

FHWA GUIDANCE TRANSPORTATION ENHANCEMENT ACTIVITIES

NOTE: Electronic PDF and HTML versions of this document are available at <http://www.fhwa.dot.gov/environment/te/1999guidance.htm> that contain active links to the additional guidance resources indicated in the print version as blue, underlined text.



**U.S. Department
of Transportation**

**Federal Highway
Administration**

This version incorporates updates through March 25, 2010. Check <http://www.fhwa.dot.gov/environment/te/1999guidance.htm> for further updates.

FHWA Final TE Guidance

The Federal Highway Administration (FHWA) issued Guidance for Transportation Enhancement (TE) Activities on December 17, 1999. The original Guidance, available as a [PDF Document](#) [200 K], does not incorporate revisions or corrections.

FHWA periodically revises the Guidance (*revisions are noted in the text*). This PDF version incorporates revisions through March 25, 2010. FHWA's Website [\[http://www.fhwa.dot.gov/environment/te/1999guidance.htm\]](http://www.fhwa.dot.gov/environment/te/1999guidance.htm) may contain additional revisions.

Revisions in 2009:

- November 20, 2009: The format for documenting revisions was made consistent throughout the Guidance.
- September 28, 2009: Real Estate section was revised to ensure that TE projects have adequate control of right-of-way.
- March 12, 2009: Donations section: Note 4 was revised to clarify the meaning.
- December 9, 2009: Donations section revised.

Revisions in 2008:

- October 2, 2008. Several revisions were made throughout the guidance to:
 - Ensure provisions enacted in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), were accurate throughout the document. (Most provisions had been revised previously, as noted.)
 - Delete references to TEA-21 that are codified into Title 23 U.S.C., unless the specific TEA-21 reference is significant.
 - Revise some descriptions, often no longer relevant, referencing specific changes made in 1999.
 - Incorporate changes made in other program areas (example: financial accounting program codes).
 - Add several hyperlinks to other website resources.
- July 2, 2008: Program Streamlining Measures 7 and 8 were revised to incorporate Memos issued June 26, 2008.
- February 26, 2008: Inserted a link in the Appendix to the [Framework for Considering Motorized Use on Nonmotorized Trails and Pedestrian Walkways](#).

Additional TE Guidance

- [Transit Enhancements Administered by the Federal Transit Administration](#)
- [FHWA Transportation Enhancements and FTA Transit Enhancements Compared](#)
- [American with Disabilities Act \(ADA\) & TE](#)
- [TE Questions and Answers](#)
- [Other Related FHWA Guidance](#): A project eligible for TE funding must meet Federal environmental, project administration, and right-of-way requirements.
- [Supplemental Documents](#)

Note: A project eligible for TE funding must meet Federal environmental, project administration, and right-of-way requirements. See [Other Related FHWA Guidance](#) for more information.

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Policy [Revised October 22, 2008]

Federal transportation policy, as reflected in the strategic goals of the U.S. Department of Transportation (DOT), the Federal Highway Administration (FHWA) and its [Environmental Policy Statement](#), stress mobility; protection of the human and natural environment; and community preservation, sustainability, and livability. The achievement of these goals and objectives remains a high priority for the DOT and the FHWA.

Transportation Enhancement (TE) activities offer funding opportunities to help expand transportation choices and enhance the transportation experience through [12 eligible TE activities](#) related to surface transportation, including pedestrian and bicycle infrastructure and safety programs, scenic and historic highway programs, landscaping and scenic beautification, historic preservation, and environmental mitigation. TE projects must [relate to surface transportation](#) and must qualify under one or more of the 12 eligible categories.

The TE activities are a subcomponent of the Surface Transportation Program (STP). The policy and procedural requirements that apply to the STP also apply to the provisions for funding and implementation of TE activities. The laws governing traditional Federal-aid projects funded under Chapter 1 of Title 23 U.S.C., such as the National Environmental Policy Act (NEPA) (see NEPA information on FHWA [Project Development](#) webpage) and related laws, apply to the TE activities as well, except where the Congress expressly provided additional streamlining provisions, innovative finance, and cost sharing provisions for the TE activities.

Through the TE activities, Congress provided innovative opportunities to enhance and contribute to the transportation system. This is being carried out in a non-traditional fashion through implementation of a specific list of TE activities. The focus of these actions is to improve the transportation experience in and through local communities. The FHWA seeks to broaden TE program participation, and the rates of implementation of transportation and community enhancing projects. Therefore, it is the policy of the FHWA to foster and encourage partnerships with State and local officials and public interest groups to improve the delivery of these valuable transportation enhancements. Where appropriate, public-private partnerships may also be encouraged.

Background [Revised October 22, 2008]

The Intermodal Surface Transportation Efficiency Act (ISTEA) (1991) established the Transportation Enhancement (TE) activities, authorizing eligibility in 23 U.S.C. 133(b)(8), establishing funding in 23 U.S.C. 133(d), and defining the activities in 23 U.S.C. 101(a)(35). Section 1201 of the Transportation Equity Act for the 21st Century (TEA-21) (1998) amended 23 U.S.C. 101(a)(35), to include two additional TE activities. Section 1122 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (2005) amended §101(a)(35) to specifically list the eligible TE activities, with minor modifications, and Section 1113(c) of SAFETEA-LU amended funding levels. See [Legislation](#).

This document provides guidance concerning the interpretation of the TE provisions and their implementation. The program management information replaces two guidance memorandums issued by the FHWA on April 24, 1992 (Transportation Enhancement Activities) and June 6, 1995 (Eligibility of Historic Preservation Work for Transportation Enhancement Funding). This guidance does not attempt to address all the possible questions that have been or could be raised concerning transportation enhancements. However, the guidance does provide further information concerning the thought process to apply in determining whether or not activities qualify for TE set-aside funds.

Much of this guidance focuses on the provisions related to TE activities as added to or amended by TEA-21. It also provides brief summaries of relevant information detailed in other related guidance memorandums. It does not seek to replace the guidance memo where the memo remains current and the information valid. This guidance also incorporates subsequent amendments based on SAFETEA-LU and other legislation, regulations, or guidance from other program areas. These changes are noted with the date for the revision.

Over the life of ISTEA (1992 through 1997), the FHWA had two basic requirements regarding eligibility determinations. First, the proposed TE activity must be one of the qualifying activities listed in the legislation. Secondly, the activity must have a connection to transportation. These two basic requirements were clarified under TEA-21 and SAFETEA-LU. This is discussed in the [Project Linkage](#) section.

From time to time, State DOTs will need to coordinate with the [FHWA division office](#) on specific eligibility determinations.

Eligible Activities [Revised January 19, 2006]

The list of qualifying TE activities provided in 23 U.S.C. 101(a)(35) is intended to be exclusive, not illustrative. That is, only those activities listed therein are eligible as TE activities. They are listed below. [This paragraph and the list below were revised on November 4, 2005]

TE Activities Defined-

- A. Provision of facilities for pedestrians and bicycles.
- B. Provision of safety and educational activities for pedestrians and bicyclists.
- C. Acquisition of scenic easements and scenic or historic sites (including historic battlefields).
- D. Scenic or historic highway programs (including the provision of tourist and welcome center facilities).
- E. Landscaping and other scenic beautification.
- F. Historic preservation.
- G. Rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals).
- H. Preservation of abandoned railway corridors (including the conversion and use of the corridors for pedestrian or bicycle trails).
- I. Inventory, control, and removal of outdoor advertising.
- J. Archaeological planning and research.
- K. Environmental mitigation
 - i. to address water pollution due to highway runoff; or
 - ii. reduce vehicle-caused wildlife mortality while maintaining habitat connectivity.
- L. Establishment of transportation museums.

TE funds may be used for workforce development, training, and education under [23 U.S.C. 504\(e\)](#), provided the activity specifically benefits eligible TE activities. See Transportation Enhancements Guidance Supplement - [Workforce Development, Training, and Education](#).

Many projects are a mix of elements, some on the list and some not. Only those project elements which are on the list may be counted as TE activities. For example, a rest area might include a historic site purchased and developed as an interpretive site illustrating local history. The historic site purchase and development would qualify as a transportation enhancement activity.

Activities which are not explicitly on the list may qualify if they are an integral part of a larger qualifying activity. For example, if the rehabilitation of a historic railroad station required the construction of new drainage facilities, the entire project could be considered for TE funding. Similarly, environmental analysis, project planning, design, land acquisition, and construction enhancement activities are eligible for funding.

The funded activities must be accessible to the general public or targeted to a broad segment of the general public.

Implementing All TE Categories [Revised August 10, 2006]

The Congress amended the definition of eligible TE activities in 23 U.S.C. 101(a)(35) both in TEA-21 and in SAFETEA-LU. The SAFETEA-LU amendment defined each category as separate and distinct from others. States are encouraged to allow for fair consideration of all eligible activities as defined in the legislation.

Transportation Enhancement and Environmental Mitigation

Congress included the language on transportation enhancements as a means of stimulating additional efforts to create an improved transportation environment and system, while making a contribution to the surrounding community. This is to be done through implementation of the specific activities listed in the legislation. Enhancement measures in the activities listed, which go beyond what is customarily provided as environmental mitigation, are considered as transportation enhancements. However, transportation enhancement activities might consist of activities not immediately connected to a nearby project being mitigated. States may not use TE funds to finance normal environmental mitigation work eligible under the regular federal-aid highway program. The process of determining which activities will be considered as normal mitigation and which will be considered TE activities may at times be difficult. The process will likely require close coordination between the State DOTs and their FHWA division offices on a case-by-case basis.

Project Linkage

To comply with Federal guidelines for eligibility, there are two basic considerations.

1. Is the proposed action one of the listed activities in the TE definition in 23 U.S.C. 101(a)(35)?
2. Does the proposed action relate to surface transportation?

The definition of TE activities includes the phrase,

"The term 'transportation enhancement activity' means, with respect to any project or the area to be served by the project, any of the following activities as the activities relate to surface transportation:"
[23 U.S.C. 101(a)(35) as amended by Section 1122(a) of SAFETEA-LU]

Previous guidance issued on June 6, 1995 (Eligibility of Historic Preservation Work for Transportation Enhancement Funding) called for a direct link to surface transportation. That guidance was repealed in the FHWA Final TE Guidance, issued December 19, 1999. Congress provided that TE activities must "relate to surface transportation." This makes clear that TE projects are to have a relationship to surface transportation. This is a more flexible standard than the past. The nature of a proposed TE project's relationship to surface transportation should be discussed in the project proposal. For example, where runoff from an existing highway contaminates an adjacent water resource and a transportation enhancement activity is proposed to mitigate the pollution caused by the runoff, a clear highway or transportation relationship exists. Another example might

involve the acquisition of a scenic easement. The acquisition would be in connection with the preservation of a scenic vista related to travel along a specific route. [First two sentences revised October 22, 2008]

Where a TE activity is for acquisition for scenic preservation purposes, and proposes to contribute to the visual experience of the traveler but is a substantial distance away with respect to a highway or transportation project, the TE activity must be determined to make a substantial contribution to the scenic viewshed.

Given the nature of the list of eligible activities, it is not necessary that each TE activity be associated with a specific surface transportation project to be eligible for funding. Examples which illustrate this include: the rehabilitation of a historic train structure; the provision of a bike or pedestrian path; or the establishment of a transportation museum.

Proximity to a highway or transportation facility alone is not sufficient to establish a relationship to surface transportation. Additional discussion, beyond proximity, is needed in the TE project proposal to establish the relationship to transportation. For example, an historic barn that happened to be adjacent to a particular highway facility would not automatically be considered eligible for TE funds simply because of its location; visibility to the traveler in a way that substantially enhances the traveling experience could qualify. Specific documentation of the enhanced experience is required. Conversely, a historic structure, such as the barn in the above example, could not be disqualified from consideration because it was not adjacent to a particular Federal-aid facility, as long as some other relationship to surface transportation could be established.

It is not necessary to have a TE activity function as an active transportation facility, either past or current, to qualify as an eligible TE activity. For example, a scenic or historic site may have a relationship to transportation but not function as a transportation facility.

Once a relationship to surface transportation is established, TE activities can be implemented in a number of ways. For example, they can be developed as parts of larger joint development projects, or as stand-alone projects.

Where questions arise, close coordination with the FHWA division office within each State will assist in the determination of a project's relationship to surface transportation.

Surface Transportation

Surface transportation means all elements of the intermodal transportation system, exclusive of aviation. For the purposes of TE eligibility, surface transportation includes water as surface transportation and includes as eligible activities related features such as canals, lighthouses, and docks or piers connecting to ferry operations, as long as the proposed enhancement otherwise meets the basic eligibility criteria.

Functional Classification

Section 133(c) of Title 23 U.S.C. includes a general limitation that STP projects not be funded on "roads functionally classified as local or rural minor collectors, unless such roads are on a Federal-aid highway system on January 1, 1991, except as approved by the Secretary." Given the nature of many of the 12 TE categories, it is clear that the location limitation of Section 133(c) cannot apply to them. Thus, on October 25, 1999, the Secretary approved the FHWA's request for an exception in the law that would allow States more flexibility in determining where they can use their TE funds. With the Secretary excepting TEs from the general STP

location restriction of § 133(c), the FHWA can now administer TE projects in a manner more consistent with the purpose of the TEs. See [Request for Approval of Exceptions](#). [link added October 22, 2008]

Program Streamlining Measures [Revised July 2, 2008]

A number of streamlining measures are available to deliver TE projects. Measures 1-8 were in the Final Guidance on Transportation Enhancement Activities, issued on December 17, 1999. Measures 9-13 were added for further clarification in March 2004, and links were added to pertinent policy documents and legal citations. Measures 7 and 8 were revised July 2, 2008, to incorporate Memos issued on June 26, 2008.

1. **Categorical Exclusions:** Except in unusual circumstances, a TE project may be processed as a categorical exclusion (CE) under the National Environmental Policy Act. The project then does not have to be processed using an environment impact statement ([23 U.S.C. 133\(e\)\(5\)\(A\)](#)). See the CE list at [23 CFR 771.117](#). [Revised July 2, 2007]
2. **Section 4(f):** Except for unusual circumstances, TE projects are not normally required to undergo a Section 4(f) evaluation ([FHWA memo of August 22, 1994](#)). NOTE: The [Section 4\(f\) Policy Paper - March 1, 2005](#), supersedes [Interim Guidance on Applying Section 4\(f\) on Transportation Enhancement Projects, August 22, 1994](#).
3. **Historic Preservation/Section 106:** TE projects are subject to Section 106 of the National Historic Preservation Act. However, the use of a Nationwide Programmatic Agreement can streamline the historic preservation coordination requirements ([FHWA memo of June 11, 1997](#)).
4. **Advance Payment Option:** TE Program funds may be advanced, on a limited basis to a local government through the advanced payment option ([23 U.S.C. 133\(e\)\(3\)\(B\)](#)).
5. **Federal Share up to 100%:** States have the option to fund individual projects up to 100 percent of the cost of the TE activity provided that on an annual basis, TE projects, as a group, comply with the Federal Share requirement ([23 U.S.C. 133\(e\)\(5\)\(C\)](#)).
6. **Donations and Credits:** States may allow consideration of the value of services as part of the non-Federal share ([23 U.S.C. 323\(c\)](#)).
7. **Federal Bidding Procedures:** TE projects not located within the highway right-of-way may make necessary procurements using State procedures and do not need to follow Federal bidding procedures ([FHWA memo of November 12, 1996](#)). See also [Procurement of Federal-aid Construction Projects](#) (June 26, 2008). This memorandum consolidates FHWA's guidance and policies on procurement requirements for the Federal-aid highway program.
8. **Davis-Bacon/Prevailing rate of wage:** The Davis-Bacon prevailing wage applies to TE projects greater than \$2,000. However, Davis-Bacon requirements do not apply to TE projects located outside the highway right-of-way ([FHWA memo of July 28, 1994](#)). See also [Applicability of Prevailing Wage Rate Requirements to Federal-aid Construction Projects](#) (June 26, 2008). This memorandum consolidates FHWA's guidance and policies concerning the applicability of the prevailing wage rate requirements (Davis-Bacon Act) for the Federal-aid highway program.
9. **Funds from Other Federal Agencies:** Funds from other Federal agencies and the value of other contributions may be credited toward the non-Federal share of the costs of a project to carry out a transportation enhancement activity ([23 U.S.C. 133\(e\)\(5\)\(C\)\(ii\)\(I\)](#)).
10. **Non-Federal Share Calculation:** The non-Federal share for a project may be calculated on a project, multiple-project, or program basis ([23 U.S.C. 133\(e\)\(5\)\(C\)\(ii\)\(II and III\)](#)).
11. **Project Location:** TE projects do not have to be located within a highway right-of-way ([FHWA exception memo approved by the Secretary of Transportation on October 25, 1999](#)).

