



U.S. Department  
of Transportation

**Federal Highway  
Administration**

Texas Division

May 19, 2009

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May 19, 2009

Amadeo Saenz  
Executive Director  
Texas Department of Transportation  
125 E. 11th St.  
Austin, Texas 78701

In Reply Refer To:  
HDA-TX

Dear Mr. Saenz

We are aware that the Texas State Legislature is currently considering legislation that would establish a new transportation planning and project development process in the State of Texas. Mr. Bob Jackson, General Counsel, Texas Department of Transportation (TxDOT), forwarded a copy of House Bill 300 (HB 300) to Mr. Jack Gilbert, Attorney, Federal Highway Administration (FHWA). The purpose of this letter is to inform you that based on our analysis, specifically looking at Article 2 of the bill, as requested, with regard to its funding distribution and project selection provisions, potential conflicts exist with Federal law and regulations governing the Federal-Aid Highway Program (FAHP).

Before addressing the specifics of our analysis, it is important to note that FHWA's primary concern is to ensure that Texas has a transportation agency that is suitably equipped and has adequate powers to discharge the duties necessary to remain eligible to receive all of the Federal funding available to it under the FAHP. Specifically, Section 302 (a) of Title 23 of the U.S. Code requires that each State "shall have a State transportation department which shall have adequate powers, and be suitably equipped and organized to discharge to the satisfaction of the Secretary the duties required by this title." Section 1.3 of Title 23 of the Code of Federal Regulations requires that "each State highway department...shall be authorized...to enter into, on behalf of the State, all contracts and agreements for projects and to take such action on behalf of the State as may be necessary to comply with the Federal laws and regulations in this part."

A State is free to enact any legislation that it believes best addresses its own transportation needs and goals. We want to assure the State of Texas and TxDOT that FHWA has no desire or intent to interfere with the Texas legislative process. However, as the agency responsible for the allocation and expenditure of public funds under the FAHP, FHWA must ensure that any Federal funds for transportation matters made available to the states are spent in full compliance with the requisite laws and regulations. Consistent with our Federal oversight role, we provide the following information so that the State of Texas can consider the potential conflicts noted herein during its continuing deliberations on HB 300.



The manner in which proposed HB 300 is implemented could create serious conflicts with Federal law and regulation. In reviewing Article 2 of HB 300 FHWA has identified certain provisions that are potentially problematic. A few of the major conflicts and concerns, which we noted in the short time we had available to look at this legislation and that we will continue to analyze, are as follows.

1. As noted, Article 2 of HB 300 makes substantial and significant revisions to the transportation program in the State of Texas. The Federal planning statute and regulations contain planning requirements which are not explicitly described in HB 300 as it passed the House. To continue to remain eligible for Federal funding, the proposed legislation must meet all of the Federal planning requirements under statute, SAFETEA-LU Section 6001 (codified at 23 USC §§ 134 and 135), as well as Federal regulations such as 23 CFR Part 450. The proposed legislation currently cites only Part 135, which addresses the required statewide transportation planning process. 23 USC Section 134 contains the metropolitan planning requirements. To be consistent with Federal law, compliance with all elements of 23 CFR Part 450 and 23 USC Sections 134 and 135 should be addressed in the proposed legislation. That would include, for example, development of a public participation plan in metropolitan areas, a 45-day public review of the public participation plan, and consultation with environmental resource agencies, land management agencies, and Indian Tribal Governments in developing plans, Transportation Improvement Program (TIPs) and State Transportation Improvement Program (STIPs). A financial plan must accompany the TIP and metropolitan transportation plan and a discussion of environmental mitigation as part of the metropolitan and statewide long range transportation plans should be included.

2. In Section 2.02 of the bill, the proposed Section 201.655 of the Transportation Code references the depositing of funds into Metropolitan Planning Organization's (MPO) accounts. The FAHP is a cost reimbursable program of funding allocated by federal legislation to the states. The FAHP does not have provisions for the "depositing" of federal-aid funding. This legislative language is unclear, vague and could well conflict with the FAHP. Any sub-allocation of Federal funding to various planning organizations would have to be consistent with the Federal apportionment formulae for the bridge program, urban, urbanized and rural areas, non-attainment areas, etc.

3. In Section 2.02, the proposed Transportation Code Section 201.666 provides for the transfer of funds between planning organizations. This provision also states that these planning entities may charge interest for funds so loaned. We are not aware of any provision in federal law that authorizes these measures.

