

SAFETEA-LU Transportation Improvements

Implementing Guidance (December 2006)

BACKGROUND

Section 1934 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU, Public Law 109-59, 119 Stat.1144) authorized funds to be appropriated from the Highway Trust Fund (HTF) to carry out each project described in this section. The purpose of this guidance is to provide information on funding, Federal share, eligibility, flexibility, and transferability of SAFETEA-LU Transportation Improvements (TI) projects.

I. GENERAL

A. Authorization of Appropriations

Section 1934 of SAFETEA-LU authorizes funds to be appropriated from the HTF for each fiscal year (FY) from 2005 through 2009 to carry out the 466 projects described in subsection (c). The sum of the amounts specified for the TI projects is \$2,555,236,000.

B. Funding

1. Allocations

Of the total amounts specified for each Transportation Improvements Project described in the table contained in subsection (b) of section 1934 of SAFETEA-LU, the funds shall be allocated to carry out each project as follows:

- (1) 10 percent for fiscal year 2005;
- (2) 20 percent for fiscal year 2006;
- (3) 25 percent for fiscal year 2007;
- (4) 25 percent for fiscal year 2008;
- (5) 20 percent for fiscal year 2009.

In addition, 23 U.S.C. §110, Revenue Aligned Budget Authority, as amended by section 1105 of SAFETEA-LU, provides that the authorized amounts of Federal-aid highway and highway safety construction programs be increased or decreased beginning in FY 2007 in accordance with the increase or decrease in estimated revenue to the HTF.

2. Funding for Transportation Improvements Projects

The Fiscal Management Information System (FMIS) program code for the funds for TI projects is LY30 for FYs 2005 through 2009, and the DELPHI accounting string is 15X0R71H50-050LY30500. The contract authority (CA) for these projects is authorized by project, but the obligation authority (OA) is provided each year in the aggregate for each State under the provisions of section 1102(c)(4)(A) of SAFETEA-LU and the annual transportation appropriations act. Thus, it is the State's decision on which TI projects the OA is used. This is consistent with 23 U.S.C. §145.

For TI funds that are transferred to the Federal Lands Highway Program (FLH), program codes will be issued upon request.

C. Obligation Authority (OA)

General

The special OA provided for the TI projects is only available for these TI projects, although some project flexibility is allowed, as described in section 1935 of SAFETEA-LU. Please refer to the Flexibility Provisions discussion in this document for additional information pertaining to project flexibility for these projects. Additionally, this special OA is available until used and is distributed by State. The State has the discretion to select which projects to carry out with this special OA.

Since this special OA is usually less than 100 percent of the allocated amounts, due to the imposition of obligation limitation on the Federal-aid highway program, States may use their regular (formula) OA to fully obligate the allocated contract authority funds for TI projects. To use regular (formula) OA, the contract authority funds must be transferred from the program code assigned to the project to program code L900 in order to differentiate regular OA from special OA.

For these transfers the State should submit requests to the FHWA Division Office. The Division Office will then submit the request via e-mail to the Office of Budget (mailbox HCF-10) and the Office of Financial Management (mailbox HCF-30) in the Office of the Chief Financial Officer. The Office of Financial Management will process the transfer of CA in FMIS and will send a confirmation e-mail to the FHWA Division Office when the transaction has been completed.

D. Federal Share

1. General

The Federal share for TI projects is determined by 23 U.S.C. §120 unless otherwise specified within the project description or in law. The match must come from non-Federal sources, unless the source of Federal funds has specific legislative authority that allows the match to be other Federal funds, including Federal-aid highway funds.

2. Federal Share Exceptions

TI 377 - Whether or not otherwise eligible in Title 23, construct Phase II and III of Phillips to the Falls Project. Notwithstanding any other provision of law, with respect to costs for Phase II and III of this project paid for from this \$40 million, the Federal share of project costs shall be 100 percent.

