Section 139 Environmental Review Process: Efficient Environmental Reviews for Project Decisionmaking and One Federal Decision

Interim Final Guidance

December 2024

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.

Introduction

This document is intended to provide guidance on the Section 139 environmental review process, which is a framework located at 23 U.S.C. 139 (Section 139) that generally applies to the environmental review of surface transportation and multimodal projects that require approval by the U.S. Department of Transportation. This document has been updated based on revisions to Section 139 since the statute was originally passed in 2005. These changes are the result of efforts to make the environmental review process more efficient and timely, and to protect environmental and community resources. The intent is to expedite approvals of urgently needed transportation improvements. This guidance does not replace the Federal Highway Administration (FHWA), Federal Transit Administration, and Federal Railroad Administration (FRA) shared National Environmental Policy Act (NEPA) procedures located in part 771 of title 23 of the Code of Federal Regulations (CFR).

In August 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, established supplemental requirements to the National Environmental Policy Act (NEPA) 42 U.S.C. § 4321, et seq., at 23 U.S.C. § 139, for highway and public transportation projects ("Sec. 139 environmental review process"[1]). These requirements were included in the FHWA/ FTA joint environmental procedures, 23 CFR part 771. In December 2015, the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114-94) broadened the applicability of Section 139 to railroad projects. On October 29, 2018, the FRA joined 23 CFR part 771 and this guidance. This guidance provides project sponsors with direction regarding the FHWA, FRA, and FTA (collectively the "Agencies") environmental review process.[2] The updated guidance incorporates amendments to 23 U.S.C. § 139, Efficient environmental reviews for project decisionmaking and One Federal Decision, made through section 11301 of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58), section 1304 of the Fixing America's Surface Transportation Act FAST Act (Public Law 114-94), and various sections of the Moving Ahead for Progress in the 21st Century (MAP-21) Act (Pub. L. 112-141). This guidance also incorporates amendments to NEPA made through the Fiscal Responsibility Act (Pub. L. 118-5).

The intent of this guidance is to provide project sponsors with a framework to facilitate efficient project management and decisionmaking in accordance with the law, and as much flexibility as possible in administering the environmental review process. This guidance supersedes[3] the

[1] These Q&As use the term "Sec. 139 environmental review process" to describe the procedures required by 23 U.S.C. § 139.

[2] Sections 139(c)(1)(A) and 139(c)(2) of title 23, U.S. Code, establish that DOT, FHWA, FRA, FTA, or a combination of these, must serve as Federal lead agency for the environmental review of projects covered by the Sec. 139 environmental review process. Section 1.81(a)(5) of title 49 of the CFR delegates this responsibility to FHWA, FRA, or FTA, as applicable, to matters within their primary responsibility. Section 327 of title 23, U.S. Code, authorizes FHWA, FRA, or FTA to assign, and States to assume, environmental review responsibilities for highway, railroad, and public transportation projects (23 U.S.C. § 327(2)(A)). This assignment includes some, but not all, of the responsibilities and authorities discussed in this guidance. States participating in the assignment program should coordinate with FHWA, FRA, or FTA, as appropriate, regarding the applicability of this guidance.

[3] For FHWA, this guidance supersedes the FHWA Technical Advisory T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents (October 30, 1987), where in conflict.

SAFETEA-LU Environmental Review Process Final Guidance issued by FHWA and FTA on November 16, 2006. This guidance supplements the Agencies' joint NEPA regulation (23 CFR part 771), the Council on Environmental Quality (CEQ) regulations (40 CFR parts 1500-1508), and, when applicable, the FRA's Procedures for Considering Environmental Impacts (64 FR 28545, May 26, 1999) (FRA Environmental Procedures).[4] Generally, Section 139 supplements NEPA and the Agencies apply Section 139 in addition to the requirements described in NEPA. However, in some instances, Section 139 provides more specific procedures and in those instances the Agencies will follow the more specific procedures or requirements for projects following the Sec. 139 environmental review process. All such instances are noted in this guidance.

This guidance uses a question-and-answer format and includes additional examples and information in the glossary of abbreviations and appendices. The table of contents provides a full list of the questions.

All Agency projects requiring development of an Environmental Impact Statement (EIS) must follow the Sec. 139 environmental review process (23 U.S.C. § 139(b)(1)). Because the size and scope of EISs vary, adjustments to the recommended approaches included in this guidance may be appropriate on a case-by-case basis, but this guidance is intended to capture the minimum statutory requirement. The Sec. 139 environmental review process may also apply to environmental assessments (EAs), as described further in Question 10.

This guidance is divided into three sections:

- Environmental Review Process – Part 1 (Questions 1-47) contains guidance on elements of the Sec. 139 environmental review process, including: applicability of this process; project initiation; roles and responsibilities of the project sponsor and the lead, cooperating, and participating agencies; project purpose and need; analysis of alternatives; and public involvement requirements.

- Process Management – Part 2 (Questions 48-87) addresses the management of the Sec. 139 environmental review process, including: coordination and scheduling, public involvement, concurrent reviews, issue resolution, mitigation commitments, adoption and use of documents, interagency funding, requirements for the Federal Infrastructure Permitting Dashboard (Permitting Dashboard), and use of errata sheets and combined final environmental impact statement/record decision (FEIS/ROD) documents.

- Statute of Limitations – Part 3 addresses the statute of limitations provision. The Agencies have slightly different procedures for implementing the statute of limitations provisions due to the variety of grant programs administered.

[4] FRA still relies on the FRA Environmental Procedures for projects initiated prior to the Environmental Impacts and Related Procedures Final Rule (83 FR 54480) effective date of November 28, 2018.

TABLE OF CONTENTS

Part 1 Environmental Review Process

Part 1 covers elements specific to implementation of the Sec. 139 environmental review process that are related to:

- Applicability of this process;
- Project initiation;
- Roles and responsibilities of the project sponsor and the lead and participating/cooperating agencies (including as it relates to cooperating agencies);
- Development of project purpose and need;
- Analysis of alternatives;
- Identification and design of the preferred alternative; and
- Opportunities for public involvement.

The Sec. 139 environmental review process emphasizes the responsibilities of the NEPA lead agencies in determining the final purpose and need for the action and the range of alternatives after considering input from the public and participating/cooperating agencies. While FHWA, FRA, or FTA is the Federal lead agency in a NEPA review subject to the environmental review process under 23 U.S.C. § 139, the lead agency role can be shared with other governmental entities, as defined by law. Therefore, unless the lead agencies agree otherwise, the terms "lead agency" or "lead agencies" throughout the guidance refer to a collaboration among all joint lead agencies when making decisions or performing tasks, regardless of whether they are serving as a joint lead agency under the authority of 23 U.S.C. § 139 or NEPA. The Sec. 139 environmental review process should not proceed unless the lead agencies reach agreement on matters under their joint authority. If appropriate, any lead agency may initiate the issue resolution process described in 23 U.S.C. § 139(h). In addition, the lead agencies must collaborate with participating/cooperating agencies in determining the methodologies to be used and the level of detail required in the analysis of each alternative as directed in 23 U.S.C. § 139(f)(4)(C).

Although as a technical matter, any "cooperating agency" under the CEQ regulations would also be considered a "participating agency" for purposes of the Sec. 139 environmental review process (see Questions 29-36), this guidance generally uses both terms whenever referring to "participating agencies" to provide clarity for when the roles and responsibilities of cooperating agencies are different from that of participating agencies that do not fit the definition of cooperating agencies.

General Information about the Sec. 139 environmental review process

Question 1: Which requirements apply to a project when the project was initiated prior to statutory amendments to the Sec. 139 environmental review process?

Answer: Congress revised the Sec. 139 environmental review process through MAP-21, the FAST ACT, and the BIL[5]. In general, the Agencies will apply the version of the Sec.139 environmental review process in effect at the time the project was initiated (e.g., publication of a notice of intent (NOI) to develop a new environmental impact statement (EIS), or a determination to proceed with an environmental assessment (EA) that will follow the Sec. 139 environmental review process). One exception to this general rule of applicability is that consistent with 49 U.S.C. § 24201(a), FRA will not follow the Sec. 139 environmental review process for any railroad project for which the Secretary approved the funding arrangement under title 49, U.S. Code, before December 4, 2015. One other limited exception, developed during the initial Sec. 139 guidance, is that a Supplemental EIS (SEIS) is exempt from the SAFETEA-LU Sec. 139 requirements if the original EIS was under active development during the 8 months prior to Aug. 11, 2005[6], when SAFETEA-LU was enacted.

When an environmental review process is supplemented through a supplemental EIS or EA, the version of the Sec. 139 environmental review process that applies to the supplementary process is the version in existence at the time of the NOI if an NOI is issued for the supplementary environmental review process[7]. If an NOI is not issued for the supplementary environmental review process, then the version of Sec. 139 environmental review process that applies is the version that was in effect when the project was initiated.

For further guidance about the applicability of 23 U.S.C. § 139 to a specific project initiated prior to the current version of the Sec. 139 environmental review process as amended, project sponsors should contact their FHWA Division, FRA Headquarters, or FTA Regional office.

Question 2: What is the "Sec. 139 environmental review process?"

Answer: The term "Sec. 139 environmental review process" refers to the Federal procedures and requirements followed when evaluating an applicable proposed project under 23 U.S.C. § 139. The Agencies are responsible for ensuring that environmental analysis for a project is prepared and completed in accordance with 23 U.S.C. § 139, NEPA, CEQ's regulations at 40 CFR part 1500-1508 and 23 CFR part 771 as applicable, and other applicable Federal laws, regulations and executive orders. This environmental review process includes the process and schedule, including a timetable for and completion of any

[5] Effective dates for reauthorization bills: SAFETEA-LU, Aug. 11, 2005 - Sept. 30, 2012; MAP-21, Oct. 1, 2012 - Dec. 3, 2015; FAST Act, Dec. 4, 2015 – Sept. 30, 2021; and BIL/IIJA, Oct. 1, 2021 to present.

[6] Sec 139 does not apply to an EIS that was under active development during the 8 months prior to August 11, 2005.

[7] See Question 14 for additional information on the NOI.

environmental permit, approval, review or study under any Federal law other than NEPA (see 23 U.S.C. § 139(a)(5)). Therefore, the Sec. 139 environmental review process extends into post-NEPA project development activities that encourage timely environmental authorizations, approvals, permits, or actions, as needed for the project.

Question 3: What does the term "authorization" mean in this guidance?

Answer: Within this guidance and consistent with 23 U.S.C. § 139(a)(2), 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. This includes, but is not limited to, a Clean Water Act Section 404 Permit, and a permit or finding under the Section 7 of the Endangered Species Act (16 U.S.C. §§ 1531-1544).

