

**ISSUES FOR SURFACE TRANSPORTATION REAUTHORIZATION
US SENATE COMMITTEE ON THE ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
CHAired BY: BARBARA BOXER**

WRITTEN TESTIMONY

JOHN R. COOPER, DIRECTOR

ALABAMA DEPARTMENT OF TRANSPORTATION

APRIL 14, 2011

I want to thank the Senate Committee on the Environment and Public Works, Subcommittee on Transportation and Infrastructure, for this opportunity to express my thoughts on Surface Transportation Act Reauthorization. My name is John Cooper and I am the Director of the Alabama Department of Transportation. Since my appointment in January, I have come to realize how important federal transportation funding is to our transportation program.

In Alabama, our annual federal program funding amounts to over \$850 million in apportionments on the highway side and approximately \$23 million for transit. This is supplemented by approximately \$450 million that we have generated at the state level from our 18¢ tax on gasoline and diesel fuel. We have worked hard in Alabama to avoid debt financing and have maintained our program on a pay-as-you-go basis. We recognize the importance of the user fee concept for transportation funding.

Our recent experiences with the federal highway program have been difficult due to the numerous short term extensions. Given the fact that our federal funding is provided through “categories,” short term extensions only provide very small pots of allocated funds for each category. That may allow the funding of small projects, but not the larger projects. While our planning efforts continue, it is impossible to execute our plans because each category is not fully funded. This impacts our program, delays projects, and generally results in increased project costs.

Therefore, the first point I would like to make to the committee as you consider policies for reauthorization is increased flexibility in the program. If the number of funding categories was reduced and the states were provided flexibility to direct federal funding toward state defined priorities, it would allow us a better use of federal funds.

For example, appropriations are provided for interstate maintenance, national highway system, surface transportation program, safety, congestion mitigation and air quality, large urban areas, small urban areas, counties, transportation enhancement, bridge replacement, rail highway crossings, and other categories. It would enhance our ability to utilize our funds if the number of categories could be reduced. I believe the program could be reduced to three or four major categories. Congressional interest

could still be served and funding for eliminated categories could be maintained through eligibility protocol.

We understand, it will be extremely difficult to increase transportation funding at this time with the current economic situation. Therefore, it is important to allow increased flexibility to allow the states to use the funds available.

We realize highway trust fund receipts cannot support current expenditure levels. We are concerned that it takes periodic transfers from the general fund to maintain the solvency of the highway trust fund. We are very concerned about these actions because not only do they increase the national debt, they move us away from the user fee concept. We have been told that until a permanent fix for the highway trust fund is developed, we will be required to “live within our means.” While we understand the funding difficulties facing Congress, we believe that eventually a solution will be realized. Until then, it may be appropriate to consider a shorter term reauthorization - say in the range of two years versus a six year reauthorization to allow us the opportunity to try to develop a “fix” to the funding dilemma. I realize this is contrary to the State's normal position, but I don't believe it is in our Nation's best interest to develop long-term reauthorization principles without corresponding funding.

Another area in which I believe we could improve the states' ability to use their federal funds is in the area of regulatory changes. We believe there are regulatory changes that will enable us to do things quicker, more efficiently, and sometimes cheaper, without sacrificing environmental and other protections that Federal Regulations were intended to provide.

We are aware that the Federal Highway Administration (FHWA) is also working to review current regulations. We are participating in the “Every Day Counts” initiative which is an FHWA effort to shorten project delivery time. One over-arching change that would help deliver projects would be to reserve federal oversight to only activities of national interest. The Interstate Highway System and our National Highway System are certainly of national interest and we welcome federal oversight in these areas. The bridge replacement program is another area in which we believe there is a national interest and the federal government should be involved in that program as well.

However, when we are trying to resurface a roadway to preserve the pavement and provide a safe riding surface, it is detrimental to the overall program when regulations require ancillary improvements for which no documented need has been addressed or benefit attained can be identified.

One example is the requirement to retrofit bridge posts and rails. Crash studies have shown that the safety of bridge rails can be improved through changing the configuration from a post and rail configuration to a Jersey Barrier Configuration. We believe bridge rail retrofit should be required where there is the greatest potential to save lives.

