UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Case No. 19-5012

INDIAN RIVER COUNTY, FLORIDA;
INDIAN RIVER COUNTY EMERGENCY
SERVICES DISTRICT,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF
TRANSPORTATION; ELAINE L. CHAO,
in her official capacity as Secretary of Transportation;
DEREK KAN, in his official capacity as Under
Secretary of Transportation for Policy; FEDERAL
RAILROAD ADMINISTRATION; PAUL NISSENBAUM,
in his official capacity as Associate Administrator of the
Federal Railroad Administration,

Defendants-Appellees,

AAF HOLDINGS LLC,

Intervenor for Defendant-Appellee.

Appeal from the United States District Court
for the District of Columbia
Case No. 1:18-cv-00333-CRC

AMICUS CURIAE BRIEF OF INDIAN RIVER NEIGHBORHOOD ASSOCIATION IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

STEVEN L. BRANNOCK
TRACY S. CARLIN
BRANNOCK & HUMPHRIES

1111 West Cass Street, Suite 200
Tampa, Florida 33606
Tel: (813) 223-4300
Email: sbrannock@bhappeals.com
tcarlin@bhappeals.com
eservice@bhappeals.com
Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, counsel for Amicus Curiae, Indian River Neighborhood Association, Inc., hereby certify that, to the best of their knowledge, information and belief, there are no parent companies or publicly-held companies that have a 10% or greater ownership interest (such as stock or partnership shares) in the Amicus, Indian River Neighborhood Association, Inc.

Amicus Indian River Neighborhood Association, Inc. is a Florida not-for-profit corporation. The Association's mission states: "We represent non-partisan volunteer residents in neighborhoods throughout Indian River County with a common vision of pro-business and managed growth to preserve Indian River County's quality of life. We have no self-interest, no land ownership or profit motives. Our solitary purpose is to protect our community for the enjoyment of future generations." The Association's main focus in the past several years has been quality of life issues, the local environment, and opposing the AAF Project.

The Association and its members are concerned about the negative environmental and safety impacts the AAF Project will bring to local neighborhoods and the downtown community. They are also concerned that the proper processes and statutory requirements related to the AAF Project were not

met. Therefore, the Association supports the Appellants' call for a reversal of the district court's order granting summary judgment in favor of Appellees.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Plaintiffs-Appellants:

Indian River Neighborhood Association, Inc.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

C. Related Cases

This civil action is related to two prior civil actions brought in the U.S. District Court for the District of Columbia:

1. *Indian River County v. Rogoff*, Civil No. 16-cv-00460-CRC

2. *Martin County, Florida v. U.S. Department of Transportation*, Civil No. 15-cv-00632-CRC

These earlier actions were dismissed as moot when the defendant federal agency withdrew the final agency action challenged in those actions. No appeal was taken from the decision dismissing the prior actions as moot.

TABLE OF CONTENTS

Corporate Disclosure Statement iii

Certificate as to Parties, Rulings, and Related Cases v

Table of Authorities vii

Glossary of Abbreviations x

Identity of Amicus and Parties' Consent to Filing Brief 1

Argument 4

Highway Trust Fund Assistance is Not Authorized for the AAF Project 4

TIFIA Assistance is the Only Title 23 Federal Assistance Available for the AAF Project 11

The District Court's Reliance on the Kussy Interpretation of § 142(m)(1)(A) is Misplaced 20

The Association Adopts Appellants' Arguments Under NEP 22

Conclusion 23

Certificate of Compliance 23

Certificate of Service 24

Addendum

TABLE OF AUTHORITIES

Cases

Barrett v. United States,
423 U.S. 212 (1976)..6

Carr v. U.S.,
560 U.S. 438 (2010)... 6, 7, 8

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984)..5, 6

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,
484 U.S. 49 (1987)..6

Morton v. Mancari,
417 U.S. 535 (1974)..16

Pereira v. Sessions,
138 S. Ct. 2104 (2018)...5, 8

United States v. Wilson,
503 U.S. 329 (1992)..6

Statutes

1 U.S.C. § 1 7

23 U.S.C. § 101(a)(5) (2006) 21

23 U.S.C. § 101(a)(21) (2006) 11

23 U.S.C. § 130 22

23 U.S.C. § 130(a) 16

23 U.S.C. § 133 (2005) 4, 10, 15, 16, 17, 18, 19, 22

23 U.S.C. § 133(b) (2005) 16, 17

23 U.S.C. § 133(b)(7) (2005) 16, 17

23 U.S.C. § 601 (2005) 9, 12, 13

23 U.S.C. § 601(a)(11) (2005) 12

23 U.S.C. § 601(a)(12) (2005) 14

23 U.S.C. § 601(a)(12)(A) (2005) 12

23 U.S.C. § 601(a)(12)(C) (2005) 12, 14

23 U.S.C. § 602 (2005) 9, 12, 13

23 U.S.C. § 603 (2005) 9, 12, 13

23 U.S.C. § 604 (2005) 9, 12, 13

23 U.S.C. § 605 (2005) 9, 12, 13

23 U.S.C. § 606 (2005) 9, 12, 13

23 U.S.C. § 607 (2005) 12, 13

23 U.S.C. § 608 (2005) 12, 13

23 U.S.C. § 609 (2005) 12, 13

26 U.S.C. § 142(m) 6, 12, 13, 15, 19

26 U.S.C. § 142(m)(1)(A) 3, 4, 5, 7, 8, 9, 10, 11, 14, 17, 20, 22

26 U.S.C. § 142(m)(1)(A)(1) 4, 15, 21

49 U.S.C. § 5302(a)(10) (2005) 10, 13, 16

Pub. L. 114-94 15

Rules

D.C. Cir. R. 26.1 iii

D.C. Cir. R. 29 1

Fed. R. App. P. 26.1 iii

Fed. R. App. P. 29 .... 1, 23

Fed. R. App. P. 32 .... 23, 24

Regulations

23 C.F.R. § 646.210(b) 19

23 C.F.R. § 646.210(b)(1) 18

GLOSSARY OF ABBREVIATIONS

Except for the following, Indian River Neighborhood Association, Inc. adopts and will use the same abbreviations as those set forth in the Glossary contained in the Brief for Plaintiffs-Appellants:

IRS	Internal Revenue Service
TIFIA	Transportation Infrastructure Finance and Innovation Program

IDENTITY OF AMICUS AND PARTIES' CONSENT TO FILING BRIEF

Amicus curiae, Indian River Neighborhood Association, Inc., is a Florida not-for-profit corporation. All of the parties to this case, including Appellants, the federal Defendants/Appellees, and Appellee/Intervenor, AAF, have consented to the filing of this Amicus *Curiae* Brief on behalf of the Appellants and in favor of reversal. *See* FRAP 29(a)(2); D.C. Cir. R. 29(b). Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned certifies that no party's counsel authored this brief in whole or in part, no party or a party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting this brief.

The Association's existence began in 2004 when development in Indian River County was overtaking the community. The County had always been more of an "old Florida" region, far enough from the major cities to allow a special kind of more rural community culture to form. As development went wild in Indian River County in the early 2000s, many individuals and neighborhoods in Indian River County were concerned about the future and what damage unmitigated growth would cause to the quality of life and the "old Florida" character of the County. As a result, several Indian River County neighborhoods came together to form the Association. Since then, the Association has grown and has added new

members. The Association's mission is to be pro-business and pro-managed growth while also preserving Indian River County's quality of life and unique "old Florida" character. The Association does not own land or have a profit motive. Instead, its purpose is to protect the community for the enjoyment of future generations.

The Association first learned of the AAF Project in late 2013 or 2014. Its staff and volunteers attended several public meetings where the AAF executives were giving presentations and touting the benefits of the project for the community. Despite the glossy public relations campaign, the Association realized that the project would negatively impact the community and its character. Over time, it became even more concerned about the potential safety impacts that would be caused by 32 high-speed trains per day running through the downtown and local neighborhoods.

Although there had been freight train service to the area for many years, the Association realized that the AAF Project was different in that it would provide no economic or other benefit to the local community of Indian River County. The two nearest train depots or stops would be in West Palm Beach and Orlando, both of which are over an hour away from Indian River's closest county lines. Thus, the project would bring environmental and safety impacts, but no significant economic

benefit in the form of jobs or passenger spending in the local economy. Consequently, the Association has opposed this project from the beginning.

At various stages, including in response to the DEIS and the EIS, the Association has raised numerous concerns regarding the dangers of the AAF Project to human safety, local historic sites, wildlife, local flora and fauna, and the character and culture of the community. The Association is concerned that as a result of AAF's statutorily-unsupported financing scheme, AAF is now selling tax exempt PABs based on an interpretation of 26 U.S.C. § 142(m)(1)(A) that the Association believes contradicts the letter and obvious intent of title 23. The Appellees' interpretations of § 142(m)(1)(A) defy common sense and make a mockery of the law for the reasons set forth in the Brief for Plaintiffs-Appellants and for the additional reasons contained in this amicus brief.

If this Court interprets the relevant provisions as required by law, the tax-exempt interest on the PABs will be impaired and, under the applicable bond documents, the Trustee for the PABs will be obligated to notify the bondholders of a Determination of Taxability. That would, as a practical matter, bring Phase II of the AAF Project to a screeching halt. As an association of local neighborhoods and citizens who will be directly impacted by the AAF Project, including the noise, vibration, and safety risks it presents, the Association has a direct interest in the

outcome of this case, which could end the AAF Project once and for all. The end of the AAF Project will benefit the Association and its members.

ARGUMENT

The district court's order should be reversed. The threshold issue here is whether, under 26 U.S.C. § 142(m)(1)(A), the AAF Project is eligible for private activity bonds and whether the interest on those PABs are tax exempt. *See* 26 U.S.C. § 142(m)(1)(A). If the AAF Project is not eligible for tax exempt interest on the PABs, the project will not be feasible and AAF would abandon it. As a result, this entire exercise could be much ado about nothing. And, because the district court misinterpreted § 142(m)(1)(A) and the express eligibility requirements for a qualified project under 23 U.S.C. § 133, as it existed in 2005 when § 142(m)(1)(A) was enacted, the order should be reversed.