Question 4: What does the term "environmental document" mean in this guidance?

Answer: Within this guidance and consistent with 23 U.S.C. § 139(a)(3), the term "environmental document" includes an EA, finding of no significant impact (FONSI), NOI, EIS, or record of decision (ROD) issued for a project to which the Sec. 139 environmental review process is applicable.[8]

Question 5: What does the term "major project" mean in this guidance?

Answer: Within this guidance and consistent with 23 U.S.C. § 139(a)(7), the term "major project" means a project: (1) for which multiple (two, or more) authorizations[9], reviews, or studies are required under a Federal law other than the NEPA; (2) for which the lead agency has determined an EIS is required (or for which the lead agency has determined an EA is required and where the project sponsor requests that the project be treated as a major project); and (3) for which the project sponsor has identified the reasonable availability of funds sufficient to complete the project (see Question 8). The Federal Environmental Review and Authorization Inventory lists potential Federal authorizations for infrastructure projects.

A major project is not a "covered project" under the FAST-41 program (as defined in section 41001 of the FAST Act, codified at 42. U.S.C. § 4370m). For FHWA, FRA and FTA projects, all projects that follow the Sec. 139 environmental review process are specifically excluded from FAST-41 and are not defined as covered projects.

[8] This definition is broader than the term "environmental document" as defined in 42 U.S.C. § 4336e(5) of NEPA, which provides the term 'environmental document' means an environmental impact statement, an environmental assessment, or a finding of no significant impact.

[9] 23 U.S.C. § 139(a)(2).

For the purposes of the Sec. 139 environmental review process, the term "major project" does not have the same meaning as the term "major project" as described in 23 U.S.C. § 106(h).

Question 6: What does the term "project" mean in this guidance?

Answer: Within this guidance and consistent with 23 U.S.C. § 139(a)(9), the term "project" means a highway, public transportation capital, or railroad project requiring the Secretary's approval; or a multimodal project that would require approval by any U.S. DOT operating administration or secretarial office, if implemented as proposed by the project sponsor. The Agencies will consider the 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) when determining whether the proposed action is a project. 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 7: What does the term "multimodal project" mean in this guidance?

Answer: Within this guidance and consistent with 23 U.S.C. § 139(a)(8), the term "multimodal project" means a project that requires the approval of more than one U.S. DOT operating administration or secretarial office.

Question 8: What does the term "reasonable availability of funds" mean in this guidance?

Answer: The FHWA may rely on the listing of a project on a statewide transportation improvement program (STIP), transportation improvement program (TIP), or metropolitan long-range plan, as applicable, to determine if a project has a reasonable availability of funding. This is a project-by-project determination.

For all FTA EISs (and for EAs where a project sponsor would like to have a project considered as a "major project" for purposes of the Sec. 139 environmental review process), the project sponsor will need to submit basic information on the financial plan for the project prior to the initiation of the environmental review process that provides the estimated project cost along with the anticipated funding sources with a description of the likelihood that they will be available for constructing the project. FTA has developed a template for providing this information, which is available at: FTA Funding Availability Template.

For FRA, the project sponsor should submit a brief explanation of how the project will be funded through implementation. This should include identification of FRA funds and other Federal, State, local or private funds, and an assessment of the likelihood of securing each funding source. As applicable, the project sponsor should include a plan for addressing any funding deficit. FRA may consider the project's inclusion in an FRA planning program, such as FRA's Corridor Identification and Development Program or the Northeast Corridor

Inventory, when determining whether the project sponsor has identified the reasonable availability of funding.[10] The project sponsors should contact their FHWA Division, FRA Headquarters, or FTA Regional office for questions on this topic.

Question 9: How do the environmental requirements for metropolitan and statewide planning (23 U.S.C. §§ 134, 135, 168 and 169; 49 U.S.C. §§ 5303-5306) and their implementing regulations (23 CFR part 450; 49 CFR part 613) relate to the Sec. 139 environmental review process?

Answer: The transportation planning process can provide useful information for the Sec. 139 environmental review process. The federally required transportation planning process for highway and public transportation projects provides for actions and strategies that "protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns" (23 U.S.C. §§ 134(h)(1)(E) and 135(d)(1)(E); 49 U.S.C. §§ 5303(h)(1)(E) and 5304(d)(1)(E)). Highway and public transportation plans ("transportation plans") are developed "in consultation with State, tribal, and local agencies responsible for land use management, natural resources, conservation, environmental protection, and historic preservation" (23 U.S.C. § 135(f)(2)(D)(i)). Consultation involves a comparison of transportation plans with available State, tribal, and local conservation plans and maps, and with available natural and cultural/historic resources inventories.

Transportation plans must include a "discussion of types of potential environmental mitigation activities and potential areas to carry out these activities" and the discussion must "be developed in consultation with Federal, State, and tribal wildlife, land management, and regulatory agencies" (23 U.S.C. §§ 134(i)(2)(D) and 135(f)(4)(A); 49 U.S.C. §§ 5303(i)(2)(D) and 5304(f)(4)(A)). In addition, under 23 U.S.C. § 169, as part of the statewide or metropolitan transportation planning process, a State or metropolitan planning organization may develop programmatic mitigation plans or policies to address the potential environmental impacts of future transportation projects, and these may be used by Federal agencies in carrying out their responsibilities under NEPA (23 U.S.C. § 169(f)).

For FHWA and FTA, parts 450 and 771 of title 23, CFR (23 CFR 450.212, 450.318, and 771.111(a)(2)(i)) allow States, metropolitan planning organizations (MPOs), and public transportation providers to engage in studies at the highway and public transportation planning process stage that, consistent with NEPA, could be used and relied on during the environmental review process. These studies can produce any of the following to be used and relied upon during the environmental review process: (1) purpose and need or goals and objectives; (2) general travel corridor, general mode(s), or both; (3) preliminary screening of alternatives and elimination of unreasonable alternatives; (4) basic description of the environmental setting; and (5) preliminary identification of environmental impacts and

[10] *See* 49 U.S.C. §§ 25101(a), 24911.

environmental mitigation. CEQ's regulations allow this practice through the use of incorporation by reference (40 CFR 1501.12).

There are two additional methods available for using, incorporating by reference, and adopting planning products into the environmental review process. The first is found at 23 U.S.C. § 168. Planning products mean "a decision, analysis, study, or other documented information that is the result of an evaluation or decisionmaking process carried out by a metropolitan planning organization or a State, as appropriate, during metropolitan or statewide transportation planning under section 134 or 135, respectively" (23 U.S.C. § 168(a)(3)). The second method is found at 23 U.S.C. § 139(f)(4)(E), and it allows elimination of alternatives from detailed evaluation in an EIS for alternatives evaluated during the planning or State environmental review process where certain requirements are met. FHWA encourages the use of Planning and Environment Linkages (PEL) under the provisions of 23 U.S.C. §§ 139(f)(4)(E) and 23 U.S.C. §§ 168 to the extent practicable, to preserve the option to use the planning products and decisions (e.g., purpose and need, and elimination of unreasonable alternatives) in the environmental review process. However, flexibilities in PEL also allow the use of either approach alone. FTA encourages the use of the regulatory approach under 23 CFR part 450 instead of the Sec. 139 environmental review process statutory provision given the flexibility of the regulatory approach.

Appendix A of 23 CFR part 450 provides additional information to explain the linkage between the transportation planning and project development processes, as well as guidance on incorporating transportation planning products and decisions into the project development process.

For projects administered under the FHWA Federal-Aid programs, additional guidance related to transportation planning requirements and their relationship to NEPA approvals is provided in an informational memorandum issued on January 28, 2008, entitled Transportation Planning Requirements and Their Relationship to NEPA Approvals, supplemented February 9, 2011. Also see Clarifying Fiscal Constraint Guidance, issued May 15, 2017.

Since some of the legal authorities for transportation planning do not apply to FRA projects (e.g., 23 CFR part 450), project sponsors are encouraged to contact FRA Headquarters offices if any questions arise about how to integrate planning with FRA's implementation of the Sec. 139 environmental review process, including questions relating to the Corridor Identification and Development (CID) Program (49 U.S.C. § 25101).

Applicability Requirements

Question 10: Which projects must follow the Sec. 139 environmental review process?

Answer: All FHWA, FRA, or FTA projects, including major projects as defined in 23 U.S.C. § 139(a)(7), requiring development of an EIS must follow the procedures outlined in the Sec. 139 environmental review process (23 U.S.C. § 139(b)(1)). The Agencies will determine the project's class of action (e.g., EA, or EIS) consistent with NEPA (42 U.S.C. § 4336). In making this determination, the Agencies may make use of any reliable data source but are not required to undertake new scientific or technical research unless the new scientific or technical research is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable, consistent with 42 U.S.C. § 4336(b)(3).

The BIL established provisions such that the Sec. 139 environmental review process may be applied to any project that requires the preparation of an environmental document if requested by a project sponsor, and if the Secretary determines it to be appropriate (see 23 U.S.C. § 139(b)(1)). FHWA will determine whether, and to what extent, to apply the Sec. 139 environmental review process to other classes of action on a project-by-project basis. In general, FRA and FTA will only apply the process requirements contained in the Sec. 139 environmental review process to EISs. However, FRA or FTA may apply, in whole or in part, certain provisions of the Sec. 139 environmental review process to other classes of action depending on the circumstances of the project; these provisions could include the statute of limitations (SOL) on claims or the joint lead agency approach. Project sponsors should contact their FHWA Division, FRA Headquarters, or FTA Regional office when determining whether to apply Sec. 139 environmental review process provisions to a non-EIS project.

The Sec. 139 environmental review process would also apply to a highway, public transportation capital, railroad, or multimodal project administered by a non-surface transportation mode of the Department of Transportation or the secretarial office of the Department of Transportation if an EIS is prepared for the project. However, this guidance is only intended to apply to projects that require an approval from FHWA, FRA, or FTA.

Question 11: Does the Sec. 139 environmental review process apply to the FHWA Federal Lands Highway projects carried out under 23 U.S.C. § 308 that do not propose the use of FHWA, FRA, or FTA funding?

Answer: The Sec. 139 environmental review process typically does not apply to the NEPA reviews of the highway projects developed and delivered by Federal Lands Highway Division Offices under 23 U.S.C. § 308. There may be some limited, fact-specific exceptions where the Sec. 139 environmental review process may apply to the NEPA reviews of highway projects developed and delivered under 23 U.S.C. § 308.