Section 1913 of SAFETEA-LU- Bridge Construction, North Dakota provides that the Federal share of the eligible costs of construction of a bridge between Bismarck, North Dakota and Mandan, North Dakota shall be 90 percent. This applies to TI project 266.

Section 1964 of SAFETEA-LU - Project Federal Share provides that the Federal share for projects listed in sections 1702, 1301 and 1934 for Alaska, Montana, Nevada, North Dakota, Oregon and South Dakota be determined by section 120(b) of title 23, U.S.C. This means that these States can utilize the sliding scale provisions under 23 U.S.C. §120(b) when determining the Federal share for section 1934 TI projects.

3. Eligible Donations and Credits

In accordance with 23 U.S.C. §323, as amended by section 1902 of SAFETEA-LU, private donations of right-of-way, funds, materials, or services may be used toward the non-Federal share on any eligible Title 23, U.S.C. project. Also, local government donations of right-of-way, funds, materials, or services performed by local government employees may be used toward the non-Federal share on any eligible title 23, U.S.C. project.

Any right-of-way donated at any time during the development of a project in accordance with the requirements of 23 U.S.C. §323, may be applied to the matching share. Other costs, including eligible donated services and materials, incurred prior to FHWA authorization of the project, cannot be applied to the non-Federal matching share of the project.

4. Toll Credits

Under the provisions of 23 U.S.C. §120(j), as amended by sections 1116 and 1905 of SAFETEA-LU, toll credits may be used toward the 20 percent non-Federal matching share for programs authorized by Title 23, U.S.C. and for transit programs authorized by chapter 53 of Title 49, U.S.C., with the exception of the Emergency Relief and the Appalachian Development Highway System programs. Toll credits can be applied at any time during the development and implementation of the project, including after execution of the initial project agreement. A State may use amounts of approved toll credits to cover all or a portion of the non-Federal share of the project, which could result in up to 100 percent of the cost being borne by Federal funds on the project (with the State meeting its matching share requirement by providing a non-cash credit). To be able to earn toll credits to apply toward the non-Federal share of a project, the State must satisfy the Maintenance of Effort determination and other provisions set forth in 23 U.S.C. §120(j). Please refer to the Implementing Guidance for the Toll Credit program for further details.

5. Use of Federal Lands Management Agency (FLMA) Funds

Under the provisions of 23 U.S.C. §120(k), as amended by section 1119 of SAFETEA-LU, any funds appropriated to a FLMA, such as the National Park Service, the Forest Service, etc., may be used to provide the non-Federal matching share for any project funded under title 23 or chapter 53 of Title 49, U.S.C.

6. Use of Federal Lands Highway Program (FLHP) Funds

Under the provisions of 23 U.S.C. §120(l), as amended by section 1119 of SAFETEA-LU, any funds appropriated for the FLHP under 23 U.S.C. §204 may be used to provide the non-Federal share for any project under title 23 or chapter 53 of Title 49, U.S.C., as long as the project is providing access to or within Federal or Indian lands. This includes funding provided for the public lands highways, park roads and parkways, and Indian reservation roads and bridges programs.

E. Period of Availability

In accordance with section 1934 of SAFETEA-LU, TI funds shall be available until expended. The special OA is also available until used.

II. FLEXIBILITY PROVISIONS

A. Advance Construction

Under the provisions of 23 U.S.C. §115, as amended in section 1501 of SAFETEA-LU, a State may construct a TI project without the aid of Federal funds and be reimbursed with the Federal TI funds as they become available. The authorization of an advance construction for a TI project does not constitute a commitment of Federal funds until the project is converted to a regular Federal-aid project. This option can be selected by checking the Advance Construction box in FMIS. For assistance with this feature of FMIS, please contact Joy Kelly (202-366-2922) of the FMIS Team.

