

**Fixing America’s Surface Transportation Act (FAST Act):
Questions and Answers on the procedural changes to 23 U.S.C. 139 as they relate to
Federal Highway Administration (FHWA), Federal Railroad Administration (FRA),
& Federal Transit Administration (FTA) projects**

OVERVIEW

The purpose of the following Questions and Answers (Qs & As) is to highlight amendments to 23 U.S.C. 139, Efficient Environmental Reviews for Project Decisionmaking,¹ made by section 1304 of the FAST Act. These amendments became applicable on December 4, 2015. The FHWA, FRA, and FTA (collectively the “Agencies”) have released initial Qs & As addressing high-level section 1304 applicability issues. These initial Qs & As are available at:

https://www.environment.fhwa.dot.gov/projdev/FAST_act_guidance_23USC139.asp.

The Agencies intend the detailed Qs & As below to provide stakeholders and practitioners with a more thorough discussion of section 1304’s specific changes. This includes changes to the definitions, programmatic reviews, lead agency and participating agency roles and responsibilities, project initiation process, alternative analysis, coordination plans, issue resolution, and project/process transparency.

General Information

Question 1: Will there be any rulemaking or additional guidance issued on section 1304 of the FAST Act?

Answer 1: Yes. The Agencies will likely update 23 CFR part 771 through the rulemaking process and update the “[SAFETEA-LU Environmental Review Process Final Guidance](#)” (2006 Guidance) based on section 1304. At a minimum, section 1304(k) of the FAST Act requires the Secretary to complete a rulemaking to implement the provisions of 23 U.S.C. 139(b)(3), Programmatic Compliance, as amended by the FAST Act. The Agencies intend to issue a supplemental notice of proposed rulemaking, which will build upon the programmatic approaches proposals found in the November 20, 2015, notice of proposed rulemaking ([80 FR 72624](#)).

Until the Agencies issue final rules or guidance, project sponsors should continue to refer to the existing SAFETEA-LU Environmental Review Process Final Guidance (2006) along with the various [MAP-21](#) and other [FAST Act](#) Qs & As referencing changes to the 23 U.S.C. 139 environmental review process made since the 2006 Guidance.

Section 139(a): Definitions

Question 2: Does section 1304 amend the definitions in 23 U.S.C. 139?

Answer 2: Yes. Section 1304(a) amends the definitions of “multimodal project” and “project” in 23 U.S.C. 139(a).

Multimodal Project

¹ These Qs & As use the term “Section 139 Environmental Review Process” to describe the procedures required by 23 U.S.C. 139.

The term “multimodal project” now means a project that requires the approval of more than one Department of Transportation (U.S. DOT) operating administration or secretarial office. 23 U.S.C. 139(a)(5). The lead agency will determine whether a project is a multimodal project based on anticipated required approvals.

Project

The term “project” now means any highway project, public transportation capital project, or multimodal project that, if implemented as proposed by the project sponsor, would require approval by any U.S. DOT operating administration or secretarial office. 23 U.S.C. 139(a)(6)(A). Additionally, section 1304(a) adds new project “considerations” the Agencies must use to determine whether a proposed action meets the definition of a project. These considerations include, if known, any sources of Federal funding or financing that the project sponsor identifies (e.g., discretionary grant, loan, or loan guarantee programs administered by the U.S. DOT). The Secretary or lead operating administration (e.g., FHWA, FRA, or FTA) will determine whether a proposed action meets the definition of a “project” during project initiation discussions (see 23 U.S.C. 139(e)).

Question/Answer 7 below further discusses the project initiation process under 23 U.S.C. 139(e).

Section 139(b): Applicability

Question 3: What does section 1304(b) direct the Secretary to do regarding programmatic approaches?

Answer 3: This provision amends 23 U.S.C. 139(b)(3). Similar to the Moving Ahead for Progress in the 21st Century Act (MAP-21) provision, section 1304(b) directs the Secretary to allow use of programmatic approaches to conduct environmental reviews. Additionally, the FAST Act reorganizes the programmatic approaches process created in MAP-21, requires “notice and public comment opportunities consistent with applicable requirements” for programmatic reviews conducted pursuant to 23 U.S.C. 139(b)(3), and removes all rulemaking language from that section. However, as noted in Question/Answer 1, section 1304(k) of the FAST Act does require rulemaking for the programmatic approach process under 23 U.S.C. 139(b)(3).

