U.S. Department
of Transportation

Federal Highway
Administration

Memorandum

Subject: INFORMATION: Funding of Passive Improvements at Railway-Highway Crossings

Date: December 26, 2002

From: Original signed by
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Administrator (HOA-1)

Reply to: HSA-10 / HCC-30

To: Directors of Field Services
Division Administrators
Federal Lands Highway Division Engineers

This is in follow-up to Office of Safety's February 13, 2001, memorandum, "Approval of Federal Funds of Highway-Rail Grade Crossing Improvements" regarding the agency's position and necessary action following the Supreme Court's ruling relating to Norfolk Southern Railway Co. v. Shanklin. The Office of the Chief Counsel has concluded that the FHWA may fund passive improvement projects for railway-highway grade crossings, prior to the completion of a full diagnostic review provided such projects are certified to be in compliance with the Manual for Uniform Traffic Control Devices (MUTCD). This is consistent with all statutory [23 U.S.C. §§ 109(e) and 130(d)] and regulatory requirements, and recognizes the discretion and expertise of the States in selecting warning devices in accordance with either 23 CFR §§ 646.214(b)(3) or (b)(4) when they seek Federal funds for crossing improvement projects. Passive devices installed will be treated as being in compliance with 23 CFR Part 646.

The Federal railway-highway grade crossing program is not static. In fact, the program envisions a continuing assessment of all railway-highway grade crossings and provides for improvement of crossings as appropriate. Thus, even when a passive device is installed, the State must continue to assess and improve crossings in accordance with 23 USC §130 and 23 CFR Parts 646.214 and 924. This may result in a crossing being upgraded with an active device or other treatment. Furthermore, changes in the MUTCD may lead to changes in previously erected passive devices. When this occurs, that is when a crossing is recommended for improvement and is actually improved with Federal funds, then the new crossing device will be the device that is treated as being in compliance with Part 646.

This action is consistent with the decision in Norfolk Southern Railway Co. v. Shanklin, 529 U.S. 344, 146 L.Ed. 2d 374, 120 S.Ct. 1467 (2000), in which the Supreme Court disagreed with the Department's contention that installation of passive devices in the absence of a full diagnostic review was not covered by the 23 CFR §§646.214(b)(3) and (4). This is also consistent with the legislative history of the railway-highway crossings program, where Congress recognized that passive devices would continue to be used at most of the Nation's crossings. Where a diagnostic review or other analysis is not performed, approval of passive device projects funded by the

FHWA is conditioned on a certification by the States that the warning device(s) to be installed or upgraded meets the Federal standards set forth in the MUTCD, therefore, fulfilling the requirements of 23 U.S.C. § 109(e).

When Congress established the railway-highway grade crossing program by enacting 23 U.S.C. §130(d), it recognized the distinction between crossings needing active devices, and the much larger number of crossings needing only passive devices, observing that "[f]ew of these lightly-traveled crossings, therefore, have sufficient accident potential to justify train-activated protection," and provided funding "to be devoted to providing adequate signing at all such crossings." 1973 U.S.C.C.A. 1859, at 1892-93. Our decision that permitting the funding of MUTCD compliant passive device projects without a diagnostic analysis is consistent with the congressional hope and expectation that "every railroad crossing in America will be equipped with adequate warning signs located at a proper distance from the crossings, and new high visibility signs at the rail-highway crossing proper." Id.

We recognize that FHWA has frequently required a full diagnostic review as a prerequisite to a finding that a particular crossing is "adequate" for purposes of Federal funding. However, a reexamination of the law and our regulations in light of the Shanklin decision leads us to conclude that this is not the case. Our rules do set forth more extensive requirements for funding active grade crossing devices and for determining the appropriate device to be installed as a part of any highway construction. The Supreme Court determined that the funding of passive devices under these circumstances was within the more generalized reviews envisioned by 23 CFR §646.214(b)(4). Since the majority of all crossings fall under the provisions of (b)(4), passive devices would satisfy the requirement as the appropriate type of warning device. Signing and marking projects could proceed without further review upon a statement by the State DOT that the crossings to be signed and marked fall under 646.214(b)(4).

The railway-highway program is not in the same place that it was in 1972. Rather, it is quite mature and States have a wealth of information with which to make judgments and set priorities about railway-highway grade crossings. With this information, States can decide which crossings can best be treated with passive devices, either temporarily or permanently, and which might require a more careful review leading other improvements. We believe that the current program, by prioritizing grade crossing reviews, assuring that the potentially more hazardous crossings are addressed first, and warning devices fully compliant with the MUTCD are provided at every crossing, complies with 23 U.S.C. §§109(e) and 130, and 23 C.F.R. §646.214.

If you have questions or wish additional information, please contact Mr. Rudolph M. Umbs at (202) 366-2177 or Debra Chappell at (202) 366-0087 in the Office of Safety or Mr. Raymond W. Cuprill at (202) 366-1377 in the Office of Chief Counsel.