

Fixing America's Surface Transportation (FAST) Act

Key Provisions for Project Delivery

June 2016



U.S. Department
of Transportation

**Federal Highway
Administration**

Key Provisions

A focus on the environmental review and permitting process



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- FAST Act contains a subtitle on “Acceleration of Project Delivery”
 - Including related provisions throughout the Act
- Multiple changes, but mostly to already existing provisions
- Adds new procedural requirements to environmental review process

Environmental Review for Project Decisionmaking



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Environmental Review for Project Decisionmaking (Sec. 1304)

- §1304 of FAST makes several changes to procedural requirements of Environmental Review Process
- Revises Section 139 of Title 23
a.k.a. “139 Environmental Review Process”
“Section 6002 Guidance”
- Effective December 4, 2015

Environmental Review for Project Decisionmaking (Sec. 1304)

Definitions–

Multimodal Project

Redefined as a project that requires the approval of more than one DOT operating administration (e.g., FHWA/FTA/FRA) or the secretarial office (OST)

Project

Redefined to be consistent with the multimodal definition above but adds considerations for determining a project – e.g., known sources of Federal funding or financing identified

Environmental Review for Project Decisionmaking (Sec. 1304)

Project Coordination –

Lead agencies must:

- Identify participating agencies no later than 45 days after the NOI or the initiation of an EA (§ 1304(d))
- Establish coordination plan no later than 90 days after the NOI or initiation of an EA, which must include a schedule for completing the environmental review process. (§1304(g)(1))
- Develop a checklist in consultation with participating agencies, to identify natural, cultural and historic resources in project area. (§1304(e)(5))

Environmental Review for Project Decisionmaking (Sec. 1304)

Project Coordination –

Lead agencies must:

- Develop an environmental document sufficient to satisfy the requirements for any Federal approval, action, or permit required for the project. (§ 1304(d))
- Consider and respond to comments received from participating agencies on matters within the special expertise or jurisdiction of those agencies. (§ 1304(c))

Environmental Review for Project Decisionmaking (Sec. 1304)

Project Coordination –

Participating agencies must:

- For all Federal permits and reviews for a project, to the maximum extent practicable and consistent with Federal law, rely on a single NEPA document prepared under the leadership of the lead agency.
- Provide comments, responses, studies, or methodologies on those areas within the special expertise or jurisdiction of the agency; and use the process to address any environmental issues of concern to the agency.

Environmental Review for Project Decisionmaking (Sec. 1304)

Project Initiation

- Requires a DOT response to a notice from a project sponsor to initiate environmental review (§ 1304(e))
 - DOT must respond no later than 45 days after project initiation notice
 - “yes,” “no,” or “need more information”
- Project sponsor may ask Secretary to designate a USDOT operating administration or office with expertise to serve as the lead Federal agency. (§ 1304(e))

Environmental Review for Project Decisionmaking (Sec. 1304)

Alternatives Analysis

- Participating agencies' comments on alternatives must be related to their area of special expertise or jurisdiction. (§ 1304(f))
- Participating agencies that decline participation in development of P&N and alternatives must comply with schedule for the project. (§ 1304(f))
- Lead agencies may eliminate alternatives that have been considered in the planning process so long as certain conditions have been met. (§ 1304(f))

Environmental Review for Project Decisionmaking (Sec. 1304)

Issue Identification and Resolution

- Any issue resolved by the lead agency with concurrence of participating agency may not be reconsidered unless significant new information or circumstances arise (§ 1304(h))
- Amends financial penalty provisions by adding the description of date for the application of financial penalties: 180 days from a “complete application,” as defined by the permitting agency.

Environmental Review for Project Decisionmaking (Sec. 1304)

Accelerated Decisionmaking

- No changes to procedure, but codifies the use of errata sheets and single document (FEIS/ROD)
- Reemphasizes the use of a single document (FEIS/ROD), to the maximum extent practicable (§ 1304(j))
- Continues to allow the use of errata sheets attached to the Draft EIS in lieu of rewriting the DEIS, subject to certain conditions.