B. Project Flexibility - Section 1935

Under the provisions of section 1935 of SAFETEA-LU, States may lend CA (and OA associated with the CA) between specified sections and projects in the same State as described in section 1935(b). The funds for these projects may be loaned for a project, but shall not ultimately reduce the authorized amount, as designated in SAFETEA-LU, for the projects. The sections and projects are as follows:

- (1) Projects numbered 3677 through 5173 in section 1702;
- (2) Projects numbered 19 through 25 in section 1301;
- (3) Projects numbered 28 through 33 in section 1302;
- (4) All of the projects listed in section 1934.

Any CA used in this manner shall be restored, to the original project(s) from which it was loaned before the end of FY 2009. Any associated OA shall be restored, to the original section from which it was loaned, when the FY 2009 OA is made available. The Division Offices will be responsible for tracking any CA and OA used in this manner until an automated process is put in place by HCF. The TI Allocation Memorandum for FY 2009 will include instructions for reconciling any outstanding loans of CA and associated OA, identifying the deadlines for completion to meet the statutory

requirements in SAFETEA-LU. Follow the same email request process explained below for restoring the advanced CA and associated OA.

Also, any request for loaned CA and OA will be limited to 85 percent of the authorized amount, in order to conservatively account for the possibility of downward adjustments made by future Appropriations bills.

States that choose to advance CA (and OA associated with the CA) between sections and projects in the same state, as described in section 1935(b), should submit requests to the FHWA Division Office. The Division Office will then submit the request via e-mail to the Office of Budget (mailbox HCF-10) and the Office of Financial Management (mailbox HCF-30) in the Office of the Chief Financial Officer. The Office of Financial Management will process the advance of CA and OA in FMIS and will send a confirmation e-mail to the FHWA Division Office when the transaction has been completed.

C. Advances - Section 1936

Under the provisions of section 1936 of SAFETEA-LU, funds apportioned under 23 U.S.C. §104(b) may be obligated to carry out a project listed in section 1934 of SAFETEA-LU. The project must be eligible under the program from which the funds are obligated. Any apportioned funds used in this manner shall be restored from the TI funds allocated for the project.

Please note that this provision does not allow the deobligation of apportioned funds, and the reobligation of TI funds for costs incurred on a project prior to August 10, 2005, the date SAFETEA-LU was enacted, except under the following circumstances:

- (1) Enactment of legislation that specifically designates reimbursement of previously incurred cost;
- (2) The project was authorized under 23 U.S.C. §115, Advance Construction;
- (3) The TI funds for a project would otherwise not be able to be fully utilized on the TI project because of prior obligation of apportioned funds, thus preventing the ability to use the funds on the scope of work, as described in section 1934. In these instances, as a matter of agency practice, the FHWA has allowed the deobligation of apportioned funds and the reobligation with the TI funds, in order to ensure that TI funds are fully obligated and the obligation liquidated on the TI project. The State must provide documentation to the Division Office that demonstrates that the TI funds cannot be fully utilized except through deobligation of apportioned funds and the reobligation with the TI funds. Acceptable documentation includes information that there is not another eligible project that would satisfy the scope of work as described in the project description in section 1934(c).

Under condition 3, the Division Office will coordinate the review and concurrence of the documentation with the Office of Program Administration and the Office of Chief

Counsel.

States that choose to utilize funds apportioned under 23 U.S.C. §104(b) to carry out a project listed in section 1934 should submit requests to the FHWA Division Office for concurrence. If the Division Office concurs with the request, the Division will process the authorization to use apportioned funds in FMIS. The Division Offices will be responsible for tracking any apportioned funds used in this manner until an automated process is put in place by HCF.

III. ELIGIBLE WORK / PROJECT DESCRIPTIONS

The project descriptions, as shown in section 1934 of SAFETEA-LU, define the scope of work for the project on which the funds may be legally expended. Funding for a project can only be used for the activities within the scope and the physical limits as defined by the project description. For those TI projects that are described as “construction” or “construct,” eligible activities would include any project development activities related to the described project, including environmental documentation, design, right-of-way activities, and physical construction. Project descriptions that list recipients, not projects, will require that the recipients utilize the funds for projects that are eligible for Federal-aid funding.

