

South Carolina Department of Transportation

Engineering Directive

Directive Number: ED-58 **Effective:** December 10, 2015

Subject: Right of Way Certification

References: Code of Federal Regulations 23 CFR 635.309(b)(c)
SCDOT Highway Design Manual, Chapter 30
SCDOT Road Design Plan Preparation Guide, Chapters 5 & 12

Purpose: Establish Procedure to Ensure Compliance with FHWA
Guidance for all Federal Aid Projects

This Directive Applies to: All Divisions Utilizing Federal Aid Funds in the Project
Development Process

REQUIREMENTS

In accordance with the Code of Federal Regulations 23 CFR 635.309(b), authorization to advertise the physical construction for bids shall be issued as soon as, but not before, all the conditions have been met:

(b) A statement is received from the State, either separately or combined with the information required by § 635.309(c), that either all right-of-way clearance, utility, and railroad work has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for proper coordination with the physical construction schedules. Where it is determined that the completion of such work in advance of the highway construction is not feasible or practical due to economy, special operational problems and the like, there shall be appropriate notification provided in the bid proposals identifying the right-of-way clearance, utility, and railroad work which is to be underway concurrently with the highway construction.

As such, the purpose of this engineering directive is to set forth and describe the Right of Way Certification process to be used in delivering the federal-aid transportation program in South Carolina. Right of Way Certification is guided by the Programmatic Agreement as of November 3, 2015, between the Federal Highway Administration (FHWA) and the South Carolina Department of Transportation (SCDOT). A copy of the Programmatic Agreement is provided in Appendix A of this directive. All projects funded with federal transportation funds require a Right of Way Certification. At the time of project authorization for construction, FHWA is responsible for ensuring this certification is included as part of the construction authorization process.

PROCESS

Early in a project's development, completion of a Project Screening Tool (PST) by a Program Manager or an Environmental NEPA and Permitting Checklist for maintenance projects will be utilized to identify one of three categories of Right of Way Certification:

Category I – This classification includes Federal-aid projects for which specifically designated activities in the scope of work are inherently contained within SCDOT's existing roadway foot print. As such, these pre-defined categories of projects would be identified and no further evaluation is required.

Replacement of existing guardrail/end treatments
Replacement of existing sign panels
Replacement of pavement markings/markers
Placement of rumble strips and/or stripes
Signal head replacement and/or retiming of signals
Pavement preservation activities with the footprint of the present pavement and shoulder treatment
Bridge painting
Emergency repairs for work within existing ROW
Widening where ALL construction work occurs within the median

Category II – This classification includes all SCDOT Federal-aid projects outside of Category I. These projects will require the preparation of an individual written Right of Way Certification prior to FHWA's authorization for construction. Identification and documentation of SCDOT's present Right of Way is essential for all projects in this category. For any project for which the Right of Way Office is charged with acquisition, certificates will be prepared and executed by the Director of Right of Way. For any Federal-aid project in which Right of Way is not required, it is the responsibility of the appropriate project manager to request a Certificate of the Director of Right of Way. A copy of the plans with present right of way appropriately annotated according to SCDOT Highway Design Manual and SCDOT Road Design Plan Preparation Guide shall accompany the request.

Category III – This classification pertains to Local Program Administration (LPA) projects. For any Federal-aid LPA project, a request for Certificate is submitted to the Regional Right of Way Administrator for review and recommendation to the Director of Right of Way. A copy of the plans with the present Right of Way appropriately annotated according to SCDOT Highway Design Manual and SCDOT Road Design Plan Preparation Guide shall accompany the request.