Under 23 U.S.C. § 308, "the Secretary, may perform, by contract or otherwise, authorized engineering or other services in connection with the survey, construction, maintenance, or improvement of highways for other Federal agencies, cooperating foreign countries, and State cooperating agencies." These projects are also known as "Federal Lands Tier 2 technical assistance projects." The Federal Lands Division Offices may conduct the NEPA reviews of these projects, based on the other Federal agency's NEPA implementing regulations. Some of these projects may be subject to Title 41 of the FAST Act (FAST-41) (see Question 5).

Depending on the class of action under NEPA, the Sec. 139 environmental review process may apply to some Federal-aid highway projects for which a State DOT has executed an agreement with a Federal Lands Division Office to develop and deliver the project (e.g., Saddle Road Extension EIS in Big Island, Hawaii). The Sec. 139 environmental review process may also apply to some NEPA reviews of the highway projects developed and delivered by Federal Lands Highway Division Offices under 23 U.S.C. § 308 if the project requires a discretionary FHWA approval (e.g., approval of new or modified access to the Interstate under 23 U.S.C. § 111 or a joint-use agreement), or if the project involves FHWA funding in addition to funding from the other Federal agency (e.g., funding a new ferry terminal and a park and ride facility to improve access to a national park on an island).

Question 12: Does the Sec. 139 environmental review process apply to projects covered under a NEPA Assignment agreement under the 23 U.S.C. § 327 Surface Transportation Project Delivery Program?

Answer: Yes. The Sec. 139 environmental review process, as described in this guidance, applies to projects covered under a NEPA Assignment agreement under 23 U.S.C. § 327. The applicable State-specific NEPA assignment agreement may specify projects excluded from assignment.

Question 13: Do the provisions in the Sec. 139 environmental review process apply the same to programmatic and tiered documents?

Answer: Yes. The Sec. 139 environmental review process requirements apply to all EISs, including programmatic or tiered documents (40 CFR 1501.11). The applicable elements of the Sec. 139 environmental review process will apply. For example, a "Tier 2" (project-specific EIS) would follow the same requirements for all EISs, such as identifying and inviting participating/cooperating agencies, providing opportunities for the public and participating/cooperating agency involvement in defining the purpose and need and determining the range of alternatives (23 U.S.C. § 139(f)), and collaborating with participating/cooperating agencies in determining methodologies and the level of detail for the analysis of alternatives (23 U.S.C. § 139(f)(4)(C)-(D)). The level of detail and analysis likely will differ depending on the focus of the EIS and the issues ripe for decision during the environmental review process.

Notice of Intent

Question 14: What is the NOI for purposes of the Sec. 139 environmental review process?

Answer: Within this guidance and consistent with NEPA and the CEQ regulations, the NOI is the environmental document that notifies the public of the agency's intent to prepare an EIS for a proposed project. The Agencies may also choose to publish an NOI for an EA, Supplemental EIS, or Supplemental EA.[11]

Question 15: What is required to be in a draft NOI and how is the draft NOI incorporated into the Sec. 139 environmental review process?

Answer: The required elements of an NOI for an EIS are listed in the CEQ regulations (40 CFR 1502.4(e)). An NOI for an EIS must include a request for public comment on alternatives or impacts and on relevant information, studies, or analyses with respect to the proposed agency action, consistent with 42 U.S.C. § 4336a(c). An NOI to prepare an EA or a supplemental document need only be sufficient to give notice that the agency will begin preparation of such document and may include a request for public comment.

The project sponsor may include the draft NOI within the project initiation notification package submitted to the Agencies (see Question 19). Projects that have used a PEL or CID Program approach, e.g., Tier 1 documents or other relevant planning studies, will have advantages over the projects that do not have information from PEL or CID service development planning to incorporate into the NEPA process (see Question 9).

The pre-NOI stage (i.e., the period before the lead Federal agency publishes the NOI) includes NEPA scoping and can help ensure that the timelines and schedules developed for the Sec. 139 environmental review process are met. During the pre-NOI stage, the lead agencies, in consultation with the cooperating and participating agencies and project sponsor, should:

- Identify cooperating and participating agencies for the project;
- Develop a draft purpose and need;
- Develop a draft coordination plan that includes a draft schedule and draft permitting timetable (See Question 51);
- Identify potentially affected community and stakeholders and develop a public involvement plan;
- Identify a preliminary range of alternatives;

[11] The environmental review process for a project is governed by the statutory and regulatory requirements in effect at the time of issuance of the most recent NOI. Issuing an NOI for an EA or supplemental document will trigger the version of the requirements in effect at that time. Currently, the publication of an NOI for an EA or supplemental document is optional and need only be sufficient to give notice that the agency will begin preparation of such document.

- Determine the extent of analysis needed for each resource;
- Initiate applicable resource surveys/studies;
- Identify potentially significant environmental issues;
- Identify potential mitigation strategies; and
- Initiate permit activities as soon as possible, such as pre-application processes.

It is a best practice that the lead agencies obtain written concurrence from the cooperating agencies during the pre-NOI stage on 1) draft purpose and need and 2) the preliminary range of alternatives. A third concurrence point related to the preferred alternative should occur later in the process. If the Federal lead agency modifies the purpose and need or the range of alternatives, after consideration of the public comments received in response to the publication of the NOI, the Federal lead agency should obtain additional written concurrence from the cooperating agencies prior to publishing the Draft EIS. The lead agencies should ensure meaningful public involvement is included during the pre-NOI stage.[12] Appendix H includes graphical representations of the recommended best practice timeline to achieve the timely decisionmaking and authorizations required for the Sec. 139 environmental review process.

Following the pre-NOI stage, the Federal lead agency will publish the NOI in the *Federal Register* for a public comment period. To limit the length of the NOI itself, the Federal lead agency may prepare additional supportive documentation, which provides greater detail or presents information graphically to enhance the public's review. The additional supportive information document should be included in the public docket established at https://www.regulations.gov/, the project website and referenced in the NOI.

The length of the public involvement period for the NOI should provide sufficient time for public review of the information. Generally, the public comment period on the NOI should not exceed 30 days, unless a different deadline is established by agreement of the lead agency, project sponsor and all participating agencies, or the deadline is extended by the lead agency for good cause (23 U.S.C. § 139(g)(2)(B)). The comments received on the NOI should be posted in a docket established at https://www.regulations.gov/, and a summary should be incorporated into the DEIS (see 40 CFR 1502.17(a)). If appropriate, the lead agencies may hold a public meeting during the NOI public comment period.

Question 16: What environmental review process timelines are calculated from the date of publication of the NOI?

Answer: The NOI publication date in the *Federal Register* establishes the timelines for:

[12] The U.S. Department of Transportation defines meaningful public involvement as a process that proactively seeks full representation from the community, considers public comments and feedback, and may incorporate that feedback into the project. Guidance is provided in the October 2022 publication, Promising Practices for Meaningful Public Involvement in Transportation Decision-Making, see https://www.transportation.gov/sites/dot.gov/files/2022-10/Promising%20Practices%20for%20Meaningful%20Public%20Involvement%20in%20Transportation%20Decision-making.pdf.

- Resolving the preliminary identification of all participating agencies - must be completed no later than 45 days from the date of publication of the NOI (see 23 U.S.C. § 139(d)(2) and Question 27);
- Resolving the draft coordination plan for the Sec. 139 environmental review process - must be completed no later than 90 days from the date of publication of the NOI (see 23 U.S.C. § 139(g)(1)(A) and Question 49);
- Completing the Sec. 139 environmental review process for major projects - must be completed to meet an agency average of not more than two years from the date of publication of the NOI (see 23 U.S.C. § 139(g)(1)(B)(iii)(I) and Question 52)[13];
- For non-major projects (see Question 5), if an EIS the Sec. 139 environmental review process must be completed within two years from the date of publication of the NOI and if an EA, within 1 year of the date of publication of the NOI or other indicator that the NEPA process has begun. These deadlines may be extended in consultation with the applicant (see 42 U.S.C. § 4336a(g)(1)); and
- Determining eligibility for enhanced technical assistance and accelerated project completion for projects with an EIS – eligibility begins two years from the date of publication of the NOI (see 23 U.S.C. § 139(m)(1)(B) and Question 61), and the resulting accelerated schedule must lead to completion within four years from the date of the publication of the NOI (see 23 U.S.C. § 139(m)(3)(B)(i) and Question 63).

Project Initiation

Question 17: How is the Sec. 139 environmental review process for a project initiated?

Answer: To initiate the Sec. 139 environmental review process for a project, the project sponsor must notify FHWA, FRA, or FTA[14] about the type of work, logical termini, length, and general location of the proposed project (i.e., the project description) and provide any additional information that the project sponsor considers to be important to initiate the Sec. 139 environmental review process for the proposed project (23 U.S.C. § 139(e)(1)). The Agencies may assist the project sponsor prior to notification to ensure the requirements for project initiation, as well as other project development requirements and policy, necessary to formally begin the NEPA process are met. The project sponsor may satisfy the project initiation requirement by submitting any relevant documents containing this information, including submittal of a draft NOI for review and approval by FHWA, FRA, or FTA for

[13] NEPA provides that the deadline to complete an EIS is 2 years and an EA is 1 year, with necessary exceptions permitted (42 U.S.C. § 4336a(g)). Under the Sec. 139 environmental review process, the Agencies note that more exhaustive and inclusive specific timelines, standards, and processes for establishing, lengthening, shortening, reporting, and consequences for failure to meet deadlines for major projects apply in lieu of the more general provisions of NEPA in 42 U.S.C. § 4336a(g).

[14] In a State with NEPA Assignment, when the project sponsor is not the State entity that has assumed responsibility for NEPA under 23 U.S.C. § 327 (e.g., the State DOT or a State High Speed Rail Authority) then the project sponsor must notify that entity rather than FHWA, FRA or FTA (see Question 12). For projects where a State NEPA assignment entity is the project sponsor, that entity should publicly indicate, e.g., on a project website or in the environmental documents, whether the Sec. 139 environmental review process applies to the project.

publication in the *Federal Register* announcing the preparation of an environmental document for the project (23 U.S.C. § 139(e)(2)) (see Questions 14-16).

To support "major project" designations, the project sponsor should also provide information regarding the reasonable availability of funds (see Question 8 for more information about this term), and for EAs, whether the project sponsor requests the project be designated as a "major project."

