



U.S. Department  
of Transportation

**Federal Highway  
Administration**

Program  
Management  
Improvement  
Team

# Program Review

## **Section 1.9(b) Waiver Special Emphasis Initiative**

**February 27, 2015**

**FINAL REPORT**



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## Executive Summary

In 1998, FHWA Headquarters delegated the 23 CFR 1.9(b) waiver approval authority to the FHWA Division Administrators. With the passage of several years since this delegation, the Program Management Improvement Team conducted this review to understand the current state of division practices.

The review team interviewed division office staff and collected documentation supporting Section 1.9(b) waivers for the three most recent years. Based on our analysis, we determined that in general, divisions are doing a very good job of managing Section 1.9(b) waiver requests. The review confirmed the number of waivers requested by the State Department of Transportations (DOTs) and the amount of Federal-aid funding associated with these requests, are relatively low. Divisions review the requests by considering each of the requirements of Section 1.9(b). In our review of documentation accompanying these waivers, we also concluded that generally such requests are adequately supported. We believe that divisions are doing a good job of reviewing and approving 1.9(b)'s and verifying conformance with the regulatory requirements. We also noted that the FHWA Delegation of Authority (Order M 1100.1A) has not been updated since July 14, 1995, but is now in process of being updated.

The review team makes the following recommendations:

- During the current revision process, the Office of Chief Financial Officer should ensure the FHWA Delegation of Authority (M 1100.1A) specifically addresses 1.9(b) waivers.
- The Directors of Field Services, in coordination with the Office of Infrastructure and other HQ offices, should emphasize the following with division offices:
  - Use of 23 CFR 1.9(b) waivers is limited to situations where costs have been incurred outside the grant period (i.e. costs incurred prior to Project Authorization).
  - The Section 1.9(b) waiver process should not be utilized to resolve other situations of non-compliance with Federal requirements. While the divisions may require additional information or documentation in resolving other instances of non-compliance, use of Section 1.9(b) waivers is limited to instances of costs incurred outside the grant period.
  - Divisions should consider Section 1.9(b) waivers during their annual risk management cycle. Frequency and magnitude of waiver requests may be indicators of an internal control weakness and the divisions may need to



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work with the State DOT and Local partners to develop appropriate risk response strategies to mitigate future occurrences of costs being incurred prior to authorization.



## Background

In 1998, FHWA Headquarters delegated the 23 CFR 1.9(b) waiver approval authority to the FHWA Division Administrators. Since then, FHWA has not conducted a nationwide review of the division's state of practice for handling a State DOT request (23 CFR 1.9(b) waiver approval) for participation of Federal-aid funds in costs incurred prior to project authorization as allowed under 23 CFR 1.9(b).

The PMIT conducted this review to determine the current FHWA division offices' state of practice for approving/denying a State DOT request for participation of Federal-aid funds in costs incurred prior to FHWA authorization, as allowed under 23 CFR 1.9(b). The review collected division/State practices for approving/denying a State DOT's request for participation of Federal-aid funds in costs incurred prior to FHWA authorization.

As a general rule, Federal-aid highway funds may not participate in costs incurred prior to FHWA authorization (23 CFR 630.106(b)). However, in special cases, exceptions to this rule may be approved by the FHWA under 23 CFR 1.9(b). These exceptions are known as Section 1.9(b) waivers and may be granted as long as:

- the State DOT provides a detailed explanation regarding the necessity of incurring costs prior to FHWA authorization (23 CFR 1.9(c));
- the State DOT has met all requirements mandated by Federal statutes;
- the State DOT has met substantial compliance with requirements prescribed by the FHWA Administrator;
- the State DOT acted in good faith, and there exists no willful violation of Federal requirements;
- FHWA approval will not adversely affect the public;
- the cost is not in excess of the cost which would have incurred under authorization; and
- the quality of the work undertaken has not been impaired.



## Purpose and Objective

The purpose of this review was to determine the current FHWA division offices' state of practice for approving/denying a State DOT request for participation of Federal-aid funds in costs incurred prior to FHWA authorization as allowed under 23 CFR 1.9(b). This review collected division/State procedures for determining when a Section 1.9(b) waiver is required and practices for approving/denying a State DOT's request for participation of Federal-aid funds in costs incurred prior to FHWA authorization.

The objectives of this review were to:

- To determine if State DOT's Section 1.9(b) waiver request submissions follow 23 CFR 1.9(c);
- To determine what process is used by FHWA divisions to handle State DOT Section 1.9(b) waiver requests, including criteria used to make decisions;
- To determine whether there is consistency among the FHWA divisions in approving participation of Federal-aid funds in costs incurred prior to FHWA authorization and whether approval is always granted under a State DOT Section 1.9(b) waiver request;
- To determine Section 1.9(b) waiver request documentation procedures used by divisions;
- To analyze survey data to identify trends; for example, the number of waiver requests, reasons documented by State DOTs for requesting a Section 1.9(b) waiver, percent of approval and denials; etc.
- To identify document successful practices (division or State DOT).



## **Scope and Methodology**

The original scope of this National Initiative Review was centered on electronically surveying all 52 division offices to gather information related to Section 1.9(b) waiver practices including: State DOT request submissions, division office process for considering requests, criteria used to approve/deny requests, and division documentation procedures. The review team modified the scope, because a national initiative review on this subject matter had not been conducted since the approval authority was delegated in 1998. So the scope was modified from electronically surveying all 52 divisions, to surveying all 52 divisions by way of phone interviews. The review team sampled 100% of the divisions Section 1.9(b) approval/denial documentation, issued between October 1, 2011 and October 1, 2014.

Prior to surveying the division offices, the review team piloted our survey questions through a face-to-face interview with the DC and MD (formerly DelMar) Divisions. These two division pilot surveys ensured that the survey questions were comprehensive and clear. After the pilot survey was completed, the remaining 49 FHWA division offices were interviewed by phone using the survey questions. The survey questions are included in Appendix B. In addition to completion of the phone survey, divisions were requested to provide available Section 1.9(b) approval/denial documentation, issued between October 1<sup>st</sup> 2011 through October 1<sup>st</sup> 2014 (3 years). We analyzed data from the interviews, along with the waiver documentation, and developed our recommendations. These data tables are contained in Appendix A.



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## **Team Members**

Ingrid Allen, FHWA - PMI Team (Initiative Lead)

Joe Huerta, FHWA - PMI Team

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## Observations

### **In general, the divisions are administering waiver requests in accordance with the provisions of 23 CFR 1.9(b). (Observations 1-5)**

**Observation #1: The State DOTs generally provided a detailed explanation regarding the necessity of incurring costs prior to FHWA authorization (23 CFR 1.9( c )).** Of the 102 waiver requests and/or approvals of waiver requests reviewed, 82 provided a detailed explanation. Twenty of the 102 waivers reviewed contained limited information.

