

Environmental Review Provisions in BIL/IIJA Questions and Answers (Q&A)

(September 8, 2022)

On November 15, 2021, the President signed into law the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58). The Surface Transportation Reauthorization portion of the BIL took effect on October 1, 2021 (See BIL § 10003). The BIL modified the environmental requirements at 23 U.S.C. § 139 (Efficient environmental reviews for project decisionmaking and One Federal Decision), which is followed by the Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), and Federal Transit Administration (FTA) (collectively the “Agencies”). The BIL also modified 23 U.S.C. § 138 (Section 4(f) Requirements) and added a new 23 U.S.C. § 157 (National Environmental Policy Act (NEPA) Reporting Program). The following interim guidance provides Agency staff and project sponsors with direction regarding the changes to these processes. The Agencies will provide additional, in-depth guidance on applying BIL/IIJA provisions to the environmental process in the future.

Except for the statutes and regulations cited, the contents of this document do not have the force and effect of law and are not meant to bind the States or the public in any way. This document is intended only to provide information regarding existing requirements under the law or agency policies.

DEFINITIONS / APPLICABILITY REQUIREMENTS

1. What is the effective date of amendments to the Sec. 139 environmental review process?

Answer: The Agencies will apply the amended procedures to projects initiated (e.g., publication of a notice of intent (NOI) to develop an environmental impact statement (EIS) or determination to proceed with an environmental assessment (EA) following the Sec. 139 environmental review process) on or after October 1, 2021. For information about the applicability of 23 U.S.C. § 139 to new projects, project sponsors should contact their FHWA Division, FRA Headquarters, or FTA Regional office.

2. Are NEPA Assignment States required to follow the revised Sec. 139 environmental review process?

Answer: Yes. EIS or EA (following the Sec. 139 environmental review process) projects initiated on or after October 1, 2021 and covered under a NEPA Assignment agreement under 23 U.S.C. § 327 must follow the revised Sec. 139 environmental review process.

3. Does the BIL add or modify any definitions that apply to the Sec. 139 environmental review process?

Answer: Yes. The BIL modified the definition of “environmental review process” and added definitions for the terms “authorization”, “environmental document”, and “major project” (see Question #4).

- a. The “**environmental review process**” definition now includes the process and schedule, including a timetable for and completion of any environmental permit, approval, review, or study under any Federal law other than NEPA. See 23 U.S.C. § 139(a)(5).
- b. The term “**authorization**” means “any environmental license, permit, approval, finding, or other administrative decision related to the environmental review process that is required under Federal law to site, construct, or reconstruct a project.” 23 U.S.C. § 139(a)(2). Examples include Clean Water Act permits and Endangered Species Act consultation.
- c. The term “**environmental document**” “includes an environmental assessment [EA], finding of no significant impact [FONSI], notice of intent [NOI], environmental impact statement [EIS], or record of decision [ROD] under the National Environmental Policy Act of 1969.” 23 U.S.C. § 139(a)(3).

4. How does 23 U.S.C. § 139 define the term “major project” under the Sec. 139 environmental review process for an individual project?

Answer: Within this guidance and consistent with 23 U.S.C. § 139(a)(7), the term “major project” means “a project for which —

- (i) multiple permits, approvals, reviews, or studies are required under a Federal law other than the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);
- (ii) the project sponsor has identified the reasonable availability of funds sufficient to complete the project;
- (iii) the project is not a covered project (as defined in section 41001 of the FAST Act (42 U.S.C. 4370m)); and
- (iv)(I) the head of the lead agency has determined that an EIS is required; or (II) the head of the lead agency has determined that an environmental assessment is required, and the project sponsor requests that the project be treated as a major project.”

In Sec. 139 and this guidance, the term “major project” does not have the same meaning as the FHWA “major project” term described in 23 U.S.C. § 106(h). For purposes of this guidance, the term “major project” will refer to the term as defined for the Sec. 139 environmental review process.

5. Do project sponsors need to request designation as a major project?

Answer: The lead Federal agency (e.g., FHWA, FRA, or FTA) will determine whether a proposed action meets the definition of a major project during project initiation (see 23 U.S.C. § 139(e)). For EIS-level actions, project sponsors do not need to request their project be designated as a “major project;” the lead Federal agency will automatically review the project for this designation. For EA-level actions, project sponsors that wish to have their project designated as a “major project” should contact their FHWA Division, FRA Headquarters, or FTA Regional office to request designation of a project as a “major project.”

