



U.S. Department
of Transportation

**Federal Highway
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

In Reply Refer To: HCC-1

Mr. Michael Behrens
Executive Director
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701

Dear Mr. Behrens:

We are aware that the Texas Legislature is currently considering a number of proposals that would make comprehensive changes in the structure and operation of the Texas highway program. We have reviewed a number of bills that are currently being considered such as HB 1892, HB 2772, SB 1267 and SB 1929; but as the Legislature is still in session; there have been frequent legislative changes that make it difficult for us to know exactly what is being proposed. In at least some of the bills, there are a number of provisions that concern us from both a legal and a transportation policy perspective. If signed into law, some of these proposals could affect the State's eligibility for receiving Federal-aid highway funds.

Texas has been recognized as having one of the most farsighted, innovative and aggressive transportation programs in the nation. Texas' forward-leaning commitment to addressing the State's critical transportation needs illustrates its appreciation of the correlation between a healthy transportation system and our Nation's economic vitality. Texas is considered the nation's leader in developing new transportation facilities through public private partnerships (PPPs). These partnerships create opportunities for innovation not typically available for government only projects. The use of PPPs allows the State to leverage the limited state and Federal resources to better serve the people of Texas.

Much of the proposed legislation that we have reviewed does not raise any issue of compliance with federal requirements. However, certain facets of these proposals appear to run afoul of federal law or regulation. Other aspects of the proposals are also of concern to us, but without the benefit of the final statutory language or your interpretation, we cannot conclude whether or not the provisions present an irreconcilable conflict with Federal requirements. While we are not able to provide detailed comments at this time, some general observations about Federal requirements may be useful for the State to consider as it deliberates various pieces of proposed legislation.

**MOVING THE
AMERICAN
ECONOMY**



First, 23 U.S.C. §302 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." This section is fundamental to the operation of the Federal-aid Highway Program (FAHP). Under the section, State departments of transportation must be responsible for the implementation of the FAHP in their State. While under State law or practice, local governments, other state agencies, or private firms or consultants, may carry out certain parts of the FAHP, we must be able to look to the State transportation department as the entity ultimately responsible to us for complying with all of the Federal requirements. In various proposals, we have seen provisions that would turn over large parts of the State highway program to counties, regional tollway authorities, regional mobility authorities or other local governmental entities. While we have some concerns regarding the ability of a plethora of regional or local agencies to carry out complex projects integral to the successful operation of the state transportation system, that decision is up to Texas. However, Federal law requires that the Texas State Department of Transportation must be responsible for complying with our Federal requirements, regarding the planning, financing, construction, maintenance, and operations of transportation facilities, irrespective of which State or local entity is actually carrying out these functions.

Second, the legislation we have reviewed includes a myriad of provisions dealing with the establishment and operation of toll roads and toll authorities at both the State and local level. We hope that these changes do not blunt the initiative that Texas has shown in reaching out to the private sector on the development and operation of needed transportation facilities. We note that to the extent that toll road projects involve or anticipate the use of Federal funds, they must comply with 23 U.S.C. §129 and/or other Federal laws. These laws deal with the development of federally assisted toll roads or the modifications of existing roads to include tolling. For example, one of these requirements relates to the disposition of the net revenues realized from toll road operations. By in large, net revenues must be used on title 23, U.S.C., eligible projects.

Third, at least one of the bills being considered would require Texas Department of Transportation (TxDOT) to provide right-of-way (ROW) to local tolling entities at no cost. The use of the ROW of Federal-aid highways is the subject of specific Federal requirements. Access to Federal-aid highways must not interfere with the safe and free flow of traffic, and is, therefore, subject to Federal Highway Administration (FHWA) approval. See 23 C.F.R. §1.23. FHWA carefully regulates new access points on the Interstate System and other limited access highways. Federal law requires adherence to standards on the National Highway System (NHS) regarding safety, air quality, design and access. These proposed bills, however, remove your ability to ensure these standards are followed on projects undertaken by local tolling authorities. Again, approval from the FHWA is required prior to allowing any change in access control or other use of acquired property on the NHS. Also, the Federal share of any net revenues realized from the sale or lease of airspace must be dedicated to title 23 purposes, unless FHWA grants a waiver. See 23 U.S.C. §156. As to providing the ROW to local entities at no cost, Federal law requires the state to charge fair market value or rent for the use or disposal of

real property interests, including access control on property acquired with Federal funds. The legislation proposing this change appears to be contrary to this Federal law. Fourth, Texas must continue to comply with the transportation planning provisions of 23 U.S.C. §§134 and 135. In accordance with these federal laws, the State carries out the transportation planning process statewide and in urbanized and metropolitan areas, in cooperation with Metropolitan Planning Organizations (MPO). Local governments are important stakeholders in transportation and in the transportation decision-making process. Various bills, such as the proposed HB 1892 and SB 1929, do not appear to adequately address the role of the MPO, whose responsibilities by Federal law must be carried out irrespective of which agency owns transportation assets. Also, it is unclear how the MPOs would work with the new proposed Rural Planning Organizations.

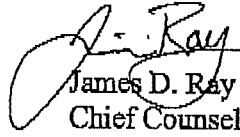
Fifth, we note that at least one bill sets out provisions relating to the necessity of an audit to be conducted by FHWA. Please understand that all parts of the State highway program using Federal funds are subject to audit at our discretion. The State of Texas has no authority to direct the audit responsibilities or any other activity of FHWA under the Federal-aid program.

Sixth, we expressed our deep concerns about developments in the procurement process for SH 121 in earlier communications. However, we note that some of the proposed legislation actually sets-out procurement requirements for SH 121 and SH 161 that may also violate Federal procurement law and regulations. We urge you to be very cautious in this legislation as the enactment of such provisions may prohibit or restrict the use of Federal funds to assist in the construction of these facilities. Aside from complying with Federal procurement requirements, we urge you to support the spirit of a fair and open competitive process in whatever procurement procedures are adopted.

Seventh, we are confused by the provisions of certain pieces of legislation that would put a moratorium on state projects planning on utilizing PPPs while at the same time creating a complex set of laws that would provide for the continued expansion of PPPs by other governmental entities in the State. We understand that the State is reviewing of its transportation programs, including those portions that use Federal grant or loan funds. This kind of review can help reassure the public about the path that Texas has adapted. However, we do not see the benefit a moratorium if the State has already committed to legislation providing for a continuation of the program. Private investment in new transportation projects is a rapidly growing trend that offers substantial benefits in project delivery and management. If Texas loses the initiative it now has, private funds now flowing to Texas will go elsewhere. Finally, the proposed legislation does not have a general assent provision that would allow TxDOT to take the steps necessary to comply with Federal requirements and thereby enable the State to continue to receive its Federal-aid highway funds, irrespective of the provisions of Texas law. Such provisions are typical and prevent the unintended loss of Federal funds. Including such a provision in this legislation would be a first step towards ensuring that any new law is implemented in such a way that avoids the loss of Federal-aid funds.

We stand ready to work with Texas officials to ensure continued compliance with all of the applicable Federal laws and regulations. We wish to make sure that Texas can continue to receive the full benefits available under the Federal-aid Highway Program. We would be happy to respond to any questions that you may have.

Sincerely,



James D. Ray
Chief Counsel