



# Memorandum

Subject: **Information:** Repayment of Preliminary  
Engineering Costs

Date: June 26, 2008

From: Dwight A. Horne  
Director, Office of Program Administration

Reply to  
Attn. of: HIPA-10

To: Division Administrators

The purpose of this memorandum is to clarify FHWA's policy regarding the time limit for Federal-aid funded preliminary engineering (PE) projects which have not progressed to the right-of-way (ROW) or the construction phase. Many questions have arisen recently regarding repayment of funds expended on projects for which no reasonable progress has been made. This memorandum provides additional guidance on when to grant time extensions to the States.

Section 102(b) of title 23, United States Code, as amended by SAFETEA-LU, requires a State to repay all Federal-aid reimbursements for PE costs on any project that has not advanced to ROW acquisition or construction within 10 years after Federal-aid funds are first made available. Part 630.112(c)(2) of title 23, Code of Federal Regulations (CFR), provides States a slightly longer timeframe in that ROW or construction must be started by the close of the tenth fiscal year following the fiscal year in which the project is authorized. Since sufficient discretion is provided to the Secretary in 23 U.S.C. 102(b), Divisions may adhere to the CFR timeframe when determining project time limits.

Where project termination is directly related to compliance with another Federal law, FHWA has had a longstanding policy of not mandating repayment of PE funds. For instance, if the FHWA and a State determined that a project would not be advanced as a result of findings during the National Environmental Policy Act (NEPA) process, no payback of PE costs would be required. To do otherwise could skew the NEPA process by causing a State to favor a "build" alternative, regardless of the environmental impacts, to avoid having to repay the PE costs associated with the NEPA review.

It is FHWA's view that 23 U.S.C. 102(b) is intended to address the matter of PE projects remaining active for indefinite periods of time. While an outright waiver of repayment of PE costs is not prescribed under this section, States may request a time extension from FHWA for repayment of Federal funds on a project that has been stalled. The request should be accompanied with sufficient justification to the Division offices. Division Administrators may grant an extension of time to begin the subsequent phase of work only if the justification is



determined reasonable and beyond the State's control. These determinations must be documented by the Divisions and be a part of the project records.

Some examples of appropriate time extensions may include:

- Litigation resulting in delay or stoppage of preliminary project design.
- Complex project consultations involving Federal, State and local agencies as well as sovereign Nations.
- Projects funded by a Congressional earmark with specific, narrow language to "plan" or "design" the project. Requiring repayment of these funds would essentially violate Congressional intent as laid out in 31 USC 1301(a), the "purpose statute".
- Where the public involvement process has altered the State's plan for satisfying the project's purpose and need.
- Projects that utilize a unique implementation or funding approach that the State is not accustomed to carrying out, such as development of public-private partnerships or other innovative financing strategies to help finance the project.

Shifting political priorities, insufficient transportation budgets and staffing should not be considered stand alone justifications for time extensions.

If a time extension is not approved, the project should be withdrawn and all Federal reimbursements credited to the Federal-aid funding program code from which the PE funds originated. The withdrawn funds and corresponding obligation authority are available to the State to use on other Federal-aid projects that meet the eligibility requirements of the original program code. Additionally, projects for which PE funds were withdrawn might eventually progress to ROW and/or construction. In these instances, the State DOT may submit a request to reinstate the PE costs incurred as of the date of the withdrawal. Division offices should not approve project reimbursements for PE costs due to redesigns caused by excessive delays to the project.

Above all, Division offices should continue to work with their State counterparts to ensure a process is in place to regularly identify those preliminary engineering projects which are nearing or are beyond their ten year limit. Additionally, Divisions should ensure that States' accounting systems have the capability to accurately identify and accumulate applicable PE costs, whether generated in-house, or via consultant contract(s), should payback be necessary. Consideration for increased emphasis in this area should be determined in the context of the Division offices' overall risk assessment process, which may also be a topic of review by FHWA Headquarters.

Questions about this policy should be referred to Vincent Barone at 202-366-4652.

#### **Attachments: Memoranda Superseded by Repayment of PE Costs Memorandum**

10/21/99 [Terminated Preliminary Engineering Projects - Payback of Federal Funds](#)

8/07/98 [Engineering Cost Reimbursement Section 1304 of the TEA-21 Implementing Guidance](#)