6. How is “reasonable availability of funds” defined?

Answer: The FHWA may rely on the listing of a project on a metropolitan long-range plan and statewide transportation improvement program (STIP) to determine if a project has a reasonable availability of funding. This is a project-by-project determination. FRA and FTA intend to provide additional guidance on this topic in the future. The project sponsors should contact their FHWA Division, FRA Headquarters, or FTA Regional office for questions in this topic.

7. How are ‘multiple’ permits, approvals, reviews, or studies defined for a major project?

Answer: Two or more permits, approvals, reviews, or studies that are required under a Federal environmental law other than the NEPA (42 U.S.C. § 4321 et seq.). The [Federal Environmental Review and Authorization Inventory](#) lists potential federal authorizations for infrastructure projects.

8. What is meant by a ‘covered project’ in the major project definition at 23 U.S.C. 139(a)(7)(A)(iii)?

Answer: The term “covered project” is defined as part of the Fixing America’s Surface Transportation Act, Title 41 (FAST-41) review process (see 42 U.S.C. § 4370m(6)). For FHWA, FRA and FTA projects, all projects that follow the Sec. 139 process are excluded from FAST-41 and are not defined as covered projects.

PROCESS IMPROVEMENTS

9. Did BIL Sec. 11301 add new schedule requirements for major projects?

Answer: Yes. BIL Sec. 11301 modified 23 U.S.C. § 139(d)(10) to require all authorization decisions necessary for the construction of a major project to be completed not later than 90 days after the date of the issuance of a ROD for the major project. The EAs may be classified as major projects when certain conditions are met (see Question #5 above). Similarly, major project EA schedules would need

to show all authorization decisions to be completed by not later than 90 days after the date of the issuance of a FONSI. However, the head of the lead agency may extend the deadline if: (1) Federal law prohibits the lead agency or another agency from issuing the approval or permit within the 90 days; (2) the project sponsor requests that the permit or approval follow a different timeline; or, (3) the lead agency determines that the extension would facilitate the completion of the major project's environmental review and authorization process.

10. Did BIL Sec. 11301 change the factors that should be considered when developing the project schedule?

Answer: Yes. The BIL changed the schedule requirements for any project subject to the Sec. 139 environmental review process. The coordination plan and schedule should continue to specify all anticipated opportunities for review and comment by the public and participating agencies. The Sec. 139 environmental review process allows the lead agencies to determine how detailed the schedule should be and whether to use specific dates or durations. Establishing a schedule involves consideration of the following factors, including those listed in 23 U.S.C. § 139(g)(1)(B)(ii):

- Responsibilities of participating agencies under applicable laws;
- Resources available to the cooperating agencies;
- Overall size and complexity of the project;
- Overall time required by an agency to conduct an environmental review and make decisions under applicable Federal law relating to a project (including the issuance or denial of a permit or license) and the cost of the project;
- Ability to have reviews occur concurrently;
- Sensitivity of the natural and historic resources that could be affected by the project; and
- Development of a combined FEIS/ROD (or EA, as applicable) to the maximum extent practicable, including identifying a Preferred Alternative in the DEIS when possible.

Sec. 11301 of the BIL also added schedule considerations specific to “major projects.” For “major projects,” to the maximum extent practicable and consistent with Federal law, the lead agency will develop, in concurrence with the project sponsor, a schedule that is consistent with an agency average of not more than 2 years for the completion of the environmental review process (23 U.S.C. § 139(g)(1)(B)(iii)). All FHWA, FRA, or FTA projects initiated after October 1, 2021 that require development of an EIS (or EA, if requested by the project sponsor) and meet the definition of a “major project” are subject to the 2 year average schedule requirements. The completion of the environmental review process for a major project with an EIS is measured from the date of the Notice of Intent (NOI) publication to the issuance of the ROD for an EIS and, for an EA, from the date on which the lead agency determines that an EA is required to issuance of a FONSI (or decision to pursue an EIS). The established schedule must include milestones to

complete the environmental review process and any other Federal, State, or local permit, approval, or review required for the project, and must be consistent with the timeframes in 40 CFR 1501.7(i).

11. If a schedule has been published, can it be modified?

Answer: Yes. The lead agency may modify an established schedule for good cause (23 U.S.C. 139(g)(1)(D)(i)). However, in the case of a major project, the lead agency may lengthen a schedule for a cooperating Federal agency by not more than 1 year after the latest deadline established for the major project by the lead agency. A lead agency may not shorten a schedule if doing so would impair the ability of a cooperating Federal agency to conduct necessary analyses or otherwise carry out relevant obligations of the Federal agency for the major project.