Highway Trust Fund Assistance is Not Authorized for the AAF Project

The order should be reversed because the district court misinterpreted the applicable statute, § 142(m)(1)(A)(1). That statute specifically requires that any project to be financed with a PAB allocation must be currently receiving title 23 federal assistance funds. But, the record does not support the district court's conclusion that the AAF Project, itself, was currently receiving title 23 federal assistance. Instead, the district court found the project to be qualified under § 142(m)(1)(A) because some portions of the rail line had received title 23 federal

assistance in the past to assist with isolated railway-highway grade crossing improvements. But, that interpretation and application of the relevant statutes flies in the face of the plain language of the statute and Congress' intent as expressed therein. Therefore, the order should be reversed.

Pursuant to § 142(m)(1)(A), the term "qualified highway or surface freight transfer facilities" means "any surface transportation project which *receives* assistance under title 23, United States Code (as in effect on the date of the enactment of this subsection."). 26 U.S.C. § 142(m)(1)(A) (emphasis added). The Association does not take the position that because the AAF Project is a railway project rather than a highway project or freight transfer facility, the project is not qualified under this provision. Rather, the Association takes issue with the district court's conclusion that because the "project" had *received* approximately $9 million in title 23 federal assistance in the form of railway-highway grade crossings in the past and is planning to receive additional monies in the future, the AAF Project otherwise qualifies under § 142(m)(1)(A). This reading of the statute ignores the plain language of the statute and the congressional intent expressed therein. Indeed, as is discussed below, it is an unprecedented construction of the statute even for DOT. Consequently, the DOT's interpretation of § 142(m)(1)(A) is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Pereira v. Sessions*, 138 S. Ct.

2104, 2113 (2018) (stating that the Court need not resort to *Chevron* deference where Congress has supplied a clear and unambiguous answer to the interpretative question at hand (citing *Chevron*, 467 U.S. at 842-43) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")).

Throughout § 142(m), Congress consistently used the present tense when it stated that to be qualified, the project must be one that "receives" federal assistance under title 23. The consistent use of the present tense "receives Federal assistance" rather than in the past, "received," or present perfect, "has received," reinforces the conclusion that pre-application federal assistance falls outside the statute's compass. *See Carr v. U.S.*, 560 U.S. 438, 447-48 (2010). As the Court stated in *Carr*: "[c]onsistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Id*. (citing *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past …, but it did not choose this readily available option"); *Barrett v. United States*, 423 U.S. 212, 216 (1976) (observing that Congress used the present perfect tense to "denot[e] an act that has been completed")). As the Court noted, the Dictionary Act also ascribes

significance to the verb tense. *Carr*, 560 U.S. at 448. It provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[,] … words used in the present tense include the future as well as the present." *Id*. (quoting 1 U.S.C. § 1). By implication then, the Dictionary Act provides that the present tense does not generally include the past. *Id*. As a result, a statute that defines a qualified project as one that "receives Federal assistance" should not readily be interpreted to encompass a project that only received federal assistance in the past and not during the time of the PAB allocation application. *See Carr*, 560 U.S. at 448.

Rather, under the plain language Congress used in the statute, to be entitled to an allocation under the PAB program, the project must be a surface transportation project that is currently receiving federal assistance under title 23 or is guaranteed to receive future federal assistance under title 23. The record in this case does not support such a finding. Indeed, the district court's finding that the AAF Project did qualify for PAB allocation under § 142(m)(1)(A) because the railroad line had received $9 million in title 23 assistance related to railway-highway grade crossings in the past is not supported by the plain language of the statute. At the time of AAF's PAB application in 2017 (Dkt. 51, p.4), the record showed that the railroad line had received $21 million in Highway Trust funds between 2005 and 2014. (Dkt. 51, p. 23). No record evidence existed, however,

that the AAF Project or any part of it was, in fact, receiving federal assistance under title 23 in the form of railway-highway grade crossings in 2017 when AAF re-filed its application for a PAB allocation related to Phase II of the AAF Project. (Dkt. 51, pp. 4 & 23). Similarly, the district court's finding that title 23 investments for railway-highway grade crossings related to the rail corridor involved in the AAF Project are planned (but not guaranteed) for the future is insufficient to satisfy the congressional requirement that the project "receives" federal assistance under title 23 at the time the PAB allocation is made. Therefore, both the district court's and the Appellees' interpretations of the plain language of the statute are incorrect and not entitled to deference. *See Pereira*, 138 S. Ct. at 2113.

Indeed, to reach the conclusion that the AAF Project is qualified and eligible under § 142(m)(1)(A), the district court altered the statute to say that the Secretary was permitted to conclude that the AAF Project "receive[d] Federal assistance under title 23[.]" (*See* Dkt. 51, p. 23 (citing 26 U.S.C. § 142(m)(1)(A) (alteration added by district court))). But that alteration totally changed the plain language of the statute and longstanding rules of statutory interpretation as set out in the Dictionary Act. *See Carr*, 560 U.S. at 448. Therefore, the mere facts that: 1) the AAF Project or at least some of the railway-highway grade crossings along the rail corridor received some federal assistance under title 23; and 2) the AAF Project

has some speculative hope of receiving future assistance with regard to some of the railway-highway grade crossings, does not satisfy the requirements of § 142(m)(1)(A) or the eligibility requirements for qualified PAB allocations under 23 U.S.C. §§ 601-06, generally known as TIFIA, discussed, *infra*. Therefore, because the district court misinterpreted and misapplied the requirements of § 142(m)(1)(A), the order should be reversed.

The order should also be reversed because the district court's conclusions about the title 23 federal assistance received by the corridor in the past and expected in the future is not supported by the record and is pure speculation. The district court concluded that FDOT's allocation of $9 million in title 23 funding must have been intended to benefit the AAF Project specifically. (*See* Dkt. 51, p. 23 ("Given that the AAF [P]roject received substantial attention in Florida, the Court is skeptical that the State's Department of Transportation disbursed (and increased) this Title 23 funding without the knowledge – if not purpose – of benefiting the project.")). Nothing in the record supports that conclusion. And, even if that were true, it still refers to past assistance, not present or even definite (as opposed to merely planned) future assistance. Even the DOT tacitly acknowledged below that the statutory requirement that a project receive title 23 funding cannot be construed so broadly as to allow the DOT to bootstrap a project into PAB eligibility based solely on an incidental and unintentional benefit from

the title 23 funds. (*See* Dkt. 51, p. 22 (citing H'rg Tr. at 64:9-23)). Thus, the district court correctly stated that the record must support the conclusion that the funds were distributed to benefit the project. (Dkt. 51, p. 22). But then, despite that correct statement of the standard, and in the complete absence of record evidence that the title 23 funds were distributed with the intent to benefit the AAF Project, specifically, the district court concluded that the FDOT must have disbursed the title 23 funds to "benefit" the AAF Project. Because the record does not support that conclusion, however, the order should be reversed.

Furthermore, the district court's apparent disregard for the plain text of title 23 requires a reversal of the order. Indeed, AAF never satisfied the only provisions in title 23 under which the AAF Project, as an intercity passenger train facility, could possibly qualify as an eligible project under title 23. Equally as important and ignored by the district court is the fact that under 23 U.S.C. § 133 (as it existed when § 142(m)(1)(A) was enacted), Highway Trust Fund monies may be spent "only for" certain specified "eligible projects." 23 U.S.C. § 133 (2005). These projects clearly included mass transit passenger rail projects, but did not include intercity passenger rail projects, like the AAF Project, as projects qualified for title 23 funds. 23 U.S.C. § 133 (2005); *see* 49 U.S.C. § 5302(a)(10) (2005) (expressly excluding intercity passenger rail projects from the definition of public transit).

Title 23 defines "project" to include "an undertaking to construct a particular portion of a highway … or any other undertaking eligible for assistance under this title." 23 U.S.C. § 101(a)(21) (2006). The word "eligible" is key here. Logic dictates that Congress must not only have intended that a "project" under § 142(m)(1)(A) be presently receiving federal assistance under title 23, but also that the project be "eligible" for federal assistance under title 23. Eligibility for federal assistance under title 23 is an obvious threshold requirement.

The district court reasoned, however, that it was "reasonable" for DOT to conclude that the AAF Project "receives" federal assistance under title 23 because the project had "directly benefitted" from approximately $9 million in federal Highway Trust Funds in the past. (Dkt. 51, p. 23). However, those funds were authorized under title 23 between 2005 and 2014, some three years before AAF's current PAB-allocation application and were spent on safety improvements made at railway highway grade crossings along the existing north-south railroad corridor to be used by the AAF Project and owned by Florida East Coast Railway, a freight hauling company. (*Id.*). But the district court did not rule that the AAF Project was "eligible" for that assistance under title 23. The question is why?

TIFIA Assistance is the Only Title 23 Federal Assistance Available for the AAF Project

The Association asserts that the district court avoided that question because AAF never applied for or sought federal assistance under TIFIA, the only eligible

assistance for the AAF Project. AAF likely did not seek TIFIA assistance because under that program, AAF's financing would have had to undergo a credit-worthiness analysis to avoid having the bonds be deemed to be "junk bonds." AAF apparently did not want to have to meet that requirement. Consequently, it crafted a more convoluted interpretation of § 142(m) and persuaded DOT to utilize that interpretation as well. But, that interpretation and application of the statute is simply not supported by the letter and intent of the relevant provisions. Therefore, the district court's decision, which adopted that incorrect interpretation, should be reversed.

The only provisions in title 23 that authorize federal assistance for an intercity passenger rail facility like the AAF Project are set forth in 23 U.S.C. §§ 601-609 (2005), commonly known as TIFIA. Section 601(a)(11) states that such a facility may be privately owned. 23 U.S.C. § 601(a)(11). Under § 601(a)(12)(C), the definition of "project" expressly includes, in pertinent part, "a project for intercity passenger … rail facilities and vehicles …." 23 U.S.C. § 601(a)(12)(C) (2005). This definition is significant because under § 601(a)(12)(A), a "project" is defined as "any surface transportation project eligible for Federal assistance under this title [title 23] or chapter 53 of title 49." 23 U.S.C. § 601(a)(12)(A). Therefore, § 601(a)(12)(C) tells us that the drafters of the TIFIA provisions understood that no other provision in title 23 authorized federal assistance for an intercity passenger

rail facility, like the AAF Project, whether or not it is publicly owned. *See* 49 U.S.C. § 5302(a)(10) (2005) (expressly excluding intercity passenger rail from coverage under chapter 53 of title 49).

