



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

Memorandum

Subject: **GUIDANCE - INFORMATION:**
Defining and Managing Emergency Relief
Repair Activities Eligible for 100 Percent
Federal Funding (Revised)

Date: March 7, 2022

From: Hari Kalla,
Associate Administrator for Infrastructure

HARI KALLA
Digitally signed by HARI
KALLA
Date: 2022.03.07 15:01:37
-05'00'

In Reply Refer To:
HISM-10

To: Associate Administrators
Division Administrators
Directors of Field Services
Federal Lands Division Directors

The Emergency Relief (ER) Program provides funding for the repair or reconstruction of Federal-aid highways and roads on Federal lands which have suffered serious damage as a result of natural disasters or catastrophic failures from an external cause. The FHWA is flexible in its response and management of the program, owing to the many variables within ER such as the type of event, magnitude of damage, and capability of agencies to respond. This memorandum provides clarifying guidance on how that flexibility is applied through the interpretation and implementation of 23 U.S.C. 125, Emergency Relief; 23 U.S.C. 120, Federal share payable; and 23 CFR part 668, Emergency Relief Program. This memorandum revises and replaces an FHWA memorandum, “GUIDANCE – INFORMATION: Defining and Managing Emergency Relief Repair Activities Eligible for 100% Federal Funding,” dated April 14, 2021.

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; however, compliance with the statutes and regulations cited is required. This memorandum is intended only to provide clarity regarding existing requirements under the law or agency policies.

It clarifies important definitions in 23 CFR part 668 and provides useful examples of applying those definitions. This clarification will assist the FHWA Division staff in implementing the Emergency Relief for Federal-Aid Highways (ERFA) program. Some of the definitions and examples will also assist the Federal Lands Highway (FLH) Division staff in implementing the Emergency Relief for Federally Owned Roads (ERFO) program.

Within the ER Program, the term “emergency repairs” is defined in 23 CFR 668.103 as “[t]hose repairs including temporary traffic operations undertaken during or immediately following the disaster occurrence for the purpose of: (1) [m]inimizing the extent of the damage, (2)

[p]rotecting remaining facilities, or (3) [r]estoring essential traffic.” The term “[e]mergency repairs” is also defined for the ERFO program under 23 CFR 668.203.

Prior to the enactment of the Infrastructure Investment and Jobs Act (IIJA)(Pub. L. 117-58, also known as the “Bipartisan Infrastructure Law”), emergency repairs, when accomplished within the first 180 days of an emergency event, were eligible for 100 percent Federal funding. Section 11107 of the IIJA amended the Federal Share provision in 23 U.S.C. 120(e)(1). Pursuant to the revised statutory language, emergency repairs, when accomplished within the first 270 days of an emergency event, are now eligible for 100 percent Federal funding.

Emergency events that have an event start date that preceded the effective date of the IIJA (October 1, 2021), will be subject to the previous language contained in 23 U.S.C. 120(e)(1). Emergency Repairs associated with these events that are accomplished within 180 days are eligible for 100 percent Federal funding. Emergency events that have an event start date on or after the effective date of IIJA will be subject to the revised language contained in 23 U.S.C. 120(e)(1). Emergency Repairs associated with these events that are accomplished within 270 days are eligible for 100 percent Federal funding.

When applying the timeframe referenced within this memo of “270 days,” Divisions should confirm the event start date of the subject ER event to determine whether the ER event start date occurred prior to October 1, 2021. For ER events with a start date prior to October 1, 2021, only emergency repairs accomplished within 180 days of the event start date are eligible for 100% federal funding.

Depending upon the nature of the event, damages to a facility, and transportation system needs, work conducted for emergency purposes could constitute temporary measures as well as restoration of a facility to pre-disaster condition that is permanently left in place.

Pursuant to 23 U.S.C. 120(e)(4), the Federal share payable for eligible repairs to restore damaged facilities to predisaster condition may amount to a 90-percent Federal Share if the eligible expenses incurred by the State due to the natural disasters or catastrophic failures in a Federal fiscal year exceed the total annual apportionment of the State under 23 U.S.C. 104 for the fiscal year in which the disasters or failures occurred.

I. Explanation of Emergency Repairs

To qualify for 100-percent Federal share as an emergency repair on Federal-aid highways, the repair must meet the following two conditions:

- (1) Emergency repairs must meet any one of the following three criteria in accordance with the definition in 23 U.S.C. 120(e) (and codified in 23 CFR 668.103):
 - Minimizing the extent of the damage;
 - Protecting remaining facilities; or
 - Restoring essential traffic.

These three criteria are not examples, but rather are eligibility conditions under 23 U.S.C. 120(e) that are demonstrated and documented as part of an ER application under 23 CFR 668.111, 668.113(a) and 668.213(b).