12. **States Assume Programmatic Responsibilities:** States shall assume the same programmatic responsibilities for design, plans, specifications, estimates, contract awards, and inspection of projects as they do for non-NHS projects ([23 U.S.C. 106\(c\)\(2\)](#)).
13. **Stewardship and Oversight:** States may assume other stewardship and oversight flexibilities available for the Federal-aid highway program. (See [FHWA's Stewardship/Oversight Task Force](#)).

Summary of Requirements for Matching Funds for TE Projects [Revised January 11, 2007]

This section was revised January 11, 2007, to:

1. Eliminate references to TEA-21 that are codified into Title 23 U.S.C.
2. Remove a reference to the Advance Payment Option (which is covered in a following section).
3. Explain inconsistencies with other sections of Title 23 regarding Federal land management agency funds and Federal Lands Highways Program funds.
4. Incorporate an amendment in SAFETEA-LU that provides additional matching flexibility under the Recreational Trails Program.

The Federal share for Transportation Enhancement projects is the same as the Surface Transportation Program, as provided in 23 U.S.C. 120(b). In general, the Federal share is 80 percent, with a 20 percent State and/or local match. This maximum share is adjusted for States with large proportions of Federal lands: see [Sliding Scale Rates In Public Land States](#).

Title 23 provides some additional flexibility for the Federal share for TE projects. Section 133(e)(5) allows a State to use TE funds for up to 100 percent of the cost of individual projects without a corresponding match. However, for a fiscal year, the ratio of Federal funds to State match for all TE funded projects must comply with the maximum Federal share provisions in 23 U.S.C. 120(b). This amendment also provides some additional innovative features.

Legislative language (23 U.S.C. 133(e)(5)):

"(C) Cost Sharing. -

"(i) REQUIRED AGGREGATE NON-FEDERAL SHARE. - The average annual non-Federal share of the total cost of all projects to carry out transportation enhancement activities in a State for a fiscal year shall be not less than the non-Federal share authorized for the State under section 120(b).

"(ii) INNOVATIVE FINANCING. - Subject to clause (I), notwithstanding section 120-

"(I) funds from other Federal agencies and the value of other contributions (as determined by the Secretary) may be credited toward the non-Federal share of the costs of a project to carry out a transportation enhancement activity;

"(II) the non-Federal share for such a project may be calculated on a project, multiple-project, or program basis; and

"(III) the Federal share of the cost of an individual project to which sub-clause (I) or (II) applies may be up to 100 percent."

This section:

- Allows other Federal funds from any non-U.S. DOT agency (except as noted below), to be credited toward the non-Federal share of the costs of a project.
- Allows the value of other contributions (as determined by the Secretary or his designee) to be credited toward the non-Federal share.
- Allows the non-Federal share to be calculated on a project, multiple-project, or program wide basis.
- Allows the Federal share of the cost of a project to be funded with 100 percent Federal funds.

These provisions only apply to eligible TE activities funded from TE set-aside funds under 23 U.S.C. 133(d)(2), and not for other "TE-like" projects using other Federal-aid funds.

Other sections of Title 23 allow some other Federal and U.S. DOT funds to match TE funds:

- Section 120(k) allows **Federal land management agency funds** to pay the non-Federal share of a Federal-aid project under Title 23 (including TE funds), or under Chapter 53 of Title 49, but see the restriction below.
- Section 120(l) allows **Federal lands highways program funds** to pay the non-Federal share of a project under Title 23 (including TE funds), or under Chapter 53 of Title 49, but see the restriction below.
- **Restriction:** Although §120(k) and §120(l) state "Notwithstanding any other provision of law", §133(e)(5)(C) states "notwithstanding section 120". Therefore, if a State allows Federal land management agency funds or Federal lands highways program funds to be used toward the match for an individual TE project, the State still must maintain a programmatic Federal share for its statewide TE program under §120(b). Note that §133(e)(5)(C) applies to funds from any Federal agency, and not only from Federal land management agencies.
- Section 206(f)(3) allows funds from **any other Federal program** to match **Recreational Trails Program (RTP) funds**.
- Section 206(f)(4) allows **RTP funds** to be used as the non-Federal share for **any other Federal program**.
- The Section 206 provisions allow RTP funds to match or be matched by other U.S. DOT funds. Therefore, TE funds may match or be matched by RTP funds. Because §133(e)(5)(C) does not list Section 206, RTP funds are not subject to the required aggregate non-Federal share restriction.

Donations: 23 U.S.C. 323 [Revised on January 11, 2007, March 12, 2009, and December 9, 2009]

This section was extracted from the Matching Funds section on January 11, 2007, to: [Revised March 12, 2009]

1. Eliminate references to TEA-21 that are codified into Title 23 U.S.C.
2. Clarify what lands may qualify as donations under §323(a) and (b).
3. Incorporate SAFETEA-LU §1902, which amended Title 23 §323(c) to allow contributions from local governments to be treated the same way as private donations, and eliminated §323(e).
4. Correct the original TE Guidance of December 19, 1999, which allowed: "The costs of preliminary engineering prior to project approval." The intended meaning of this statement was "NEPA project approval", but not "FHWA project authorization" or "prior to project obligation". [Revised March 12, 2009]
5. Revise the statement about the timing of allowable donations with respect to FHWA's NEPA approval. This is to be consistent with [23 CFR 771.113\(a\)](#). [Note added December 9, 2009.]
6. FHWA expects to issue new guidance on Donations that will apply broadly across the Federal-aid highway program. This section will be revised after that guidance is issued.

Title 23 §323 allows the fair market value of donated land that is acquired for a Federal-aid project, and allows credit for donations of funds, materials, or services.

Costs for services incurred prior to project authorization (obligation in FHWA's Fiscal Management Information System) are not allowable.

Section 323(a) and (b) allow the fair market value of land acquired or newly incorporated into a project to be credited as a donation toward a Federal-aid project (with restrictions, such as lawfully obtained, not subject to

23 U.S.C. 138 [Section 4(f)], etc.). However, §323 does not allow a credit for land transferred from an agency of the Federal government.

Section 323(c) [as amended in SAFETEA-LU] states: *Credit for Donations of Funds, Materials, or Services.- Nothing in this title or any other law shall prevent a person from offering to donate funds, materials, or services or a local government from offering to donate funds, materials, or services performed by local government employees, in connection with a project eligible for assistance under this title. In the case of such a project with respect to which the Federal Government and the State share in paying the cost, any donated funds, or the fair market value of any donated materials or services, that are accepted and incorporated into the project by the State transportation department shall be credited against the State share. [Note: SAFETEA-LU amended §323(c) to incorporate references to local governments, and eliminated §323(e).]*

Section 323 allows:

- The fair market value of donated funds, materials, or services from a private donor to be applied to a project.
- The fair market value of local government funds, materials, or services, performed by local government employees, to be applied to a project.
- Any donated funds, or the fair market value of any donated materials or services that are accepted and incorporated into the project by the State transportation department shall be credited against the State share.
- **The value of donated services that are incurred prior to project authorization (obligation in FHWA's Fiscal Management Information System) is not allowed.** The value of donated services may include the costs of environmental studies, related engineering studies, agency coordination, and public involvement that take place prior to FHWA's environmental (NEPA) approval. However, donations related to final design activities, property acquisition (with the exception of hardship and protective buying), purchase of construction materials or rolling stock, or project construction shall not proceed prior to FHWA's NEPA approval. See See [23 CFR 771.113\(a\)](#). [Revised December 9, 2009]

See [Q&A #10](#), [Q&A #11](#), and [Donations and Credits under the Uniform Act: Questions and Answers](#).

Donation credit may be allowed provided that appropriate documentation supporting expenditures would be available for review as needed by the FHWA. Only the value of expenses determined to be reasonable, in coordination with the FHWA division office, will be allowed toward the local match.

See additional information in applicable OMB Circulars:

- State, local, and tribal governments: http://www.whitehouse.gov/omb/circulars/a087/a87_2004.aspx#12
- Nonprofit organizations: http://www.whitehouse.gov/omb/circulars/a122/a122_2004.aspx#b12

In accordance with the provisions of 23 U.S.C. 120(j), a State may use toll revenues that are generated and used by public, quasi-public, and private agencies to build, improve, or maintain highways, bridges, or tunnels that serve the public purpose of interstate commerce as a credit toward the non-Federal share. Credit amounts are approved by FHWA and maintained by the State DOT. Establishment and use of toll credits is governed by separate implementing guidance. (See August 7, 1998 memorandum - Toll Credit for Non-Federal Share, Section 1111(c) of TEA-21, Implementing Guidance). See additional information at www.fhwa.dot.gov/innovativefinance/ifp/index.htm.

Volunteer Time Donated [Added October 15, 2007]

Some States allow the value of volunteer time for labor or services donated toward a project to be credited toward the project match. Each State that allows volunteer donations should establish procedures to determine the value of volunteer time. The value of volunteer time should be consistent with the guidelines published by the nonprofit organization *Independent Sector* at http://www.independentsector.org/programs/research/volunteer_time.html.

Specialized Skills. The value of volunteer time for specialized skills or professional services (for example, real estate or legal services donated toward a project) may be valued at a reasonable value for those specialized skills or professional services. These rates are published by the Bureau of Labor Statistics at <http://www.bls.gov/bls/blswage.htm>.

However, Independent Sector notes: "It is important to remember that when a doctor, lawyer, craftsman, or anyone with a specialized skill volunteers, the value of his or her work is based on his or her volunteer work, not his or her earning power. In other words, volunteers must be performing their special skill as volunteer work. If a doctor is painting a fence or a lawyer is sorting groceries, he or she is not performing his or her specialized skill for the nonprofit, and their volunteer hour value would not be higher."

Advance Payment Option [Revised January 11, 2007]

This section was revised January 11, 2007, to add hyperlinks and make minor text corrections.

[Section 133\(e\)\(3\)\(B\)](#) of Title 23 provides for an advance payment option for TE activities when necessary to make prompt payments for project costs. Because the Cash Management Improvement Act governs payments to States, this advance payment option is only available to local governments through the State DOT. The following procedures apply:

- Advances are limited to TE projects funded from the 10 percent set-aside of STP funds for TE activities.
- The advance is considered a working capital advance (see [49 CFR Part 18.21\(e\)](#)) and limited to the estimated amount needed for one billing cycle. The local government must bill the State for costs incurred. The advance will be netted out at the time of the final billing.
- To reduce administrative burden, projects with a Federal share under \$25,000, which will be completed in less than one year, may receive an advance for the full amount of the Federal share.
- Agreements to provide for the use of this option should be developed through the cooperative efforts of the State and the FHWA division office.

Historical Note: Section 316 of the National Highway System Designation Act of 1995 codified the Advance Payment Option in 23 U.S.C. 133(e)(3)(B). The original text included at the end of §133(e)(3)(B)(i): "*if the Secretary certifies for the fiscal year that the State has authorized and uses a process for the selection of transportation enhancement projects that involves representatives of affected public entities, and private citizens, with expertise related to transportation enhancement activities.*" Section 1108(b)(2)(A) of TEA-21 removed this text. However, public involvement requirements continue under the metropolitan and statewide planning processes.

Transferability of TE Funds [Revised January 25, 2007]

This section was revised January 25, 2007 to:

1. Replace references to TEA-21 that are codified into Title 23 U.S.C with the statutory reference.

2. List program categories with their references in their Title 23 order, including the Highway Safety Improvement Program (added in SAFETEA-LU).
3. Add a historical note.

The "Uniform Transferability of Federal-aid Highway Funds" provision in [23 U.S.C. 126](#) permits transfers among highway program categories apportioned under 23 U.S.C. 104 and 144. Section 126(b) limits the transfer of TE set-aside funds for use on other highway program activities. The maximum amount that a State may transfer of the State's set-aside under 23 U.S.C.133(d)(2) for a fiscal year, may not exceed 25 percent of (1) the amount of the set-aside, less (2) the amount of the State's set-aside for TE funding for fiscal year 1997. For example: State "A's" set-aside for TE in FY 1999 is \$2 million. In FY 1997 it was \$1.8 million. Therefore, State "A" may transfer up to \$50,000 out of TE for use on other types of highway program activities.

The funding for TE activities primarily comes from the set-aside of 10 percent of STP funds for activities listed in [23 U.S.C. 101\(a\)\(35\)](#). Therefore, the transferability of these funds must be consistent with the rules that apply to the STP. The transfer of TE funds must include consideration of the purposes of the set-aside and the categories of activities for which the funds are limited. TE funds may be transferred only to:

- 104(b)(1): National Highway System
- 104(b)(2): Congestion Mitigation and Air Quality (CMAQ) Improvement Program
- 104(b)(3): Surface Transportation Program
- 104(b)(4): Interstate Maintenance
- 104(b)(5): Highway Safety Improvement Program
- 104(h): Recreational Trails Program
- 144: Highway Bridge Replacement and Rehabilitation Program

Historical note: TEA-21 established two sections as §110: "Uniform Transferability of Federal-aid Highway Funds" and "Revenue Aligned Budget Authority". In 1999, Pub. L. 106-159 renumbered the Uniform Transferability provision from §110 to §126. SAFETEA-LU inserted "under" prior to "Section 104(b)(3)".

Planning Process [Revised August 10, 2006]

The metropolitan and statewide planning processes should occupy a central role in identifying, planning, and funding TE activities. The planning processes are the appropriate mechanisms for determining funding priorities among competing TE activities, including those not part of larger transportation projects. The FHWA field offices should encourage the State and metropolitan planning organizations (MPOs) to seek out and fully integrate TE activities into both their plan development and programming processes. TE activities must be included in the appropriate metropolitan and statewide transportation improvement programs. See also:

- [Statewide and Metropolitan Transportation Planning](#)
- [Transportation Planning Capacity Building Program](#)

Public Involvement [Revised August 10, 2006]

Public involvement is an integral part of the Federal-aid planning, programming, and project implementation processes. While there are no specific public involvement requirements for TE activities, the metropolitan and statewide transportation planning processes have general requirements for public involvement and participation, as does the project development process under the National Environmental Policy Act (NEPA).

The State public involvement process may provide specific guidance or suggested techniques to solicit and select TE projects. The State's TE process should include methods to foster effective communication, information gathering, and feedback. The State should encourage as part of its TE program representation from State, regional, and/or local agencies, Federal and tribal agencies, organizations with interests related to the TE activities, and ensure that people from various social and economic backgrounds can benefit from the TE activities. Some States use statewide advisory committees to develop broad policies or to assist in the project selection process.

