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This document is scheduled to be published in the  
Federal Register on 05/30/2025 and available online at

<https://federalregister.gov/d/2025-09736>, and on <https://govinfo.gov> 910-22-P]

## **Federal Highway Administration**

### **23 CFR Part 630**

#### **RIN 2125-AG25**

### **Rescinding Preliminary Engineering Project 10-Year Repayment Provision**

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This final rule rescinds a portion of the regulations issued on May 10, 2001, Federal-Aid Project Agreement, which required that State Departments of Transportation (DOTs) repay FHWA Federal funds provided for preliminary engineering for a project if right-of-way acquisition for, or actual construction of, the road for which this preliminary engineering is undertaken is not started in ten years.

**DATES:** This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** For questions about this final rule, please contact Mr. Anthony DeSimone, FHWA Office of Infrastructure, 317-226-5307, or via email at [Anthony.DeSimone@dot.gov](mailto:Anthony.DeSimone@dot.gov). For legal questions, please contact Mr. David Serody, FHWA Office of Chief Counsel, 202-366-4241, or via email at [David.Serody@dot.gov](mailto:David.Serody@dot.gov). Office hours for FHWA are from 8 a.m. to 4:30 p.m., eastern time (E.T.), Monday through Friday, except Federal holidays.

#### **SUPPLEMENTARY INFORMATION:**

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## **I. General Discussion**

Through this final rule, FHWA is rescinding a portion of the rule issued on May 10, 2001, Federal-Aid Project Agreement, via 66 FR 23845, amending §630.112(c)(2) of title 23 Code of Federal Regulations (CFR). This rule amended the regulation of project agreements. Specifically for the purpose of this rescission, this rule included a provision that required repayment of preliminary engineering for which right-of-way or construction was not started by the tenth fiscal year following authorization. For the reasons explained below, FHWA has determined that this subparagraph is unnecessary and will rescind it in full.

Section 1016(a) of the Intermodal Surface Transportation Efficiency Act of 1991 amended 23 U.S.C. 102(b) to state: “If on-site construction of, or acquisition of right-of-way for, a highway project is not commenced within 10 years after the date on which Federal funds are first made available, out of the Highway Trust Fund (other than Mass Transit Account), for preliminary engineering of such project, the State shall pay an amount equal to the amount of Federal funds made available for such engineering. The Secretary shall deposit in such Fund all amounts paid to the Secretary under this section.” This provision was modified by section 1304 of the Transportation Equity Act for the 21<sup>st</sup> Century in 1998 to allow the Secretary of Transportation the ability to grant time extensions of this requirement. In 2001, FHWA amended its regulation on project agreement provisions, 23 CFR 635.112, to, in part, require that States accept and comply with the 10-year payback provision under 23 U.S.C. 102(b) as a condition to payment of any Federal funds obligated. 23 CFR 635.112(c)(2).

Section 11310(a) of the Infrastructure Investment and Jobs Act (Pub. L. 117-58) repealed the 10-year payback requirements formerly found in 23 U.S.C. 102(b). Accordingly, FHWA finds good reason to eliminate this regulatory provision entirely. The repeal of 23 U.S.C. 102(b) removes the statutory authority for FHWA to demand the

reimbursement of preliminary engineering funds if on-site construction of, or acquisition of right-of-way for, a project is not commenced within 10 years of the date on which Federal funds were first made available for the preliminary engineering on the project. Similarly, the statutory change removes the obligation of State DOTs to repay such preliminary engineering costs in these circumstances. For these reasons, FHWA finds it unnecessary to maintain a provision that FHWA cannot enforce due to lack of statutory authority and that State DOTs have no legal obligation to follow.

The FHWA notes that the repeal of the 10-year payback provision under 23 U.S.C. 102(b) and FHWA's termination of 23 CFR 630.112(c)(2) does not change any other requirements that may allow FHWA to demand repayment of funds used for preliminary engineering. For example, FHWA notes that it may require the repayment and recovery of funds used for preliminary engineering if it finds improper or ineligible use of such funding otherwise not in compliance with Federal requirements. *See* 23 CFR 1.36. The purpose of the rescission of 23 CFR 635.112(c)(2) is only that FHWA will not use the 10-year payback rule as the basis to demand such repayment, as there is no longer statutory authority for such a requirement.

## **II. Administrative Procedure Act**

Under the Administrative Procedure Act (APA), the requirement for prior notice and an opportunity for public comment does not apply when the agency, for good cause, finds that those procedure are "impracticable, unnecessary, or contrary to the public interest." *See* 5 U.S.C. 553(b)(B). The FHWA finds that notice and an opportunity for public comment are unnecessary for this rulemaking because this rulemaking because the legal provisions underlying the rule are no longer operative and the regulation is unenforceable. Therefore, FHWA finds good cause to issue this final rule without notice and an opportunity for public comment.

