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The United States Department of Transportation Issues Final Statewide and Metropolitan Planning Rule

On February 14th, 2007, the FHWA and the FTA released their long-awaited Statewide and Metropolitan Planning Rule (72 Fed. Reg. 7224). The final rule revises planning regulations at 23 C.F.R. Part 450 and 49 C.F.R. Part 613 to reflect the many changes made by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59 August 10, 2005). The FHWA and the FTA published a proposed rule on June 9, 2006, which drew over 1,600 comments from over 150 stakeholders, including many MPOs. AMPO submitted extensive comments on September 7, 2006, many of which are reflected or addressed in the final rule. The final rule includes a 36-page preamble responding to stakeholder comments and defending the FHWA and the FTA's positions on the rule.

In general, the final rule reflects AMPO's overall comments that the rule language should conform closely to SAFETEA-LU in many instances where the draft rule appeared to be broader than the statutory mandate. Similarly, in many places, the agencies clarified that MPOs need flexibility in the planning process depending on factors such as geographic region, size, funding, and air quality, amongst others. Highlights of significant changes from the proposed rule are summarized below:

Definitions

While most of the definitions in the final rule remained the same, the FHWA and the FTA did make some changes and added some additional definitions. Highlights include:

- In the final rule, the FHWA and the FTA have further clarified the differences between *amendments* and *administrative modifications*. The language in the final rule defines *amendment* as a "major change to a project..." in a planning document and thus would trigger the various planning requirements associated with Transportation Improvement Program (TIP) re-adoption. Amendments to illustrative projects would not require TIP re-adoption. *Administrative modifications* are defined as a "minor change" to projects in planning documents. This distinction will be especially important for MPOs who adopt TEA-21 compliant TIPs prior to the July 1, 2007 implementation deadline for SAFETEA-LU. If an MPO wishes to alter a TIP, an

administrative modification would not force the MPO to redevelop its TIP under SAFETEA-LU requirements, however if the MPO wishes to make a change that constitutes an *amendment*, the MPO would have to re-adopt a TIP that meets the requirements set forth in SAFETEA-LU.

- The final rule also re-defines *Coordinated Public Transit-Human Services Transportation plans* to mean comprehensive strategies for transit service delivery developed with transportation and human service providers along with public input. The final rule emphasizes that the coordinated plan should be locally developed, should meet the needs of individuals with disabilities, older adults, and low-income individuals, and should prioritize transportation services for funding and implementation.
- Because the final rule does not include Appendix B on Fiscal Constraint (see below), the definition section includes an additional definition of *financial plan*, to mean documentation required to be included with a Metropolitan Transportation Plan (MTP) and TIP, demonstrating consistency between reasonably available and projected sources of revenue and project implementation costs.

Transportation Planning Process

The final rule offered several, mostly minimal, changes to the transportation planning process as compared to the proposed rule. Some highlights include:

- Language in the proposed rule would have required MPOs to “Increase the ability of the transportation system to **support homeland security** and to safeguard the personal security of all motorized and non-motorized users.” AMPO commented that the language in the proposed rule exceeded the statutory requirements of SAFETEA-LU and the phrase “support homeland security” should be removed from the rule. The FHWA and the FTA agreed and removed the phrase from the final rule. This is echoed in the description of requirements for the MTP. A similar change was made in the statewide planning rule.
- The proposed rule included language that the metropolitan transportation planning process shall be consistent with the development of applicable ITS architectures. The final rule includes a parenthetical statement “to the maximum extent practicable” to make this requirement more flexible based on regional needs.
- The final rule recognizes that MPOs need flexibility with regard to inter-agency consultation, and that the MPO can establish reasonable time frames for responses. However, the consultation process must still be documented in writing.
- AMPO’s comments asked for a practical definition of “all interested parties” in the context of the development of a participation plan, defining “all interested parties” as something less than literally “all” and focus on the parties who chose to join in the process. No additional clarification was provided as to the meaning of “all interested parties”. In absence of a definition, MPOs may have some flexibility to define the

universe of potentially interested parties for outreach purposes using the rule of reason.

- The FHWA and the FTA did change the word “continual” to “reasonable”, as AMPO suggested, when discussing required comment opportunities during the metropolitan transportation planning process. This change provides flexibility to the MPOs and enables the MPOs to determine reasonable time for public comment. The FHWA and the FTA made a similar change to the statewide transportation planning process.
- While the Final Rule maintains the FHWA and the FTA imposed bright-line cutoff of July 1, 2007 for phase-in of new SAFETEA planning requirements, the language in this section of the rule was changed from the proposed rule to clarify that on or after July 1, 2007, the FHWA and the FTA will take action on new TIPs developed under SAFETEA-LU even if the MPO has not yet adopted a SAFETEA-LU compliant MTP, as long as the underlying planning process is consistent with SAFETEA-LU.
- In order to give MPOs and States more flexibility, the FHWA and the FTA changed the requirement that the Annual Listing of Obligated Projects be developed no later than 90 calendar days following the end of the State Program year by adding the phrase “or the Federal Fiscal Year”.

