



U.S. Department
of Transportation

Federal Highway
Administration

Memorandum

Subject: **Information:** Implementation of the
NHS Bridge Condition Penalty
(23 U.S.C. 119(f)(2))

Date: June 8, 2018

From: /Original signed by/
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In Reply Refer To: HIBS

To: Division Administrators
Directors of Field Services

Purpose

The purpose of this memorandum is to provide information on the obligation requirements for Minimum Condition of National Highway System (NHS) Bridges (NHS Bridge Condition Penalty). The memorandum also discusses the next steps if a State that is subject to the NHS Bridge Condition Penalty does not fully obligate bridge penalty set-aside funds. We are sending you this information to ensure consistency among division offices and clarify the existing approach in the implementation and execution of the NHS Bridge Condition Penalty.

Background

Section 119(f)(2) of Title 23, U.S.C., established the Minimum Condition for NHS Bridges. Each State must maintain its deck area on structurally deficient (SD) NHS bridges at or below 10.0 percent over a 3-year period. If a State fails to maintain the deck area on SD NHS bridges at or below 10.0 percent for 3 consecutive years, an amount equal to 50 percent of its FY 2009 Highway Bridge Program (HBP) apportionment is set aside for use on NHS bridge projects. For States that have triggered the NHS Bridge Condition Penalty, the Office of Chief Financial Officer (HCF) sets aside a portion of the State's National Highway Performance Program (NHPP) funds under program code Z510 along with an equal amount of associated 1-year obligation limitation. The FHWA has implemented these requirements in 23 CFR 490.411 and 490.413. The latter (23 CFR 490.413) redefines a SD bridge to be any bridge with a National Bridge Inventory component condition rating of 4 or less (classified as a bridge in poor condition) and requires the penalty funds to be obligated in the year in which they are set-aside.

Implementation

The NHS Bridge Condition Penalty is triggered when the deck area on NHS bridges classified as in poor condition is greater than 10% for 3 consecutive years. When

triggered, the State is required to obligate NHS Bridge Condition Penalty set-aside funds in the fiscal year that the penalty is assessed. Division offices should work collaboratively with States that are subject to the penalty to identify eligible bridge projects and obligate NHS Bridge Condition Penalty set-aside funds in a timely manner on eligible projects. In unique circumstances where States are unable to obligate all of the NHS Bridge Condition Penalty set-aside funds by the end of the fiscal year, the division office should notify the Office of Bridges and Structures as soon as possible.

Obligation limitation associated with NHS Bridge Condition Penalty set-aside funds is only available for one fiscal year. If a State cannot fully obligate NHS Bridge Condition Penalty set-aside funds in the first fiscal year, the State should demonstrate why it is unable to obligate such funds and must return any unused obligation limitation for the annual August Redistribution. Additional obligation limitation will not be provided in the second fiscal year for the carryover balance. The State will be required to set aside formula obligation limitation in the second fiscal year for use only with the carried over NHS Bridge Condition Penalty set-aside funds.

The set-aside obligation limitation is not tracked separately in FMIS-5. Therefore, the division and State must monitor the obligations and ensure the appropriate amount of annual obligation limitation is either obligated or returned for August Redistribution.

Additionally, if a State is unable to fully obligate NHS Bridge Condition Penalty set-aside funds in the first fiscal year, the State must develop a plan to show how it will obligate such funds to meet the requirements of 23 U.S.C. 119(f)(2) and 23 CFR 490.413 in the second fiscal year. A State must submit the plan to the division office for review within 90 days of the beginning of the second fiscal year. This plan must identify projects to be funded with NHS Bridge Condition Penalty set-aside funds from both the second fiscal year, as well as any funds carried over from the first fiscal year. All available funds must be obligated by the end of the second fiscal year and each fiscal year thereafter. Carryover is not permitted after the second consecutive fiscal year under penalty.

If a State de-obligates NHS Bridge Condition Penalty set-aside funds because of project underruns or project cancellation, the State must re-obligate the NHS Bridge Condition Penalty set-aside funds on one or more eligible NHS bridge projects by the end of the fiscal year. De-obligating funds for any other purpose, such as to free them up, replace with other funds, or use reverse advance construction, is not authorized and would not be valid de-obligations.

Attached Table 1 outlines the NHS Bridge Condition Penalty provision requirements, funding, and obligation limitation by year. Table 2 outlines three scenarios for fiscal years one and two funding situations and the impact on formula obligation limitation.

The Office of Bridges and Structures will continue to monitor States' NHS Bridge Condition Penalty set-aside fund status, provide regular updates to division offices,

reach out to the division offices in those States affected by the NHS Bridge Condition Penalty provision, and monitor obligation rates. Please contact Douglas Blades with any questions or concerns via email (douglas.blades@dot.gov) or at 202-366-4622.

Table 1. Minimum Condition for NHS Bridges Penalty Provision Requirements, Funding, and Obligation Limitation

	Year 1 FY NHS Bridge Condition Penalty Provision Triggered	Year 2 If Unobligated Balance Remains
Requirement	States are required to obligate all Penalty set-aside funds in the triggered FY (Year 1). Justification must be provided for not fully obligating the penalty set-aside.	States required to obligate NHS Bridge Condition Penalty set-aside funds unable to be obligated in Year 1 and all of the second year penalty funds, if applicable. Plan must be provided within 90 days (by December 30).
Funds (Contract Authority)	HCF sets aside funds with designated program code	Funds will continue to be available for obligation
Obligation Limitation	HCF sets aside NHS Bridge Condition Penalty obligation limitation for Year 1 funds in an amount equal to the contract authority	State required to obligate remaining funds using annual formula obligation limitation.
August Redistribution	State must return unused set-aside NHS Bridge Condition Penalty obligation limitation for August Redistribution. If not returned, the obligation limitation will expire and be removed from FMIS. Returned obligation limitation will not be restored in the following year. The State may not use the obligation limitation for other funds.	State must return unused set-aside formula obligation limitation for August Redistribution. If not returned, the obligation limitation will expire and be removed from FMIS. Returned obligation limitation will not be restored in the following year. The State may not use the obligation limitation for other funds.
De-obligation	If a State de-obligates previous years' NHS Bridge Condition Penalty set-aside funds for a legitimate reason, funds must be re-obligated that same FY on one or more eligible NHS bridge projects.	

Table 2. Obligation limitation examples

	Year 1 FY NHS Bridge Condition Penalty Provision Triggered	Year 2 If a State is Unable to obligate NHS Bridge Condition Penalty Funding Unobligated Balance Remains (in addition to Year 2 new set-aside)
State 1	\$1,000,000 – Set-aside	\$0 – Set-aside
	\$1,000,000 – Obligated	\$0 – Formula obligation limitation
	\$0 – Unobligated balance	
State 2	\$1,000,000 – Set-aside	\$500,000 – Set-aside
	\$500,000 – Obligated	\$500,000 – Formula obligation limitation used for obligations
	\$500,000 – Unobligated balance & obligation limitation returned for August Redistribution	
State 3	\$1,000,000 – Set-aside	\$1,000,000 – Set-aside
	\$0 – Obligated	\$1,000,000 – Formula obligation limitation used for obligations
	\$1,000,000 – Unobligated balance & obligation limitation returned for August Redistribution	