Submitted by: William C. Johnston
Acting Director of Right of Way

Recommended by: Randall L. Young
Acting Chief Engineer for Project Delivery

Approved: Leland Colvin
Acting Deputy Secretary for Engineering

Lead: Director of Right of Way

History: Issued on January 1, 2015
First Revision on December 10, 2015

APPENDIX A
FOR ENGINEERING DIRECTIVE 58

PROGRAMMATIC AGREEMENT
Between the Federal Highway Administration,
and the South Carolina State Department of Transportation,
Regarding The Issuance of Right-of-Way Certifications on Federal-Aid Highway
Projects

Background

The right-of-way (ROW) certification procedure for federally-assisted highway projects identifies the acquisition status of necessary ROW for the purpose of advancing any federal-aid project to construction. It addresses the status of any required relocation activities necessary on the project. The specific requirements for this action are found in 23 CFR 635.309 (b) and (c).

Per 23 CFR 635.309, prior to authorization to advertise bids for physical construction, the acquiring agency shall prepare a certification statement, such that certifies the following:

- *All ROW clearance, utility and railroad work has been completed or that all necessary arrangements have been made for it to be undertaken and completed for proper coordination with the physical construction schedules. (23 CFR 635.309(b))*
- *All individuals and families have been relocated to DSS housing or the agency has made available to displaced persons adequate replacement housing in accordance with the provisions of the current FHWA directives covering the administration of the relocation assistance program in 49 CFR Part 24, and that one of the following has application (23 CFR 635.309(c)):*
 - *All necessary ROW, including legal and physical possession and control of access rights, have been acquired. Trial or appeal of cases may be pending in court, but legal possession has been obtained. There may be some improvements remaining on the ROW, but all occupants have vacated the lands and improvements. (23 CFR 635.309(c)(1))*
 - *Although all necessary ROW have not been fully acquired, the right to occupy and use all ROW required for the project have been acquired. Trial or appeal of some parcels may be pending in court and on other parcels full legal possession has not been obtained, but right of entry has been obtained; the occupants of all the lands and improvements have vacated. (23 CFR 635.309(c)(2))*
 - *The acquisition or right of occupancy and use of a few remaining parcels is not complete, but all occupants of the residences on such parcels have had replacement housing made available to them in accordance with title 49, Code of Federal Regulations (CFR) 24.204. The agency may request authorization on this basis only in very unusual circumstances, and this exception must never become the rule. Under these circumstances, advertisement for bids or force-account work may be authorized if the FHWA determined that it will be in the public interest. The physical construction may proceed, but the acquiring agency shall ensure that occupants of residences, businesses, farms, or non-profit organizations who have not yet moved from the ROW are protected against inconvenience, injury or any action coercive in nature. When the acquiring agency requests authorization to advertise for bids and to proceed with physical construction where acquisition or right of occupancy and use of a few parcels has not been obtained, full explanation and reasons therefore, including identification of each such parcel, will be set forth in the acquiring agency's request to proceed to construction. The request should include a realistic date when physical occupancy and use is anticipated. Appropriate notification shall be provided in the bid proposals identifying all locations where right of occupancy and use has not been obtained. (23 CFR 635.309(c)(3))*
- *ROW has been acquired or will be acquired in accordance with the current FHWA directive(s) covering the acquisition of real property or that acquisition of ROW is not required. (23 CFR 635.309(g))*
- *Steps relative to relocation advisory assistance and payments as required by the current FHWA directive(s) covering the relocation assistance program have been taken or that they are not required. (23 CFR 635.309(h))*

Purpose / Application

The purpose of this programmatic agreement is to set forth and describe the ROW certification process to be used in delivering the federal-aid highway program in South Carolina. The application of this agreement shall be in accordance with the requirements outlined in SCDOT's Right of Way Manual; as approved by FHWA.

