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# ***Federal Aid Technical Bulletin***

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## **Bulletin No. 07-02 - revised**

**Date:** August 21, 2007

**Subjects:** - Federalizing Projects  
- Estimating Fuel Overruns  
- New Improvement Type in FMIS  
- Changes to FAMS for Capacity Work Mixes

### **Federalizing Projects**

In light of the proposed Florida Future Corridor Planning and Screening Process (FCPSP) and the FDOT Executive Board's proposal to use State procedures and funds to acquire right of way, FDOT requested an opinion by FHWA as to whether the use of Federal-aid funds for NEPA activities triggers the application of the Uniform Act for right of way acquisition purposes. The FHWA Chief Counsel issued a legal opinion dated April 26, 2007 (attached below) which reaffirms FHWA's previous position that the use of Federal funds for NEPA activities does trigger the application of the Uniform Act. The legal opinion provides that when Federal-aid funds participate in NEPA activities and FHWA issues a NEPA finding, the State is obligated to comply with the Uniform Act and all other Federal requirements (environmental mitigation and FHWA 1273 construction provisions such as Davis-Bacon and Buy America, if Federal funds are used for construction).

The legal opinion provides that the Uniform Act would *not* apply if the *only* Federal expenditures on a project relate to planning level feasibility studies or other expenditures typically associated with planning level decision-making. Based on the FCPSP's Concept, Feasibility, and ETDM/PD&E stages of activity, the legal opinion provides that (based on the *Future Corridors Planning Screening Process Implementation Guidance*) the FCPSP Concept and Feasibility stages would be considered planning level activities. Additionally, the legal opinion provides that a State may withdraw or "defederalize" a project under certain circumstances at early stages of project development provided there is repayment of all Federal funds previously received for the project and provided FHWA has not issued a NEPA finding (i.e., a Finding of No Significant Impact or Record of Decision, or the project does not involve significant environmental impacts and is classified as a Categorical Exclusion under 23 CFR 771).

It is important to note that the FDOT inquiry and the FHWA response dealt with the issue of Uniform Act applicability for right of way acquisition subsequent to FHWA NEPA approval. The Uniform Act also applies to all State, local, and privately funded

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early right of way acquisition (i.e., pre-FHWA NEPA approval) in advance of projects that will utilize Federal funds in the NEPA, right of way, preliminary & final design, or construction project phases (see 49 CFR 24.101(b), 24.2(22), and Uniform Act, Sec. 207). Local governments and others should work closely with their FDOT Local Agency Program and Right of Way Offices prior to undertaking early right of way acquisition in advance of Federal-aid projects.

Title 23 U.S.C. Section 145 provides the statutory authority that allows State Transportation Agencies (STAs) to select projects for the Federal-aid highway program. If a STA uses Federal funds for early phases of project development (preliminary engineering, environmental documentation, Right of Way, etc.) there is no requirement to use Federal funds for construction. If the STA chooses to use State funds for construction, Federal requirements such as the use of form "FHWA-1273 Required Contract Provisions Federal-aid Construction Contracts" would not be required.

If the STA has used federal funds for preliminary engineering or environmental phases of the project development, and now wants to use State funds for construction, this would not free them from compliance with federal environmental requirements, such as NEPA & 4(f). However, if the STA was in compliance with federal environmental law and was choosing to use State funds for construction for another reason, that is their right under 23 U.S.C. 145, and, if they do so, compliance with Federal requirements for construction projects, such as the form FHWA-1273 requirements would not be required.

### **Estimating Fuel Overruns**

FHWA has approved authorizing the estimated fuel/bituminous overruns that are expected to occur over the lifecycle of a construction project. These will be tracked by pay item and Activity 209 and will periodically be adjusted to actual amounts as other modifications to the project are needed. This should reduce the number of authorization requests for the project in the Federal Authorization Management System because the funds would be authorized in advance.

Please do not encumber these amounts. The Office of Comptroller's current process will continue and they will be paid as unencumbered disbursements.

Please indicate in the FAMS comments the amount of the modification and that the increase is for "Anticipated Fuel/Bituminous Adjustments". The estimate should be added to the phase 52 of the construction project based on current prices and the remaining term of the contract.

**New Improvement Type for Systematic Preventive Maintenance on Bridges**

For preventive maintenance activities that are cost effective means of extending the service life of a bridge a new improvement type has been added to FMIS as Improvement type code 47 "Brdg Preventative Maint". System preservation activities for the purpose of preventive maintenance on bridges are to be identified and carried out using a systematic process, such as a Bridge Management System.

