



ASSOCIATION  
OF  
METROPOLITAN  
PLANNING  
ORGANIZATIONS

July 7, 2009

Acting Deputy Administrator Jeffrey F. Paniati  
Federal Highway Administration  
Room E87-314  
1200 New Jersey Ave. S.E.  
Washington, DC 20590-9898

Dear Deputy Administrator:

We are writing on behalf of the member metropolitan planning organizations (“MPOs”) of the Association of Metropolitan Planning Organizations (“AMPO”) with regard to serious concerns about proposed rescissions of federal funds previously committed to metropolitan transportation planning.

AMPO represents metropolitan planning organizations across the United States, of which there are 385 ranging in designated population size of 50,000 to several million. MPOs perform essential planning and coordinating of America’s critical transportation infrastructure systems in urban regions. The role of MPOs is all the more essential to the our national transportation network and American’s economic recovery now that MPOs are called upon to implement a large portion of the \$27 billion in stimulus projects funded by the American Recovery and Reinvestment Act of 2009. Moreover, MPOs are increasingly providing leadership in reducing global warming greenhouse gases and other environmental efforts, and may have additional planning responsibilities in these areas, as illustrated by the recent passage by the U.S. House of Representatives of the American Clean Energy and Security Act of 2009, H.R. 2998 § 222, which would amend title 23 to require MPOs to establish “targets and strategies” to reduce greenhouse gases through transportation planning activities.

Specifically, we wish to ensure that recent rescissions of transportation funding stemming from fiscal year 2009 appropriations do not erode these essential planning functions by rescinding metropolitan planning funds (known as “PL” funds), which are legally not subject to rescission.

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

funding. The funding set aside for PL has increased a mere 0.25% since 1991, and costs for MPOs routinely exceed available funding. Rescission of PL funds in 2008 has already forced loss of jobs, layoffs, delays in planning and project delivery, and inability to continue critical planning tasks.

## Background

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

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

Pub. L. 110-140 § 1132(a), 121 Stat. 1492 (H.R. 6) (Dec. 19, 2007) (emphasis added).

A companion provision in Section 1132(b) of EISA formerly allowed States to “make adjustments” to the distribution of rescissions by “transferring the amounts to be rescinded *among the programs* for which funds are apportioned under [23 U.S.C. ch. 1],” as long as the adjusted amount did not exceed 110% of the funds to be rescinded from each program. *See* Pub. L. 110-140 § 1132(b) (emphasis added). However, the recent transportation appropriations law expands States’ ability to control distributions (at least with regard to 2009 discretionary rescissions) by providing that “notwithstanding section 1132 of Public Law 110-140, in administering the rescission required under this heading, the Secretary of Transportation shall allow each State to determine the amount of the required rescission to be drawn from the programs to which the rescission applies.” *See* Omnibus Appropriations Act of 2009, Pub. L. 111-08, 123 Stat. 924 (Mar. 11, 2009).

Some States, and apparently FHWA,<sup>1</sup> have interpreted EISA to allow funds set aside for metropolitan planning under Title 23 (“PL” funds) to be proportionately rescinded on the same basis as funds for highway programs. Further, some States have proposed to disproportionately rescind PL funds despite the necessity for proper metropolitan transportation planning to achieve our Nation’s transportation goals. It is our view that rescission of PL funds would be illegal under current federal transportation law, and that FHWA must ensure that PL funds are not rescinded.

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<sup>1</sup> See FHWA Notice N4510.707, Rescission of Federal-Aid Apportionments (Apr. 13, 2009).

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

Chapter 1 of title 23 of the United States Code, 23 U.S.C. §§ 101-164, as amended by the 2005 SAFETEA-LU transportation law, consists of numerous sections controlling the availability, use and distribution of federal highway funds. As mandated by 23 U.S.C. § 104(b), under the heading “Apportionments” and in certain other sections of title 23 chapter 1, highway funds are allocated to states through discrete highway funding programs, which are the apportioned “programs” referenced in the 2007 EISA energy bill, including (1) the National Highway System (NHS) program; (2) the congestion mitigation and air quality (CMAQ) program; (3) the surface transportation (STP) program; (4) the interstate maintenance (IM) program; (5) the highway safety improvement program; and (6) the highway bridge replacement and rehabilitation (BR) program. Each of these programs is specifically referenced in title 23 as a “program.”

In contrast, planning funds are not considered to be a program for rescission purposes and are not apportioned in the manner of highway “programs,” but rather are taken off the top of the overall congressional appropriations for certain highway programs pursuant to section 104(f) of title 23, which provides under the separate heading “Metropolitan planning” that:

the Secretary shall *set aside* 1.25 percent of the funds authorized to be appropriated for the interstate maintenance, national highway system, surface transportation, congestion mitigation and air quality improvement, and highway bridge replacement and rehabilitation *programs* authorized under this title to carry out the requirements of section 134 [relating to metropolitan planning]

23 U.S.C. § 104(f) (emphasis added).<sup>2</sup> After setting aside PL funds, appropriated highway funds are then apportioned among the various highway programs pursuant to 23 U.S.C. § 104(b) (“after making the set-asides authorized by subsections (d) and (f) and section 130(e), shall apportion the remainder of the sums authorized to be appropriated for expenditure on the [federal-aid highway programs]”) and other provisions of title 23. Although the overall set-aside pool created by Section 104(f) is subsequently sub-allocated to states in a separate process in section 104(f)(2), there is no indication in Section 104 that the PL set-aside is considered a highway “program” for which funds are apportioned which would be subject to rescission as that term is used in EISA.