We reviewed these 20 requests, and found the circumstances behind these approvals were not clear in the division office's approval letters and additional information, such as supporting documentation, was not available from the division. For this reason, the team could not determine if these waivers involved costs incurred prior to authorization. These 20 requests were from a single division office, and this situation was not observed in the other 51 divisions. Though this represents nearly 20% of the waivers reviewed, the inability to produce waiver approval documentation was observed in only one division (2%) and is not considered representative of the division's state-of-practice.

Eighty-two (80%) of the 1.9(b) waiver requests reviewed contained a detailed explanation regarding the reasons costs were incurred prior to authorization. Documentation supporting these reasons for the requests is usually contained in the State DOT's transmittal letter, with some divisions having additional information contained in other submittal supporting documentation. In cases involving Locally Administered Projects (LAP's) the documentation was often prepared by the local agency and transmitted by State DOT letter supporting the LAP requests.

### **Observation #2: The divisions use the 1.9(b) waiver requirements as a basis for their decisions.**

The division offices use the established CFR criteria below as the basis for their decision in approving/denying State DOT waiver requests:

- the State DOT has met all requirements mandated by Federal statutes;
- the State DOT has met substantial compliance with requirements prescribed by the FHWA Administrator;
- the State DOT acted in good faith, and there exists no willful violation of Federal requirements;
- FHWA approval will not adversely affect the public;
- the cost is not in excess of the cost which would have incurred under authorization; and
- the quality of the work undertaken has not been impaired.



The review team did not perform an independent review of the support documentation for each 1.9(b) waiver to determine if the team was in agreement with the analysis and approval. Rather, this review concentrated on what documentation was received in support of the waiver request, to determine if the requirements of 1.9(b) had been addressed. The review team's expectation was that waiver requests would include documentation for division consideration of the 1.9(b) requirement criteria during the review process. We often found statements addressing the requirements were either included in the State DOT's transmittal letter, and/or included in the division office approval letters. In other cases, the review team had to dig a little deeper into the submittal documentation to find discussion on each requirement.

As previously discussed, 20 of the 102 waivers reviewed contained only limited information. Below is a summary of how each of these requirements is typically documented within the remaining 82 waivers reviewed:

**Requirement: The State DOT has met all requirements mandated by Federal statutes;**

Of the 82 Section 1.9(b) waiver requests reviewed, all approval letters (or documentation in support of the approval letters) contained statements or support concerning whether Federal statutes had been met. The review team looked for an indication that the division had assured full compliance with statutory requirements. Section 1.9(b) provides the division office latitude for interpretation of substantial compliance of regulatory requirements (ex. 23 CFR and other policy and regulatory requirements). There is no provision for any latitude in compliance with statutory requirements (ex. 23 U.S.C.). In the 82 waivers reviewed, statements in the approval or submittal documentation indicated there was full compliance with statutory requirements. Often, statements concerning compliance with statutory requirements were included in the division office approval letters. This was considered a good practice, so that it is clear the division considered compliance with statutory requirements during their analysis of the waiver.

**Requirement: The State DOT has met substantial compliance with requirements prescribed by the FHWA Administrator;**

The review team looked for an indication that the State DOT and division had considered compliance with regulatory requirements. Section 1.9(b) provides the division office latitude for interpretation of substantial compliance. In the 82 waivers reviewed, there was an indication the division considered compliance with regulatory requirements, and made a determination on whether there was substantial compliance. Often, statements concerning compliance with regulatory requirements were included in the division office approval letters. This was considered a good practice, so that it is



clear the division considered compliance with regulatory requirements during their analysis.

**Requirement: The State DOT acted in good faith, and there exists no willful violation of Federal requirements;**

We found statements concerning whether or not the State DOT acted in good faith with no willful violation of Federal requirements were either included in the State DOT's transmittal letter, and/or in the division office approval letters. As with the other requirements noted above, it was considered a good practice when the divisions noted compliance on this issue in their approval letter.

**Requirement: FHWA approval will not adversely affect the public;**

We found statements concerning whether approval of the 1.9(b) waiver would adversely affect the public were either included in the State DOT's transmittal letter, and/or in the division office approval letters. As with the other requirements noted above, it was considered a good practice when the divisions noted compliance on this issue in their approval letter.

**Requirement: The cost is not in excess of the cost which would have incurred under authorization;**

We found statements concerning whether the cost was in excess of the cost which would have been incurred under authorization were either included in the State DOT's transmittal letter, and/or in the division office approval letters. As with the other requirements noted above, it was considered a good practice when the divisions noted compliance on this issue in their approval letter.

**Requirement: The quality of the work undertaken has not been impaired.**

We found statements concerning whether the cost was in excess of the cost which would have been incurred under authorization were either included in the State DOT's transmittal letter, and/or in the division office approval letters. As with the other requirements noted above, it was considered a good practice when the divisions noted compliance on this issue in their approval letter.

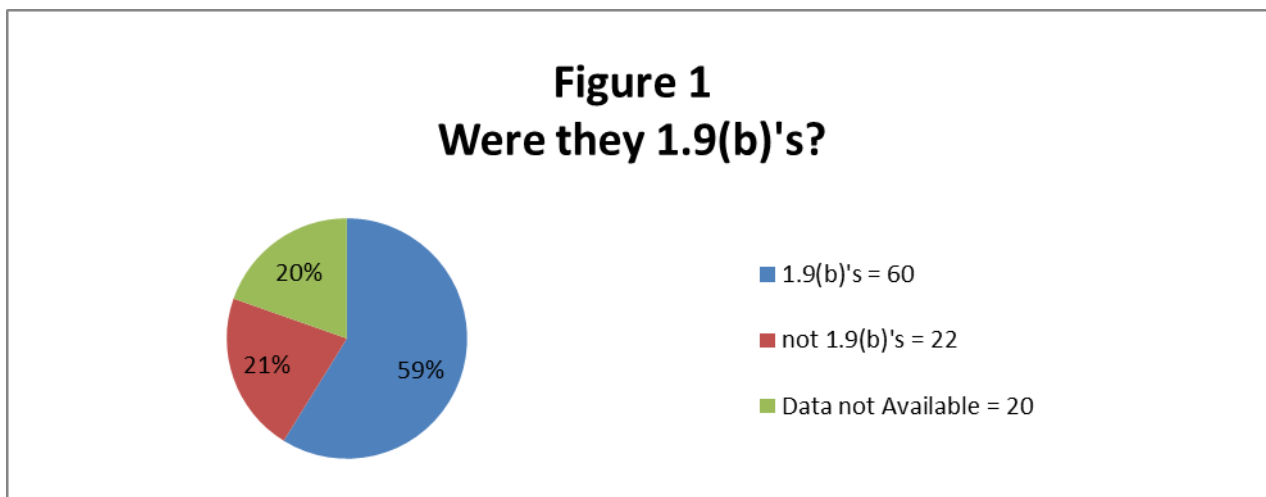
**Observation #3: In general, there is consistency amongst the FHWA divisions in approving participation of Federal-aid funds in costs incurred prior to FHWA authorization and approval is granted under a State DOT Section 1.9(b) waiver request.**