Section 139(c): Federal Lead Agency

Question 4: Does section 1304 amend the definition or the role and responsibilities of Federal lead agencies?

Answer 4: Yes. Section 1304(c) of the FAST Act revised the definition of Federal lead agency to add “or any operating administration thereof designated by the Secretary” following “[t]he Department of Transportation,” clarifying who will serve as lead agency for a project. 23 U.S.C. 139(c). Section 1304(c) also amends the roles and responsibility of the Federal lead agency by adding the requirement for the lead agency “to consider and respond to comments received from participating agencies on matters within the special expertise or jurisdiction of those agencies.” 23 U.S.C. 139(c)(6)(C). This limits the lead agency’s obligation to consider and respond to comments that the participating agencies submit to only those areas within the participating agency’s area of special expertise or jurisdiction.

Additionally, the lead agency must now identify participating agencies for an environmental impact statement (EIS) no later than 45 days after the publication date of the notice of intent (NOI) to prepare an EIS and for the initiation of an environmental assessment (EA) where the Section 139 environmental review process has been determined to apply. 23 U.S.C. 139(d)(2).

Section 139(d): Participating Agencies

Question 5: Does section 1304 modify the responsibilities of participating agencies?

Answer 5: Yes. Section 1304(d) modifies the responsibilities of participating agencies under 23 U.S.C. 139(d). An agency participating in the Section 139 environmental review process must provide comments, responses, studies, or methodologies on those areas within the area of special expertise or jurisdiction of the agency. Additionally, the participating agency must use the Section 139 environmental review process to address any environmental issues of concern to the agency. 23 U.S.C. 139(d)(9). The Agencies expect that a participating agency will focus its involvement in the Section 139 environmental review process on its area of special expertise or jurisdiction, and any environmental issues of concern to the participating agency.

Additional participating agency roles are discussed below in Question/Answer 9.

Question 6: Does section 1304 makes any additional changes in 23 U.S.C. 139(d)?

Answer 6: Yes, section 1304 adds a new paragraph 139(d)(8), Single NEPA Document. This paragraph mandates that, except as inconsistent with subsection (d)(7), and to the maximum extent practicable and consistent with Federal law, all Federal permits and reviews for a project rely on a single environmental document prepared under NEPA, under the leadership of the lead agency. To the maximum extent practicable, the lead agency must develop an environmental document sufficient to satisfy the requirements for any Federal approval, action, or permit required for the project. In addition, participating agencies must cooperate with the lead agency and provide timely information to help the lead agency develop a single environmental document. 23 U.S.C. 139(d)(8).

Under subsection (d)(8), a Federal agency required to make an approval or take an action for a project relying on a single NEPA document must work with the lead agency to ensure that the Federal agency making the approval or taking the action is treated as both a participating and cooperating agency for the project. Per the CEQ regulation, a cooperating agency is an agency with jurisdiction by law or special expertise with respect to any environmental impact. 40 CFR 1508.5.

Section 139(e): Project Initiation

Question 7: Does section 1304 amend the Section 139 NEPA project initiation process?

Answer 7: Yes. Section 1304(e) amends 23 U.S.C. 139(e) by adding: (1) an application review requirement, which requires the Federal lead agency to determine whether to initiate the Section 139 environmental review process (including project readiness), 23 U.S.C. 139(e)(3), and (2) a lead agency designation request process, 23 U.S.C. 139(e)(4).

Review of Project Initiation Application

Section 1304(e)(2) adds a new step in the project initiation process. The Federal lead agency or the Secretary (when a Federal lead agency has not been identified) must provide a written response to the project sponsor no later than 45 days after the date on which it receives a project initiation notice (discussed in the previous paragraph) (see 23 U.S.C. 139(e)(3)). The written response must either: (1) describe the determination to initiate the Section 139 environmental review process or to decline the application with an explanation for that decision; or (2) request additional information necessary to initiate the Section 139 environmental review process. 23 U.S.C. 139(e)(3). The Agencies recommend contacting the potential Federal lead agency (or agencies) to discuss the proposed project's details and the Federal lead agency's preferences before formally submitting the project notification.

