U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: **INFORMATION:** Early Utility Relocation Prior to Transportation Project Environmental Review and Section 11315 of the Bipartisan Infrastructure Law

Date: March 17, 2023

From: Hari Kalla /s/
Associate Administrator for Infrastructure

In Reply Refer To:
HIF

To: Directors of Field Services
Division Administrators
Director of Technical Services
Federal Lands Highway Division Engineers

This memorandum provides guidance regarding the implementation of provisions contained in the Infrastructure Investment and Jobs Act (IIJA) (Public Law 117-58, also known as the "Bipartisan Infrastructure Law" (BIL)) that allow for early utility relocation prior to a transportation project environmental review. Except for the statutes and regulations cited, the contents of this document do not have the force and effect of law and are not meant to bind the States or the public in any way. This document is intended only to provide information regarding existing requirements under the law or agency policies.

Section 11315 of the BIL amends section 123 of title 23, United States Code (U.S.C.), to prescribe the conditions under which a State may carry out and be reimbursed for the costs of an early utility relocation project. Title 23, U.S.C., section 123(a)(2) defines an early utility relocation project as "utility relocation activities identified by the State for performance before completion of the environmental review process for the transportation project."[1] A State may carry out at its own expense an early utility relocation project for a transportation project before the State completes the environmental review process for the transportation project. Subject to the requirements in 23 U.S.C. 123, funds apportioned under title 23, U.S.C., may now be used to reimburse the State for costs incurred by the State, including subrecipient costs, for an early utility relocation project.

To carry out an early utility relocation project, regardless of whether reimbursement will be sought, a State must comply with general requirements applicable to all utility relocation projects. *See* 23 U.S.C. 123(c). These include but are not limited to: FHWA regulations governing utilities at 23 CFR part 645, the National Environmental Policy Act (42 U.S.C. 4321 et seq.) (NEPA), the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (42 U.S.C. 4601 et seq.), and other applicable Federal laws and regulations.

[1] A utility relocation activity is defined in 23 U.S.C. 123(a)(6) as "an activity necessary for the relocation of a utility facility, including preliminary and final design, surveys, real property acquisition, materials acquisition, and construction."

Once the transportation project for which the early utility relocation project was required has been authorized for construction, in order to be eligible for reimbursement for early utility relocation project costs, 23 U.S.C. 123(b)(4)(B) requires a State to certify, and FHWA to concur, that:

i. The early utility relocation project is necessary to accommodate a transportation project eligible for assistance under title 23, U.S.C.;
ii. The early utility relocation project complies with all applicable laws, including FHWA regulations in title 23, Code of Federal Regulations. The early utility relocation project follows applicable financial procedures and requirements, including documentation of eligible costs and the requirements under 23 U.S.C. 109(l);
iii. Prior to commencement of utility relocation activities, an environmental review process[2] was completed for the early utility relocation project that resulted in a finding that the early utility relocation project would not result in significant environmental impacts, and would comply with other applicable Federal environmental requirements;[3]
iv. The early utility relocation project did not influence the environmental review process for the transportation project; the decision relating to the need to construct the transportation project; or the selection of the transportation project design or location. The utility relocation cannot predetermine the outcome of the environmental review process. The selected alternative may result in the need for different or additional utility relocations or may negate the need for any relocation; If this is the case, only the relocation that was necessitated by the transportation project will be eligible for reimbursement.
v. The State provided adequate documentation of eligible costs the State has incurred for the early utility relocation project;
vi. The transportation project for which the early utility relocation project was required is on the applicable State Transportation Improvement Program and metropolitan Transportation Improvement Program;
vii. The transportation project for which the early utility relocations was required completed the NEPA process and complies with other environmental laws; and

The early utility relocation project does not need to be authorized prior to commencing the work but should be authorized in FMIS once the Division office has verified the above requirements have been met.

Reimbursement for early utility relocation activities is also subject to the requirements of 23 U.S.C. 123(b)(1) to (b)(3), which apply to reimbursement for all utility relocation activities. This includes the requirement that the State demonstrate to the satisfaction of the Secretary that the State paid the cost of the utility relocation activity from State funds. See 23 U.S.C. 123(b)(3).

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[2] Environmental review process is defined under 23 U.S.C. 139(a)(5) as the process for preparing for a project an environmental impact statement, environmental assessment, categorical exclusion, or other document prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

[3] Utility relocations are typically processed as Categorical Exclusions (CE) under 23 CFR 771.117(c)(2). CEs are actions that, based on FHWA's past experience with similar actions, do not involve any significant environmental impacts. *See* 23 CFR 771.117(a). However, any action that normally would be classified as a CE but could involve unusual circumstances will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Examples of these unusual circumstances may be found at 23 CFR 771.117(b).