Project sponsors may propose, and FHWA, FRA, or FTA may accept, programmatic approaches to satisfy the project initiation requirements of 23 U.S.C. § 139 (see 23 U.S.C. § 139(b)(3)). In any such proposal, the project sponsor should provide to FHWA, FRA, or FTA in an approved document: (a) the information about each project (i.e., type of work, termini, length, general location, and the list of other Federal approvals) required for project initiation; and (b) an indication of when the Sec. 139 environmental review process for each project will commence (i.e., when the staff, consultant services, financial resources, and leadership attention necessary to move the project's Sec. 139 environmental review process forward will be committed).

Question 18: Do project sponsors need to request designation as a "major project"?

Answer: For EIS-level actions, project sponsors do not need to request their project be designated as a "major project;" the Federal lead 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" and may include such request in the project initiation notice (see Question 17).

The Federal lead agency will determine whether a proposed action meets the definition of a "major project" (see 23 U.S.C. § 139(a)(7)) during project initiation (23 U.S.C. § 139(e)(1)).

Question 19: When should the notification for project initiation occur?

Answer: The project initiation notification to FHWA, FRA, or FTA should occur when the project sponsor is ready to proceed with the NEPA process and complete it in a timely manner.[15] Generally, the timing of the notification is flexible, but for EISs, should occur no later than just prior to, or at the same time as, the submittal of the draft NOI to FHWA, FRA, or FTA. Notification should occur when (1) the proposed project is sufficiently defined to provide the required information, and (2) the project sponsor is ready to complete the NEPA phase of project development by devoting appropriate staff, consultant services, financial

[15] For an EIS developed under the Sec. 139 environmental review process, the Agencies will consider the date on which the FHWA, FTA or FRA issues the NOI as the start of the timeline from which deadlines are calculated. For EAs developed under the Sec. 139 environmental review process, if an NOI is issued the Agencies will consider the date on which the FHWA, FTA or FRA issues a NOI as the start of the timeline. If an NOI is not issued for the EA, then the start of the timeline will be the date on which the Agencies determine an EA is required.

resources, and leadership attention to the project. Consultation among the project sponsor, lead agencies, and other appropriate agencies prior to this notification should occur. See Appendix B for a project initiation template example.

Question 20: What are FHWA, FRA, or FTA's responsibilities during the review of the project initiation package?

Answer: The agency receiving a project initiation package must review the information to determine project readiness and provide a written response to the project sponsor no later than 45 days after the date on which the agency receives the project initiation notice (see 23 U.S.C. § 139(e)(3)). The written response must either:

- Describe the determination to initiate the Sec. 139 environmental review process or to decline the application with an explanation for that decision; or
- Request additional information necessary to initiate the Sec. 139 environmental review process.

To avoid multiple reviews and to ensure the designation of the appropriate Federal lead agency, the Agencies recommend contacting the potential Federal lead agency (or agencies) to discuss the proposed project's details before formally submitting the project notification package.

Question 21: What is the process to designate the Federal lead agency?

Answer: There are three options for designating the Federal lead agency for a project subject to Sec. 139. The first—and recommended—option is to contact the potential Federal lead agencies (i.e., FHWA, FRA, FTA, or a combination) to discuss the project. Sec. 139 requires DOT, or a DOT operating administration, to be the Federal lead agency. For most projects, informal discussions with the potential Federal lead agencies will result in the identification of the Federal lead agency without using the formal designation process.[16] The second option is a formal option: the project sponsor may submit to the Secretary a request to designate the operating administration or secretarial office within DOT with the expertise on the proposed project to serve as the Federal lead agency (23 U.S.C. § 139(e)(4)). The Secretary responds to such a request no later than 45 days after the date of receipt of the request, either approving or denying 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 (23 U.S.C. § 139(e)(4)(B)). If the project sponsor submits additional information, then the Secretary will respond to the submission no later than 45 days after the date of the receipt of the new information.

[16] In determining the Federal lead agency, the Agencies may consider: the magnitude of agency's involvement; project approval or disapproval authority; expertise concerning the action's environmental effects; duration of agency's involvement; and sequence of agency's involvement. *See* 42 U.S.C. § 4336a(a)(1)(A).

If the Secretary is unable to designate a Federal lead agency in accordance with the procedures described above, then a third option, available to any Federal, State, Tribal, or local agency or person that is substantially affected by the lack of a designation of a lead agency, is to request designation of the Federal lead agency by the Secretary consistent with procedures in 42 U.S.C. § 4336a and Section 139's requirement that DOT or a DOT operating administration serve as the Federal lead agency.

Question 22: What is an environmental checklist under 23 U.S.C. § 139(e)(5)?

Answer: As appropriate, the lead agency, in consultation with participating/cooperating agencies will develop a checklist to help the project sponsor(s) identify potential natural, cultural, and historic resources in the project area. The purposes of the checklist are: to identify agencies and organizations to project sponsor(s) that can provide information about the natural, cultural, and historic 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 (or both) (see Question 50). The Agencies anticipate developing environmental checklists on a case-by-case basis and only where needed to facilitate the Sec. 139 environmental review process. If a checklist is developed, the Federal lead agency will transmit it to the project sponsor and include a copy in the project file.

Lead Agencies

Question 23: What agencies must serve as lead agencies in the Sec. 139 environmental review process?

Answer: FHWA, FRA, FTA, or a combination as appropriate, typically serve as the Federal lead agency or a joint Federal lead agency for a project that seeks FHWA, FRA, or FTA funding (23 U.S.C. §§ 101(b)(4)((B)(i) and 139(c)(1)(A); 49 CFR 1.81(a)(5)). A State or local government entity that will be a direct recipient of funds for the project from title 23, U.S. Code; subtitle V of title 49 U.S. Code; title 45, U.S. Code;[17] or chapter 53 of title 49 U.S. Code must serve as a joint lead agency (23 U.S.C. § 139(c)(3); 23 CFR 771.109(c)(2)). An operating administration designated by the Secretary under 23 U.S.C § 139(c)(1)(B) or 139(e)(4) will also be a Federal lead agency (see Question 21). At the discretion of the direct recipient, it may ask a sub-recipient of FRA or FTA funding to serve as a joint lead agency.

For FHWA, the State DOT is typically the direct recipient of project funds, and therefore must serve as a joint lead agency along with FHWA (23 U.S.C. § 139(c)(3)). If a local governmental entity is a project sponsor and a direct recipient of FHWA funds, the local governmental entity must also serve as a joint lead agency (23 U.S.C. § 139(c)(3)). A local

[17] The Secretary shall apply the procedures in Sec. 139 environmental review process to "any railroad project that requires the approval of the Secretary under NEPA." 49 U.S.C. § 24201(a)(1).

governmental agency that is the project sponsor but is not a direct recipient of Federal-aid funds is not required to serve as a joint lead agency, but may be invited to serve as a joint lead agency (40 CFR 1501.7(b)).

For FTA, the direct recipients of FTA projects funds are most often local or regional public transportation agencies, but may also include cities, MPOs, State agencies, and State-owned corporations. The direct recipient serves with FTA, and potentially other Federal agencies, as a joint lead agency.

For FRA, direct recipients of FRA financial assistance are often State DOTs or local agencies. Such direct recipients will serve, with FRA and potentially other Federal agencies, as a joint lead agency.

Question 24: Which other agencies may serve as joint lead agencies?

Answer: In addition to the required lead agencies, other Federal, State, Tribal or local governmental entities may act as joint lead agencies, in accordance with 42 U.S.C. § 4336a and 40 CFR 1501.7, and at the discretion of the required lead agencies. Agencies that become joint lead agencies by FHWA, FRA, or FTA invitation generally assume the roles, responsibilities, and the authority of a Federal lead agency for the procedural requirements of 23 U.S.C. § 139.[18]

A private entity acting as the project sponsor[19] cannot serve as joint lead agency, but may prepare environmental documents in accordance with the procedures in 23 CFR 771.109, provide environmental or engineering studies and comment on environmental documents (23 U.S.C. § 139(a)(1)).

Question 25: In the case of a project for which the State DOT will receive and transfer Federal funds, provided by FHWA, FRA, FTA, or a combination, to a local governmental agency, which agencies are required to be a lead agency?

Answer: A state or local government entity that is a direct recipient of FHWA, FRA, FTA funds, or a combination of funds, for the project is required to be a joint lead agency with FHWA, FRA, or FTA. (see 23 U.S.C. § 139(c)(3) and 23 CFR 771.109(c)(2)). In the example presented in this question, the State DOT is a direct recipient of FHWA, FRA, or FTA funds, and therefore is required to be a joint lead agency, but the local government agency is not a direct recipient and is not required to be a joint lead agency. However, local governmental entities that are sub-recipients of FHWA, FRA, FTA funds, or a combination, may be invited to be joint lead agencies, at the discretion of the Federal and non-Federal

[18] For projects following the Sec. 139 environmental review process, the roles and responsibilities for lead agencies described in 23 U.S.C. § 139(c)(6) supplement the requirements in 42 U.S.C. § 4336a(a).

[19] The term "project sponsor" means the agency or other entity, including any private or public-private entity, that seeks approval of the Secretary for a project. 23 U.S.C. § 139(a)(10).

lead agencies. A local governmental agency sub-recipient that will be designing and constructing the project will normally be asked to serve as a joint lead agency with the FHWA and the State DOT.

When the State DOT and a sub-recipient are both serving with FHWA, FRA, or FTA as joint lead agencies, the lead agencies must jointly decide which of them has responsibility for hiring needed contractors and managing the day-to-day conduct of the environmental review in accordance with 23 U.S.C. § 139(c). Any of the lead agencies may assume this responsibility with the concurrence of the other lead agencies. This allocation of responsibilities would take into account the capabilities and resources available to each of the lead agencies. When a sub-recipient agency serving as a joint lead agency assumes responsibility for day-to-day management of the Sec. 139 environmental review process, the role of the direct recipient (e.g., State DOT), is to provide active oversight and supervision of the sub-recipient agency's work. The direct recipient remains legally responsible for ensuring compliance with the applicable requirements. Accordingly, the Agencies expect the direct recipient to participate fully and carryout the responsibilities of the lead agencies.

Question 26: How does the Federal lead agency requirement apply to the FHWA Federal Lands Transportation Program and the Federal Lands Access Program?

Answer: FHWA must be the Federal lead agency or a joint lead agency for Federal Lands Transportation Program and Federal Lands Access Program projects (23 U.S.C. § 139(c)(1)(A) and 49 CFR 1.81(a)(5)). Federal land management agencies are also entitled to be joint lead agencies. Federal Lands Highway has nationwide agreements with some Federal land management agencies that guide implementation of projects on their lands, including environmental responsibilities. When these agreements are not already in place, or additional responsibilities warrant documentation, the Federal Lands Division Office establishes a project agreement to outline roles and responsibilities of the Federal land management agencies. For Federal Lands Highway projects carried out under 23 U.S.C. § 308 that do not propose the use of FHWA, FRA, or FTA funding, see Question 11.