If the TI project, as described in section 1934, would be eligible under one of the FHWA's regular Federal-aid programs, then it is eligible for funding with TI funds (following the eligibility rules of the applicable Federal-aid program). For example, if a project is eligible under the Transportation Enhancement Program, it must follow the eligibility rules that would apply to an enhancement project funded with Surface Transportation Program (STP) funds in order to be eligible for the TI funds. In the case of a TI project that would be otherwise eligible as a CMAQ project (including any process that must be undertaken to justify the use of CMAQ funds), then the TI project is advanced under the eligibility rules that would apply to a CMAQ project in order to be eligible for the TI funds. If the TI project is eligible under more than one regular Federal-aid program, the State has the flexibility to choose the program that provides the best approach to carry out the TI project.

If, however, the TI project, as described in section 1934, normally would not be eligible under one of FHWA's regular Federal-aid programs, then the project description in section 1934 should specifically identify those activities to be funded. In order to fund projects or activities not otherwise eligible for Federal-aid funding under 23 U.S.C., a statutory designation of Federal-aid funds must explicitly describe the project to be funded. An explicit project description serves as statutory authority to fund the activity or project consistent with “the purpose” of the statutory designation. See 31 U.S.C. §1301(a), “the purpose” statute. Additionally, project descriptions that list a road that is not classified as a Federal-aid Highway may be treated as a Federal-aid highway for the purpose of identifying eligible activities, so that the earmarked funds may be expended.

Please note unlike the HPP program, which is codified as part of the Federal-aid highway

program in chapter 1 of title 23, U.S.C., the TI projects are not codified in chapter 1 of title 23 as a permanent highway program. Thus, as a matter of agency practice and procedure, TI projects are administered consistent with title 23, U.S.C. procedures as a non-codified program in the same manner as if apportioned under chapter 1 of title 23, U.S.C.

In cases where generally stated TI projects are obviously not normally eligible Federal-aid highway projects, an effort to obtain the intended activities for the project should be made by entities other than FHWA. This information will only be used to clarify the intended activities that must fit within the scope of work as defined by the project description.

If the project analysis confirms that the project is not a highway improvement, the State DOT should consider identifying another agency to administer the project. In such cases where the project is better administered by another Federal agency, the State, upon agreement with the Federal agency, may request to have the funds transferred for the project and reassigned to that agency under 23 U.S.C. §132. For example, a TI project having a project description of “Native American Cultural Center” does not appear to encompass highway eligible activities therefore it could be transferred to another federal agency for administration. Please refer to the “Transfer of TI funds to Other Federal Agencies” section of this document for additional details.

Another option is for the State to subgrant funds for a project to another State or local governmental agency better suited to administer the project. Under 49 C.F.R. Part 18, a State may make a subgrant (a pass-through) of Federal funds to a subgrantee. A subgrantee is defined as the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided. See 49 CFR 18.3. For example, a TI project having a project description of “Design and construct Recreational Trail,” with no highway activities associated with it, may be subgranted to another state agency that administers these types of projects.

Unlike appropriation act provisions that contain substitution provisions that permit funding to be shifted to otherwise eligible Title 23 projects, SAFETEA-LU did not provide the Secretary the discretion to shift funding to otherwise eligible Title 23 projects. Thus, any changes to project descriptions have to be accomplished through legislation except where there is an obvious typographical error.

If a project description includes an obvious typographical or technical error, this matter should be coordinated with staff of the Office of Program Administration (HIPA-10). When there is a discrepancy between what is described in section 1934 of SAFETEA-LU and what was intended, under 31 U.S.C. §1301(a), funds may only be used on the purpose (eligible work described) of the project description. Any changes to project descriptions for these projects may only be accomplished through legislation.