TIFIA also provides for a "federal security instrument" that backs senior private debt evidenced in this case by PABs. 23 U.S.C. §§ 601-09. TIFIA requires that the senior debt satisfy rigorous "credit worthiness standards" to assure that the debt's underlying obligations receive an investment-grade rating high enough to assure that they will not be deemed to be "junk bonds." 23 U.S.C. § 602.

Until AAF conceived of the AAF Project, only two passenger rail projects were financed through PABs under § 142(m). The PABs for both projects were backed by major TIFIA assistance under title 23, however. As a result, they were required to, and did, satisfy the investment-grade criterion set in § 602.

In contrast, AAF never applied for or even claimed its project was eligible for TIFIA assistance. If AAF had so applied and had satisfied all of the stringent conditions that must be met to obtain that federal assistance under title 23, no lawsuit challenging the validity of PAB allocations for that AAF Project could have been sustained on the ground that there is no authority under title 23 to provide federal assistance for such a project. That authority does exist, but only in TIFIA, which was not applied for here.

Consequently, the district court's conclusion that DOT's evaluation of this project was consistent with its longstanding interpretation of § 142(m)(1)(A) is incorrect. (*See* Dkt. 51, pp. 19, 21 n.3, and 22). To the contrary, the only times DOT has awarded PAB allocations to railway projects (as opposed to pure roadway projects) has been where the railway project receives TIFIA assistance under 23 U.S.C. § 601(a)(12)(C), whether or not the project is privately owned. DOT's interpretation of § 142(m)(1)(A) in this case is entirely unprecedented.

Indeed, based upon the DOT's own Build America website (https://www.transportation.gov/buildamerica/programs-services/pab, last accessed 4/16/19 (cited at Dkt. 51, p. 22)) and the DOT TIFIA link (https://www.transportation.gove/tifia/tifia-credit-program-overview (Projects Financed by TIFIA tab, last accessed 4/16/19)), at least thirteen of the PABs listed therein similarly relied upon and received TIFIA federal assistance for a PAB project that fit the definition of a "project" under § 601(a)(12). In each case, the amount of TIFIA assistance exceeded fifty percent (50%) of the principal amount of the bond issue. This amount therefore satisfied the implicit materiality standard that qualifies as a project under the "receives Federal assistance" requirement. The fact that the DOT's own Build America Bureau website relies solely upon the TIFIA provisions to pitch PABs supports the conclusion that, until AAF first applied for the $1.75 billion in PABs for Phases I and II in August 2014, DOT

relied heavily, if not exclusively, on the TIFIA provisions to hold a project to be both qualified and eligible under § 142(m)(1)(A)(1). It is also worth noting that out of the twenty-five bond issues identified on the Build America website, which amount to $8,989,907,000, only two of them (totaling $710,870,000) were for passenger rails facilities (plus, of course, the $600 million in PABs issued for Phase I of the AAF Project).

Rather than proceed under TIFIA and comply with its more stringent credit-worthiness requirements, AAF convinced DOT there was another, unprecedented way to satisfy the federal assistance test thereby allowing the PABs to be marketed without the required assurance that they not be "junk bonds." AAF's sleight of hand encouraged the DOT to look to Highway Trust Fund monies that involve no federal financial stake and hence impose no federal credit worthiness standards on the debt financing. Thus, this apparent ruse did not really seek to protect the investing public.

This ruse also conflicts with title 23, but for a different reason. Under 23 U.S.C. § 133 (as in effect when § 142(m) was enacted into law), Highway Trust Fund monies could be spent "only" for certain specified "eligible projects." 23 U.S.C. § 133.[1] Thus, at the time § 142(m) became law – the relevant time – the only kind of passenger rail facilities included in "eligible projects" were public

[1] The word "only" was deleted in 2015. *See* Pub. L. 114-94, Div. A, Title 1, §§ 1109(b), 1407(b), 1446(d)(5)(C), Dec. 4, 2015, 129 Stat. 1338, 1410, 1438.

mass transit projects "eligible for assistance under chapter 53 of title 49." *Id.* Any Highway Trust Fund monies used to help fund those projects were drawn from the Fund's "Transit Account." This is important because, under chapter 53, the only kind of passenger rail facilities included in the exclusive list of "Eligible Projects" were public mass transit passenger rail facilities seeking federal grant assistance through a governmental unit. The AAF intercity rail project does not fit that description. *See* 49 U.S.C. § 5302(a)(10) (2005).

The bottom line is that the list of "eligible projects" set forth in § 133(b) does not include intercity passenger rail projects, like the AAF Project. 23 U.S.C. § 133(b) (2005). This unambiguous exclusion makes perfect sense given the source of funding made available under § 133, *i.e.*, Highway Trust Funds, and the more problematic impacts such projects have on materially reducing highway congestion. For the same reasons, "eligible projects" do not include freight rail projects. *Id.*

Because the nature of the AAF Project is not included in the definition of "eligible projects" in § 133, Appellees seized instead on § 130(a) – "projects for the elimination of hazards of railway-highway crossings" – in the obvious hope that no one would notice that these projects are clearly included in the exclusive list of "eligible projects" under § 133(b)(7), the more specific statute on the subject. *See generally Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where

there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”). Section 133(b)(7) addresses “highway and transit safety infrastructure improvements and programs, … hazard elimination … railroad-highway grade crossings.” 23 U.S.C. § 133(b)(7). In short, § 133 still applies and thus controls for which “eligible projects” Highway Trust Fund monies may be spent.

In short, Appellees’ rationale is that crossing improvements funded with Highway Trust Fund monies drawn from the “Highway Account” were made *for* the AAF Project, even though the AAF Project itself is not an eligible project under § 133 for which such federal assistance may be given. This convoluted logic makes no sense.

Congress could not possibly have intended that, under § 142(m)(1)(A), a project could “receive” federal assistance under such contradictory circumstances. By this stretch of “logic” about crossing improvements, Florida East Coast Railway could have sought PAB financing of the freight corridor infrastructure improvements for its freight-train business under § 133 and likewise been determined to be qualified for PAB allocation under the same mind-boggling interpretation of the plain language of § 142(m)(1)(A), where § 133(b) expressly excludes freight-related projects. Such a construction of § 142(m)(1)(A) cannot stand. If it does, it will lead to absurd results in the PAB allocation process. Any

one claiming even a peripheral, past benefit, whether direct or indirect, out of title 23 federal assistance from crossing improvements could properly qualify for PABs, and PABs that are exempt from the strict creditworthiness analysis required by the TIFIA Program. Given the very limited availability of PABs, such a broad interpretation would create a free for all for all sorts of rail facilities otherwise unqualified and ineligible for federal assistance under title 23.

In the district court, Appellees seemed to ignore the limitations of § 133, in part, because the district court should have asked whether, at the time the Highway Trust Fund monies were used to pay for the railroad-highway crossing improvements, DOT or FDOT documented or even thought that at least one of the intended purposes of the use of the monies was to benefit an intercity passenger rail project. The federal Appellees would find it particularly difficult to establish that intent where their own regulation provides otherwise. Indeed, 23 C.F.R. § 646.210(b)(1) reads, in pertinent part: "Projects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." In other words, the intended benefit of the funds is the roadway, not the railway. "The reason no net benefit for the improvements is attributed to the railroads is that they are viewed under the law as highway (not railroad) improvements brought on by the highways crossing the railroad tracks." *See* FHWA's "Railroad-Highway Grade Crossing Handbook," p.

7, found at https://safety.fhwa.dot.gov/hsip/xings/com_roaduser/07010, last accessed on April 16, 2019. In the last paragraph of the section titled Government Agency Responsibility and Involvement, the Handbook sums up each party's responsibilities as follows:

> Although the railroads retain responsibility for the construction, reconstruction and maintenance of the track structure and riding surface at the highway-rail intersection, their obligation for the roadway usually ends within a few inches of the outside ends of the ties that support the rails and the crossing surface. The street or highway agency has responsibility for the design, construction, and maintenance of the roadway approaches to the crossing, even though these approaches may lie within the railroad's right of way.

See Handbook, p. 17 (footnote omitted). That the expenditure of Highway Trust Fund monies for the improvements on even all the existing grade crossings within the AAF Project should cause such discrete highway/roadway projects to morph into a surface transportation projects as contemplated by § 142(m) and limited by § 133 defies common sense. Stated differently: Not only does § 133 prohibit the use of Highway Trust Fund monies to fund crossing improvements for the AAF Project, but DOT's own regulation, 23 CFR §646.210(b), goes one step farther to indicate that DOT's end run around that prohibition in § 133 also runs afoul of the regulation's "no ascertainable net benefits" determination. As a result, the district court's contrary interpretation of § 142(m) and its complete failure to address the limitations provided by § 133 must be reversed.

The District Court's Reliance on the Kussy Interpretation of § 142(m)(1)(A) is Misplaced

The order on review should also be reversed because, to conclude that the AAF Project was qualified under § 142(m)(1)(A), the district court misinterpreted the October 7, 2015, FHWA opinion letter submitted to the IRS by Edward V.A. Kussy, Acting Chief Counsel of FHWA. (AR75346). The district court concluded that the Kussy letter establishes that DOT's allocation of PABs to the AAF Project is consistent with DOT's longstanding interpretation of projects under § 142(m)(1)(A). (*See* Dkt. 51, pp. 23-24). The district court noted that the Kussy letter opined that "the most reasonable reading … permits the proceeds of [PABs] authorized by this provision to be used on the *entire* transportation facility that is being financed and constructed even though only a portion of that facility receives Federal assistance under title 23." (Dkt. 51, p. 24 (citing AR73546)). But Plaintiffs (and now the Association) have never disagreed with that statement in the Kussy letter – as far as it goes. Given the date the Kussy letter was transmitted to the IRS, however, it is implicit in that letter that FHWA assumes that the entire transportation facility, and not just the part thereof receiving title 23 assistance, qualifies as a title 23 project. At that time, it is quite possible that no one at FHWA even appreciated that, in addition to highways, a passenger rail facility could qualify as an eligible title 23 project under TIFIA. Indeed, the Kussy letter focuses only on: 1) when highway facilities are constructed under the Federal-Aid

Highway Program; 2) the case where the entire highway facility is eligible for federal assistance; and 3) how to fund particular highway projects (or portions thereof). The letter draws a distinction between "highway facilities" or "the entire transportation facility" or "facility" or "portions of the facility or activities associated with the construction of the facility" characterized as a "project." (AR73546). But in its summation, the letter unequivocally states that "PAB proceeds may be used on any *qualified* facility that *includes* a project funded with Federal-aid highway funds made available under title 23." (*Id*. (emphases added)). It would be illogical to interpret that sentence to mean that an *unqualified* facility that *includes* a small part that is funded with Federal Highway Trust Fund monies is otherwise an "eligible project" under § 142(m)(1)(A)(1).

