-LU and MAP-21 had provided the flexibility to deploy additional enforcement to problem areas and help reverse a trend of increasing crashes on specific highway segments. AASHTO understands FHWA will consider the change in Highway Safety Improvement Program eligibility to be in effective as of the date the FAST Act was passed and that further obligation of MAP-21 funds will need to follow the FAST Act requirements.

Recommendations

- Retain eligibility of unobligated pre-FAST Act HSIP dollars based on the statute under which the funding was originally provided.
- Allow any state to promptly amend its HSIP program to the extent needed to conform to new statutes.

10. PUBLIC TRANSPORTATION

FAST ACT PROVISIONS REQUIRING FURTHER CLARIFICATION

Bus and Bus Facilities Formula Grants

Questions

- For the Bus and Bus facilities competitive grants/ set aside for low and no emission vehicles: How can FTA help the State DOTs look at what has been effective deployment of low and no emission vehicles in rural settings?
- In MAP-21 (Section 20029. Bus and Bus Facilities Formula Grants), small urbans could not be direct recipients. In the FAST ACT (Section 3017. Grants for Bus and Bus Facilities), will new language allow for small urbans to be direct recipients, similar to pre- MAP-21?
    - FTA responded that they intended to have the direct recipient status the same as under the 5307 and 5311 programs. However, because Section 5339 says limit recipients to State and local government entities that "operate fixed route bus service," the small urbans can be direct recipients of 5339 funds as long as they are fixed route operators. The FAST Act language excludes demand response operators, but FTA is looking into the issue and may publish that information in the Federal Register.

Buy America Procurement

Question

How will the new Buy America requirements impact vehicle procurements?

Innovative Procurement

Questions

- How does this language differ from current FTA regulations?
- Many states already do statewide contracts for their subrecipients, following FTA regulations. What new authority and opportunities does this language provide?

Section 5310 Pilot Program for Innovative Access and Mobility

Questions

- How is FTA going to implement this?
- If through a NOFA, when and how many (one, more than one?
- How does FTA think state DOTS might take advantage of this funding opportunity on behalf of their Section 5311 and 5310 subrecipients?
- Is FTA planning on going beyond the specific provisions—specifically will the NOFA solicit "other" projects? (The law defines three project types: (A) deploy coordination technology; (B) create or exchange one call/one click and (C) Other projects as determined by appropriate by the secretary). Will the NOFA define type (C) projects?
- Will FTA encourage projects under this program to build on work that has been funded under the VTCLI, which was often used by state and regional agencies to create or enhance one call/one click centers?

Technical Assistance and Workforce Development—Innovative Public Transportation Frontline Workforce Development Program

Questions

- Does FTA have any thoughts on how State DOTs could take advantage of this funding opportunity on behalf of their Section 5311 and 5310 subrecipients?
- FTA has previously done workforce grants under the Ladders of Opportunity Program. Can FTA share, with AASHTO, information about any projects done by State DOTs for their subrecipients?

Improved Public Transportation Safety Measures

Questions

- Can FTA provide any insights into why Congress added this new requirement for a national rulemaking on protecting drivers from assault? What does FTA believer are the transit specific technologies/practices that can be *regulated* to reduce assaults? The FAST act language seems to presuppose the proposed regulations will deal largely with vehicle technology, such as what?
- The Fast Act language specifically allows FTA to address this rulemaking differently for rural bus systems than urban bus systems. What dialogue is possible between AASHTO's SCOPT and MTAP prior to FTA issuing the required NPRM under this section to ensure the proposed rules are relevant and appropriate for rural settings? What information and data does FTA have that defines the nature of the bus driver assault issue within rural areas?

FAST ACT PROVISIONS OF CONCERN AND CORRESPONDING RECOMMENDATIONS

Bus and Bus Facilities Formula Grants

In the Statewide applications for Bus and Bus Facilities section of the FAST ACT, a State may submit a statewide application on behalf of a public agency or private nonprofit organization for which the State allocates funds.

Recommendation

States should have the flexibility to apply for a lump sum (i.e. without defining specific projects and specific subrecipients) or to apply for a specific amount of funding for a specific project and subrecipient who are not eligible to apply directly.

PENDING MAP-21 IMPLEMENTATION ISSUES AND RECOMMENDATIONS

FTA Asset Management and Safety Rules

Recommendation

AASHTO filed extensive, common-sense comments on these proposed rules. As such, USDOT is encouraged to promptly incorporate AASHTO's recommendations into its proposed rules and then issue final rules.

11. RAIL TRANSPORTATION

FAST ACT PROVISIONS REQUIRING FURTHER CLARIFICATION

Rail Grant Programs in FAST ACT

Questions

- What criteria will be used in the establishment of these new grant programs for capital, operating and safety?
- Who will be the eligible recipients of the new grant programs?