

# Congressman Young's Coconut Road I-75 Interchange Earmark

## Lee County MPO Options

Released by Lee MPO Chair, Carla Brooks Johnston (Former Mayor, Sanibel) August 8, 2007

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Lee MPO Chair Carla Brooks Johnston released an independent research report on questions which she deems critical to the MPO's making an informed decision on how to spend the \$10 million dollars earmarked for a Coconut Road I-75 Interchange.

Her charge to researcher, Darla Letourneau, a career professional familiar with Congressional appropriations procedures, was to determine the following:

- 1) What exactly did Congress vote for when inserting Congressman Young's Coconut Road Earmark?
- 2) Could the Lee MPO reallocate the funds to higher priority projects, if it wished?
- 3) What is the exact procedure for re-programming an earmark?

The research paper documents that

- 1) Congress didn't vote \$10 million for "a Coconut Road Interchange"; Congress voted \$10 million for "I-75 widening and improvement."**
- 2) The money can be reallocated immediately on a loan basis, and permanently by making a technical correction in the legislation to what Congress actually voted.**
- 3) There are a number of ways someone in our Congressional delegation can initiate such a legislative technical correction.**

Johnston stated, "Fifteen honorable elected officials comprise the Lee MPO. We need the answers to the above questions prior to our August 17, 2007 meeting when we decide on how the Coconut Road earmark money will be spent. In setting our county-wide priorities, we include the economic development needs of the majority of county businesses, the needs of residents and visitors in our rapidly growing population, and we strive to protect the environmental resources which make possible our economic viability. Our staff and the Florida Department of Transportation staff constantly update the data we use in decision making. The Lee MPO, in setting priorities, affirms this staff work and affirms the support of our Congressional delegation's

vote. I do not think anyone believes that Alaskan Congressman Young's self-interests should determine Lee County Florida priorities."

BELOW IS REPORT. ACTUAL DOCUMENTS IN ADOBE ATTACHED

**Memorandum: July 31, 2007**

**To:** Carla Brooks Johnston, Chair of Lee County MPO

**From:** Darla Letourneau, former Deputy Asst. Secy, U.S. Department of Labor, 1993-2000 (DOL representative to Appropriations Committees) (Lee County resident)

**Subject: Research on Coconut Road I-75 Interchange Earmark:**

- I. History of Earmark
- II. Is the \$10 M Lost to Lee County if not used for Coconut Rd.?
- III. How to Change the Purpose of the Earmark
- IV. Conclusion

## **I. HISTORY**

The authorization and funding for the Coconut Road interchange I-75/Lee County project is contained in Public Law 109-59, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (known as SAFETEA-LU). This law was signed by the President on August 10, 2005. This statute included 5 projects for Lee County:

### **Lee County's Five "Member Earmark" Projects (total 5-year funds—FY-05-09)**

#### **High Priority Projects (HPP) (Section 1701 of Title I):**

#781	I-75 Widening and Improvements in Collier & Lee County, FL	\$36.0 million
	<i>[Added by House in conference June/July 2005]</i>	
#931	Widening and Improvements for I-75 in Collier & Lee County	\$21.6 million
	<i>[added by House in conference June/July 2005]</i>	
#3898	I-75 Widening and improvements in Collier & Lee County, FL	\$15.0 million

*[added by Senate in conference June/July 2005]*

#3920 I-75 improvements, widen to six lanes I-75 from Golden Gate

Parkway in Collier County to Daniels Parkway in Lee County \$ 8.5 million

*[added by Senate in conference June/July 2005]*

**Transportation Improvement Projects (TIP) (Section 1934 of Title I):**

#462 Coconut Rd. interchange I-75/Lee County\* \$10.0 million

***[\*This project added by the House in conference was numbered project #461 in the Conference Report (H. Rept. 109-203), and designated as \$10 million for “widening and improvements for I-75 in Collier and Lee County” when it passed both the House and Senate on July 28, 2005. However, AFTER final passage by Congress and before the President signed the bill into law on August 10<sup>th</sup>, the purpose of the earmark was changed to “Coconut Rd.”]***

**GRAND TOTAL \$91.1 million**

[See Attachments 1, 2, 3, 4, 4(a), and 5.]

As you can see, several of the Lee County projects have the same description—“I-75 widening and improvements in Collier and Lee County.” The reason for multiple projects with the same title/description is that each individual project number represents a specific member’s request. Although the name of the member requesting the project was not required to be made public when this bill was enacted in 2005, it is fair to assume that each member of the Lee and Collier County’s congressional delegation (Senate and House) asked for a member earmark related to the I-75 work needed in Lee and Collier Counties.