The word "qualified" simply cannot be ignored. Even in the case of a "highway," as opposed to an intercity passenger rail project, not all "highways" are qualified for federal assistance under title 23. Rather, 23 U.S.C. § 101(a)(5) provides: "The term 'Federal-aid highway' means a public highway eligible for assistance under this chapter other than a highway functionally classified as a local road or rural minor collector." Under the federal Appellees' logic, PABs could finance even reconstruction of such an excluded local road or rural minor collector so long as it crosses a railway line and railway-highway grade crossing improvements are made on the roadway that are funded out of Highway Trust

Fund monies. This does not make sense. Put simply, the Kussy letter is not consistent with the DOT's tortured construction of § 142(m)(1)(A) in this case because only the crossing improvements, and not the AAF Project as a whole (an intercity passenger rail project) are eligible to receive federal assistance under 23 U.S.C. §§ 130 and 133. In sum, to qualify as a title 23 project, Appellees were required to show that the AAF Project, an intercity rail project, is an "eligible project" qualified for federal assistance under 23 U.S.C. § 133. Appellees wholly failed to make that showing and, therefore, they cannot satisfy the required "receives Federal assistance" test. Likewise, Appellees failed to meet the underlying, assumed requirement in the Kussy letter that the project to which the federal assistance is given is a qualified, eligible facility. Therefore, the order should be reversed.

The Association Adopts Appellants' Arguments Under NEPA

The Association adopts and incorporates by reference the arguments Appellants makes regarding the federal Appellees' NEPA compliance or lack thereof. The very interests that the Appellants asserted in their treatment of the NEPA issues are much the same interests that the Association addressed in opposition to the AAF Project. Therefore, the Association adopts those arguments.

CONCLUSION

For the foregoing reasons and for the reasons articulated in the Brief of Appellants, the Association respectfully requests this Court to reverse the Order and remand to the district court with the instructions requested by Appellants at pages 55-56 of the Brief for Plaintiffs-Appellants.

/s/Tracy S. Carlin
STEVEN L. BRANNOCK
TRACY S. CARLIN
BRANNOCK & HUMPHRIES
1111 West Cass Street, Suite 200
Tampa, Florida 33606
Tel: (813) 223-4300
Fax: (813) 262-0604
Email: sbrannock@bhappeals.com
tcarlin@bhappeals.com
eservice@bhappeals.com

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g), the undersigned hereby certifies that this brief complies with the word limit of Rule 29(a)(5) of the Federal Rules of Appellate Procedure. According to the word-processing system used to prepare the brief, excluding sections exempted by Fed. R. App. P. 32(f), the brief contains a total of 5,372 words.

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared using a proportionally-spaced typeface in 14-point font.

/s/Tracy S. Carlin
TRACY S. CARLIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **April 17, 2019**, I electronically filed the foregoing with the Clerk of the Circuit Court by using CM/ECF system which will send a notice of electronic filing to Roberto M. Vargas (rvargas@jonesfoster.com) and James C. Gavigan, Jr. (jgavigan@jonesfoster.com), Jones, Foster, Johnston & Stubbs, P.A., 505 South Flagler Drive, Suite 1100, West Palm Beach, Florida 33401; Gary S. Phillips (gphillips@phillipslawyers.com) and Jeffrey B. Shalek (jshalek@phillipslawyers.com), Phillips, Cantor, Shalek & Pfister, P.A., 4000 Hollywood Blvd., Suite 500-N, Hollywood, Florida 33021; and William J. Cornwell (wjc@whcfla.com; filings@whcfla.com) and David K. Friedman (dkf@whcfla.com; jh@whcfla.com), Weiss, Handler & Cornwell, P.A., One Boca Place, Suite 218-A, 2255 Glades Road, Boca Raton, Florida 33431.

/s/Tracy S. Carlin
TRACY S. CARLIN

ADDENDUM

ADDENDUM OF STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the Brief for Plaintiffs-Appellants:

Statutory Provisions

23 U.S.C. § 133 (2005) Add.1

23 U.S.C. § 601 (2005) Add.8

23 U.S.C. § 602 (2005) Add.11

23 U.S.C. § 603 (2005) Add.14

23 U.S.C. § 604 (2005) Add.18

23 U.S.C. § 605 (2005) Add.21

23 U.S.C. § 606 (2005) Add.23

23 U.S.C. § 607 (2005) Add.24

23 U.S.C. § 608 (2005) Add.25

23 U.S.C. § 609 (2005) Add.27

49 U.S.C. § 5302 (2005) Add.28

Regulatory Provisions

23 C.F.R. § 646.210(b)(1) Add.34

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 1. Federal-Aid Highways (Refs & Annos)

This section has been updated. Click here for the updated version.

23 U.S.C.A. § 133

§ 133. Surface transportation program

Effective: August 10, 2005 to September 30, 2005

(a) Establishment.--The Secretary shall establish a surface transportation program in accordance with this section.

(b) Eligible projects.--A State may obligate funds apportioned to it under section 104(b)(3) for the surface transportation program only for the following:

(1) Construction, reconstruction, rehabilitation, resurfacing, restoration, and operational improvements for highways (including Interstate highways) and bridges (including bridges on public roads of all functional classifications), including any such construction or reconstruction necessary to accommodate other transportation modes, and including the seismic retrofit and painting of and application of calcium magnesium acetate, sodium acetate/formate, or other environmentally acceptable, minimally corrosive anti-icing and de-icing compositions on bridges and approaches thereto and other elevated structures, mitigation of damage to wildlife, habitat, and ecosystems caused by a transportation project funded under this title.

(2) Capital costs for transit projects eligible for assistance under chapter 53 of title 49, including vehicles and facilities, whether publicly or privately owned, that are used to provide intercity passenger service by bus.

(3) Carpool projects, fringe and corridor parking facilities and programs, bicycle transportation and pedestrian walkways in accordance with section 217, and the modification of public sidewalks to comply with the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(4) Highway and transit safety infrastructure improvements and programs, hazard eliminations, projects to mitigate hazards caused by wildlife, and railway-highway grade crossings.

(5) Highway and transit research and development and technology transfer programs.

(6) Capital and operating costs for traffic monitoring, management, and control facilities and programs.

(7) Surface transportation planning programs.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(8) Transportation enhancement activities.

(9) Transportation control measures listed in section 108(f)(1)(A) (other than clause (xvi)) of the Clean Air Act (42 U.S.C. 7408(f)(1)(A)).

(10) Development and establishment of management systems under section 303.

(11) [1] In accordance with all applicable Federal law and regulations, participation in natural habitat and wetlands mitigation efforts related to projects funded under this title, which may include participation in natural habitat and wetlands mitigation banks; contributions to statewide and regional efforts to conserve, restore, enhance, and create natural habitats and wetlands; and development of statewide and regional natural habitat and wetlands conservation and mitigation plans, including any such banks, efforts, and plans authorized pursuant to the Water Resources Development Act of 1990 (including crediting provisions). Contributions to such mitigation efforts may take place concurrent with or in advance of project construction. Contributions toward these efforts may occur in advance of project construction only if such efforts are consistent with all applicable requirements of Federal law and regulations and State transportation planning processes. With respect to participation in a natural habitat or wetland mitigation effort related to a project funded under this title that has an impact that occurs within the service area of a mitigation bank, preference shall be given, to the maximum extent practicable, to the use of the mitigation bank if the bank contains sufficient available credits to offset the impact and the bank is approved in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 Fed. Reg. 58605 (November 28, 1995)) or other applicable Federal law (including regulations).

(13) [1] Infrastructure-based intelligent transportation systems capital improvements.

(14) Environmental restoration and pollution abatement in accordance with section 328.

(15) Control of noxious weeds and aquatic noxious weeds and establishment of native species in accordance with section 329.

(c) Location of projects.--Except as provided in subsection (b)(1), surface transportation program projects (other than those described in subsections (b)(3) and (4)) may not be undertaken on roads functionally classified as local or rural minor collectors, unless such roads are on a Federal-aid highway system on January 1, 1991, and except as approved by the Secretary.

(d) Allocations of apportioned funds.--

(1) For safety programs.--10 percent of the funds apportioned to a State under section 104(b)(3) for the surface transportation program for a fiscal year shall only be available for carrying out sections 130 and 152 of this title. Of the funds set aside under the preceding sentence, the State shall reserve in such fiscal year an amount of such funds for carrying out each such section which is not less than the amount of funds apportioned to the State in fiscal year 1991 under such section.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(2) For transportation enhancement activities.--10 percent of the funds apportioned to a State under section 104(b)(3) for a fiscal year shall only be available for transportation enhancement activities.

(3) Division between urbanized areas of over 200,000 population and other areas.--

(A) General rule.--Except as provided in subparagraphs (C) and (D), 62.5 percent of the remaining 80 percent of the funds apportioned to a State under section 104(b)(3) for a fiscal year shall be obligated under this section--

(i) in urbanized areas of the State with an urbanized area population of over 200,000, and

(ii) in other areas of the State,

in proportion to their relative share of the State's population. The remaining 37.5 percent may be obligated in any area of the State. Funds attributed to an urbanized area under clause (i) may be obligated in the metropolitan area established under section 134 which encompasses the urbanized area.

(B) special rule for areas of less than 5,000 population.--Of the amounts required tobe [2] obligated under subparagraph (A)(ii), the State shall obligate in areas of the State (other than urban areas with a population greater than 5,000) an amount which is not less than 110 percent of the amount of funds apportioned to the State for the Federal-aid secondary system for fiscal year 1991.

(C) Special rule for certain States.--In the case of a state in which--

(i) greater than 80 percent of the population of the State is located in 1 or more metropolitan statistical areas, and

(ii) greater than 80 percent of the land area of such State is owned by the United States,

the 62.5 percentage specified in the first sentence of subparagraph (A) shall be 35 percent and the percentage specified in the second sentence of subparagraph (A) shall be 65 percent.

(D) Noncontiguous States exemption.--Subparagraph (a) shall not apply to Hawaii and Alaska.