Section 203(e) Efficient Implementation of NEPA applies to Federal Lands Transportation Program and Federal Lands Access Program projects for environmental documents classified as an EIS, EA, or categorical exclusion (CE). The Federal Lands Division Office may serve as the Federal lead agency and prepare the project's environmental document as long as it addresses all areas of analysis required by the Federal land management agencies. The Federal land management agencies may adopt or use the Federal Lands Highway prepared environmental document for compliance purposes.

Question 27: What are the roles of lead agencies under the Sec. 139 environmental review process?

Answer: The roles and responsibilities of lead agencies are described in 23 U.S.C. § 139(c)(6), 42 U.S.C. § 4336a(a)(2), 23 CFR 771.109, and 40 CFR 1501.7. The Agencies

have read those authorities together to provide the following guidance. The lead agencies for projects following the Sec. 139 environmental review process are responsible for:

- Taking such actions as necessary and proper, within the authority of the lead agency to facilitate expeditious resolution of the environmental review process for the project (23 U.S.C. § 139(c)(6)(A); see 23 CFR 771.109(c)(1));
- Establishing a schedule for completion of any environmental review, permit or authorization required for the project. When establishing the schedule, the lead agencies must consult with and obtain concurrence from each participating agency and the project sponsor, and consult with the applicant.[20] (42 U.S.C. § 4336a(a)(2)(C); 23 U.S.C. § 139(g)(1)(B); 40 CFR 1501.10(c));
- Preparing or ensuring that any required EIS or other document required under NEPA is completed in accordance with Section 139 and applicable Federal law (23 U.S.C. § 139(c)(6)(B));
- Supervising the preparation of an environmental document if, with respect to the project, there is more than one participating Federal agency (42 U.S.C. § 4336a(a)(2)(A); 40 CFR 1506.5(a));
- Requesting the participation of each participating/cooperating agency at the earliest practicable time (42 U.S.C. § 4336a(a)(2)(B); 23 U.S.C. § 139(d); 40 CFR 1501.7(h)(1));
- Considering and responding 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));
- Determining whether a review, permit, or authorization will not be completed in accordance with the schedule. If that is the case, the lead agency is responsible for notifying the agency responsible for issuing such review, permit, or authorization of the discrepancy and requesting that the agency take measures as the agency determines appropriate to comply with the schedule (42 U.S.C. § 4336a(a)(2)(E); 40 CFR 1501.10(c));
- Meeting with a cooperating agency that requests a meeting (42 U.S.C. § 4336a(a)(2)(F); 40 CFR 1501.7(h)(3)); and
- Calculating annually the average time taken by the lead agency to complete all environmental documents for each project during the previous fiscal year (23 U.S.C. § 139(c)(6)(D)).

Question 28: Who is the Federal lead agency for a multimodal project that requires approval from a U.S. DOT Operating Administration other than FHWA, FRA, or FTA in addition to the FHWA, FRA, or FTA approval?

Answer: When a project requires approvals, including funding approval, from FHWA, FRA, or FTA and another U.S. DOT Operating Administration, the Operating

[20] In some instances, the project sponsor may be the State in which the project is located or the applicant. The project sponsor may also be a joint lead agency, in which case the lead agencies should jointly develop the schedule. The lead agencies may also consult with any other entities the lead agency deems appropriate.

Administrations together will reach an agreement on lead, joint lead, and cooperating agency status (see Question 7 and Question 10). Section 139(c)(1)(B) authorizes the Secretary to designate a single Operating Administration to serve as the Federal lead agency. Section 139(e)(4) also establishes a formal "lead agency designation" process (see Question 21).

Participating/Cooperating Agencies

Question 29: What is a cooperating agency and how is it different from a participating agency that is not a cooperating agency?

Answer: "Participating agency" is a broad term that encompasses all the agencies that are involved in the Sec. 139 environmental review process including, cooperating agencies, participating Federal agencies, and participating agencies. "Participating agency" refers to an agency, department, or other unit of Federal, State, local, or Tribal government that may have an interest in the project and has accepted invitation to be a participating agency, or in the case of a Federal agency, has not declined the invitation in accordance with 23 U.S.C. § 139(d)(3). 23 CFR 771.107. NEPA defines "participating Federal agency" as a Federal agency involved in an environmental review or authorization of an action (42 U.S.C. § 4336e(8)). NEPA defines a "cooperating agency" as any Federal, State, Tribal, or local agency that has been designated as such consistent with 42 U.S.C. § 4336a(a)(3) (42 U.S.C. § 4336e(2)) (see Question 30). By definition, any potential cooperating agency has an interest in the proposed project and thus is also considered a participating agency, although not all participating agencies are cooperating agencies (see Question 31).

Question 30: Which agencies must be invited to be cooperating agencies, and how is this decided?

Answer: If the agency has jurisdiction by law, then it must be a cooperating agency, and may accept such designation if it has special expertise, consistent with 40 CFR 1501.8(a).[21] An agency or Tribe may request that the lead agency designate it a cooperating agency, and a Federal agency may appeal a denial of its request to CEQ, in accordance with 40 CFR 1501.8(a). To establish cooperating agency status, the lead agencies must request the participation of the other agency, and the other agency must accept or decline such designation.

[21] Inviting Tribes or agencies to become a cooperating agency should not be confused with meeting the Federal agency's responsibilities for government-to-government consultation. The Federal government's unique relationship with Tribes is derived from the U.S. Constitution, treaties, Supreme Court decisions, Federal statutes, and Executive Orders. U.S. DOT policy, including DOT Order 5301.1A, requires government-to-government consultation if requested by the Tribes regardless of a tribal government agency's status as a cooperating agency or participating agency.

Question 31: What is a participating agency, which agencies must be invited to be participating agencies, and how is this decided?

Answer: The lead agencies must invite any Federal, State, Tribal, regional, and local government agencies that may have an interest in the project to serve as participating agencies (see 23 U.S.C. § 139(d)(2)). Nongovernmental organizations and private entities, including those acting as project sponsors, cannot serve as participating agencies. The lead agencies should identify participating agencies as early as possible during the environmental review process and should send out invitations at that time (or notification pursuant to a programmatic agreement).

The participating agency's role is to enhance interagency coordination, ensure that issues of concern are identified early, and to be active participants in the NEPA process. Designation as a participating agency does not indicate project support but does give invited agencies specific opportunities to provide input at key decision points in the NEPA process. By definition, any potential cooperating agency has an interest in the proposed project and thus is also considered a participating agency, although not all participating agencies are cooperating agencies.

Appropriate practices for inviting participating agencies may vary from project to project. For example, if a project could impact land under the jurisdiction of the National Park Service (NPS), the lead agencies must invite NPS to be a participating agency because the NPS will always have an interest in a project that may impact Federal lands under their jurisdiction. However, if the project is not anticipated to impact land under the Bureau of Land Management's (BLM) jurisdiction, the lead agencies are not required to invite BLM to be a participating agency. To help identify potential participating agencies, FHWA recommends that each State develop a comprehensive and inclusive list of Federal, State, tribal, regional, and local agencies that have interest in projects and potentially could have permitting authority, special expertise, or both. Ultimately, the agencies identified as participating agencies from this list will vary depending on the location of proposed projects and anticipated impacts based on preliminary scoping results.

For FTA projects, public transportation agencies other than State DOTs should seek access to the list of agencies developed by the applicable State DOT for the project area. The public transportation agencies should consider the applicability and potential interest of those agencies relative to the proposed action and the project area to revise that list as appropriate. FTA will work with the project sponsor to develop a list of potential participating agencies on a case-by-case basis.

For FRA projects, where the project sponsor is not a State DOT, FRA recommends that the project sponsor seek access to the list of agencies developed by the State DOT for the project area. FRA will work with the project sponsor to develop a list of potential participating agencies on a case-by-case basis.

Participating agency status may be established on either a programmatic or project-by-project basis.

Question 32: What are the roles and responsibilities of participating and cooperating agencies?

Answer: The roles and responsibilities of participating and cooperating agencies are similar, but cooperating agencies have a higher degree of responsibility and involvement in the environmental review process. A distinguishing feature of a cooperating agency is that the CEQ regulations permit a cooperating agency to assume, on request of the lead agency, "responsibility for developing information and preparing environmental analyses, including portions of the EIS or EA concerning which the cooperating agency has special expertise." (40 CFR 1501.8(b)(3)).

The roles and responsibilities of participating and cooperating agencies include, but are not limited to:

- Participating in the NEPA process at the start of the NEPA scoping process when participating/cooperating agency identification occurs, and invitations are sent. Agencies should provide input regarding the development of the purpose and need statement, range of alternatives, methodologies, and the level of detail for the analysis of alternatives (23 U.S.C. § 139(f)).
- Carrying out the agencies' obligations under other applicable laws concurrently with the review required under NEPA, unless doing so would impair the ability of the agency to carry out those obligations (23 U.S.C. § 139(d)(7)(A)).
- Identifying, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts (23 U.S.C. § 139(h)(3)). Participating and cooperating agencies also may participate in the issue resolution process described later in this guidance, as appropriate.
- Providing comments, responses, studies, or methodologies on those areas within the area of special expertise or jurisdiction of the agency not later than a date specified in the schedule established by the lead agency to help the lead agency develop a single environmental document (23 U.S.C. § 139(d)(8)) (see Question 65).
- Providing meaningful and timely input on unresolved issues and using the Sec. 139 environmental review process to address any environmental issues of concern to the agency.
- Concurring with the proposed project schedule, provided by the lead agencies, developed as part of the project's coordination plan or as part of enhanced technical assistance (see Questions 54-56; 63).
- Reviewing draft environmental documentation as established in the project coordination plan (see Questions 48-51).

Consistent with 23 U.S.C. § 139(d)(8) the lead, cooperating, and participating agencies must evaluate the project in a single environmental document to the extent practicable.[22] For projects that follow the Sec. 139 environmental review process, the Agencies will determine practicability and may grant an exception if requested by the project sponsor, the obligations of a cooperating or participating agency under NEPA have already been satisfied with respect to the project, or the lead agency determines reliance on a single environmental document would not facilitate timely completion of the environmental review process.[23] If the Agencies grant an exception to the single environmental document requirement, the cooperating and participating agencies may still adopt other environmental documents prepared by the Agencies. For example, in certain circumstances a Federal agency may be able to rely on a single EIS, but is required to issue its own ROD. In this situation, the Federal lead agency may grant an exception to the requirement that agencies develop a single ROD for the project. However, the other Federal agency may still rely on the Agencies' EIS, even if it issues its own ROD.