When the funds come to the local level through the Florida Department of Transportation (FDOT), all the numbered projects with the same title/description are managed as one.

Detail: Legislative History:

House Action

The transportation bill, H.R. 3, originated in the House, and was passed by the full House on March 10, 2005.

- There was no section in the House-passed bill dealing with “Transportation Improvement Projects” (TIP).

- The original House bill only contained 96 “High Priority Projects” (HPP) (compared to the final number of 5,091), and none of these were for the Coconut Road Interchange or any other Lee County projects.
- Only 3 relatively small Florida projects were on the original House-passed list of 96 projects, and none of them were for Lee County.

### Senate Action

On March 16, 2005, the Senate Committee on Environment and Public Works reported out its version of SAFETEA-LU, S. 732.

- Nothing in the table of contents of S.732 indicates that either the HHP or TIP sections were included and no member earmarks were listed in S. 732. (See table of contents of S. 732, found on [www. THOMAS.gov](http://www.THOMAS.gov).)
- It is not unusual for the number of member earmarks to grow substantially as the bill goes through the legislative process. Committees (esp. in the Senate) often slip in the member earmarks at the last minute in order to minimize the press scrutiny of earmarks, and maximize the Chairman’s leverage over the members seeking the earmarks.
- From April 26 through May 17, 2005, the Senate version of H.R. 3 (S. 732) was on the Senate floor. The Senate considered hundreds of amendments, and passed its version of H.R. 3 on May 17, 2005. Based upon a review of the Congressional Record, it does not appear that any member earmark projects were considered during floor action. [See the detailed list of all legislative actions for H.R. 3, as found on THOMAS.] Again, this demonstrates that most member earmarks are handled behind closed doors and at the end of the legislative process.

### Conference Committee

The Conference Committee, made up of members (usually authorizing committee members) appointed by both the House and Senate, met on June 6, 2005 to resolve disagreements between the House and Senate bills.

- On July 28<sup>th</sup>, the conferees filed the conference report (called H. Rept. 109-203). The conference agreement includes a substitute for the Senate amendment, and for the first time includes a new category of member projects--Section 1934, Transportation Improvements (TIP) projects, and includes the conference agreed upon list of member projects.
- This TIP list, organized by State in the conference report, contained 465 member projects, including 7 Florida projects (#44-50), none of which are in Lee County.
- At the end of this list of projects in alphabetical order by State (which is the way the Senate organizes its projects), there is a list of 10 projects, apparently added late in the process, that are not in order by State.
- In this list of 10 “last minute” projects, which have hand-written new project numbers on the side, there is for the first time “Project #461, FL, Widening and Improvements for I-75 in Collier and Lee County, \$10 million”.

- This means that when the House members voted on the H.R. 3 conference report (H. Rept. 109-203) on July 29, 2005, they voted for this wording of the project, not “Coconut Rd. Interchange”.
- Since the Senate passed the House-passed conference report on the same day, the Senate also voted on this original version of this earmark language. [See Attachment 3. (Note Adobe copy omits Attachment title—It starts w. cover for “Conference Report-H.R.3)]

[Note: All the source documents are found on the official congressional website ([www.THOMAS.gov](http://www.THOMAS.gov), maintained by the Library of Congress. To access the final conference report voted on by Congress, search for “H.Rept. 109-203”, and go to section 1934, and look for Project #461.)

### Bill Enrollment

Bills that pass Congress must go through a technical “bill enrollment” process to ensure that the final bill sent to the President for signature reflects precisely the effect of all amendments agreed to by both bodies. Under House and Senate rules, just after Congress’s final passage of the bill, the bill’s conference committee manager requests unanimous consent for the Clerk of the House (under the direction of the Conference Committee Chairman), to make such changes after passage of the bill. By giving unanimous consent for these technical corrections to be made in the bill after it has been passed, the House and Senate are authorizing corrections to section numbers, punctuation, and cross references, and to make such other necessary technical and conforming changes as may be necessary to reflect the final actions of both bodies. [See Attachments 4(a), and also see explanation in THOMAS “How Our Laws Are Made, XVII. Enrollment”.]

In the case of H.R. 3, the enrolled version of the bill [See Attachment 4, from THOMAS] redesignated the \$10 million Lee County project #461 as #462 (most likely reflecting a clerical error in the bill as passed). Most importantly, after congressional passage of the conference report, the purpose of this project changed from its passed version of “widening and improvements for I-75 in Collier and Lee County” to “Coconut Rd. interchange I-75/Lee County”.