(E) Distribution between urbanized areas of over 200,000 population.--The amount of funds which a State is required to obligate under subparagraph (A)(i) shall be obligated in urbanized areas described in subparagraph (A)(i) based on the relative population of such areas; except that the State may obligate such funds based on other factors if the State and the relevant metropolitan planning organizations jointly apply to the Secretary for the permission to do so and the Secretary grants the request.

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(4) Applicability of planning requirements.--Programming and expenditure of funds for projects under this section shall be consistent with the requirements of sections 134 and 135 of this title.

(5) Applicability of certain requirements to third party sellers.--

(A) In general.--Except as provided in subparagraphs (B) and (C), in the case of a transportation enhancement activity funded from the allocation required under paragraph (2), if real property or an interest in real property is to be acquired from a qualified organization exclusively for conservation purposes (as determined under section 170(h) of the Internal Revenue Code of 1986), the organization shall be considered to be the owner of the property for the purpose of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.).

(B) Federal approval prior to involvement of qualified organization.--If Federal approval of the acquisition of the real property or interest predates the involvement of a qualified organization described in subparagraph (A) in the acquisition of the property, the organization shall be considered to be an acquiring agency or person as described in section 24.101(a)(2) of title 49, Code of Federal Regulations, for the purpose of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

(C) Acquisitions on behalf of recipients of Federal funds.--If a qualified organization described in subparagraph (A) has contracted with a State transportation department or other recipient of Federal funds to acquire the real property or interest on behalf of the recipient, the organization shall be considered to be an agent of the recipient for the purpose of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

(e) Administration.--

(1) Noncompliance.--If the Secretary determines that a State or local government has failed to comply substantially with any provision of this section, the Secretary shall notify the State that, if the State fails to take corrective action within 60 days from the date of receipt of the notification, the Secretary will withhold future apportionments under section 104(b)(3) until the Secretary is satisfied that appropriate corrective action has been taken.

(2) Program approval.--

(A) Submission of project agreement.--For each fiscal year, each State shall submit a project agreement that--

(i) certifies that the State will meet all the requirements of this section; and

(ii) notifies the Secretary of the amount of obligations needed to carry out the program under this section.

(B) Request for adjustments of amounts.--Each State shall request from the Secretary such adjustments to the amount of obligations referred to in subparagraph (A)(ii) as the State determines to be necessary.

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

(C) Effect of approval by the Secretary.--Approval by the Secretary of a project agreement under subparagraph (A) shall be deemed a contractual obligation of the United States to pay surface transportation program funds made available under this title.

(3) Payments.--

(A) In general.--Except as provided in subparagraph (B), the Secretary shall make payments to a State of costs incurred by the State for the surface transportation program in accordance with procedures to be established by the Secretary.

(B) Advance payment option for transportation enhancement activities.--

(i) In general.--The Secretary may advance funds to the State for transportation enhancement activities funded from the allocation required by subsection (d)(2) for a fiscal year.

(ii) Limitation on amounts.--Amounts advanced under this subparagraph shall be limited to such amounts as are necessary to make prompt payments for project costs.

(iii) Effect on other requirements.--This subparagraph shall not exempt a State from other requirements of this title relating to the surface transportation program.

(4) Population determinations.--The Secretary shall use estimates prepared by the Secretary of Commerce when determining population figures for purposes of this section.

(5) Transportation enhancement activities.--

(A) Categorical exclusions.--To the extent appropriate, the Secretary shall develop categorical exclusions from the requirement that an environmental assessment or an environmental impact statement under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) be prepared for transportation enhancement activities funded from the allocation required by subsection (d)(2).

(B) Nationwide programmatic agreement.--The Secretary, in consultation with the National Conference of State Historic Preservation Officers and the Advisory Council on Historic Preservation established under title II of the National Historic Preservation Act (16 U.S.C. 470i et seq.), shall develop a nationwide programmatic agreement governing the review of transportation enhancement activities funded from the allocation required by subsection (d)(2), in accordance with--

(i) section 106 of such Act (16 U.S.C. 470f); and

(ii) the regulations of the Advisory Council on Historic Preservation.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(C) Cost sharing.--

(i) Required aggregate non-Federal share.--The average annual non-Federal share of the total cost of all projects to carry out transportation enhancement activities in a State for a fiscal year shall be not less than the non-Federal share authorized for the State under section 120(b).

(ii) Innovative financing.--Subject to clause (i), notwithstanding section 120--

(I) funds from other Federal agencies and the value of other contributions (as determined by the Secretary) may be credited toward the non-Federal share of the costs of a project to carry out a transportation enhancement activity;

(II) the non-Federal share for such a project may be calculated on a project, multiple-project, or program basis; and

(III) the Federal share of the cost of an individual project to which subclause (I) or (II) applies may be up to 100 percent.

(f) Obligation authority.--

(1) In general.--A State that is required to obligate in an urbanized area with an urbanized area population of over 200,000 individuals under subsection (d) funds apportioned to the State under section 104(b)(3) shall make available during the period of fiscal years 1998 through 2000 and the period of fiscal years 2001 through 2003 an amount of obligation authority distributed to the State for Federal-aid highways and highway safety construction programs for use in the area that is equal to the amount obtained by multiplying--

(A) the aggregate amount of funds that the State is required to obligate in the area under subsection (d) during the period; and

(B) the ratio that--

(i) the aggregate amount of obligation authority distributed to the State for Federal-aid highways and highway safety construction programs during the period; bears to

(ii) the total of the sums apportioned to the State for Federal-aid highways and highway safety construction programs (excluding sums not subject to an obligation limitation) during the period.

(2) Joint responsibility.--Each State, each affected metropolitan planning organization, and the Secretary shall jointly ensure compliance with paragraph (1).

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

CREDIT(S)

(Added Pub.L. 102-240, Title I, § 1007(a)(1), Dec. 18, 1991, 105 Stat. 1927, and amended Pub.L. 103-429, § 3(4), Oct. 31, 1994, 108 Stat. 4377; Pub.L. 104-59, Title III, §§ 315, 316, Nov. 28, 1995, 109 Stat. 586, 587; Pub.L. 105-178, Title I, §§ 1108(a) to (e), 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 138 to 140, 193; Pub.L. 109-59, Title VI, § 6006(a)(2), Aug. 10, 2005, 119 Stat. 1872.)

Footnotes

1 So in original. Par. (12) of subsec. (b) has not been enacted.

2 So in original. Probably should be "to be".

23 U.S.C.A. § 133, 23 USCA § 133

Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 6. Infrastructure Finance (Refs & Annos)

This section has been updated. Click here for the updated version.

23 U.S.C.A. § 601

§ 601. Generally applicable provisions

Effective: August 10, 2005 to September 28, 2006

(a) Definitions.--In this chapter, the following definitions apply:

(1) Eligible project costs.--The term "eligible project costs" means amounts substantially all of which are paid by, or for the account of, an obligor in connection with a project, including the cost of--

(A) development phase activities, including planning, feasibility analysis, revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other preconstruction activities;

(B) construction, reconstruction, rehabilitation, replacement, and acquisition of real property (including land related to the project and improvements to land), environmental mitigation, construction contingencies, and acquisition of equipment; and

(C) capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction.

(2) Federal credit instrument.--The term "Federal credit instrument" means a secured loan, loan guarantee, or line of credit authorized to be made available under this chapter with respect to a project.

(3) Investment-grade rating.--The term "investment-grade rating" means a rating of BBB minus, Baa3, or higher assigned by a rating agency to project obligations.

(4) Lender.--The term "lender" means any non-Federal qualified institutional buyer (as defined in section 230.144A(a) of title 17, Code of Federal Regulations (or any successor regulation), known as Rule 144A(a) of the Securities and Exchange Commission and issued under the Securities Act of 1933 (15 U.S.C. 77a et seq.)), including--

(A) a qualified retirement plan (as defined in section 4974(c) of the Internal Revenue Code of 1986) that is a qualified institutional buyer; and

(B) a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986) that is a qualified institutional buyer.

(5) Line of credit.--The term "line of credit" means an agreement entered into by the Secretary with an obligor under section 604 to provide a direct loan at a future date upon the occurrence of certain events.

(6) Loan guarantee.--The term "loan guarantee" means any guarantee or other pledge by the Secretary to pay all or part of the principal of and interest on a loan or other debt obligation issued by an obligor and funded by a lender.

(7) Obligor.--The term "obligor" means a party primarily liable for payment of the principal of or interest on a Federal credit instrument, which party may be a corporation, partnership, joint venture, trust, or governmental entity, agency, or instrumentality.

(8) Project.--The term "project" means--

(A) any surface transportation project eligible for Federal assistance under this title or chapter 53 of title 49;

(B) a project for an international bridge or tunnel for which an international entity authorized under Federal or State law is responsible;

(C) a project for intercity passenger bus or rail facilities and vehicles, including facilities and vehicles owned by the National Railroad Passenger Corporation and components of magnetic levitation transportation systems; and

(D) a project that--

(i) is a project--

(I) for a public freight rail facility or a private facility providing public benefit for highway users;

(II) for an intermodal freight transfer facility;

(III) for a means of access to a facility described in subclause (I) or (II);

(IV) for a service improvement for a facility described in subclause (I) or (II) (including a capital investment for an intelligent transportation system); or

(V) that comprises a series of projects described in subclauses (I) through (IV) with the common objective of improving the flow of goods;

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

(ii) may involve the combining of private and public sector funds, including investment of public funds in private sector facility improvements; and

(iii) if located within the boundaries of a port terminal, includes only such surface transportation infrastructure modifications as are necessary to facilitate direct intermodal interchange, transfer, and access into and out of the port.

(9) Project obligation.--The term "project obligation" means any note, bond, debenture, or other debt obligation issued by an obligor in connection with the financing of a project, other than a Federal credit instrument.

(10) Rating agency.--The term "rating agency" means a credit rating agency identified by the Securities and Exchange Commission as a Nationally Recognized Statistical Rating Organization.

(11) Secured loan.--The term "secured loan" means a direct loan or other debt obligation issued by an obligor and funded by the Secretary in connection with the financing of a project under section 603.

(12) State.--The term "State" has the meaning given the term in section 101.

(13) Subsidy amount.--The term "subsidy amount" means the amount of budget authority sufficient to cover the estimated long-term cost to the Federal Government of a Federal credit instrument, calculated on a net present value basis, excluding administrative costs and any incidental effects on governmental receipts or outlays in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).

(14) Substantial completion.--The term "substantial completion" means the opening of a project to vehicular or passenger traffic.

