



Memorandum

Subject: **GUIDANCE – ACTION:** Repurposing of Earmarks FY 2022

Date: June 30, 2022

From: Brian R. Bezio
Chief Financial Officer

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To: Associate Administrators
Division Administrators
Division Directors

The Department of Transportation Appropriations Act, 2022, allows States and territories to repurpose certain funds originally earmarked for specific projects more than 10 fiscal years prior to FY 2022. This memorandum provides the implementing guidance for this provision.

Except for the statutes and regulations cited, the contents of this memorandum do not have the force and effect of law and are not meant to bind the public in any way. This memorandum is intended only to provide clarity to States and territories regarding existing requirements under the law or agency policies.

Background

Section 124 of the Department of Transportation Appropriations Act, 2022 (Public Law 117-103, division L, title I) (hereinafter “Repurposing Provision”) provides the authority for a State or territory (hereinafter “State or States”) to repurpose any earmark that was designated on or before September 30, 2011, and is either (1) less than 10 percent obligated or (2) final vouchered and closed. The repurposed funds may be obligated on a new or existing project in the State within 25 miles of the earmark designation. The project must be an eligible project under the Surface Transportation Block Grant Program (STBG) (23 U.S.C. 133(b)), or the Territorial and Puerto Rico Highway Program (THP) (23 U.S.C. 165). The Repurposing Provision is available to be applied in fiscal year (FY) 2022.

Earmark Eligibility for Repurposing

For an earmark to be eligible for repurposing, it must meet **all** of the following conditions under the Repurposing Provision:

- ***Meets the definition of an earmark.*** Under the Repurposing Provision, an “earmarked amount” is defined as congressionally directed spending¹ identified in a prior law, report, or joint explanatory statement, which was authorized to be appropriated or appropriated more than 10 fiscal years prior to the current fiscal year, and administered by the Federal Highway Administration. This definition includes any discretionary program funding (e.g., Ferry Boat Discretionary, Interstate Maintenance Discretionary, Bridge Discretionary, etc.) that was congressionally designated to a specific project identified in a report accompanying legislation such as appropriations acts. Previously earmarked funding that no longer meets the definition of an earmark due to being repurposed under the FY 2016, FY 2017, FY 2018, FY 2019, FY 2020, or FY 2021 provisions is not eligible.
- ***Authorized or designated on or before September 30, 2011.*** This includes Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Public Law 109-59) earmarks which were authorized in FY 2005 but were allocated from FY 2005 through FY 2011. This includes applicable earmarks for which the description was subsequently revised by Congress.
- ***Administered by FHWA.*** Projects administered by other Federal agencies are not eligible for consideration. However, if the project was completed by another Federal agency and excess funding for the earmark is retained by FHWA, the excess funding may be repurposed.
- ***Less than 10 percent obligated, or the project has been completed and closed.*** Except as provided below, the earmark must have less than 10 percent obligated, of the funds made available, as of October 1, 2021. Funds may not be deobligated after that date to meet this threshold.

Under the Repurposing Provision, if, as of October 1, 2021, a State has obligated 10 percent or more of the funds originally made available for an earmark, all projects that used the earmarked funds must have final voucher of payments processed and closed in the Fiscal Management Information System (FMIS) for the remaining unobligated earmark funds before the repurposing request is submitted by the State for the earmark to be eligible for repurposing. Project closure may occur at any time before the deadline for repurposing earmarks. All of the funds deobligated from the closed project(s) for the earmark should be included in the repurposing.

A list of earmarks with unobligated funds that may be eligible for repurposing is available at <https://www.fhwa.dot.gov/cfo/earmarkrepurposing/>. The list may not include the universe of earmarks that will be eligible under the provision. However, it will give States a good idea of the projects that may be considered. States should work with their FHWA division office

¹ The Repurposing Provision defines “congressionally directed spending” in reference to Rule XLIV of the Standing Rules of the Senate and Rule XXI of the Rules of the House of Representatives. The House and Senate Rules define “congressionally directed spending” as a provision or report language “providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.”

to ensure all earmarks and allocated funds listed or otherwise identified meet the repurposing eligibility criteria and to confirm the amount of funds available. If additional earmarks are identified that are not on the list, the FHWA division office should contact the appropriate program office to determine if they are eligible for repurposing.

