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FTA Guidance on the Application of 49 U.S.C. 5324(c) to Railroad Right-of-Way (ROW) Acquisition

Section 3024 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) amended Federal transit law by adding a new provision at 49 U.S.C. 5324(c) that allows FTA, under certain conditions, to assist in the acquisition of pre-existing railroad right-of-way (ROW) before the completion of an environmental review for any transportation project that will eventually be built on that ROW. The new provision is:

(c) RAILROAD CORRIDOR PRESERVATION.—

(1) IN GENERAL.—The Secretary may assist an applicant to acquire railroad right-of-way before the completion of the environmental reviews for any project that may use the right-of-way if the acquisition is otherwise permitted under Federal law. The Secretary may establish restrictions on such an acquisition as the Secretary determines to be necessary and appropriate.

(2) ENVIRONMENTAL REVIEWS.—Railroad right-of-way acquired under this subsection may not be developed in anticipation of the project until all required environmental reviews for the project have been completed.

The Federal Transit Administration (FTA) also allows the advance acquisition of a limited amount of real property for hardship or protective purposes as defined in the FTA environmental regulation at 23 CFR 771.117(d)(12). SAFETEA-LU does not change in any way the regulatory provision regarding hardship and protective acquisitions, and these forms of advance acquisition are not the subject of this guidance.

Railroad ROW is land that is generally linear in configuration and is visually identifiable as railroad ROW by the presence of tracks, ties, ballast, berms or grade cuts, bridges, culverts, railroad structures, or other features over most of its length, including its endpoints. Former railroad ROW that has lost its visual identity by incorporation into subsequent urban development or the natural environment is not included in the definition of “railroad ROW” that is subject to this provision.

In accordance with 49 U.S.C. 5324(c), the acquisition of pre-existing railroad ROW may be considered a separate action from the future transit project that will ultimately be built on that ROW under certain conditions and with certain understandings as follow:

1. The acquisition must be strictly limited to railroad ROW as defined above. Contiguous railyards owned by the same entity as the linear railroad ROW may be included in the transaction, but the acquisition of railroad land that is not primarily linear in form is not permitted under this provision. For example, the acquisition of a rectangular railyard by itself would not be permitted under this provision.

2. If the railroad ROW is to be acquired with the use of FTA funds, an environmental review of the railroad ROW acquisition itself must be completed in accordance with the National Environmental Policy Act (NEPA) and all other applicable Federal environmental laws and regulations. For example, the applicant will need to investigate the extent and nature of contamination of soil and groundwater on the railroad ROW and the presence of historic resources within the ROW (e.g., old railroad buildings and structures) that will have to be maintained. In many cases, the railroad ROW being acquired may be carrying little or no freight-train traffic prior to the acquisition. In these cases, with appropriate documentation, FTA will likely determine that the railroad ROW acquisition is a categorical exclusion in accordance with 23 CFR 771.117. In those situations where the ROW being acquired carries freight-train traffic, and if the acquisition would result in the diversion of that freight-train traffic to other rail lines, the impacts of the diversion must be considered. In that situation, an EA or an EIS may be required in accordance with the FTA NEPA regulation at 23 CFR Part 771. Other impacts, such as the remediation of severe contamination in conjunction with the change in ownership, may warrant an EA or possibly even an EIS. Consultation with the FTA Regional Office on the appropriate NEPA documentation is essential.
3. If the railroad ROW is to be acquired with the use of FTA funds, the ROW acquisition must be included in the State Transportation Improvement Program (STIP) prior to the NEPA approval for the ROW acquisition by FTA.¹
4. If the railroad ROW is to be acquired with the use of FTA funds, the normal requirements of the FTA program from which the FTA funding for the railroad ROW acquisition will be drawn apply. FTA's policy and requirements for automatic pre-award authority would also apply to any acquisition in advance of a grant award.
5. The applicant shall be responsible for ensuring compliance with other Federal laws that may affect the acquisition of the railroad ROW. The applicant should check with the Surface Transportation Board and the Federal Railroad Administration to determine whether any other Federal requirements apply.
6. If the railroad ROW is to be acquired with the use of FTA funds, or if the future project that will use the railroad ROW is to be Federally assisted, the applicant must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act and its implementing regulation at 49 CFR Part 24. The applicant must follow the relevant procedures set forth in FTA Circular 5010.1D, *Grant Management Requirements* (November 2008), including the requirement for FTA review of, and concurrence in, certain appraisals. The applicant should pay particular attention to the legal description of the property to be acquired. The applicant is

¹ A project that is located in a metropolitan area and is included in the STIP must also have been included in the metropolitan Transportation Improvement Program (TIP) because the metropolitan TIP must be included without change in the appropriate STIP [23 CFR 450.216(b)]. The TIP must be consistent with the metropolitan transportation plan. Therefore, all FTA planning requirements will have been satisfied for any project included in the STIP, whether the project is in a metropolitan area or non-metropolitan area.