However, when we resurface a roadway, regulations require that bridge rails be retrofitted regardless of specific safety considerations or the potential to provide a safety benefit. We believe the bridge rail retrofit program could be better served if states were allowed to develop criteria to evaluate the geometric conditions of the roadway in the area of the bridge, crash history, traffic volume, and other pertinent factors, and then use these factors to prioritize the expenditure of funds to retrofit bridge rails so that the most critical bridges are addressed first. The arbitrary requirement to replace bridge rails during the resurfacing program detracts from our ability to maintain our system, plus it ignores the approach of addressing the most critical bridge needs first.

Another example of regulatory reform is the “logical termini” regulation. The logical termini regulation requires states to consider potential environmental impacts adjacent to the project. We support this regulation in concept, but its application goes beyond what we believe is necessary to protect future environmental impacts. One example of this is a project we have been working on to improve an intersection in rural Alabama. We were required to evaluate environmental impacts for seven miles so that if future roadway improvements were made, the work at the intersection would not preclude any alternatives to be considered on the future improvements. In this situation, there were opportunities to realign or consider alternative improvements when the future work is done, that would not have been dictated by the original project. This is an area of regulation we believe needs to be addressed.

Another area of regulation requires a written evaluation of an approved environmental impact statement before a project may advance if no major action has occurred within three years. Considering the typical life of a project, a three-year time period is too short. This currently results in multiple reevaluations that are very costly and time consuming. We have reevaluations being required on projects where rights of way have already been purchased and there is no question that additional study will not cause any change in decisions made. We would like to see the regulations changed to lengthen the three-year evaluation requirement.

There are other areas of regulations that I would like to address and have included them in an addendum to my written report.

It has been suggested that the next transportation authorization include performance oriented measures. Traditionally, the Federal Surface Transportation Program has focused more on process than outcomes. This requires states to meet procedural requirements; such as, a fiscally constrained transportation plan, but ignores whether such a plan will produce an improved system. In recognition of this paradigm, Congress, the federal government, and states have acknowledged the value of a program driven by performance outcomes. Spending our limited funds to provide the greatest enhancement to our transportation system makes good sense.

I wish to express a word of caution with regard to nationally established performance standards. Not all states are alike. We each have unique needs. There is not a common set of national performance standards that could be applied equitably to all states. Should there be a desire from Congress to include performance measures in the next transportation authorization, we would ask that any requirements be directed to the states to establish their own program, tailored to their unique needs and circumstances, and avoid any national standards that compare one state against another.

We would also express caution toward creating a performance measurement program that would result in another venue of federal oversight. Any nationally established goals and objectives will likely result in additional, promulgated rules, regulations, and guidelines that could

become a reporting nightmare and avenue for greater federal control of our transportation program. In a time when we may receive fewer federal resources; federal regulations and mandates should be reduced, not expanded.

I would be remiss if I didn't express my concern over the growing emphasis on high speed rail. High speed rail does not present a viable solution to transportation issues in Alabama. While there might be some appropriate applications for high speed rail, it should not come at the detriment of our highway system. I believe it is not in the best interest of this Country to use scarce highway generated tax dollars to fund high speed rail. If this Country does wish to move in the area of travel by high speed rail, I would hope that an alternate funding source could be identified that does not dilute the already stressed highway trust fund.

The purchasing power of highway funds in Alabama has brought us to the point of almost becoming nothing more than a maintenance department. We are struggling to preserve our existing highway system and have very little available funding for system enhancements. We believe that our responsibility is foremost to preserve the investment we've already made in transportation. With current funding levels, very little funding is available for increasing the capacity of our existing roads or constructing new roads, which we still need in Alabama.

I recognize the difficult tasks facing Congress and I believe increasing flexibility and addressing regulatory reform will help enhance the value of our limited federal transportation dollars.

Thank you for the opportunity to express my comments concerning the next federal transportation reauthorization. I will be happy to address any questions you might have. Thank you.

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ADDENDUM TO WRITTEN TESTIMONY

JOHN R. COOPER, DIRECTOR

ALABAMA DEPARTMENT OF TRANSPORTATION

APRIL 14, 2011

Title of Regulation, Statute or Policy Guidance:

23 CFR §771.125 (b) The final EIS will be reviewed for legal sufficiency prior to Administration approval.

Description of Specific Issues, Problems, Shortcomings:

It is recognized that a legal sufficiency review may provide valuable input into the development of an Environmental Impact Statement to produce a document that can withstand legal challenge. However, not all EIS's will be the subject of a legal challenge. There are many projects that have overwhelming public support and the risk of a legal challenge is minimal. Projects and documents that have minimal risk of a legal challenge should be exempt from the legal sufficiency reviews. Some legal sufficiency reviews have taken over a year to complete. Other reviews have suggested additional studies even after many previous technical reviews by environmental experts. Making this an optional requirement, to be performed at the discretion of the state FHWA office, will save valuable time and cost.