- (2) Emergency work was accomplished within the first 270 days following the event or within the allowable time extension due to the inability to access a site to evaluate damages and repair costs (23 U.S.C. 120(e)(1)-(3)).

The 270-day requirement for funding eligibility does not apply to emergency repairs under the ERFO program, since such emergency repairs are eligible for 100 percent of the cost of the repair. *See* 23 U.S.C. 120(e)(2). However, both the ERFO and ERFA programs are subject to contracting and permitting flexibility for emergency repairs.¹

Applicants are expected to coordinate with the FHWA Division Office to the extent practicable to demonstrate that the above conditions are met. The Division Office will determine whether these requirements are satisfied based on documentation and information provided by the Applicant, and will document the basis for the eligibility determination, the rationale for classifying projects as emergency in purpose and a description of what repairs constitute the restoration of essential traffic. The basis for the eligibility determination may include a description of why the repair is necessary, which alternative strategies or repairs were considered, and any alternate routes that were analyzed.

Work for emergency repairs is typically specific immediate work on transportation facilities in response to natural disasters or a catastrophic failure of a component of the transportation system during or immediately following an event. Such work is typically temporary in nature to satisfy an immediate need with respect to the facility, but it could remain in place as part of the permanent fix and it can be provided by either owner-controlled maintenance crews or by contracted forces. There is no requirement that emergency repairs be removed and replaced if they also serve the needs for the permanent solution. The scope of work associated with each site should include the type of emergency work determined to be appropriate in the Detailed Damage Inspection Report (DDIR).

Any ERFA work that meets the criteria for emergency repairs in 23 CFR 668.103 and is accomplished within the first 270 days may be eligible for 100-percent Federal share regardless of whether the measures are intended to be temporary measures or non-temporary restoration. Conversely, if eligible ERFA work is accomplished outside the first 270 days or does not meet the criteria for emergency repairs in 23 CFR 668.103, it may still be funded under the ER Program at the pro-rata Federal share for that facility.

The following chart summarizes the eligible Federal share for repairs under the ERFA program by Work Type and Work Purpose:

¹ 23 CFR 668.109; 668.205(d); 668.209(b).

		How long the measure is intended to be kept in place	
		Temporary Measures	Non-temporary Restoration
Work Purpose	Emergency Repairs ¹ accomplished within the first 270 days	100% Fed share	100% Fed share
	Emergency Repairs ¹ not accomplished within the first 270 days	pro-rata ² Fed share	pro-rata Fed share

¹ Repairs to minimize damage, protect facilities, or restore essential traffic

² This is not anticipated as a common work purpose scenario

II. Examples of Emergency Repairs Meeting 23 CFR 668.103 or 668.203

Applicants are expected to coordinate with the FHWA Division Office or FLH Division staff to the extent practicable to demonstrate that the emergency work satisfies the criteria.

Minimizing the Extent of the Damage

This criterion typically involves emergency work completed immediately following an event that stops or limits the extent of damage to a facility such as, but not limited to, stopping or eliminating erosion, removing added load stressors, limiting failure modes, fire suppression, or restricting traffic loading. This work should be identified and costs accounted for in a site-specific DDIR.

Examples of minimizing damage:

- Stop/eliminate/limit erosion of underlying material
 - Controlling/redirecting water flow
 - Localized stream bank armor/protection
 - Replacing culverts/bank armor to convey water safely
 - Landslide remediation
- Remove load ²

² See 23 U.S.C. 125(d)(3): “Debris removal. The costs of debris removal shall be an eligible expense under this section only for –

- (A) an event not declared a major disaster or emergency by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.);
- (B) an event declared a major disaster or emergency by the President under that Act if the debris removal is not eligible for assistance under section 403, 407, or 502 of that Act (42 U.S.C. 5170b, 5173, 5192); or

- Redirecting water flows from unprotected structures
- Removing floating detritus pileup on bridge substructure
- Removing landslide debris pushing on walls/foundations/embankments
- Stop/limit additional failure
 - Keeping a bridge or specific structural components from collapse
 - Shoring structural components
 - Backfilling along roadway pavement to correct minor sloughing is not considered an emergency repair
- Fire Suppression

Protecting Remaining Facilities

This criterion typically involves work to safeguard the public or to avoid significant maintenance repair, or reconstruction that may be conducted when there is significant risk of loss, such as providing traffic control for closures, shoring of structures, redirecting rushing waters, or removal of items that could collapse and damage a facility. The determination to do this type of work and the associated cost estimate should be documented in a site-specific DDIR.