Under 23 U.S.C. § 139(d)(8)(C), a Federal agency required to make an approval or take an action for a project relying on a single environmental 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.

Participating and cooperating agencies must develop and implement administrative policy and procedural mechanisms to enable the agency to ensure completion of the Sec. 139 environmental review process in a timely, coordinated, and environmentally responsible manner (23 U.S.C. § 139(d)(7)(B)).

By accepting the designation as a participating or cooperating agency, the agency does not indicate project support and does not assume increased oversight or approval authority beyond any applicable statutory authority (23 U.S.C. § 139(d)(4)(B)). Resource constraints may make the agency's full participation difficult at times. The agency should communicate such constraints with the lead agency, and to the extent feasible, the lead agency should address constraints with the timing and location of meetings, use of conference calls, and other coordination methods.

It is incumbent upon the participating and cooperating agencies to provide meaningful input at appropriate opportunities during the Sec. 139 environmental review process. Participating or cooperating agencies may identify new issues after the completion of technical studies or draft environmental documents (see Question 36). Lead agencies should consider comments on previously considered issues only if those comments derive from new information. Participating/cooperating agencies should understand that revisiting issues that lead agencies had previously considered resolved will occur only if significant new information or

[22] Similarly, NEPA requires the lead and cooperating agencies to evaluate a proposal in a single environmental document. 42 U.S.C § 4336a(b). Section 139 supplements this requirement by further requiring the agencies to rely on a single NOI and ROD to the maximum extent practicable. 23 U.S.C. § 139(d)(8)(A). In addition, Section 139 provides specific criteria for the lead agency to waive this requirement. 23 U.S.C. § 139(d)(8)(D).

[23] 23 U.S.C. § 139(d)(8)(D).

circumstances arise (i.e., the new information is at substantial variance with what was presented previously and pertains to an issue of sufficient magnitude and severity to warrant reconsideration) (23 U.S.C. § 139(h)(4)).

Question 33: Who sends out the invitations to serve as participating and cooperating agencies and when should the invitations be sent?

Answer: The Federal lead agency should invite potential participating and cooperating agencies (23 U.S.C. § 139(d)(1)-(2)). Project sponsors, with the approval of the Federal lead agency, may send the invitations to the participating and cooperating agencies. For FTA, project sponsors should consult with the FTA Regional Office as to the process that will be used. Unless there is an agreement between the non-Federal lead agencies and a particular Tribe or Tribal entity regarding direct coordination, the Federal lead agency is responsible for inviting Tribes and Tribal entities that may have an interest in the project.

The participating and cooperating agency invitations should be sent prior to publication of the NOI to prepare an EIS in the *Federal Register* or the initiation of an EA and prior to the initial interagency scoping meeting.[24] Although most participating and cooperating agencies should be known and identified prior to the publication of the NOI, the lead agencies may identify additional participating/cooperating agencies later in the scoping process. As soon as an agency's interest is identified, the lead agencies should invite the agency to be a participating/cooperating agency. Appendix H includes a graphical representation of the recommended best practice timelines.

Question 34: What needs to be included in the invitation sent to potential participating and cooperating agencies?

Answer: The invitation should be in the form of an email or letter and should include a basic project description and map of the project location. The invitation should be tracked to ensure delivery. As with all correspondence, a copy should be placed in the project file. The invitation should include a project description, clearly request the involvement of the agency as a participating/cooperating agency and state the reasons why the project may be of interest to the invited agency. The project description may be included in scoping materials enclosed with the letter, or a more detailed project description and scoping materials may be provided on the project website with a web address provided in the letter. The invitation should identify the lead agencies and describe the roles and responsibilities of participating and cooperating agencies. Lead agencies should bear in mind that invited agencies may have obligations under several authorities and the invitation should reflect all areas of jurisdiction of the invited agency.

[24] Although the statute requires the participating agency invitations must be sent not later than 45 days *after* the publication of the NOI or initiation of the EA (23 U.S.C. § 139(d)(2)), to meet the requirements of 139(g)(1)(B)(iii), the invitations should be sent and consultations with the participating agencies should begin prior to the publication of the NOI or initiation of the EA (see Question 31, and Appendix H).

The invitation must specify a deadline for responding to the invitation (23 U.S.C. § 139(d)(2)). Consistent with 23 U.S.C. § 139, the deadline for responses is normally no more than 30 days. This deadline, or any other related to the environmental review process, may be extended by the lead agency for good cause or shortened with the agreement of the lead agency, the project sponsor, and all participating and cooperating agencies (23 U.S.C. § 139(g)(2)(B)). If needed, the issue resolution process (23 U.S.C. § 139(h)) is available to address issues related to deadlines. See Appendix B for the Agencies' examples of invitation letters.

Question 35: What is involved in accepting or declining an invitation to be a participating or a cooperating agency?

Answer: The lead agencies will designate any Federal agency invited to participate in the NEPA process as a participating agency unless the invited agency declines the invitation by the specified deadline (23 U.S.C. § 139(d)(3)). If a Federal agency chooses to decline, the agency must do so in writing (electronic or hardcopy), indicating that the agency (1) has no jurisdiction or authority with respect to the project, (2) has no expertise or information relevant to the project, and (3) does not intend to submit comments on the project (23 U.S.C. § 139(d)(3)). If the Federal agency's response does not state the agency's position in these terms, then the invited agency will be treated as a participating agency. If a potential cooperating Federal agency declines being a participating agency and indicates items (1) and (2) above in declining the participating agency invitation, that Federal agency does not meet the criteria to be a cooperating agency.

A State, Tribal, or local agency is expected to respond to an invitation to be designated as a participating agency. If the State, Tribal, or local agency fails to respond by the stated deadline or declines the invitation, regardless of the reasons for declining, the agency will not be considered a participating agency.

Additionally, the Agencies must publish the names of any participating agencies not participating in the development of the project purpose and need and range of alternatives. (23 U.S.C. § 139(o)(1)(A)(ii)). The Agencies will not list a participating agency unless its response to the Federal lead agency's invitation states that the agency will not participate in the development of those two milestones. If a participating agency declines to participate in the development of the purpose and need and range of alternatives, the agency must still comply with the schedule developed in the coordination plan (23 U.S.C. § 139(f)(4)(A)(iii)).

Question 36: What happens if an agency declines to be a participating/cooperating agency, but new information becomes available later in the process that indicates that the agency should become a participating agency?

Answer: If an agency declines an invitation to be a participating/cooperating agency, such as in accordance with 23 U.S.C. § 139(d)(3), but new information indicates that the agency does indeed have authority, jurisdiction, acknowledged special expertise, or information relevant to the project, then the lead agencies should immediately extend a new invitation in

writing to the agency to become a participating agency or cooperating agency, as appropriate. If the agency agrees to be a participating/cooperating agency, then the lead agencies should consult with that new participating/cooperating agency in determining whether the new information substantially affects previous decisions. After giving due consideration to the new information, the lead agency may determine that it would not have substantially affected previous decisions. However, it may be necessary to reconsider previous decisions if it is probable that the input of the new participating/cooperating agency would substantially change the decision.

An agency that declines an invitation to be a participating/cooperating agency might forego the opportunity to provide input on several project issues such as the development of purpose and need, the range of alternatives, and methodologies. The declining agency also might forgo the opportunity to consult and concur on the schedule, if included in the coordination plan, for completing the environmental review process for the project, depending on the timing of these actions.

If an invited agency declines to be a participating agency, but the lead agencies think the invited agency meets the criteria of a cooperating agency (that is, having jurisdiction or authority over the project and will be required to make a decision about the project or has acknowledged special expertise or information relevant to the project), then the lead agencies should work immediately to resolve the disagreement about participation (see Questions 29-31). If informal procedures prove inadequate to reach a mutually satisfactory agreement on participation, then the lead agencies should elevate the issue within the agencies or pursue the statutory issue resolution process (23 U.S.C. § 139(h)).

If an agency declines an earlier invitation to become a participating/cooperating agency and later wants to participate for reasons other than newly available information, then the agency should notify the lead agencies and request to be invited to become a participating/cooperating agency, as appropriate, recognizing that previous decisions are unlikely to be revisited for reasons other than substantial new information.

Purpose and Need

Question 37: Who is responsible for defining the project's purpose and need?

Answer: The lead agencies are responsible for defining the project's purpose and need statement,[25] following an opportunity for involvement by interested participating/cooperating agencies and the public (23 U.S.C. § 139(f)(1)-(2)). If a cooperating or participating agency has an authorization, permit or other approval authority over the project, the lead agencies and that agency should attempt to jointly develop a

[25] For projects following the Section 139 environmental review process, the requirements of 23 U.S.C. § 139(f) supplement 42 U.S.C. § 4336a(d).

purpose and need statement that can be utilized for all applicable environmental reviews and other requirements.

The purpose and need statement shall include a clear statement of the objectives that the proposed action is intended to achieve, which may include a description of how the project: achieves a transportation objective identified in an applicable statewide or metropolitan transportation plan; supports land use, economic development, or growth objectives established in applicable Federal, State, local, or Tribal plans; and serves national defense, national security, or other national objectives, as established in Federal laws, plans, or policies (23 U.S.C. § 139(f)(3)).

In addition, FHWA/FTA Joint Guidance issued on "Purpose and Need" July 23, 2003, and the report, "*Improving the Quality of Environmental Documents*" (2006), developed through a cooperative initiative between FHWA, American Association of State Highway Transportation Officials, and the American Council of Engineering Companies is available to assist in developing concise and understandable purpose and need statements. FRA project sponsors may also refer to this guidance, as applicable.

Question 38: How does the lead agency provide an "opportunity for involvement" by participating/cooperating agencies and the public in defining the project purpose and need?

Answer: The lead agencies should determine on a case-by-case basis the appropriate way to provide a meaningful opportunity for involvement by participating/cooperating agencies and the public, considering factors such as the overall size and complexity of the project.[26] The form and timing of that involvement is flexible, and the lead agencies should coordinate beforehand and agree on when and in what form the participating/cooperating agency and public involvement will occur. The opportunity for involvement must be publicized (23 U.S.C. § 139(f)(1)) and may occur in the form of in person workshops or meetings, virtual public workshops or meetings, solicitations of verbal or written input, conference calls, postings on web sites, distribution of printed materials, or any other involvement technique or medium with agreement of the lead agencies.