Environmental Review for Project Decisionmaking (Sec. 1304)

Accelerated Decisionmaking

- Changes to Project Reporting
 - Federal agencies participating in the environmental review or permitting process must provide information on status and progress of EISs and EAs to be included in a “searchable internet website” established by the Secretary. (§1304(j))
 - Connected to the newly established Federal Permitting Dashboard (see Title XLI (41) of FAST)

Environmental Review for Project Decisionmaking (Sec. 1304)

Programmatic Approaches

- Directs the Secretary to allow for the use of programmatic approaches to conduct environmental reviews (§ 1304(b))
- Secretary shall ensure that programmatic reviews
 - Promote transparency
 - Use accurate and timely information
 - For tiered analyses,
 - describe the relationship between programmatic analysis and any future analysis and
 - define the role of the public in the process.
 - Are available to other relevant Federal and State agencies, Indian tribes, and the public; and
 - Provide notice and public comment opportunities

Environmental Review for Project Decisionmaking (Sec. 1304)

Programmatic Approaches

- Effective after the completion of rulemaking
- Rulemaking is Congressionally directed to be complete by December 4, 2016
- Rulemaking requires a 60-day comment period

Procedural Changes (Sec. 1304)

Implementation Summary

- Issued Q&As focused on applicability to modes on April 8, 2016

NEXT STEPS

- Issue In-depth Procedural Q/A's
- Issue separate Liaison Guidance focused on Section 1304(i)
- Update 23 CFR 771/774 with procedural changes through rulemaking
- Update Section 139 guidance

Let's Take a Few Questions



New Flexibilities



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New Flexibilities

Alignment of §4(f) and §106 Procedures (§1301)

- Requires coordination with DOI and ACHP within 90 days
 - Occurred February 5, 2016
- Establishes an optional process for historic sites under Section 4(f) in exchange for multiple, additional concurrence points with other Federal and State entities
- Does not change the substantive requirements of Section 4(f) or preclude DOT from using existing procedures for Section 4(f) and Section 106 reviews

New Flexibilities

Treatment of certain bridges under preservation requirements (§1303)

- Effective October 1, 2015
- Exempts common post-1945 concrete and steel bridges or culverts from individual review under Section 4(f).
- In November of 2012, the Advisory Council on Historic Preservation (ACHP) issued a Program Comment that established the ability to eliminate individual historic review requirements under Section 106 for these structures.
- States for which an inventory has not yet been reported are not eligible to use the ACHP Program Comment (Nov. 2012) or the Section 4(f) exemption provided by the FAST Act.
- Projects with circumstances that could benefit from the Program Comment and this exemption should be noted in the NEPA documentation.

New Flexibilities



Treatment of Improvements to Rail & Transit Under Preservation Requirements (§11502)

- Effective December 4, 2015
- Exempts from Section 4(f) review the use of railroad and rail transit lines, or elements thereof, that are in use or historically used for the transportation of goods or passengers.
- Applies regardless of whether the element is listed on or is eligible for listing on the National Register of Historic Places

Note: This exception does not apply to rail/transit stations and bridges and tunnels located on rail/transit lines not in use

New Flexibilities



Railroad Rights-of-way (§11504)

- Directs DOT to provide ACHP with a proposed exemption of railroad rights-of-way consistent with the existing exemption for the Interstate Highway System.
 - Requires completion within 1 year of enactment
- Exemption is not available for use until the ACHP has taken action on the proposed exemption.

New Flexibilities

Emergency Exemptions (§1432)

- Effective October 1, 2015
- Clarifies that certain emergency reconstruction projects are eligible for emergency exemptions or expedited procedures under specific environmental laws.
- Does not modify any of the existing emergency procedure processes in place.

New Flexibilities

Elimination of Barriers for At-risk Bridges (§1439)



- Authorizes taking of nesting swallows for at-risk bridges until the Department of the Interior takes regulatory action to establish alternative procedure.
 - at-risk is defined as a bridge eligible for funding under title 23, U.S.C., with any component condition rating of 3 or less.
- Effective October 1, 2015 until Department of Interior issues final rule to authorize the take of nesting swallows to facilitate bridge repair, maintenance, or construction activities.
- The take period is only between April 1 and August 1

New Flexibilities

Encourage Pollinator Habitat and Forage (§1415)



- Effective October 1, 2015
- Clarifies that activities to establish and improve pollinator habitat are eligible for Federal funding if related to a federally eligible transportation project
- Administrator released a letter focused on FHWA efforts
- Newly released publication of “Pollinators and Roadsides: Best Management Practices for Managers and Decision Makers”
- For additional information visit:
https://www.environment.fhwa.dot.gov/ecosystems/vegmgmt_pollinators.asp

Refinement of Existing Procedures



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Refines Existing Procedures Strengthening Planning and Environmental Linkages (§1305 and §1306)

- Effective October 1, 2015
- The FAST Act makes some changes to PEL, most of which are clarifications from MAP-21. It:
 - Adds purpose and need and preliminary screening of alternatives (including the elimination of unreasonable alternatives) to the list of planning decisions that can be used in the environmental review process.
 - Eliminates the requirement for concurrence of other participating agencies within relevant expertise. Replaces it with concurrence of cooperating agencies with responsibility for permitting, review, or approval of the project.