[(15) Redesignated (14)]

(b) Treatment of chapter--For purposes of this title, this chapter shall be treated as being part of chapter 1.

CREDIT(S)

(Added Pub.L. 105-178, Title I, § 1503(a), June 9, 1998, 112 Stat. 241, § 181; renumbered § 601 and amended Pub.L. 109-59, Title I, §§ 1601(a), 1602(b)(1), (5), (d)(1), Aug. 10, 2005, 119 Stat. 1239, 1246, 1247.)

23 U.S.C.A. § 601, 23 USCA § 601
Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 6. Infrastructure Finance (Refs & Annos)

This section has been updated. Click here for the updated version.

23 U.S.C.A. § 602

§ 602. Determination of eligibility and project selection

Effective: August 10, 2005 to September 30, 2012

(a) Eligibility.--To be eligible to receive financial assistance under this chapter, a project shall meet the following criteria:

(1) Inclusion in transportation plans and programs.--The project shall satisfy the applicable planning and programming requirements of sections 134 and 135 at such time as an agreement to make available a Federal credit instrument is entered into under this chapter.

(2) Application.--A State, local government, public authority, public- private partnership, or any other legal entity undertaking the project and authorized by the Secretary, shall submit a project application to the Secretary.

(3) Eligible project costs.--

(A) In general.--Except as provided in subparagraph (B), to be eligible for assistance under this chapter, a project shall have eligible project costs that are reasonably anticipated to equal or exceed the lesser of--

(i) $50,000,000; or

(ii) 33 # percent of the amount of Federal highway assistance funds apportioned for the most recently completed fiscal year to the State in which the project is located.

(B) Intelligent transportation system projects.--In the case of a project principally involving the installation of an intelligent transportation system, eligible project costs shall be reasonably anticipated to equal or exceed $15,000,000.

(4) Dedicated revenue sources.--The Federal credit instrument shall be repayable, in whole or in part, from tolls, user fees, or other dedicated revenue sources that also secure the project obligations.

(5) Public sponsorship of private entities.--In the case of a project that is undertaken by an entity that is not a State or local government or an agency or instrumentality of a State or local government, the project that the entity is undertaking shall be publicly sponsored as provided in paragraphs (1) and (2).

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(b) Selection among eligible projects.--

(1) Establishment.--The Secretary shall establish criteria for selecting among projects that meet the eligibility requirements specified in subsection (a).

(2) Selection criteria.--

(A) In general.--The selection criteria shall include the following:

(i) The extent to which the project is nationally or regionally significant, in terms of generating economic benefits, supporting international commerce, or otherwise enhancing the national transportation system.

(ii) The creditworthiness of the project, including a determination by the Secretary that any financing for the project has appropriate security features, such as a rate covenant, to ensure repayment.

(iii) The extent to which assistance under this chapter would foster innovative public-private partnerships and attract private debt or equity investment.

(iv) The likelihood that assistance under this chapter would enable the project to proceed at an earlier date than the project would otherwise be able to proceed.

(v) The extent to which the project uses new technologies, including intelligent transportation systems, that enhance the efficiency of the project.

(vi) The amount of budget authority required to fund the Federal credit instrument made available under this chapter.

(vii) The extent to which the project helps maintain or protect the environment.

(viii) The extent to which assistance under this chapter and chapter 1 would reduce the contribution of Federal grant assistance to the project.

(B) Preliminary rating opinion letter.--For purposes of subparagraph (A)(ii), the Secretary shall require each project applicant to provide a preliminary rating opinion letter from at least 1 rating agency indicating that the project's senior obligations, which may be the Federal credit instrument, have the potential to achieve an investment-grade rating.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(c) Federal requirements.--In addition to the requirements of this title for highway projects, chapter 53 of title 49 for transit projects, and section 5333(a) of title 49 for rail projects, the following provisions of law shall apply to funds made available under this chapter and projects assisted with the funds:

(1) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

(2) The National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(3) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.).

CREDIT(S)

(Added Pub.L. 105-178, Title I, § 1503(a), June 9, 1998, 112 Stat. 243, § 182; renumbered § 602 and amended Pub.L. 109-59, Title I, §§ 1601(b), (c), 1602(b)(2), (5), (d), Aug. 10, 2005, 119 Stat. 1240, 1247.)

23 U.S.C.A. § 602, 23 USCA § 602
Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 6. Infrastructure Finance (Refs & Annos)

This section has been updated. Click here for the updated version.

23 U.S.C.A. § 603

§ 603. Secured loans

Effective: August 10, 2005 to September 30, 2012

(a) In general.--

(1) Agreements.--Subject to paragraphs (2) through (4), the Secretary may enter into agreements with 1 or more obligors to make secured loans, the proceeds of which shall be used--

(A) to finance eligible project costs of any project selected under section 602; or

(B) to refinance interim construction financing of eligible project costs of any project selected under section 602; or

(C) to refinance long-term project obligations or Federal credit instruments if such refinancing provides additional funding capacity for the completion, enhancement, or expansion of any project that--

(i) is selected under section 602; or

(ii) otherwise meets the requirements of section 602.

(2) Limitation on refinancing of interim construction financing.--A loan under paragraph (1) shall not refinance interim construction financing under paragraph (1)(B) later than 1 year after the date of substantial completion of the project.

(3) Risk assessment.--Before entering into an agreement under this subsection, the Secretary, in consultation with the Director of the Office of Management and Budget and each rating agency providing a preliminary rating opinion letter under section 602(b)(2)(B), shall determine an appropriate capital reserve subsidy amount for each secured loan, taking into account such letter.

(4) Investment-grade rating requirement.--The execution of a secured loan under this section shall be contingent on the project's senior obligations receiving an investment-grade rating.

(b) Terms and limitations.--

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(1) In general.--A secured loan under this section with respect to a project shall be on such terms and conditions and contain such covenants, representations, warranties, and requirements (including requirements for audits) as the Secretary determines appropriate.

(2) Maximum amount.--The amount of the secured loan shall not exceed the lesser of 33 percent of the reasonably anticipated eligible project costs or, if the secured loan does not receive an investment grade rating, the amount of the senior project obligations.

(3) Payment.--The secured loan--

(A) shall--

(i) be payable, in whole or in part, from tolls, user fees, or other dedicated revenue sources that also secure the senior project obligations; and

(ii) include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and

(B) may have a lien on revenues described in subparagraph (A) subject to any lien securing project obligations.

(4) Interest rate.--The interest rate on the secured loan shall be not less than the yield on United States Treasury securities of a similar maturity to the maturity of the secured loan on the date of execution of the loan agreement.

(5) Maturity date.--The final maturity date of the secured loan shall be not later than 35 years after the date of substantial completion of the project.

(6) Nonsubordination.--The secured loan shall not be subordinated to the claims of any holder of project obligations in the event of bankruptcy, insolvency, or liquidation of the obligor.

(7) Fees.--The Secretary may establish fees at a level sufficient to cover all or a portion of the costs to the Federal Government of making a secured loan under this section.

(8) Non-Federal share.--The proceeds of a secured loan under this chapter may be used for any non-Federal share of project costs required under this title or chapter 53 of title 49, if the loan is repayable from non-Federal funds.

(c) Repayment.--

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(1) Schedule.--The Secretary shall establish a repayment schedule for each secured loan under this section based on the projected cash flow from project revenues and other repayment sources.

(2) Commencement.--Scheduled loan repayments of principal or interest on a secured loan under this section shall commence not later than 5 years after the date of substantial completion of the project.

(3) Deferred payments.--

(A) Authorization.--If, at any time after the date of substantial completion of the project, the project is unable to generate sufficient revenues to pay the scheduled loan repayments of principal and interest on the secured loan, the Secretary may, subject to subparagraph (C), allow the obligor to add unpaid principal and interest to the outstanding balance of the secured loan.

(B) Interest.--Any payment deferred under subparagraph (A) shall--

(i) continue to accrue interest in accordance with subsection (b)(4) until fully repaid; and

(ii) be scheduled to be amortized over the remaining term of the loan.

(C) Criteria.--

(i) In general.--Any payment deferral under subparagraph (A) shall be contingent on the project meeting criteria established by the Secretary.

(ii) Repayment standards.--The criteria established under clause (i) shall include standards for reasonable assurance of repayment.

(4) Prepayment.--

(A) Use of excess revenues.--Any excess revenues that remain after satisfying scheduled debt service requirements on the project obligations and secured loan and all deposit requirements under the terms of any trust agreement, bond resolution, or similar agreement securing project obligations may be applied annually to prepay the secured loan without penalty.

(B) Use of proceeds of refinancing.--The secured loan may be prepaid at any time without penalty from the proceeds of refinancing from non-Federal funding sources.

[**(5) Redesignated** (4)]

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(d) Sale of secured loans.--

(1) In general.--Subject to paragraph (2), as soon as practicable after substantial completion of a project and after notifying the obligor, the Secretary may sell to another entity or reoffer into the capital markets a secured loan for the project if the Secretary determines that the sale or reoffering can be made on favorable terms.

(2) Consent of obligor.--In making a sale or reoffering under paragraph (1), the Secretary may not change the original terms and conditions of the secured loan without the written consent of the obligor.

(e) Loan guarantees.--

(1) In general.--The Secretary may provide a loan guarantee to a lender in lieu of making a secured loan if the Secretary determines that the budgetary cost of the loan guarantee is substantially the same as that of a secured loan.

(2) Terms.--The terms of a guaranteed loan shall be consistent with the terms set forth in this section for a secured loan, except that the rate on the guaranteed loan and any prepayment features shall be negotiated between the obligor and the lender, with the consent of the Secretary.

CREDIT(S)

(Added Pub.L. 105-178, Title I, § 1503(a), June 9, 1998, 112 Stat. 245, § 183; renumbered § 603 and amended Pub.L. 109-59, Title I, §§ 1601(d), 1602(b)(3), (5), (d), Aug. 10, 2005, 119 Stat. 1240, 1247.)

23 U.S.C.A. § 603, 23 USCA § 603
Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 6. Infrastructure Finance (Refs & Annos)

This section has been updated. Click here for the updated version.

23 U.S.C.A. § 604

§ 604. Lines of credit

Effective: August 10, 2005 to September 30, 2012

(a) In general.--

(1) Agreements.--Subject to paragraphs (2) through (4), the Secretary may enter into agreements to make available lines of credit to 1 or more obligors in the form of direct loans to be made by the Secretary at future dates on the occurrence of certain events for any project selected under section 602.

