

# **Supplement to January 28, 2008 “Transportation Planning Requirements and Their Relationship to NEPA Process Completion” February 9, 2011<sup>1</sup>**

## **Background**

The Office of Planning, Environment, and Realty issued an informational memorandum on January 28, 2008, explaining the relationship between certain Transportation Planning and Air Quality Conformity regulations and the timing of a final NEPA decision (Record of Decision (ROD), Finding of No Significant Impact (FONSI), or Categorical Exclusion (CE)). However, in clarifying the requirements, additional questions arose from the field after the memorandum’s release. In response to the questions, this document clarifies and simplifies information on what transportation planning requirements must be addressed before FHWA can make a final National Environmental Policy Act (NEPA) decision.

A project must meet various planning and NEPA requirements. The procedures of the different requirements, direct the project sponsors to meet all the following:

- All Projects requiring Federal action or that are to be implemented with Federal-aid must come from a fiscally constrained Metropolitan Transportation Plan (MTP) and Transportation Improvement Program (TIP) or from a fiscally constrained Statewide Transportation Planning Program (STIP) [23 CFR Part 450].
- The TIP shall include a Project, or an identified phase of a Project, only if full funding can reasonably be anticipated to be available for the Project or the identified phase within the time period contemplated for completion of the Project or the identified phase. [23 U.S.C. § 134(j)(3)(D)].
- The STIP shall include a Project, or an identified phase of a Project, only if full funding can reasonably be anticipated to be available for the Project within the time period contemplated for completion of the Project. [23 U.S.C. § 135(g)(4)(E)].
- NEPA project approval can only be given when the NEPA documents meet all applicable environmental laws and Executive Orders or reasonable assurances of compliance are provided in accordance with 23 CFR § 771.133.
- In air quality nonattainment and maintenance areas, additional Clean Air Act and EPA requirements apply. [42 U.S.C. § 7506(c) and 40 CFR Part 93]. See Questions 25-27 for more information.

## **Requirements**

The purpose of this document is to identify primary terminology, promote consistency, and to better explain the requirements discussed in this section. The definitions are reflected below in Table 1 and also in the Glossary.

Before the FHWA<sup>2</sup> can sign the final NEPA decision (i.e., ROD, FONSI, or CE), the proposed Project (“Project”) as defined in the NEPA document must meet the following specific criteria:

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<sup>1</sup> This version of the supplemental Questions and Answers is updated as of April 7, 2011.

<sup>2</sup> For those States that have programmatic agreements with FHWA, all of the requirements in this section apply.

- **For Metropolitan Planning Areas (within a MPO):**
  - The Project or phases of the Project within the time horizon of the MTP must be included in the fiscally constrained MTP, and other phases of the Project and the associated costs beyond the MTP horizon must be referenced in the Plan.

**Table 1. Terms and Definitions**

<b>Terms</b>	<b>Definition</b>
<b>Project</b> ( <i>capital P</i> )	In this document, the term “Project” ( <i>capital P</i> ) refers to a specific proposed facility or other action as defined in the NEPA document (e.g., a bridge or a new highway) and includes every “phase of a Project”, from Highway Planning and Research, Preliminary Engineering, Right-Of-Way (ROW) acquisition, through Construction.
<b>project</b> ( <i>small p</i> )	The term “project” ( <i>small p</i> ) is used here as a reference to a phase of a Project, or a component of such a phase (e.g., bridge piers or highway landscaping related to a Project).
<b>Fiscal Constraint</b>	The MTP, TIP and the STIP have sufficient financial information for demonstration that a Project in the MTP, TIP and STIP can be implemented using committed, available, or reasonably available revenue resources.
<b>Available Funds</b>	Funds derived from existing sources dedicated to or historically used for transportation purposes. For example, apportioned/authorized Federal-aid dollars or toll revenues for the next 2 years. [23 CFR § 450.104]
<b>Committed Funds</b>	Funds that have been dedicated or obligated for transportation purposes. For example, funds obligated for a Federal-aid Project or toll revenues for the next 2 years. [23 CFR § 450.104]
<b>Reasonably Available</b>	The term “reasonably available” in this guidance is synonymous with “reasonably anticipated to be available” and “reasonably expected to be available”. Determining whether a future funding source is “reasonably available” requires a judgment decision. Two important considerations in determining whether an assumption is “reasonable” are (a) evidence of review and support of the new revenue assumption by State and local officials and (b) documentation of the rationale and procedural steps to be taken with milestone dates for securing the funds. For example, a new tax for transportation purposes requiring local and/or State legislation and/or support from the Governor is reasonable if there is clear evidence of sufficient support (both governmental and public) to enact the new tax, and a strategy exists for securing those approvals within the time period for implementing specific projects.

- The Project or phase of the Project must be in the fiscally constrained TIP, which includes:
  - At least one subsequent Project phase, or the description of the next Project phase for information purposes only in unusual instances<sup>3</sup>.
  - All Federal-aid Projects or Project phases and non-federally funded, regionally significant projects that require a Federal action. [23 CFR § 450.324(d)]

<sup>3</sup> Please refer to Question 16 for more information.

- Full funding is reasonably available for the completion of all the phase(s) of the Project within the time period anticipated for completion of the Project.<sup>4</sup> [23 CFR § 450.324(h)-(i)]
- **For Non-metropolitan Areas:**
  - The Project must be consistent with the Long Range Statewide Transportation Plan (also referred to as SLRP).
  - The Project or phase of the Project must be in the fiscally constrained STIP, which includes:
    - If the completion of the Project is beyond the timeframe of the STIP, the STIP must contain at least one subsequent Project phase, or a description of the next Project phase for informational purposes.
    - All Federal-aid projects or project phases and non-federally funded, regionally significant projects that require a Federal action [23 CFR § 450.216(h)]
    - Full funding is reasonably available for the completion of all phase(s) of the Project. [23 CFR § 450.216(l)-(m)]

Table 2 describes the fiscal constraint actions that must be in place before a final environmental decision is taken (see the attached Questions and Answers for more detail).