It is unclear how such a substantive change could have been made at this point in the process without taking the matter back to Congress for a vote. For example, on July 29<sup>th</sup>, Congress passed H. Con Res. 226 to make a correction to the enrollment of H.R. 3, striking section 1942. Thus, there is a legislative process (Concurrent Resolution) available for post-enactment substantive changes, which was not used in the case of TIP#462 (Coconut Rd.).

The enrolled version of a bill is not usually available to the public, since it is quickly replaced by the version of the bill signed by the President that is then printed as public law. Although a copy of the enrolled version of the bill is now available on THOMAS, it is unlikely that it was available publicly at the time it was transmitted to the President.

- A change in the description/purpose of a member project would not be within the scope of the technical enrollment rules. It is hard to imagine how such a substantive change to Section 1934 could have been made at this point in the legislative process without the knowledge and/or involvement of the Chair of the Conference Committee at the time (Rep. Don Young (R-AK).
- According to press reports, Congressman Connie Mack requested the \$10 million in #462, which was included in the final conference report as “#461: I-75 widening and improvements “. Congressman Mack has said he was unaware of the change in its designated purpose to “Coconut Rd. interchange/I-75” until after the bill was signed by the President.

P.L. 109-59, as signed by the President

- The bill as signed by the President, P.L. 109-59, enacted on August 10, 2005, contains the same language as in the enrolled bill.
- **It wasn't until after the bill became law that it became public that the \$10 million for Lee County in Project #462 changed from "widening and improvements in I-75" to "Coconut Rd. interchange/I-75".**

## **II. IS THE \$10 MILLION LOST TO LEE COUNTY IF NOT USED FOR COCONUT ROAD INTERCHANGE?**

As this section will explain in detail, the MPO should not be worried about "losing \$10 million" if it doesn't want to proceed with the Coconut Rd. interchange. **This \$10 million is reserved for Lee County's use until expended and cannot be taken away from the County or redirected by either the State or the Federal government without a change in the Federal statute.**

There is an established congressional process and common practice for member earmark "technical corrections" legislation. Given that the intended purpose of Lee County's project #462 was changed in the bill enrollment process after it had been passed by both the House and Senate, it is a prime candidate for a technical correction. It is the MPO's responsibility to ask its congressional delegation for this legislative change. While this legislative process plays out, Lee County MPO can request FDOT to temporarily redirect (loan) these TIP #462 (Coconut Rd.) project funds, as provided by the statute in Section 1935, Project Flexibility, to the existing project for widening and improvements to I-75 in Lee and Collier Counties (HPP #3898).

The following discussion details the components of this process.

### **A. Flexibility Provisions**

#### Member Earmark Projects: Funding Availability

Although changes in the purpose of the funds cannot be made without legislative action, the statute provides for some flexibility in the use of these funds during the 5 year period, as outlined below.

- The House and Senate members have different interests; therefore, the flexibility rules have been designed to reflect those interests. Since the Senators represent the whole State, they provided some flexibility for projects with the State that were Senate projects. However, House members represent only their districts, so they have no interest in flexibility among projects within a State, thus, the flexibility provisions in the statute don't apply to the House projects in Section 1701 (HPP).
- The funds listed for the "High Priority Projects" (HPP) are the 5-year total, and 20% of these funds are allocated to the State (FDOT) each year, FY 2005 to FY 2009. The HPP program is "subject to obligation limitation that is set aside specifically for this program."

- The limitation is special no year limitation that remains available until used.” (See Attachments 2 and 2(a).)
- As part of the “Transportation Improvement Projects” (TIP), the funds for these projects are also allocated to FDOT, and the amount listed in the table is the total for FY 2005-2009.
- These funds are allocated in the following amounts:
  - 10% for FY 2005,
  - 20% for FY 2006,
  - 25% for FY 2007,
  - 25% for FY 2008, and
  - 20% for FY 2009.

(Section 1934(a) (2)).

- These funds are available until expended. (Section 1934(b) (1)).

[See Attachments 1 and 1(a).]

- Thus, of the \$10 million for Project #462 (Coconut Rd.), 55% has already been allocated to FDOT, or \$5.5 million. To date, it does not appear that any of these funds have been used for the Coconut Road Project (#462) purposes.

