U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: **INFORMATION:** Guidance on Early Acquisitions and Compliance with NEPA and Uniform Act

Date: August 24, 2007

Original signed by:
From: Gloria M. Shepherd
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Planning, Environment, and Realty

In Reply Refer To:
HEPR-10

To: Division Administrators
Attn: Division Realty Professionals

Purpose

The purpose of this memorandum is to provide guidance for *"at risk"* early acquisitions[1] of real property by a State Department of Transportation (State DOT) where a State wishes to maintain Federal-aid funding eligibility for the project. The scope of this memorandum is limited to requirements relating to the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*) and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et seq.*) (Uniform Act). It is not intended to address all Federal requirements that may apply to early acquisitions with State funds.

Guidance

Early acquisitions of real property without contemporaneous Federal-aid participation and prior to completion of environmental review under NEPA, commonly referred to as *"at risk"* acquisitions, must comply with the Uniform Act and must not influence the decision of the environmental review process of the project required under NEPA. These requirements apply to all projects that receive or are expected to receive Federal-aid funding for any part of

[1] "Early acquisition" is defined in 23 CFR 710.105(b) as acquisition in advance of any FHWA authorization or agreement. The term "at risk" is used to explain that the States bear the risk associated with acquiring parcels that may not be required for the project if not within the approved alignment following the environmental process.

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the project[2]. These requirements are applicable even if the State DOT does not intend to apply acquisition costs against the State share under 23 CFR 710.501(b) or to seek reimbursement under 23 CFR 710.501(c).

This guidance affirms the longstanding Federal Highway Administration (FHWA) interpretation of NEPA and Uniform Act requirements where the State DOT wishes to acquire property prior to the completion of NEPA and still maintain Federal-aid eligibility for the project.

Background

In order for Federal-aid funds to participate in any project costs, the project must be carried out in conformity with applicable Federal and State laws and regulations. See 23 CFR 1.9 and *National Wildlife Federation* v. *Snow*, 561 F. 2d 227, 241 (D.C. Cir. 1976). Federal law on acquisitions in the Federal-aid Highway Program establishes various circumstances under which acquisitions in advance of the completion of NEPA may be accomplished with Federal-aid funding, or with the option of future Federal-aid credit or reimbursement. See 23 U.S.C. 108; 23 CFR 710.501(b)-(c); 23 CFR 710.503. The FHWA regulation at 23 CFR 710.501(a) does recognize that the legal authority for undertaking early acquisitions rests entirely on State law and that State DOTs may undertake early acquisitions entirely at their own expense and without any intention to seek future Federal-aid credit or reimbursement. Questions have arisen about the applicability of NEPA and the Uniform Act in such instances.

NEPA and "At Risk" Early Acquisitions

Early acquisitions, by definition, involve no contemporaneous Federal authorization or agreement covering those activities. This is in contrast to hardship and protective acquisitions that utilize Federal funds for the transaction. (See 23 CFR 710.503 and 771.117(d)(12)). Thus, the early acquisitions themselves do not require the FHWA, NEPA review at the time of the acquisitions, but will require Federal/FHWA scrutiny and oversight to ensure that such acquisitions do not influence the Federal environmental review of the project. This is true regardless whether the State DOT seeks subsequent credit or reimbursement by satisfying the conditions in 710.501(b) or (c).

Evaluating the effect of early acquisition on the environmental review of a project during the NEPA process involves consideration of whether the right of way acquisition would exert an influence on such issues as the need to construct the project, the selection of alternatives, and the choice of a specific project location. Recent case law reinforces the NEPA requirement that any agency action prior to the completion of the environmental review must not damage the environment or limit the choice of reasonable alternatives. See *National Audubon Society*

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[2] See, e.g., memorandum dated April 26, 2007, from James D. Ray, Chief Counsel, to Gloria M. Shepherd, Associate Administrator for Planning, Environment and Realty, titled "Applicability of the Uniform Act when Federal-aid Funds Participate in Distinct Preconstruction Activities."

v. Department of Navy, 422 F. 3d 174, 203-206 (4th Cir. 2005). This interpretation is based on the Council on Environmental Quality (CEQ) regulation at 40 CFR 1506.1, which limits actions during NEPA.

While the 1999 adoption of the early acquisition regulation at 23 CFR 710.501 broadened the circumstances under which early acquisitions may qualify for Federal-aid Highway Program reimbursement or credit, that regulatory change did not alter the underlying NEPA constraint on project-related activities during NEPA.