States should encourage effective public involvement in guidance, correspondence, brochures, websites, and information given to potential project sponsors. States may consider how project sponsors manage public involvement as part of their TE project evaluation process.

FHWA has additional information available on public involvement and related topics:

- [Public Involvement](#)
 - [Participation by Interested Parties](#)
 - [Public Involvement Interactive Website](#)
- [Community Impact Assessment](#)
 - [Community Impact Assessment website](#) sponsored by FHWA at the [University of South Florida](#)
- [Environmental Justice](#)
- [National Environmental Policy Act](#) (NEPA)
- [Transportation Planning Capacity Building website](#) on public involvement

Project Development

Building on the work done in the planning processes, State DOTs, MPOs, and FHWA field offices have a responsibility to actively pursue TE opportunities during the development of individual transportation projects. Accordingly, future environmental approvals should specifically take into consideration the potential for implementing transportation enhancement activities as part of these overall projects. During their involvement in these projects, FHWA field offices should promote TE activities as a means to more creatively integrate transportation facilities into their surrounding communities and the natural environment.

When appropriate, TE activities may be developed in cooperation with other State and local agencies and with private entities. However, the State DOT or other eligible transportation agency shall remain responsible to the FHWA for the project. Furthermore, TE activities, including stand-alone TE projects, must comply with all applicable environmental and other Federal requirements. Even though the express purpose of the project is to enhance an element of the natural, cultural, or human environment, the impacts of the proposed action must be assessed to assure compliance with Federal and State requirements.

Financial Accounting [Revised October 22, 2008]

The main source of TE funds is the 10% set aside of STP funds. In addition, funds from the Minimum Guarantee (1998 to 2004) and Equity Bonus (2005 to 2009) allocation to the STP pool of funds add to the totals available for transportation enhancement activities. These adjustments are added to the total STP pool prior to the State apportionment and are therefore already a part of the STP totals. See [Transportation Enhancement Activities Apportionments, Rescissions, and Obligations](#) for more information.

The FHWA Office of Budget and Finance has established appropriation code Q22 [Q220] (1998 to 2003), H22 [H220] (2004, 2005) and L220 (2005 to 2009) for TE activities and notified each State of the fiscal year's STP suballocation amounts available only for TE activities. While 10 percent of each year's STP apportionment may be obligated only for TE activities, the actual obligation can occur in a subsequent year. For example, if State "A" receives \$100 million in STP apportionments in FY 2000, then \$10 million must be reserved for TE and cannot be used for any other purpose unless transferred to another program. However, the State may choose to obligate only \$8 million for TE in FY 2000, reserving \$2 million for TE obligations in subsequent years. The statute does not require that 10 percent of the funds for any given project be devoted to TE activities.

There is no requirement that STP funds used for TE activities be limited to only 10 percent. If a State chooses, STP funds beyond the 10 percent set-aside are eligible for use on TE activities.

23 U.S.C. 133(d)(2) specifies that the 10 percent of STP funds for TE activities are separate from the STP funds which are sub-allocated to the larger metropolitan areas and to other areas of the State. Accordingly, while the STP sub-State allocation funds can be used for transportation enhancement activities, any such use would not count toward the 10 percent requirement. Under the [transferability](#) provisions, States may transfer funds into the STP State flexible account. It should be noted that funds transferred into that account are not subject to the 10 percent set-aside for TE.

Monitoring Program Accomplishments [Revised October 22, 2008]

States should maintain records on: (1) the amounts obligated for TE activities using the STP TE appropriation code (counting toward the 10 percent requirement) and other STP funds (not counting toward the 10 percent requirement) or other non-STP funds, and (2) how obligations for TE activities are distributed among the 12 qualifying activities. A brief description of each specific TE action for which STP funds have been obligated is useful. [Paragraph revised October 22, 2008]

State Project Selection Criteria [Revised October 22, 2008]

States have adopted a variety of processes for determining how to use the TE set-aside funds. Some States use numerical point-based systems. [Paragraph revised October 22, 2008]

In accordance with the above guidance on eligibility, a project must first be shown to be one or more of the 12 activities identified in the legislation. It must then meet the test of having a relationship to surface transportation in order to be considered for funding. Any additional State criteria must also be satisfied. States are permitted to have additional criteria if they choose, or may have weighting systems of their own design.

Maintenance and Operations

TE funds are generally not to be used for the operation and/or long term maintenance of eligible TE activities. The exception to this provision is the TE activity category defined in legislation as *Rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals)*. A State may choose to participate in the operations of such facilities. Consistent with Section 101 of Title 23, the term operating costs is defined to mean all reasonable costs for the facility to function. These costs may include administrative costs, costs of utilities and rent, and other costs associated with the continuous operations of the facility. The determination of what constitutes reasonable costs should be by agreement between the State and the FHWA division office.

Under the provision of 23 U.S.C. 116, a State must maintain a project constructed with Federal-aid funds. Because of this provision, we encourage States to develop a plan of maintenance for TE eligible activities. Strategies for the upkeep and maintenance of the public investment should be considered at the time of the TE proposal.

For information on Maintenance vs Major Reconstruction, [see Q&A #35](#). [Added February 25, 2004]

Grandfathering of the Eligibility Guidance [Revised October 22, 2008]

It is recognized that the States and FHWA field offices have been operating in good faith based on the general guidance that FHWA has issued on transportation enhancements. A number of States had published State guidance documents and had calls for projects under the provisions of ISTEA or TEA-21. To minimize the potential for reversing funding determinations, this program guidance will not apply retroactively to projects for which the State DOT had already notified project sponsors of a decision to fund the proposed work. However, all other projects should be developed consistent with the policy guidance provided in this package. [Paragraph revised October 22, 2008]

Provision of Safety and Educational Activities for Pedestrians and Bicyclists

The "*provision of safety and educational activities for pedestrians and bicyclists*" includes non-construction safety-related activities and the reasonable costs to provide safety and educational activities such as bike/pedestrian safety training, cost of facilitators and classes. It may also include related training materials such as brochures, videotapes, other training aids, as well as rent for leased space and limited staff salaries. Long term salary participation should be avoided. TE proposals should be written to reflect a definitive period for participation.

The funded activities must be accessible to the general public or targeted to a broad segment of the general public. The activities must show a relationship to the surface transportation system, and as with all bicycle and pedestrian activities under the STP, bike and pedestrian projects using TE funds need not be located on a Federal-aid highway and may be non-construction activities.

Project sponsors using TE funds are encouraged to integrate safety messages and educational opportunities for bicyclists and pedestrians into enhancement projects through the development of campaigns, programs, educational materials including maps and brochures, and pedestrian and bicycle enforcement activities. Project sponsors are encouraged to coordinate these activities with the National Highway Traffic Safety Administration and other modal administrations. This TE activity is not intended to replace or duplicate existing funding opportunities under 23 U.S.C. 402 for bicycle and pedestrian activities currently available through the State and Community Traffic Safety Program.

Scenic or Historic Highway Programs (including the provision of tourist and welcome centers)

ISTEA listed scenic or historic highway programs as an eligible TE activity. TEA-21 introduced the parenthetical "*including the provision of tourist and welcome centers*" and attached it to the scenic and historic highway programs activity. Although linked with scenic and historic highway programs, the eligibility for

tourist and welcome centers warrants further discussion as a separate activity. Congress provided additional language to assist in interpreting its intent regarding this activity. The Conference Report language notes:

"In order to be eligible under the enhancement program, the tourist or welcome center (whether a new facility or existing facility) does not have to be on a designated scenic or historic byway, but there must be a clear link to scenic or historical sites."

The connection to a scenic site should take into account the intrinsic characteristics that make an area or site scenic as determined by a State or area commission, where one exists. Where these mechanisms are not available, the proposal should document those characteristics that give evidence of compliance with the provisions of the Conference Report language. While a tourist or welcome center does not have to be on a designated scenic or historic byway, many of the characteristics that determine what is scenic are similar to those of the scenic byways program. Activities eligible under the National Scenic Byways Program are generally eligible under TE activities. A historic site should have evidence of documented consultation and concurrence with the State Historic Preservation Officer or similar authority for determining the historicity of a particular site.

The eligibility for TE funding for the provision of tourist and welcome centers applies to both existing and new centers. This means that TE funds may be used for the construction of a new facility and/or the restoration of an existing facility. This would include those related construction actions necessary to provide the facility, such as interior fixtures and parking areas. TE funds can be used to purchase and install items which support or interpret the scenic or historic highway program or site including brochure racks for interpretive materials or maps or kiosks. TE funds cannot be used for statewide programs, marketing, or promotion not related to the scenic or historic highway program. TE funds cannot be used for staffing, operating costs, or maintenance. TE funds should not be used to purchase items such as racks for advertising or brochures for local or national businesses.

The intent is not to use the category to simply repair and restore what are clearly rest areas. The intent is to fund those activities clearly linked to scenic or historic programs or scenic or historic sites.

The tourist or welcome center does not have to be immediately adjacent to an existing Federal-aid highway. However, where it is determined that a proposed tourist or welcome center would not be in connection with a particular Federal-aid highway, the requirement to demonstrate a relationship to surface transportation must still be taken into consideration. Additionally, evidence of a connection to a scenic or historic site must be established. An example could include efforts and materials to direct members of the traveling public to a specific local area site deemed to be of scenic or historic significance. The visitor or welcome center should be publicly owned and open to the public. Proposals for privately owned facilities to be used for a welcome or tourist center, and leased to a public entity, should be reviewed by the FHWA division office on a case-by-case basis.

Environmental Mitigation to Address Water Pollution due to Highway Runoff or Reduce Vehicle-Caused Wildlife Mortality While Maintaining Habitat Connectivity [Revised October 22, 2008]

TEA-21 expanded the category under transportation enhancements that addresses environmental mitigation for water pollution due to highway runoff and added measures to reduce vehicle-caused wildlife mortality while maintaining habitat connectivity. These activities can be either stand-alone projects or part of a larger existing or proposed project under the TE activities as long as such activity is related to surface transportation.

Transportation enhancements are a means of promoting additional efforts, projects, and activities which relate to transportation but go beyond what is considered ordinary environmental mitigation for a project. As part of the NEPA process, all Federal-aid transportation projects are required to provide environmental mitigation based on their impacts. Mitigation efforts include measures to avoid and minimize impacts. Where impacts are unavoidable, compensatory mitigation is provided. The TE program was created to expand on this concept. However, TE projects are not to replace mitigation currently eligible or required under regular Federal-aid funded projects. TE funds should be used to rectify current or prior impacts from transportation facilities. Examples of such projects for the area of water quality improvement in this category of TE funding include: [Paragraph revised October 22, 2008]

- Retrofitting an existing highway by creating a wetland to filter highway runoff based on the impacts from the road in terms of water pollution.
- Improving streams and drainage channels through landscaping to promote filtering and improve the overall water quality conditions of receiving channels.
- Providing payment in-kind for existing highway water quality impacts that warrant mitigation to regional or watershed-based planned improvement projects.

This category in the TE program also addresses activities for the reduction of vehicle-caused wildlife mortality while maintaining habitat connectivity. This funding category is not limited to threatened and endangered species, but includes any wildlife mortality directly caused by vehicles. It will be up to the States to recognize and develop a statement of purpose and need for such projects. This determination will vary from State to State. The criteria used to determine a need for a wildlife crossing or control project in a specific location are determined by the States based on migration patterns, habitat use and distribution, and crossing characteristics of the wildlife through data collection on safety of motorists, habitat fragmentation, and wildlife mortality.

Examples of projects eligible for funding in this TE category include:

- Projects designated as wildlife underpasses or overpasses
- Measures at areas identified as crossings for wildlife, which include the necessary fencing and other markings and mitigation techniques associated with movement of wildlife across transportation corridors.
- Bridge extensions to provide or improve wildlife passage and wildlife habitat connectivity.
- Monitoring and data collection on habitat fragmentation and vehicle-related wildlife mortality.

If a direct measure to reduce wildlife mortality at a highway crossing area is determined to be unfeasible (i.e., too expensive, geologically impossible, or unsafe for motorists), it might be possible to provide for the loss of wildlife due to vehicle collisions by developing new habitat resources, or improving existing habitat resources to support additional population numbers. The results could be deemed to be reducing the effects of the highway-related mortality on the long term population stability or public use benefits of wildlife. When considering this approach coordination with appropriate wildlife management agencies must be initiated. The decision to undertake this approach should be made in cooperation with and approved by the FHWA division office.

Youth Conservation or Service Corps [Revised October 22, 2008]

TEA-21 required the U.S. DOT to encourage the use of youth conservation or service corps to perform appropriate TE activities. Although this provision was not repeated in SAFETEA-LU, it was not repealed, and it remains in effect. [Paragraph revised October 22, 2008]

- Legislation: TEA-21 §1108(g):

(g) ENCOURAGEMENT OF USE OF YOUTH CONSERVATION OR SERVICE CORPS. *-The Secretary shall encourage the States to enter into contracts and cooperative agreements with qualified youth conservation or service corps to perform appropriate transportation enhancement activities under Chapter 1 of Title 23, United States Code.*

The definition of a qualified youth conservation or service corps is taken from 42 U.S.C. Sec. 12572, and 42 U.S.C. Sec. 12656.

Details describing the definitions and programs identified under the sections listed above are provided in the attached [Appendix](#).

Service corps and youth conservation corps organizations have effectively worked with States, local governments, and communities to assist in transportation enhancement projects. The FHWA has tracked many of these efforts and will be working with our division offices to encourage States to consider agreements with these organizations for enhancement activities where appropriate. Corps organizations often are able to recruit, hire, train, and provide opportunities for economically and/or educationally disadvantaged young people.

Where States and local officials are able to identify opportunities to enter into partnerships with these service organizations, they should fully consider the benefits to their own efforts and the benefits to the youth involved.

Establishment of Transportation Museums

Transportation Museums established using TE funds must meet the following definition of a museum. The facility must; (1) be a legally organized not-for-profit institution or part of a not-for-profit institution or government-entity; (2) be essentially educational in nature; (3) have a formally stated mission; (4) have one full-time paid professional staff member who has museum knowledge and experience and is delegated authority and allocated financial resources sufficient to operate the museum effectively; (5) present regularly scheduled programs and exhibits that use and interpret objects for the public according to accepted standards; (6) have a formal and appropriate program of documentation, care, and use of collections and /or tangible objects; and (7) have a formal and appropriate program of presentations and maintenance of exhibits.

Establishment of transportation museums is interpreted to mean funding of capital improvements. The funds are not intended to reconstruct, refurbish, or rehabilitate existing museums, nor portions of museums, that are not for transportation purposes. It does not cover operations or maintenance of the facility. The museum must be related to surface transportation. Establishment of transportation museums is interpreted to include the costs of the structure and the purchase of artifacts necessary for the creation and operation of the facility. Displays, segments of buildings, or objects not directly related to transportation should not be funded with TE funds. TE funds may be used to build a new facility, add on a transportation wing to an existing facility, or convert an existing building for use as a transportation museum.

The museum must be open to the public and run by a public, non-profit or not-for-profit organization meeting the definition of museums stated above in this section. If entrance fees are charged for the museum a portion of the fee should be provided for the long term maintenance and operation of the facility.

The legislation governing the TE program specifically refers to TE activities "relating to surface transportation." Therefore, TE funds are not to be used to preserve aircraft or create an airport or air museum. Objects or

structures related to aviation are not normally eligible for TE funds. Landscaping and other eligible TE activities may be appropriate for consideration for the road leading to an aviation facility.