Refines Existing Procedures

Strengthening Planning and Environmental Linkages (§1305 and §1306) cont.

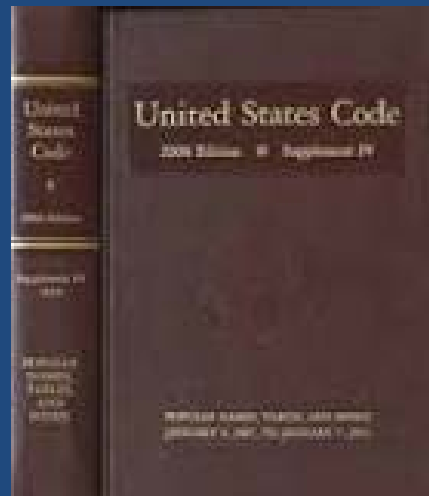
- Eliminates the requirement for approval by the State, relevant MPO, local or tribal governments where the project is located prior to “adoption or incorporation by reference” and establishes conditions for which “adoption or incorporation by reference” for a planning product
- Emphasizes the preference for utilizing programmatic mitigation plans in future NEPA documents.

Refines Existing Procedures

Categorical Exclusion for Projects of Limited Federal Assistance (§1314)

- Effective October 1, 2015
- Requires annual adjustments for inflation to the dollar thresholds for the existing CE for projects with limited Federal assistance
- See 23 CFR 771.117(c)(23)
- Annual adjustments will be posted to the environmental toolkit.

Codifies Existing Activities



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Codifies Existing Activities

Clarification of Transportation Environmental Authorities

(§1302)

- Effective October 1, 2015
- Approves the terminology “Section 4(f)” and “Section 106” as short-hand references to the statutes.

Codifies Existing Activities

Programmatic Agreement Template (§1315)

- FHWA may enter into programmatic agreements with a State to allow that State make a NEPA CE certification, or determination and approval on FHWA's behalf. This applies to CEs that:
 - Are specifically listed in paragraphs (c) and (d) of Section 771.117
 - Meet the criteria for a CE under 40 CFR 1508.4
 - Are identified in the programmatic agreement

CE Agreements are subject to the conditions in Section 771.117(g), which was clarified under the FAST Act.

Codifies Existing Activities

Programmatic Agreement Template (§1315)

CEQ Designation Process

1. Gather information for substantiation, based on the State's experience or other information, to show that such types of actions typically do not have significant environmental impacts.
2. FHWA consults with the Office of the Secretary of Transportation (OST) and CEQ about the new CE(s).
3. FHWA solicits and considers public comments received through the required notice-and-comment process, before receiving formal approval by OST and CEQ.

Codifies Existing Activities

Permitting Process Improvement (§41003)

- Establishes online public access, similar to the existing permitting dashboard, to publish the status of NEPA & permitting for all covered projects.
- All FHWA projects subject to section 139 of title 23 are excluded from this provision; however section 1304(j) of FAST does require a searchable website linked to the dashboard in this provision for various NEPA permitting milestones on all EA and EIS projects.

Let's Take a Few Questions



NEPA Assignment Changes



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CE Assignment Program Changes

Technical Assistance for States (§1307)

- Effective October 1, 2015
- At the request of a Governor, the FHWA must provide to the SDOTs technical assistance, training, or other support relating to the following:
 - assuming responsibility under the CE Assignment Program,
 - development of an memorandum of understanding for the CE Assumption Program, or
 - addressing a responsibility in need of corrective action
- Note - Priority will be given to those states that have waived or are in the process of sovereign immunity waiver under CE assumption.

