

Senate Committee on Environment and Public Works
Hearing Entitled “Lessons Learned from the Federal Response to the Francis Scott Key Bridge Collapse on March 26, 2024”

July 10, 2024

Questions for the Record for Administrator Bhatt¹

Senator Cardin:

1. When unprecedented disasters occur, Congress has stepped in to support affected communities by taking on an additional portion of the rebuild expenses. Can you describe for the committee how, based on ample precedent, providing 100% federal funding support for the rebuild, is the best way Congress can support Baltimore?

The President has been clear since day one about his commitment that the Federal government should cover any needed costs for reconstructing the Francis Scott Key Bridge. The Biden-Harris Administration has asked Congress to join the Administration in demonstrating our commitment to aid in recovery efforts by authorizing a 100 percent Federal cost share for bridge reconstruction. Authorizing a 100 percent Federal cost share would be consistent with past catastrophic bridge collapses. For example, in 2007, Congress authorized a 100 percent Federal cost share for repair and reconstruction of the I-35W bridge in Minnesota. In 2018, Congress provided a 100 percent Federal cost share for Emergency Relief (ER) funds for Puerto Rico to respond to damage caused by Hurricanes Irma and Maria. Providing 100 percent Federal funding for the Francis Scott Key Bridge will support the restoration of the I-695 corridor, a vital connection for people and goods traveling along the East Coast, will provide certainty to Maryland and its construction contractors as they work collectively to reconstruct the bridge, and will provide certainty as Maryland plans for other transportation projects in the State. Consistent with FHWA’s regulations, and as reflected in the Administration’s November 2024 supplemental request to Congress, FHWA funding support for the project will not duplicate other sources, such as insurance.

2. On June 28, OMB Director Young sent a strong request letter in support of Baltimore’s funding needs, reiterating her April request for Congress to authorize a 100% federal cost share. For FHWA it provides \$3.1 billion for Baltimore and other project needs. The Emergency Relief fund at FHWA currently has about \$850 million against \$4.4 billion in pending requests. Can you underscore the urgency of Congress acting quickly to respond to Director Young’s request and replenish the Emergency Relief program?

The ER Program provides funding for the repair or reconstruction of Federal-aid highways and Federally owned roads that have suffered serious damage as a result of natural disasters or catastrophic failures from an external cause. The ER program has

¹ Administrator Bhatt resigned from the Federal Highway Administration (FHWA) effective September 10, 2024. These responses are provided on behalf of FHWA.

been authorized at \$100 million annually for numerous years. As of November 7, 2024, the total amount of unmet needs for all eligible ER events nationwide is approximately \$8.4 billion and the available ER Program fund balance is approximately \$119.6 million. The ER Program “backlog” (funding available for allocation less nationwide unmet needs) is an estimated \$8.3 billion. Every State in our Nation is impacted by climate events, and the increased frequency with which these impacts are occurring highlights the significance of the ER Program and the financial strain that it is currently under. Supplemental appropriations are needed to be able to provide ER funds to States across the country. The shortfall in the ER fund will continue to get more dire as additional disasters occur and FHWA continues to receive ER funding requests.

- a. What are some of the consequences of Congress failing to act before the end of the calendar year?

The ER Program provides State Departments of Transportation (DOTs), local agencies, and Federal Land Management Agencies (FLMAs) the assurance that eligible emergency and permanent repairs will be reimbursed on a routine basis. FHWA typically allocates ER funds on a semi-annual basis to meet the upcoming six months of obligation needs of ER applicants. FHWA released information regarding the second ER semi-annual allocation for Fiscal Year (FY) 2024 on September 13, 2024, providing \$802 million of available ER Program funds to 36 States, Guam, and Puerto Rico. The funds will be used to support repair needs following natural disasters, extreme weather, or catastrophic events, such as hurricanes, flooding, and mudslides.