Improvement type code 40; "Special Bridge" should continue to be used for the National Bridge Inspection Program (NBIS) and other non-maintenance activities.

**Changes to FAMS for Capacity Work Mixes**

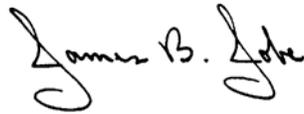
Projects on the Interstate which are adding capacity through lanes will default to an 80/20 participation rate in FAMS for the soft-match calculation. Projects will still be entered at 100% on the AR Detail and the soft-match will be displayed on the FAR Update screen once the project has been submitted to review. Projects which incorrectly used the 90/10 soft-match rate on previous authorizations will automatically be corrected when the project is modified. New projects will no longer be able to use IM funds if there is any capacity work associated with the other IM work on the project, unless the capacity work is only HOV, auxiliary, or turn lanes; or the project is an interchange improvements or ramp work. New interchanges or new ramps may not use IM funds. If there is any capacity work on the project that is adding through lanes, NH must be used and we will soft-match at 80/20. Some work mixes are optional, such as 0022 - Bridge Replacement, as to whether capacity is being added. The FP Info page must be updated prior to any authorization requests being pulled. The system will not allow a pending authorization until this field has been updated by the District Federal Aid Coordinator. This determination should be made based on the plans and in consultation with the project manager.

The following work mixes have been identified as capacity work types and will default to Added Capacity in the system:

- 0002 NEW ROAD CONSTRUCTION
- 0020 NEW BRIDGE CONSTRUCTION
- 0023 BRIDGE-REPLACE AND ADD LANES
- 0025 BRIDGE-REHAB AND ADD LANES
- 0213 ADD LANES & RECONSTRUCT
- 0218 ADD LANES & REHABILITATE PVMNT
- 0547 ADD THRU LANE(S)
- 2000 RIGHT OF WAY - FUTURE CAPACITY
- 9982 PRELIM ENG FOR FUTURE CAPACITY

If any other funds such as Urban (SU) are to be used on the Interstate, the 1.93 additive for sliding scale should not be included.

If you have any questions regarding these guidelines, please do not hesitate to contact us.



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# Memorandum

Subject: Applicability of the Uniform Act when  
Federal-aid Funds Participate in Distinct  
Preconstruction Activities

Date: April 26, 2007

From: James D. Ray  
Chief Counsel

In Reply Refer To: HCC-30

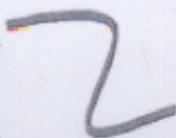
To: Gloria M. Shepherd  
Associate Administrator

This memorandum addresses the applicability of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), codified at 42 U.S.C. §§ 4601-4655 when Federal-aid funds participate in distinct preconstruction activities. The Uniform Act is intentionally broad and specifically designed to protect persons who are ultimately displaced as the result of a project in which Federal-aid funds participate in any phase of delivery, including distinct preconstruction activities. It is longstanding policy of the Federal Highway Administration (FHWA) that when there is Federal-aid participation in any phase of "project" costs for a transportation facility which results in the displacement of persons or acquisition of property, the State must comply with the provisions of Titles II and III of the Uniform Act. A question has been raised as to whether the use of Federal-aid funds for the preparation of the environmental analysis pursuant to the National Environmental Policy Act of 1969 (NEPA), codified at 42 U.S.C. § 4321 et seq, triggers application of the Uniform Act. A State may not circumvent the requirements of the Uniform Act by selectively applying Federal-aid funds to this distinct "project" phase and seeking a favorable decision by the FHWA but later forego Federal-aid funds in the construction of the project. In the end, regardless of which agency, Federal or State, pays for the physical construction of the project, the use of Federal-aid funding for the NEPA decision-making process that preserves future federal funding eligibility makes it a "project" that has been carried out with the assistance of Federal funds for purposes of applying the Uniform Act.