Surface Transportation Project Delivery Program Changes

Audits (§1308)

- The State is required to provide FHWA with any information it requests, but that information will be what FHWA reasonably considers necessary to ensure that the State is adequately carrying out the responsibilities assigned to the State.
- The State is solely responsible and solely liable for carrying out responsibilities assigned in lieu *and without further approval of* FHWA.
- The State continues to only assume the USDOT/FHWA environmental review responsibilities (and not those of any other Federal agency) for individual projects.

Program for Eliminating Duplication of Environmental Reviews

New Pilot Program



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Program for Eliminating Duplication of Environmental Reviews

New Pilot Program (§1309)

- Establishes a pilot for NEPA assumption States to substitute State environmental laws that are “at least as stringent” as NEPA and 23 USC 139, with the concurrence of CEQ
- The State must:
 - waive sovereign immunity
 - Participate in the 327 NEPA Assignment Program
 - Have state law “at least as stringent” as NEPA

Program for Eliminating Duplication of Environmental Reviews

New Pilot Program (§1309)

- The provision requires rulemaking that is coordinated with CEQ
- The program is yet to be established by FHWA and CEQ, but will require:
 - a state to apply,
 - public notice on the application, and
 - for FHWA and CEQ to review the application to approve or disapprove.
- If approved, the State must enter into an agreement for the pilot program

Program for Eliminating Duplication of Environmental Reviews

New Pilot Program (§1309)

- Under this pilot program, legal claims would be filed in Federal court and decision made by the State under this program would have a 2-year statute of limitations instead of 150 days for NEPA decisions.

Program for Eliminating Duplication of Environmental Reviews

Implementation Summary (§1309)

NEXT STEPS

- Establish Program
- Issue rulemaking
- Issue guidance
- Deliver report to Congress by December 4, 2017

Other Provisions to Consider



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Other Provisions

- Application of CEs for Multimodal Projects (§1310)
 - Broadens USDOTs ability to apply CEs designated under NEPA regulations/procedures across modes for multi-modal projects, subject to certain conditions
- Accelerated Decision Making for EIS projects (§1311)
 - Codifies MAP-21 changes to the environmental review process for certain projects under Title 49 (49 U.S.C. 304(a)).
 - The section replaces the current process for adoption of environmental documents with a new statutory process

Other Provisions

- Improving State and Federal Agency Engagement in Environmental Reviews (§1312)
 - Expands the existing provisions on the use of Federal funds for liaison positions and to allow for the involvement of non-State entities.
- Aligning Federal Environmental Reviews (§1313)
 - Requires the development of a series of improvements aimed at aligning the Federal environmental review process for non 23 U.S.C. 139 projects. This work, led by USDOT, is to be done in coordination with relevant permitting agencies.

Additional FAST Act Information

The screenshot shows a web browser window displaying the Environmental Review Toolkit website. The browser's address bar shows the URL: <https://www.environment.fhwa.dot.gov/index.asp#1>. The website header includes the U.S. Department of Transportation Federal Highway Administration logo and navigation links: About, Programs, Resources, Briefing Room, Contact, Search FHWA. Social media icons for Facebook, YouTube, Twitter, and LinkedIn are also present. The breadcrumb trail reads: FHWA > HEP > Environment > Toolkit Home.

The main content area is titled "Environmental Review Toolkit" and features a navigation menu with the following items: Home, Planning and Environment, NEPA and Project Development, Accelerating Project Delivery, Historic Preservation, Section 4(f), and Water, Wetlands, and Wildlife. The "Home" item is currently selected.

A "NEW!" banner highlights "FAST Act Guidance and Information =>". Below this, a large section titled "Fixing America's Surface Transportation Act or 'FAST Act'" is displayed. The text reads: "On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act, or 'FAST Act' - the first Federal law in over ten years to provide long-term funding certainty for surface transportation." A "View all highlights" link is provided at the bottom of this section. A pagination bar at the bottom of the main content area shows page numbers 1 through 9, with page 1 selected.

To the right of the main content, there is a "Successes in Stewardship Monthly Newsletter" section. It highlights "June 2016" with the headline: "New Programmatic Categorical Exclusion Agreement Creates Potential to Accelerate Projects in Maine". A pie chart shows the distribution of Categorical Exclusions (CEs): 1 (3%) for FHWA-Approved CE and 32 (97%) for MaineDOT-Approved CE. A "View newsletter archives" link is also present.

At the bottom right, there is a "Contacts" section with a green header and a grid of contact information.

FAST Provisions for Accelerated Project Delivery



<https://www.fhwa.dot.gov/fastact/>