Our interviews with division personnel and reviews of their waiver approvals or denial documentation indicated that State DOTs waiver requests are generally rare, and the divisions consistently base waiver approvals and denials on the Section 1.9(b) requirements. We found no instances where divisions approved costs incurred prior to authorization using any other means or method other than the 1.9(b) process. Nor did



we find any instance where these waivers were called anything other than 1.9(b) waivers.

However, the review team did note 22 instances out of the 102 total 1.9(b) requests reviewed where the 1.9(b) process was used in a situation other than costs incurred prior to project authorization, and on an additional 20 waiver requests information was not available to determine if these waivers involved costs incurred prior to project authorization.



The details of the 22 waiver requests that were not Section 1.9(b) situations are as follows:

- In 10 instances, the divisions approved 1.9(b) waivers while a valid project authorization was already in place, but the costs incurred by the recipient had exceeded the amount of the original obligation. In these instances, the process was used to approve the eligibility of these costs prior to executing a Modified Project Agreement to increase the existing obligation. Since a valid Project Agreement was already in place, a 1.9(b) waiver was not appropriate. The division should obtain adequate information to approve execution of a Modified Project Agreement, but a 1.9(b) waiver should not be approved if a Project Authorization is in place.
- In one instance, a valid Project Authorization was in place, but the project was delayed and subsequently removed from the Statewide Transportation Improvement Plan (STIP). A 1.9(b) waiver was approved to document the project being placed back onto the STIP and that all requirements had been met. A valid Project Agreement was in place, so a 1.9(b) waiver was not appropriate.



- One division used the 1.9(b) process (4 instances) to document the addition of Form FHWA-1273's to the contract documents. The projects had evidently moved to letting without the required form in place. In all instances, a valid Project Authorization was in place, so a 1.9(b) waiver was not appropriate.
- In 4 instances, the 1.9(b) waiver process was used to document procedural errors, though a valid Project Authorization was in place.
- In 3 of the 22 instances, the State DOT's submitted a request for a 1.9(b) waiver and the two Divisions involved (New York and Virginia) properly informed the State DOT that a 1.9(b) waiver was not appropriate. In these instances, the request did not involve costs incurred outside a Project Agreement. The divisions took actions as appropriate on the project, but did not approve or deny the actions as 1.9(b) waivers.

As part of the interviews, we asked the divisions if the State DOT had been delegated approval to grant 1.9(b) waivers. Delegation of Section 1.9(b) approvals is not allowable and no divisions had attempted to delegate approval of these waivers. Approval of 1.9(b) waivers is not one of the items that may be delegated to the State DOT under 23 U.S.C. 106(c).

The review team asked the divisions how they monitored whether their State DOT was approving costs incurred prior to Project Authorization. While no division had recently performed a process review on the 1.9(b) process, divisions generally reported they had a strong relationship with their State DOT, and the State DOT would not approve such costs without discussing the situation with the division. As a method of monitoring that costs are not being incurred prior to authorization, most divisions performed Billing Reviews. Billing Reviews have a specific question on this topic. The Financial Integrity Review and Evaluation (FIRE) Program provides that Billing Reviews should be performed based on risk. The divisions also performed Improper Payment Reviews, which have specific questions relative to dates charges were incurred relative to the authorization date. The financial questions on the Compliance Assessment Program (CAP) also include questions concerning the date costs are incurred relative to the Project Authorization date.

**Observation #4: The divisions use similar procedures to document waivers.**

In all instances, a written request was provided to the division by the State DOT. Sometimes, these requests were provided in draft form and the division assists the State DOT by providing guidance on the type of additional information that should be provided. In conjunction or prior to the division office review of the State DOT's draft request submittal, some divisions met with their State DOT face to face and discussed