Requirements for Obligating Repurposed Funding

Under the Repurposing Provision, the following criteria must be met to obligate funding that has been repurposed from an earmark to one or more new or existing projects:

- ***Type of Project.*** The repurposed funding must be obligated on an STBG (for States) or THP (for Puerto Rico or territories) eligible project.
- ***Location of Project.*** The project(s) receiving the repurposed funding must be within the State that received the original earmark and within 25 miles of the original earmark description. If the earmark was for a geographic area (e.g., city, county, corridor), a project will be considered to meet this location requirement if it is within 25 miles of the area's boundary.
- ***Period of Availability.*** The repurposed earmark funds must be obligated on or before September 30, 2025.
- ***Federal Share.*** The applicable maximum Federal share for obligating the repurposed earmark funds is the same as originally provided for the earmark funds.

Other Requirements

The State should identify the corresponding amount of applicable special or allocated obligation limitation to be transferred with the earmark, if available. Earmarks with insufficient associated limitation available (i.e., excess funds) should use the State's annual formula obligation limitation when obligating those repurposed funds. Most earmarks will have less associated special or allocated limitation than funding and, therefore, will require some amount of formula limitation to obligate the excess repurposed funds. Note that annual formula obligation limitation is not actually used until the funds are obligated to a project so the repurposing process does not impact the available balance of formula limitation.

In order to ensure a project meets the requirements under the Repurposing Provision, the State must identify specific projects (i.e., location and scope of work) for the repurposed funding and should repurpose the full unobligated balance of the earmark available as of the date of the repurposing request. Repurposed funds may be identified for one or more new or existing projects, or any combination thereof. The State should identify the specific amount for each project when the request to repurpose is made. Based on the definition of "earmarked amount" in the Repurposing Provision, once funds are repurposed for a specific project, the funds may not be changed to a different project at a later date since the project no longer meets the definition of "earmarked amounts" in the Repurposing Provision. Cost underruns released from one Federal-aid agreement may be obligated for increased costs only on a different project previously identified at the time of repurposing for the same earmark.

Process for Requesting and Approving Repurposing

The State, FHWA division office, and the FHWA Office of the Chief Financial Officer (HCF) will process earmark repurposing requests as provided in the attached procedures using a modified transfer request form (FHWA-1575 (ERP 2022)). The Division Administrator's (DA) review and approval of a State's repurposing request constitutes FHWA's concurrence that (1) the repurposed earmark request meets the criteria for repurposing, and (2) any new proposed projects are STBG (or THP) eligible, within 25 miles of the earmark description, and within the State. The division office submits the DA-approved repurposing request to HCF for verification. HCF will (1) ensure there is accurate and complete financial information necessary to process the request and (2) process the request if valid. If HCF review finds inaccurate or incomplete financial information on the request, HCF will contact the State via the division office to revise and resubmit the request as appropriate.

The State may submit a request to repurpose at any time prior to the submission deadlines. The submission deadlines will ensure State requests are revised and approved by the end of the fiscal year and processed in a timely manner. Each FHWA division office should work with its respective State to ensure the division office has adequate time to review, approve, and submit all modified transfer forms prior to the submission deadlines:

- If the State intends to obligate the repurposed funds before the end of the fiscal year, HCF will need to receive the completed request for repurposing from the FHWA division office by August 26, 2022.
- If the State does not intend to obligate the repurposed funds before the end of the fiscal year, HCF will need to receive the completed request for repurposing from the FHWA division office by September 9, 2022.

If the funds to be repurposed are not currently available in FMIS, the State should notify their FHWA division office in writing of their intent to repurpose such funds at least 30 days before the above deadlines. States should prioritize these requests to allow for adequate time to complete the additional steps required to repurpose. The division office must contact the appropriate FHWA program office to allocate the funds and applicable obligation limitation in FMIS, if available, following normal procedures, noting that the purpose is for repurposing the earmark. If no Demo ID (a unique identifier assigned to an earmark) exists for the earmark, the program office must also create one and identify it in the allocation memo (see Attachment 1 for additional information). Once the funds are allocated in FMIS and a Demo ID is provided, the State may then submit the request to repurpose the funds on the modified transfer form to the division office. The State should include the Demo ID from the allocation memo on the transfer form.

FHWA may not consider repurposed funding requests that do not contain the required information or are not received by the submission deadline.

Required Congressional Annual Report on Repurposed Earmarks

After the funds are repurposed, the States must provide an annual report to FHWA on the identified projects as required in the Repurposing Provision. HCF will consolidate the information and submit the final annual report to Congress. Please see the "Annual Report"

section of Attachment 1 – FY 2022 Earmark Repurposing Process for more information on the required annual report.