## Background

This issue regarding the applicability of the Uniform Act was raised by the Florida Department of Transportation Executive Board (Board). The Board would like to designate complete corridors in Florida through the Florida Future Corridor Planning and Screening Process (FCPSP). The FCPSP consists of three stages of activity, as follows:

(1) The Concept Stage is intended to identify proposed study areas for statewide corridor improvements and validate statewide mobility and connectivity needs. The Concept Stage would be used to evaluate proposals and suggestions and determine which should move forward into more detailed planning. The screening criteria used during the Concept Stage would be used at the highest level, guiding the collection of data to determine whether there



is a statewide mobility or connectivity need and to identify key issues related to economic development, growth management and community livability, and environmental stewardship in the study area. Environmental stewardship information would include the identification of conservation lands, wildlife habitats, and other environmentally sensitive areas located in the study area.

(2) The Feasibility Stage would evaluate and build consensus around a more precise definition of corridor needs and develop an action plan for meeting the mobility and connectivity needs identified in the Concept Stage while addressing key economic, environmental and community issues in the corridor. At this stage of the process, regional visions would play an important role in establishing the goals for the corridor Feasibility Study, and determining if corridor improvement alternatives should advance into FDOT's Preliminary Design and Engineering (PD&E) process. The study area would be narrowed by defining more specific beginning and ending points of the corridors using the results of the data collection and screening process in the Concept Stage. The Feasibility Stage would analyze new facilities, re-design and reuse of existing facilities, or a combination of the two. Specific information would be collected in order to determine the best package of strategies to address mobility and economic connectivity needs in the corridor. Proposed screening criteria include: (1) mobility and connectivity impacts; (2) compatibility with existing and envisioned land uses (emphasis on adopted regional visions); (3) potential benefit to existing and future economic activities; and (4) community and environmental avoidance, minimization, and mitigation areas. Environmental stewardship information at this stage would focus on the identification of and potential impacts to environmental resources such as coastal and marine environments, wetlands, threatened and endangered habitats, and air quality impacts. Where potential negative impacts are identified, a preliminary determination will be made of whether they can be avoided, minimized, or mitigated.

(3) The Early Transportation Decision Making (ETDM) / PD&E Stage would be used to conduct thorough analyses of the impacts of the alternative corridor improvement "projects" in order to select the best projects for advancement to finance and production. [Source: Florida's Future Corridors, *Implementation Guidance: Future Corridors Planning and Screening Process*, Draft, November 18, 2006.]

The Board would like to have the flexibility to use Federal-aid funds for these stages, yet not be bound by the requirements of the Uniform Act until it makes a determination whether Federal-aid funds would be sought for future phases of project development. It is our understanding that this determination may not occur until some point after the completion of the NEPA process. Currently, approximately 24% of Florida's transportation program is funded with Federal funds. However, the Board believes there is a potential for greater efficiency and cost savings when right-of-way activities are conducted with State funds and in the absence of the requirements of the Uniform Act. The Board has asked for FHWA's opinion whether the Uniform Act must be followed on future project delivery phases carried out solely with State funds, if Federal-aid funds participate in Concept and ETDM/PD&E stages under the FCPSP.

## Discussion

The Uniform Act was enacted on January 2, 1971, to establish a uniform policy for the fair and equitable treatment of persons who are displaced, or have their property taken for Federal and Federally assisted projects and programs. The primary purpose is to ensure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole, and to minimize the hardship of displacement on such persons. (See 42 U.S.C. § 4621(b)). In the opening hearings on the proposed Uniform Act legislation, Chairman Muskie emphasized the importance of a uniform policy for the acquisition of property and relocation of persons. He explained, "This lack of uniformity only provides irritation and confusion in the communities affected. It provides an unfortunate image of the Federal government at the State and local level. It results in a continuing and annoying conflict between Federal agencies and State and local aid recipients. And it undermines confidence in and support for Government agencies." (S. Report No. 91-488 at 4, October 21, 1969).

The Report of the House Public Works Committee accompanying the Uniform Act clarified that any person who moves as the result of a Federally assisted project, after the effective date of the Act, is a "displaced person" entitled to its benefits. The Committee noted that it is immaterial whether the real property is acquired before or after the effective date of the bill, or by a Federal or State agency; or whether Federal funds contribute to the cost of the real property. The controlling point is that the real property must be acquired for a Federal or Federally financially assisted program or project. The Committee provided two examples to illustrate this point. (H.R. Rep. No. 91-1656 at 5853, December 2, 1970).

(1) A number of State highway departments frequently acquire right-of-way for Federal-aid highways . . . with non-Federal funds, and seek Federal financial assistance only for the actual construction work. Persons required to move from such rights-of-way are recognized as displaced persons and are entitled to relocation benefits under the Uniform Act. (Id.).