(2) Use of proceeds.--The proceeds of a line of credit made available under this section shall be available to pay debt service on project obligations issued to finance eligible project costs, extraordinary repair and replacement costs, operation and maintenance expenses, and costs associated with unexpected Federal or State environmental restrictions.

(3) Risk assessment.--Before entering into an agreement under this subsection, the Secretary, in consultation with the Director of the Office of Management and Budget and each rating agency providing a preliminary rating opinion letter under section 602(b)(2)(B), shall determine an appropriate capital reserve subsidy amount for each line of credit, taking into account such letter.

(4) Investment-grade rating requirement.--The funding of a line of credit under this section shall be contingent on the project's senior obligations receiving an investment-grade rating from at least 1 rating agency.

(b) Terms and limitations.--

(1) In general.--A line of credit under this section with respect to a project shall be on such terms and conditions and contain such covenants, representations, warranties, and requirements (including requirements for audits) as the Secretary determines appropriate.

(2) Maximum amounts.--The total amount of the line of credit shall not exceed 33 percent of the reasonably anticipated eligible project costs.

(3) Draws.--Any draw on the line of credit shall represent a direct loan and shall be made only if net revenues from the project (including capitalized interest but not including reasonably required financing reserves) are insufficient to pay the costs specified in subsection (a)(2).

(4) Interest rate.--The interest rate on a direct loan resulting from a draw on the line of credit shall be not less than the yield on 30-year United States Treasury securities as of the date of execution of the line of credit agreement.

(5) Security.--The line of credit--

(A) shall--

(i) be payable, in whole or in part, from tolls, user fees, or other dedicated revenue sources that also secure the senior project obligations; and

(ii) include a rate covenant, coverage requirement, or similar security feature supporting the project obligations; and

(B) may have a lien on revenues described in subparagraph (A) subject to any lien securing project obligations.

(6) Period of availability.--The full amount of the line of credit, to the extent not drawn upon, shall be available during the period beginning on the date of substantial completion of the project and ending not later than 10 years after that date.

(7) Rights of third-party creditors.--

(A) Against Federal Government.--A third-party creditor of the obligor shall not have any right against the Federal Government with respect to any draw on the line of credit.

(B) Assignment.--An obligor may assign the line of credit to 1 or more lenders or to a trustee on the lenders' behalf.

(8) Nonsubordination.--A direct loan under this section shall not be subordinated to the claims of any holder of project obligations in the event of bankruptcy, insolvency, or liquidation of the obligor.

(9) Fees.--The Secretary may establish fees at a level sufficient to cover all or a portion of the costs to the Federal Government of providing a line of credit under this section.

(10) Relationship to other credit instruments.--A project that receives a line of credit under this section also shall not receive a secured loan or loan guarantee under section 603 of an amount that, combined with the amount of the line of credit, exceeds 33 percent of eligible project costs.

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(c) Repayment.--

(1) Terms and conditions.--The Secretary shall establish repayment terms and conditions for each direct loan under this section based on the projected cash flow from project revenues and other repayment sources.

(2) Timing.--All repayments of principal or interest on a direct loan under this section shall be scheduled to commence not later than 5 years after the end of the period of availability specified in subsection (b)(6) and to conclude, with full repayment of principal and interest, by the date that is 25 years after the end of the period of availability specified in subsection (b)(6).

[(3) Repealed. Pub.L. 109-59, Title I, § 1601(e)(2)(B), Aug. 10, 2005, 119 Stat. 1241]

CREDIT(S)

(Added Pub.L. 105-178, Title I, § 1503(a), June 9, 1998, 112 Stat. 247, § 184; renumbered § 604 and amended Pub.L. 109-59, Title I, §§ 1601(e), 1602(b)(4), (d), Aug. 10, 2005, 119 Stat. 1241, 1247.)

23 U.S.C.A. § 604, 23 USCA § 604
Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 6. Infrastructure Finance (Refs & Annos)

This section has been updated. Click here for the updated version.

23 U.S.C.A. § 605

§ 605. Program administration

Effective: August 10, 2005 to September 30, 2012

(a) Requirement.--The Secretary shall establish a uniform system to service the Federal credit instruments made available under this chapter.

(b) Fees.--

(1) In general.--The Secretary may collect and spend fees, contingent upon authority being provided in appropriations Acts, at a level that is sufficient to cover--

(A) the costs of services of expert firms retained pursuant to subsection (d); and

(B) all or a portion of the costs to the Federal Government of servicing the Federal credit instruments.

(c) Servicer.--

(1) In general.--The Secretary may appoint a financial entity to assist the Secretary in servicing the Federal credit instruments.

(2) Duties.--The servicer shall act as the agent for the Secretary.

(3) Fee.--The servicer shall receive a servicing fee, subject to approval by the Secretary.

(d) Assistance from expert firms--The Secretary may retain the services of expert firms, including counsel, in the field of municipal and project finance to assist in the underwriting and servicing of Federal credit instruments.

CREDIT(S)

(Added Pub.L. 105-178, Title I, § 1503(a), June 9, 1998, 112 Stat. 249, § 185; renumbered § 605 and amended Pub.L. 109-59, Title I, §§ 1601(f), 1602(b)(5), (d), Aug. 10, 2005, 119 Stat. 1241, 1247.)

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

23 U.S.C.A. § 605, 23 USCA § 605
Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 6. Infrastructure Finance (Refs & Annos)

This section has been updated. Click here for the updated version.

23 U.S.C.A. § 606

§ 606. State and local permits

Effective: August 10, 2005 to September 30, 2012

The provision of financial assistance under this chapter with respect to a project shall not--

(1) relieve any recipient of the assistance of any obligation to obtain any required State or local permit or approval with respect to the project;

(2) limit the right of any unit of State or local government to approve or regulate any rate of return on private equity invested in the project; or

(3) otherwise supersede any State or local law (including any regulation) applicable to the construction or operation of the project.

CREDIT(S)

(Added Pub.L. 105-178, Title I, § 1503(a), June 9, 1998, 112 Stat. 249, § 186; renumbered § 606 and amended Pub.L. 109-59, Title I, § 1602(b)(5), (d), Aug. 10, 2005, 119 Stat. 1247.)

23 U.S.C.A. § 606, 23 USCA § 606
Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 6. Infrastructure Finance (Refs & Annos)

This section has been updated. Click here for the updated version.

23 U.S.C.A. § 607

§ 607. Regulations

Effective: August 10, 2005 to September 30, 2012

The Secretary may issue such regulations as the Secretary determines appropriate to carry out this chapter.

CREDIT(S)

(Added Pub.L. 105-178, Title I, § 1503(a), June 9, 1998, 112 Stat. 249, § 187; renumbered § 607 and amended Pub.L. 109-59, Title I, § 1602(b)(5), (d), Aug. 10, 2005, 119 Stat. 1247.)

23 U.S.C.A. § 607, 23 USCA § 607
Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 6. Infrastructure Finance (Refs & Annos)

This section has been updated. Click here for the updated version.

23 U.S.C.A. § 608

§ 608. Funding

Effective: August 10, 2005 to September 30, 2012

(a) Funding.--

(1) In general.--There is authorized to be appropriated from the Highway Trust Fund (other than the Mass Transit Account) to carry out this chapter $122,000,000 for each of fiscal years 2005 through 2009.

(2) Availability.--Amounts made available to carry out this chapter shall remain available until expended.

(3) Administrative costs.--From funds made available to carry out this chapter, the Secretary may use, for the administration of this chapter, not more than $2,200,000 for each of fiscal years 2005 through 2009.

(b) Contract authority.--

(1) In general.--Notwithstanding any other provision of law, approval by the Secretary of a Federal credit instrument that uses funds made available under this chapter shall impose upon the United States a contractual obligation to fund the Federal credit investment.

(2) Availability.--Amounts authorized under this section for a fiscal year shall be available for obligation on October 1 of the fiscal year.

[(c) Omitted]

CREDIT(S)

(Added Pub.L. 105-178, Title I, § 1503(a), (c), June 9, 1998, 112 Stat. 249, § 188; amended Pub.L. 105-206, Title IX, § 9007(a), July 22, 1998, 112 Stat. 849; Pub.L. 108-88, § 5(a)(10), Sept. 30, 2003, 117 Stat. 1115; Pub.L. 108-202, § 5(a)(10), Feb. 29, 2004, 118 Stat. 481; Pub.L. 108-224, § 4(a)(10), Apr. 30, 2004, 118 Stat. 629; Pub.L. 108-263, § 4(a)(10), June 30, 2004, 118 Stat. 700; Pub.L. 108-280, § 4(a)(10), July 30, 2004, 118 Stat. 879; Pub.L. 108-310, § 5(a)(10), Sept. 30, 2004, 118 Stat. 1149; Pub.L. 109-14, § 4(a)(10), May 31, 2005, 119 Stat. 327; Pub.L. 109-20, § 4(a)(10), July 1, 2005, 119 Stat. 348; Pub.L. 109-35, § 4(a)(10), July 20, 2005, 119 Stat. 381; Pub.L. 109-37, § 4(a)(10), July 22, 2005, 119 Stat.

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

396; Pub.L. 109-40, § 4(a)(10), July 28, 2005, 119 Stat. 413; renumbered § 608 and amended Pub.L. 109-59, Title I, §§ 1601(g), 1602(b)(5), (d), Aug. 10, 2005, 119 Stat. 1242, 1247.)

23 U.S.C.A. § 608, 23 USCA § 608
Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 23. Highways (Refs & Annos)
Chapter 6. Infrastructure Finance (Refs & Annos)

This section has been updated. Click here for the updated version.

23 U.S.C.A. § 609

§ 609. Reports to Congress

Effective: August 10, 2005 to September 30, 2012

On June 1, 2006, and every 2 years thereafter, the Secretary shall submit to Congress a report summarizing the financial performance of the projects that are receiving, or have received, assistance under this chapter (other than section 610), including a recommendation as to whether the objectives of this chapter (other than section 610) are best served--

(1) by continuing the program under the authority of the Secretary;

(2) by establishing a Government corporation or Government-sponsored enterprise to administer the program; or

(3) by phasing out the program and relying on the capital markets to fund the types of infrastructure investments assisted by this chapter (other than section 610) without Federal participation.