To reduce the confusion on this point, the Administration proposes to clarify its regulations in 23 CFR Part 771 through its recent Notice of Proposed Rulemaking (72 FR 44038, August 7, 2007). Among the proposed changes to part 771 is a revision of the Section 771.113 discussion of existing exceptions to the general prohibition against property acquisition prior to completion of the NEPA process. The proposed amendment would provide, in part:

> (d) The prohibition in paragraph (a)(1) of this section is limited by the following exceptions:
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> > *(4) The FHWA regulations at 23 CFR 710.501 address early acquisition of right-of-way by a State prior to the execution of a project agreement with the FHWA or completion on NEPA. In 710.501(b) and (c), the regulation establishes conditions governing subsequent requests for Federal-aid credit or reimbursement for the acquisition. Any State-funded early acquisition for a Federal-aid highway project where there will not be Federal-aid highway credit or reimbursement for the early acquisition is subject to the limitations described in the CEQ regulations at 40 CFR 1506.1 and other applicable Federal requirements.*

In summary, when a State DOT proceeds with early acquisition using its own money and with no intention of seeking Federal-aid credit or reimbursement, the FHWA nonetheless must make certain that the State DOT's acquisition actions do not affect the environmental analysis or review of the project, or bias the FHWA's decisions on the project. A State undertaking State-funded early acquisitions is doing so subject to the risk that the State may purchase right of way that is subsequently not used in a federally-assisted project either because the NEPA process yields a different decision than that which motivated the State to engage in early acquisition in the first place, or because the FHWA determines the standards for avoiding bias were not satisfied.

<u>*Uniform Act and Early Acquisitions*</u>

Review of the Uniform Act, its implementing regulations at 49 CFR Part 24, and the FHWA real estate regulations in 23 CFR Part 710 confirms that the required safeguards associated with acquisition and relocation on a Federal-aid project apply regardless whether the State

DOT subsequently requests reimbursement or credit for the early acquisition costs.[3] The Uniform Act expressly applies to projects where financial assistance will be available to pay for all or any part of the project's costs (see, e.g., 42 U.S.C. 4621(b), 4630, and 4655). The implementing regulations at 49 CFR Part 24 are consistent with the statute and similarly do not base applicability of the law upon the funding source for the acquisition itself. (See, e.g., 49 CFR 24.101 (b) and (d).

23 CFR Part 710 regulations also address this matter. Part 710 "applies whenever Federal assistance under title 23 of the United States Code is used," 23 CFR 710.103. While Section 710.501 does not specifically reference the Uniform Act, Section 710.309 provides expressly that the State "shall conduct acquisition and related relocation activities in accordance with 49 CFR Part 24."

In summary, when a State DOT proceeds with early acquisition using its own money and with no intention of seeking Federal-aid credit or reimbursement for the acquisition, the FHWA nonetheless must make certain that the State DOTs' acquisition actions do not violate the Uniform Act. A State undertaking State-funded early acquisitions is doing so subject to the risk that the FHWA might determine that the acquisitions violated the requirements of the Uniform Act described above, and consequently that the project cannot use Federal-aid funds.

Conclusion

This guidance affirms that early acquisitions must comply with the Uniform Act and must not influence the environmental evaluation of the project under NEPA if Federal-aid eligibility is to be maintained for the project. The FHWA recognizes that the acquisition of real property is critical to meeting objectives of FHWA and State DOTs, Divisions are encouraged to continue to work with their State DOT partners to explore appropriate use of all tools currently available to expedite acquisition of real estate, while complying with the applicable laws including NEPA and Uniform Act. This includes acquisitions permitted by 23 CFR 710.501 and 710.503 and undertaken in compliance with such provisions, and acquisitions authorized following a Tier I environmental approval. The Office of Real Estate Services will continue to coordinate with the Office of Project Development and Environmental Review, the Office of Chief Counsel, and others as appropriate to explore ways to improve program results in a manner consistent with applicable law. To the extent deemed necessary, the FHWA may issue further guidance or propose amendments to 23 CFR Part 710 at a future date.

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[3] This memorandum provides guidance in connection with early acquisitions undertaken in connection with a project expecting to receive Federal-aid reimbursement in order to preserve eligibility. It is not intended to address issues associated with acquisitions not undertaken in connection with a project. For information on the treatment of acquisitions in advance of a project , reference is made to existing *Questions and Answers* on the Office of Real Estate Services website at the following links:http://www.fhwa.dot.gov/tea21/qanda/1301_qa.htm, http://www.fhwa.dot.gov/realestate/21final.htm, and http://www.fhwa.dot.gov/realestate/ua/uafaqs.htm. As noted, the funding agency will review such acquisitions to determine if the intent of the acquisition was for a federally-funded program or project, in which case the provisions of the Uniform Act and the implementing regulations apply.

For further information on right of way requirements, you may contact the Office of Real Estate Services Point of Contact serving your Division or Gerald Solomon by telephone at (202) 366-2037 or by email at Gerald.Solomon@dot.gov. For further information on NEPA requirements, you may contact Lamar Smith at (202) 366-8994 or by email at Lamar.Smith@dot.gov.