Q & A Regarding FY 2016 Earmark Repurposing

The purpose of these questions and answers is to provide technical advice to the Federal Highway Administration's (FHWA) division offices and State departments of transportation (State DOTs) on matters associated with the repurposing of earmarked funding for Federal-aid projects pursuant to section 125 of the Department of Transportation Appropriations Act, 2016 (Pub. L. No. 114-113, Division L, Title I) (hereinafter "provision").

Question 1: What is the purpose of this provision?

Answer 1: The purpose of the provision is to make funding available from earmarks and designated projects that have not been advanced by State DOTs. The limitations in the provision are to ensure the projects are obligated promptly and used in the same geographic area as the original earmark to provide funding for other needed projects eligible 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).

Question 2: Do earmarks have to be repurposed?

Answer 2: No. If an earmark is not repurposed, then it will remain unchanged and available for obligation.

Question 3: Does the list of earmarks and allocated funds prepared by the FHWA's Office of the Chief Financial Officer (OCFO) identify the only earmarks and allocated funds that can be considered for repurposing?

Answer 3: No. The list may not include all the earmarks and funding programs that may be eligible under the provision. However, it will give States a summation of the projects that could be considered. States should work with their FHWA division offices to ensure all earmarks and allocated funds listed or otherwise identified meet the repurposing eligibility criteria and the amount of funds is available. If a State identifies an earmark that is not listed, they should provide the name, the original amount, and the legislation for the earmark. The funds must be allocated in FMIS before the repurposing process can take place.

Question 4: How long are the funds and obligation authority available for obligation?

Answer 4: From the date a repurposing request is submitted by the State, funds may be obligated up to 3 years after the fiscal year of the request. Therefore, obligations for requests received in FY 2016 must be obligated by September 30, 2019. Unobligated balances will lapse on that date but the properly obligated contract authority funds will remain available for expenditure. 23 U.S.C. 118(c)(2) will apply to contract authority from the Highway Trust Fund. Any General Funds (Budget Authority) will be cancelled 5 years after the funds expire.

Question 5: Is obligation limitation associated with repurposed funds subject to August Redistribution?

Answer 5: No. While some obligation limitation may be subject to August Redistribution prior to repurposing, such as the limitation for allocated programs, once funds are repurposed they are no longer subject to August Redistribution.

Q & A Regarding FY 2016 Earmark Repurposing

Question 6: Do all earmark repurposing requests have to be submitted this Federal Fiscal Year?

Answer 6: Yes. States may submit a request to repurpose earmarks at any time prior to September 12, 2016. Any earmarks not repurposed will remain unchanged with the same original period of availability.

Question 7: If Congress changed the description of an earmark at any point prior to this provision, can it still be repurposed?

Answer 7: Yes. The repurposing should be based on the latest project description, including applicable earmarks for which the original description was subsequently revised by Congress.

Question 8: If an earmark is repurposed under this provision, can it be changed again?

Answer 8: No. Once repurposed under this provision, the project description no longer meets the requirement of the provision that the project be described in applicable legislation or a report identified by Congress and, as such, cannot be further repurposed after September 12, 2016.

Question 9: Can the repurposed funds be used to replace previously obligated funds on an existing project?

Answer 9: No. Pursuant to 23 CFR 630.110(a), properly obligated funds may not be replaced. A State may use repurposed funds to add additional funds to a project due to a need for additional obligations or to convert advance construction as long as that project is identified at the time the repurposing is originally requested.

Question 10: What does the requirement that the project be within the same geographic area and within 50 miles of the earmark mean?

Answer 10: The repurposed funds may be obligated only on a new or existing project within 50 miles of the original earmark designation in the State. Fifty miles can be considered from any reasonable point from the location of the earmark; but the new or existing project must remain within the State.

Question 11: Who has the authority to request repurposing of an earmark that appears to be for a local agency?

Answer 11: The provision provides the authority for a State to repurpose any earmark that was designated on or before September 30, 2005 “located within the boundary of the State or territory”. The only requirement for the State is that the repurposed project must be within 50 miles of the designation, within the State, and eligible for STBG.

Question 12: What is the basis for the requirement that applicable earmarks be designated before October 1, 2005?

Answer 12: The provision states an earmark must be “more than 10 fiscal years prior to the fiscal year in which this Act becomes effective.” The Act became effective in FY 2016. As such, 10 years before FY 2016 is FY 2006, which began on October 1, 2005. More than 10 years, therefore, is before October 1, 2005.

Q & A Regarding FY 2016 Earmark Repurposing

Question 13: Can discretionary awards made by the Secretary without Congressional identification be repurposed?