The lead agencies must provide an opportunity for involvement prior to defining the purpose and need for the environmental document (23 U.S.C. § 139(f)(2)). In the project's coordination plan, the lead agencies should establish when opportunities for involvement will occur, the form they will take, and when a decision on purpose and need will be made. The level of agency involvement on projects may also be specified through interagency agreements. The lead agencies should document their consideration in defining the purpose and need, including consideration of agency and public input, and should provide documentation to participating/cooperating agencies to ensure that any issues of concern are identified as early as possible. It is a best practice to: (1) draft the project purpose and need,

[26] The U.S. DOT has guidelines for engaging communities in meaningful public involvement in the document, *Promising Practices for Meaningful Public Involvement in Transportation Decision-making*.

(2) provide public notice and opportunity for comments, and (3) obtain written concurrence from cooperating agencies as part of the preparation of the NOI, or earlier. Appendix H includes a graphical representation of the recommended best practice timelines (see Questions 9 & 14-16).

Alternatives Analysis

Question 39: Who is responsible for developing the range of alternatives?

Answer: The lead agencies are responsible for developing the reasonable range of alternatives that are technically and economically feasible and meet the purpose and need for the project (23 U.S.C. § 139(f)(4)(B)(i); 42 U.S.C. § 4332(C)(iii)). In developing the alternatives, the lead agencies must involve participating/cooperating agencies and the public and must consider the input provided by these groups (23 U.S.C. § 139(f)(4)(A)). If a participating/cooperating agency has permit or other approval authority over the project, that agency should provide input on the range of alternatives that can be utilized for all applicable environmental reviews and other requirements. This coordination is especially important for various permits, such as Clean Water Act Section 404 permits, Coast Guard bridge permits, other individual permit applications, and ESA Section 7 consultations.

General direction on developing a concise and understandable range of alternatives is found in the FHWA-supported report, "*Improving the Quality of Environmental Documents*" (2006).

Question 40: How is the project's range of alternatives used by other agencies?

Answer: In accordance with Section 139(f)(4)(B), Federal agencies must use the project's range of alternatives as determined by the lead agency (see Question 39) for all Federal environmental reviews and permit processes required for the project, to the maximum extent practicable, and consistent with Federal law, unless the range of alternatives must be modified for either of the following reasons:

- To address significant new information or circumstances, if 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/cooperating agency to fulfill the responsibilities of the agency under NEPA in a timely manner.

To ensure the project's range of alternatives satisfy multiple Federal environmental reviews and permitting processes, the lead agencies should engage in early and continuous discussions with the affected Federal participating/cooperating agencies. Generally, there should be consistency between the range of alternatives considered during development of the coordination plan as well as through permitting.

Question 41: How do the lead agencies provide an "opportunity for involvement" by participating/cooperating agencies and the public in defining the project's range of alternatives?

Answer: Consistent with Section 139(f)(4)(A), the lead agencies must, as early as practicable, give participating/cooperating agencies and the public a meaningful opportunity for involvement when defining the project's range of alternatives (23 CFR 771.111). The lead agencies will determine the level of involvement on a case-by-case basis, taking into account factors such as the overall size and complexity of the project. The lead agencies must publicize any opportunity for involvement (23 U.S.C. § 139(f)(4)). The form and timing of that involvement is flexible, and the lead agencies should coordinate beforehand and agree on when and in what form the participating/cooperating agency and public involvement will occur. Involvement may occur in the form of in-person workshops or meetings, virtual public workshops or meetings, solicitations of verbal or written input, conference calls, postings on web sites, distribution of printed materials, or any other involvement technique or medium with agreement of the Federal lead agency.

In the project's coordination plan, the lead agencies should establish when and how the involvement opportunities will occur and the timing of the lead agencies' decision on the range of alternatives to be evaluated in the environmental document. The lead agencies may schedule the required opportunities for involvement for the development of purpose and need (see Question 38) and range of alternatives concurrently or sequentially. If the opportunities for involvement are concurrent, and if the purpose and need statement is substantially altered as a result of the public and participating/cooperating agency involvement, then the lead agencies should consider whether an additional opportunity for involvement in the development of the project's range of alternatives that derive from the new purpose and need is warranted.

The lead agencies must provide an opportunity for involvement prior to defining the project's range of alternatives to be evaluated in the environmental document (23 U.S.C. § 139(f)(4)(B)). The lead agencies' decision on the range of alternatives and their consideration of agency and public input in defining the project's range of alternatives should be documented and shared with the participating/cooperating agencies to ensure that any issues of concern are identified as early as possible. It is a best practice to define the preliminary range of alternatives, provide public notice and opportunity for comments, and obtain written concurrence from cooperating agencies as part of the preparation of the NOI, or earlier. Appendix H includes a graphical representation of the recommended best practice timelines (see also Questions 9 & 14-16).

Question 42: What requirements are included in the Sec. 139 environmental review process for developing the methodologies for the analysis of alternatives?

Answer: The lead agencies must determine, in collaboration with the participating/cooperating agencies (23 U.S.C. § 139(f)(4)(C)), the appropriate methodologies to be used and the level of detail required in the analysis of alternatives.

Accordingly, the lead agencies should work cooperatively and interactively with the relevant participating and cooperating agencies on the methodology and level of detail to be used in a particular analysis. Consensus is not required, but the lead agencies must consider the views of the participating/cooperating agencies with relevant interests before deciding on a particular methodology. Well-documented, widely accepted methodologies that are routine and well established, such as those for noise impact assessment and Section 106 (historic preservation) review, should require minimal collaboration. The project's coordination plan will establish the timing and form of the required collaboration with participating/cooperating agencies in developing the methodologies (see Questions 48-60).

The lead agencies should communicate decisions on methodology to the participating/cooperating agencies with relevant interests or expertise. The lead agencies may define a comment period based on the methodology utilized. At the discretion of the lead agencies, methodologies may be developed incrementally. The initial methodology developed during scoping may be refined after further analysis and collaboration. Unless a participating/cooperating agency objects to the selected, duly communicated methodology, the lead agencies can reasonably assert that comments on methodology received much later in the process (e.g., after issuance of the DEIS) are not timely. Exceptions should be based on significant and relevant new information or circumstances that are materially different from what was foreseeable at the time that the lead agencies made and communicated the decision on methodology.

The collaboration with a participating/cooperating agency on the methodologies and level of detail can be accomplished on a project-by-project, program, or region-wide basis, or for special classes of projects (e.g., all projects affecting a particular watershed), as deemed appropriate by the lead agencies. If an approach other than project-by-project collaboration is used, however, the participating/cooperating agencies with an interest in that methodology may be made aware at the outset of the collaboration that the lead agencies intend to develop a comprehensive methodology to be applied to a program or class of projects or to a region. Once a methodology has been determined for a region, program, or class of project, the lead agencies can apply the methodology to qualifying projects without project-specific collaboration if the relevant participating/cooperating agencies and lead agencies have entered into a programmatic agreement to that effect. If no such agreement is in place, the lead agencies still may apply that methodology to a qualifying project, but project-specific collaboration is necessary. The methodology used by lead agencies should be consistent with any methodology established by statute or regulation under the authority of another Federal agency.

The lead agencies may revise a methodology at any time, but collaboration with the participating/cooperating agencies with an interest in that methodology is needed if the revision substantively affects the outcome of the analysis. When there is a written programmatic agreement on a methodology that applies to the project, such agreement is binding only on the parties to the agreement. Participating/cooperating agencies not party to that agreement with an interest in the methodology in question retain the right to collaborate on that methodology for the particular project. The results of the collaboration on

methodologies and level of detail should be communicated to participating/cooperating agencies in written form so that any objections can be raised as early as possible.

After the lead agencies have collaborated with the participating/cooperating agencies on the methodologies and level of detail, the lead agencies will make the decision on the methodology and level of detail to be used while considering the requirements of other environmental laws. The lead agencies' decisions on methodologies and their considerations in making those decisions should be documented and shared with participating/cooperating agencies to ensure that any issues of concern are raised as early as possible.

Question 43: How can a lead agency eliminate alternatives through the alternative analysis (reduction of duplication)?

Answer: Section 139(f)(4)(E) requires the lead agency to reduce duplication between the evaluation of alternatives under NEPA and the evaluation of alternatives under the metropolitan transportation planning process or a State environmental review process, to the maximum extent practicable. The provision allows lead agencies to eliminate a proposed alternative from detailed consideration 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 conducted by a metropolitan planning organization (MPO), or a State or local transportation agency;
- 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.

This process does not eliminate the applicability of 23 U.S.C. § 168(c)(1)(D), 23 CFR 450.212 and 450.318 to support the elimination of alternatives for FHWA and FTA. FHWA

encourages the use of PEL under the provisions of both 23 U.S.C. §§ 139(f)(4)(E) and 168 to the extent practicable, to preserve the option to use the planning products and decisions (e.g., purpose and need, and elimination of unreasonable alternatives) in the environmental review process. However, flexibilities in PEL also allow the use of either approach alone. FTA encourages the use of the regulatory approach under 23 CFR part 450 instead of the Sec. 139 environmental review process statutory provision given the flexibility of the regulatory approach. While FRA is not subject to the same planning requirements as FHWA and FTA, it may rely on Section 139(f)(4)(E) and encourages project sponsors to contact FRA Headquarters with any questions about its applicability to the alternative analysis process.

Preferred Alternative

Question 44: When should the preferred alternative be identified?

Answer: The preferred alternative should be identified in the DEIS (or EA) to the extent practicable (23 CFR 771.123(e)). The lead agencies should identify the preferred alternative after completion of scoping and sufficient analysis of the project's range of alternatives. The scoping process is complete when the lead agencies have provided the public and participating/cooperating agencies with the opportunity for involvement in the development of purpose and need and the project's range of alternatives, and considered any input or comments received. After completion of scoping and a preliminary analysis of alternatives, the Federal lead agency will decide whether identification of a preferred alternative in the DEIS (or EA) is appropriate.

The Agencies recommend identifying the preferred alternative in the DEIS to facilitate issuing a combined FEIS/ROD document "to the maximum extent practicable" (see Questions 77-85 for combined FEIS/ROD guidance). When the preferred alternative is not identified in the DEIS or through a separate notice, the preferred alternative must be identified in the FEIS in accordance with CEQ's regulations (40 CFR 1502.14(d)).

Question 45: Under what circumstances can a preferred alternative be developed to a higher level of detail than other alternatives being considered?

