

DEPARTMENT OF TRANSPORTATION**Federal Transit Administration****[Docket Number: FTA-2008-0054]****Notice of Availability of Final Guidance on the Application of 49 U.S.C. 5324(c), Railroad Corridor Preservation****AGENCY:** Federal Transit Administration (FTA), DOT.**ACTION:** Notice of availability of guidance.

SUMMARY: By this notice the FTA announces the availability of final guidance on the application of a provision of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) concerning the acquisition of railroad right-of-way for transit projects. The guidance explains FTA's interpretation of the provision, which allows the acquisition of pre-existing railroad right-of-way, under certain conditions, before the completion of the environmental review for a transit project that would use the right-of-way. On December 22, 2008, FTA announced in the **Federal Register** the availability of the draft guidance and requested public comment. Several comments were received, and responses thereto are presented in this notice. The final guidance is available on the U.S. Government electronic docket site and on the FTA Web site.

DATES: This final guidance is effective April 30, 2009.**ADDRESSES:** The final guidance is available in the U.S. Government's electronic docket site at <http://www.regulations.gov> under docket number FTA-2008-0054 and on the FTA Web site at <http://www.fta.dot.gov> under "Planning and Environment."**FOR FURTHER INFORMATION CONTACT:** Joseph Ossi, Office of Planning and Environment (TPE-30), 202-366-1613, or Christopher Van Wyk, Office of Chief Counsel (TCC-30), 202-366-1733, Federal Transit Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590.**SUPPLEMENTARY INFORMATION:****Background**

Section 3024 of SAFETEA-LU added a new provision at 49 U.S.C. 5324(c) that allows a grant applicant, under conditions that may be specified by the Secretary of Transportation (the "Secretary"), to acquire existing railroad right-of-way prior to the completion of the environmental review of any transit project that will eventually use that

right-of-way. Pursuant to authority delegated by the Secretary, FTA has developed guidance that would (1) specify the conditions under which this provision may be used and (2) give guidance on applying that provision to specific situations.

Comments

On December 22, 2008, FTA announced in the **Federal Register** (73 FR 78424) the availability of the draft guidance and requested public comment. The notice of availability of the draft guidance contained a deadline of January 21, 2009, for public comment, but due to delays in posting the draft guidance to the docket at <http://www.regulations.gov> and to FTA's Web site, FTA posted a notice to the docket on January 2, 2009, stating that all comments submitted by February 1, 2009, will be treated as timely and that FTA would consider comments received after that date to the extent possible. As of the date of issuance of this notice of availability of the final guidance, all comments received in the docket have been considered. Comments were received from five transit agencies and one unaffiliated individual. The comments received, FTA's responses, and the resulting changes made in the guidance are discussed below.

Some commenters pointed out that the draft guidance was not posted in a timely manner, and, as previously stated, FTA responded by extending the comment period. Notice of the extension was included in the docket.

A commenter suggested that FTA change its environmental impact and related procedures in Title 23 of the Code of Federal Regulations at part 771 (23 CFR part 771) to provide a categorical exclusion for the acquisition of any real property "in advance of any project for which NEPA clearance will later be sought" as long as the real property is "not subject to changed use at the time of acquisition." This suggestion is beyond the scope of this action which is to provide guidance on the application of the provision at 49 U.S.C. 5324(c) on railroad corridor preservation. FTA notes that a final rulemaking published by FTA in the **Federal Register** on March 24, 2009 (74 FR 12518) did in fact create a categorical exclusion for the acquisition of railroad ROW consistent with 49 U.S.C. 5324(c). This revised environmental rule at 23 CFR part 771 is effective April 23, 2009.

One commenter expressed concern that the guidance applies only to pre-existing railroad ROW and not to all ROW needed for a future transit project. This commenter suggested that FTA's

approach would "tip" the government's hand on current projects being explored, give landowners an opportunity to change their property in some way, and increase its value prior to its acquisition for the project. FTA decided not to implement this comment because the statute explicitly applies only to railroad ROW. Furthermore, if a property owner were to attempt to initiate some form of development on the property in order to "change the property for economic gain" in anticipation of an FTA-assisted project, FTA has the authority to approve a protective acquisition of that property in accordance with 23 CFR 771.117(d)(12). The provision on railroad ROW preservation at 49 U.S.C. 5324(c) does not change the existing authority to use protective acquisition when there is an imminent threat of development.

One commenter objected to the "extra restrictions" contained in the guidance for ROW acquisitions. FTA believes that the restrictions in this guidance are the minimum necessary to comply with Federal laws and to ensure that Federal funds entrusted to FTA are spent for the purpose that Congress intended.