When submitting a project initiation notice, a project sponsor must continue to provide the project's type of work, termini, length, general location, and anticipated Federal approvals. However, section 1304(e)(1) clarifies that the project sponsor may provide any additional information it considers important when it proposes to initiate the Section 139 environmental review process for the proposed project. 23 U.S.C. 139(e)(1).

Request to Designate a Lead Agency

Section 1304(e)(2) also establishes a new "lead agency designation" process (see 23 U.S.C. 139(e)(4)). Under this process, a project sponsor may submit a request to the Secretary to designate the operating administration or secretarial office within U.S. DOT with the expertise on the proposed project to serve as the Federal lead agency. The Secretary must respond to the request no later than 45 days after the date of receipt of the request. The response must:

- Approve or deny the request. If the Secretary denies the request, the response must include an explanation for the denial; or
- Require the project sponsor to submit additional information. If the project sponsor submits additional information, then the Secretary must respond to the submission no later than 45 days after the date of the receipt of the new information.

Although project sponsors have the option to request a lead agency designation from the Secretary under 23 U.S.C. 139(e)(4), the Agencies recommend that project sponsors first contact the potential Federal lead agency (or agencies) (i.e., FHWA, FRA, or FTA) to discuss the project. Where a lead agency is not readily identified, the Agencies will informally consult with the Office of the Assistant Secretary for Transportation Policy (OST). For most projects, informal discussions with the potential Federal lead agency (or agencies) will result in the identification of the Federal lead agency without using the formal designation process. Should a project sponsor request lead agency designation by the Secretary, OST will consult with the Agencies in making the designation.

Question 8: What is the environmental checklist added by section 1304(e)(2)?

Answer 8: The lead agency for a project, in consultation with participating agencies, must develop, as appropriate, a checklist to help the project sponsor(s) identify potential natural, cultural, and historic resources in the project area. 23 U.S.C. 139(e)(5). The purposes of the checklist are to identify agencies and organizations that can provide information about the resources; to develop the information needed to determine the range of alternatives; and to improve interagency collaboration to help expedite the permitting process. Ordinarily some of

this information is developed through the transportation planning process or development of the coordination plan. The lead agencies, including project sponsors, will develop environmental checklists when needed to facilitate the Section 139 environmental review process.

Section 139(f): Purpose & Need; Alternative Analysis

Question 9: Does section 1304 change the participating agencies' involvement in the alternative analysis?

Answer 9: Yes. Section 1304 amends the participation of the participating agencies in 23 U.S.C. 139(f)(4)(A). Each participating agency receiving an opportunity for involvement in determining the range of alternatives must limit the comments of the agency to the subject matter areas within the agency's area of special expertise or jurisdiction, to the maximum extent practicable and consistent with applicable law. In addition, even if a participating agency declines to participate in the development of the purpose and need and range of alternatives, it must still comply with the schedule developed for the coordination plan.

Question 10: Does section 1304 change how the project's range of alternatives is used by other agencies?

Answer 10: Yes. Section 1304(f)(2)(B) modifies 23 U.S.C. 139(f)(4)(B), which directs agencies to use the range of alternatives for a project (determined by the lead agency with opportunity for involvement by participating agencies and the public) for all Federal environmental reviews and permit processes required for the project. The lead agency must use this approach to the maximum extent practicable and consistent with Federal law, unless it must modify the alternatives for either of the following reasons:

- To address significant new information or circumstances, and the lead agency and participating agencies agree that the alternatives must be modified to address new information or circumstances; or
- For the lead agency or a participating agency to fulfill the responsibilities of the agency under NEPA in a timely manner.

Applying a range of alternatives to satisfy multiple Federal environmental reviews and permitting processes will require early and ongoing discussions with the affected Federal agencies. The lead agency and cooperating agencies should consider the same range of alternatives during development of the coordination plan.

Question 11: Does section 1304 address how alternatives can be eliminated through the alternative analysis?