**Table 2. Fiscal Constraint Requirement before Approving the NEPA Decision**

<b>Before a Final Environmental Decision (ROD, FONSI, CE) is approved in:</b>	<b>Fiscal Constraint must be demonstrated by:</b>
Metropolitan Areas	<ul style="list-style-type: none"> <li>• Entire Project is in the MTP</li> <li>• At least one subsequent phase of the Project is in the TIP (more if within TIP timeframe)</li> <li>• Full funding is reasonably available for the completion of the entire Project<sup>5</sup></li> </ul>
Non-Metropolitan Areas (Outside MPO)	<ul style="list-style-type: none"> <li>• Project is consistent with the SLRP</li> <li>• At least one subsequent phase of the Project is in the STIP (more if within STIP timeframe)</li> <li>• Full funding is reasonably available for the completion of the entire Project</li> </ul>

<sup>4</sup> “The term “phase of a Project” refers to activities such as design, acquisition of right-of-way, and construction. For a discussion of the distinction between “phase of a Project” and “phased Projects”, see Question 22. See also the definition of “Project” and “project” in Table 1 and in the Glossary.

<sup>5</sup> Pursuant to 23 CFR § 450.216(b), approved TIPs are included in the STIP, which must meet the requirements in 23 U.S.C. § 135(g)(4)(E).

Table 3 details the Federal planning and environmental requirements that must be met whether or not the environmental process is funded with Federal-aid (see the attached Questions and Answers for more detail).

**Table 3. Federal-aid Eligibility and the Associated Environmental /Planning Requirements**

<b>If the Environmental process is funded with:</b>	<b>NEPA process can start:</b>	<b>Required actions before the Final Environment Decision can be approved:</b>
Federal Funds	<ul style="list-style-type: none"> <li>Corridor/feasibility (<b>P</b>lanning and <b>E</b>nvironment <b>L</b>inkages - PEL) studies: the study does <b>not</b> need to be in the fiscally constrained MTP or SLRP and can start at any time, but the study must be in the Unified Planning Work Program (UPWP) or State Planning and Research (SPR) work program when funded with Metropolitan Planning (PL)/SPR funds. If the study is using capital funds (National Highway System (NHS) and Surface Transportation Program (STP), then it needs to be identified in the UPWP or SPR work program, and/or in the TIP or STIP.</li> <li>Tier I – Environmental Impact Statement (EIS) can start prior to being in the fiscally constrained MTP or SLRP if the scope is for corridor planning or feasibility study and will not include decisions directly resulting in Project implementation activities of any kind (e.g., ROW purchase).</li> </ul>	
	<ul style="list-style-type: none"> <li>NEPA study must be in the MTP or consistent with the SLRP</li> <li>NEPA phase of the Project must be in TIP or STIP</li> </ul>	<ul style="list-style-type: none"> <li>See Table 2.</li> </ul>
<b>If the Environmental process is funded with:</b>	<b>Environmental process can start:</b>	<b>Required actions before the Final Environment Decision can be approved:</b>
Non Federal Funds	<ul style="list-style-type: none"> <li>After the planning level purpose and need has been identified</li> <li>Project does <b>not</b> need to be in the fiscally constrained MTP Project does <b>not</b> need to be fiscally constrained STIP/TIP</li> </ul>	<ul style="list-style-type: none"> <li>Project is in the fiscally constrained MTP or is consistent with the SLRP, if the future phases are Federally funded</li> <li>See Table 2.</li> </ul>

## Questions and Answers

### **General**

#### **1. What is a Project?**

Title 23 defines a project as an “undertaking to construct a particular portion of a highway, or the particular portion of a highway so constructed or any undertaking eligible for assistance under Title 23”. [23 U.S.C. § 101(a)(21)]

In the regulations, 23 CFR § 1.2(b), the term is defined as an “undertaking by a State highway department for highway construction, including preliminary engineering, acquisition of ROW and actual construction, or any highway planning and research, or for any other work or activity to carry out the provisions of the Federal Laws for the administration of Federal aid for highways”.

This document uses “Project” (capital ‘P’) when referencing a specific undertaking described in the NEPA document (e.g., a bridge replacement), including all phases through construction. The term “project” (small ‘p’) is used here as a reference to a phase of a Project, or a component of such a phase (e.g., bridge piers or highway landscaping related to a Project) (*see* a more detailed definition in the Glossary).

#### **2. What is a phase of a Project?**

A Project phase is defined as separate portion of a Project such as Preliminary Engineering (PE), environment/NEPA, final design, ROW, utility relocation, construction, and/or partial construction (i.e, a component or “project”). [23 CFR § 1.2(b), § 450.216(i) and § 450.324(e)] There may be a project agreement for an individual phase of a Project.

#### **3. What is Fiscal Constraint?**

Fiscal constraint means that the MTP, TIP, and STIP include sufficient financial information to demonstrate that Projects in the MTP, TIP, and STIP can be implemented using committed, available, or reasonably available revenue sources, with assurance that the Federally supported transportation system is being adequately operated and maintained. Additionally, Projects in non-attainment and maintenance areas can be included in the first two years of the TIP and STIP only if funds for those Projects are “available” or “committed”. [23 CFR § 450.216(m) and § 450.324(i)]

#### **4. What is the NEPA decision?**

NEPA decisions occur when the FHWA signs a ROD or FONSI, or approves a CE for a proposed action. [23 CFR Part 771]

#### **5. What are the planning and environmental requirements?**

They are the statutory requirements included in 23 U.S.C. § 134, § 135 and §139. The implementing planning and environmental regulations are in 23 CFR Part 450 and Part 771 respectively. The most applicable sections on this subject can be found in the following:

- 23 CFR § 450.214 - Statewide Transportation Plan
- 23 CFR § 450.216 – Statewide Transportation Improvement Program
- 23 CFR § 450.322 – Metropolitan Transportation Plan
- 23 CFR § 450.324 – Metropolitan Transportation Improvement Program
- 23 CFR § 771.107 – Definitions

- 23 CFR § 771.109 – Applicability and Responsibilities
- 23 CFR § 771.113 – Timing of Administration Activities

**6. What is the difference between an “action” defined in 23 CFR Part 771, and the term “action” used in the planning regulation?**

In 23 CFR Part 771, the term “action” means a Project (highway or transit) proposed for FHWA funding or approval, which may or may not involve a commitment of Federal funds. Further, “Administration action” is approval by the FHWA of the applicant’s request for funds for construction, or other activities which may or may not involve a commitment of Federal funds. [23 CFR § 771.107(b)-(c)]

In planning, we have not provided a formal definition for “action”; however, when we refer to Projects “... that require actions by FHWA,” the meaning is similar to the definition of “Administration action” as stated above. [23 CFR § 450.216(h)] An action in a planning context is a step taken to advance Projects to implementation whether or not the Projects will be receiving Federal (Title 23 or 49) funds.

**7. What are “regionally significant” projects?**

Regionally significant projects, which may or may not be funded with Title 23 or 49 funds, are Projects anywhere in the State that have direct impact on a regional transportation system or those Projects that serve regional transportation needs (e.g., major activity centers, major planned developments such as major retail malls, sport complexes, or employment centers, or transportation terminals) and are normally part of the metropolitan or regional transportation network model. For example, these Projects can include actions such as granting access to Interstate Highways or principal arterial system, which require Federal approval, but not necessarily Federal funds. [23 CFR § 450.104]

***Fiscal Constraint of Plans, TIPs, and STIPs***

**8. Is the term “fiscally constrained” different as it applies to the Transportation Plan, STIP, and TIP?**

No, the methodology and standards for developing and assessing fiscal constraint for the Transportation Plan, STIP and TIP are the same.

However, the fiscal constraint information in the STIP and TIP should be more refined than that found in the transportation plan (MTP or SLRP). The STIP and TIP require a 4-year fiscal constraint demonstration that indicates the resources available or committed and/or reasonably expected to be available to carry out the programs. This means that the STIP and TIP must demonstrate and balance their revenue forecast with their expected expenditure forecast (total estimated project costs) for the near term (4-year) period while adequately operating and maintaining the federally supported transportation system. [23 CFR § 450.216(m) and § 450.324(h)]

It is more challenging for the transportation plan to forecast future revenues/costs for a 20-year time frame and to predict the exact nature of funding sources. Although near term MTP financial information is expected to be fairly accurate, the estimates for the outer years (10+ years) of the plan may be less precise. If cost ranges or bands are used (which are allowable in the outer years of the plan), associated revenues should be reasonably expected to be available to cover Project expenditures, including the upper limit of those bands or ranges. Over time, more current financial

data and forecasts can be developed as the MTP is updated every four to five years (or more frequently).

For outer years beyond the timeframe of the TIP and STIP, project sponsors must identify reasonably available source of funding for their Project, which should include a defined funding strategy for the completion of their Projects.

Table 4 provides information on the funding requirements and type of revenue resources that are associated with the planning documents and timeframe.

**Table 4. Planning Documents and the Application of the Fiscal Constraint Funding Requirements<sup>6</sup>**

<i>Planning Documents</i>	<i>Project Fiscal Constraint Funding Requirements</i>			
	<b>Year 1 - Year 2</b>		<b>Year 3 – Year 4</b>	<b>Year 5 – Year 20+</b>
<b>Metropolitan Transportation Plan (MTP)</b>	Nonattainment & Maintenance Areas	Attainment Areas	Reasonably Expected to be Available	Reasonably Expected to be Available
	Available or Committed Funds	Reasonably Expected to be Available		
<b>Statewide Long-range Transportation Plan (SLRP)</b>	Fiscal Constraint is not required for the SLRP, but the State may want to develop, as an option, a financial plan to demonstrate what funds are reasonably available for the State project implementation.			
<b>Transportation Improvement Program (TIP)</b>	Available or Committed Funds	Reasonably Expected to be Available	Reasonably Expected to be Available	For projects in the TIP and STIP that go beyond the 4 year life of the TIP/STIP, funding for Year 5 and beyond to project completion must be reasonably expected to be available.
<b>Statewide Transportation Improvement Program (STIP)</b>	Available or Committed Funds	Reasonably Expected to be Available	Reasonably Expected to be Available	

**9. Does full funding have to be shown in the TIP or STIP, or is it only in the Transportation Plan?**

When Projects are programmed in the STIP/TIP, it is with the understanding that full funding can reasonably be anticipated to be available for the Project within the time period contemplated for the completion of the Project. That is, the estimated total cost of an entire Project and how that cost is expected to be covered, must be shown in the STIP or TIP (or in the financial element of an associated transportation plan) through the Project’s anticipated year of completion. As allowed in the MTP, reasonable strategies for ensuring the availability of proposed funding sources to cover the estimated total cost of Projects may be identified to demonstrate fiscal constraint in a STIP/TIP. [23 U.S.C. § 135(g)(4)(E), 23 CFR § 450.216(i) and (m), 23 U.S.C. § 134(j)(3)(D) and 23 CFR § 450.324(e) and (i)]

For Projects in the metropolitan planning areas, estimated full Project costs need to be shown in the Metropolitan Transportation Plan. Besides demonstrating currently available and reasonably anticipated revenues to cover those costs, the financial element of a MTP may recommend strategies

<sup>6</sup> This table is updated as of April 7, 2011.

to ensure the availability of additional funding sources to cover the costs of all Projects and programs described in the MTP. For more discussion on this issue, see Question 13 below.

Non-metropolitan Projects do not need to be specifically identified or have their costs shown in the Long-Range Statewide Transportation Plan, but the Projects do need to be consistent with that plan.