A commenter recommended that the guidance be changed to include railroad ROW that has lost its visual identity over the years as a railroad ROW and has been generally incorporated into background land uses. FTA has not incorporated this change into the final guidance. The premise in preserving a railroad corridor for a future transit project without first considering the environmental impacts of the future transit project is that, in FTA's experience, existing rail corridors have been the least environmentally damaging location for transit projects. Where a former railroad corridor has been incorporated into the background land uses, that premise is not valid.

One commenter suggested that the guidance be revised to apply to the acquisition of any property owned by a railroad company, without regard to the configuration of the property or its contiguity to a linear railroad ROW. FTA has decided not to follow this suggestion. The statutory provision is titled "Railroad Corridor Preservation" and random parcels of land that are not primarily linear in configuration would not qualify as "railroad corridors."

A commenting agency stated: "We are adamantly opposed to an FTA unilateral determination of a time horizon" for building the transit project on the railroad ROW acquired with FTA assistance. Another late-commenting agency expressed the same sentiment. FTA is responsible for ensuring that Federal transit funds result in transit

improvements, but FTA did not mean to imply that the time horizon for building the transit project would be arbitrarily dictated. The draft guidance indicated that long-range metropolitan transportation plan would be considered before setting the time horizon. To be clearer on this point, FTA has added that the decision on the time horizon would be made "in consultation with the applicant." FTA expects to be flexible in extending the time horizon as long as there is a reasonable assurance that a transit project will ultimately be built on the railroad ROW.

A commenter pointed out that an acquisition of a railroad ROW may take the form of a fee-simple acquisition, the acquisition of a long-term easement within the railroad ROW alongside the existing tracks, or the long-term acquisition of trackage rights, i.e., the right to operate on existing tracks. Although the commenter assumed that the guidance applies to all forms of acquisition, FTA decided to state explicitly in the guidance that it applies to all forms of acquisition and included a "long-term lease" to the forms mentioned by the commenter. In coming to this conclusion, FTA was guided by Federal transit law, which at 49 U.S.C. 5302(a)(1)(A) broadly includes the acquisition of trackage rights within the definition of "Capital Project." Noting again that the statutory provision is titled "Railroad Corridor Preservation," FTA decided that the term of anything less than a fee-simple acquisition must be of sufficient duration to cover the time needed to build a transit project on the ROW plus the useful life of that transit facility. The guidance notes that FTA Circular 5010.1D, *Grants Management Requirements*, provides that a railroad structure has a minimum useful life of 50 years, and most other transit buildings and facilities (concrete, steel, and frame construction) have a minimum useful life of 40 years.

One commenter made the following statement concerning the proposed guidance: "Section 10 of the [draft] guidance is somewhat confusing because if work is to be performed on the corridor, such as remediation, it would likely be part of the project that would require later approval. It should be eliminated leaving only the clear requirements of section 11. Maintenance of existing conditions would not generally be a part of the Federal undertaking." FTA disagrees. Prior to or during the acquisition of real property, an applicant's due diligence may discover contamination along the ROW that poses a health or environmental hazard. Immediate remediation of the

problem in accordance with applicable State law would be appropriate in that instance. Waiting for the future transit project on the ROW to deal with a contamination problem may greatly increase the risk of harm to the environment or the general public, as well as the applicant's potential liability. FTA agrees that in most cases contamination would not pose an immediate, severe threat and could be addressed during the later construction of a transit facility on the ROW. A minor rewording of section 10 of the draft guidance to this effect has been made. The subject section is section 9 in the final guidance as a result of other edits.

If there are railroad buildings or structures along the ROW that are eligible for the National Register of Historic Places and whose ownership would change with the acquisition of the ROW by the applicant, steps will need to be taken to ensure compliance with Section 106 of the National Historic Preservation Act and its implementing regulation at 36 CFR Part 800. One example of an adverse effect under that regulation is the neglect of a historic property, so compliance may entail the maintenance of the historic structures and buildings until such time as further action is taken when the future transit project on the ROW is developed. "Maintenance of existing conditions" during the interim would be required as "part of the Federal undertaking."

One commenter asked for clarification of what project or project(s) must be in the State Transportation Improvement Program (STIP) at the time of FTA's approval of the acquisition of the ROW. The guidance states that the acquisition of the ROW and the later transit project on that ROW are separate actions for planning and NEPA purposes and that only the acquisition must be in the STIP at the time of FTA's approval of the acquisition. The transit project on the ROW must be in the STIP at the time of FTA's approval of that project (if it is FTA-funded). FTA slightly revised the wording in the guidance in an attempt to make this point more clearly.