#### Member Earmark Projects: Flexibility Rules

- Section 1935 of Title I allows for some flexibility of funding between certain member earmark projects. Essentially, a State can “loan” money between projects both within and across types (High Priority Projects (HPP) and Transportation Improvement (TIP) projects). This flexibility applies to all High Priority Projects that are numbered 3677 or higher (these are “Senate earmarks”); and applies to any Transportation Improvement Project (this program was added by the Senate; therefore they established rules as if they were all “Senate earmarks”).
- This flexibility provision essentially provides timing flexibility, allowing a State to give a higher priority to a certain high priority project so it can get a faster/bigger start; however, by the end of FY 2009, any project that had funds shifted out of it must have its funding level fully restored.
- Thus, no overall 5 year authorization for a project from the category list may be reduced.
- According to FHWA’s October 2006 Implementing Guidance for SAFETEA-LU High Priority Projects (Section II.B), the State DOT submits its request to the FHWA Division Office. This process does not require a decision by headquarters—they simply execute the financial transaction requested by the State.

[See Attachments 1, 1(a), and 8.]

- Although the Federal funds are allocated to the States, the programs operate on a reimbursable basis, both between the Federal government and the States, and between the local entities and the State. In other words, actual funds are not transferred until after the work is completed and the State (or the local government) submits the request for reimbursement. [Response from FHWA Program Administration staff 7/20/07.]

### Application of Flexibility Provisions to TIP Project #462 (Coconut Road)

- With respect to the application of this flexibility provision to Florida, the State has had the option over the past 3 years of temporarily shifting the \$5.5 million allocated to date from TIP Project #462(Coconut Rd.) to HHP #3828 (\$15 million for widening and improvements to I-75/Lee and Collier Counties), allowing that project to get a faster start.
- Thus, rather than the project #462 (Coconut Rd.) funds “sitting in the bank” while the County pursues a statutory change in the language designating the use of funds, these funds can be put to use now on the I-75 widening & improvement project (#3828), which could include a study of such things as Bonita Beach and Corkscrew interchanges.
- **The County has until 2009 (and even later if SAFETEA-LU reauthorization is delayed) to secure the language change in #462 (Coconut Rd.) that would return it to the original House and Senate passed conference report language of “I-75 widening and improvement in Lee & Collier Counties”. These funds will not be “lost” or “expire”, and cannot be redirected by the State for some other project without specific legislative action.** [See Attachment 9.]
- If the project funds for #462 (Coconut Rd.) remain unused after 2009, the reauthorized transportation bill will likely include a section, such as Section 1603 in the 2005 SAFETEA-LU, which gives the Secretary of Transportation the authority to redirect the use of funds for “inactive projects”, but it includes a “sense of Congress” that “these funds should be spent in the same geographic region for which the eligible funds were initially made available.” [See Attachment 9.]
- In sum, these funds will remain for a Lee County transportation project under any scenario.

### **III. How to Change the Purpose of the Earmark**

Member earmarks in SAFETEA-LU are statutory earmarks, which mean that these funds cannot be used for any other purpose without a change in the Federal statute. Based on a review of public documents, it is not unusual that changes are needed in earmark language to reflect changes in local needs or entities to receive the funds, etc.

There are several ways in which these statutory changes can be made:

1. A technical corrections bill. A SAFETEA-LU technical corrections bill, H.R. 1195 and S. 1611, is currently making its way through Congress. It was passed by the House on March 1, 2007, and the Senate Committee on Environment and

Public Works reported it out of Committee on June 6<sup>th</sup>. The Committee on Banking, Housing, and Urban Affairs (which has some jurisdiction over the transit sections of the statute), also reported out its version of S. 1611 on June 13, 2007, and the bill is currently on the Senate Legislative Calendar. H.R. 1195 was passed by unanimous consent and voice vote in the House and the same procedure is likely for the Senate. In order words, it is signed off on by both sides of the aisle, and is passed without any debate or vote.

Detail:

The Senate bill, S. 1611, could be brought to the floor at anytime. [Note that the Senate is scheduled to recess August 6 – September 3, 2007, so it could be taken up before the August recess, or in September when they return.] Once the Senate passes its bill, a conference committee will be required, since the House and Senate bills will need to be reconciled, which creates another possible opportunity for this technical amendment to be inserted.