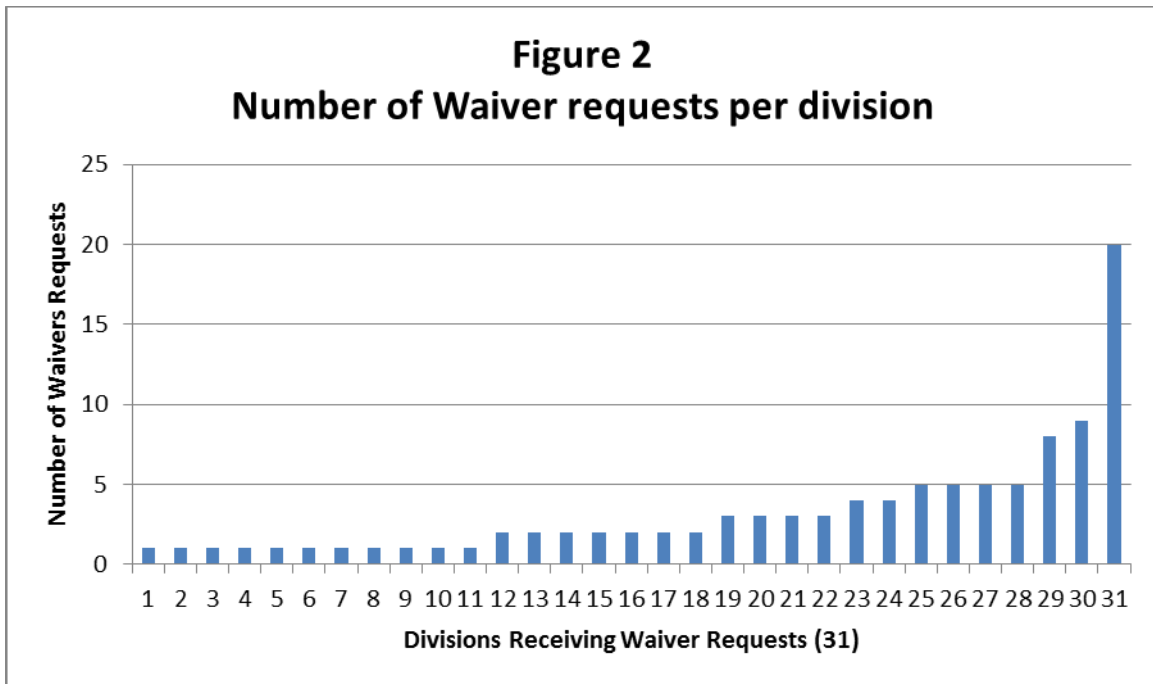


the particular circumstances surrounding the requests, before a decision was made by the State DOT to submit any type of formal request. The divisions either stamped the State DOT letter approved, or approved the waiver request by separate letter. Only a few divisions tracked the 1.9(b) waivers separately using a spreadsheet. Waivers were placed in the project folders, and some divisions also maintained a 1.9(b) folder either in hard copy or an electronic version. Several divisions stated they do not maintain a separate electronic 1.9(b) folder, because they can easily perform a search on the topic to obtain the waivers. Given the generally low number of requests in most divisions, the current tracking methods seem adequate.

No Standard Operating Procedures (SOP's) were noted, though a few divisions did have formal but unwritten procedures. Given the rarity of Section 1.9(b) waivers and the clarity of the 23 CFR 1.9(b), development of a SOP is not recommended.

**Observation #5: Survey data was analyzed to identify trends; for example, the number of waiver requests, reasons documented by state DOTs for requesting a Section 1.9(b) waiver, percent of approval and denials; etc.**

Waiver requests are rare and randomly requested. Of the 52 divisions surveyed, 31 divisions received at least one waiver request in the three year review period (from October 1<sup>st</sup> 2011 through October 1<sup>st</sup> 2014). A total of 102 waivers were received by divisions over the review period. The number of requests received during that three year time period typically ranged from 0 to 5 per division; however, one division received 8 waivers, one division received 9 waivers, and one division received 20 waivers. The division that received 20 waivers also delegated approvals of section 1.9(b) requests to non-supervisory staff and this will be discussed further in this report.



Of the 102 Section 1.9(b) waiver requests received, 90 (88%) were approved by the divisions. Discussions with several division offices, indicated instances where the number of requests had increased in the past and the division office had analyzed the reasons for the increases, and had worked with their State DOT partners to reduce the number of requests. The reasons for the requests will be discussed further in this report. As stated previously, several approvals by divisions were not 1.9(b) situations. Of the 90 approved waivers, 72 were Section 1.9(b) situations.

Of the 12 waiver requests that were not approved, 9 were denied and the remaining 3 waivers were neither approved nor denied because the divisions properly recognized the request did not involve costs incurred prior to authorization. In these 3 instances, the New York and Virginia Divisions properly informed the State DOTs that a 1.9(b) was not appropriate. Two requests were denied because they contained insufficient support documentation. Four requests were denied because the sponsor did not meet statutory and regulatory requirements and one of these four was not a 1.9(b) situation. One request was denied because the project sponsor knowingly proceeded after the project authorization had been withdrawn. One request was denied because of ongoing procedural issues the division had previously worked with the State DOT to correct. The remaining denial was due to inaccuracies in the submittal. This last request was subsequently approved when corrected information was submitted. Of the nine denials, eight were 1.9(b) situations. The nine denials represent 9% of the 102 waivers submitted during the review period.



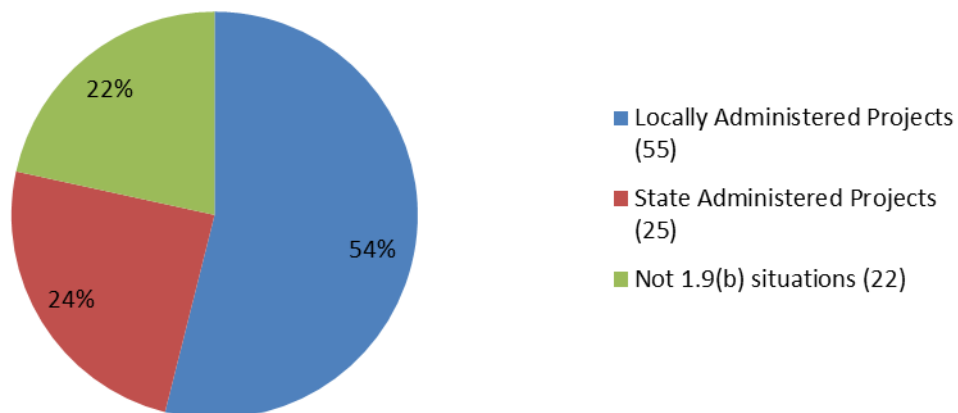


Of the 102 Section 1.9(b) waivers submitted in the review time period, 55 involved Locally Administered Projects (LAP's). Of these 55, 39 involved instances where the local agency was unfamiliar with Federal requirements and there was a lapse in oversight by the State DOT. On several of the LAP instances noted, the local agency received notification a request for funding had been granted, and the local agency assumed they could then move forward at that time. Notification letters, in most instances were clear that further coordination was necessary, but the LAP progressed without this coordination. Other LAP instances involved some of our smaller programs, such as Safe Routes to School, and unfamiliarity with program requirements at both the State DOT and LAP level created the need for the waiver. In the remaining 16 of 55 requests involving LAP's, the reasons were not available or were not clear in the documentation analyzed by this review team.

Twenty-five of the 102 waiver requests involved State DOT administered projects. The reasons for these 25 requests on State DOT administered projects included, lapse in procedures, human error, and unfamiliarity with program requirements.

As noted previously, 22 requests were not 1.9(b) instances, so the administration of these requests was not analyzed.