Answer 11: Yes, section 1304(f)(2)(C) creates paragraph 23 U.S.C. 139(f)(4)(E), Reduction of Duplication. The new paragraph requires that the lead agency reduce duplication, to the maximum extent practicable, between the evaluation of alternatives under NEPA and the evaluation of alternatives under other processes (i.e., the metropolitan transportation planning process or the State environmental review process). The provision allows lead agencies to eliminate from detailed consideration an alternative proposed in an EIS if the lead agency determines the following conditions are met:

- The alternative was considered in a metropolitan planning process or a State environmental review process by a metropolitan planning organization (MPO) or a State or local transportation agency, as applicable;
- The lead agency provided guidance to the MPO or State or local transportation agency, as applicable, regarding the analysis of alternatives in the metropolitan planning process or State environmental review process, including guidance on the NEPA requirements and any other Federal law necessary for approval of the project;
- The applicable metropolitan planning process or State environmental review process included an opportunity for public review and comment;
- The applicable MPO or State or local transportation agency rejected the alternative after considering public comments;
- The Federal lead agency independently reviewed the alternative evaluation approved by the applicable MPO or State or local transportation agency; and
- The Federal lead agency determined:
 - In consultation with Federal participating or cooperating agencies, that the alternative to be eliminated from consideration is not necessary for compliance with NEPA; or
 - With the concurrence of Federal agencies with jurisdiction over a permit or approval required for a project, that the alternative to be eliminated from consideration is not necessary for any permit or approval under any other Federal law. The Federal lead agency will provide this determination to the Federal agencies with jurisdiction over a permit or approval required for the project. If the Federal lead agency does not receive a written response within the time period specified in the request for concurrence (typically no more than 30 days, consistent with 23 U.S.C. 139(g)(2)(B)), it will assume concurrence.

This process does not eliminate the applicability of 23 CFR 450.212 and 450.318 to support the elimination of alternatives.

Section 139(g): Coordination and Scheduling

Question 12: Does section 1304 establish new coordination and scheduling requirements?

Answer 12: Yes. Section 1304(g)(1) modifies the coordination plan requirements in 23 U.S.C. 139(g)(1). The lead agency must develop a coordination plan no later than 90 days after the publication of an NOI to prepare an EIS or the initiation of an environmental assessment.

The coordination plan for all EISs (and EAs where it has been determined by the Federal lead agency that the Section 139 environmental review process will apply) must include a schedule for completing the Section 139 environmental review process. The schedule will be included in the coordination plan after the lead agencies (1) consult with and receive the concurrence of each participating agency, and (2) consult with the State or project sponsor on the schedule. The lead agencies will provide the schedule to participating agencies for concurrence and request a response within 30 days, unless a different deadline is established by agreement of the lead

agency, the project sponsor, and all participating agencies or the deadline is extended by the lead agency for good cause, consistent with 23 U.S.C. 139(g)(2)(B).² If the lead agencies do not receive a written response within the time period specified in the request for concurrence, the lead agencies will assume concurrence.

Question 13: Were the deadlines for decisions under other laws revised through section 1304?

Answer 13: No. Section 1304 does not revise deadlines for decisions under other laws. However, 23 U.S.C. 139(g)(3) now requires that the Secretary publish on the Internet (Permitting Dashboard (Dashboard)) which determinations or permits were not made or issued within 180 days after all final decisions or a complete permit application was submitted for the permit or license. The Secretary is still required to report this information to Congress.

Section 139(h): Issue Identification and Resolution

Question 14: Did the FAST Act add new issue identification and resolution requirements?

Answer 14: Yes. The FAST Act adds a new issue resolution provision to 23 U.S.C. 139(h). New paragraph (h)(4) states that “any issue resolved by the lead agency with the concurrence of participating agencies may not be reconsidered unless significant new information or circumstances arise.” The Agencies recommend documenting the issue and its resolution in the project file and including the concurrence of the affected participating agency (or agencies).

Question 15: Did the FAST Act modify the financial penalty provisions at 23 U.S.C. 139(h)(7)?

Answer 15: Yes, section 1304(h)(3) modifies the timeframes for applying the financial penalties in 23 U.S.C. 139(h)(7)(B)(ii). When a Federal agency of jurisdiction over an approval required for a project fails to issue or deny a permit, license, or other approval by the dates below, the Federal agency may be subject to the financial penalty provision. The timeframes are as follows:

- If a project schedule exists, the date that is 30 days after the date for rendering a decision as described in the coordination plan;
- If no schedule exists, the later of:
 - The date that is 180 days after the date on which an application for the permit, license, or approval is complete; and
 - The date that is 180 days after the date on which the Federal lead agency issues a decision on the project under NEPA; or
 - A modified date in accordance with the coordination plan.