**10. Are non-metropolitan Projects exempt from meeting the fiscal constraint requirements?**

Although there are no Federal requirements for the SLRP to be fiscally constrained, some States have instituted this as a State requirement. In those States, non-metropolitan Projects and the SLRP should be fiscally constrained as determined by State rules and procedures.

Also, within the environmental analysis for a non-metropolitan Project or corridor study, much of the information concerning cost, Project schedule, source of funds, and commitments by Project sponsor are documented. In most cases, the fiscal constraint demonstration or other financial information is included in the environmental documents.

When rural Projects are programmed, the key is to secure available funding and correctly list it in the fiscally constrained STIP prior to the ROD/FONSI/CE being approved. The Project sponsor should document Project funding and demonstrate fiscal constraint in the financial plan portion of the STIP. The STIP's financial plan is a good practice and should be used to fully document the STIP's fiscal constraint determination. Further, the financial information can subsequently be used in the Financial Plan required for Projects costing \$500 million or more.

**11. Do corridor or feasibility studies need to comply with the fiscal constraint requirement?**

Planning studies must be listed either in the work programs, STIP/TIP, or both. [23 CFR § 420.119(e), 23 CFR § 450.216(g)(2) and (4)]

For those studies funded with NHS, STP, or other Federal-aid, the State should list the cost for these planning studies in the STIP/TIP to meet fiscal constraint requirements, unless the State and the MPO(s) have chosen to exclude them from the STIP/TIP [23 CFR § 450.216(g)(4)].

However, the majority of corridor and feasibility studies are funded with PL or SPR funds. The PL/SPR funded projects should be listed in the UPWP or SPR Work Program as appropriate, but do not need to appear in the STIP. [23 CFR § 450.216(g)(3)]

**12. Does the fiscal constraint requirement apply to a Tier I EIS?**

A Tier I EIS, a corridor study, or a feasibility study may be initiated prior to any resulting Project being fiscally constrained in the MTP.

A Tier I EIS can be a broad study that is based on early decisions made in the planning process, such as the type of project, the general location, and the major design features. In cases where a Tier I EIS is similar to a major corridor and/or investment study described in 23 CFR § 450.212 and § 450.318, the Tier I ROD may be signed without demonstrating fiscal constraint. In cases where the purpose of the Tier I is only to be a corridor or similar study, there should be a discussion as to why this type of documentation is being used. A Tier I EIS is a NEPA document, and a corridor study is more effectively carried out as a planning document.

When the scope of the Tier I document is clearly defined to include a decision that could result in a Federally-funded action (such as the purchase of ROW), the Project must be listed in the MTP and STIP/TIP, with one subsequent phase listed in the existing STIP/TIP before the Tier I ROD can be



signed. The subsequent phase (Tier II) will be the continuation of the NEPA process. In the case of a “No Build” decision, the ROD can be signed without a subsequent phase of work listed. Because of the nature of the Tier I decision making, Tier I Project cost estimation may be broader (e.g., use of banding) than for the regular projects.

As provided in Appendix A of 23 CFR Part 450, the option of linking the transportation planning and NEPA process may be the most appropriate vehicle for corridor/feasibility study rather than the Tier I EIS. Linking Planning and NEPA connects the environmental analysis with the analyses that are used to develop the MTP, STIP/TIP, or planning-level/corridor/subarea/feasibility studies. When done in accordance with Appendix A, these analyses or studies are still within the scope of the planning process and are not subject to the fiscal constraint requirement. [23 CFR § 450.212, § 450.318, and Appendix A]

**13. Does the MTP need to include a Project phase that is planned for future years, beyond the 20-year horizon?**

Yes, regulations require that the entire Project described in the ROD, FONSI, or CE shall be consistent with the MTP. In the metropolitan areas, only the Project phases within the 20-year time horizon of the MTP must be fiscally constrained, but other phases and associated costs need to be referenced in the plan. [23 CFR § 450.322(f)(10)] Illustrative Projects are not part of the fiscally constrained MTP, and are listed only for informational purposes, until such time as additional resources beyond those identified in the MTP are to become available. [23 CFR § 450.322(f)(10)(vii)]

**14. What assurance is needed to determine if a Project meets fiscal constraint?**

Within the NEPA documentation, a discussion should be included on the planning information that was used to develop the Project. It should provide information about the Project and its relationship with the current MTP and TIP, including corridor or feasibility study information, a comparison of design concept and scope, and specific references in the current transportation plan and the TIP to assist in identifying the Project.

**15. If the majority of the Project implementation is beyond the four year time frame of the STIP/TIP, does the full Project cost information still need to be in the STIP/TIP?**

For Projects scheduled to start within the existing STIP/TIP years, if the majority of the work will be conducted in years beyond the STIP/TIP time frame, only the Project costs within the next four years must be in the STIP/TIP. [23 CFR § 450.216(m), § 450.324(e)] For portions of the Project that are beyond the STIP/TIP years, the Project must be in the fiscally constrained MTP and the estimated total Project cost must be described within the financial element of the MTP, STIP, and/or applicable TIP. For more information about this, please review Questions 8, 9, and 10. [23 CFR § 450.216(m), § 450.322(f), § 450.324(h)-(i)]

**16. Can the environmental decision be signed if the next phase of the Project (e.g. PE, final design, ROW, utility relocation, construction, or construction phase) is beyond the horizon of the STIP/TIP and is not included in the STIP?**

Generally at least one subsequent phase of the Project must be included in the approved STIP/TIP before the FHWA can sign the ROD or FONSI, or approve the CE.<sup>7</sup> However, in the unusual instances where no subsequent phase of the Project falls within the STIP/TIP timeframe, then a

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<sup>7</sup> If this requirement is not satisfied, there is no “action” within the meaning of 23 CFR §§ 771.107(b)-(c) and 771.109(a)(1) for FHWA decision under NEPA.

description of the Project must be included in the STIP/TIP for informational purposes and identified as being beyond the horizon of the STIP/TIP. “Unusual instances” refers to unexpected situations where an agency can expect lengthy Project delays after the final NEPA decision. In such cases, there is a State commitment to implement the Project at the conclusion of NEPA, but some non-financial barrier arises before NEPA is complete that prevents the State from proceeding with the Project within the STIP/TIP horizon. In those unusual instances, the STIP/TIP should contain a description of the Project for informational purposes and note that the Project is beyond the timeframe of the STIP/TIP.