**Figure 3**  
**Administration of Projects**





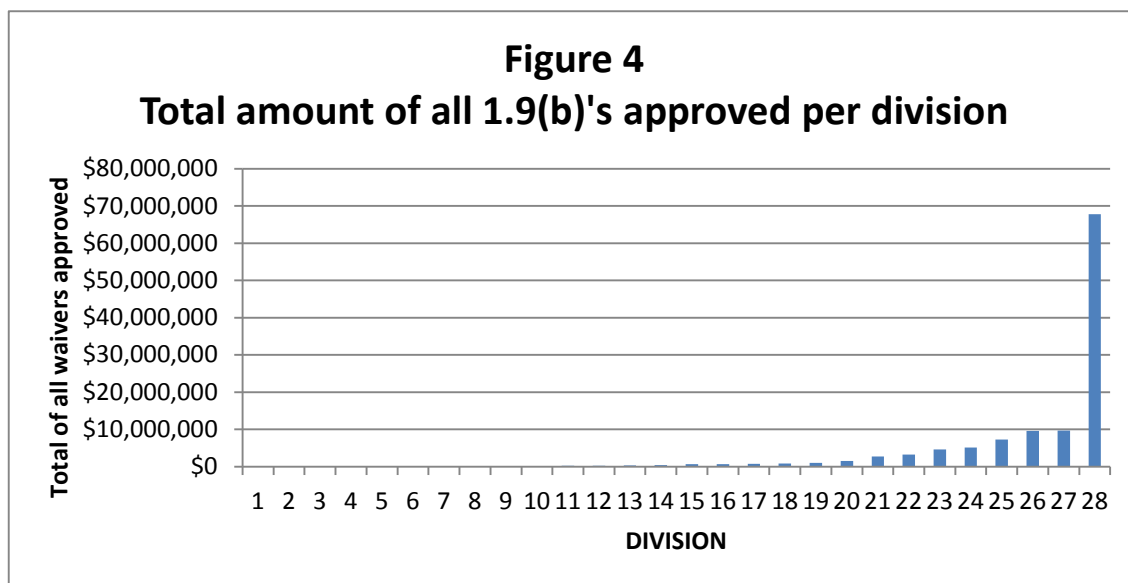


Per a February 26, 1998 memorandum signed by the FHWA Administrator, authority to approve 1.9(b) waivers was delegated to the DA. During our analysis, we learned Division Administrators (DA) retain approval authority of 1.9(b) waiver requests in 47 division offices (90%). In one division, approval is delegated to the Assistant Division Administrator (ADA). In another division, approval authority is delegated to the Director of Engineering and Operations. In another division, approval is delegated to a Team Leader, and two divisions delegate approval to non-supervisory staff. In one of the division where approval has been delegated to non-supervisory staff, 20 waivers were approved during the review time period.

Similarly, the Division Administrator (DA) retains denial authority of 1.9(b) waiver requests in 45 divisions (87%). In one division waiver denial is delegated to the Assistant Division Administrator (ADA). In another division, denial authority is delegated to the Director of Engineering and Operations. In three divisions, denial is delegated to a Team Leader, and two divisions delegated denial to non-supervisory staff.

The amount of Federal-aid funding involved in most of these waiver requests is low. Over the three year review period, the total of all 1.9(b) requests approved was \$117,228,815. Thirty-one divisions received waiver requests and 28 divisions approved Section 1.9(b) waivers during the review period. The waiver requests, that were not 1.9(b) situations, were not included in this waiver amount analysis.

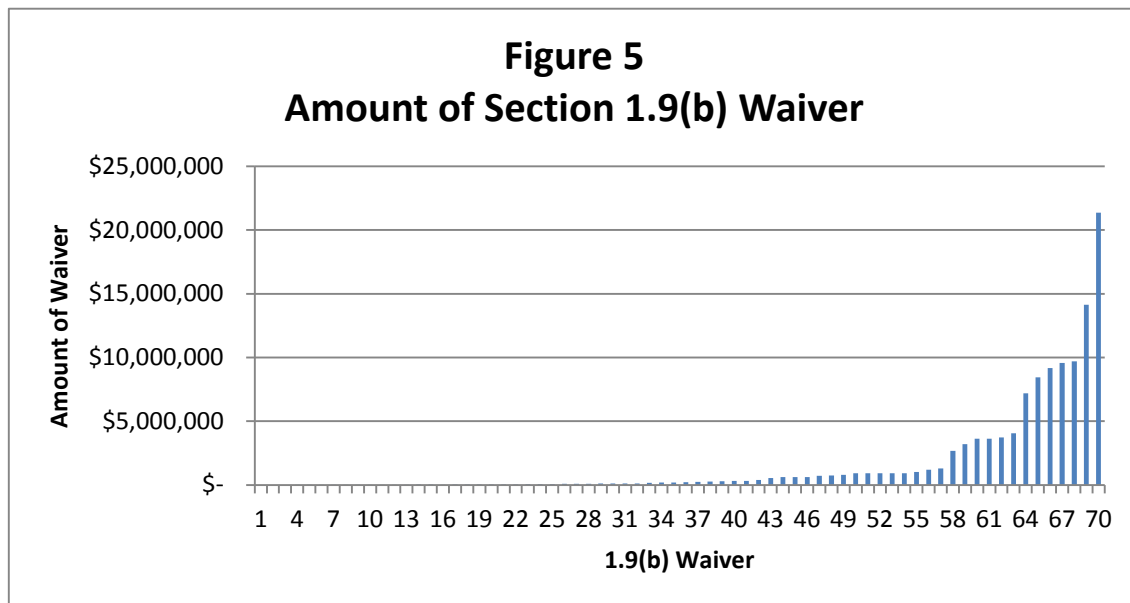
The amount of approved 1.9(b) waivers was analyzed by looking at division totals (i.e. looking at the total funding amount approved per division over the three year period), and by reviewing the funding amounts of the individual waivers.





The division totals included the following: Of the 28 divisions approving 1.9(b) waivers during the review period, eighteen divisions (64%) had approved waivers totaling less than \$1 million during the review period (i.e. the total of all waivers approved by the division during the review time period was less than \$1 million). Five divisions (18%) approved waivers totaling between \$1 million and less than \$5 million. Four divisions (14%) approved waivers totaling between \$5 million and less than \$10 million. In the remaining one division, the total amount of all approvals in the review period was just under \$68 million. This one division's approvals accounted for 58% of the total funds approved during the review period. This is also one of the divisions that delegated approval to non-supervisory staff and could not provide the documentation on their 20 approvals.

Individual Waiver amounts: The amount of each 1.9(b) waiver request was also reviewed. Of the 102 requests received, 22 were not 1.9(b) situations and 8 were 1.9(b) situations, but they were denied. Of the remaining 72 approved waivers, 2 requests reviewed by the review team did not provide cost data. Of the remaining 70 approved waivers, 28 (40%) involved costs less than \$100,000, and 54 (81%) were for amounts less than \$1 million. Only two waivers were for costs in excess of \$10 million (\$14,138,151 and \$21,354,691).





## Recommendations

Though this review confirmed divisions are doing a good job of reviewing and approving 1.9(b)'s in conformance with the regulatory requirements, we recommend the following:

- During the current revision process, the Office of Chief Financial Officer should ensure the FHWA Delegation of Authority (M 1100.1A) specifically addresses 1.9(b) waivers.
- The Directors of Field Services should emphasize the following with divisions offices:
  - a. Use of 23 CFR 1.9(b) waivers is limited to situations where costs have been incurred outside the grant period (i.e. costs incurred prior to Project Authorization).
  - b. The Section 1.9(b) waiver process should not be utilized to resolve other situations of non-compliance with Federal requirements. While the division may require additional information or documentation in resolving other instances of non-compliance, use of Section 1.9(b) waivers is limited to situations involving costs incurred outside of the grant period.
  - c. Divisions should consider Section 1.9(b) waivers during their annual risk management cycle. Frequency and magnitude of waiver requests may be indicators of a systemic root cause, and the divisions may need to work with the State DOT and Local partners to develop appropriate risk response strategies to mitigate future occurrences of costs being incurred prior to authorization.