If you have any questions on early utility relocation, please contact Julie Johnston in the Office of Infrastructure at (202) 591-5858 or Lev Gabrilovich in the Office of Chief Counsel at (202) 366-3813.

Attachments:

- Section 11315 of the Bipartisan Infrastructure Law

(1) in subsection (a)(2)(G), by inserting ", including the payment of fees awarded under section 2412 of title 28" before the period at the end;

(2) in subsection (c)—

(A) by striking paragraph (5) and inserting the following:

"(5) except as provided under paragraph (7), have a term of not more than 5 years;";

(B) in paragraph (6), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following:

"(7) for any State that has participated in a program under this section (or under a predecessor program) for at least 10 years, have a term of 10 years.";

(3) in subsection (g)(1)—

(A) in subparagraph (B), by striking "and" at the end;

(B) in subparagraph (C), by striking "annual";

(C) by redesignating subparagraph (C) as subparagraph (D); and

(D) by inserting after subparagraph (B) the following:

"(C) in the case of an agreement period of greater than 5 years pursuant to subsection (c)(7), conduct an audit covering the first 5 years of the agreement period; and"; and

(4) by adding at the end the following:

"(m) AGENCY DEEMED TO BE FEDERAL AGENCY.—A State agency that is assigned a responsibility under an agreement under this section shall be deemed to be an agency for the purposes of section 2412 of title 28.".

SEC. 11314. STATE ASSUMPTION OF RESPONSIBILITY FOR CATEGORICAL EXCLUSIONS.

Section 326(c)(3) of title 23, United States Code, is amended—

(1) by striking subparagraph (A) and inserting the following:

"(A) except as provided under subparagraph (C), shall have a term of not more than 3 years;";

(2) in subparagraph (B), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(C) shall have a term of 5 years, in the case of a State that has assumed the responsibility for categorical exclusions under this section for not fewer than 10 years.".

SEC. 11315. EARLY UTILITY RELOCATION PRIOR TO TRANSPORTATION PROJECT ENVIRONMENTAL REVIEW.

Section 123 of title 23, United States Code, is amended to read as follows:

"§ 123. Relocation of utility facilities

"(a) DEFINITIONS.—In this section:

"(1) COST OF RELOCATION.—The term 'cost of relocation' includes the entire amount paid by a utility properly attributable to the relocation of a utility facility, minus any increase in the value of the new facility and any salvage value derived from the old facility.

"(2) EARLY UTILITY RELOCATION PROJECT.—The term 'early utility relocation project' means utility relocation activities

identified by the State for performance before completion of the environmental review process for the transportation project.

"(3) ENVIRONMENTAL REVIEW PROCESS.—The term 'environmental review process' has the meaning given the term in section 139(a).

"(4) TRANSPORTATION PROJECT.—The term 'transportation project' means a project.

"(5) UTILITY FACILITY.—The term 'utility facility' means any privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, stormwater not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, that directly or indirectly serves the public.

"(6) UTILITY RELOCATION ACTIVITY.—The term 'utility relocation activity' means an activity necessary for the relocation of a utility facility, including preliminary and final design, surveys, real property acquisition, materials acquisition, and construction.

"(b) REIMBURSEMENT TO STATES.—

"(1) IN GENERAL.—If a State pays for the cost of relocation of a utility facility necessitated by the construction of a transportation project, Federal funds may be used to reimburse the State for the cost of relocation in the same proportion as Federal funds are expended on the transportation project.

"(2) LIMITATION.—Federal funds shall not be used to reimburse a State under this section if the payment to the utility—

"(A) violates the law of the State; or

"(B) violates a legal contract between the utility and the State.

"(3) REQUIREMENT.—A reimbursement under paragraph (1) shall be made only if the State demonstrates to the satisfaction of the Secretary that the State paid the cost of the utility relocation activity from funds of the State with respect to transportation projects for which Federal funds are obligated subsequent to April 16, 1958, for work, including utility relocation activities.

"(4) REIMBURSEMENT ELIGIBILITY FOR EARLY RELOCATION PRIOR TO TRANSPORTATION PROJECT ENVIRONMENTAL REVIEW PROCESS.—

"(A) IN GENERAL.—In addition to the requirements under paragraphs (1) through (3), a State may carry out, at the expense of the State, an early utility relocation project for a transportation project before completion of the environmental review process for the transportation project.