Real Estate Guidance for Enhancement Projects [Revised September 28, 2009]

See also [Real Estate Guidance in the Appendices](#).

Real estate and property management issues must be addressed in many of the proposed TE activities. Several of the TE activities may involve property acquisition, restoration and rehabilitation of structures, and lease agreements. The purpose and the need for the acquisition should be clearly documented.

Acquisition of real property for TE projects is subject to the [Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970](#) regarding acquisition procedures and relocation assistance. An agency or qualified organization without the power of eminent domain is subject to the limited requirements set forth in [49 CFR 24.101\(b\)](#).

The regulation at [23 CFR 1.23\(a\)](#) provides that "The State shall acquire rights-of-way of such nature and extent as are adequate for the construction, operation and maintenance of a project." The regulation at [23 CFR 710.201\(e\)](#), provides that "The real property interest acquired for all Federal-aid projects funded pursuant to title 23 of the United States Code shall be adequate for the construction, operation, and maintenance of the resulting facility and for the protection of both the facility and the traveling public." Consequently, when acquiring property interests for TE projects, States and Divisions should exercise caution and obtain fee title or a permanent easement unless there are compelling reasons or substantial cost or time savings in obtaining some other interest.

In those rare or unusual instances, it may be reasonable to acquire less than fee title or a less than permanent easement. In cases where the right-of-way interest is not in perpetuity, there should be a careful evaluation to guarantee control of the property for the expected life of the facility or to ensure, at a minimum, that the facility can be expected to function as intended. Adequate legal instruments could be a license agreement, lease, covenant, or other document to allow the facility to operate or function for a specified period of time based on its typical useful life or other reasonable prescribed time based on the investment.

There may be some projects, such as shared use paths, where land is owned or controlled by another governmental agency other than the project sponsor. In these cases, an interagency agreement to allow construction, operation, and maintenance of the facility may be an acceptable interest. Another example would be a utility or other entity that would be willing to grant a license to construct a facility, provided the utility would retain the right to use the land if needed for its operations. In those situations, provisions should be included to have the facility reconstructed or relocated to continue serving the same need, or alternatively to repay the Federal funds. In some instances, it may be appropriate to provide for the partial recovery of Federal funds if the facility does not fulfill its full useful life. An example would be a 20 year preservation agreement that would no longer be functional after 15 years due to unforeseen circumstances. The agreement between the State Highway Agency and the project sponsor should provide for either the full return of the Federal funds used, or some pro-rata portion based on the time elapsed. This agreement should be included in the Federal-Aid Project Agreement by reference. The conveyance document (deed, easement, permit, etc.) should specify the agreed upon recapture of the Federal investment. See the [Guiding Principles and Questions for TE Activities](#) for more information.

Property management issues to consider for TE projects include:

1. The project agreement should clearly state the purpose of the project and outline how the property will be used and maintained in the future. The agreement should include any conditions and requirements for repayment of Federal funds.
2. It is important that the applicant discuss how and for what purposes the property will be used following the rehabilitation. Where properties are to be leased with the income going to the applicant, a portion of the proceeds should go toward the future maintenance of the structure, and should account for reserve funds for replacements.
3. Where the primary purpose of the project is to enhance a historic transportation facility, coordination with the appropriate historic agencies can help to ensure that protective language is included in any agreement before the project is authorized for Federal funding.
4. Prospective applicants such as conservation groups or individuals should have a public co-sponsor to ensure that there will be continued responsibility on the part of a public agency for the project. Measures to maintain the public investment over time should be considered and should be included in project proposals and/or agreements.
5. The general rule of thumb for significant Federal-aid investments is that the public interest in and access to the activity should be in perpetuity. However, the extent of real property interest needed for the protection of the public interest in the expenditure of TE funds is somewhat dependent on the nature and magnitude of the expenditure. For example, if the project were simply to provide a gravel parking lot to be used to enhance a transportation use on lands under State ownership, a limited property use agreement would be sufficient. An expenditure of \$5,000 for a gravel parking lot with an agreement that the lot would be retained in that use for 5 to 7 years might be reasonable.
6. The expenditure of \$1,000,000 to rehabilitate a historic train station should require a much longer time period to amortize the public investment. The project agreement should specify a commitment to preserve the building, maintain the historic integrity, and sustain the planned use for which the TE award was granted. Major expenditures warrant that consideration be given to how the property will be maintained following the investment of TE funds, and what will be the source of financial resources for necessary repair, renewal, and rehabilitation. The agreement or conveyance document should provide for the recapture of the Federal investment if the property is converted to another use or purpose. Whenever buildings are involved, they should be insured and a provision made to reimburse the amount of Federal funding from the proceeds if the building is sold or destroyed. (See 23 CFR 710.201(e) and 49 CFR 18.31(c)).
7. Protection of property rights for the continued use of a facility, or for use over a specified period of time should be captured in the form of a legal document which can be recorded in the land records. These types of property reservations could be leases, easements, or other evidence of a property interest recognized in the State in which the TE funds are to be used.
8. Reversionary clauses may be appropriate in some instances where the property is originally obtained at no cost from a Federal agency through a Federal land transfer. These clauses would assure that where the property is no longer needed for the purpose for which it was transferred it would be offered for return to the original owner.
9. TE projects can involve real property, funds, materials, or services provided by units of local government and private entities. A donation of this type may be eligible for a credit to the matching share. To be eligible for a credit, the real property may not be part of a current transportation facility (23 CFR 710.507(c)). The fair market value of the real property, materials, or services may be credited against the non-federal share of the project. See also the [Donations](#) section of this Guidance, [Q&A #10](#), [Q&A #11](#), and [Donations and Credits under the Uniform Act: Questions and Answers](#).
10. State DOTs should include procedures in the Right of Way manual to inventory and monitor projects that utilize Federal funds to ensure continued use of the property for the approved activity or for the repayment of the Federal funds as appropriate.
11. Title VI provisions of 49 CFR 21 should be included in any leases or agreements.

See also:

- [Q&A #10, Q&A #11](#)
- [Donations and Credits under the Uniform Act: Questions and Answers](#) (excerpts from [23 CFR Part 710 Questions and Answers](#))
- [23 CFR Part 710 Questions and Answers](#)
- Right-of-Way Regulation on Transportation Enhancements [[TE website](#); [GPO website](#)]. This is FHWA's regulation providing for entities that lack power of eminent domain, and for acquisitions by qualified conservation organizations. This regulation is not limited to TE-funded projects. The concepts may be used for all Federal-aid highway program projects.
- [TE Guidance Appendices](#)

Transportation Enhancements Guidance Supplement - Inventory, Control, and Removal of Outdoor Advertising [Revised December 6, 2005]

This guidance supplement incorporates an amendment to the TE eligible activities as enacted in SAFETEA-LU on August 10, 2005. (Revised December 6, 2005)

The category *Inventory, Control, and Removal of Outdoor Advertising* helps States control and remove billboards and other outdoor advertising. The Conference Report for SAFETEA-LU stated that the addition of "inventory" is a clarification that inventory for outdoor advertising is currently and shall continue to be an eligible activity. It also stated:

Inventory control may include, but not be limited to, data collection, acquisition and maintenance of digital aerial photography, video logging, scanning and imaging of data, developing and maintaining an inventory and control database, and hiring of outside legal counsel.

FHWA encourages multiple year planning for inventory, control, and removal of outdoor advertising, however, funding requests should be limited to a single year.

A project for inventory, control, or removal of outdoor advertising must be within the confines of a project as is required for other types of TE projects. This information includes, but is not limited to, project termini, list of the locations, number and type of signs, sign company or owners, and a cost estimate for removal.

FHWA participation in inventory, control, and removal of outdoor advertising will be limited to functions required for effective inventory and control, as well as not duplicating existing State DOT internal resources. FHWA will consider practices in other States of a similar program size, and the National Association of Highway Beautification Agencies (NAHBA) website surveys submitted by States to make a judgment for stewardship purposes of reasonable and necessary expenditure of Federal funds. FHWA cannot make duplicate payments for the same or similar deliverables. States or project sponsors must provide a detailed breakdown of costs to ensure there is no duplication of effort within this project or a State's program as a whole.

Outside legal counsel, if reasonable and necessary, may be hired to remove illegal signs. However, the State must make a reasonable attempt to recoup the cost of the removal of illegal signs from the property owner before seeking Federal reimbursement. When retaining outside services, the State DOT must follow accepted consultant selection practices for projects using Federal-aid highway funds in accordance with 23 U.S.C. 112.

Removal of Illegal Signs

Federal regulations in 23 CFR 750.705(d), (h), (i), and (j) require States to remove illegal signs expeditiously; to develop laws, regulations, and procedures to accomplish these requirements; to establish enforcement procedures sufficient to discover illegally erected or maintained signs shortly after such occurrence to cause their prompt removal; and to submit regulations and enforcement procedures to the FHWA for approval.

Section 1046(b) of the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 amended 23 U.S.C. 131(r) to state:

r. *Removal of Illegal Signs.*

1. *By owners.--Any sign, display, or device along the Interstate System or the Federal-aid primary system which was not lawfully erected, shall be removed by the owner of such sign, display, or device not later than the 90th day following the effective date of this subsection.*
2. *By states.--If any owner does not remove a sign, display, or device in accordance with paragraph (1), the State within the borders of which the sign, display, or device is located shall remove the sign, display, or device. The owner of the removed sign, display, or device shall be liable to the State for the costs of such removal. Effective control under this section includes compliance with the first sentence of this paragraph.*

The above provision ties into 23 CFR 750.305(b), which itemizes nonparticipating costs and states that Federal funds may not participate when the sign owner reimburses the State for sign removal costs. Further, the State must make a reasonable attempt to recoup the cost of the removal of illegal signs from the property owner before seeking Federal reimbursement.

Furthermore, 23 CFR 750.304 requires the States to write Outdoor Advertising Control (OAC) Policies and Operating Procedures, and submit the document to FHWA for approval. The document should include the State DOT's procedures and identify situations when coordination between the State's OAC office and other State DOT staff is necessary. This information should be incorporated into the State Right-of-Way Manual.

FHWA must ensure compliance with the Federal regulations; the April 14, 1972, State/Federal Agreement for carrying out National Policy relative to control of outdoor advertising; Transportation Enhancement Guidance; accounting principles; and stewardship and oversight responsibilities to ensure fiscal responsibility for efficient use of Federal funds.

Transportation Enhancements Guidance Supplement - Workforce Development, Training, and Education [Added January 19, 2006]

TE funds may be used at 100 percent Federal share for direct educational expenses for surface transportation workforce development, training, and education under [23 U.S.C. 504\(e\)](#), provided the activity specifically benefits eligible TE activities. TE funds may be used for surface transportation workforce development, training, and education such as:

- Design and construction techniques for pedestrian and bicycle facilities, including training on how to construct accessible pedestrian facilities.
- Pedestrian and bicyclist safety.
- Using native plants and wildflowers in surface transportation landscaping.
- Historic preservation techniques related to surface transportation, such as techniques related to historic features along scenic byways, historic bridges, and other historic surface transportation facilities.
- Curation techniques for surface transportation artifacts.

- Techniques to reduce water pollution due to highway runoff.
- Techniques to reduce vehicle-caused wildlife mortality.

TE funds cannot be used for the ongoing administrative or operating expenses for a State's TE program, for consultants to help administer the State's program, or to conduct general training on administering the TE program. However, TE funds may be used for direct costs (training costs, conference and registration fees, travel costs) related to surface transportation workforce development, training, and education benefiting the TE program, including attendance at conferences and training related to the TE program. Salary costs are not eligible under 23 U.S.C. 504(e)(1)(A), but see [Training Related to Specific TE Projects](#) below.

[FHWA's Guidance for Use of Federal-Aid State Core Program Funds for Training, Education, and Workforce Development Question and Answers](#) states:

"Travel to an industry meeting where training was one of several topics of discussion would not qualify for use of core funds. However, core funds could be used to support employee travel to and from a training or professional development program designed to improve the employees' skill, knowledge, or abilities in surface transportation management or a technical discipline, i.e. travel to a National Highway Institute or other industry training and professional development program."

Because most activities under the National Scenic Byways Program are eligible TE activities, TE funds also may be used for surface transportation workforce development, training, and education benefiting the National Scenic Byways Program.

TE funds also may be used for surface transportation workforce development, training, and education benefiting historic preservation and archaeological planning and research as they relate to eligible TE activities.

Training Related to Specific TE Projects

If an employee is working on a specific eligible TE project, the cost of training for that employee that is necessary and reasonable for the employee to perform work on that project may be charged to the TE project. See OMB Circular A-87, Attachment B, Items 42 ([Training costs](#)) and 43 ([Travel costs](#)). Because this is a project cost, the employee's salary while at the training also is eligible. The Federal share for training related to a specific TE project is the same as the overall TE project.

23 U.S.C. 504(e)

- e. Surface Transportation Workforce Development, Training, and Education.-
 1. Funding.-Subject to project approval by the Secretary, a State may obligate funds apportioned to the State under sections 104(b)(1), 104(b)(2), 104(b)(3), 104(b)(4), and 144(e) for surface transportation workforce development, training, and education, including-
 - A. tuition and direct educational expenses, excluding salaries, in connection with the education and training of employees of State and local transportation agencies;
 - B. employee professional development;
 - C. student internships;
 - D. university or community college support; and
 - E. education activities, including outreach, to develop interest and promote participation in surface transportation careers.
 2. Federal share.-The Federal share of the cost of activities carried out in accordance with this subsection shall be 100 percent.

3. Surface transportation workforce development, training, and education defined.-In this subsection, the term "surface transportation workforce development, training, and education" means activities associated with surface transportation career awareness, student transportation career preparation, and training and professional development for surface transportation workers, including activities for women and minorities.

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NOTE: This section contains copies of current policy guidance memos as they exist at publication of this guidance. Links to these documents or their replacements are revised as needed. See also [Other Related FHWA Guidance](#). [This note revised November 19, 2009.]

Youth Conservation or Service Corps

TEA-21 requires the U.S. DOT to encourage the use of youth conservation or service corps.

Legislation: TEA-21 §1108(g):

- (g) *ENCOURAGEMENT OF USE OF YOUTH CONSERVATION OR SERVICE CORPS. -The Secretary shall encourage the States to enter into contracts and cooperative agreements with qualified youth conservation or service corps to perform appropriate transportation enhancement activities under chapter 1 of title 23, United States Code.*

The definition of a qualified youth conservation or service corps is taken from existing titles and chapters of the United States Code (U.S.C.). These sections of the U.S.C. are provided below.