## Successful Practices

The review team considered the division offices including a statement that addressed each of the Section 1.9(b) requirements in their approval letter a successful practice. This ensures the reasons for approval are clearly contained within the approval document. Several divisions were already doing an excellent job of including discussion on each of the requirements within their waiver approval letters.

Other successful practices included: several divisions noting that they had worked with the State DOT to make sure the request was submitted from senior leadership of the State DOT. This practice often aided in reducing the number of requests, since State DOT staff was more reluctant to seek Federal participation if they had to explain a failure in procedures to their State DOT senior leadership. This often aided in resolution of the underlying issues when senior leadership were made aware of instances where procedures had failed and then dedicated resources to strengthen the underlying root causes. Several divisions described situations where the number of waiver requests on LAP's had increased due to lack of clear procedures and guidance from the State DOT. When State DOTs increased their training and improved their guidance to the local agencies, the number of requests had decreased significantly. Many divisions required the State DOT to provide documentation in their submittal explaining the actions that have been implemented to ensure the situation requiring the waiver does not recur in the future. Requiring the State DOT to provide a discussion on remedial activities is considered a good practice.



## Conclusion

In general, the review team found that the FHWA division offices are doing a very good job of approving/denying State DOT request for participation of Federal-aid funds in costs incurred prior to project authorization, as allowed under 23 CFR 1.9(b). The number of requests and amounts of the requests are very low compared to the total size of the Federal-aid program. The team found no reason to reverse the current delegation to Division Administrators, though we recommended the FHWA Delegation of Authority (M 1100.1A) specifically address this approval action.. The team also makes no recommendation for additional reviews in this area at this time, though it may be appropriate to review waivers periodically in the future.

The review team would like to thank the division staff for their assistance and cooperation provided during the review.



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## **Appendix A - 1.9(b) Waiver Data Analysis Tables**

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**Table 2 - Number of instances and reasons for non-approvals and denials of waivers**

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**Table 8 – Number of divisions and who approves 1.9(b) waivers**

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**Table 10 - Number of divisions approving the amount specified**

**Table 11 - Total number and amount of all 1.9(b) waiver approvals**

**Table 12 – Number of waivers requested that were not eligible under 1.9(b)**

**Table 13 – Number of waivers and reasons for waivers (summary)**

**Table 14 - Number of waivers and reasons for waivers (detail by division)**

**Table 15 – Amount of each approved 1.9(b) waiver reported**

**Table 16 - Total # and total amount of 1.9(b)'s approved per division**



**Table 1 - Number of 1.9(b) waiver requests during study period and disposition**

#	Disposition
102	Total waiver requests <b>submitted</b> to FHWA (includes 22 non-1.9(b)'s)
90	Total waiver requests <b>approved</b> (includes 18 non-1.9(b)'s)
9	Total waiver requests <b>denied</b> (includes 1 non-1.9(b))
3	Waiver requests <b>not approved</b> by division (because these 3 were not 1.9(b) situations)

**Table 2 - Number of instances and reasons for non-approvals and denials of waiver requests**

#	Reasons for non-approvals and denials
2	Request denied due to insufficient support. Project Agreement was not in place. [These 2 were 1.9(b) situations.]
1	Request was denied because the LPA knowingly proceeded after the project was withdrawn. Project Agreement was not in place. [This 1 was a 1.9(b) situation.]
1	Request was denied because this was an ongoing procedural issue thought previously corrected. Project Agreement was not in place. [This 1 was a 1.9(b) situation.]
1	Request was denied due to inaccuracies in the request. Resubmittal was approved. Project Agreement was not in place. [This 1 was a 1.9(b) situation.]
4	Request denied because statutory and regulatory requirements were not followed. [3 of these were 1.9(b) situations and 1 was not a 1.9(b) situation]
3	Request did not involve costs incurred outside of grant period (not a 1.9(b)). A Project Agreement was in place. [Note: The divisions properly informed their State DOT that a 1.9(b) was not appropriate. (NY and VA)][These 3 were not 1.9(b)'s]
<b>12</b>	<b>Total non-approvals and denials during study period</b>
<b>4</b>	<b>Total non-approvals and denials that were confirmed as not 1.9(b) situations</b>
<b>8</b>	<b>Total denials that were confirmed as 1.9(b) situations</b>

**Table 3 – Number of waivers and were they 1.9(b)'s**

#	Were they 1.9(b)'s?
60	Number of waiver requests that were <b>confirmed 1.9(b)'s</b>
22	Number of waiver requests that were <b>confirmed not 1.9(b)'s</b>
20	Information not available to make a determination ( <b>unconfirmed 1.9(b)'s</b> )
<b>102</b>	<b>Total 1.9(b) requests during study period</b>





**Table 4 – Number of Section 1.9(b)'s approved and denied**

#	Section 1.9(b)'s approved and denied
22	Number of waiver requests that were confirmed <b>not 1.9(b)'s</b>
72	Number of waiver requests <b>approved</b> (both confirmed 1.9(b)'s and unconfirmed 1.9(b)'s)
8	Number of waivers <b>denied</b> (confirmed 1.9(b)'s)
<b>102</b>	<b>Total 1.9(b) requests during study period</b>

**Table 5 – Number of waivers and project administration data**

#	Administration Data
55	LAP administered projects
25	State DOT administered projects
22	Not a 1.9(b)
<b>102</b>	<b>Total 1.9(b) requests during study period</b>

**Table 6 – Number of waivers and project type data**

#	Project Type Data
16	Regular FAHP Construction Projects
7	Regular FAHP Preliminary Engineering Projects
5	Regular FAHP Right-of-Way Projects
8	Emergency Relief Projects
7	Safe Routes to School Projects
3	Utility Projects
2	Traffic Management Center Projects
2	Federal Transit Administration projects
2	Scenic Byways Projects (1 was tribal)
1	Recreational Trails Project
1	Forest Service Project
1	Corridor Border Infrastructure Project
1	RR Project
1	Transportation Enhancement Project
1	Ferry Boat Project
1	Technology Deployment Project
1	SPR fund project
20	Information not available to make a determination (all in 1 division)
22	Not a 1.9(b)
<b>102</b>	<b>Total 1.9(b) requests during study period</b>