Recommendation for Modification, Elimination:

Make the legal sufficiency review in 23 CFR §771.125 (b) an optional requirement, to be performed at the discretion of the state FHWA office.

Title of Regulation, Statute or Policy Guidance:

23 CFR §771.129 – Re-evaluations

Description of Specific Issues, Problems, Shortcomings:

Title 23 CFR 771.129 requires a written evaluation of an approved EIS before the project may advance if no major action has not occurred within three years. The three year time period is too short considering the typical life of a project. The three year time period requires multiple re-evaluations on projects that are costly and time consuming. FHWA has required additional studies during the re-evaluation process on projects simply because the standard method of study has changed. This has occurred on projects where rights of way have already been purchased for the approved alternate and there is no question that the additional study will not cause any change in decisions made. These studies have delayed the advancement of projects for years with no real value added to the process.

Recommendation for Modification, Elimination:

Change all references to three years in regulations regarding environmental reevaluations (23 CFR §771.129) to six years.

Title of Regulation, Statute or Policy Guidance:

Title 23 USC §109 paragraph (n) – Standards

“It is the intent of Congress that any project for resurfacing, restoring, or rehabilitating any highway, other than a highway to which access is fully controlled, in which Federal funds participate shall be constructed in accordance with standards to preserve and extend the service life of highways and enhance highway safety.”

Description of Specific Issues, Problems, Shortcomings:

It is up to each state Division Office of the Federal Highway Administration (FHWA) to decide what standards to apply that enhance highway safety. Depending on one’s interpretation, the simplest resurfacing job can become major reconstruction work in order to apply a standard that “enhances safety.” It is not believed that the intent of this law was to require that any federal money spent on a resurfacing job requires that the road be upgraded to modern standards; however, some FHWA Division Administrators are using this section of law to require the upgrading of certain features on projects. This can add unnecessary cost and time to a project. Paragraph (n) is redundant and unnecessary since paragraph (c) and paragraph (o) already address the establishment of standards.

Recommendation for Modification, Elimination:

Eliminate Title 23 USC §109 paragraph (n)

Title of Regulation, Statute or Policy Guidance:

Section 4(f) [now codified in 49 U.S.C. § 303 and 23 U.S.C. §138]

Description of Specific Issues, Problems, Shortcomings:

The regulation commonly referred to as Section 4(f), refers to the original section within the U.S. Department of Transportation Act of 1966 which established the requirement for consideration of park and recreational lands, wildlife and waterfowl refuges, and historic sites in transportation project development. The law, now codified in 49 U.S.C. § 303 and 23 U.S.C. §138, is implemented by the Federal Highway Administration (FHWA) through the regulation 23 CFR 774. Before approving a project that uses Section 4(f) property, FHWA must either (1) determine that the impacts are *de minimis*, or (2) undertake a Section 4(f) Evaluation. If the Section 4(f) Evaluation identifies a feasible and prudent alternate that completely avoids Section 4(f) properties, it must be selected. If there is no feasible and prudent alternate that avoids all Section 4(f) properties, FHWA has some discretion in selecting the alternative that causes the least overall harm. FHWA must also find that all possible planning to minimize harm to the Section 4(f) property has occurred. Section 4(f) properties include publicly owned public parks, recreation areas, and wildlife or waterfowl refuges, or any publicly or privately owned historic site listed or eligible for listing on the National Register of Historic Places. Section 4(f) only applies to funding from the US Department of Transportation and does not apply to other federal agency funded projects. State DOT's are held to a higher standard under Section 4(f) than other agencies (state or federal) whose funding comes from sources other than DOT. Properties that are "potentially" eligible for the National Register of Historic Places are already protected under Section 106 of the National Historic Preservation Act, but must also undergo the rigors of Section 4(f). Section 4(f) studies and reviews will add at least an additional year to the environmental process.