One commenter asked that the guidance discuss at length the application of the Uniform Relocation and Real Property Acquisition Policies Act (Uniform Act), including its relocation requirements, for each of three acquisition types previously discussed (i.e., fee simple, easement, and trackage rights). FTA has decided that this is outside the scope of this guidance. The requirements of the Uniform Act are adequately covered in its implementing regulation (49 CFR Part 24). Section 6 of the guidance was

intended as a reminder that the Uniform Act generally applies when the action involves Federal funding, but it was not intended to delve into the details of its applicability and requirements. FTA changed the wording of Section 6 to avoid the apparent implication that all requirements of the Uniform Act would apply to all types of acquisition.

One commenter suggested that appropriate ROW acquisition regulations would avoid the intense scrutiny that is generated by projects that must use eminent domain to acquire needed land. FTA has decided that the comment is outside the scope of this guidance on 49 U.S.C. 5324(c). The Uniform Act and its implementing regulation (49 CFR Part 24) are not the subject of this guidance.

One commenter asked that the guidance clarify that the value of the railroad ROW acquired in accordance with this guidance with Federal funds other than New/Small Starts funds may be counted as "other Federal" funds when computing the various funding shares of the future New/Small Starts project that uses the ROW. FTA considered this suggestion and decided that these New Starts and Small Starts issues are beyond the scope of this guidance on railroad ROW acquisition. FTA intends to resolve issues related to New and Small Starts in accordance with the pertinent policies and statutory requirements in effect at the time the issue arises. FTA's thinking was influenced by the fact that the current authorization of the Federal transit program ends on September 30, 2009. Therefore, FTA deleted from the final guidance two provisions of the proposed guidance related to New and Small Starts, which are: (1) The provision that is the subject of the instigating comment and that said that railroad ROW acquired with FTA financial assistance would not be counted as in-kind local match for a New/Small Starts project built on that ROW; and (2) the provision which said that FTA financial participation in the acquisition of a railroad ROW would have no bearing whatsoever on the New/Small Starts evaluation of a project proposed to be built on that ROW.

The final guidance is available in the U.S. Government's electronic docket site at <http://www.regulations.gov> under docket number FTA-2008-0054 and on the FTA Web site at <http://www.fta.dot.gov> under "Planning and Environment."

Issued on: April 24, 2009.

Matthew J. Welbes,

Acting Deputy Administrator.

[FR Doc. E9-9977 Filed 4-29-09; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

FTA Supplemental Fiscal Year 2009 Apportionments and Allocations

Editorial Note: FR document E9-9475 was originally published at page 19115 in the issue of Monday, April 27, 2009. In that publication graphic material was omitted. The corrected document is republished below in its entirety.

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice.

SUMMARY: Division I of the “Omnibus Appropriations Act, 2009” (Pub. L. 111-8), signed into law by President Barack Obama on March 11, 2009, made funds available for all of the surface transportation programs of the Department of Transportation (DOT) for the Fiscal Year (FY) ending September 30, 2009. This notice supplements the December 18, 2008 **Federal Register** notice. The notice apportions formula funds made available under the Omnibus Appropriations Act and allocates FY 2009 funds to congressionally designated projects that were contained in the accompanying committee report and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The notice does not include any extensions of previously lapsed earmarks. The Federal Transit Administration (FTA) will address allocations of lapsed and/or unallocated resources subsequent to this notice.

FOR FURTHER INFORMATION CONTACT: For general information about this notice contact Henrika Buchanan-Smith, Office of Program Management, at (202) 366-2053. Please contact the appropriate FTA regional or metropolitan office for any specific requests for information or technical assistance. Appendix A at the end of this notice includes contact information for FTA regional and metropolitan offices.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Overview
- II. FTA Programs Funding
- III. FY 2009 FTA Program Initiatives and Changes
- IV. FTA Programs