Transportation Improvement Programs

While the FHWA and the FTA did make subtle changes to the final rule regarding TIPs, the major issues revolve around a series of questions about TIP development that the FHWA and the FTA posed in the proposed rule:

- In the preamble of the proposed rule, the FHWA and the FTA specifically invited comments on several questions as they related to the TIP: 1) Should the agencies require MPOs that are submitting TIP amendments to demonstrate that funds are “available and committed” projects identified both in the year that the TIP is submitted and in the following year; 2) Should MPOs be required to prepare an “agreed to” list of projects at the beginning of each of the four years of the TIP, rather than just the first year; 3) Should a TIP amendment be required to move a project between years in the TIP if an “agreed to” list is required for each year? In AMPO’s comments, we opposed these changes to the TIP, with the belief that these changes would go beyond statutory authority and would effectively slow down the planning process. The FHWA and the FTA agreed, and none of these proposed new requirements were included in the final rule.

Metropolitan Transportation Plans

The FHWA and the FTA did make some changes to the MTP including:

- The final rule clarifies that the MTP need discuss only system-level “types of” environmental mitigation options at a very general level of detail, as opposed to project-specific or particular mitigation projects. The final rule includes similar language for the Statewide Transportation Plan.

Statewide Planning Issues

The FHWA and the FTA did make some changes to this section, however most were minor. One change that AMPO suggested was not made:

- In the proposed rule, the FHWA and the FTA included language that the “STIP *may* include a financial plan that demonstrates how the approved STIP can be implemented...” AMPO proposed that the regulation change *may* to *shall* because a financial plan at the State planning level would have been helpful to MPO decision-makers in understanding revenue demands and the constraints of the program. The FHWA and the FTA did not change this language.

Financial Plans / Fiscal Constraint

Financial Plans and Fiscal Constraint were a major component of the final rule. Highlights include:

- Citing AMPO’s comment that the Office of Federal Register frowns on appendices, the agencies removed Appendix B (Fiscal Constraint) from the rule, although the agencies continue to take the position that fiscal constraint includes consideration of Operations and Maintenance. The final rule clarifies, however, that the Operations and Maintenance factor is merely a review of “system-level estimates of costs and revenue sources that are reasonably expected to be available to adequately operate and maintain Federal-aid highways” and is limited to federally supported infrastructure.
- While the FHWA and the FTA did remove Appendix B (fiscal constraint) from the Final Rule, they did include language to guide MPO development of the financial plan in the text of the rule itself. This includes language that would require revenue and cost estimates for MTPs to reflect “year of expenditure” dollars based on reasonable financial accounting principles and information, beginning December 11, 2007.
- The FHWA and the FTA recognize the difficulty in creating revenue and cost estimates for the outer years of the MTP, and as a result, included language in the rule that allows cost ranges or cost bands to be used for the outer years (beyond the first ten years) of the plan as long as the future funding source(s) is reasonably expected to be able to support these cost bands.
- If the FHWA and the FTA have determined that a MTP is fiscally constrained but a revenue source is subsequently removed or substantially reduced, the FHWA and the FTA will not withdraw the original determination of fiscal constraint but they will

not act on an updated or amended MTP that does not reflect the change in the revenue situation. The final rule treats the TIP in a similar manner. This approach is consistent with AMPO's belief that transportation must be forward-focused and iterative, and that retroactive disapprovals would be inappropriate.

Environmental Issues

While the FHWA and the FTA changed parts of the proposed rule that focused specifically on environmental issues, most concerns revolved around Appendix A (Linking Transportation Planning and NEPA):

- In response to comments, the FHWA and the FTA added a disclaimer to Appendix A clarifying that the guidance document attached to the rule is not part of the rule and is not legally binding. The preamble to the rule further clarifies that MPO participation in the NEPA process is entirely voluntary. Even though AMPO believes that it would have been "cleaner" had the FHWA and the FTA removed both appendices, there is not much legal difference in having the NEPA guidance attached to the final rule (with the caveats) and having the NEPA guidance available at all. Ultimately, the issue with this guidance is that it includes significant uncertainty about the relationship between the MPO process and the NEPA process.

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The FHWA and the FTA plan to issue more guidance on SAFETEA-LU implementation as appropriate. In AMPO's comments to the docket on the proposed rule, we asked for additional guidance in a number of areas including dispute resolution mechanisms for any planning requirement involving joint decision making or information sharing; clarification of TMA versus non-TMA roles; the MPO redesignation process; incorporation of MPO documents into the NEPA process; the Congestion Management Process and how it relates to the MPO planning process; the way that Operations and Maintenance plays into the Financial Plan; and the role of the MPO in the Strategic Highway Safety Plan, among others. Please let AMPO know if there are areas where you believe additional guidance is appropriate to further clarify SAFETEA-LU implementation, the Statewide and Metropolitan planning rule, or any other rule or guidance document related to SAFETEA-LU.

Please feel free to contact Debbie Singer, AMPO's General Counsel, at 202.296.7051 or dsinger@ampo.org should you have any questions or concerns. If there is an issue in the rule that you believe your MPO cannot live with, please be aware that Final Rules can be challenged, however the process is long and costly. If you would like more information on this process, please do not hesitate to contact Debbie.