"(B) REQUIREMENTS FOR REIMBURSEMENT.—Funds apportioned to a State under this title may be used to pay the costs incurred by the State for an early utility relocation project only if the State demonstrates to the Secretary, and the Secretary finds that—

"(i) the early utility relocation project is necessary to accommodate a transportation project;

"(ii) the State provides adequate documentation to the Secretary of eligible costs incurred by the State for the early utility relocation project;

"(iii) before the commencement of the utility relocation activities, an environmental review process was completed for the early utility relocation project that resulted in a finding that the early utility relocation project—

"(I) would not result in significant adverse environmental impacts; and

"(II) would comply with other applicable Federal environmental requirements;

"(iv) the early utility relocation project did not influence—

"(I) the environmental review process for the transportation project;

"(II) the decision relating to the need to construct the transportation project; or

"(III) the selection of the transportation project design or location;

"(v) the early utility relocation project complies with all applicable provisions of law, including regulations issued pursuant to this title;

"(vi) the early utility relocation project follows applicable financial procedures and requirements, including documentation of eligible costs and the requirements under section 109(l), but not including requirements applicable to authorization and obligation of Federal funds;

"(vii) the transportation project for which the early utility relocation project was necessitated was included in the applicable transportation improvement program under section 134 or 135;

"(viii) before the cost incurred by a State is approved for Federal participation, environmental compliance pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) has been completed for the transportation project for which the early utility relocation project was necessitated; and

"(ix) the transportation project that necessitated the utility relocation activity is approved for construction.

"(C) SAVINGS PROVISION.—Nothing in this paragraph affects other eligibility requirements or authorities for Federal participation in payment of costs incurred for utility relocation activities.

"(c) APPLICABILITY OF OTHER PROVISIONS.—Nothing in this section affects the applicability of other requirements that would otherwise apply to an early utility relocation project, including any applicable requirements under—

"(1) section 138;

"(2) the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.), including regulations under part 24 of title 49, Code of Federal Regulations (or successor regulations);

"(3) title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.); or

"(4) an environmental review process.".

SEC. 11316. STREAMLINING OF SECTION 4(F) REVIEWS.

Section 138(a) of title 23, United States Code, is amended—

(1) in the fourth sentence, by striking "In carrying out" and inserting the following:

"(4) STUDIES.—In carrying out";

(2) in the third sentence—

(A) by striking "such land, and (2) such program" and inserting the following: "the land; and

"(B) the program";

(B) by striking "unless (1) there is" and inserting the following: "unless—

"(A) there is"; and

(C) by striking "After the" and inserting the following: "(3) REQUIREMENT.—After the";

(3) in the second sentence—

(A) by striking "The Secretary of Transportation" and inserting the following:

"(2) COOPERATION AND CONSULTATION.—

"(A) IN GENERAL.—The Secretary"; and

(B) by adding at the end the following:

"(B) TIMELINE FOR APPROVALS.—

"(i) IN GENERAL.—The Secretary shall—

"(I) provide an evaluation under this section to the Secretaries described in subparagraph (A); and

"(II) provide a period of 30 days for receipt of comments.

"(ii) ASSUMED ACCEPTANCE.—If the Secretary does not receive comments by 15 days after the deadline under clause (i)(II), the Secretary shall assume a lack of objection and proceed with the action.

"(C) EFFECT.—Nothing in subparagraph (B) affects—

"(i) the requirements under—

"(I) subsections (b) through (f); or

"(II) the consultation process under section 306108 of title 54; or

"(ii) programmatic section 4(f) evaluations, as described in regulations issued by the Secretary."; and

(4) in the first sentence, by striking "It is declared to be" and inserting the following:

"(1) IN GENERAL.—It is".

SEC. 11317. CATEGORICAL EXCLUSION FOR PROJECTS OF LIMITED FEDERAL ASSISTANCE.

Section 1317(1) of MAP–21 (23 U.S.C. 109 note; Public Law 112–141) is amended—

(1) in subparagraph (A), by striking "$5,000,000" and inserting "$6,000,000"; and

(2) in subparagraph (B), by striking "$30,000,000" and inserting "$35,000,000".

SEC. 11318. CERTAIN GATHERING LINES LOCATED ON FEDERAL LAND AND INDIAN LAND.

(a) DEFINITIONS.—In this section:

(1) FEDERAL LAND.—