**Table 7 – Number of divisions and use of 1.9(b) waivers**

#	Use of 1.9(b) Waivers
52	Number of division offices surveyed
42	Number of divisions that reported <b>using</b> 1.9(b)
10	Number of divisions that reported <b>not using</b> 1.9(b)
31	Number of divisions <b>receiving</b> waiver requests during the time period specified
30	Number of divisions <b>approving</b> waiver requests during the time period specified
28	Number of divisions <b>approving</b> 1.9(b) waivers (i.e. <b>this excludes non-1.9(b)'s</b> )

**Table 8 – Number of divisions and who approves 1.9(b) waivers**

#	Who approves 1.9(b) waivers?
47	Division Administrators
1	Assistant Division Administrator
1	Director of Engineering and Operations
1	Team Leaders
2	Operations Engineers / Field Operations Engineers

**Table 9 - Number of divisions and who denies 1.9(b) waivers**

#	Who denies 1.9(b) waivers?
45	Division Administrators
1	Assistant Division Administrator
1	Director of Engineering and Operations
3	Team Leaders
2	Operations Engineers / Field Operations Engineers

**Table 10 - Number of divisions approving the amount specified**

#	Number of divisions approving the amount specified below (excludes non-1.9(b)'s)
18	Number of divisions approving waivers totaling <b>less than \$1 mill.</b>
5	Number of divisions approving waivers totaling <b>between \$1 mill. and \$5 mill.</b>
4	Number of divisions approving waivers totaling <b>between \$5 mill. and \$10 mill.</b>
1	Number of divisions approving waivers totaling <b>over \$67 mill.</b>
<b>28</b>	<b>Number of divisions approving 1.9(b) waivers (excludes non-1.9(b)'s)</b>



<b>Table 11 - Total number and amount of all 1.9(b) waiver approvals during the survey period</b>	
<b>#</b>	<b>Total Amount of all 1.9(b) waiver approvals during the survey period</b>
	(Waivers confirmed as <b>not 1.9(b)</b> situations - are <b>not included</b> )
70	\$117,228,815
2	Cost information not provided
<b>72</b>	<b>Number of waiver requests approved (both confirmed 1.9(b)'s and unconfirmed 1.9(b)'s)</b>

<b>Table 12 – Number of waivers requested that were not eligible under 1.9(b)</b>	
<b>#</b>	<b>Waivers requested that were not eligible under 1.9(b)</b>
	(Listed by # of occurrences within a division – division not listed)
1	1 submitted and approved. Project Agreement was in place, but project fell off the STIP when project was postponed - 1.9(b) was used to document the project was back on the STIP and ready to proceed. This was done to "maintain integrity of process".
4	4 submitted and approved. Project Agreement was in place but project did not contain 1273 - 1.9(b) process was used to document the 1273 was being added to the project.
4	4 submitted and approved. Consultant contract overran obligation, but a valid Project Agreement was in place, so this is not a 1.9(b).
3	3 submitted and approved. Costs were incurred in excess of the obligation, but a valid Project Agreement was in place. The division approved these as 1.9(b)'s but stated they did not really consider them 1.9(b)'s. They did call them 1.9(b)'s in their approval letter.
1	1 submitted and approved. A Project Agreement was in place, but they never adjusted the obligation throughout the life of the project.
2	2 submitted and approved. Consultant contract overran obligation, but a valid Project Agreement was in place, so these were not a 1.9(b).
2	2 submitted but the division properly told the State DOT they were not 1.9(b)'s.)
4	4 submitted and approved. These four were for procedural issues, and were not 1.9(b)'s.
1	1 submitted but the division properly told the State DOT it was not a 1.9(b) issue.
<b>22</b>	<b>Total number of waiver requests submitted to FHWA that were not 1.9(b)'s</b>

<b>Table 13 – Number of waivers and reasons for waivers (summary)</b>	
<b>#</b>	<b>Reasons for waivers</b>
36	LAP - unfamiliar with program requirements and lapse in State DOT oversight of local
16	LAP - Unclear reason (13 of these in one division)
3	LAP - unfamiliar with ER (permanent repair) eligibility requirements
3	State DOT - unfamiliar with ER (permanent repair) eligibility requirements
9	State DOT - lapse in procedures



2	State DOT - human error
11	State DOT - Unclear reason (7 of these in one division)
22	Not 1.9(b)
<b>102</b>	<b>Total 1.9(b) waiver requests during study period</b>

**Table 14 - Number of waivers and reasons for waivers (detail by division)**

#	Number of and reasons for waivers (detail by division – division not shown)
1	1) LAP – local agency unfamiliar, unique project circumstances, lapse in State DOT oversight of locals, but not 1.9(b)
1	1) State DOT unfamiliar with Emergency Relief (ER) permanent eligibility requirements
4	1-4) Information not provided
2	1-2) Information not provided
5	1) Information not provided, 2-5) not 1.9(b)'s
2	1) LAP – local agency unfamiliar, unique project circumstances, lapse in State DOT oversight of locals, 2) State DOT unfamiliar with ER permanent eligibility requirements
8	1-3) Lapse in procedures, but not 1.9(b), 4-5) LAP – local agency unfamiliar and lapse in State DOT oversight of locals, 6) LAP – local agency unfamiliar and lapse in State DOT oversight of locals, but not 1.9(b), 7) State DOT lapse in procedures, 8) LAP – local agency unfamiliar and lapse in State DOT oversight of locals
20	Limited information was available, but the following reasons were provided by the division: 1-10) LAP – local agency error in project delivery, 11-15) Odd funding - better HPP/TIGER utilization, 16-20) Right-of-way protective purchase issues
1	1) State DOT lapse in procedures
2	1 - 2) State DOT lapse in procedures
5	1-3) State DOT and LAP – local agency unfamiliar with ER permanent repairs requirements, 4) State DOT human error, 5) State DOT human error
5	1-2) LAP – local agency unfamiliar and lapse in State DOT oversight of locals, 3-5) 1.9(b) process used for non 1.9(b) instance
4	1-2) LAP – local agency unfamiliar and lapse in State DOT oversight, 3) LAP – local agency unfamiliar and lapse in State DOT oversight, 4) LAP – local agency unfamiliar and FRA project with unique circumstances
2	1) State DOT lapse in procedures, 2) State DOT lapse in procedures
3	1-2) LAP – local agency unfamiliar and lapse in State DOT oversight, 3) was not a 1.9(b)
2	1-2) LAP – local agency unfamiliar and lapse in State DOT oversight, but these were not 1.9(b)'s
1	1) LAP – local agency unfamiliar with ER permanent eligibility and lapse in State DOT oversight
9	1-4, 6-7, 9) LAP – local agency unfamiliar and lapse in State DOT oversight, 5) and 8) were not 1.9(b) issues and the division properly informed the State DOT
1	1) LAP – local agency unfamiliar and lapse in State DOT oversight



