

Pre-Decisional Discussion Draft

FAST ACT FACT SHEET

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DATE: January 13, 2016

SUBJECT: FAST Act – Section 1304 Efficient Environmental Reviews for Project Decisionmaking

PROBLEM STATEMENT:

The FAST Act amends the “Efficient Environmental Review Process” (codified at 23 USC 139) that was by SAFETEA-LU and revised by MAP-21. Makes numerous revisions to the process (currently used only for Environmental Impact Statements), including:

- Requires that the lead agency notify participating agencies within 45 days after the NOI (EIS) or initiation of an EA.
- Requires, to the extent possible that all federal permits and reviews for a project shall rely on a single ED prepared by the lead agency but also requires that to the extent possible, the lead agency shall develop an ED sufficient to satisfy the requirements of other federal agencies.
- No later than 45 days after a project sponsor notifies the Secretary that the environmental review process should be initiated, the Secretary must provide a written response including a timeline and expected date for the Federal Register Notice.
- A participating agency that declines to participate in the development of the P&N and Range of Alternatives is required to comply with the project schedule.
- A Coordination Plan is now required not later than 90 days after the publication of the NOI.
- A schedule is now required as part of the Coordination Plan.
- DOT is required to establish an internet site to make publicly available the status and progress of projects requiring an EIS or EA and any federal, state, or local approvals required for those projects and make publicly available the names of participating agencies not participating in the development of the P&N and Range of Alternatives.
- Caltrans will be responsible for providing the above project status information to USDOT.

RECOMMENDATION:

It is recommended that Caltrans continue using the environmental review and issue resolution processes, as necessary. Since SAFETEA-LU was enacted, the issue resolution process has not been invoked by Caltrans. Additionally, the *Division D-Miscellaneous Title XLI-Federal Permitting Improvement* section of the FAST Act mandates a new permitting improvement process but that the requirements do not apply to projects already subject to 23 USC 139. To date, Caltrans has not used the 23 USC 139 process for EA/FONSI, only EISs. However, the federal permitting improvement provisions could theoretically apply to a very small number of EAs, in which case Caltrans would want to apply the 23 USC 139 process to those EAs.

BACKGROUND:

SAFETEA-LU Section 6002 established this requirement and both MAP-21 and the FAST Act have modified the existing process. Because there is already a coordination process in place, the changes are largely minor. Caltrans coordinates regularly with federal permitting agencies to ensure that project schedules and milestones are met. Conflict resolution provisions with the federal permitting agencies are in effect as part of the programmatic efforts

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that Caltrans has established with federal permitting agencies (NEPA/404 MOU, Section 106 Programmatic Agreement, Section 7 auto-elevation). No California Statute is impacted or required. **However, a project schedule that is agreed upon by the Participating Agencies is a new requirement and will require additional time for schedule development, review, and concurrence.**

ALTERNATIVES:

Alternative 1: Continue to use the existing coordination process, with new mandates created by both MAP-21 and the FAST Act, as needed. Notify federal permitting agencies during regularly scheduled coordination meetings of these new changes.

Pros: The process is already in place and only minor changes to guidance will be needed.

Cons:

- The requirement for a project schedule that is agreed upon by the Participating agencies will require additional time for schedule development, review and concurrence.
- Reporting on the progress and status of projects statewide to USDOT for internet publication represents a new workload.

PROPOSED IMPLEMENTATION SCHEDULE:

The Standard Environmental Reference will be updated with the revised provisions as soon as staffing allows.

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FAST ACT Section 1309
Program for Eliminating Duplication of Environmental Reviews (23 USC 330)
“NEPA/CEQA Reciprocity”

What the FAST ACT does:

- The FAST Act establishes a 12-year pilot program which allows up to five states (limited to those with NEPA Assignment) to substitute one or more state environmental laws for NEPA (called “Alternative Environmental Review” or “AER”).
- A state may elect to use an AER on behalf of up to 25 local governments for locally-administered projects.
- Under the AER process, Caltrans or a local agency’s CEQA document may be used to meet the requirements of NEPA, FHWA’s implementing regulations (23 CFR 771 and 772), and/or 23 USC 139 (Efficient Environmental Reviews), as applicable.
- To be eligible, the state must apply to participate in the program, and the application must specify each federal requirement that will be substituted, each state provision that will substitute the federal provision, and prove that each state provision *is more stringent* than the substituted federal provision.
- The FAST Act requires that the state agree to be sued in federal court.
- **The FAST Act sets the statute of limitations, to challenge a document prepared under the AER or compliance with 23 USC 330, at two years. In comparison, the statute of limitations is 150-days for projects approved through the normal process.**
- If Caltrans participated in the program, it would have the discretion on a project-by-project basis to decide whether to use the AER or prepare a NEPA document.