Additional Information

We will provide FAQs on FHWA’s Repurposing website. If you have specific questions, please direct them to the “Repurposed Earmarks” mailbox (RepurposedEarmarks@dot.gov).

cc: Chief Counsel
Directors of Field Services

Attachments:

- Attachment 1 – FY 2022 Earmark Repurposing Process
- Attachment 2 – Modified Transfer Request Form (FHWA-1575 (ERP 2022))

FY 2022 Earmark Repurposing Process

This guidance describes the steps necessary to implement the statutory requirements to request earmarks to be repurposed. The address for FHWA’s Earmark Repurposing website is <http://www.fhwa.dot.gov/cfo/earmarkrepurposing/>. Questions should be submitted to the “Repurposed Earmarks” mailbox (RepurposedEarmarks@dot.gov).

REPURPOSING PROCESS

1. If the funds are not allocated in the Fiscal Management Information System (FMIS), then a written request should first be made by the State to the FHWA division office. A Demo ID should also be requested for these funds and should be included on the repurposing form. The FHWA division office will send the request to the appropriate FHWA program office to allocate the funds following the normal process. The request should note that the funds will be used for repurposing and a Demo ID is needed. This process may take 30 days which should be included in the timeline to meet the September 9, 2022, deadline and should be received before August redistribution submittals; States should account for this when prioritizing the preparation of repurposing requests.

Once the funds are allocated in FMIS and a Demo ID assigned, the State may continue to step 2 of this process.

2. The State submits a request to repurpose eligible earmarks to the FHWA division office for concurrence utilizing the modified transfer form (FHWA-1575 (ERP 2022)). An example form is attached. **A separate transfer form should be submitted for each Demo ID to be repurposed.** The left side of the form contains the information on the earmark (i.e., the Demo ID) to be repurposed. The right side of the form provides the information needed to identify the new project(s) and the amount of funds for each project.

When submitting repurposing requests, States should use a file naming convention for the transfer forms that includes the Demo ID, whether the request is new or a revision, and the date of the request (Demo ID – [new/revision] _XX-XX-2022).

The submission must contain sufficient information to demonstrate that each requested earmark is eligible for repurposing and each new project meets the requirements of the Repurposing Provision (section 124 of division L, title I, of Public Law 117-103). Below are specific requirements for completing the modified transfer form:

- a. The top portion of the modified transfer form includes:
 - i. The requesting State or territory;
 - ii. Contact information for the transfer request;
 - iii. Tracking numbers (States should assign their own tracking number as shown in the sample transfer forms to each request to make it easier to identify during review and processing); and

- iv. Demo ID for the earmark that the State is requesting to repurpose. A valid Demo ID is required on all transfer forms.
- b. The left side of the modified transfer form should include information concerning the original earmark, including:
 - i. The name of the earmark as provided in the applicable legislation or report or as provided in FMIS Demo ID information;
 - ii. Identify the specific legislation or report if not identified in FMIS. The Public Law number, section, and subsection should be noted for each fund that is listed;
 - iii. The program code of the funding to be repurposed; and
 - iv. The amount to be transferred from the earmark. This should be the full unobligated balance for the earmark as of the date of the repurposing request.
- c. The right side of the modified transfer form should include the new project descriptions that comply with the statutory requirement, including:
 - i. The location and scope of work. It should demonstrate that the funding will be obligated for an eligible STBG (for States) or THP (for territories) project. It may be necessary to provide more detail in the comments box or an attachment;
 - ii. Repurposed program codes will be selected based on the original program code for the earmark funds (see Program Code Crosswalk on the repurposing website) and obligation authority type to be used;
 - iii. Obligation authority (OA) type (select via drop-down box); and
 - iv. The amount of funds being repurposed for this project description. The total amount should match the unobligated balance of the earmark.
- d. Include the following in the “Comments” box of the modified transfer form:
 - i. Describe how the project qualifies if 10 percent or more of the funds have been previously obligated.
 - ii. FHWA will presume that the maximum amount of applicable obligation limitation available for the funds will be repurposed and transferred with the funds. If it is desired to transfer less obligation limitation, indicate this in the Comments. This is most important when the earmark uses a shared type (a “bucket”) of obligation limitation. **Under the annual appropriations act in effect at the time of obligation, funds subject to limitation in excess of the amount available will require the use of annual formula obligation limitation at the time of obligation.**
- e. The State should certify the earmark is eligible for repurposing and will be obligated for the identified purposes as required by the Repurposing Provision by marking the “YES” in the certification box. The State should sign the form and

submit it to the FHWA division office. The State should also submit a text readable (e.g., MS Excel) version of the form.