4. In Section 2.02, the proposed Transportation Code Section 201.672 of the bill describes the use of allocated funds including Federal funds to support MPO planning activities. While some Federal funds, such as funding for the Surface Transportation Program (STP), can be used to support such activities, not all other Federal funds are available for planning activities (e.g., Congestion Mitigation Air Quality (CMAQ) and the National Highway System (NHS)) as suggested by the proposed legislation. Further this section appears to limit metropolitan planning organizations to a set amount of funding. Title 23 does not provide a limitation on the amount of STP, FHWA Planning Funds (PL) and Federal Transit Administration (FTA) planning allocated funds that may be used for MPO planning activities.

5. In Section 2.12, the proposed Transportation Code Sections 472.315 and 472.316, appear to exclude non-elected officials of public agencies that administer or operate major modes of transportation, such as transit operators. Further, it does not include appropriate State transportation officials. Both types of officials are required to be members of the MPO policy board by current Federal planning regulations. 23 CFR § 450.310(d).

6. Also, in Article 2 of the bill, the proposed Transportation Code Section 207.658 gives metropolitan and rural planning organizations exclusive authority to set the priority of projects for selection from the TIPs that they create. TxDOT then is compelled to include the plans designated by MPOs and Rural Planning Organizations (RPO) in its plans (§207.665). However, Federal law, 23 USC Section 134(i)(4), only authorizes Transportation Management Areas (TMAs) to have this type of authority, and only in limited situations.

Under Federal law, the MPO and the Governor are responsible for approving each of the MPO TIPs (23 CFR 450.216 (b)), the State is responsible for developing the STIP (23 CFR 450.216(a)), and each State is responsible for developing its Statewide Transportation Plan (23 CFR 450.214(a)). Taken as a whole, the provisions in Article 2 of HB 300 seem to remove from TxDOT its authority to meet its responsibilities under 23 USC Sections 134 and 135. TxDOT has the responsibility to ensure the connectivity and consistency of Federal projects from one region to another (23 CFR Part 450). If project selection rests with the MPOs and RPOs, it is unclear how projects that cross jurisdictional boundaries will be coordinated and implemented. Also, this bill appears to imperil TxDOT's ability to maintain, or cause to be maintained, projects constructed under the provisions of the FAHP (23 U.S.C. § 116). Our conclusion is that if the proposed legislation passes in its current form, the State of Texas would be unable to meet the requirements of 23 USC Section 302.

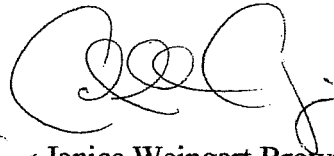
As a corollary issue, please note that we do not view the language set out in proposed Transportation Code Section 472.045 as providing a solution to the problems described in our letter. While Federal requirements applicable to the FAHP take precedence over any conflicting State law, we are concerned that the language in Section 472.045 suggests otherwise. We find the notice provision in subsection (a) particularly troublesome because it could create an expectation that compliance with conflicting Federal requirements is not necessary unless the Federal government notifies the State of the conflict between the laws.

Finally, even though we were only asked to review Article 2 of HB 300, we briefly reviewed other parts of the proposed legislation and noted additional provisions that could be found to be in direct conflict with Federal law. For example, Section 1.13 of HB 300, the proposed Transportation Code Section 201.641, delegates environmental review to local toll entities. Under current Federal environmental regulations, 23 CFR § 771.109 (c), the applicant for developing an environmental document must be a State Department of Transportation or a local unit of government acting through the State Department of Transportation. It again appears that the proposed legislation does not provide for the necessary authority of the State Department of Transportation.

Please note again that FHWA's primary interest is in ensuring that the Texas highway program is organized and equipped to deliver the FAHP in an efficient and effective manner that demonstrates fidelity with the applicable Federal laws and regulations. The proposed legislation

causes FHWA great concern as it appears to be inconsistent with core concepts of our program. We look forward to continuing to work with the State of Texas. Please feel free to contact us should you have any questions or need any further information.

Sincerely,

A handwritten signature in black ink, appearing to read 'Janice Weingart Brown', written in a cursive style.

for Janice Weingart Brown  
Division Administrator

cc: Bob Jackson, TxDOT  
Thomas Holian, FHWA