The TI projects are to be administered, as any other Federal-aid highway project, in accordance with the oversight agreement required by 23 U.S.C. §106(c) between the

FHWA division office and the State DOT.

IV. TRANSFER OF TI FUNDS TO OTHER FEDERAL AGENCIES

A. Transfers to the Federal Transit Administration (FTA)

Under the provisions of 23 U.S.C. §104(k)(1), as amended by section 1108 of SAFETEA-LU, funds for transit projects or transportation planning may be transferred to and administered by FTA in accordance with the provisions of chapter 53 of Title 49, U.S.C. The procedures for accomplishing these transfers were established in the October 26, 1999, joint FHWA/FTA memorandum. Questions regarding these procedures should be addressed to the Office of Financial Management in the Office of the Chief Financial Officer.

Projects transferred in this manner shall adhere to the Federal share requirements established for the projects in 23 U.S.C. In accordance with the established procedures, the FTA will certify annually that the transferred funds are being used for the intended purpose, which, for a TI project, is the project description in section 1934 of SAFETEA-LU.

To initiate transfers for TI projects that are to be transferred to FTA, the State should submit a request to the FHWA Division Office indicating the amount of CA and an equal amount of OA to be transferred. The request should include how the non-Federal share match requirement will be satisfied. The Division Office will forward the request via e-mail to the Office of Budget (mailbox HCF-10) and the Office of Financial Management (mailbox HCF-30) in the Office of the Chief Financial Officer. The Office of Financial Management will process the withdrawal of funds and OA from the State in FMIS and notify the Office of Budget. The Office of Budget will then complete the transfer to FTA and send e-mail confirmation to the FHWA Division Office, with a copy to the Office of Program Administration, when the transaction has been completed.

B. Transfers to Other States or to Federal Highway Administration (FHWA)

Under the provision of 23 U.S.C. §104(k)(3), as amended by section 1108 of SAFETEA-LU, funds apportioned or allocated to a State under 23 U.S.C., may be transferred to another State or to the FHWA (Office of Federal Lands Highway) for eligible projects, at the State's request. Since the TI funds are allocated under 23 U.S.C., the TI project may also be transferred under the provisions of 23 U.S.C. §104(k).

For transfers from State to State, the State transferring the project should submit requests to the FHWA Division Office indicating the amount of CA and OA to be transferred to another State. Additionally, the State receiving the transferred CA and OA must submit a letter acknowledging the project that will utilize the funds. The Division Office will forward the transfer request and acknowledgement, via e-mail, to the TI Program Coordinator in the Office of Program Administration (HIPA-10). The Office of Program Administration will assign a new Demo ID for the acknowledging State and issue a

memo requesting that the Office of Financial Management, in the Office of the Chief Financial Officer, withdraw CA and OA from the State transferring the project and allocate the same to the State acknowledging the transfer. The Office of Financial Management will process the transfer of CA and OA in FMIS and notify the Office of Budget. The Office of Budget will send an e-mail confirmation to the FHWA Division Office, with a copy to the Office of Program Administration, when the transaction has been completed.

For projects that are transferred to the FHWA, the State transferring the project should submit requests to the FHWA Division Office to have the funds and an equal amount of OA transferred to FHWA. The Division Office will forward the request via e-mail to the Office of Budget (mailbox HCF-10) and the Office of Financial Management (mailbox HCF-30) in the Office of the Chief Financial Officer. The Office of Financial Management will process the withdrawal of CA and OA from the State in FMIS and notify the Office of Budget. The Office of Budget will then issue allotments to FHWA, if necessary, and send an e-mail confirmation to the FHWA Division Office, with a copy to the Office of Program Administration, when the transaction has been completed.