Answer 13: No. If the project was not identified by Congress in applicable legislation or report and the Secretary used full discretion to select projects in a discretionary program, the funds may not be repurposed under this provision.

Question 14: If a repurposed project is completed, can excess funds due to cost underruns deobligated from the project be re-obligated on another project?

Answer 14: If a repurposed 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 12, 2016. In addition, for contract authority funding after the period of availability, the reobligation must occur in the same fiscal year as the deobligation. Moreover, the original obligation must have been proper (an amount was not obligated in excess of the estimate to complete the project authorized or before the project was ready to proceed), and the deobligation must have been for a valid reason complying with 23 CFR 630.110(a).

Question 15: Can the repurposed funds be transferred to another agency or Federal Lands to carry out a project or projects?

Answer 15: Yes, based upon authorized transfer procedures as described in FHWA Order 4551.1.

Question 16: Can earmarked funds that were transferred to another agency be repurposed under this provision?

Answer 16: No. The provision applies only to funds being administered by FHWA.

Question 17: Are earmarks that are not subject to obligation limitation required to use annual formula limitation after repurposing?

Answer 17: No. Only funds that are subject to obligation limitation and do not have obligation limitation remaining available will need to use annual formula obligation limitation.

Question 18: If earmarked funds were deobligated after December 18, 2015, can the project be qualified for the “less than 10%” provision without further justification?

Answer 18: No. The provision provides a specific cut-off date for the 10% requirement, which is the effective date of the provision, December 18, 2015. The earmark still must be treated as 10% obligated. Earmarks that are obligated 10% or more as of the effective date of the act must be closed in FMIS and final vouchered before they can be considered for repurposing. All of the funds deobligated from the closed project(s) for the earmark may be considered for repurposing. Project closure may occur at any time before the deadline for repurposing earmarks.

Question 19: Can funds deobligated after December 18, 2015, also be repurposed?

Answer 19: Yes. But if the obligation amount exceeded 10% on December 18, 2015, the earmark project(s) must still be final vouchered and closed in FMIS.

Q & A Regarding FY 2016 Earmark Repurposing

Question 20: What does "have been closed and for which payments have been made under a final voucher" really mean for earmarks that are 10% or more obligated?

Answer 20: A closed project means closed in FMIS. If the project is not a FMIS project, the State must certify the project is closed. Final voucher paid means the State has requested final payment from FHWA based on final project estimates. The State should consider if additional funding is needed to make the started earmark project functional before it considers repurposing the remaining earmark funds. All projects related to the earmark must have a final voucher and be closed for the funds to be eligible to be repurposed.

Question 21: How detailed does the new project description on the repurpose request need to be?

Answer 21: The project description should clearly define the scope of work and the project location that the funds will be obligated on before the end of the availability period. Please see the OCFO memo titled "Project Funds Management Guide for State Grants" dated October 29, 2014, for additional information. The project description does not need to specify the phase of work, i.e., P.E., right-of-way, or construction.

Question 22: Can the State choose an "area wide" project, such as a guardrail replacement program project in a specific city or county?

Answer 22: Yes; however, to ensure the integrity of the earmark and use of funds, the "area wide" project must be limited to work within the 50-mile area of the original earmark, and the project description must be clearly defined and eligible under FHWA project authorization guidance. For example, the State may not repurpose an earmark for an unidentified list of resurface projects in the 50-mile area.

Question 23: If the earmark was for 'Highway xx in an identified city,' is the 50-mile range from anywhere in the city?

Answer 23: No. The 50-mile radius is from any point on the specified highway or work location in the identified city.

Question 24: Does preliminary engineering or right-of-way payback apply to the original earmark?

Answer 24: If the earmark, as written, was specifically for preliminary engineering (PE) (e.g., design activities) or right-of-way acquisition, then consistent with the FHWA PE Order, the project is not subject to PE or right-of-way reimbursement to FHWA because the earmark had a specific limited purpose. If the State did use part of earmarked funds for PE or right-of-way activities that were intended to include construction prior to repurposing and the amount obligated was less than 10% of the earmark, the earmark may be repurposed but the expended funds for PE or right-of-way activities will be subject the applicable reimbursement provisions. If the State spent 10% or more of the earmark intended for construction for PE or right-of-way activities, the project cannot be considered complete. If the State promptly pays back those activities, the funds could be considered for repurposing.

Question 25: How can the State determine how much obligation limitation is available for the earmark?

Answer 25: If the funds have not been allocated in FMIS, the relevant program office should be able to provide that information. If the funds have been allocated, first go to the "Fund Control Menu" in FMIS and look up the applicable program code. See the "Limitation Type" column. Then go back to

the "Fund control" menu, select "Limitation – Balances". Select the appropriate limit type and determine if the limit is "Limit by Demo".