42 U.S.C. Sec. 12572

- TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 129 - NATIONAL AND COMMUNITY SERVICE
SUBCHAPTER I - NATIONAL AND COMMUNITY SERVICE STATE GRANT PROGRAM

Division C - National Service Trust Program

- Part I - Investment in National Service
Sec. 12572. Types of national service programs eligible for program assistance

(a) Eligible national service programs

The recipient of a grant under section 12571(a) of this title and each Federal agency receiving assistance under section 12571(b) of this title shall use the assistance, directly or through sub-grants to other entities, to carry out full- or part-time national service programs, including summer programs, that address unmet human, educational, environmental, or public safety needs. Subject to subsection (b)(1) of this section, these national service programs may include the following types of national service programs:

1. A community corps program that meets unmet human, educational, environmental, or public safety needs and promotes greater community unity through the use of organized teams of participants of varied social and economic backgrounds, skill levels, physical and developmental capabilities, ages, ethnic backgrounds, or genders.
2. A full-time, year-round youth corps program or full-time summer youth corps program, such as a conservation corps or youth service corps (including youth corps programs under division I of this subchapter, the Public Lands Corps established under the Public Lands Corps Act of 1993 (16 U.S.C. 1721 et seq.), the Urban Youth Corps established under section 12656 of this title, and other conservation corps or youth service corps that performs service on Federal or other public lands or on Indian lands or Hawaiian home lands), that -
 - A. undertakes meaningful service projects with visible public benefits, including natural resource, urban renovation, or human services projects;
 - B. includes as participants youths and young adults between the ages of 16 and 25, inclusive, including out-of-school youths and other disadvantaged youths (such as youths with limited basic skills, youths in foster care who are becoming too old for foster care, youths of limited-English proficiency, homeless youths, and youths who are individuals with disabilities) who are between those ages; and
 - C. provides those participants who are youths and young adults with -
 - i. crew-based, highly structured, and adult-supervised work experience, life skills, education, career guidance and counseling, employment training, and support services; and

- ii. the opportunity to develop citizenship values and skills through service to their community and the United States.
- 2. A program that provides specialized training to individuals in service-learning and places the individuals after such training in positions, including positions as service-learning coordinators, to facilitate service-learning in programs eligible for funding under part I of division B of this sub-chapter.
- 3. A service program that is targeted at specific unmet human, educational, environmental, or public safety needs and that -
 - A. recruits individuals with special skills or provides specialized pre-service training to enable participants to be placed individually or in teams in positions in which the participants can meet such unmet needs; and
 - B. if consistent with the purposes of the program, brings participants together for additional training and other activities designed to foster civic responsibility, increase the skills of participants, and improve the quality of the service provided.
- 4. An individualized placement program that includes regular group activities, such as leadership training and special service projects.
- 5. A campus-based program that is designed to provide substantial service in a community during the school term and during summer or other vacation periods through the use of -
 - A. students who are attending an institution of higher education, including students participating in a work-study program assisted under part C of title IV of the Higher Education Act of 1965 (42 U.S.C. 2751 et seq.);
 - B. teams composed of such students; or
 - C. teams composed of a combination of such students and community residents.
- 6. A pre-professional training program in which students enrolled in an institution of higher education -
 - A. receive training in specified fields, which may include classes containing service-learning;
 - B. perform service related to such training outside the classroom during the school term and during summer or other vacation periods; and
 - C. agree to provide service upon graduation to meet unmet human, educational, environmental, or public safety needs related to such training.
- 7. A professional corps program that recruits and places qualified participants in positions -
 - A. as teachers, nurses and other health care providers, police officers, early childhood development staff, engineers, or other professionals providing service to meet educational, human, environmental, or public safety needs in communities with an inadequate number of such professionals;
 - B. that may include a salary in excess of the maximum living allowance authorized in subsection (a)(3) of section 12594 of this title, as provided in subsection (c) of such section; and
 - C. that are sponsored by public or private nonprofit employers who agree to pay 100 percent of the salaries and benefits (other than any national service educational award under division D of this subchapter) of the participants.
- 8. A program in which economically disadvantaged individuals who are between the ages of 16 and 24 years of age, inclusive, are provided with opportunities to perform service that, while enabling such individuals to obtain the education and employment skills necessary to achieve economic self-sufficiency, will help their communities meet -
 - A. the housing needs of low-income families and the homeless; and
 - B. the need for community facilities in low-income areas.
- 9. A national service entrepreneur program that identifies, recruits, and trains gifted young adults of all backgrounds and assists them in designing solutions to community problems.
- 10. An inter-generational program that combines students, out-of-school youths, and older adults as participants to provide needed community services, including an inter-generational component for other national service programs described in this subsection.

11. A program that is administered by a combination of nonprofit organizations located in a low-income area, provides a broad range of services to residents of such area, is governed by a board composed in significant part of low-income individuals, and is intended to provide opportunities for individuals or teams of individuals to engage in community projects in such area that meet unaddressed community and individual needs, including projects that would -
 - A. meet the needs of low-income children and youth aged 18 and younger, such as providing after-school "safe-places", including schools, with opportunities for learning and recreation; or
 - B. be directed to other important unaddressed needs in such area.
12. A community service program designed to meet the needs of rural communities, using teams or individual placements to address the development needs of rural communities and to combat rural poverty, including health care, education, and job training.
13. A program that seeks to eliminate hunger in communities and rural areas through service in projects -
 - A. Involving food banks, food pantries, and nonprofit organizations that provide food during emergencies;
 - B. involving the gleaning of prepared and unprepared food that would otherwise be discarded as unusable so that the usable portion of such food may be donated to food banks, food pantries, and other nonprofit organizations;
 - C. seeking to address the long-term causes of hunger through education and the delivery of appropriate services; or
 - D. providing training in basic health, nutrition, and life skills necessary to alleviate hunger in communities and rural areas.
14. Such other national service programs addressing unmet human, educational, environmental, or public safety needs as the Corporation may designate.

42 U.S.C. Sec. 12656

- TITLE 42 - THE PUBLIC HEALTH AND WELFARE
 CHAPTER 129 - NATIONAL AND COMMUNITY SERVICE
 SUBCHAPTER I - NATIONAL AND COMMUNITY SERVICE STATE GRANT PROGRAM

Division J - Miscellaneous

Sec. 12656. Urban Youth Corps

(a) Findings

The Congress finds the following:

1. The rehabilitation, reclamation, and beautification of urban public housing, recreational sites, youth and senior centers, and public roads and public works facilities through the efforts of young people in the United States in an Urban Youth Corps can benefit these youths, while also benefiting their communities, by -
 - A. providing them with education and work opportunities;
 - B. furthering their understanding and appreciation of the challenges faced by individuals residing in urban communities; and
 - C. providing them with a means to pay for higher education or to repay indebtedness they have incurred to obtain higher education.
2. A significant number of housing units for low-income individuals in urban areas has become substandard and unsafe and the deterioration of urban roadways, mass transit systems, and transportation facilities in the United States have contributed to the blight encountered in many cities in the United States.

3. As a result, urban housing, public works, and transportation resources are in need of labor intensive rehabilitation, reclamation, and beautification work that has been neglected in the past and cannot be adequately carried out by Federal, State, and local government at existing personnel levels.
4. Urban youth corps have established a good record of rehabilitating, reclaiming, and beautifying these kinds of resources in a cost-efficient manner, especially when they have worked in partnership with government housing, public works, and transportation authorities and agencies.

(b) Purpose

It is the purpose of this section -

1. to perform, in a cost-effective manner, appropriate service projects to rehabilitate, reclaim, beautify, and improve public housing and public works and transportation facilities and resources in urban areas suffering from high rates of poverty where work will not be performed by existing employees;
2. to assist government housing, public works, and transportation authorities and agencies;
3. to expose young people in the United States to public service while furthering their understanding and appreciation of their community;
4. to expand educational opportunity for individuals who participate in the Urban Youth Corps established by this section by providing them with an increased ability to pursue post-secondary education or job training; and
5. to stimulate interest among young people in the United States in lifelong service to their communities and the United States.

(c) Definitions

For purposes of this section:

1. Appropriate service project
The term "appropriate service project" means any project for the rehabilitation, reclamation, or beautification of urban public housing and public works and transportation resources or facilities.
2. Corps and Urban Youth Corps
The term "Corps" and "Urban Youth Corps" mean the Urban Youth Corps established under subsection (d)(1) of this section.
3. Qualified urban youth corps
The term "qualified urban youth corps" means any program established by a State or local government or by a nonprofit organization that -
 - A. is capable of offering meaningful, full-time, productive work for individuals between the ages of 16 and 25, inclusive, in an urban or public works or transportation setting;
 - B. gives participants a mix of work experience, basic and life skills, education, training, and support services; and
 - C. provides participants with the opportunity to develop citizenship values and skills through service to their communities and the United States.

Transit Enhancements Provision of TEA-21

Administered by the Federal Transit Administration

TEA-21. TEA-21 created the "transit enhancements" provisions in the Urbanized Area Formula Program administered by the Federal Transit Administration (FTA). TEA-21 established the requirement that a minimum of one percent of the part of FTA's Urbanized Area Formula Program funding for urbanized areas with populations 200,000 and over must be made available for activities that are transit enhancements.

FTA's Urbanized Area Formula Program. Under the FTA Urbanized Area Formula Program (Title 49 U.S.C. Section 5307), over \$2 billion is apportioned annually to urbanized areas with populations of 200,000 and over for transit capital projects. In Fiscal Year 1999, \$2.3 billion was apportioned to urbanized areas with populations 200,000 and over. One percent of each urbanized area's apportionment, or a total of \$23 million, must be used for transit enhancements. Funds are available for obligation by FTA for the Federal fiscal year in which the funds are appropriated, plus three years. Thus, FY 1999 funds are available to be obligated by FTA through FY 2002.

FTA makes grants in each urbanized area with a population 200,000 and over to a "designated recipient." A designated recipient is a public body that has the legal authority to apply for, receive, and dispense Federal funds in the urbanized area. There is usually one designated recipient in an urbanized area, but occasionally there is more than one. There are approximately 400 designated recipients of the FTA program. Recipients of FTA grant funds are referred to as "grantees."

A designated recipient may allow another public agency to be the direct applicant for Urbanized Area Formula Program funds. On occasion, a grantee, whether a designated recipient or not, may choose to pass its grant funds through to another agency to carry out the purposes of the grantee's agreement with FTA. To do this, the grantee must enter into a written agreement with the sub-recipient that assures FTA that the grantee will be able to comply with its obligation to satisfy the requirements of the grant agreement.

Eligible Transit Enhancements. The term "transit enhancement" means projects or project elements that are designed to enhance mass transportation service or use and are physically or functionally related to transit facilities. Following are the transit projects and project elements that qualify as transit enhancements. All must be related to or serve mass transit.

- Historic preservation, rehabilitation, and operation of historic mass transportation buildings, structures, and facilities (including historic bus and railroad facilities);
- Bus shelters;
- Landscaping and other scenic beautification, including tables, benches, trash receptacles, and street lights;
- Public art;
- Pedestrian access and walkways;
- Bicycle access, including bicycle storage facilities and installing equipment for transporting bicycles on mass transportation vehicles;
- Transit connections to parks within the recipient's transit service area;
- Signage; and
- Enhanced access for persons with disabilities to mass transportation.

FTA Administration of the Enhancements Minimum-Expenditure Provision

Requirements. One percent of the Urbanized Area Formula Program apportionment to each urbanized area with a population of 200,000 and over must be made available only for transit enhancements. When there are several grantees in an urbanized area, it is not required that each grantee spend one percent of its Urbanized Area Formula Program funds on transit enhancements. Rather, one percent of the urbanized area's funding must be expended on projects and project elements that qualify as enhancements

It will be the responsibility of the Metropolitan Planning Organization for the urbanized area to determine how the one percent will be allotted to transit projects. The one-percent is a minimum requirement; more than one percent of an urbanized area's formula program funds may be expended for transit enhancements. In fact, most of the enhancement activities listed have long been eligible for funding under the Urbanized Area Formula Program. However, one item - "operating costs for historic facilities"-is only eligible for funding when classified as a transit enhancement activity. (The Urbanized Area Formula Program does not provide assistance for transit operating costs for areas with populations 200,000 and over.)

Project Budget. The project budget for each grant application that includes a request for enhancement funds must identify transit enhancements and use the specific budget activity line items established by FTA for transit enhancements. Assistance with this step is available from any FTA regional office (see regional office list below).

Enhancement Report. The recipient of a grant that contains an enhancement project must submit a report to the appropriate FTA regional office listing the projects or elements of projects carried out with those funds during the previous fiscal year and the amount expended. The report must be submitted in the Federal fiscal year's final quarterly report.

Bicycle Access. Projects providing bicycle access to transit assisted with the FTA enhancement funding are assisted with a 95 percent Federal share. All other transit enhancement activities are funded with a maximum 80 percent Federal share.

Enhanced Access for Persons with Disabilities. The costs of meeting transit requirements set forth by the Americans with Disabilities Act of 1990 are eligible under all FTA programs. Enhancement projects or elements of projects designed to enhance access for persons with disabilities must go beyond the requirements attendant to the Americans with Disabilities Act.

FTA Web Site. Information about the Federal Fiscal Year 1999 funding for enhancements can be found on the FTA web site at www.fta.dot.gov/library/legal/fr11698a.pdf. (Reader should scroll to page 19, for Table 4.)

FTA Regional Offices. Telephones of the FTA Regional Offices are listed below.

Region I, Cambridge, Mass., (617) 494-2055.
Region II, New York, NY., (212) 668-2170
Region III, Philadelphia, Pa., (215) 656-7100
Region IV, Atlanta, Ga., (404) 562-3500
Region V, Chicago, Ill., (312) 353-2789
Region VI, Ft. Worth, Tex., (817) 978-0550
Region VII, Kansas City, Mo. (816) 523-0204
Region VIII, Denver, Co. (303) 844-3242

Region IX, San Francisco, Cal. (415) 744-3133
Region X, Seattle, Wash. (206) 220-7954

Applicability of Prevailing Wage Rate Requirements to Federal-aid Construction Projects



U.S. Department of Transportation
Federal Highway Administration

MEMORANDUM

INFORMATION: Applicability of Prevailing
Subject: Wage Rate Requirements to Federal-aid Construction
Projects

Date: June 26,
2008

From: Dwight A. Hornes
Director, Office of Program Administration
Directors of Field Services
To: Acting Resource Center Manager
Division Administrators

Reply To Attn.
of: HIPA-30

Over the years, a number of questions have been brought to our attention concerning the prevailing wage rate requirements under 23 U.S.C. 113. Generally, 23 U.S.C. 113 requires all laborers and mechanics employed for construction work on Federal-aid highways shall be paid wages at rates not less than those prevailing wages as determined by the Secretary of Labor under the Davis-Bacon Act. In addressing these questions, this office has issued a number of memorandums, e-mails and letters to communicate the decisions regarding these questions. As a result, the FHWA's guidance on the applicability of 23 U.S.C. 113 is contained in various different sources. The purpose of this memorandum is to consolidate and briefly restate existing guidance and policies concerning the applicability of the prevailing wage rate requirements under 23 U.S.C. 113.

The US Department of Labor's (DOL) regulation in 29 CFR Parts 1, 3 and 5 provides the applicable policy for the implementation of prevailing wage rate requirements on federally funded construction projects. Congress extended these requirements to Federal assistance programs through a series of related acts. For the Federal-aid highway program, the related act is found in 23 U.S.C. 113 - "Prevailing rate of wage." Thus, Section 113 serves as the source statute for applicability determinations in the Federal-aid highway program while the DOL's statutes, regulations and directives provide the appropriate policy for implementing Section 113 prevailing wage rate requirements whenever these requirements apply to a Federal-aid highway project.

Section 113(a) states:

The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the construction work performed on highway projects on the Federal-aid highways authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with sections 3141-3144, 3146, and 3147 of title 40.

First, we have determined that the phrase:

- "Construction work performed on highway projects on the Federal-aid highways" means any construction project that takes place in the right-of-way of a Federal-aid highway is subject to 23 U.S.C. 113. This would include work that may not appear to be highway construction (construction of wetlands, landscaping, etc.) but is an otherwise eligible project under Title 23.