- House authorizing committee: Committee on Transportation and Infrastructure
  - Chair, Rep. James Oberstar (D-MN-8); Ranking Minority, John Mica (FL-7) [Note: Don Young (R-AK) was chair in 2005, and remains a member of the committee but is not in a leadership position.]
    - There are 5 representatives on this subcommittee from FL—4 are Republicans, including the Ranking Minority, John Mica, Connie Mack, Mario Diaz-Balart, and Vern Buchanan
  - The one Democrat is Corrine Brown (3<sup>rd</sup> district)
  - Subcommittee: Highways and Transit
    - Chair: Peter DeFazio (D-OR)
    - Ranking Minority: John Duncan (R-TN)
  - (Note: Connie Mack is on committee but is not on this subcommittee)
- Senate authorizing committee: Committee on Environment and Public Works [note: other committees have joint jurisdiction over other parts of the bill, but not the highway portion]
  - Chair, Barbara Boxer (CA); Ranking Minority, James Inhofe (OK)
  - Subcommittee: Transportation and Infrastructure:
    - Max Baucus (D-MT) (Chair)
    - John Isakson (R-GA) (Ranking)
  - (Note: There are no Senators from FL on this Committee.)

2. Technical amendments section in the next version of SAFETEA-LU legislation when it is reauthorized in 2009. In the 2005 legislation, there is a Section 7103, “Technical Amendments to Transportation Projects”, which amends the previous legislation, TEA-21, which makes changes in 19 of the member earmarks in that bill. These changes are primarily changes in wording of the use of the funds for that community rather than a shifting of those projects to another purpose within the State. [See Attachment 7.]

Detail:

- It is important to note that even though the funds in these original TEA-21 projects had been available since 1998, the funds remain available until spent, so that just because the original authorization dates of between FY 1998 and FY 2003 had passed, those funds were still available to be spent for these newly revised purposes, as enacted in these technical amendments in 2005.

3. Appropriations. Although a transportation bill, generated by the House or Senate authorizing committee, is the traditional starting point for technical corrections in legislation under its jurisdiction, these kinds of technical corrections can be attached to other legislative vehicles that are moving through.

Detail:

- The primary vehicle used for such technical corrections is the annual appropriations bills. In this case, it could be the Transportation Appropriations bill which covers transportation issues.
- Although the funds for these transportation projects (and everything in the SAFETEA-LU legislation) come from the Highway Trust Fund, the authority to obligate that money each year must be provided in the annual appropriations bill.
- Since having authorizing legislation on an appropriations bill is subject to a point of order on the floor, the appropriations committee must have a sign-off from the chair of the authorizing committee in order to “legislate on an appropriations bill”.
- An appropriations bill is often the only “train leaving the station” every year, so it becomes the vehicle for an assortment of legislative amendments in both the House and Senate, sometimes added in committee, on the floor, or in conference.

House Appropriations Committee:

Chair: Dave Obey (D-WI)

Ranking: Jerry Lewis (R-CA)

Transportation/HUD Subcommittee

Chair: John Olver (D-MA)

Ranking: Joe Knollenberg (R-MI)

Note: There are 4 members from FL on the full Committee, but none on the subcommittee: Allen Boyd (D), Bill Young (R), Dave Weldon (R), and Ander Crenshaw (R).

Senate Appropriations Committee:

Chair: Robert Byrd (D-WVA)

Ranking: Thad Cochran (R-MS)

Transportation/HUD Subcommittee

Chair: Patty Murray (D-WA)

Ranking: Christopher Bond (R-MO)

Note: There are no Senators from Florida on the Appropriations Committee

Status of FY 2008 bill: House Committee marked up bill on July 11, 2007 & Senate Committee marked it up on July 12, 2007. Floor action in both houses could occur at any time. Conference committee action is anticipated in September-October.

4. Process for Making Change:

- In all of the three approaches above, by custom, a request for the change in language usually is initiated by a member of the affected congressional delegation.
- Bills often start in the House. However, the Senate could address it in their version of the bill, or an individual Senator could offer an amendment on the floor, or a conferee could attempt to insert it in conference, with clearance from the authorizing committee.

#### **IV. CONCLUSION**

In light of this research, it should be clear that:

- The purpose of the \$10 million TIP project #462 (Coconut Rd.) was changed from the language in the final conference report as voted on by Congress on July 28, 2005—“widening and improvements for I-75 in Collier and Lee County”—to “Coconut Rd. interchange I-75/Lee County” AFTER congressional passage but before the bill was signed into law by the President.
- The Lee County MPO has the right to have the \$10 million redirected.
- The statute protects this \$10 million for a Lee County transportation project until expended.
- It cannot be redirected to any other State or any other project within the State without a statutory change, which, by custom, is initiated by the congressional delegation representing the geographic area of the designated project.

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