**17. What happens to a Project when the revenue situation changes and the Project may or may not be in the fiscally constrained Metropolitan Transportation Plan?**

In cases where the FHWA finds a MTP to be fiscally constrained and a revenue source is subsequently removed or substantially reduced (i.e., by legislative or administrative actions), the FHWA will not withdraw the original determination of fiscal constraint; however, in such cases, the FHWA will not act on an updated or amended MTP until such time that it reflects the changed revenue situation.

However, if the MPO expects that the revenue situation has changed and projects identified in the plan cannot be financially supported to completion, we recommend the MPO revise its revenue numbers and amend the plan.

Further, when the MPO updates its MTP, we suggest the MPO request that project sponsors revisit their current projects that are in the existing fiscally constrained plan to ensure that the Project description (e.g. project scope, location, and purpose and need) and associated cost estimates are still valid and that funding resources are still available for the completion of the Project. Also, Project sponsors should advise and update the MPO with current information for the MTP if their Project cost estimates have been revised due to NEPA document re-evaluation or a supplemental EIS.

**18. Can the ROD/FONSI/CE be approved when the funding in the environmental documentation does not match what is in the MTP or STIP/TIP?**

No. As the final environmental review is completed, it is important to ensure that the cost estimates are consistent with costs described in the MTP and STIP/TIP. If there is a significant difference between the Project cost estimates in the final environmental document compared to the MTP and/or STIP/TIP, this potentially may impact the overall fiscal constraint demonstration and the mix of future projects selected for funding in the MTP and STIP/TIP if the Project is underfunded. In this case, a plan and/or STIP/TIP amendment is necessary prior to the final NEPA decision.

*Note:* We recommend that environmental documentation and planning documents use Year of Expenditure (YOE) dollars for the cost estimates. See Question 21.

**19. Does the Long-Range Statewide Transportation Plan (SLRP) have to be fiscally constrained?**

No. The planning regulations do not require the Long-Range Statewide Transportation Plan to be fiscally constrained, although some States have found it beneficial to include a statewide financial plan. The financial plan can show how longer-range statewide transportation projects can be implemented, indicate the resources that are reasonably available (i.e., reasonably available public and private funds), and identify revenue shortfalls and potential financial strategies to fund the needed projects and programs. [23 CFR § 450.214(l)]

**20. How does a State monitor all the non-metropolitan Major Projects and ensure that there is adequate funding in the future years in absence of a statewide financial plan?**

A Project with a total estimated cost of \$500 million or more that is receiving Federal financial assistance is designated as a Major Project. Section 106(h)(3) of Title 23 states a Finance Plan shall be produced for a Major Project and should demonstrate the Project's fiscal constraint and also document all the existing on-going future commitments such as required for Major Projects. Since most Major Projects are multi-year projects, the Major Project information will appear in the STIP and will be carried over to future STIP(s). This information is not only critical to ensure that the current STIP meets the fiscal constraint requirement, but also to ascertain that there is adequate future funding to complete the Major Project. Furthermore, the financial plan for the STIP could capture the anticipated funding commitments for all Major Projects in one document.

In addition, a Project with a total cost between \$100 million and \$500 million, while not classified as Major Project, requires the preparation of Finance Plans that must be made available to FHWA upon request. [23 U.S.C. § 106(i)]

### ***Year of Expenditure (YOE) Funds***

**21. What is Year of Expenditure (YOE)?**

Year of Expenditure dollars are dollars that are adjusted for inflation from the present time to the expected year of construction. By using YOE dollars, this ensures that the more accurate cost estimates are used in planning, programming and implementation of the Project.

The planning regulations require that revenue and cost estimates in the MTP, STIP, and TIP, must use inflation or growth rate(s) to reflect "year of expenditure dollars," based on reasonable financial principles and information, developed cooperatively by the State, MPOs, and public transportation operators. [23 CFR § 450.216(l), § 450.322 (f)(10)(iv), and § 450.324(h)] Year of expenditure cost estimates should also be used in NEPA documentation.

In addition, the Major Project Guidance requires financial information associated with the Project (NEPA phase through final construction) must be included in the Major Project financial plan, regardless of the source of funding. These costs must be expressed in YOE dollars and estimated using a risk based approach.

See Major Project Financial Guidance:

[http://www.fhwa.dot.gov/ipd/project\\_delivery/resources/financial\\_plans/guidance.htm](http://www.fhwa.dot.gov/ipd/project_delivery/resources/financial_plans/guidance.htm).

### ***Environmental Studies and Planning Process***

**22. One of the examples (Colorado: I-25) in the January 28, 2008, memorandum described a phased NEPA decision-making process, sometimes described as "phased RODs/FONSI". Is this allowed as a mechanism to break-up a larger Project to deal with limited available Project funding and fiscal constraint or for political reasons?**

A Project that will be built over time with multiple work phases based on one NEPA decision document is not a phased ROD/FONSI, it is a *phased Project*. A phased ROD/FONSI occurs when there is one NEPA evaluation document but from that evaluation document, a NEPA decision

document (ROD/FONSI) is issued for only a section or portion of the proposed Project (e.g., construction of a two mile section of a proposed 10 mile long highway).