1	1) LAP – local agency unfamiliar and lapse in State DOT oversight
1	1) LAP – local agency unfamiliar and lapse in State DOT oversight
1	1) State DOT lapse in procedures
1	1) LAP – local agency poor communication with their consultant and lapse in State DOT oversight
3	1-3) LAP – local agency and State DOT unfamiliar and poor oversight
3	1-3) LAP – local agency unfamiliar and lapse in State DOT oversight
2	1-2) LAP – local agency unfamiliar and lapse in State DOT oversight
5	1) State DOT unfamiliar with ER permanent eligibility requirements, 2-5) were not 1.9(b)'s
2	1) State DOT lapse in procedures, 2) not a 1.9(b)
3	1) LAP – local agency unfamiliar and lapse in State DOT oversight, 2) State DOT lapse in procedures, 3) LPA unfamiliar and lapse in State DOT oversight
1	1) LAP – local agency unfamiliar and lapse in State DOT oversight
1	1) LAP – local agency unfamiliar and lapse in State DOT oversight
<b>102</b>	<b>Total 1.9(b) waiver requests during study period</b>

<b>Table 15 – Amount of each approved 1.9(b) waiver reported</b>	
<b>#</b>	<b>Amount of each approved 1.9(b) reported</b>
	<b>[In yellow highlighted rows, amounts were not reported per individual waiver.]</b>
3	\$0
1	\$500
1	\$1,440
1	\$3,400
1	\$5,000
1	\$14,198
1	\$16,845
1	\$16,629
1	\$17,500
1	\$17,850
1	\$19,589
1	\$20,434
1	\$42,000
1	\$42,733
1	\$48,678
1	\$52,000
1	\$56,149
<b>2</b>	
<b>totaling</b>	<b>\$67,857</b>



1	\$71,995
1	\$77,639
1	\$99,684
1	\$99,940
1	\$113,342
1	\$124,933
3 totaling	\$144,592
1	\$164,357
1	\$184,000
1	\$194,000
1	\$216,914
1	\$236,794
2 totaling	\$240,820
1	\$253,935
1	\$296,290
1	\$319,346
1	\$319,525
1	\$399,932
1	\$548,500
1	\$608,699
1	\$616,646
1	\$619,900
1	\$713,671
1	\$747,092
1	\$800,000
1	\$1,015,508
1	\$1,198,942
1	\$1,300,000
1	\$2,674,331
1	\$3,200,000
1	\$3,720,233
1	\$4,060,700
5 totaling	\$4,600,000
1	\$7,176,974
2 totaling	\$7,238,681



1		\$8,454,292
1		\$9,177,965
1		\$9,563,000
1		\$9,700,000
1		\$14,138,151
1		\$21,354,691
2		no funding info provided
22		Not 1.9(b)s
8	Denials that were 1.9(b)s (amounts are not included in the above)	
<b>102</b>		<b>\$117,228,815</b>

<b>Table 16 - Total # and total amount of 1.9(b)'s approved per division</b>		
<b>#</b>	<b>Total amount of 1.9(b)'s approved per division (division not shown)</b>	
1		\$14,198
1		\$42,000
1		\$52,000
2		\$67,857
3		\$77,639
1		\$99,684
1		\$124,933
3		\$134,285
3		\$144,592
2		\$162,019
1		\$184,000
2		\$240,820
1		\$296,290
1		\$399,932
1		\$616,646
2		\$628,288
1		\$713,671
2		\$856,694
1		\$1,015,508
4		\$1,537,287
1		\$2,674,331
2		\$3,200,500
5		\$4,600,000



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

4		\$5,076,382
2		\$7,238,681
1		\$9,563,000
1		\$9,700,000
20		\$67,767,578
2		no funding info provided
8		Denials that were 1.9(b)s
22		Not 1.9(b)s
<b>102</b>		<b>\$117,228,815</b>





## **Appendix B - Survey Questions for Section 1.9(b) Waivers**

10/17/2014

1. Does your Division approve Federal-aid participation in costs incurred prior to project authorization?
  - a. If yes, what were the specific circumstances, e.g., type of project, PoDI, State DOT administered projects, or locally administered projects, the issues that resulted in cost being incurred prior to authorization, which party initially identified the issue, the Division or State DOT etc.? If the Division, how did they identify the issue? Please provide the documentation for these approvals?
  - b. Does your Division Office have a formal process, e.g., documented standard operating procedure (SOP) for dealing with these types of requests? If yes, please provide your SOP?
  - c. Was it a full or partial approval? What was the reason for the partial approval?
2. Does your State DOT approve Federal-aid participation in costs incurred prior to project authorization?
  - a. How do you know? e.g., has the Division conducted a process review on the PoDI or full Federal oversight projects, State DOT administered projects or locally administered projects regarding this matter?
3. Does your Division/State DOT approve 1.9(b) waivers?
  - a. If so, what are the reasons given by the State DOTs for incurring costs prior to authorization?
  - b. How does the State DOT submit its waiver request (e.g. phone call/verbal, email, or letter) and what kind of documentation, if any, accompanies the request?
  - c. Are there other areas of non-compliance your Division has waived under 1.9(b)? If so please explain the 1.9(b) waiver approval and the rationale associated with the approval.
4. How many 1.9 b waiver requests has your Division received from your State DOT since October 1, 2011?
  - a. Does your Division track formal and informal waiver requests from your State DOT?



5. How many 1.9(b) waivers has your Division approved since October 1, 2011?
  - a. What is the total dollar amount of these waiver approvals?
6. Who formally approves the 1.9(b) waiver request?
  - a. Who formally denies the 1.9(b) waiver request?
    - i. What were the specific circumstances behind the denials?
  - b. How is the DA aware of the informal and formal denials?
  - c. How is the DA informed of the totality of all 1.9b discussions, both formal and informal?
  - d. Was the denial because the request was not a 1.9 b? Please provide documentation for these denials?
7. Has the number of 1.9(b) waiver requests changed in recent years (as far back as the Division can remember)? If so, are waiver requests increasing/decreasing/stagnant/random? Please explain.
  - a. If there has been an increase in waiver request, what is the reason(s) for the increase? During what timeframe did the increase in waiver request occur?
8. Is additional guidance on 1.9(b) waivers needed? If YES, please describe or suggest what may be needed.