Definition of Project Categories

- Category I:

This category of projects includes those in which the scope of work is inherently contained within SCDOT's existing roadway foot print extending to the appropriate shoulder treatment. As such it is considered that work associated with Federal Aid projects for the activities specifically identified below, would occur with the prescribed roadway right of way. Category I projects would be identified in the Project Planning Report, specifically marked and categorized in the Right of Way Data Management System and P2S. As identified, Obligation management would then designate "ROW-CAT I" in the designated FMIS field. For this category to apply the project must be SCDOT administered and the scope of work must be solely limited to those types as follows:

- Replacement of existing guardrail/end treatments
- Replacement of existing sign panels
- Replacement of pavement markings/markers
- Placement of rumble strips and/or stripes
- Signal head replacement and/or retiming of signals
- Pavement Preservation activities within footprint of the present pavement and shoulder treatment
- Bridge Painting
- Emergency repairs for work within existing ROW
- Widening where ALL construction work occurs within the median

SCDOT understands that this statement in FMIS will be viewed by FHWA as SCDOT's statement certifying the following:

"SCDOT hereby certifies that all work is to be accomplished within the existing right-of-way and that no additional right-of-way is necessary for this project; therefore, no residential or commercial relocations or clearances were required. SCDOT further certifies there are no known utility conflicts on this project. This project is clear."

- Category II:

This category includes all SCDOT administered projects that provide for a scope of work outside of that covered in Category I. These projects will require the preparation of an individual written ROW certification prior to FHWA's authorization to advertise construction.

Certifications shall be initiated by the project Program Manager. It shall be the responsibility of the SCDOT's Right of Way Headquarters Office to execute the Certification according to the following guidelines:

- Certificates for present right of way will be executed by the Director, Rights of Way or his designee.
- Certificates for acquisitions of right of way will be executed by the Director, Rights of Way or Right of Way Administrator (Field) on behalf of the Director, Rights of Way
- Any Construction "hold offs" included within a certificate shall be issued by the Right of Way Administrator (Field) with concurrence from the Director of Rights of Way

Category II projects would be identified in the Project Planning Report, specifically marked and categorized in the Right of Way Data Management System and P2S. As identified, Obligation management would then designate "ROW-CAT II" in the designated FMIS field. All certifications are to be submitted electronically to FHWA.

Should a conditional certification be issued for any Category II project, it shall be incumbent upon the SCDOT to issue a clear certification at the completion of all ROW acquisition and/or relocations activities.

- Category III:

This category includes all Federal-Aid projects administered by an approved Local Public Agency regardless of scope.

Certifications for LPA projects will be initiated by the LPA or the representative consultant firm in responsible charge of the project on behalf of the LPA. The certificate shall be executed according to the guideline set forth below:

- The LPA representative or its appropriate authoritative party is responsible for the initiation of the certification for submittal to the Regional Right of Way Administrator
- The Regional Right of Way Administrator will review and recommend for submittal to the Director, Rights of Way or Right of Way Administrator (Field) for execution.

Category III projects would be identified in the Project Planning Report for Local Public Agencies, specifically marked and categorized in the Right of Way Data Management System and P2S. As identified, Obligations Management would then designate "ROW-CAT III" in the designated FMIS field. All certifications are to be submitted electronically to FHWA through SCDOT.

Should a conditional certification be issued for any Category III project, it shall be incumbent upon the SCDOT to issue a clear certification at the completion of all ROW acquisition and/or relocations activities by the LPA.

Review and Monitoring

FHWA will maintain a comprehensive database of all ROW certifications. Certifications submitted under Category II and Category III will be reviewed and accepted by FHWA prior to authorizing construction advertisement. Category I projects will be sampled on an annual basis to ensure criteria are being appropriately applied.

Terminate, Modify, Amend

This Programmatic Agreement (PA) shall remain in effect indefinitely. Either party to this PA may terminate it for cause by providing a 30-day written notice to the other party. Either party to this PA may request that it be amended, whereupon the parties will consult to consider such an amendment. Should this agreement be terminated or suspended individual certifications will be required on ALL federal-aid projects.

Implementation of this Programmatic Agreement will begin on day of execution. The applicable section(s) of the SCDOT ROW manual will be updated to reflect this process as part of the Acquisition Manual update, which is due January 1, 2015.

We agree to the above process for ROW certifications in delivering the South Carolina federal-aid highway program.

Approved by:

Emily Lawton
FHWA SC Division Administrator

Leland Colvin
Chief Engineer for Project Delivery

Nov 3, 2015

Date