The FHWA acknowledges some Projects that are currently in the midst of a lengthy NEPA process anticipate use of phased decision making. It is expected that these Projects will proceed, but the FHWA expects the future use of the phased ROD/FONSI concept will be limited to situations where there are unanticipated changes in circumstances after the planning process, or where the phased nature of the decision making on a corridor or project is fully discussed and defined in the context of the NEPA study on which the phased decision will be based (including agency and public involvement). This approach should be considered only after consultation with both the Office of Project Development and Environmental Review and the Office of Chief Counsel.

**23. How should the planning process be used to determine Projects, needs, and priorities?**

Statewide and Metropolitan transportation planning should be the foundation for highway and transit Project decisions, emphasizing public involvement, and consideration of environmental and other factors. The planning process identifies the transportation system needs and the Projects that will address these needs. With the fiscal constraint requirement, the planning process can recommend and advance only those Projects that a State/MPO/local agency can afford to implement.

In the overall planning process, corridor, subarea, or other focused planning studies should clearly identify the purpose and need of proposed Projects and weed out those that are not environmentally and/or financially feasible unless new or additional revenue sources are identified. Transportation agencies need to consider methods to improve linkages between planning and environmental issues in order to focus subsequent NEPA review on a more limited list of Project options. In this manner, agencies can better evaluate Project feasibility and costs before launching into what can be a long and expensive NEPA review process.

**24. Does starting the environmental analysis process for a Project (even with State or local funds) ensure future Federal-aid funding?**

No, starting the environmental analysis process does not ensure future Federal funding commitments. If however, a Project sponsor wants to advance a Project that is not in the fiscally constrained plan or STIP/TIP, it may do so with its own funds. In this case, Federal funds are not to be used to conduct the environmental analysis process. The project sponsor assumes the risk that the Project may not be eligible for or receive Federal funds, if later requested. By not being part of the broader transportation planning process, this Project still has to compete for the available limited Federal funds that have not been assigned to other Projects. A final NEPA decision for the Project will not be made until all appropriate elements listed in the “Requirements” section” of this document have been met.

***Nonattainment and Maintenance Areas***

**25. What Projects are subject to the project level transportation conformity requirements?**

Project level conformity applies to nonexempt (those projects not listed in 40 CFR § 93.126) FHWA/FTA projects. For purposes of conformity, an FHWA/FTA project is any highway or transit project which is proposed to receive funding assistance and approval through the Federal Aid Highway program or the Federal mass transit program, or requires FHWA or FTA approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system.

**26. What are the transportation conformity requirements that must be addressed before the NEPA decision can be signed?**

Before the NEPA decision (ROD, FONSI, or CE) can be signed by the FHWA, regulations require that a project level conformity determination be made for all nonexempt FHWA/FTA projects that are subject to transportation conformity. [40 CFR§ 93.104(d)]

In the metropolitan areas, conformity for a nonexempt FHWA/FTA project can be demonstrated if the Project is part of a conforming metropolitan transportation plan and TIP, and meets all the project level conformity requirements. [40 CFR § 93.104(d) and § 93.109]

For a nonexempt FHWA/FTA project in a “donut” area (part of the nonattainment and maintenance area that lies outside of the metropolitan planning area boundary), the Project must be included in the regional emissions analysis that supported the conformity determination of the associated metropolitan transportation plan and TIP and meet all applicable project level conformity requirements. [40 CFR § 93.109]

In an isolated rural non-attainment and maintenance area, Project level conformity must meet all the requirements in 40 CFR § 93.109(l) prior to the FHWA signing or approving the ROD, FONSI, or CE.

For more information, please see [http://www.fhwa.dot.gov/environment/conformity/feis\\_rod.htm](http://www.fhwa.dot.gov/environment/conformity/feis_rod.htm).

**27. How do transportation conformity requirements apply in tiered EIS documents?**

The transportation conformity regulation (40 CFR § 93.126) states that “specific activities that do not involve or lead directly to construction, such as planning and technical studies” are exempt from the requirement to determine conformity. Therefore, project-level conformity requirements, including any relevant hot-spot analyses, do not apply for the Tier 1 EIS. However, should a named Tier 1 analysis transition into a Tier 2 product and the project sponsor decides to seek a decision leading to a selected alignment, with the ROD allowing acquisition of right of way and authorization of final design, P,S &E, etc., then project level conformity would be required.

In the Tier 2 EIS, the preferred alternative would be selected from the shorter list of alternatives identified in the Tier 1 EIS. All requirements for project-level conformity apply for the preferred alternative selected in the Tier 2 EIS. Project-level conformity must be determined before the Tier 2 ROD can be signed.

***Major Projects: Phased Construction and Operational Independence***

**28. For a Major Project, if the Project phases are not identified in the approved environmental decision, can the state decide at a later date to construct the Major Project in phases?**

Yes, on a case-by-case basis, the scope of work described by the ROD, FONSI, or CE can be divided into a phased Project that corresponds to operationally independent increments of work (as described in question below and Question 22 above) which will be built non-concurrently. The FHWA Division Office will need to consult with the FHWA Project Delivery Team (formerly the Major Projects Team) prior to making this determination. In cases where the scope of the work is divided into a phased Project after the NEPA decision, Major Project requirements will apply only to the individual Projects meeting the Major Project designation requirements.

**29. What requirements need to be met before determination of operational independence and non-concurrent construction is approved by the FHWA (HQ and Division)?**

“Operational independence” is a project management and financial planning concept that applies to Projects that are subject to 23 U.S.C. § 106(h). An operationally independent phase of the Project is a component of the overall Project that can be built and can function as a viable transportation facility even if the rest of the Project described in the environmental document is never built. Multiple contracts developed for bidding by the Owner for contract administration purposes or due to funding shortfalls are generally not considered to be operationally independent.

Operational Independence is further defined and discussed in the guidance on operational independence and non-concurrent construction<sup>8</sup> and in FHWA Major Project guidance<sup>9</sup>.