Thus, any Federal-aid construction project (regardless of Federal-aid funding source) physically located within the right-of-way of a Federal-aid highway is subject to 23 U.S.C. 113 requirements. See [Mr. Anthony R. Kane's February 13, 1992 memorandum titled: "ISTEA of 1991 – Construction and Maintenance Requirements."](#)

- The term "Federal aid highway" is defined in 23 U.S.C. 101 as "... a highway eligible for assistance under this chapter other than highways classified as local roads or rural minor collectors." Therefore, 23 U.S.C. 113 requirements are applicable to Federal-aid construction projects on highways functionally classified as arterials and collectors but not applicable to projects located on highways functionally classified as local roads or rural minor collectors. In addition, 23 U.S.C. 113 requirements are not applicable to Federal-aid construction projects that are not located within the right-of-way of a Federal-aid highway. In certain circumstances, 23 U.S.C. 113 requirements apply to a Federal-aid construction project not located on a Federal-aid highway if the project is linked to or dependent upon a Federal-aid highway project. Examples include: a project required by an environmental document for a Federal-aid highway project or a project for the construction of a traffic control center that monitors traffic on one or more Federal-aid highways. In both cases, the project would not exist without the Federal-aid highway project. See [Mr. David R. Geiger's July 28, 1994 memorandum titled: "Applicability of Davis-Bacon for Transportation Enhancement Projects."](#)

Second, 23 U.S.C. 113 requirements are applied on a:

- "Contract basis" as such, contracting agencies need to be aware that the use of Federal-aid funding for any portion of a construction contract invokes 23 U.S.C. 113 requirements for all work under the contract, regardless of the amount of Federal-aid participation or the use of nonparticipating items of work. It should be noted that minor construction activities necessary to provide a connection to a Federal-aid highway would not invoke 23 U.S.C. 113 requirements for a project not located on a Federal-aid highway. Examples of minor construction activities include: the placement of advance construction signs, approach paving, curb returns, or drainage modifications on the right-of-way of a Federal-aid highway.

Third, for projects funded with emergency relief funding:

- Contract work for emergency repairs: All contract work for emergency repairs performed by contractors or subcontractors within the right-of-way of a Federal-aid highway is covered by 23 U.S.C. 113 requirements. The term emergency repair is defined in 23 CFR 668.103 as "Those repairs including temporary traffic operations undertaken during or immediately following the disaster occurrence for the purpose of: (1) Minimizing the extent of the damage, (2) Protecting remaining facilities, or (3) Restoring essential traffic." While contracting agencies are empowered to begin emergency repairs immediately, they must comply with 23 U.S.C. 113 requirements so that properly documented costs will be eligible for reimbursement once the FHWA Division Administrator makes a finding that the disaster is eligible for emergency relief funding. "
- Contract work for debris removal only: 23 U.S.C. 113 requirements do not apply where emergency contract work is only for the removal of debris and related clean up, which is not considered to be a "construction" activity. Since 23 U.S.C. 113 only applies to "construction work," 23 U.S.C. 113 prevailing minimum wage requirements do not apply to debris removal under the emergency relief program. However, debris removal performed in conjunction with construction, alteration, and repair work (such as highway resurfacing, re-grading, significant earthmoving, bridge repairs, etc.) is covered by 23 U.S.C. 113. See [DOL's August 25, 2006 letter to Mr. Horne.](#)

- Work by public agency forces: 23 U.S.C. 113 requirements do not apply to State or local government agency employees who perform emergency repairs or construction work on a force account basis because government agencies (such as States or their subdivisions) are not considered contractors or subcontractors. See [29 CFR 5.2 \(h\)](#). However, 23 U.S.C. 113 requirements do apply to contracts let by State or local government agencies using an alternative procurement procedure that has been approved through the force account approval process.

Fourth, for railroad and utility relocation or adjustment projects:

- Work done by railroads or utilities: 23 U.S.C. 113 requirements do not apply to work performed by railroads, utility companies or work performed by a contractor engaged by a railroad or utility company. Payment for relocation work performed by the utilities and railroads is considered to be compensation for a relocation in order to accommodate highway construction. See [Mr. Dowell H. Anders' May 15, 1985, legal opinion titled: "Utility and Railwork – Wage Rate and EEO Requirements."](#)
- Work done by highway construction contract: 23 U.S.C. 113 requirements apply when utility or railroad relocation work is not accomplished through its utility or railroad forces but under a highway construction contract that has been let by the contracting agency.

Fifth, for subsurface utility location services:

- Subsurface utility engineering or utility location services are considered exploratory drilling services. These contracts provide the location of utilities for engineering or planning purposes. 23 U.S.C. 113 requirements do not apply. See [DOL's Field Operations Handbook, Section 15d03\(b\)](#).

Sixth, for ferry boats and terminals:

- The provisions of 23 U.S.C. 113 applies to the building, alteration, and repairs of ferry boats and terminals located on or servicing a Federal-aid highway route. Wage rate determinations for ferryboat building, alteration, and repairs are issued only if the location of the contract performance is known when bids are solicited. 23 U.S.C. 113 does not apply if the location of contract performance is unknown at the time of bid solicitation. However, the contract needs to include all other applicable DOL requirements. See [DOL's Field Operations Handbook, Section 15d08](#).

Seventh, for High Priority and other congressionally designated projects:

- These projects are subject to all Federal requirements unless the requirement is specifically waived in legislation. If the project is physically located within the right-of-way of a Federal-aid highway, then 23 U.S.C. 113 requirements apply. For rail line construction projects, if a portion of a rail line construction contract is within the right-of-way of a Federal-aid highway, 23 U.S.C. 113 requirements apply to all contract work. 23 U.S.C. 113 requirements do not apply to rail line contracts that are not located within the right-of-way of a Federal-aid highway.

Eighth, for Safe Routes to School and Nonmotorized Transportation Pilot projects:

- Congress required that States treat these projects as if they were on the Federal-aid system despite their functional classification or location outside the right-of-way of a Federal-aid highway. Therefore, 23 U.S.C. 113 requirements apply to all Safe Routes to School construction projects, even for projects not located within the right-of-way of a Federal-aid highway. See [P.L. 109-59, Section 1404 \(j\)](#).

Ninth, for warranty work:

- 23 U.S.C. 113 applies to warranty or repair work if this work is required in the original construction contract. This is true regardless of whether there is a pay item for the warranty work. If an employee spends more than 20 percent of his/her time in a work week engaged in such activities on the site of the original work, he/she is covered for all time spent on the site. The original contract prevailing wage rates apply regardless of when the warranty work is done. This is consistent with the DOL Wage and Hour Division Opinion Letter dated March 9, 1973, that concluded Davis-Bacon Related Act requirements applied to warranty/repair work for the construction of prefabricated housing units. The DOL determined that such work was covered because it took place at the site of the construction work and involved more than an incidental amount of construction activity.

Finally, it should be noted that other labor requirements of the DOL may apply to contracts even when 23 U.S.C. 113 is not applicable. These requirements include the Fair Labor Standards Act requirements (minimum wage, overtime pay, record keeping and child labor standards) and the Contract Work Hours and Safety Standards Act (overtime requirements). For guidance on the application of these requirements, please visit the DOL Web site at <http://www.dol.gov/compliance/laws/comp-cwhssa.htm>.

If you have any questions regarding the applicability of DOL requirements to Federal-aid construction projects, please contact Mr. Edwin Okonkwo at 202-366-1558.

Procurement of Transportation Enhancement Projects



U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: **INFORMATION:** Procurement of Transportation Enhancement Projects Date: November 12, 1996

From: Associate Administrator for Program Development

In Reply Refer To: HNG-22

To: Regional Administrators

In response to several inquiries from the field, we have decided to authorize the State highway agencies (SHA's) to procure transportation enhancement projects, not located within the highway right-of-way, under the procedures of the "Common Rule." This decision is consistent with 49 CFR 18.36(j) and our treatment of other nontraditional programs funded with Federal-aid funds, such as the Recreational Trails Program.

The Federal Highway Administration (FHWA) was one of the 23 Federal Agencies that adopted the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" (also known as the Common Rule - 49 CFR 18). The FHWA adopted the Common Rule on March 11, 1988. The Office of Management and Budget approved certain exceptions to the Common Rule based on existing legislation specific to each agency that adopted the rule.

One of the FHWA's exceptions to the Common Rule provides for competitive bidding on highway construction projects. Specifically, 49 CFR 18.36(j) states:

"23 U.S.C. 112(a) directs the Secretary to require the recipients of highway construction grants to use bidding methods that are "effective in securing competition." Detailed construction contracting procedures are contained in 23 CFR part 635, subpart A."

This exception to the Common Rule was developed prior to the passage of the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 and implementation of the transportation enhancement program established in the ISTEA. Since that time, SHA's and local public agencies have developed numerous enhancement projects that are transportation related, but may not always be located within the highway right-of-way. Some of these projects are relatively low cost (e.g., restoration of historic railroad stations, hiking/bicycle paths, landscaping and scenic beautification).

It is often not cost-effective to use the competitive bidding procedures in 23 CFR 635A to procure such services for low cost projects. The Common Rule offers more flexibility to the States with regard to the method of procurement for such low cost projects. Therefore, transportation enhancement projects not located within the highway right-of-way may be procured under State procedures.

Highway related projects must still meet the linkage criteria noted in our July 28, 1994, memorandum concerning the applicability of Davis-Bacon to Transportation Enhancement Projects (copy attached). A project would be highway related if it is "linked" to a Federal-aid highway based on proximity or

impact (i.e., without the Federal-aid highway the project would not exist). For transportation enhancement projects that are within the highway right-of-way, a contracting agency will continue to follow the procedures in 23 CFR 635A.

We intend to address these and other FHWA Common Rule exceptions in a future rulemaking.

/s/ original signed by

Thomas J. Ptak

Applicability of Davis-Bacon for Transportation Enhancement Projects



U.S. Department of Transportation

MEMORANDUM

Federal Highway Administration

Subject: **INFORMATION:** Applicability of Davis-Bacon For Transportation Enhancement Projects

Date: July 28, 1994

From: Acting Chief, Construction and Maintenance Division

Refer To: HNG-22

Mr. Andy Hughes Director

To: Office of Engineering Services (HES-04)
Atlanta, Georgia

Your June 1 memorandum transmitted a request from the Alabama Division Office for guidance on the applicability of Davis-Bacon (D-B) wage rates to transportation enhancement projects. The following information is provided in response to this request.

The D-B predetermined minimum wage must be paid to all covered workers on Federal-aid projects exceeding \$2,000 that are located on a Federal-aid highway. Title 23 defines a Federal-aid highway as any highway eligible for Federal-aid, other than highways classified as local roads or rural minor collectors. The D-B requirements do not apply to force account work performed by highway agency forces.

The applicability of D-B to a transportation enhancement project is dependent on the relationship or linkage of the project to a Federal-aid highway. If the project is "linked" to a Federal-aid highway based on **proximity** or **impact** (i.e., without the Federal-aid highway the project would not exist), then D-B requirements apply. Examples of such projects include the removal of outdoor advertising, a wetland to filter highway drainage, etc.

If the project is not "linked" to a particular Federal-aid highway and is eligible based solely on **function** (i.e., a transportation facility, such as an independent bike path, the restoration of a railroad station, etc.), then the D-B requirements do not apply. However, the D-B requirements apply to all projects greater than \$2,000 that are physically located within the **existing** right-of-way of a Federal-aid highway, regardless of the transportation enhancement characteristics.

Another D-B related issue, which has been raised on several occasions, is the acceptability of using volunteer labor on transportation enhancement projects. The Department of Labor states in its Field Operations Handbook (§15e23): "There are no exceptions to D-B coverage for volunteer labor unless an exception is specifically provided for in the particular D-B Related Act under which the project funds are derived." The D-B Related Act for the Federal-aid Highway Program (23 U.S.C. §113) is silent on this subject. Therefore, on transportation enhancement projects subject to D-B coverage, a contractor or subcontractor may not use volunteer labor. On the other hand, a State highway or local government agency may use volunteer laborers under their direct control as a force account effort.

If you have further questions on the matter, please contact Mr. Robert S, Wright of my staff at (202) 366-1558.

NEPA Requirements for Transportation Enhancement Activities



U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: ACTION: NEPA Requirements for Transportation Enhancement Activities (Reply Due: December 15)

Date: October 28, 1996

From: Rodney E. Slater Administrator

Reply to: HEP-30

To: Regional Administrators

Section 316 of the National Highway System Designation Act of 1995 has given us a mandate to further streamline the processing of transportation enhancement activities (TEA) projects under the National Environmental Policy Act of 1969 (NEPA). Accordingly, as part of the streamlining process, Section 316 of the 1995 act directs the Secretary of Transportation to develop categorical exclusions under NEPA for TEA'S.

We already have considerable flexibility under the current regulation to streamline the NEPA process for TEA'S, consistent with the principles of environmental protection and enhancement. For example, Section 771.117(c) identifies actions that, by their nature, meet the criteria for CE's. Some of these actions cover TEA-type projects, namely construction of bicycle and pedestrian lanes, paths, and facilities; landscaping; acquisition of scenic easements; and such non-construction activities as publication of a scenic byways brochure, a historic bridge photobook, or a geographic information system for archaeological survey of a transportation project. As the provision states, these actions "normally do not require any further NEPA approvals....."

Thus, the fact that a TEA project falls within one of these listings is usually approval enough; NEPA documents and FHWA approval would be required only if unusual circumstances are involved in the proposed action or project. Such circumstances include the presence of significant environmental impacts, substantial controversy on environmental grounds, significant impact on properties protected by Section 4(f) of the Department of Transportation Act of 1966 or Section 106 of the National Historic Preservation Act of 1966, or inconsistencies with any Federal, State or local requirement relating to the environment.

Under another provision, Section 771.117(d), additional TEA actions may qualify for a CE classification, but because of the greater possibility of impacts with these projects, FHWA approval of the classification is required. The list in this section consists only of examples to illustrate the types of projects that may qualify; TEA's do not have to match one of the examples to qualify for a CE classification. The applicant (the State or other project sponsor) is responsible for providing information to allow the FHWA to decide if a CE classification is proper. It is important to state that because most TEA's are small-scale projects, they should almost always be processed as a CE. Only a modest amount of information is required to describe their potential environmental impacts and to demonstrate that they do not have significant impacts.

For types of projects not listed in Section 771.117(c) or covered by Section 771.117(d), our approval of a CE classification under Section 771.117(d) can be accomplished on a project-by-project basis or programmatically. As discussed in the attached guidance memorandum dated March 30, 1989, the programmatic approach allows a State transportation department and the FHWA to concur in advance that additional types of projects satisfy all the criteria for a CE classification. The use of programmatic CE approvals has been an effective way of ensuring that the letter and spirit of NEPA are satisfied in a way that reflects the particular nature of the environment and the program in each State.

I urge you to review the extent to which each State in your region has used the programmatic CE approach to ensure that TEA's receive the full advantage of this option. You are encouraged to use the programmatic CE process for TEA projects whether or not they are included in the lists of example projects in the Section 771.117(c) or (d). When we modify 23 CFR 771, a section will be included to state that all TEA projects normally should be processed as CE's. This change will be consistent with Section 316 of the 1995 act.

To advise the Congress regarding the status of our streamlining efforts, I request that you provide us a brief description, by December 15, of any process used for streamlining NEPA approvals for TEA's in your States. Please describe how the CE classification has been applied to TEA projects under Section 771.117(c) and (d). Where programmatic approvals have been used, we would like to know which types of projects are covered, whether other types of projects have been proposed but not approved, and the process for securing approvals, including the roles of the State transportation department, the FHWA division office, and project sponsors in assembling and reviewing environmental documentation. We would also like to know about cases where a TEA project required preparation of an EA or an EIS.