Examples of protecting facilities:

- Traffic control; closing facilities for safety of the public
- Shoring of bridges/structural components
- Redirect rushing water to avoid eminent breach/erosion
- Removing trees/overhead items presenting eminent collapse (i.e., fall or rootball uplift that could create significant damage)

Restoring Essential Traffic (or Travel on Federal Roads)

Providing access for essential traffic is typically an eligible expense when a roadway or bridge site is repaired to safely allow essential traffic passage with potential limitations of travel time that might include lower design speeds, minimal pavement standards, a decreased number of lanes, and use of available detours. Closing roadways during an event and providing temporary traffic control elements should be considerations of specific limitations that are site-specific determinations by agreement between the owner agency and the FHWA Division Office. The determination of the restored level of access should be documented in a site-specific DDIR submitted to FHWA.

Restoration of essential traffic should be based on evaluation of need, and does not mean a return to normal level of service nor full reconstruction of the site.

Examples of Essential Traffic Determinations

- Closing facilities for safety of the public; temporary traffic control and maintenance of traffic while the roadway is in this configuration.

(C) projects eligible for assistance under this section located on tribal transportation facilities, Federal lands transportation facilities, or other federally owned roads that are open to public travel (as defined in subsection (e)(1)).”

- Safe passage of emergency vehicles and construction vehicles (responding for emergency repair).
- Public access to essential locations, such as medical facilities, school, work, and grocery stores.
- Availability of reasonable detours, emergency access requirements, or even time of year (i.e., expected weather conditions).

Consideration of essential traffic should involve analysis to determine that the agency is able to provide a degree of access so that the system is reasonably connected for safe travel. It does not necessarily mean the shortest or most convenient route, the same mode (e.g., ferry to detour route), or complete re-establishment of pre-disaster access. Essential traffic determinations will vary between urban or rural settings as well as between residential, business, and industrial settings.

III. Extending the 100 Percent Federal Share Beyond 270 Days

Under 23 U.S.C. 120(e)(3), the 270-day period may only be extended due to the inability of the Applicant to access damaged facilities to evaluate the damage and costs of repairs. Access restrictions can include, but are not limited to: roadways and bridges are impassable for an extended period, another emergency event occurred preventing access, or the site is unsafe to access. The Division Office will consider written requests to extend the 270-day time period to complete the emergency repairs. The Division Office will review the justification and, if acceptable in light of 23 U.S.C. 120(e)(3), will respond back to the Applicant with a revised date by which the emergency repairs may amount to 100 percent of the cost of repairs. The extension is not justified merely because work is delayed starting due to lack of resources.

To the extent practicable, the emergency repair timeframe extension request should include an estimate of the number of additional days needed to complete the work.

Besides 100-percent Federal funding, work for emergency repairs accomplished within 270 days of the event start date allows for contracting flexibility and project delivery without FHWA's prior approval.³ For these reasons, it is critical that FHWA Division Offices consistently apply and document determinations.

IV. Program and Funds Management under the ERFA Program

The regulation at 23 CFR 668.107, discussing cost reimbursement of ER events, identifies a combination of work purpose and a time period not to exceed 270 days for reimbursement of emergency repairs, and distinctly a pro-rata Federal share reimbursement for work not eligible for 100-percent Federal share. The following information applies to the ERFA program.

A DDIR is used to satisfy application requirements under 23 CFR 668.111 for every site that sustained damage during an event, and should distinguish work that meets the criteria of 23 CFR 668.103. The scope of work associated with each site should include the type of repair work

³ 23 CFR 668.109(a)(1).

determined to be appropriate in the DDIR with an estimate. When possible, it is helpful to provide an estimate of the number of days (or date) for completion of the repairs to proactively assess whether the emergency repair work could all be 100-percent Federal or a combination, and also to establish whether it could be appropriate to apply other flexibilities available within the first 270 days. The Applicant, subrecipients, and FHWA should have adequate controls to be able to separate these costs and apply the appropriate reimbursement rate. *See* 2 CFR 200.303; 23 CFR 630.108.

Under 23 U.S.C. 120(e)(1), reimbursement of emergency repairs (determined by their purpose, *see* section I of this document) under the ERFA program may be at 100 percent for the work accomplished up to 270 days from the beginning date of the event. This is referred to as the “cutoff date.” After the cutoff date, the reimbursement of cost incurred shall be reduced to the pro-rata Federal share for the affected roadway. Note that although the reimbursement may occur after the 270 days, the work must be accomplished within 270 days after the event occurred. Frequently, project authorization requests for repairs may come after the emergency repairs have been completed. In these cases, at the time of project authorization it should be clear whether those repairs will be or have been accomplished within the 270-day time frame.

The cutoff date should be entered into the Recipient Remarks in the Fiscal Management Information System (FMIS). If some sites were inaccessible and required extension of the 270 days, the cut-off date would be different only for those affected sites, not the entire event.