Note that “operational independence” is not the same as NEPA “independent utility” and the two concepts are used for different purposes. In 23 CFR § 771.111(f), the FHWA’s assessment of independent utility and logical termini occurs during the NEPA review in order to ensure a meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated. This includes considering whether the Project will result in a usable facility and will be a reasonable expenditure even if no additional improvements in the area are made. Given the extensive record of such NEPA determinations, distinguishing the Major Project Review requirements from the environmental review requirements helps avoid unintended consequences in implementing 23 U.S.C. § 106(h).

***FHWA Division Office’s Roles and Responsibilities***

**30. Whose job is it to make sure that all planning requirements are in place before final NEPA decision is made?**

Under the Federal-aid program, it is the role of the FHWA Division Office to help the State, MPO(s), and Project sponsors navigate through and meet these requirements. The Division Office should have all environmental and planning information at hand. The planners and environmental specialists should work closely and develop a process or system that can help track all the relevant information as the environmental documents are being completed.

**31. Why is fiscal constraint requirement critical now?**

Fiscal constraint has been a critical part of the planning and project development processes since the passage of ISTEA in 1991. In today’s limited fiscal environment, it is critical that we provide due diligence as to how public funds are expended. When making NEPA decisions, including the decisions whether to initiate the NEPA process, it is incumbent on the Division Office to consider the broader context of fiscal stewardship. Fiscal stewardship is a critical role and responsibility for the FHWA and is engrained throughout the transportation decision making process: from fiscal constraint requirements in the transportation planning process, to reasonable cost estimates of alternatives in project development and the NEPA process, to financial plans and Major Project requirements during design and construction.

<sup>8</sup>[http://www.fhwa.dot.gov/ipd/project\\_delivery/resources/operational\\_construction/memo\\_operational\\_independence.htm](http://www.fhwa.dot.gov/ipd/project_delivery/resources/operational_construction/memo_operational_independence.htm)

<sup>9</sup>[http://www.fhwa.dot.gov/ipd/project\\_delivery/resources/general/mpg\\_memo.htm](http://www.fhwa.dot.gov/ipd/project_delivery/resources/general/mpg_memo.htm)

The FHWA must actively encourage transparency, consistency, and reasonableness with regard to planned expenditures of public resources, and attempt to ensure that consistent messages are being provided throughout the planning, project development, NEPA, design, construction, operation, and environmental mitigation follow-up processes.

**32. . How do we ensure that environmental studies are for real and viable projects?**

An effective transportation planning process requires the MPOs and the States to make the appropriate decisions that will benefit the transportation system and the region. A robust planning process that includes planning/corridor/subarea/feasibility studies, environmental analysis, and financial planning will help project sponsors, the MPOs, and the States to determine if completing all of the proposed Projects is achievable, given the anticipated revenues and the relative priorities of these Projects. The planning process, when appropriately used as a screening mechanism, ensures that only those “viable” Projects that meet funding and priority requirements will advance. These “viable Projects” will be limited in number and with the smaller number of Project commitments, the FHWA can better leverage its staff resources in reviewing and providing oversight of the NEPA process.

## Appendix A

# STATUTORY AND REGULATORY REQUIREMENTS FOR FISCAL CONSTRAINT / FINANCIAL PLANNING IN THE FEDERAL TRANSPORTATION PLANNING PROCESS

Type of Plan/Program/Project	Fiscal Constraint requirement?	Financial Plan Required?	Update Schedule/Notes
Metropolitan Transportation Plan	Yes	Yes	Plans must have at least a 20-year time horizon and be updated every 5 years in attainment areas and every 4 years in non-attainment and maintenance areas. Also, for nonattainment and maintenance areas, the financial plan shall address the specific financial strategies required to ensure the implementation of TCMs in the applicable SIP.
Metropolitan Transportation Improvement Programs (TIPs)	*Yes – must be fiscally constrained by year	Yes	Must be updated at least every four years; MPO must develop Annual Listing of Obligated Projects consistent with the categories identified in the TIP. Also, in nonattainment or maintenance areas, projects included for the first 2 years of the TIP shall be limited to those for which funds are available or committed.
Statewide Transportation Improvement Programs (STIP)	Yes – must be fiscally constrained by year	Not mandatory, but if not included, financial issues should be addressed in some other way	Not less than 4-year time horizon; must be updated at least every four years; funding shown in STIP must be consistent with funding shown in the TIPs for the metro portions of the statewide program. Also, in nonattainment or maintenance areas, projects included for the first 2 years of the STIP shall be limited to those for which funds are available or committed.
Statewide Transportation Plan	Not required	Not required, but must reference or contain information on the availability of financial and other resources needed to carry out the plan	No mandatory update schedule. Not less than 20-year horizon.
FHWA Major projects (>\$500 Million cost)	Yes, near term phases must be part of fiscally-constrained TIP and STIP	Yes. NOTE: this is a project-specific financial plan that is different than the region's financial Plan for the Long Range Transportation Plan	Single project plan.
FTA Major Capital Investments (Mainly New Starts)	Yes, must be in fiscally constrained TIP and STIP	Yes	Project level plan. Projects entering the FTA New Starts process also require Alternatives Analysis pursuant to 49 U.S.C. §5309(e)(2).



## **Glossary**

### **Air Quality Attainment areas**

An area considered to have air quality that meets or exceeds the U.S. Environmental Protection Agency (EPA) health standards used in the Clean Air Act. An area may be an attainment area for one pollutant and a nonattainment area for others.

### **Air Quality Maintenance areas**

Any geographic region of the United States previously designated nonattainment pursuant to the CAA Amendments of 1990 and subsequently re-designated to attainment subject to the requirement to develop a maintenance plan under section 175A of the CAA, as amended.

### **Air Quality Non-attainment area**

A geographic region of the United States that the EPA has designated as not meeting a given national ambient air quality standard (NAAQS).

### **Banding**

For the outer years (i.e., beyond the first 10 years) of the MTP, the financial plan may reflect aggregate cost ranges/cost bands, as long as the future funding source(s) is reasonably expected to be available.