Furthermore, under the APA, there must be at least thirty days between publication of a substantive rule and its effective date except “as otherwise provided by the agency for good cause and published with the rule.” *See* 5 U.S.C. 553(d)(3). For similar reasons as above, because FHWA is rescinding a legally inoperative requirement, a period of 30 days between publication and effectiveness is unnecessary. The requirements in 23 CFR 635.112(c)(2) are inoperative now and will be as inoperative at publication as they will be thirty days later with or without publication of this final rule. Therefore, FHWA finds good cause to issue this final rule with immediate effectiveness.

### **III. Rulemaking Analyses and Notices**

#### **A. Executive Orders 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures**

This final rule does not meet the criteria of a “significant regulatory action” under Executive Order (E.O.) 12866, as amended by Executive Orders 14215 and 13563. Therefore, the Office of Management and Budget (OMB) has not reviewed this rule under those orders.

This final rule rescinds regulations that are currently inoperative for projects going forward. For that reason, FHWA does not believe there are any costs to this rulemaking, as opposed to the deregulatory benefit of removing unnecessary provisions from the CFR.

These changes would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

#### **B. Executive Order 14192 (Unleashing Prosperity Through Deregulation)**

This final rule is not an E.O. 14192 regulatory action. This rule would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impacts of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

### **C. Regulatory Flexibility Act**

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) (as amended by the Small Business Regulatory Enforcement Fairness Act of 1996; 5 U.S.C. 601 et seq.), agencies must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). No regulatory flexibility analysis is required, however, if the head of an agency or an appropriate designee certifies that the rule will not have a significant economic impact on a substantial number of small entities. FHWA has concluded and hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities; therefore, an analysis is not included. This final rule will only remove regulations that are already inoperative for any future projects.

### **D. Unfunded Mandates Reform Act**

This final rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4, 109 Stat. 48) for State, local, and Tribal governments, or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

### **E. Executive Order 13132 (Federalism Assessment)**

This action has been analyzed in accordance with the principles and criteria contained in E.O. 13132. The FHWA has determined that this action does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

The FHWA has also determined that this action does not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

#### **F. Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid Office of Management and Budget (OMB) control number. This final rule is deregulatory and so would not impose any additional information collection requirements.

#### **G. National Environmental Policy Act**

FHWA has analyzed this rule pursuant to the NEPA and has determined that it is categorically excluded under 23 CFR 771.117(c)(2), which applies to the promulgation of rules, regulations, and directives. Categorically excluded actions meet the criteria for categorical exclusions under 23 CFR 771.117(a) and normally do not require any further NEPA approvals by FHWA. This rule will rescind a legally inoperative requirement. FHWA does not anticipate any adverse environmental impacts from this rule, and no unusual circumstances are present under 23 CFR 771.117(b).

#### **H. Executive Order 13175 (Tribal Consultation)**

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

FHWA has assessed the impact of this final rule on Indian tribes and determined that this

rule would not have tribal implications that require consultation under Executive Order 13175.

#### **I. Regulation Identifier Number**

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in the spring and fall of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

#### **J. Rulemaking Summary, 5 U.S.C. 553(b)(4)**

As required by 5 U.S.C. 553(b)(4), a summary of this rule can be found at *regulations.gov*, under the docket number.

#### **List of Subjects in 23 CFR Part 630**

Government contracts, Grant programs—Transportation, Highways and roads, Project agreement procedures.

Issued in Washington, DC, under authority delegated in 49 CFR 1.85.

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Gloria M. Shepherd  
Executive Director  
Federal Highway Administration

For the reasons stated in the preamble, FHWA amends 23 CFR part 630 as set forth below:

#### **PART 630 – PRECONSTRUCTION PROCEDURES**

1. The authority citation for part 630 continues to read as follows:

**Authority:** 23 U.S.C. 106, 109, 112, 115, 315, 320, and 402(a); Sec. 1110, 1501, and 1503 of Pub. L. 109-59, 119 Stat. 1144; Pub. L. 105-178, 112 Stat. 193; Pub. L. 104-59, 109 Stat. 582; Pub. L. 97-424, 96 Stat. 2106; Pub. L. 90-495, 82 Stat. 828; Pub. L. 85-

767, 72 Stat. 896; Pub. L. 84-627, 70 Stat. 380; 23 CFR 1.32 and 49 CFR 1.81 and 1.85,  
and Pub. L. 112-141, 126 Stat. 405, sections 1303 and 1405.

**§ 630.112 [Amended]**

2. Amend § 630.112 by removing and reserving paragraph (c)(2).

[FR Doc. 2025-09736 Filed: 5/27/2025 4:15 pm; Publication Date: 5/30/2025]