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Federal Railroad Administration Answers to Frequently Asked Questions about Rail Improvement Grant Conditions under 49 U.S.C. § 22905(c)(1)

I. Introduction

These answers to frequently asked questions (FAQs) are intended to assist applicants for Federal Railroad Administration (FRA) grant¹ programs that are subject to the requirements of section 22905(c)(1) of title 49, United States Code (U.S.C.) (as well as railroads who own rights-of-way that will be used in projects funded by these programs). Under section 22905(c)(1), a grant applicant must have a written agreement with a railroad that owns rights-of-way to be used by the project (referred to here as the 22905 Agreement) prior to grant obligation.

The FAQs provide example agreement language consistent with section 22905 for use in the required 22905 Agreements. Using this example agreement language will increase efficiency and consistency in the drafting, negotiation, and review of 22905 Agreements, while also ensuring statutory compliance.

The FAQs are a guidance document that do not have the force and effect of law and are not binding. The FAQs are intended to provide information regarding existing requirements under the law and summarize FRA's answers to frequent questions.

Legal Authority: 49 U.S.C. § 22905(c)(1) requires a written agreement between an applicant and a railroad that owns rights-of-way to be used by a project funded by a grant subject to 49 U.S.C. § 22905(c)(1), and specifies assurances that must be included in that agreement.

49 U.S.C. § 22905

(c) Grant Conditions.—The Secretary shall require as a condition of making any grant under this chapter for a project that uses rights-of-way owned by a railroad that—

(1) a written agreement exist between the applicant and the railroad regarding such use and ownership, including—

(A) any compensation for such use;

¹ As used in this document, the term “grant” refers to both a grant and a cooperative agreement.

- (B) assurances regarding the adequacy of infrastructure capacity to accommodate both existing and future freight and passenger operations;
- (C) an assurance by the railroad that collective bargaining agreements with the railroad's employees (including terms regulating the contracting of work) will remain in full force and effect according to their terms for work performed by the railroad on the railroad transportation corridor; and
- (D) an assurance that an applicant complies with liability requirements consistent with section 28103 of this title

II. General Questions

1. Which grant programs are subject to the conditions identified in 49 U.S.C. § 22905(c)(1)?

Section 22905 grant conditions apply to grants in most FRA administered grant programs, including:

- a) Consolidated Rail Infrastructure Safety Improvement (CRISI).
- b) Special Transportation Circumstances.
- c) Restoration and Enhancement Grants.
- d) Federal-State Partnership for State of Good Repair.
- e) Federal-State Partnership for Intercity Passenger Rail Grants.
- f) High-Speed Rail Corridor Development.
- g) Railroad Crossing Elimination Program.
- h) Interstate Rail Compacts Grant Program.
- i) National Infrastructure Project Assistance.

2. Are FRA's *Federal Register* Notices of Availability to announce guidance published on the FRA website legally binding?

No. An informational notice, such as a Notice of Availability, does not have the force and effect of law and is not legally binding. Accordingly, such a document cannot be relied on as legal authority.

3. Who is the "applicant" referenced in section 22905(c)(1)?

The "applicant" is the entity that is selected for the FRA grant and will be the signatory to the grant agreement with the FRA, also referred to as the Grantee.

4. In addition to those terms specifically required by section 22905(c)(1), what else should be included in the 22905 Agreement between the applicant and the railroad?

- a. The 22905 Agreement **should**:
 - i. Identify the parties to the 22905 Agreement.
 - ii. Define the terms "applicant" and "railroad" when used.

- iii. Include a concise project description (e.g. milepost to milepost), not only a reference to the description in another document, that includes the capital improvements to the rights-of-way that will be identified in the statement of work for the grant agreement. The project description should make clear that the capital improvements to the rights-of-way are part of the project receiving funding that is subject to section 22905(c)(1).
 - iv. Include a statement that the terms of the 22905 Agreement comply with 49 U.S.C. § 22905(c)(1).
 - v. Specify who is making each assurance.
- b. The 22905 Agreement should **not**:
- Limit or contradict the terms of section 22905(c)(1).

