U.S. Department of Transportation
**Federal Highway Administration**

# Memorandum

Subject: **INFORMATION:** Q&As on Obligation of Earmarked Funds for Federal-Aid Projects

Date: February 15, 2011

From: King W. Gee
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In Reply Refer To:
HIPA-10/HCFM-1

To: Division Administrators
Directors of Field Services
Director of Technical Services

We have recently received a number of requests for information on the obligation of earmarked funds for Federal-aid projects. To address these requests on a more comprehensive basis, we have prepared the attached Questions and Answers for your use.

The purpose of the attached information is to provide technical advice to the division offices on matters associated with obligation of earmarked funding on Federal-aid projects. It should not be considered an expression of FHWA support for earmarks generally or specific projects being funded with earmarks.

We anticipate that you may have additional questions and will provide updates as necessary for questions that may affect multiple divisions. If you have any questions, please contact Mr. David Bruce in the Office of the Chief Financial Officer (802-828-4567), Mr. Steve Rochlis of the Office of Chief Counsel (202-366-1395) or Mr. Peter Kleskovic of the Office of Program Administration (202-366-4652).

Attachment

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# Q & A REGARDING EARMARK OBLIGATIONS

The purpose of these questions and answers is to provide technical advice to the Federal Highway Administration's (FHWA) State division offices on matters associated with the obligation of earmarked funding for Federal-aid projects. The distribution of this advice should not be considered an expression of FHWA support for earmarks generally or the specific projects that are funded with the earmarks.

**Question 1:** State XXX has obligated formula funds (STP, NHS, etc.) for a project. Subsequently, Congress earmarked or provided congressionally designated funding for this project in an Authorization or Appropriations Act. Can State XXX make a downward adjustment (de-obligation) of the formula funds and replace them with the earmarked funds?

**Answer 1:** State XXX may de-obligate any unexpended formula funds and replace them with the earmarked or congressionally designated funding, provided that the earmarked or designated funds could not be used on any other project eligible within the description of the earmarked or designated project. The State should provide acceptable documentation to the division office that supports this determination, including confirmation that another eligible project is not available that would satisfy the scope of work as cited in the project description contained in the Authorization or Appropriations Act.

Under 23 CFR 630.110(a), a project agreement should not be modified to replace one Federal fund category with another unless specifically authorized by statute. This regulation reflects the Government Accountability Office's *Principles of Federal Appropriations Law* (commonly referred to as the Red Book) prohibitions on de-obligating funds solely to free them up for another use. These prohibitions are intended to avoid potential Anti-Deficiency Act issues.

In this instance, the de-obligation would be to fulfill the congressional purpose that funding be directed to the specific project. Failure to obligate earmarked or designated funding would effectively defeat this purpose. By adding the earmarked funding to the project agreement, a corresponding de-obligation of formula funds obligated for the project must be made to reflect eligible Federal-aid costs.

**Question 2:** What if a portion of the obligated formula funding has been expended?

**Answer 2:** Converting expended obligations from one funding category to another, including earmarks, is generally not permitted. Specific statutory language is needed before FHWA can approve conversion of previously expended obligations to a new earmark. The language can be specific to a project or a program, such as the Emergency Relief program (23 U.S.C. 125 (c)(2)) or Section 1936 ("Advances") of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).

For example, unless Congress has provided authorization in statute for replenishment of expended contract authority, State XXX may de-obligate only the unexpended obligation in order to substitute earmarked funds.

If a State anticipates an earmark may be forthcoming, it is always free to pursue an Advanced Construction (AC) authorization. In that case, the State may advance a project consistent with the authority in 23 U.S.C 115 to access earmarked funding that is appropriated after the AC project gets underway.

> **Question 3:** Can a State repay and de-obligate formula funds expended for a project that is subject to Section 1936 of SAFETEA-LU?

**Answer 3:** Yes. Section 1936 of SAFETEA-LU allows States to obligate and expend formula funding for projects identified in specific sections of SAFTEA-LU. It also provides for the restoration of those formula funds with funds allocated by the specified sections of the Act for costs that were reimbursed after August 10, 2005 (the date SAFETEA-LU was approved).

Congress developed Section 1936 in response to the phased availability of funding for certain programs authorized in SAFETEA-LU. This provision is, again, subject to the condition that the State must provide documentation to the division office demonstrating that the earmarked funds would otherwise not be fully utilized except for this project.

> **Question 4:** What happens to earmarked fund balances not fully utilized because the project was completed and fully reimbursed by FHWA or could not be constructed?

**Answer 4:** Typically, the authorizing legislation for earmarks provides that funds are available until expended. In such a case, the remaining funds will reside in an unobligated status until either a subsequent project is developed that matches the earmarked project description or Congress enacts legislation affecting the earmark, such as a rescission.