Recommendation for Modification, Elimination:

Eliminate Section 4(f) requirements

Title of Regulation, Statute or Policy Guidance:

23 USC §106 (h) – Major Projects

Description of Specific Issues, Problems, Shortcomings:

Title 23 USC §106 (h) requires that all projects over the cost of \$500,000,000 have a project management plan and an annual financial plan. It is believed this section of law was established under SAFETEA-LU in response to the scope and cost overruns associated with the Boston Tunnel. While the intent to oversee and manage costly projects is important, the level of detail these plans require is very time consuming. States with projects on the Appalachian Development (APD) Highway System are already required to prepare cost-to-complete estimates on a periodic basis following federal guidelines. Funding to the states for APD corridors is based on the cost to complete. The federal rules and funding mechanisms in place for APD corridors satisfy the intent of 23 USC §106 (h), however, FHWA is requiring a separate financial plan that follows an additional set of guidelines in order to satisfy 23 USC §106 (h). Exempting APD corridors from the duplicative 23 USC §106 (h) requirements will save time and streamline the process.

Recommendation for Modification, Elimination:

Exempt highways and projects on the Appalachian Development Highway System from the requirements of 23 USC §106 (h).

Title of Regulation, Statute or Policy Guidance:

23 U.S.C. 112 (b) and 23 CFR 635 Subpart B - Force Account Work

Description of Specific Issues, Problems, Shortcomings:

Even though Title 23 USC 112 (b) allows the use of the force account method of contracting, FHWA's interpretation of rules [23 CFR 635 Subpart B] governing the use of force account contracting has severely restricted the use of force account work. The law and rules allow force account work when it is determined to be cost effective. 23 CFR 635.204 Determination of More Cost Effective Method or an Emergency establishes the process for making a determination that force account construction is cost effective. Section 635.205 Finding of Cost Effectiveness defines work that is considered to be cost effective for force account construction due to its "inherent nature" or to protect the "rights and responsibilities of the community at large." The adjustment of railroad or utility facilities are given as examples that are cost effective due to their inherent nature. FHWA has interpreted Section 635.205 Finding of Cost Effectiveness as the only conditions under which work by force account can be allowed. The FHWA interpretation renders Section 635.204 (c) moot. FHWA guidance further states that "any noncompetitive construction contract method requires a cost effectiveness determination as well as an evaluation that demonstrates circumstances are unusual and unlikely to recur." The "unusual and unlikely to recur" condition is not supported by statute. 23 CFR 635.204 (a) states "Congress has expressly provided that the contract method based on competitive bidding shall be used by a State transportation department or county for performance of highway work financed with the aid of Federal funds unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists." The law does not require the state to demonstrate that conditions are unusual and unlikely to recur.

Significant time and cost savings can be achieved though a greater allowance of force account contracting in accordance with Section 635.204 (c).

Recommendation for Modification, Elimination:

It is requested that FHWA allow force account contracting when the conditions of 23 CFR 635.204 (c) are met.

Title of Regulation, Statute or Policy Guidance:

23 USC Section 217(g) and FHWA Guidance - (Updated April 4, 2007) Bicycle and Pedestrian Provisions of Federal Transportation Legislation

Description of Specific Issues, Problems, Shortcomings:

23 USC Section 217(g) states, in part:

(g) Planning and Design.--

(1) In general.--**Bicyclists and pedestrians shall be given due consideration** in the comprehensive transportation plans developed by each metropolitan planning organization and State in accordance with sections 134 and 135, respectively. **Bicycle transportation facilities and pedestrian walkways shall be considered, where appropriate**, in conjunction with all new construction and reconstruction of transportation facilities, except where bicycle and pedestrian use are not permitted.

FHWA Guidance - (Updated April 4, 2007) Bicycle and Pedestrian Provisions of Federal Transportation Legislation states the following:

"Due consideration" of bicycle and pedestrian needs should include, at a minimum, a presumption that bicyclists and pedestrians will be accommodated in the design of new and improved transportation facilities. In the planning, design, and operation of transportation facilities, bicyclists and pedestrians should be included as a matter of routine, and the decision to not accommodate them should be the exception rather than the rule. There must be exceptional circumstances for denying bicycle and pedestrian access either by prohibition or by designing highways that are incompatible with safe, convenient walking and bicycling.

The law clearly states that bicycle and pedestrian facilities shall be considered where appropriate. FHWA guidance has embellished the law from "consider where appropriate" to a must include condition unless not doing so can be justified. And, furthermore, "there must be exceptional circumstances" for not providing such facilities.

This places an undue burden on states to justify exceptional circumstances when not including provisions for bicyclists and pedestrians in a project.

Recommendation for Modification, Elimination:

We request FHWA rescind their guidance on the meaning of "due consideration."