As noted, Section 104(b) itself recognizes that the planning set-aside is separate from the highway program allocation by virtue of the fact that it requires the Secretary to apportion funds to highway programs only “*after* making the set-asides authorized by subsections (d) and (f) [the set aside for planning].”<sup>3</sup> In other words, funds are apportioned to various highway programs

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<sup>2</sup> This set aside for metropolitan planning is similar to the funding earmarked for USDOT administrative expenditures under 23 U.S.C. § 104(a). Prior to the 2005 SAFETEA amendments, funding for federal expenditures was accomplished through a similar off-the-top percentage set aside from various program funds; however, with the passage of SAFETEA, Pub. L. 109-59, Congress instead specified fixed dollar amounts as authorizations for federal administrative expenditures.

<sup>3</sup> 23 U.S.C. § 104(b) provides that: “On October 1 of each fiscal year, the Secretary, after making the set-asides authorized by subsections (d) and (f) and section 130(e), shall apportion the remainder of the sums authorized to be appropriated for expenditure on the Interstate and National Highway System program, the Congestion

only after funds for planning activities are set aside. Accordingly, Congress's use of the phrase in EISA "among all programs for which funds are apportioned" could not have referred to PL funds, as those funds are not apportioned under title 23 but rather are set aside for planning purposes before apportionment to highway programs. Indeed, if Congress had intended PL funds to be subject to rescission, Congress would have specifically mentioned the PL set-aside under 23 U.S.C. § 104(f) as it did with regard to specified set-asides in Section 1132(c) of EISA, where Congress expressly indicated that certain set-asides would be subject to rescission — specifically transportation enhancement [23 U.S.C. § 133(d)(2)] and sub-allocated surface transportation funds [23 U.S.C. § 133(d)(3)]. Notably, EISA makes no mention of PL funds set aside pursuant to 23 U.S.C. § 104(f) as being subject to rescission.<sup>4</sup> If Congress believed that set-asides under title 23 chapter 1 were subject to rescission, there would have been no need for the clarification in EISA § 1132(c), thus further indicating that PL funds were not intended to be subject to rescission for fiscal years 2008 and 2009 under the mandate of EISA.<sup>5</sup>

Please note that AMPO raised this important issue last year in a letter dated August 5, 2008 in relation to rescissions under fiscal year 2008 appropriations. Although FHWA did reply by letter dated September 29, 2008, it provided no considered response to AMPO's position but rather merely noted that FHWA had already decided in Notice N4510.673 that PL funds were subject to rescission and that FHWA has treated PL as an apportioned formula program. However, FHWA did not address the core issue of whether Congress intended PL funds to be subject to rescission and whether PL is a program within the meaning of EISA given the precise language employed in the relevant statutory provisions.

Lastly, AMPO notes that, at the very least, PL funds set-aside from the Surface Transportation Program should be protected from rescission pursuant to the express exemption in the Omnibus Appropriations Act, which provides that "such rescission shall not apply to the funds distributed in accordance with sections 130(f) and 104(b)(5) of title 23, United States Code; sections 133(d)(1) and 163 of such title, as in effect on the day before the date of enactment of Public Law 109–59; and the first sentence of section 133(d)(3)(A) of such title." See Omnibus Appropriations Act of 2009, Pub. L. 111-08, 123 Stat. 924 (Mar. 11, 2009). FHWA should direct States that the proportion of PL funds attributable to those programs are not subject to rescission and may not be reduced in any way.

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Mitigation and Air Quality Improvement program, the highway safety improvement program, and the Surface Transportation program for that fiscal year, among the several States . . ."

<sup>4</sup> In SAFETEA-LU, Congress did specifically list metropolitan planning as subject to rescission, but did not do so in EISA. See SAFETEA-LU, Pub. L. 109-59, 119 Stat. 1937 (Aug. 10, 2005), which provided: "Sec. 10212. RESCISSION OF UNOBLIGATED BALANCES. (a) IN GENERAL.—On September 30, 2009, \$8,708,000,000 of the unobligated balances of funds apportioned before such date to the States for the Interstate maintenance, national highway system, bridge, congestion mitigation and air quality improvement, surface transportation (other than the STP set-aside programs), *metropolitan planning*, minimum guarantee, equity bonus, Appalachian development highway system, recreational trails, safe routes to school, railway-highway crossings, coordinated border infrastructure, and highway safety improvement programs (and separately the set aside for the high risk rural roads program), and each of the STP set-aside programs, is rescinded." (Emphasis added.)

<sup>5</sup> We also note that FHWA has determined that State Planning and Research funds (SPR) are not subject to rescission; PL funds are by law on similar footing.

## Conclusion

Based on federal law, planning funds set aside under 23 U.S.C. § 104(f) are not subject to rescissions of funding for the various federal-aid highway programs. As a result, States may not distribute rescissions by reducing funding already committed for metropolitan planning purposes. Nor may States adjust rescissions directed at various highway programs by altering the level of PL funds when applying rescissions across highway programs.

Because rescission of PL funds would be contrary to Congressional intent and would seriously undermine the transportation planning process at a critical juncture of America's economic recovery, we respectfully request that FHWA issue guidance to division offices and States clarifying the rescission mechanism and directing that PL funds not be reduced pursuant to the statutory mandate of EISA.

Sincerely,

A handwritten signature in black ink, appearing to read "DeLania Hardy". The signature is fluid and cursive, with a large initial "D" and "H".

DeLania Hardy  
Executive Director