C. Transfers to Other Federal Agencies

A Federal-aid highway project may be transferred to another Federal agency, but the project must meet the eligibility requirements of the FHWA prior to being transferred. Under the provisions of 23 U.S.C. §132, as amended by section 1119 of SAFETEA-LU, a State may enter into an agreement with a Federal agency to have a Federal-aid project “undertaken” by the Federal agency. The term “undertaken” is interpreted to mean that the Federal agency must actually administer the project or carry out an activity necessary to the project, either with its own forces or through a contract with the appropriate private company. The State may request a direct transfer of funds for the Federal share of the project to the Federal agency [23 U.S.C. §132(a)(1)] or make a deposit or payment to the Federal agency as is required under the agreement for the work to be undertaken by the Federal agency [23 U.S.C. §132(a)(1)] and be reimbursed. As a prerequisite for a direct transfer, an agreement must be established between the State and the Federal agency undertaking the project that specifies the roles and responsibilities of each party for ensuring that the applicable requirements of 23 U.S.C. are met. In cases where State Law prohibits a direct transfer to FLMA agencies, FLH will continue the practice of administering the project with the FLMA.

For non-traditional projects unrelated to highway improvements or other eligible activities under title 23, the receiving Federal agency can administer the project in accordance with their own appropriate Federal requirements with the following exceptions:

- (1) The non-Federal share match for these funds must still come from non-Federal sources, unless the source of Federal funds has specific legislative authority that allows the match to be other Federal funds; and
- (2) Since the project description defines the scope of work on which the funds may

be legally expended, the funding for the project can only be used for the activities within the scope and physical limits as defined by the project description.

Funds transferred to another Federal agency shall be administered in accordance with the requirements of title 23 U.S.C. These requirements include, but are not limited to, statewide planning, environment, Title VI of the Civil Rights Act, nondiscrimination provisions, participation of small business enterprises, prevailing wage rates, and acquisition of right-of-way. However, Federal agencies may utilize their own federal construction contracting requirements lieu of the associated requirements of 23 U.S.C. A written agreement must be established between the FHWA and the federal agency prior to the transfer of funding, which address the roles and responsibilities of all parties in carrying out the project in accordance with title 23.

In cases where the transfer is for a highway or other Federal-aid FHWA eligible activity, the project must be carried out by the receiving agency in accordance with all 23 U.S.C. requirements, including inclusion of the TI project in the Statewide Transportation Improvement Program (23 U.S.C. §135). However, the receiving Federal agency may utilize their own Federal contracting requirements for letting of contracts. For any project using TI funding the two criteria cited above should be included in all agreements.

This process would apply to projects that are to be administered by a Federal DOT agency other than the FTA, such as the Federal Railroad Administration or the Maritime Administration, or other Federal agencies. The State should submit requests to the FHWA Division Office to have the funds and an equal amount of OA transferred to the Federal agency, except in cases where the State will be making a deposit or payment to the Federal agency. In accordance with 23 U.S.C. §132(a), the transfer request must include a certification statement that the agreement is in place between the State and the Federal agency that will undertake the project. The Division Office should maintain copies of the agreement for their reference.

The Division Office will then submit the request, including an acknowledgement of the certification statement, via e-mail, to the Office of Budget (mailbox HCF-10) and the Office of Financial Management (mailbox HCF-30) in the Office of the Chief Financial Officer. The Office of Financial Management will process the withdrawal of CA and OA from the State in FMIS and will notify the Office of Budget. The Office of Budget will then issue allotments to the appropriate Federal agencies and send e-mail confirmation to the FHWA Division Office when the transaction has been completed.

The funds for these projects may only be used for the purposes specified in the project description in section 1934 of SAFETEA-LU. These funds may not be used for the Federal agency's administrative expenses. Additionally, these funds require non-Federal share match that must come from non-Federal sources or from specific federal sources that statutorily permit the use of federal funds to substitute for the non-federal share. In general, it is expected that the Federal agency will administer the project in accordance with their appropriate Federal requirements.