FHWA did not have a sufficient balance of available ER funds to fully fund all requested Emergency Relief for Federal-Aid (ERFA) and Emergency Relief for Federally Owned (ERFO) roads allocation requests for the allocation package released on September 13, 2024. To carry out necessary repairs across the country, in this allocation package, the second ER semi-annual allocation for FY 2024, FHWA funded all ERFA requests at or below \$300,000 (with the expectation that many of these will be final allocations in preparation for event close-out); all other ERFA requests were funded at a proportional rate of 69.38 percent of each request. For ERFO, all requests were fully funded. Without action by Congress to replenish the ER fund, the shortfall in the ER fund will continue to get more dire as additional disasters occur and FHWA continues to receive ER funding requests. Without congressional action, FHWA will soon lack the funding to address additional needs resulting from recent hurricanes and other prior disasters, as well as needs from future storms or other disasters. This funding shortfall will affect the ability of State, local, and Federal stakeholders to restore damaged transportation infrastructure in a timely manner. As the Secretary has stated, without congressional action, the federal government cannot continue to offer States emergency resources when they need it most and the failure to

provide additional funds has already set back the long-term recovery efforts of States around the country that have been diligently rebuilding from previous disasters.

3. According to 23 C.F.R. §608.105(e), ER funds shall not duplicate assistance under another Federal program or compensation from insurance or any other source [...] Any compensation for damages or insurance proceeds including interest recovered by the State or political subdivision or by a toll authority for repair of the highway facility must be used upon receipt to reduce ER fund liability on the project.” States and local transportation agencies are required to make “diligent efforts” to “recover repair costs from the legally responsible parties to reduce the project costs.” Please describe how compensation from damages would pay down the rebuild cost according to this policy.

FHWA was informed in August 2024 that the Maryland Transportation Authority (MDTA) received \$350 million in insurance proceeds. As such, the Administration’s supplemental request transmitted to Congress in November 2024 accounts for MDTA’s receipt of these proceeds.

4. Please confirm if there are any tolling restrictions that would accompany a federally supported rebuild under existing statute for the Emergency Relief Program?

The use of ER funds on a facility will federalize that facility for purposes of Title 23, United States Code, meaning such facility will be subject to the requirements of Title 23, including the limits on the use of toll revenues, annual audit, over-the-road-bus equal access, and certification of annual maintenance under 23 U.S.C. 129 (addressing toll roads, bridges, tunnels, and ferries).

Under 23 U.S.C. 129(a)(3), a State may use toll revenues received from the operation of the toll facility only for the following: (1) debt service with respect to the projects on or for which the tolls are authorized, including funding of reasonable reserves and debt service on refinancing; (2) a reasonable return on investment of any private person financing the project, as determined by the State or interstate compact of States concerned; (3) any costs necessary for the improvement and proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation; (4) if the toll facility is subject to a public-private partnership agreement, payments that the party holding the right to toll revenues owes to the other party under the public-private partnership agreement; and (5) if the public authority certifies annually that the tolled facility is being adequately maintained, any other purpose for which Federal funds may be obligated by a State under Title 23, United States Code.

The State must annually audit the use of toll revenues for compliance with the above restrictions and make the records pertaining to the use of toll revenues available to the Secretary of Transportation (Secretary) for audit upon request. Should the Secretary conclude that the State is not complying with the revenue use limitations, the Secretary may require the State to discontinue toll collection until the Secretary and the State reach an agreement for achieving compliance.

The use of toll revenues on Federal-aid highway facilities is determined under the applicable statute, as described above. Maryland is not required to use future toll revenues to pay for the reconstruction of a new bridge or to reimburse the ER program.

5. The Maryland Department of Transportation (MDOT), State Highway Administration Title 23 program is routinely audited by FHWA and therefore has a sound understanding of Title 23 eligible activities. Is there any reason to believe that MDOT-SHA would not adhere to the Title 23 requirements?

No. The Maryland Department of Transportation (MDOT) State Highway Administration (SHA) has established processes and procedures and fiscal control tools to aid in compliance with the applicable Federal requirements.

Section 106(g) of Title 23, United States Code, requires FHWA to establish an oversight program to monitor the effective and efficient use of funds authorized to carry out such title. FHWA uses a risk-based stewardship and oversight (RBSO) approach to meet this statutory requirement. A key element of the RBSO approach is the Stewardship and Oversight (S&O) Agreement which defines the roles and responsibilities of FHWA and each State department of transportation (State DOT) with respect to project approvals and related responsibilities and documents methods that will be used for Federal-aid Highway Program (FAHP) oversight activities. In addition to S&O Agreements, FHWA utilizes program and project involvement, data-driven compliance assurance checks, program and process reviews, and other information to develop an effective, efficient, and appropriate RBSO approach.

6. The Maryland Transportation Authority (MDTA) submits annual reports to FHWA in accordance with USC Title 23.129 requirements on its applicable facilities and are thus very familiar with federal requirements. Is there any reason to believe that the MDTA would not adhere to the Title 23 requirements?