12. Does BIL Sec. 11301 require reporting when a cooperating Federal agency fails to meet certain deadlines for major project schedules?

Answer: Yes. A cooperating Federal agency that fails to meet a major project deadline that was previously extended by the lead agency under 23 U.S.C. § 139(g)(1)(D)(ii)(I) must submit a report to the Secretary of Transportation (Secretary) that describes the reasons why the deadline(s) were not met. The Secretary must submit that report to the Committee on Environment and Public Works (Senate) and the Committee on Transportation and Infrastructure (House of Representatives) and make the report publicly available on the internet (23 U.S.C. § 139(g)(1)(E)).

13. Did BIL Sec. 11301 change the page limit for EIS projects?

Answer: Yes. The BIL modified the EIS page limit requirement to 200 pages or fewer (23 U.S.C. 139(n)(3)). However, the Council on Environmental Quality (CEQ) requirements at 40 CFR 1502.7 include a 150-page limit for the text of an EIS but allow up to a 300-page limit for projects of unusual scope or complexity. Even though the CEQ language allows up to 300 pages for certain EISs, 23 U.S.C. § 139 dictates the requirements for FHWA, FRA and FTA projects and the lead Federal agency needs to approve any new page limits for EISs that are projected to be more than 200 pages long.

14. Did BIL Sec. 11301 change the time limit for NEPA decisions?

Answer: Yes. The statutory language in the BIL supersedes the language in the CEQ regulations for EISs and EAs designated as major projects. For major projects, the schedule, to the maximum extent practicable, will be consistent with an agency average of not more than 2 years (23 U.S.C. 139(g)(1)(B)(iii)). Thus, EISs and EAs for major projects will not be subject to the CEQ regulations requiring that all EISs be completed within 2 years (40 CFR 1501.10(b)(2)) and all EAs be completed in 1 year (40 CFR 1501.10(b)(1)). Further, the project-by-project approval of exceptions in the CEQ regulations for the time limits will not be necessary for major projects. If a

project is designated as a major project EA, then the EA will follow the major project timeframe (i.e., a schedule that is consistent with an agency average of not more than 2 years). If a project is evaluated as an EA but it is not defined as a major project, then the EA must be completed within one year unless the senior agency official approves a new time limit, consistent with the CEQ regulations (40 CFR 1501.10(b)(1)).

15. What does it mean that the major project duration “is consistent with the agency average of not more than 2 years?”

Answer: The lead agency is required to establish a project schedule in accordance with 23 U.S.C. § 139(g)(1)(B). A new sub-paragraph specifies that for major projects, to the maximum extent practicable and consistent with applicable Federal law, the lead agency must develop a schedule that is consistent with an agency average of not more than 2 years for the completion of the environmental review process. The permitting timetable should have a project schedule consistent with an agency average of not more than two years from NOI to ROD or EA start date to FONSI for all major projects.

16. Does the BIL change the conditions under which the Federal Agencies issue separate NEPA documents for a project?

Answer: Yes. BIL Sec. 11301 modified 23 U.S.C. § 139(d)(8) so that the single environmental document language now captures EISs and EAs that are following the Sec. 139 environmental review process. To the maximum extent practicable, and for all Federal authorizations and reviews for a project, the Agencies and all Federal participating and cooperating agencies must rely on a single environmental document. However, the BIL modifies 23 U.S.C. § 139(d)(8)(D) to allow the lead agency to waive the requirement to prepare a single environmental document if:

- (i) the project sponsor requests separate documents;
- (ii) the NEPA obligations of a cooperating agency or participating agency have already been satisfied; or
- (iii) the lead agency determines that a single environmental document would not facilitate timely completion of the environmental review process for the project.

17. Under what conditions can the lead agency extend the authorization deadline for a major project?

Answer: All authorizations necessary for the construction of a major project must be completed by not later than 90 days after the date of the issuance the ROD or FONSI. However, the head of the lead agency may extend the authorization deadline if:

- (i) Federal law prohibits the lead agency or another agency from issuing an approval or permit within the 90-day period;
- (ii) the project sponsor requests that the permit or approval follow a different timeline; or
- (iii) an extension would facilitate completion of the environmental review and authorization process of the major project. Some examples of such facilitation include instances where new or previously unanticipated information about project impacts or mitigation relevant to one or more alternatives needs to be considered for project decision making, or changing project sponsor priorities that affect overall project costs and/or timing.

18. Does the BIL Sec. 11301 require a new report to Congress? Who is responsible for the review, consultation, and report? What should the report contain?