What the FAST ACT does NOT do:

- The FAST Act does not eliminate NEPA.
- With the exception of using the CEQA document to satisfy the requirements of NEPA, the FAST Act does not allow the substitution of state laws for other federal laws or eliminate the need to comply with federal laws and regulations such as Section 7 of the Endangered Species Act, Section 106, Clear Air Act (and conformity requirements), Section 4(f), Clean Water Act (LEDPA), Executive Order 11988, Executive Order 11990, Farmland Protection Policy Act, etc.
- The FAST Act does not *require* a federal agency granting a permit or other approval over the project to accept the “CEQA for NEPA” document although it does state that other federal agencies shall adopt or incorporate by reference documents produced under an AER process to the “maximum extent practicable and consistent with federal law.”
- No changes are expected to other NEPA requirements such as environmental document re-evaluations, etc.
- The FAST Act does not remove Caltrans from the process. Caltrans will remain the federal lead agency under NEPA Assignment and will need to review local agencies’ CEQA documents for compliance with the AER and other federal laws.

Required for Implementation:

- Draft rule-making within 270 days (however note the much of the MAP-21 rule-making was completed significantly behind schedule)
- Public comment period
- Final rule-making
- A detailed Caltrans application with public comment period
- Development of Environmental Document Annotated Outline satisfactory to all local agencies, FHWA, and other federal permitting and approving agencies.
- Waiver of Sovereign Immunity Legislation
- MOU developed and executed

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DATE: January 13, 2016

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 5 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 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 (2 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.

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

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 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.

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

Pros:

- Eliminates need for to apply for the Pilot Program, the selection of local agencies to participate, and the development and implementation of new polices, 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.

FIXING AMERICA'S SURFACE TRANSPORTATION (FAST) ACT

Fact Sheet

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DATE: January 15, 2016

SUBJECT: 23 USC 330 (amended) (1309)
Program for Eliminating Duplication of Environmental Reviews **CEQA for NEPA**

PROBLEM STATEMENT/BACKGROUND:

(What does the FAST Act do in your program area? Does the FAST Act make policy changes, create new programs or activities?)

Section 1309 NEPA/CEQA Reciprocity: (23 U.S.C. §330) Establishes a new pilot for up to five states to test whether state environmental law can be substituted for NEPA and related regulations and Executive Orders. Note that only NEPA, and not additional federal environmental laws, are covered by this pilot. To be eligible, a state must already be participating in the Surface Transportation Project Delivery Program (23 U.S.C. §327). The state may provide up to 25 municipalities with the ability to operate local environmental reviews consistent with the state approved procedures. NEPA lawsuits could be filed over a 730 day period (two years) following NEPA approval and notice in the Federal Register, compared to the existing 150 days. And because Section 330 also provides for the possibility of a supplemental environmental review, this creates an additional new two year (730 days) window for lawsuits.

ACTION ITEM FOR IMPLEMENTATION/RECOMMENDATIONS FOR IMPLEMENTATION:

(What action items will Caltrans or others need to take and when to implement the FAST Act (with an emphasis on short-fuse items that must be taken in the first half of 2016)? Will implementation require state legislative action (we definitely need to know whether implementing legislation is required, and your policy recommendations for implementation), changes to funding allocations or suballocations – if so, what is recommended? Anything else?)

Prior to FHWA Rulemaking in 270 days:

- 1) Outreach to local agencies to:
--inform them that under the NEPA/CEQA Reciprocity Pilot, lawsuits can be filed for over a 730 day period (two years) following NEPA approval and notice in the Federal Register, compared to the existing 150 days. And because Section 330 also provides for the possibility of a

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supplemental environmental review, this creates an additional new two year (730 days) window for lawsuits.

– determine local agency interest in participating in the Pilot

2) Analyze which state and federal law is more or less stringent

3) Develop alternate policies and procedures

Following FHWA Rulemaking:

4) Complete the detailed application

5) Respond to public input on the Application

6) Develop an MOU with FHWA

7) Train CT staff and interested local agencies on the new alternate process

8) Modify LP2000 to capture reporting requirements

9) Enter alternate environmental document data

10) Track and report on the data

11) Prepare a report to Congress within two years of the effective date of Section 330.

IMPACT OF THE FAST ACT (Pros/Cons):

(To the extent that Divisions are able to provide information within the given timeframe, will implementing the FAST Act impose new costs, staffing requirements?)

- Yes, more time, costs and resource immediately and over the long term (although interested local agencies may be interested in off-setting this cost)
- Implementing this provision will require a lot of work for a very few projects
- Any NEPA compliance time savings are uncertain at this point
- The 2-year statute of limitations (as opposed to 150-days) is very problematic.