### **Categorical Exclusion (CE)**

A Project may be categorically excluded from a detailed environmental analysis in an Environmental Assessment (EA) or Environmental Impact Statement (EIS) if it meets certain criteria that a Federal agency has previously determined as having no significant environmental impact and does not involve unusual circumstances that require evaluation. Types of actions typically considered by FHWA to be categorically excluded are described in 23 CFR § 771.117.

### **Conformity**

A process to assess the consistency of any transportation plan, program or project with State air quality implementation plans. The transportation conformity process is defined by the Clean Air Act as amended and implemented by 40 CFR Part 51 and Part 93.

### **Donut area**

Geographic areas outside a metropolitan planning area boundary, but inside the boundary of a nonattainment or maintenance area that contains any part of a metropolitan area(s). These areas are not isolated rural nonattainment and maintenance areas.

### **Final NEPA Decision**

A final NEPA decision is documented in a ROD, FONSI, or CE determination.

### **Finding of No Significant Impact (FONSI)**

A Federal agency prepares a written environmental assessment (EA) to determine whether or not a project would have significant impacts on the environment. If the answer is no, the agency issues a finding of no significant impact (FONSI). The FONSI may address measures which an agency will take to reduce (mitigate) potentially significant impacts.

### **Independent Utility**

Project must be usable and be a reasonable expenditure even if no additional improvements in the area are made, as described in 23 CFR § 771.111(f).

### **Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)**

ISTEA (Public Law 102-240) is a Federal law that made major changes to transportation planning and policy as embodied in Title 23 of the United States Code.

**Isolated rural nonattainment and maintenance areas**

Areas that do not contain or are not part of any metropolitan planning area as designated under the transportation planning regulations. Isolated rural areas do not have federally-required metropolitan transportation plans or TIPs and do not have Projects that are part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. Projects in such areas are instead included in statewide transportation improvement programs. These areas are not donut areas.

**Long-range Plan (LRP)**

This is a 20-year horizon plan that identifies facilities that should function as an integrated transportation system, and are developed pursuant to Title 23 and 49, U.S.C. (United States Code). It gives emphasis to those facilities that serve important national and regional transportation functions, and in the case of the MTP includes a financial plan that demonstrates how the long-range plan can be implemented. Both the SLRP and MTP are examples of long-range plans.

**Long-Range Statewide Transportation Plan (also referred to as SLRP)**

Long-range Statewide Transportation Plan means the official, statewide, multimodal, transportation plan covering a period of no less than 20 years developed through the statewide transportation planning process.

**Major Project**

Federal-aid Project funded under Title 23 with an estimated total cost of \$500 Million or more. Major Projects are required to submit a project management plan and an annual financial plan to FHWA for review.

**Metropolitan Planning Organization (MPO)**

The organizational entity designated by Federal law with lead responsibility for developing transportation plans and programs for urbanized areas of 50,000 or more in population.

**Metropolitan Transportation Plan (MTP)**

This is the official multimodal transportation plan addressing no less than a 20-year planning horizon that is developed, adopted, and updated by the MPO through the metropolitan transportation planning process.

**NEPA and NEPA Process**

The National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.) requires Federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. There are three NEPA classes of action: categorical exclusions (CEs), which may apply if an action meets established criteria and has no significant environmental impacts individually or cumulatively; environmental impact statements (EISs), which are required for actions with significant environmental impacts; and environmental assessments (EAs), which are used to evaluate an action when the significance of environmental impacts is not certain. An EA may result in a finding of no significant impact (FONSI) if analysis shows there are no significant environmental impacts or the action includes mitigation for potentially significant impacts, or an EA may result in the preparation of an EIS.

**Non-metropolitan Area**

The term "non-metropolitan areas" means all areas of a State that are outside the MPO planning boundary areas.

**Operational Independence**

This is a term unique to Major Project Guidance, which describes conditions under which a component of the overall Major Project may proceed if the component can be built and can function as a viable transportation facility even if the rest of the Project described in the environmental document is never built.

**Project**

A Project is an undertaking by a State highway department or local agency for highway, transit, or other action eligible for Federal funding or requiring Federal approval. In this document, the term "Project" (capital 'P') refers to a specific proposed facility or other action as defined in the NEPA document and includes every "phase of a Project", such as preliminary engineering, acquisition of rights-of-way and actual construction, unless otherwise stated. The term "project" (small 'p') is used here as a reference to a phase of a Project, or a component of such a phase (e.g., bridge piers or highway landscaping related to a Project).

**Record of Decision (ROD)**

A ROD presents the environmental decision by the Federal agency for a Project, the basis for the decision, identifies the selected alternative, and summarizes any mitigation measures that will be incorporated in the Project. The ROD can only be signed once the Project final EIS meets all the requirements in 23 CFR Part 771.

**Regional Transportation Plan (RTP)**

Some states refer to their MTP as RTP. They are the same document.

**Statewide Transportation Improvement Program (STIP)**

This is a statewide prioritized listing/program of transportation projects covering a period of four years that is consistent with the long-range statewide transportation plan, metropolitan transportation plans, and TIPs, and required for Projects to be eligible for funding under title 23 U.S.C. and title 49 U.S.C. Chapter 53.

**Transportation Improvement Program (TIP)**

Also known as a transportation program, a TIP is a prioritized listing/program of transportation projects covering a period of four years that is developed and formally adopted by an MPO as transportation plan, and required for Projects to be eligible for funding under title 23 U.S.C. and title 49 U.S.C. Chapter 53.

**Year of Expenditure (YOE)**

Year of expenditure dollars are dollars that are already adjusted for inflation. For example, if two identical items each have a current value of \$1,000, it may in fact, cost \$1,000 to purchase one of them in the first year of a Project, while it is estimated to cost \$1,200 to purchase the other in the fourth year of a Project.