Answer: Yes. BIL Sec. 11301 requires that U.S. Department of Transportation (USDOT) submit an annual report to Congress regarding the efficiencies of the environmental review process (23 U.S.C. § 139(c)(7)). This report will be submitted by the Secretary to the Committee on Environment and Public Works (Senate) and the Committee on Transportation and Infrastructure (House of Representatives) and it will include:

- review of existing practices, procedures, rules, regulations, and applicable laws to identify impediments to meeting the requirements applicable to projects under 23 U.S.C. § 139; and
- best practices, programmatic agreements, and potential changes to internal departmental procedures that would facilitate an efficient environmental review process for projects under 23 U.S.C. § 139.

The report must be submitted by November 15, 2023. 23 U.S.C. § 139(c)(7)(C). The report must include the results of the review and analysis of whether additional funding would help the Secretary meet the requirements applicable to projects under 23 U.S.C. § 139. The Agencies' Headquarters will be responsible for collecting the data from the Field Offices and coordinating report development.

19. Does BIL create a new reporting requirement for all environmental documents?

Answer: Yes. BIL Section 11301 created a new requirement at 23 U.S.C. § 139 (c)(6)(D). Similar to other reporting requirements, FHWA will look at the EAs and EISs completed in the previous fiscal year, calculate the time it took to complete each document from initiation to decision, and then determine the average and median time it took by class of action. FRA and FTA may provide guidance on how they calculate annually the average time taken to complete all environmental documents.

OTHER

20. BIL Sec. 11312 created a new NEPA reporting requirement. Who is responsible for collecting the data and issuing the report?

Answer: BIL Sec. 11312 created a new requirement at 23 U.S.C. § 157 for NEPA data reporting. USDOT must submit an annual report to Congress regarding various categorical exclusion (CE), EA and EIS data. The Agencies' Headquarters will be responsible for collecting the data from the Field Offices and coordinating report development.

The Secretary will submit the report to the Committee on Environment and Public Works (Senate) and the Committee on Transportation and Infrastructure (House of Representatives).

21. What substantive changes did Sec. 11316 of the BIL make to the Section 4(f) review of proposed uses of public parks, recreation lands, wildlife and waterfowl refuges, and historic sites?

Answer: BIL Sec. 11316 amended 23 U.S.C. § 138 to establish a timeline for the Agencies to approve certain proposed uses of Section 4(f) property. As of October 1, 2021, individual Section 4(f) Evaluations require consultation with the Secretaries of the Interior (DOI), Housing and Urban Development (HUD), and Agriculture (USDA) in the form of a 30 day review period on the draft Evaluation. The review period may be extended for a maximum of 15 days. If timely comments are not received from an agency, the Agencies must assume that agency has no objection to the proposed action. BIL did not make corresponding changes to 49 U.S.C. § 303.

22. Will the BIL Sec. 11316 changes to the Section 4(f) review process require a change in the Section 4(f) regulation?

Answer: Yes. The Section 4(f) regulation at 23 CFR 774.5(a) will need to be modified to reflect the new timeframe found in 23 U.S.C. § 138(a)(2)(B). Specifically, the regulation will need to reflect that the regulatory minimum of 45 days for receipt of comments is now reduced to 30 days for FHWA projects. Both the Section 4(f) regulation and the BIL allow that if comments are not received within 15 days after the comment deadline, the administration (as defined in 23 CFR 774.17) may assume lack of objection and proceed. However, because BIL did not amend 49 U.S.C. § 303, FRA and FTA will continue to apply the existing requirements in Part 774 (i.e., 60 day coordination period with DOI, HUD, and USDA).

23. Has USDOT fulfilled the requirements of the "Development of Categorical Exclusions" provision in BIL Sec. 11301 (23 U.S.C. 139(q))?

Answer: Yes. Per 23 U.S.C. 139(q), USDOT had 60 days from the date of enactment of the BIL to consult with six Federal Agencies identified in the BIL,

identify any CEs applicable to FHWA that would accelerate project delivery if they were available to those Agencies, and provide the Agencies with existing substantiation for those CEs. USDOT provided the CE substantiation information to the Federal Agencies for 4 CEs on January 14, 2022.

24. Will all the requirements for the performance accountability system be tracked by the Permitting Dashboard?

Answer: Yes. Currently, the Permitting Dashboard tracks project schedules for EISs and EAs, which includes whether the lead agency, cooperating agencies, and participating agencies are meeting the established schedules and the time taken to complete the environmental review process