- A. Metropolitan Planning Program (49 U.S.C. 5305(d))
- B. State Planning and Research Program (49 U.S.C. 5305(e))
- C. Urbanized Area Formula Program (49 U.S.C. 5307)
- D. Clean Fuels Formula Program (49 U.S.C. 5308)
- E. Capital Investment Program (49 U.S.C. 5309)—Fixed Guideway Modernization
- F. Capital Investment Program (49 U.S.C. 5309)—Bus and Bus-Related Facilities
- G. Capital Investment Program (49 U.S.C. 5309)—New and Small Starts
- H. Special Needs of Elderly Individuals and Individuals With Disabilities Program (49 U.S.C. 5310)
- I. Nonurbanized Area Formula Program (49 U.S.C. 5311)
- J. Rural Transportation Assistance Program (49 U.S.C. 5311(b)(3))
- K. Public Transportation on Indian Reservation Program (49 U.S.C. 5311(c)(1))
- L. National Research Program (49 U.S.C. 5314)
- M. Job Access and Reverse Commute Program (49 U.S.C. 5316)
- N. New Freedom Program (49 U.S.C. 5317)
- O. Paul S. Sarbanes Transit in Parks Program (49 U.S.C. 5320)
- P. Alternatives Analysis Program (49 U.S.C. 5339)
- Q. Growing States and High Density States Formula (49 U.S.C. 5340)
- R. Over-the-Road Bus Accessibility Program (49 U.S.C. 5310 Note)

Tables

- 1. FTA Revised FY 2009 Appropriations and Apportionments for Grant Programs
- 2. FTA Revised FY 2009 Metropolitan Planning Program and Statewide Planning and Research Program Apportionments
- 3. FTA Revised FY 2009 Section 5307 and Section 5340 Urbanized Area Apportionments
- 4. FTA FY 2009 Section 5307 Apportionment Formula
- 5. FTA Revised FY 2009 Formula Programs Apportionments Data Unit Values
- 5-A. FTA Urbanized Areas 200,000 or More in Population Eligible To Use Section 5307 Funds for Operating Assistance
- 6. FTA Revised FY 2009 Small Transit Intensive Cities Performance Data and Apportionments
- 7-A. FTA FY 2009 Section 5308 Clean Fuels Allocations
- 8. FTA Revised FY 2009 Section 5309 Fixed Guideway Modernization Apportionments
- 9. FTA FY 2009 Fixed Guideway Modernization Program Apportionment Formula
- 10-A. FTA FY 2009 Section 5309 Bus And Bus-Related Facilities Allocations
- 10-B. FTA Reprogrammed Section 5309 Bus And Bus-Related Facilities Allocations
- 11. FTA Revised FY 2009 Section 5309 New Starts Allocations
- 12-A. FTA Reprogrammed Section 5309 New Starts Allocations

- 13. FTA Revised FY 2009 Special Needs for Elderly Individuals and Individuals With Disabilities Apportionments
- 14. FTA Revised FY 2009 Section 5311 and Section 5340 Nonurbanized Area Formula Apportionments, and Rural Transportation Assistance Program (RTAP) Allocations
- 16. FTA Revised FY 2009 Section 5316 Job Access and Reverse Commute (JARC) Apportionments
- 18. FTA Revised FY 2009 Section 5317 New Freedom Apportionments
- 19-A. FTA FY 2009 Section 5339 Alternative Analysis Allocations
- 20. FTA FY 2009 National Research Programs Allocations

Appendix A

I. Overview

This document apportions and allocates FY 2009 formula funds appropriated in Division I of the Omnibus Appropriations Act, 2009 (Pub. L. 111-8, March 11, 2009), and FY 2009 funds designated for specific projects under SAFETEA-LU and the committee report accompanying the Omnibus Appropriations Act, 2009, for the Bus and Bus Facilities program, New Starts program, Clean Fuels program, and the Alternatives Analysis program. It also includes projects that were extended or reprogrammed as a matter of law in the Omnibus Appropriations Act, 2009. This notice does not include allocations of recovered previous years' discretionary funds or unallocated FY 2009 discretionary resources. FTA will provide information regarding the availability of unallocated discretionary resources at a later date.

FTA reminds grantees apportioned formula funds from the American Recovery and Reinvestment Act (Pub. L. 111-05; “ARRA”) that at least fifty percent of the funds attributable to each urbanized areas over 200,000 in population and each State for all other areas must be obligated in a FTA grant by September 1, 2009. The March 5, 2009 Federal Register notice that apportioned ARRA funds provides more details about this requirement and includes the statement that “FTA will consider a submittal timely if a complete ARRA formula grant is received on or before July 1, 2009.” FTA reminds grantees that the July 1, 2009 deadline accounts for the Department of Labor process associated with labor certifications which can take up to 60 days to complete the certification referral process. Grantees are strongly encouraged to submit applications well in advance of that deadline whenever possible. Planning submission of a grant application on or near July 1, 2009 might not account for local decision