Programmatic Agreement on Transportation Enhancements



U.S. Department of Transportation

Memorandum

Federal Highway Administration

Subject: **INFORMATION:** Programmatic Agreement on Transportation Enhancements

Date: June 11, 1997

From: Chief, Environmental Analysis Division

Reply to: HEP-40

To: Regional Administrators
Federal Lands Highway Program Administrator

Attached for your information, consideration, and use by State DOTs is a copy of the new programmatic agreement on transportation enhancements. This nationwide agreement with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers (SHPOs) is expected to reduce the time spent by State DOTs in project review, consultation, and processing of transportation enhancement activities. It will accomplish this by encouraging local coordination and public participation, and reducing the need for project-by-project coordination with out-of-State groups. In addition, the agreement permits the SHPO and the State DOT to exercise judgment in weighing the benefits of the project against minor, but measurable, adverse changes to historic qualities. The net result, as one State DOT noted, will be to greatly assist in the implementation of the ISTEA, and to reduce the time to process projects by 30 to 60 days.

The Acting Administrator has signed this nationwide programmatic agreement on behalf of the FHWA. Individual States may activate this programmatic agreement by sending concurrent letters of acceptance to the three signatories and to the SHPO and the FHWA Division Office. The FHWA Division Administrator will be the Agency official with responsibility for ensuring that the agreement is carried out.

Use of this nationwide programmatic agreement is NOT mandatory. States DO NOT have to adopt it for their enhancements projects. Many States have already developed agreements that work for them; and those agreements remain in effect. Some States may wish to adapt the approach conveyed in this agreement and further tailor it for their specific program needs. Please advise the State that if they choose to adapt this agreement and create a new one, they will need to develop it in consultation with the FHWA Division, the SHPO, and the ACHP.

If you have any questions please contact Mr. Bruce Eberle, FHWA Historic Preservation Officer. He may be reached at (202) 366-2060. NOTE: The current contact person is MaryAnn Naber, (202) 366-2060.

James M. Shrouds

Environmental Mitigation to Address Water Pollution due to Highway Runoff or Reduce Vehicle Caused Wildlife While Maintaining Habitat Connectivity

Examples of TE projects in this category:

- Fletchers Creek Wetland Restoration, Millford, Connecticut. Minor drainage improvements which involved the retrofitting of culverts and tide gates to allow for additional tidal flow to enter the salt marshes within Fletchers Creek to help restore the marshes which had been degraded from the construction of a now abandoned service road and a trolley line.
- Kent's Hill Section Highway Runoff Mitigation Project, Reedfield, Maine. This section of State Route 17 experienced road surface runoff that was causing erosion and sedimentation problems that were impacting a wetland and two lakes. The drainage section was very steep and roadside ditches were deep and unsafe. The Department of Transportation was performing emergency repair to the ditches after major storm events. The TE program helped provide funds to construct two ponds, a dry pond, and a wet pond and stabilize the steep slopes along the roadside.
- Runoff Mitigation on Searles Prairie, Arkansas. Searles Prairie Natural Area is a native tall grass prairie remnant located in northwest Arkansas in the City of Rogers. The 10-acre virgin prairie, which has never been plowed, is located near Arkansas State Highway 62 and Dixieland Road. With the increased development in the vicinity and the scheduled road improvements this natural prairie area, which was located in a natural low spot, was threatened with the potential of filtering a large increase in surface runoff. The City of Rogers, working with the Arkansas State Highway Department, developed a project that was financed through the TE program. The project involved the building of an upstream storm structure to intercept surface runoff and convey the runoff to up-sized drainage pipes that diverted flow around the native tall grass prairie to protect the highly valued natural prairie.
- Cucumber Creek Nature Preserve Expansion, Oklahoma. A TE project was completed in southeastern Oklahoma near State Highway 259 to improve the water quality conditions in Cucumber Creek. To mitigate the impacts of the existing highway runoff, the land between the highway and stream was regraded and stabilized to prevent future erosion and pollution problems in the creek.

Request for Approval of Exceptions



U.S. Department of Transportation

Federal Highway Administration

Memorandum

Subject: ACTION: Request for Approval of Exceptions

Date: July 28, 1999

From: Kenneth R. Wykle, Administrator

Reply to: HCC-30, RBlack, x61359

To: The Secretary

THROUGH: The Deputy Secretary

This memorandum requests that you approve an exception in the law that would allow States more flexibility in determining where they can use their Transportation Enhancement (TE) funds. A general provision of the Surface Transportation Program (STP) law restricts the classes of highway projects for which STP funds may be used, unless the Secretary approves an exception. Because TE projects are part of the STP, this general provision has the effect of restricting the use of TE funds. In many cases, these restrictions make no sense in light of the TE program mandate and the restriction undermines the effectiveness of the TE program. This memorandum requests that you except all TEs from this restriction.

The STP was established by the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and continued by the Transportation Equity Act for the 21st Century (TEA-21). The STP funds are available for 14 categories of eligible projects, 23 U.S.C. § 133(b). Section 133(c) includes the general limitation that STP projects not be funded on "roads functionally classified as local or rural minor collectors, unless such roads are on a Federal-aid highway system on January 1, 1991, and except as approved by the Secretary (emphasis added).

One of the eligible categories is TE projects, defined by 23 U.S.C. § 101(35). The TE projects include provision of facilities for pedestrians and bicycles; landscaping and other scenic beautification; historic preservation; preservation of abandoned railway corridors; and environmental mitigation to address water pollution due to highway runoff. The definition of TE contains the requirement that each activity "relate[s] to surface transportation."

Because TEs are part of the STP, the general location restriction of § 133(c) applies to them; TE projects cannot be located on local or rural minor collector roads. Given the nature of many of the 12 categories of TEs, however, it is clear that the location limitation of § 133(c) cannot apply to them. Provision of safety and educational activities for pedestrians and bicyclists, preservation of abandoned railway corridors, or archaeological planning and research are not tied to a location on a highway. Even for TE projects which could be connected to a particular highway, such as historic preservation and scenic enhancements, the location restriction of § 133(c) is often at odds with what the TE program seeks to accomplish. By granting a general waiver of TE projects, as permitted by § 133(c), the administration of TE projects would be greatly simplified and made consistent with the apparent purpose of the statute. The TE activities will still have to relate to surface transportation. This definitional provision cannot be waived and provides adequate protection against potentially inappropriate expansion of the TE program.

RECOMMENDATION: I recommend that you approve the TE exception from the location of project limitation of § 133(c) of Title 23 of the United States Code, thereby giving the States increased flexibility in determining where their TE projects will be constructed.

APPROVED: **X**
DISAPPROVED:
DATE: 10-25-99

Section 4(f) Policy Paper – March 1, 2005

The [Section 4\(f\) Policy Paper, March 1, 2005](#), supersedes [Interim Guidance on Applying Section 4\(f\) on Transportation Enhancement Projects, August 22, 1994](#).

Additional Real Estate Guidance

Donations and Credits under the Uniform Act: Questions and Answers

Excerpts from [23 CFR PART 710 QUESTIONS AND ANSWERS](#)

Posted January 11, 2007

Q1. *Do early acquisitions prior to NEPA clearance or acquisitions after NEPA clearance and project authorization, by local governments or private parties for federally funded projects need to conform to the Uniform Act requirements?*

A1: Yes. To be eligible for reimbursement, 23 U.S.C. 108(c)(2)(A) requires that any land acquired, and relocation assistance provided, comply with the requirements of the Uniform Act.

Q2. *What does "lawfully obtained" mean in order to be eligible for credit?*

A2. To be eligible for credit, 23 U.S.C. 323(b)(1)(A) requires that the acquired land be "lawfully obtained." In such instances, if the property was acquired for a transportation purpose under the threat of eminent domain (subsequent to the Uniform Act), the requirements of the Uniform Act would apply. If the property was acquired by other means (e.g., local government acquisition via tax delinquency), it must have been acquired in accordance with the laws of the jurisdiction in which the property is located, and not be located within a current transportation facility.

Q3: *Can a contribution of real property by a unit of local government be applied as a credit if ownership of the real property will remain with the unit of local government after completion of the project?*

A3: Yes. For example, transportation enhancement projects can involve real property owned by units of local government and private entities. To be eligible for a credit, the real property may not be part of a current transportation facility or transportation enhancement already in use as such. The fair market value of the real property newly incorporated into the transportation project will be credited against the non-Federal share of the project. (23 CFR 710.507(c)).

Q4: *Can the cost of determining the fair market value of real property applied as a contribution for credit by a unit of local government be applied to the credit?*

A4: No, a credit sought by a unit of local government is restricted to the fair market value of the real property, funds, materials, or services incorporated into the project. See <http://www.fhwa.dot.gov/realestate/qa710.htm#q17>.

Q5: *Will the allowable credit for early acquisitions be the historic cost incurred or the current fair market value of the acquired property?*

A5: The allowable credit for land acquired early (prior to NEPA clearance or project authorization)

may be based on either the current fair market value or historic acquisition cost of such land. The method selected (i.e., current fair market value or historic acquisition cost) by the State or local unit of government must be used on a consistent basis and specified in the State's Right-of-Way Manual. The Manual may also specify certain criteria that would allow for use of the alternate method. For example, a State's Manual may require that historic acquisition costs be used as the primary basis for credit purposes and that current fair market value would be used in those instances where: (1) there has been a significant lapse in time since the property was acquired, or (2) there has been a significant change in market conditions (not caused by the project) since the property was acquired. See [23 CFR 710.201\(c\)](#) and <http://www.fhwa.dot.gov/realestate/qa710.htm#q17>.

Q6: *Does Section 138 of Title 23 describe park land? Can public park land incorporated into a transportation enhancement project, which furthers the park use, qualify for credit?*

A6: 23 U.S.C. 138, 49 U.S.C. 303, and 23 CFR 771.135 describe the national policy regarding the preservation of 4(f) lands (i.e., publicly owned park and recreation lands, wildlife and waterfowl refuges, and historic sites). Federally funded projects requiring the use of such lands will not be approved unless: (1) there is no feasible and prudent alternative to the use of such land, and (2) the action includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

Q7: *Can public owned right-of-way incorporated into a project qualify for credit?*

A7: 23 U.S.C. 323(b)(1)(C) prohibits non-Federal share credits for the incorporation of lands described in 23 U.S.C. 138 (lands subject to Section 4(f)) into Federally funded projects.

Q8. *Can land already used for the sponsor's TE project qualify for a credit?*

A8. Credits are not available for lands acquired with any form of Federal financial assistance, or for lands already incorporated and used for transportation purposes. See [23 CFR 710.507\(c\)](#). This includes land within the operating right-of-way limits of a transportation facility.

- For additional information on Right-of-Way and Real Estate, see [23 CFR Part 710 Questions and Answers](#).
- TE Guidance: [Donations](#)
- TE Guidance: [Real Estate Guidance](#)

Right-of-Way Regulation on Transportation Enhancements ([23 CFR 710.511](#))

§710.511 Transportation enhancements.

- a. General. Section 133(b) (8) of title 23 of the United States Code authorizes the expenditure of surface transportation funds for transportation enhancement activities (TEA). Transportation enhancement activities which involve the acquisition, management, and disposition of real property, and the relocation of families, individuals, and businesses, are governed by the general requirements of the Federal-aid program found in titles 23 and 49 of the Code of Federal Regulations (CFR), except as specified in paragraph (b)(3) of this section.
- b. Requirements. (1) Displacements for TEA are subject to the Uniform Act.
 2. Acquisitions for TEA are subject to the Uniform Act except as provided in paragraphs (b)(3), (b)(4), and (b)(5) of this section.

3. Entities acquiring real property for TEA who lack the power of eminent domain may comply with the Uniform Act by meeting the limited requirements under 49 CFR 24.101(a)(2).
 4. The requirements of the Uniform Act do not apply when real property acquired for a TEA was purchased from a third party by a qualified conservation organization, and --
 - i. The conservation organization is not acting on behalf of the agency receiving TEA or other Federal-aid funds, and
 - ii. There was no Federal approval of property acquisition prior to the involvement of the conservation organization. ["Federal approval of property acquisition" means the date of the approval of the environmental document or project authorization/agreement, whichever is earlier. "Involvement of the conservation organization" means the date the organization makes a legally binding offer to acquire a real property interest, including an option to purchase, in the property.]
 5. When a qualified conservation organization acquires real property for a project receiving Federal-aid highway funds on behalf of an agency with eminent domain authority, the requirements of the Uniform Act apply as if the agency had acquired the property itself.
 6. When, subsequent to Federal approval of property acquisition, a qualified conservation organization acquires real property for a project receiving Federal-aid highway funds, and there will be no use or recourse to the power of eminent domain, the limited requirements of 49 CFR 24.101(a)(2) apply.
- c. Property management. Real property acquired with TEA funds shall be managed in accordance with the property management requirements provided in subpart D of this part. Any use of the property for purposes other than that for which the TEA funds were provided must be consistent with the continuation of the original use. When the original use of the real property is converted by sale or lease to another use inconsistent with the original use, the STD shall assure that the fair market value or rent is charged and the proceeds reapplied to projects eligible under title 23 of the United States Code.

The Uniform Act and Transportation Enhancements



U.S. Department of Transportation

Memorandum

Federal Highway Administration

Subject: INFORMATION: The Uniform Act and Transportation Enhancements

Date: November 1, 1996

From: Associate Administrator for Program Development

Reply to: HRE-01

To: Regional Administrators

New Federal-aid program partners, such as transportation enhancement sponsors, often view the Uniform Act as a complex set of requirements, though with an important purpose - to protect the rights of property owners and ensure equitable treatment for displaced persons. In order to relieve some of the concern about the complexity, we want to highlight the simplified acquisition procedures available under the Uniform Act regulations. The regulations [49 CFR 24. 1 01 (a)(2)] specifically allow so-called "voluntary transactions" by entities that lack condemnation authority, such as non-profit organizations.

The government-wide Uniform Act regulations have contained voluntary transaction provisions since 1989 in order to accommodate the program needs of other Federal agencies. For example, the property needs of many Department of the Interior (DOI) programs do not rely on invoking eminent domain authority, which typically is a necessary option in the highway program where project alignment dictates specific parcels. Many, if not most, Federal-aid transportation enhancement activities are quite similar to these DOI acquisitions. Although they were not initially thought of in terms of the Federal-aid highway program, voluntary transaction procedures clearly can be used to reduce the complexity of acquisitions, especially in certain transportation enhancement situations.

Voluntary transaction procedures may be used by a private entity if the acquisition--and this is the key--is, indeed, voluntary. Voluntary means that the owner is informed in writing by the private entity acquiring the property that it is unable to acquire the property if negotiations fail. In other words the potential buyer must convey clearly its intention to "walk away" if the owner does not agree to sell the property. When this condition is met, the acquiring entity then needs only to provide the owner with an estimate of the fair market value of the property. When these two conditions are met, no other Uniform Act requirements apply to the owner. If there are any tenants on the property, they remain eligible for relocation assistance as if they were displaced under the threat of condemnation.

Federal-aid transportation enhancements embody the new partnerships we are striving to build under ISTEA and our strategic plan. We encourage you to ensure Division office staff and State partners are fully aware of the voluntary transaction procedures and encourage their use in acquiring property for transportation enhancements wherever appropriate.

Thomas Ptak

Property Acquisition by Conservation Organizations for Transportation Enhancement Activities

The Uniform Relocation Assistance and Real Property Acquisition Policies Act (the Uniform Act) provides protections and benefits for persons whose real property is acquired and/or who are displaced by a Federal or Federally-assisted program or project. It is one of the most fundamental and wide-ranging cross-cutting Federal funding requirements. Its roots lie in the Constitution itself, and it is a recognition of the vulnerability of the average person faced with government's power of eminent domain.