Consistent with 2 CFR 200.302 (Financial Management) and 200.303, (Internal Controls), the non-Federal entity must have adequate financial management systems, record documentation, and internal controls to demonstrate compliance with Federal statutes and regulations. Project data entry in FMIS must be able to identify and separate individual sites and activities, and the appropriate reimbursement rate(s) for work at those sites and activities. *See* 23 CFR 668.113(b); 2 CFR 200.303. Multiple reimbursement rates for one site may be authorized within a single FMIS project. A separate FMIS Detail Line should be utilized within each Federal-aid Agreement if the associated site(s) includes emergency repair work accomplished within the first 270 days. Using different Federal shares by detail line in a single project agreement should occur only if the State DOT system can track the variation.

The Applicant and the responsible Federal-aid Division Office must be able to demonstrate that the work on individual sites is properly accounted for as either meeting the criteria of 23 CFR 668.103 (100 percent eligible for Emergency Repairs, if other conditions are met) or not meeting the criteria (pro-rata Federal share eligible). Such controls may include:

1. Requiring site-specific determination of what constitutes “restored essential traffic” or the facility protected from damage or further deterioration, typically to be documented in the DDIR (or an agreed scope of work). The Applicant should have sufficient documentation to demonstrate when costs were incurred. This can be monitored via the Program of Projects for each event.
2. Tracking/identifying the 100-percent cutoff date.
 - a. Automatic notifications of near-term or imminent cut-off dates (i.e., 5-10 days in advance). Note that because billing for work accomplished within the first 270

days may come later, the State will need controls to indicate such situations. In some cases, the project agreement end date field may be used to accomplish this objective in FMIS.

- b. Develop a procedure to assign a separate detail on a Federal project number for work meeting the criteria for emergency repairs in 23 CFR 668.103 and those accomplished within 270 days.
 - c. For each DDIR, create the original project agreement in FMIS to cover the work meeting the criteria for emergency repairs in 23 CFR 668.103. Subsequently, create a modification to the project agreement to cover work not meeting the criteria for emergency repairs in 23 CFR 668.103 at pro-rata Federal share.
3. Creating Division Office standard operating procedures (SOP) for establishing the cutoff date and reviewing (for each site) the damage assessments and the invoice costs to determine that work meeting the criteria for emergency repairs in 23 CFR 668.103 was accomplished within 270 days after the event start date.
 4. Use of independent tracking systems (e.g., ER event summary spreadsheets) that are maintained with critical information on cost, time, and other items related to the projects, including with breakout of work that meets or does not meet the criteria for emergency repairs in 23 CFR 668.103, to periodically review or update all projects' status (scope, cost, construction progress).
 5. Working with the State to establish the end date for emergency repairs eligible for 100-percent Federal funding to be completed. The DDIR provides for identification of repairs meeting the criteria for emergency repairs in 23 CFR 668.103 (including distinctions of emergency and permanent repairs) with estimated costs for such repairs.
 6. Working with the State to require contracts to provide separate contract line items for emergency repairs that are accomplished within 270 days after the event start date and work that extends beyond the first 270 days. Each emergency repair bid item would be duplicated with the appropriate period of performance, thereby tying the cutoff date to contractor billing.

As with all Federal-aid programs, FHWA remains responsible for the correct application of ER Program rules and regulations and administration of funds under 23 U.S.C. 125, 23 U.S.C. 120(e), and 23 CFR part 668. Most FHWA Divisions have established program and financial controls that operate the ER Program management within the context of Risk Based Stewardship & Oversight and the delegation of program administration to the State DOT. Examples of such controls include:

1. Hold a quarterly ER Program meeting to discuss status of ER events and associated projects.
2. Manually adjust all invoices after the 270-day limit from 100 percent to the pro-rata Federal share for the project established under 23 U.S.C. 120, based on the cost incurred date.
3. Review State DOT tracking procedures.
4. For large events, conduct a Process Review/ Billing Review of the State's financial management office's procedures for payment reviews for the proper share. Also conduct a billing review where the work was done by a Local Public Agency and the risk of non-

compliance might be greater. Generate a report from FMIS showing expenditures that were billed at 100 percent and request documentation to support that the work was accomplished within 270 days after the event start date.

5. Perform a Compliance Assessment Program or similar review to identify a sample of billings from ER projects, and confirm the proper application of the Federal share.
6. The State DOT tracks the start of an event, and the type of repairs, and then applies the date when the 270 days ends while reviewing emergency repair reimbursements. The reimbursement documentation provides the dates when work was accomplished to determine whether 100-percent eligibility applies. Using documents including inspector diary notes, field note records, invoices, and timesheets when reviewing that information, the State DOT also compares the work that was done to the approved DDIR to help determine emergency repairs compared to permanent repairs.

Please direct Federal-aid ER questions to Mr. Chris Newman (202-366-4652) or Ms. Kathleen Hulbert (202-809-4758) and Federal Lands ER questions to Mr. Sergio Mayorga (703-404-6247) of the Office of Stewardship, Oversight and Management.