(2) It makes no difference to a person required to move because of the development of a postal facility which method the postal authorities use to obtain the facility, or who acquires the site or holds the fee title to the property. Since the end product is the same, a facility which serves the public and is regarded by the public as a public building, any person so required to move is a displaced person entitled to the benefits of this legislation. (H.R. Rep. No. 91-1656 at 5854).

These examples confirm Congress' intent that the Uniform Act applies to all projects that receive Federal financial assistance, regardless of whether there is Federal participation in the costs of acquisition or the costs of construction. In implementing the Uniform Act, FHWA took the position that all persons displaced after the date that a State became able to comply with the Act, must be offered relocation benefits if any Federal-aid funds are to participate in any phase of the project. That is, after the Act became applicable in a State, a State could not avoid the requirements of the Uniform Act by acquiring right-of-way with State funds and seeking Federal-aid funds only in the costs of construction. (Memorandum of Chief Counsel, *"Application of the Uniform Relocation Act to the Federal-Aid Urban System and Systems Realignment Required by Section 128 of the 1973 Highway Act,"* September 24, 1973). This is reiterated in DOT's implementing regulations which define a project as "any activity or

series of activities undertaken by a Federal agency or with Federal financial assistance received or anticipated in any phase of an undertaking in accordance with the Federal funding agency guidelines.<sup>1</sup> (49 C.F.R. 24.2(22).)

An interpretation that the Uniform Act applies only if a person is displaced was unsuccessfully argued by the Department of Housing and Urban Development (HUD) in the matter of Lake Park Home Owners Association v. U.S. Department of Housing and Urban and Development, 443 F. Supp. 6, 8 D.C. OH, 1976. HUD contended that the Uniform Act is not triggered unless property is directly acquired either by the Federal government or by a State agency receiving Federal financial assistance for the specific acquisition. In rejecting HUD's argument, the Court found that HUD's position rested upon a misconstruction of the statutory definition of "displaced person" and noted that the Uniform Act applies to the acquisition of real property for a program or project undertaken with Federal financial assistance. The Court held:

"The pertinent question arising from such language is not whether Federal monies directly funded the acquisition of the real property involved, but whether the state program or project which resulted in the acquisition was federally assisted. Under HUD's construction of the section, the "displaced person" status of a tenant or homeowner would be dependent upon whether the federal funding agency agreed to participate directly in the acquisition of the real estate involved in a state program or project. The federal participation in a given state project might be quite substantial, but if federal dollars were funneled to program or project costs other than land acquisition, no one moving as a result of the program or project would, under HUD's construction of the section, be a displaced person. The statutory definition plainly runs contrary to such an analysis. The statute turns on whether there is federal funding of the program or project, not whether federal funds can be traced directly to the acquisition of a particular parcel of real estate. . . . The crucial statutory reference is to the state program or project involved. The scope and nature of the federal grant, contract, or agreement is not determinative; if federal funds are to be made available to pay all or part of the cost of the state program or project, the necessary assurances must be received." (Id. at 8-9)

The purpose of conducting a NEPA environmental analysis is to determine whether the Federal government should fund a project.<sup>2</sup> For purposes of the Uniform Act, this is the first phase of a project regardless whether the right-of-way and construction phases of the project are subsequently conducted without Federal-aid funds. Furthermore, activities during the NEPA environmental analysis are not exclusively those associated with only preliminary studies. For example, in difficult situations detailed design is often necessary as part of the

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<sup>1</sup> This is echoed in Florida's Relocation Assistance Program. The requirements of the Uniform Act are incorporated by reference in the State's program in Rule 14-66.007 of the Florida Administrative Code. Under this rule, the Uniform Act applies to all transportation projects or project phases that are Federalized or for which there is any anticipation or intent to Federalize. The rule defines anticipation to include discussions by local or State officials regarding the intended or potential use of Federal funds in any phase of the project.

<sup>2</sup> Often a State prepares the NEPA document, in order to preserve the project's eligibility to receive future Federal-aid funds for the project. When a State uses Federal funds to carry out NEPA, it must do so with a good faith belief that the use of Federal funds is at least a strong possibility. Prior to beginning the NEPA process, any State decision not to use Federal funds for later phases of a project would eliminate the rationale for using Federal funds for NEPA. The exception would be if the project involves some major Federal action other than a funding decision by the FHWA.

environmental analysis or as part of the application process for permits from other agencies. Thus, Federal funds may be used for many preliminary design and other activities not strictly required for the NEPA review.