No. The MDTA has several Federal-aid toll facilities within its portfolio and recently developed a Section 129 audit/compliance plan for the Intercounty Connector, I-95 Section 100, Fort McHenry Tunnel, and Nice Bridge. Due to this recent exercise, MDTA is fully aware of the requirements on Federal-aid toll facilities under 23 U.S.C. 129. The MDTA's annual reports to FHWA indicate the applicable facilities are in compliance with applicable Federal requirements.

7. Has Maryland been self-supporting in terms of tolling revenue?

FHWA does not track specific uses of toll revenues by States. Based on MDOT's Section 129 reporting to FHWA for the State for FY 2022, MDOT uses toll revenue for its toll facilities' operations and maintenance, debt service, and eligible Title 23 expenditures.

- a. Has Maryland needed any support from the FHWA ER program in the past?

Yes, FHWA has allocated ER funds to Maryland in prior years following eligible emergency events.

- b. In terms of “corridor states” or states that play an outsized role in our nation’s interstate system, has Maryland required more than its share from the U.S. tax payer?

FHWA does not have information to report on the total amount of Federal assistance that the State of Maryland has received from the entire Federal government.

Within the context of FHWA funding, the Federal-aid highway program apportionment for Maryland each fiscal year—like that of all States—is determined by statute. For FY 2024, Maryland’s Federal-aid highway program apportionment was \$828,287,771, which is approximately 1.5 percent of the total Federal-aid highway program apportionments to all States for such fiscal year.

8. Asking MDTA to forego toll revenue as a result of the FSK damage caused by a Container Ship is not without meaningful consequences. Is it common practice for the FHWA ER program to receive tax revenue from a state?

Federal law expressly allows Federal participation in the reconstruction, resurfacing, restoration, rehabilitation or replacement of existing toll facilities. There is no provision in Federal law that would prohibit the continued collection of tolls on the bridge after it is reconstructed. Separately, unless otherwise authorized by Congress, a recipient of ER funds is required to contribute a pro-rata share to the costs of repair or reconstruction to predisaster condition. The applicable pro-rata share is determined under 23 U.S.C. 120. Under current law, Maryland is not required to use future toll revenues to pay for the reconstruction of a new bridge or to reimburse the ER program. ER funds have been used for other toll facilities and no State has been required to use toll revenues to reimburse the ER program.

As noted above, the use of toll revenues on Federal-aid highway facilities is determined under the applicable statute (23 U.S.C. 129). Under 23 U.S.C. 129(a)(3), a State must restrict the use of toll revenues received from the operation of the toll facility as described in that provision.

Under the law, ER funds cannot duplicate assistance under another Federal program or compensation from insurance or any other source. FHWA will follow the law, and the ER program will be reimbursed with compensation for damages or with proceeds obtained through applicable insurance.

- a. Would this type of arrangement, in which toll revenue collected from Maryland's new bridge is diverted to the FHWA ER program be a departure from precedent?

Yes. ER funds have been used for other toll facilities and no State has been required to use toll revenues to reimburse the ER program. As noted above, Maryland is not currently required to use future toll revenues to pay for the reconstruction of a new bridge or to reimburse the ER program.

- b. Why should Maryland be punished or treated differently than any other state with projects in the ER?

Maryland is not currently being treated differently regarding ER Program funding. Unless otherwise authorized by Congress, any recipient of ER funds is required to contribute a pro-rata share for permanent repairs. Similarly, unless otherwise authorized by Congress, the limitations on the use of toll revenues apply to all Federal-aid highway facilities.

FHWA typically allocates ER funds on a semi-annual basis to meet the upcoming six months of obligation needs of ER applicants. Similar to other State DOTs and FLMAs, MDOT can request funding allocations whenever a nationwide call for ER needs is made.

Senator Ricketts:

1. Does FHWA have the authority to retroactively designate damaged or destroyed infrastructure as a part of the interstate system?

Federal law gives the Secretary of Transportation authority (which the Secretary has delegated to the FHWA Administrator) to modify the Interstate System, upon the recommendation of the State or States. While the designation of the Francis Scott Key Bridge occurred after the bridge collapsed, part of the facility still exists (the designation was for an 18.8-mile segment). The facility was signed as an Interstate, and anyone using the facility before the bridge collapsed would have thought it was already on the Interstate System.

- a. If so, please cite the authority in statute.