Section 139(j): Assistance to Affected State and Federal Agencies

Question 16: Did the FAST Act modify the authority of agencies to provide assistance to affected State and Federal agencies?

² See MAP-21 guidance on financial penalties: <https://www.fhwa.dot.gov/map21/qandas/qasect1306.cfm>

Answer 16: Yes. Section 1304(i) modifies the authority to provide funds and the use of those funds. Section 139(j)(1) of title 23 U.S.C. is no longer limited to States receiving financial assistance from U.S. DOT under title 23 or chapter 53 of title 49, U.S. Code, but now applies to any public entities receiving those funds. The public entities can provide funds to Federal agencies (including U.S. DOT), State agencies, and Indian tribes participating in the Section 139 environmental review process for the project or program. The funds may only be used “to support activities that directly and meaningfully contribute to expediting and improving permitting and review processes.” The Agencies will provide additional guidance on this section in the future.

Section 139(n): Accelerated Decisionmaking in Environmental Reviews

Question 17: Has section 1304 made any substantive changes to the final EIS/record of decision (FEIS/ROD) and errata sheets provision in section 1319 of MAP-21?

Answer 17: No. Substantively, section 1304(j) of the FAST Act did not change or update the combined FEIS/ROD and errata sheet language in section 1319 of MAP-21. However, the FAST Act repealed section 1319 of MAP-21 and codified the language at 23 U.S.C. 139(n). Project sponsors should cite to 23 U.S.C. 139(n) when applying one or both of those concepts, and should no longer refer to section 1319 of MAP-21. The section 1319 of MAP-21 Guidance will be updated to reflect this change and incorporated in the Agencies’ update to the 2006 Guidance.

Section 139(o): Improving Transparency in Environmental Review

Question 18: Does section 1304 add new requirements to improve transparency in environmental reviews?

Answer 18: Yes. Section 1304(j)(1) of the FAST Act establishes a timeframe of 18 months to establish a searchable Internet website maintained under the Dashboard to make publicly available the status and progress for EIS and EA documents. 23 U.S.C. 139(o). U.S. DOT implemented this requirement and the Dashboard is accessible at <https://www.permits.performance.gov/>. Section 139(o) of title 23 of the U.S. Code also directs the Agencies to publish the names of the participating agencies not participating in the development of the project purpose and need and range of alternatives.

Paragraph (o)(2) requires Federal agencies participating in the environmental review or permitting process for a project to provide to the Secretary information regarding the status and progress of the approval of the project for publication on the Dashboard. It also directs the Secretary to encourage State and local agencies to provide the status and progress of their approvals for publication on the Dashboard.

Question 19: When will the Agencies identify a participating agency as “not participating in the development of a project purpose and need and range of alternatives” on the Dashboard pursuant to 23 U.S.C. 139(o)(1)(A)(ii)?

Answer 19: The Agencies will only list a participating agency on the Dashboard as “not participating in the development of a project purpose and need and range of alternatives” if the participating agency sends written notice to the Federal lead agency that it does not wish to

participate in the development of a project's purpose and need or in determining that project's range of alternatives. This written notice can take the form of an email or a letter, and should be sent to the Federal lead agency prior to finalization of purpose and need or range of alternatives. The failure of a participating agency to respond to a request for comments on a draft purpose and need or draft range of alternatives generally will not, by itself, lead to the identification of the agency on the Dashboard.

Question 20: Are States with assigned NEPA responsibility under 23 U.S.C. 327 required to comply with 23 U.S.C. 139(o)?

Answer 20: Yes, 23 U.S.C. 139(o)(3) directs those States that have assumed responsibilities under NEPA to supply project development and compliance status for all applicable projects to the Secretary. These States will be required to enter that information directly into the Dashboard. The FHWA Office of Project Development and Environmental Review will grant access rights to State DOT staff responsible for providing project information to access the Federal Government electronic platform that the State DOT will use to enter information in the Dashboard.