Question 26: If a portion of the funds for an earmark was previously transferred to another agency, can the remaining balance retained by FHWA be used for repurposing?

Answer 26: Yes. The State must certify that the project is closed and may repurpose the remaining balance that is administered by FHWA. Stated differently, if funds were previously transferred to another agency, only funds returned to FHWA (currently administered by FHWA) can be repurposed under this provision.

Question 27: Why are there negative unobligated balances on the FMIS N25A report for some earmarks (or Demo IDs)?

Answer 27: Some Demo contract authority was permitted to be used on other demos for various reasons, including advance funding authority under the High Priory Projects program. If your State has a Demo with a negative unobligated balance, you must identify which Demo was used to balance the funds. A State cannot transfer funds if the funds were used under a different Demo even if the balance appears on the N25A as unobligated.

Question 28: Does FHWA have to approve the project selected for repurposing?

Answer 28: No. The Division Administrator's approval represents the FHWA's concurrence on eligibility of each earmark requested for repurposing and the identified project is qualified. The FHWA divisions are to work with States to ensure the provision's requirements are met for repurposing, such as: if an eligible earmark has less than 10% of the funds obligated or the State demonstrated that it was complete; and, if the repurposed project is for an eligible activity within 50 miles of the original location and is in the same State as the original earmark.

Question 29: What are the requirements to obligate funds repurposed under this provision?

Answer 29: Standard Federal-aid requirements will apply for obligation. The obligation of the funds must be for the project identified during repurposing. Please see the OCFO memo titled "Project Funds Management Guide for State Grants" dated October 29, 2014, for additional information.

Question 30: Can the Division Administrator delegate approval of these requests?

Answer 30: The Division Administrator can delegate the approval only to the Assistant Division Administrator. The Division Administrator's signature is required to ensure the appropriate level of and multi-discipline review has been completed. The Division Administrator's 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 50 miles of the earmark description, and within the State.

Question 31: Can States request an extension beyond September 12, 2016, to submit earmark repurposing requests?

Answer 31: No. Extensions cannot be considered beyond September 12, 2016. For requests to be processed before the end of the fiscal year and to be considered valid for processing, FHWA division offices must submit repurposing requests to the OCFO's "FHWA Transfers" e-mail address by

September 12, 2016. To ensure repurposed funds are available for obligation before the end of the fiscal year, the request must be submitted by August 29, 2016.

Question 32: What is the purpose of the earmark certification box?

Answer 32: The certification statements for both the State DOTs and the FHWA Division Administrator are to provide clearly defined and consistently applied assurance that the requested repurposing meets the eligibility criteria set forth in the provision.

Question 33: Does the State have to use the transfer form to request repurposing?

Answer 33: Yes. This form was slightly modified for the earmark repurposing requests and to ensure the necessary information is provided for the OCFO to efficiently complete the repurposing process and meet the requirements of the provision.

Question 34: Will the State have to do any quarterly reporting?

Answer 34: Yes. States must submit quarterly reports as required by the law proving the authority. However, FHWA will facilitate these reports by providing the States a consolidated report each quarter containing the project identified and approved for repurposing. The State will provide the FHWA division office a letter certifying the accuracy of the list. The reports are required only from States that made a request to repurpose earmarks.

Question 35: Why are some of the demo ID's repeated on the earmark lists?

Answer 35: Some demo ID have multiple program codes and were identified from more than one law so it the report filter created more than one line for the demo. Please refer to the FMIS N25A report for details on the correct program code and the amount of funding available for each program code.

Question 36: Is there a limited time period to expend obligations?

Answer 36: For funds from the Highway Trust Fund (i.e., contract authority), the obligated funds are available until expended; but the project can become inactive if it is not proceeding. For funds from the General Fund (i.e., budget authority), the funds will be cancelled 5 years after the period of availability, September 30, 2024, and will no longer be available for expenditure.

Question 37: Can the repurposed funds be used to convert advance construction (AC)?

Answer 37: Yes. As long as the project was properly identified during the repurposing process the funds may be used to convert AC.

Question 38: Can "placeholder" or "backup" projects be identified during repurposing process?

Answer 38: No. The actual projects the State plans to obligate funds on must be identified with the amount of repurposed funds to be obligated on that project. Token amounts of funding for a project will not be considered.

Q & A Regarding FY 2016 Earmark Repurposing

Question 39: Does the Federal-aid number need to be identified at the time of repurposing?

Answer 39: No, the Federal-aid number can be identified later at the time of obligation.