In 1987, Congress expanded the Uniform Act's requirements beyond government agencies to apply to any person or organization acquiring property or causing displacement for a project receiving Federal financial assistance. This expansion meant that various persons and organizations that do not have eminent domain authority (the right to condemn property) must also comply with the requirements of the Uniform Act.

Voluntary Transactions

FHWA, in its government-wide regulations implementing the Act, provided much simplified requirements for these "voluntary transactions" by such persons or organizations. When the acquisition of property meets the "voluntary transactions criteria of the Uniform Act regulations, the person, organization, or government agency can considerably streamline the purchase of the property. The key to this expedited process is that the purchaser must not be able or willing to condemn the property if the owner refuses to sell it. Guidance on "voluntary transactions" is provided in the November 1, 1996 Memo, "The Uniform Act and Transportation Enhancements."

Conservation Organizations Exemption from Uniform Act (Section 315-N.S. Act)

Section 315 of the N.S., which applies to transportation enhancement activities only, exempts qualified conservation organizations from the requirements of the Uniform Act. This allows conservation organizations more flexibility in acquiring property from third parties which subsequently is used in Federally-assisted projects.

On February 20, 1996, guidance was issued on this new flexibility in applying the Uniform Act and the criteria for doing so, in the Memo, "Implementation Guidance-Section 315 N.S. Act." Conservation organizations are not required to be covered by the Act except in two statutorily prescribed circumstances: (1) where they are acting not for themselves but as the agent of a recipient of Federal funds, or (2) when Federal approval to acquire real property occurred before the involvement of the conservation organization. Section 315 allows conservation organizations to participate in transportation enhancement activities with a minimum of administrative burden while maintaining the fundamental protections of the Uniform Act.

Sample Cooperative Agreement

Cooperative Agreement between the U.S. Department of Interior Bureau of Indian Affairs (BIA) and the Kansas Department of Transportation (DOT)

PURPOSE: The current Federal-Aid Transportation Act requires states to set aside certain portions of their federal funding allocated under the current Federal-Aid Transportation Act for Transportation Enhancement (TE) projects. The Prairie Band Potawatomi Nation ("PBPN") has proposed a TE project for a pedestrian/bicycle path on the Prairie Band Potawatomi Nation Reservation in Jackson County, Kansas. Pursuant to an agreement between a state and a federal agency, TE projects may be undertaken by a federal agency pursuant to 23 U.S.C. §132. The Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended, 25 U.S.C. §450, et seq., (the "ISDEAA") allows Indian tribes to enter into self-determination contracts with the BIA for certain projects or activities that would otherwise be performed by the BIA, including construction projects. Federal laws and regulations contemplate and encourage tribal use of TE funds pursuant to the foregoing scenario. The Federal Highway Administration, the BIA, and the PBPN have requested KDOT to take such steps as are deemed by KDOT to be necessary or advisable for the purpose of securing the benefits of the current Federal-Aid Transportation Act for a TE project.

PROJECT: KDOT and the BIA desire to enter into this Agreement for the construction of a pedestrian/bicycle path on the Tribe's reservation in Jackson County, Kansas. KDOT has authorized this Project and is described as follows:

The construction of Phase II and Phase III of the 10' asphalt pedestrian and bicycle trail from L4 Lane at 158 & L, through a residential housing area at M & 152 trailing past the Prairie People Park crossing a pre-1910 relocated steel bridge (three pedestrian bridges) and past a historical hay rock area with inscriptions dating back to the mid 19th century, ending at a soon-to-be upgraded ballpark and the Buffalo Lookout tower.

EFFECTIVE DATE: The parties in consideration of the premises and to secure the approval and construction of the Project shall mutually agree to perform in accordance with this Agreement as of the _____ day of _____, 20____.

ARTICLE I

THE SECRETARY AND BIA AGREE:

1. The administration of the Project will be transferred from KDOT to the BIA as authorized by 23 U.S.C. § 132, and federal-aid payments for this Project will be made by KDOT in accordance with 23 U.S.C. §132.
2. The Project will be administered by the BIA pursuant to the ISDEAA, 25 C.F.R. Part 900 and 25 C.F.R. Part 170.

3. The BIA's performance is contingent upon the execution of a valid self-determination contract between the BIA and the PBPN for the construction of the Project, which contract shall include terms requiring the PBPN to bear the local match of fifteen percent (15%) for the Project and to bear one hundred percent (100%) of the Project costs that exceed \$437,647.06 (the "local share").
4. The PBPN has assured both KDOT and the BIA that they will have acquired the property needed for the Project prior to the time of the Project letting. Further, the PBPN has assured both KDOT and the BIA that they have sufficient funding to cover the local share.
5. The execution of a valid self-determination contract between the BIA and the PBPN is contingent upon federal laws and regulations including qualifications and terms independent of the terms of this Agreement.
6. The BIA is not expected to contribute any funding to the Project independent of that funding provided to the BIA by KDOT pursuant to 23 U.S.C. § 132.
7. If the BIA and the PBPN are unable to enter into a valid self-determination contract for the construction of the Project or if the PBPN does not fulfill the terms of its self-determination contract, this Agreement will be null and void and any unobligated deposits or payments made by KDOT will be returned to KDOT with no obligation on the part of the BIA to complete the Project. The BIA agrees to return to KDOT any portion of the federal TE funds that is not used on the Project to KDOT within thirty (30) days after the Project is complete.
8. That the Project is scheduled to start construction no later than 2006 and be completed no later than 2007.
9. That this is a pilot agreement for future 23 U.S.C. §132 agreements. If either party requests documentation or information, the other party agrees to provide the requesting party such documentation or information from the appropriate entity.
10. Nothing herein shall be construed as a waiver of the sovereign immunity of the United States or of the State of Kansas or of the State of Kansas' rights under the Eleventh Amendment of the Constitution of the United States.

ARTICLE II

KDOT AGREES:

1. To pay federal TE funds in the amount of eighty-five percent (85%) of the total actual and eligible costs of construction and construction inspection, but not to exceed a maximum of \$372,000 for the Project (the "federal share"), to the BIA pursuant to 23 U.S.C. §132.

ARTICLE III

THE BIA AGREES:

1. To enter into negotiations with the PBPN for a self-determination contract under the ISDEAA and 25 C.F.R. Part 900, wherein the PBPN would agree to construct the Project utilizing tribal funds to satisfy the local share along with the federal share paid to the BIA pursuant to this Agreement.
2. To administer the Project according to all applicable laws, regulations, policies, procedures, and practice, including, but not limited to, the ISDEAA, 25 C.F.R. Part 170 and Part 900, the Indian Reservation Roads ("IRR") Program, and any and all applicable environmental and cultural laws, regulations, policies, and procedures.

3. To require the PBPN to construct the Project pursuant to the IRR Program design standards as listed in the ISDEAA, 25 C.F.R Part 170 and 25 C.F.R. Part 900, and to monitor the PBPN's construction performance and construction inspection pursuant to the ISDEAA, 25 C.F.R. Part 170, and 25 C.F.R. Part 900.
4. When all Project work has been accomplished, to submit a statement of completion and a final cost report to KDOT for the purposes of preparing a final voucher to the FHWA and otherwise cooperate with KDOT toward the close-out of the Project.

(The signature page immediately follows this paragraph.)

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be signed by their duly authorized officers on the day and year first above written.

ATTEST:

BUREAU OF INDIAN AFFAIRS
SOUTHERN PLAINS REGIONAL OFFICE

Tom Simpson
TOM SIMPSON,
REGIONAL ROADS ENGINEER

ATTEST:

BUREAU OF INDIAN AFFAIRS
SOUTHERN PLAINS REGIONAL OFFICE

John Bruner JUL 19 2005
Acting REGIONAL DIRECTOR

ATTEST:

Debra L. Miller
Secretary of Transportation

BY: *Warren L. Sick*
Warren L. Sick, P.E.
Assistant Secretary and
State Transportation Engineer



Framework for Considering Motorized Use on Nonmotorized Trails and Pedestrian Walkways



U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: ACTION: Framework for Considering Motorized Use on Nonmotorized Trails and Pedestrian Walkways

Date: February 26, 2008

From: /S/Original signed by
April Marchese, Director
Office of Natural and Human Environment

In reply, HEPN-50
refer to:

To: Division Administrators
Resource Center Directors
Federal Lands Highway Division Engineers

The purpose of this memorandum is to provide guidance to Federal Highway Administration (FHWA) division offices and a consistent framework for determining when to permit an exception for motorized use on nonmotorized trails and pedestrian walkways under [23 U.S.C. § 217\(h\)\(5\)](#), which states that the Secretary may grant an exception if deemed appropriate. In 49 CFR § 1.48(b)(2), FHWA is delegated authority to administer provisions in Title 23 Chapter 2, Other Highways. Within FHWA, the Office of Natural and Human Environment has authority to develop policies and procedures for bicycle and pedestrian activities, according to the *FHWA Delegations and Organization Manual (FHWA Order M1100.1A)*.

The Office Natural and Human Environment developed a [Framework for Considering Motorized Use on Nonmotorized Trails and Pedestrian Walkways under 23 § U.S.C. 217](#) (attached). This policy was developed with assistance from several Federal-aid divisions, with particular help from Maine, Minnesota, New Hampshire, Vermont, and Wisconsin, where staff have had specific requests for exceptions to allow motorized use on otherwise nonmotorized facilities.

The FHWA's policy is to allow motorized use on nonmotorized trails or pedestrian walkways **only in exceptional cases**. Such allowances will benefit from significant data gathering and careful justification so as to not unduly impair nonmotorized operation of the trail or pedestrian walkway, or violate the expectations of adjacent or nearby property owners. An exception should be considered only when other reasonable options have been exhausted. The exception may allow limited use of segments of nonmotorized trails and pedestrian walkways, such as for 90 degree crossings, short doglegs, crossing structures such as bridges, or other exceptional circumstances. This policy delegates decisionmaking authority to the FHWA division offices, but only for decisions on a case-by-case basis.

This policy is in effect as of the date of this memorandum. Nevertheless, we welcome constructive comment on this policy. We will review comments received, and may consider policy revisions if the comments provide constructive suggestions consistent with the intent of 23 U.S.C. § 217(h). If you have any questions concerning this action, please contact Gabe Rousseau at (202) 366-8044, gabe.rousseau@dot.gov, or Christopher Douwes at (202) 366-5013, christopher.douwes@dot.gov.

Interpretation of Title 23, Section 144(o) Reasonable Costs Associated with the Demolition of Historic Bridges



U.S. Department of Transportation
Federal Highway Administration

MEMORANDUM

Subject: **INFORMATION:** Interpretation of Title 23,
Section 144(o) Reasonable Costs Associated
With the Demolition of Historic Bridges

Date: April 26, 2001

From: *Original Signed By*
James D. Cooper Director
Office of Bridge Technology

Reply to
Attn of: HIBT-30

Gloria M. Shepherd
Director of Human Environment

To: Director of Field Services
Division Administrators

Our August 18, 1999, memorandum ([copy attached](#)) provided an official interpretation of Title 23, Section 144(o) in regards to the Historic Bridge Program. We have received considerable comments in regards to the conflicts that have arisen between Sections 144(o) Historic Bridge Program and Section 133(b), Transportation Enhancement Activities and Historic Bridges. We have discussed these conflicts with the Office of Chief Counsel and they have provided assistance in clarifications that we think can assist the field and the States in working with these two important and apparently conflicting portions of Title 23.

Section 144(o) of Title 23 of the U.S.Code, entitled "Historic Bridge Program," provides for the reasonable costs associated with actions to preserve, or reduce the impact of a project on the integrity of historic bridges. In particular, if as a result of a Federal-aid project, a historic bridge is to be no longer used for motorized vehicular traffic, the costs eligible as reimbursable associated with preserving the bridge are limited to the cost of demolition of the bridge. This limitation of funding for historic bridges would seem to conflict with the use of transportation enhancement funds by States. This memorandum will discuss the FHWA's interpretation of the two sections so that they can be reconciled.

Section 144(o): The Historic Bridge Program

Section 144(o) paragraph (3) entitled "Eligibility" states that:

Reasonable costs associated with actions to preserve, or reduce the impact of a project under this chapter on, the historic integrity of historic bridges shall be eligible as reimbursable project costs under this title (including this section) if the load capacity and safety features of the bridge are adequate to

serve the intended use for the life of the bridge; except that in the case of a bridge which is no longer used for motorized vehicular traffic, the costs eligible as reimbursable project costs pursuant to this subsection shall not exceed the estimated cost of demolition of such bridge. Section 144(o) paragraph (4)(B) also addresses the demolition issue.

Costs incurred by the State to preserve the historic bridge including funds made available to the State, locality, or private entity to enable it to accept the bridge, shall be eligible as reimbursable project costs under this chapter up to an amount not to exceed the cost of demolition. Any bridge preserved pursuant to this paragraph shall thereafter not be eligible for any other funds authorized pursuant to this title.

Section 133(b): Transportation Enhancement Activities and Historic Bridges

"Transportation Enhancement Activities" (TE's) are one of the twelve categories of eligible projects in the Surface Transportation Program set forth in 23 U.S.C. § 133(b). Included in the definition of TE at 23 U.S.C. § 101(35) is "historic preservation, and the rehabilitation and operation of historic transportation buildings, structures, or facilities." The States have complete discretion in determining their TE projects.

Conflict Between 144(o) and 133(b)

The Historic Bridge Program, added to the U.S. Code in 1987 by the STURRA, consists of five subsections, two subsections of which are quoted above. Subsection 144(o)(3), the one entitled "Eligibility", puts a definite cap upon the amount of title 23 funds that can be expended on a historic bridge closed to motorized vehicular traffic. That cap is the cost of demolishing the bridge. The next subsection 144(o)(4), "Preservation," forecloses the use of other title 23 funds for a historic bridge beyond the cost of demolition. It says, "Any bridge preserved *pursuant to this paragraph* shall *thereafter* not be eligible for any other funds authorized pursuant to this title." Subsection 144(o)(4) then sets forth a particular condition ("any bridge preserved pursuant to this paragraph") that forecloses the use of any other title 23 funds. Thus, once a State uses §144 funds on a historic bridge, it can no longer return to FHWA to ask for more funds for the bridge. The use of the word "thereafter" is important. If other federal-aid highway funds are used on the historic bridge *before* §144 funds are used, the prohibition does not come into effect. If §144 funds are used initially, however, TE funds may not be used on the bridge thereafter. To illustrate the difference, let us take the example of a State using \$100,000 of TE funds to preserve a historic bridge. A few years go by, and the bridge has deteriorated to the point that the State wants to use §144 funds to replace it. The State can offer a responsible party §144 funds up to the cost of demolition of the bridge (e.g., \$400,000) for preservation. The TE funds are not subtracted from the \$400,000. If, however, a State first used §144 funds to preserve a bridge up to the cost of demolition (here, \$400,000), the State cannot later come to the FHWA for title 23 funds, including TE funds, for the bridge. The explicit prohibition in §144(o)(4) would forbid such a course of action.

Conclusion

If a State uses §144 bridge funds up to the cost of demolition on a historic bridge first, the State cannot later use other title 23 moneys for the bridge. If the State uses TE funds on the bridge first, however, it may then use the §144 funds later, up to the cost of demolition. We realize that this policy, the result of meshing two separate sections passed by two different Congresses, is not completely satisfying. When one section is very broad and the other is very limiting, however, it is difficult to reconcile them.

If you have questions or you need clarification of our determination, please contact Mr. Raymond J. McCormick at (202) 366-4675 or Mr. Harold Peaks (202) 366-1598.