This authority is provided in 23 U.S.C. 103(c)(4)(A), which states, "If the Secretary determines that a highway on the National Highway System meets all standards of a highway on the Interstate System and that the highway is a logical addition or connection to the Interstate System, the Secretary may, upon the affirmative recommendation of the State or States in which the highway is located, designate the highway as a route on the Interstate System."

- b. In the past, has FHWA retroactively designated damaged or destroyed infrastructure as a part of the interstate system before?

FHWA is not aware of any similar designations by FHWA, or requests by States to make such a designation. As noted above, the facility was signed as an Interstate, and anyone using the facility before the bridge collapsed would have thought it was already on the Interstate System. States request modifications only a few times a year, and none of the recent requests were under similar circumstances.

2. Does the Administration have the legal authority to waive NEPA and use alternative arrangements to go even beyond categorical exclusion to expedite the rebuild of the bridge?

All repair projects under the ER Program must comply with the National Environmental Policy Act (NEPA). MDOT utilized FHWA's emergency procedures at 23 CFR 771.117(c)(9) to issue a Programmatic Categorical Exclusion (CE) for the debris removal and related emergency activities within days of the collapse. Using the same emergency procedures, FHWA approved the CE for reconstruction of the bridge on July 23, 2024. The CE provides the appropriate level of information to allow for a streamlined permitting approach with the respective resource agencies utilizing their emergency procedures, as applicable.

Permanent repair projects do not meet the criteria for "emergency repairs" identified in 23 CFR 668.103 and 668.203 but may also qualify as a CE if the work:

- Occurs within the existing right-of-way and in a manner that substantially conforms to the preexisting design, function, and location as the original (which may include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction); and*
- Commences within a 2-year period beginning on the date of the emergency declaration.*

MDOT limited the project scope of the bridge replacement to occur within the existing MDTA right-of-way along the current centerline of the bridge and its approaches. Also, work is expected to begin within two years of Governor Moore's declaration of a state of emergency. The documentation for the CE shows the Project will benefit socioeconomic resources by restoring community connectivity and commerce across the Patapsco River. The expected impacts to natural resources are minimal and will comply with the required permits and stormwater management approval to further minimize impacts. The Project will not provide additional capacity or provide new access points. Given these circumstances, FHWA determined a CE is the appropriate class of action in compliance with NEPA.

As outlined in Council on Environmental Quality's 2020 guidance memorandum titled "Emergencies and the National Environmental Policy Act Guidance," the NEPA

implementing regulations provide for alternative arrangements for NEPA compliance in emergency situations when the agency proposal has the potential for significant environmental impacts and would require an environmental impact statement (EIS) if the situation were not an emergency. However, FHWA determined the reconstruction will not involve significant environmental impacts for the reasons stated above. Therefore, alternative arrangements were not necessary.

Senator Boozman:

1. As part of its Buy Clean program, the GSA adopted a dual standard that applies different emissions thresholds to produces based on their production process. I have serious concerns about the legal authority of the GSA to adopt such a measure under the IRA as well as the effectiveness of such an approach in supporting the American steel industry achieving stated climate goals. Will FHWA's emissions standards include a dual standard?
 - a. If so, how do you plan to address concerns about the legal authority of a dual standard as well as concerns that it would prioritize certain high emissions products at the expense of low emissions products?

FHWA has not made a determination of whether emissions standards applicable to FHWA's programs will include a dual standard. FHWA is currently engaging with industry to obtain industry average information that will inform thresholds that can be used by recipients of the FHWA Low-Carbon Transportation Materials Grants Program to qualify materials as per the December 2022 Environmental Protection Agency (EPA) Interim Determination (which outlined an approach to establish thresholds and data requirements for qualifying concrete (and cement), glass, asphalt mix, and steel materials/products that meet the substantially lower embodied carbon requirements). FHWA anticipates referencing this industry average information to establish acceptable thresholds.

As part of FHWA's engagement with industry trade associations and program operators, FHWA requested that data be provided based on a representative sample of the industry data and developed using accepted International Organization for Standardization (ISO) standards benchmarking processes. For example, within the steel product category industry stakeholders may provide data based on materials meeting the same functional requirements and other industry specific considerations. Additionally, FHWA has convened a subject matter expert review panel to provide FHWA assurances that the industry averages distribution results meet FHWA expectations. During this process, FHWA is also closely coordinating with the General Services Administration (GSA), EPA, and the Council on Environmental Quality (CEQ).