If Federal funds participate in the preparation of the NEPA document and the FHWA approves the project as eligible for Federal financial assistance, the Uniform Act would apply even if the project progresses thereafter solely with State funds.<sup>3</sup> The Uniform Act is quite clear that it applies broadly whenever Federal assistance flows to any part of a transportation project and is not limited solely to the participation of Federal funds in the acquisition of property or construction of the project. While “program” is also mentioned, FHWA considers “program” to cover groups of similar projects or activities (e.g., bridge projects or projects with no significant impacts such a Categorical Exclusions (CE)).

To release a State from the requirements of the Uniform Act solely on the basis that Federal funds will not participate in the acquisition and relocation of property or construction of the project would strip property owners and tenants of the rights afforded to them under the Uniform Act. The Uniform Act is not a set of inconvenient procedures, but establishes and defines specific rights and benefits that are available to citizens whose property is acquired or who are displaced by a transportation facility carried out with Federal financial assistance. The entitlement to these benefits should not be so vague and imprecise that displaced persons have no idea what benefits and procedural rights they have as a transportation project is developed. Consequently, the Uniform Act applies to State-funded right-of-way activities if Federal funds participated in the environmental analysis, in engineering for the project, in right-of-way acquisition or relocation, or in construction.

By contrast, the Uniform Act does not apply if the only Federal expenditures on a project relate to planning level feasibility studies or other Federal expenditures typically associated with planning level decision-making. Based on the *Future Corridors Planning and Screening Process Implementation Guidance*, discussed above, the activities which would occur during the Concept and Feasibility stages are of the type contemplated in FHWA’s Statewide Transportation Planning and Metropolitan Transportation Regulations at 23 C.F.R. 450.212 – Transportation planning studies and project development. Pursuant to section 1301 of the Transportation Equity Act for the 21<sup>st</sup> Century, (Pub. L. 105-178), a State, MPO, or public transportation operator may undertake multimodal, systems-level corridor or subarea planning studies as part of the statewide transportation planning process. The results or decisions of these transportation planning studies may be used as part of the overall project development process consistent with NEPA. Specifically, these corridor or subarea studies may result in producing any of the following for a proposed transportation project:

- (1) Purpose and need or goals and objectives statement(s);

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<sup>3</sup> The Uniform Act does not apply if a State uses Federal funds for preparation of the NEPA environmental analysis but, as a result of the environmental review, FHWA decides not to approve the project for Federal assistance. At that point, from the Federal perspective there no longer is a “project.” This is true even if the proposal progresses thereafter without additional Federal funds. Similarly, a State may withdraw or “defederalize” a project under certain circumstances at early stages of project development. This typically involves repaying all Federal funds previously received for the project.

- (2) General travel corridor and/or general mode(s) definition (e.g., highway, transit, or a highway/transit combination);
- (3) Preliminary screening of alternatives and elimination of unreasonable alternatives;
- (4) Basic description of the environmental setting; and/or
- (5) Preliminary identification of environmental impacts and environmental mitigation. (See 23 C.F.R. 450.212 (a).)

However, if FDOT undertakes general travel corridor or specific project environmental activities that extend beyond those identified above, the project has passed out of the planning phase into the environmental development and PD&E phase. If Federal-aid funds participate in these activities and FHWA issues a NEPA Finding of No Significant Impact or Record of Decision, or the project does not involve significant environmental impacts and is classified as a CE under 23 CFR Part 771, all pertinent Federal requirements would apply to the remaining phases of project delivery. This includes requirements that are related to environmental mitigation or to future Federal-aid contracts, such as Davis-Bacon or Buy America. If there are no future Federal-aid contracts or approvals subsequent to the NEPA decision, the State must still comply with the Uniform Act because Federal-aid funds participated in the completed environmental review phase of the project.

### **Conclusion**

Statewide transportation planning only contemplates proposed projects, which have not been developed to the point at which the NEPA requirements or the Uniform Act would apply. (23 U.S.C. § 135(j).) However, once a State elects to use Federal-aid funds for the preparation of an environmental document under the EDTM/PD&E phase of the Florida Future Corridor Planning and Screening Process and FHWA issues a NEPA finding, the State is obligated to comply with the Uniform Act, and all other applicable Federal requirements.