5. How should the 22905 Agreement incorporate the terms specified in section 22905(c)(1)?

To ensure compliance with the law, the assurances should use the statutory language of sections 22905(c)(1)(B)-(D).² FRA encourages the use of the following sample language, as appropriate:

22905(c)(1)(B): *The [INSERT PARTY NAME(S)] assures the adequacy of infrastructure capacity to accommodate both existing and future freight and passenger operations. [See Section IV for additional detail.]*

22905(c)(1)(C): *The railroad assures that collective bargaining agreements with the railroad's employees (including terms regulating the contracting of work) will remain in full force and effect according to their terms for work performed by the railroad on the railroad transportation corridor. [See Section V for additional detail.]*

22905(c)(1)(D): *The applicant assures that it complies with liability requirements consistent with 49 U.S.C. § 28013. [See Section VI for additional detail.]*

6. May the 22905 Agreement include additional terms?

Yes. The 22905 Agreement may include terms in addition to those required by section 22905(c)(1), provided those additional terms do not limit or contradict the assurances required by 22905. For example, the 22905 Agreement could flow down responsibility for compliance with other applicable requirements, like the protective arrangements equivalent to those established under the Railroad Revitalization and Regulatory Reform Act of 1976. 49 U.S.C. 22905(c)(2).³

² See Section III for example language addressing Section 22905(c)(1)(A).

³ FRA has recently issued proposed guidance relating to these equivalent labor protections and intends to issue final guidance after considering public comment.

7. May the 22905 Agreement include additional parties?

Yes. While the 22905 Agreement must be signed by the applicant that will sign the grant agreement with FRA, and the railroad that owns rights-of-way used by the project, additional parties may also be signatories to the 22905 Agreement.

8. Is a 22905 Agreement required if the applicant owns the rights-of-way to be used by the project?

No. If the applicant owns all rights-of-way used by the grant funded project, then a 22905 Agreement is not required. The applicant should note its position that a 22905 Agreement is not required because the applicant owns the railroad rights-of-way in an email to the project manager.

9. Is a 22905 Agreement required if the project is not one that “uses rights-of-way”?

No. If the project does not use railroad rights-of-way, or if the project is excluded from application under section 22905(e), no 22905 Agreement is required. A project uses rights-of-way if it includes capital improvements to rights-of-way. A project that is limited to operating assistance does not use rights-of-way, so no 22905 Agreement is required. The grantee should note its position that section 22905 does not apply under section 22905(e) or that a 22905 Agreement is not required because the project does not use railroad rights-of-way in an email to the project manager.

10. Is a 22905 Agreement required with every railroad owning the rights-of-way used by a project?

Yes. Under section 22905(c)(1), a 22905 Agreement is required between the applicant and every railroad that owns rights-of-way that are to be used by the project. This could be a single agreement among the applicant and all rights-of-way owning railroads or multiple agreements between the applicant and each right-of-way owning railroad.

11. Can the section 22905(c)(1) requirements be met in previously executed agreements between the applicant and the railroad owning the rights-of-way?

Yes. An applicant may rely on the terms of an existing agreement or agreements, provided such terms are sufficient to meet the requirements of section 22905(c)(1), including assurances specific to the grant funded project(s).

12. Will FRA review and approve 22905 Agreements?

No. FRA will not review 22905 Agreements prior to the obligation of a grant. The terms and conditions of the grant agreement will state that by accepting the grant, the applicant is certifying that the 22905 Agreement(s) has been executed or is not required. Grantees must also make any 22905 Agreement(s) available to FRA, upon request.

13. Will FRA obligate a grant agreement if a grantee cannot make the certification because it has not executed a required 22905 Agreement?

No. An applicant must be able to certify it has executed 22905 Agreement or that a 22905 Agreement is not required.

III. Questions about section 22905(c)(1)(A) (“any compensation for such use”)

14. Is this provision required if the applicant does not compensate the railroad for use of the rights-of-way?

Yes. In that circumstance, the 22905 Agreement should clearly state that the applicant will not compensate the railroad for the use of its rights-of-way.