3. The Division Administrator (DA) or, if designated, the Deputy Division Administrator (DDA) or the Chief Operating Officer (COO), will either approve the transfer request form and submit it to the “FHWA Transfers” mailbox (FHWA_Transfers@dot.gov) or reject the transfer request form and notify the State. The DA may delegate this authority only to the DDA or COO. The DA’s approval represents the FHWA’s concurrence on eligibility of each earmark requested for repurposing and the requirements for project selection. The DA is responsible for confirming the following:
 - a. The earmark is less than 10 percent obligated as of October 1, 2021, or all related projects that used the earmarked funds are final vouchered and closed.
 - b. The new project is an eligible STBG or THP project and located within 25 miles of the earmark description in the same State.
 - c. Obligation limitation available is properly identified, if applicable.

The FHWA division office is also responsible for verifying the amount of funds available for repurposing. The total unobligated balance of applicable funds must be checked. The balance can be checked in FMIS on either the M58A or W10A report. The N25A is another resource but may show a “demo” project (a type of earmark in the system) with an unobligated balance of funds but those funds may have been used on another demo when allowable in certain situations, causing a negative unobligated balance on the other demo. Only the net balance of the projects is available. If funds have not been allocated in FMIS, the repurposing request cannot be submitted.

The email to the FHWA Transfers mailbox should include the following information in the subject line: that it is for FY 2022 earmark repurposing, the name of the State, and the Demo IDs. If a correction is necessary, that must be clearly identified in the subject of the email along with the State and Demo ID.

4. HCF will evaluate the request and verify the amount of funds and obligation limitation, if applicable, available to transfer with the applicable earmark, dependent on its original obligation limitation. The demo description will be revised in FMIS to reflect “Repurposing” and one or more program codes will be used to re-allocate the funds for the new description.

HCF, in conjunction with the appropriate program office, will verify that the earmark meets the definition of “earmarked amount” including that it was identified in a prior law, report, or joint explanatory statement, which was authorized to be appropriated or appropriated on or before September 30, 2011.

When complete, HCF will notify the FHWA division office official mailbox and submitter that the transfer is processed and the funds may be obligated to the projects. Once the division office is notified that a transfer has been processed, the division office should review and verify the accuracy of the transfer. If discrepancies are identified, the division office should promptly inform HCF.

ANNUAL REPORT

FHWA will facilitate the annual reporting required by the States in the Repurposing Provision. HCF will consolidate the list of repurposed projects received during the year. The timeline for HCF to provide the annual list of projects to the FHWA division offices to then be provided to the States will be determined and communicated to the division offices and States at a later date.

The State should provide a letter to the FHWA division office confirming the list of projects and certifying that the earmarks were eligible for repurposing and the projects identified are within 25 miles of the earmark location within the State and will be obligated for eligible purposes as required in the Repurposing Provision. The State should attach the list of projects to the letter. The timeline the FHWA division office to provide the State's certification to the "Repurposed Earmarks" mailbox will be determined and communicated to the division offices and States at a later date.

HCF will consolidate the reports for the required annual report to Congress.

OBLIGATIONS

The State should obligate the funds in FMIS for the eligible projects as identified on the modified transfer form. The State has until the end of FY 2025 to establish project agreements and make the obligations for earmarks repurposed in the 2022 process pursuant to the Repurposing Provisions. Note, this does not change the availability period for previously repurposed earmarks. The funds should not be used for other projects. The project title and description should clearly reflect the purpose of the project as identified on the modified transfer form.

If transfers to Federal Lands or other agencies are desired, the repurpose transfer process should be followed first. Then, a request to transfer the repurposed funding to Federal Lands or another agency should be submitted following the normal process after the funds are repurposed.

When the funds are obligated on a project agreement in FMIS, the FHWA division office must ensure the project description clearly reflects the use of the funds for the new project and is consistent with the repurpose request on the modified transfer form. The project should use the associated demo ID.

If an obligated project is completed and excess funds are deobligated, the unobligated funds may be used only on another project from the same earmark identified on the modified transfer request form submitted before September 9, 2022; based on the definition of "earmarked amount" in the Repurposing Provision, once funds are repurposed for a specific project, the funds may not be changed to a different project that was not on the repurposing request.