CREDIT(S)

(Added Pub.L. 105-178, Title I, § 1503(a), June 9, 1998, 112 Stat. 250, § 189; renumbered § 609 and amended Pub.L. 109-59, Title I, §§ 1601(h), 1602(d), Aug. 10, 2005, 119 Stat. 1242, 1247.)

23 U.S.C.A. § 609, 23 USCA § 609
Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle III. General and Intermodal Programs (Refs & Annos)
Chapter 53. Public Transportation (Refs & Annos)

This section has been updated. Click here for the updated version.

49 U.S.C.A. § 5302

§ 5302. Definitions

Effective: August 10, 2005 to June 5, 2008

(a) In general.--Except as otherwise specifically provided, in this chapter, the following definitions apply:

(1) Capital project.--The term "capital project" means a project for--

(A) acquiring, constructing, supervising, or inspecting equipment or a facility for use in public transportation, expenses incidental to the acquisition or construction (including designing, engineering, location surveying, mapping, and acquiring rights-of-way), payments for the capital portions of rail trackage rights agreements, transit-related intelligent transportation systems, relocation assistance, acquiring replacement housing sites, and acquiring, constructing, relocating, and rehabilitating replacement housing;

(B) rehabilitating a bus;

(C) remanufacturing a bus;

(D) overhauling rail rolling stock;

(E) preventive maintenance;

(F) leasing equipment or a facility for use in public transportation, subject to regulations that the Secretary prescribes limiting the leasing arrangements to those that are more cost-effective than purchase or construction;

(G) a public transportation improvement that enhances economic development or incorporates private investment, including commercial and residential development, pedestrian and bicycle access to a public transportation facility, construction, renovation, and improvement of intercity bus and intercity rail stations and terminals, and the renovation and improvement of historic transportation facilities, because the improvement enhances the effectiveness of a public transportation project and is related physically or functionally to that public transportation project, or establishes new or enhanced coordination between public transportation and other transportation, and provides a fair share of revenue for public transportation that will be used for public transportation--

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(i) including property acquisition, demolition of existing structures, site preparation, utilities, building foundations, walkways, open space, safety and security equipment and facilities (including lighting, surveillance and related intelligent transportation system applications), facilities that incorporate community services such as daycare or health care, and a capital project for, and improving, equipment or a facility for an intermodal transfer facility or transportation mall, except that a person making an agreement to occupy space in a facility under this subparagraph shall pay a reasonable share of the costs of the facility through rental payments and other means; and

(ii) excluding construction of a commercial revenue-producing facility (other than an intercity bus station or terminal) or a part of a public facility not related to public transportation;

(H) the introduction of new technology, through innovative and improved products, into public transportation;

(I) the provision of nonfixed route paratransit transportation services in accordance with section 223 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12143), but only for grant recipients that are in compliance with applicable requirements of that Act, including both fixed route and demand responsive service, and only for amounts not to exceed 10 percent of such recipient's annual formula apportionment under sections 5307 and 5311;

(J) crime prevention and security--

(i) including--

(I) projects to refine and develop security and emergency response plans;

(II) projects aimed at detecting chemical and biological agents in public transportation;

(III) the conduct of emergency response drills with public transportation agencies and local first response agencies; and

(IV) security training for public transportation employees; but

(ii) excluding all expenses related to operations, other than such expenses incurred in conducting activities described in clauses (i)(III) and (i)(IV);

(K) establishing a debt service reserve, made up of deposits with a bondholder's trustee, to ensure the timely payment of principal and interest on bonds issued by a grant recipient to finance an eligible project under this chapter; or

(L) mobility management--

(i) consisting of short-range planning and management activities and projects for improving coordination among public transportation and other transportation service providers carried out by a recipient or subrecipient through an agreement entered into with a person, including a governmental entity, under this chapter (other than section 5309); but

(ii) excluding operating public transportation services.

(2) Chief executive officer of a state.--The term "chief executive officer of a State" includes the designee of the chief executive officer.

(3) Emergency regulation.--The term "emergency regulation" means a regulation--

(A) that is effective temporarily before the expiration of the otherwise specified periods of time for public notice and comment under section 5334(b); and

(B) prescribed by the Secretary as the result of a finding that a delay in the effective date of the regulation--

(i) would injure seriously an important public interest;

(ii) would frustrate substantially legislative policy and intent; or

(iii) would damage seriously a person or class without serving an important public interest.

(4) Fixed guideway.--The term "fixed guideway" means a public transportation facility--

(A) using and occupying a separate right-of-way or rail for the exclusive use of public transportation and other high occupancy vehicles; or

(B) using a fixed catenary system and a right-of-way usable by other forms of transportation.

(5) Individual with a disability.--The term "individual with a disability" means an individual who, because of illness, injury, age, congenital malfunction, or other incapacity or temporary or permanent disability (including an individual who is a wheelchair user or has semiambulatory capability), cannot use effectively, without special facilities, planning, or design, public transportation service or a public transportation facility.

(6) Local governmental authority.--The term "local governmental authority" includes--

(A) a political subdivision of a State;

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(B) an authority of at least 1 State or political subdivision of a State;

(C) an Indian tribe; and

(D) a public corporation, board, or commission established under the laws of a State.

(7) Mass transportation.--The term "mass transportation" means public transportation.

(8) Net project cost.--The term "net project cost" means the part of a project that reasonably cannot be financed from revenues.

(9) New bus model.--The term "new bus model" means a bus model (including a model using alternative fuel)--

(A) that has not been used in public transportation in the United States before the date of production of the model; or

(B) used in public transportation in the United States, but being produced with a major change in configuration or components.

(10) Public transportation.--The term "public transportation" means transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include schoolbus, charter, or intercity bus transportation or intercity passenger rail transportation provided by the entity described in chapter 243 (or a successor to such entity).

(11) Regulation.--The term "regulation" means any part of a statement of general or particular applicability of the Secretary designed to carry out, interpret, or prescribe law or policy in carrying out this chapter.

(12) Secretary.--The term "Secretary" means the Secretary of Transportation.

(13) State.--The term "State" means a State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands.

(14) Transit.--The term "transit" means public transportation.

(15) Transit enhancement.--The term "transit enhancement" means, with respect to any project or an area to be served by a project, projects that are designed to enhance public transportation service or use and that are physically or functionally related to transit facilities. Eligible projects are--

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(A) historic preservation, rehabilitation, and operation of historic public transportation buildings, structures, and facilities (including historic bus and railroad facilities);

(B) bus shelters;

(C) landscaping and other scenic beautification, including tables, benches, trash receptacles, and street lights;

(D) public art;

(E) pedestrian access and walkways;

(F) bicycle access, including bicycle storage facilities and installing equipment for transporting bicycles on public transportation vehicles;

(G) transit connections to parks within the recipient's transit service area;

(H) signage; and

(I) enhanced access for persons with disabilities to public transportation.

(16) Urban area.--The term "urban area" means an area that includes a municipality or other built-up place that the Secretary, after considering local patterns and trends of urban growth, decides is appropriate for a local public transportation system to serve individuals in the locality.

(17) Urbanized area.--The term "urbanized area" means an area encompassing a population of not less than 50,000 people that has been defined and designated in the most recent decennial census as an 'urbanized area' by the Secretary of Commerce.

(b) Authority to modify "individual with a disability".--The Secretary may by regulation modify the definition of the term "individual with a disability" in subsection (a)(5) as it applies to section 5307(d)(1)(D).

CREDIT(S)

(Added Pub.L. 103-272, § 1(d), July 5, 1994, 108 Stat. 786, and amended Pub.L. 103-331, Title III, § 335A, Sept. 30, 1994, 108 Stat. 2495; Pub.L. 104-50, Title III, § 333(a), Nov. 15, 1995, 109 Stat. 457; Pub.L. 104-287, § 6(c), Oct. 11, 1996, 110 Stat. 3398; Pub.L. 105-102, § 3(a), Nov. 20, 1997, 111 Stat. 2214; Pub.L. 105-178, Title III, § 3003, June 9, 1998, 112 Stat. 338; Pub.L. 105-206, Title IX, § 9009(a), July 22, 1998, 112 Stat. 852; Pub.L. 109-59, Title III, §§ 3002(b)(4), 3004, Aug. 10, 2005, 119 Stat. 1545.)

49 U.S.C.A. § 5302, 49 USCA § 5302

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.

Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

23 C.F.R. § 646.210

§ 646.210 Classification of projects and railroad share of the cost.

Currentness

(a) State laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings shall not apply to Federal-aid projects.

(b) Pursuant to 23 U.S.C. 130(b), and 49 CFR 1.48:

(1) Projects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs.

(2) Projects for the reconstruction of existing grade separations are deemed to generally be of no ascertainable net benefit to the railroad and there shall be no required railroad share of the costs, unless the railroad has a specific contractual obligation with the State or its political subdivision to share in the costs.

(3) On projects for the elimination of existing grade crossings at which active warning devices are in place or ordered to be installed by a State regulatory agency, the railroad share of the project costs shall be 5 percent.

(4) On projects for the elimination of existing grade crossings at which active warning devices are not in place and have not been ordered installed by a State regulatory agency, or on projects which do not eliminate an existing crossing, there shall be no required railroad share of the project cost.

(c) The required railroad share of the cost under § 646.210(b) (3) shall be based on the costs for preliminary engineering, right-of-way and construction within the limits described below:

(1) Where a grade crossing is eliminated by grade separation, the structure and approaches required to transition to a theoretical highway profile which would have been constructed if there were no railroad present, for the number of lanes on the existing highway and in accordance with the current design standards of the State highway agency.

(2) Where another facility, such as a highway or waterway, requiring a bridge structure is located within the limits of a grade separation project, the estimated cost of a theoretical structure and approaches as described in § 646.210(c)

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works.

(1) to eliminate the railroad-highway grade crossing without considering the presence of the waterway or other highway.

(3) Where a grade crossing is eliminated by railroad or highway relocation, the actual cost of the relocation project, the estimated cost of the relocation project, or the estimated cost of a structure and approaches as described in § 646.210 (c) (1), whichever is less.

(d) Railroads may voluntarily contribute a greater share of project costs than is required. Also, other parties may voluntarily assume the railroad's share.

AUTHORITY: 23 U.S.C. 109(e), 120(c), 130, 133(d)(1), and 315; 49 CFR 1.48(b).

Notes of Decisions (5)

Current through April 12, 2019; 84 FR 14887.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

 © 2019 Thomson Reuters. No claim to original U.S. Government Works.