15. Can FRA provide an example of language that would satisfy section 22905(c)(1)(A)?

Yes. See below for two examples.

Example 1: The Parties agree that the Applicant will compensate the Railroad for use of the Railroad rights-of-way used in the project [describe the compensation for use including the dollar amount, percentage of cost, or other compensation agreement].

Example 2: The Parties agree that the Railroad will not require, and the Applicant will not compensate, the Railroad for use of the Railroad rights-of-way used in the project.

IV. Questions about section 22905(c)(1)(B) (“assurances regarding the adequacy of infrastructure capacity to accommodate both existing and future freight and passenger operations”)

16. Is this assurance required if there are no passenger operations on the rights-of way?

Yes. Section 22905(c)(1)(B) requires an assurance regarding the adequacy of infrastructure capacity to accommodate both existing and future passenger and freight operations. This assurance applies to the type of existing and future operations on the rights-of-way; therefore, the 22905 Agreement may include a statement of fact about the type of operations in addition

to the assurance required by the law (e.g., “There are no existing or anticipated future passenger operations on the infrastructure.”). See Question 4 for an example of the language applicants should provide to ensure compliance with section 22905(c)(1)(B).

17. What does “infrastructure capacity” mean in this provision?

The term “infrastructure capacity” means the infrastructure capacity that results from the project.

18. What do the terms “existing” and “future” mean in this provision?

The term “existing” refers to operations that exist before the project begins, and the term “future” refers to operations that result from the project. Section 22905(c)(1)(B) does not affect either party’s ability to modify future operations.

V. Questions about section 22905(c)(1)(C) (“an assurance by the railroad that collective bargaining agreements with the railroad’s employees (including terms regulating the contracting of work) will remain in full force and effect according to their terms for work performed by the railroad on the railroad transportation corridor”)

19. Does this language require or prohibit changes to any existing collective bargaining agreements with the railroad’s employees?

No. Section 22905(c)(1)(C) requires an assurance that existing collective bargaining agreements with the railroad’s employees will remain in full force and effect according to their terms, but it does not require or prohibit changes to collective bargaining agreements.

20. Is this assurance required if the railroad engages contractors to perform the work on the railroad transportation corridor?

Yes. Section 22905(c)(1)(C) requires an assurance whether railroad employees or contractors perform the work. Section 22905(c)(1)(C) does not prohibit the railroad from engaging contractors for work in the railroad transportation corridor, provided such contracting is done consistent with the existing collective bargaining agreements.

21. Is this assurance required if the railroad does not have any collective bargaining agreements in place?

No. However, if the railroad has no collective bargaining agreements in place at the time the 22905 Agreement is executed, the railroad should provide an assurance to that effect (e.g., “The railroad assures that it has no collective bargaining agreements in place with its employees for work performed on the railroad transportation corridor.”).

22. Which “railroad” does section 22905(c)(1)(C) reference, the operating railroad or the host railroad?

Section 22905(c)(1)(C) requires an assurance by the railroad that owns the rights-of-way.

VI. Questions about section 22905(c)(1)(D) (“an assurance that an applicant complies with liability requirements consistent with section 28103 of this title”)

23. Is this assurance required if there are no passenger rail operations conducted?

No. However, if there are no passenger operations on the rights-of-way at the time the 22905 Agreement is executed, the applicant should provide an assurance to that effect (e.g., “There are no passenger operations conducted or expected to be conducted on the rights-of-way.”). Section 22905(c)(1)(D) does not alter the applicability of section 28103, which may otherwise apply by law.

24. Is this assurance required if the applicant does not conduct any operations because it enters into contracts for operations?

Yes. Section 22905(c)(1)(D) requires an assurance that the applicant complies with liability requirements consistent with 49 U.S.C. § 28103. Section 22905(c)(1)(D) does not prohibit entry into contracts that pass on the obligation to comply with such requirements to another entity.

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