

Update to FAST ACT FACT SHEET

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SUBJECT: FAST Act – Section 1309 – Program for Eliminating Duplication of Environmental Reviews

PROBLEM STATEMENT:

The FAST Act introduces a 12-year Pilot Program for up to five states and limited to those with NEPA Assignment under which a state may elect to establish a program of “Alternative Environmental Review Procedures.” Under this alternative process, a state may elect to substitute one or more state laws for NEPA, any provisions of 23 USC Section 139, FHWA’s NEPA implementing regulations, and any Executive Orders (presumably those Executive Orders directed to USDOT).

RECOMMENDATION:

Caltrans does not intend to pursue this program for its own projects due to the increased risk/exposure created by longer statute of limitations for lawsuits (two years versus 150 days). It is recommended that Caltrans reach out to our local partners to determine if there is interest in pursuing this program on their behalf.

Update (March 18, 2016): Caltrans Division of Environmental Analysis has formed a FAST Act NEPA Sub-Group consisting of Caltrans DEA staff and representatives from CTC, CSAC, El Dorado County, LA Metro, MTC, OCTA, RCTC, Sacramento County, Monterey County, Trinity County, Yolo County, and Urban Counties of California.

The NEPA Sub-Group met on March 1st to gauge interest in the program. The first session focused on questions and answers but there is some interest in participating in the program if appropriate projects were selected. There was much discussion over the two-year statute of limitations. There may be efforts underway to have this removed through legislation.

On March 10th, FHWA hosted a listening session on the proposed program, also in an effort to gauge interest. FHWA representatives from both California and Washington D.C. were present. Overall, local agencies expressed some of the same concerns as at the first meeting (How would agencies be chosen? Would Caltrans then become the CEQA lead as well?). Again, there appears to be interest in participating with the caveat that the projects would need to be carefully vetted.

BACKGROUND: N/A - This is a new process created by the FAST Act.

SUBJECT: FAST Act: Eliminating Duplication of Environmental Reviews

ALTERNATIVES:

Alternative 1: Apply for participation in the Pilot Program and develop and implement an alternative review process whereby one or more laws of the state (primarily CEQA) will substitute for NEPA, FHWA's NEPA implementing regulations and 23 USC Section 139.

Pros

- May result in some minor resource savings by not preparing a separate NEPA document or determination although the CEQA document will need to have a "Federal Compliance" section.

Cons

- May not satisfy all stakeholders.
- Caltrans must agree to be sued in federal court (as under NEPA Assignment)
- Does not include substitution of state laws for other federal laws, just those under the authority of USDOT.
- **Extends the statute of limitations for lawsuits under the program to two years rather than 150 days under the existing process putting projects and funding at risk.**
- Application process and implementation of the program will require additional staffing.

Alternative 2: Choose not to apply for the Pilot Program.

Pros:

- Eliminates need to apply for the Pilot Program, the selection of local agencies to participate, and the development and implementation of new policies, guidance, environmental document annotated outlines, etc.
- Saves costs in not hiring additional staff to develop, implement, and provide for the long-term management of the program.

Cons:

- May not satisfy all stakeholders.

PROPOSED IMPLEMENTATION SCHEDULE:

- Rulemaking is not expected until late 2016. Note that rulemaking under MAP-21 was consistently behind the mandated timeframes.
- Following draft and final rulemaking, Caltrans will be able to apply for the program. The application itself must then be published in the Federal Register for public review and comment.
- It is anticipated that implementation of the program will be similar to that of NEPA Assignment and will generate new staffing requirements.
- DEA will have to issue new guidance, prepare new environmental document annotated outlines, develop new processes for the oversight of locally-administered projects, etc.
- California must apply for a waiver of sovereign immunity to participate in the program.
- Earliest possible implementation is likely late 2017/early 2018 assuming that rulemaking is not significantly delayed.