- responsible for appropriate title searches of deeds or easement documents to identify any reversion clauses, easement restrictions, or other interests that may affect the value or permissible use of the land.
7. If the railroad ROW is to be acquired with the use of FTA funds, FTA expects a transit project using the railroad ROW to be implemented within a timeframe that will be specified in the grant. This grant condition will be stated in writing at the time of the grant for ROW acquisition. In determining the appropriate timeframe to specify in the grant, FTA will consider the planning and environmental review status of any proposed project that would use the ROW. If a transit use of the railroad ROW does not come to pass within the timeframe specified in the grant, FTA may allow the preservation of the ROW to continue or may require the disposition of the ROW, reimbursement of the FTA share of the fair market value of the acquired ROW, or other options, in accordance with 49 U.S.C. 5334(h)(1) through (3), 49 U.S.C. 5334(h)(4), or 49 CFR 18.31(c). In this situation, FTA will decide, at its sole discretion, which of the available options to pursue.
 8. When the time comes to define and implement a transit project that will use the preserved railroad ROW, if that transit project is to be Federally-funded, it will be subject to NEPA and related laws. Notwithstanding the earlier acquisition of the railroad ROW, the consideration of all reasonable alternatives will still be required during the NEPA review.
 9. If the proposed transit project that would use the railroad ROW is to be funded under Section 5309 New Starts or Small Starts, it is subject to the evaluation processes under those programs. The earlier FTA involvement in the acquisition of the preserved railroad ROW will have no bearing on the applicability of these requirements to the transit project that uses the ROW. Furthermore, if the New Starts or Small Starts evaluation of the proposed transit project that would use the railroad ROW leads to an FTA decision not to recommend Section 5309 New Starts or Small Starts funding and, as a result, the local project sponsor no longer advances the project, the provision of #7 above regarding disposition and reimbursement still holds.
 10. If FTA funding is used for the railroad ROW acquisition, the ROW may not be altered or encumbered in any way without FTA's prior written approval. 49 CFR 19.37 and 18.31(b). FTA's written approval to maintain historic railroad structures (if any) or to remediate contamination on the ROW may be included in FTA's NEPA approval of the acquisition. Any other alteration of the acquired ROW, such as demolition, site preparation, or utility work, would require a separate written approval by FTA. Such approval by FTA would not be forthcoming prior to FTA's review of the project for which such work is to be performed, in accordance with #8 above or #11 below, whichever is applicable.
 11. FTA considers the acquisition of the railroad ROW and the subsequent construction of a transit facility on that ROW to be separate projects. If, after having acquired a

railroad ROW with FTA assistance in accordance with this guidance, the transit agency that owns the railroad ROW decides to construct a transit project on that ROW entirely with non-Federal funding², the FTA requirements that are associated with FTA funding would not apply to that transit project. As previously stated in #10 above, the proposed encumbrance of the ROW would require FTA's written approval. In reviewing the proposed encumbrance, FTA would consider the eligibility of the proposed transit project for FTA assistance under 49 U.S.C. Chapter 53. If the non-Federal project proposed to be constructed on the railroad ROW is one that is not eligible for funding under 49 U.S.C. Chapter 53 (e.g., a highway) and if it precludes the construction of an eligible transit facility on the railroad ROW, then FTA would exercise one of the options described in #7 above regarding disposition and reimbursement.

12. FTA considers the acquisition of the railroad ROW and the subsequent construction of a transit facility on that ROW to be separate projects. If a transit agency were to acquire a railroad ROW entirely with non-Federal funding, then the FTA requirements that are associated with FTA funding would not apply to that acquisition, with one exception. The exception is that, if the future project that will use the railroad ROW is to be Federally assisted, the transit agency must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act and its implementing regulation at 49 CFR part 24 in acquiring the railroad ROW.
13. If any Federal funding is used for the railroad ROW acquisition, then the value of that ROW would not be counted as local matching funds when a transit project is proposed to be built on the ROW with FTA grant assistance. If a transit agency were to acquire a railroad ROW entirely with non-Federal funding, then the value of that ROW could be counted as local matching funds when a transit project is proposed to be built on the ROW with FTA grant assistance. In this case, the value of only the portion of the railroad ROW needed for the FTA-assisted project would be counted as local matching funds.

² In this guidance, "to construct a transit project entirely with non-Federal funding" means that, other than the FTA funds used to acquire the railroad ROW, no Federal funds are used for any aspect of the subsequent transit project including the acquisition of vehicles or equipment, any form of construction, initial operations, etc.