Answer: Consistent with CEQ's regulations, Federal agencies must discuss each alternative retained for detailed study so that reviewers may evaluate their comparable merits (40 CFR 1502.14(b)). However, Section 139(f)(4)(D) permits the development of the preferred alternative to a higher level of detail.[27] The Federal lead agency decides whether the

[27] The allowance in 23 U.S.C. § 139(f)(4)(D) should not be confused with FHWA's policy on permissible activities during the NEPA process, FHWA Order 6640.1A, *FHWA Policy on Permissible Project Related Activities During the NEPA Process*. Under FHWA statutes and regulations, project sponsors cannot initiate final design prior to the conclusion of the NEPA process (23 U.S.C. § 112 and 23 CFR 630.109). FHWA Order 6640.1A discusses the permissible project-related activities that may be advanced prior to the conclusion of the NEPA process. These

preferred alternative can be developed to a higher level of detail. That decision must ensure that: (1) it will not prevent the lead agencies from making an impartial decision on the appropriate course of action, and (2) it is necessary to facilitate the development of mitigation measures or concurrent compliance with other Federal environmental laws. The lead agencies must agree that a particular alternative is the preferred alternative and that the conditions above are met before developing that alternative in greater detail.

Providing a higher level of detail for a proposal or only one alternative (compared to the other alternatives) could run the risk of biasing the environmental analysis or introducing the perception of bias. The CEQ regulations indicate that Federal agencies must discuss each alternative retained for detailed study so that reviewers may evaluate their comparable merits (40 CFR 1502.14(b)). However, 23 U.S.C. § 139(f)(4)(D) permits the development of a higher level of detail for the preferred alternative.

The Federal lead agency should identify and consider all factors relevant to the project that could prevent them from making impartial decisions about alternatives in the future. The factors will vary from project to project. Considerations that may be relevant to impartiality include the following:

- Whether the information on all alternatives is sufficiently developed to identify important resources and associated potential impacts to enable a reasonably informed choice;
- Whether the early coordination with the public and participating/cooperating agencies and the collaboration with participating/cooperating agencies on impact methodologies resulted in general agreement about the level of detail for alternatives to guide continued analysis of the alternatives;
- What the potential impact of the additional financial and time commitments on one alternative is to the overall project costs and schedule if another alternative ultimately is selected;
- What the likelihood is that fair comparisons among alternatives will result despite the development of a preferred alternative to a higher level of detail;
- Whether the development of a preferred alternative might have an unacceptably adverse effect on public confidence in the environmental review process for the project;
- Whether that adverse effect on public confidence could be avoided by delaying the differential development of alternatives until a later point in the environmental review process;
- How the difference in level of detail among the alternatives might affect the presentation of the alternatives in the environmental documents; and
- What is the extent to which the results of public and participating/cooperating agency involvement support the proposed preferred alternative.

preliminary design actions are allowed because they do not materially affect the objective consideration of alternatives or have adverse environmental impacts. The policy is intended to be read consistent with 23 U.S.C. § 139(f)(4)(D).

The key question is whether developing the preferred alternative more fully would cause an imbalanced NEPA comparison among alternatives because of time, money, or energy expended. The Federal lead agency must ensure the environmental review process is not prejudiced by additional design work on the preferred alternative. Providing a higher level of detail for a proposal or only one alternative (compared to the other alternatives) could run the risk of biasing the environmental analysis or introducing the perception of bias, and would be undertaken at the applicant's risk.

Section 139 does not change the standard practices relating to the evaluation and presentation of alternatives. This includes disclosing the rationale for the identification of a preferred alternative. When the preferred alternative is developed at a higher level of detail, the lead agencies should take particular care to ensure that the evaluation of alternatives reflects the required rigorous and objective analysis (40 CFR 1502.14(a)). Each reasonable alternative must be explored at a sufficient level of detail to support a reasoned choice. As always, the comparison of alternatives must be done in a fair and balanced manner. If there are substantial differences in the levels of information available for the alternatives, it may be necessary to apply assumptions about impacts or mitigation to make the comparisons fair. The basis for the decision to develop the preferred alternative to a higher level of detail may be documented in the project file.

Question 46: Who can initiate a request for development of a preferred alternative to a higher level of detail than other alternatives under evaluation, and how is that done?

Answer: The non-Federal lead agency or the project sponsor can initiate a request to develop the preferred alternative to a higher level of detail. The request should be made by letter (electronic or hard copy) from the official authorized by the requesting agency to sign the EIS or that official's authorized delegate, or the project sponsor, to the FHWA Division Office, FRA Headquarters, or FTA Regional Office, and to the appropriate offices of the other lead agencies, if any. The request may be included in a letter requesting the Federal lead agency identify the preferred alternative, if appropriate. The letter should request the concurrence of the other lead agencies in developing the preferred alternative to a higher level of detail. The request should provide the following information:

- Reasons why the agency (or project sponsor) wants to develop the preferred alternative to a higher level of detail before completion of the NEPA review, including how compliance with specific Federal laws, development of impact and resource analyses, and mitigation measures, as appropriate, would be facilitated by the proposed differential treatment of the alternatives;
- General nature and extent of the work the agency (or project sponsor) would perform on the preferred alternative if the request were approved; and
- Reasons why greater design detail will not prejudice the lead agencies' consideration of other alternatives.

In determining whether to grant or deny a request to develop the preferred alternative to a higher level of detail, FHWA, FRA, or FTA should also consider any other factors that could negatively affect the environmental review process (see Question 45).

Question 47: To what level of detail can the preferred alternative be developed before the NEPA determination?

Answer: Under the Sec.139 environmental review process, the development of the preferred alternative to a higher level of detail than other NEPA alternatives may not proceed beyond that level necessary to develop mitigation or to comply with other applicable environmental laws. The degree of additional development needed and allowable will depend on the specific nature of the impact being mitigated or resource being protected, or the level of information required to concurrently comply with other applicable laws (23 U.S.C. § 139(f)(4)(D)). For Federal-aid highway projects, FHWA Order 6640.1A, *FHWA Policy on Permissible Project Related Activities During the NEPA Process*, clarifies the preliminary design actions that are allowed when they do not materially affect the objective consideration of alternatives or have adverse environmental impacts.

Part 2 Process Management

Part 2 of the guidance focuses on sections of the Sec. 139 environmental review process that address logistics of managing the environmental review process. This part describes developing coordination plans and schedules, requesting additional technical assistance for complex projects, undertaking concurrent reviews, identifying and resolving issues of concern, ensuring compliance with mitigation commitments, page limits adopting and using environmental documents, providing or receiving funding for activities related to the environmental review process, implementing Federal Permitting Dashboard requirements, and using errata sheets and issuing a combined FEIS/ROD, and page limits for environmental documents.

Coordination and Schedule

Question 48: Who is responsible for developing the coordination plan for public and agency participation?

Answer: Section 139(g) requires that the lead agencies establish a plan for coordinating public and agency participation in and comment on the environmental review process. The lead agencies should consult with the participating/cooperating agencies on the coordination plan because key elements of the coordination plan could set expectations that require a commitment of resources by the participating/cooperating agencies.

Question 49: When is the coordination plan developed?

Answer: It is a best practice to draft the coordination plan, including the schedule, with input from participating/cooperating agencies as part of the preparation of the NOI (see Question 15).[28] The lead agencies may revise the coordination plan as needed (e.g., if additional participating/cooperating agencies are identified later or as issues become clear). The lead agencies must make the coordination plan available to the public and participating/cooperating agencies to provide transparency and allow for any issues of concern to be raised as early as possible (23 U.S.C. § 139(g)(1)(A)).

Although a coordination plan must be developed for each project, many elements of a coordination plan may be reused for different projects. In addition, the required elements of the coordination plan (see Question 50) may be addressed programmatically in a separate agreement (e.g., a memorandum of understanding) and referenced in the project's coordination plan for greater efficiency. The lead agencies may develop a project's coordination plan separately from existing programmatic coordination plans, or may incorporate one or more programmatic coordination plans into the project's coordination plan.

Question 50: What should be included in a coordination plan?

Answer: The coordination plan should outline the following: (1) how the lead agencies have divided the responsibilities for compliance with the various aspects of the Sec. 139 environmental review process; and (2) how the lead agencies will provide the opportunities for input from the public and other agencies, in accordance with applicable laws, regulations, and policies (including the use of electronic communications and social media, as appropriate). Consistent with 23 U.S.C. § 139(g)(1)(B), the plan must include a project schedule for completing the Sec. 139 environmental review process and also should identify coordination points, such as:

- Scoping activities;
- Development of purpose and need;
- Identification of the range of alternatives;
- Collaboration on methodologies;
- Completion of the DEIS (or EA);
- Identification of the preferred alternative and the level of design detail;
- Completion of the combined FEIS/ROD (or EA and FONSI) or completion of the FEIS and the ROD as separate coordination points only for those unusual situations where the Federal lead agency does not pursue a combined FEIS/ROD; and

[28] A coordination plan must be developed no later than 90 days after the publication of a NOI to prepare an EIS (23 U.S.C. § 139(g)(1)(A)).

- Completion of applications, permits, licenses, or approvals occurring prior to and after the ROD (or FONSI).

Publishing the coordination plan does not satisfy the lead agencies' obligation to provide an opportunity for public and agency involvement in the development of the project's purpose and need and range of alternatives.

Question 51: Are the lead agencies required to develop a project schedule as part of the coordination plan?

Answer: Yes. The lead agency is required to establish a project schedule as part of the coordination plan in accordance with 23 U.S.C. § 139(g)(1)(B) and 42 U.S.C. § 4336a(2)(D). Project schedules generally aid in expediting the environmental review process, improve project management, and establish expectations for all parties involved.

The lead agency must prepare the project schedule for the EA or EIS in consultation with, and with the concurrence of, each participating/cooperating agency, and with the State or the project sponsor (23 U.S.C. § 139(g)(1)).[29] It is best practice for the lead agencies to develop the project schedule and coordination plan while preparing the NOI or determining the EA class of action (see Question 15 for a discussion of the NOI). The lead agencies must include in the project schedule milestones to complete the environmental review process and any other Federal, State, or local authorization, permit, approval, study, or review required for the project, and must be consistent with the deadlines established in NEPA for EAs and EISs, unless a project is designated as a major project (see Question 52 and the Table of Timing Requirements in Appendix G).[30] The lead agencies must also make the schedule available to the public and participating/cooperating agencies (23 U.S.C. § 139(g)(1)(F)).

Question 52: Do different project schedule requirements apply to major projects?

Answer: Yes. For major projects, the timelines established in Section 139(g)(1)(B)(iii) supplement the more general requirements for certain environmental documents prescribed in 42 U.S.C. § 4336a(g). The schedule for major projects includes both the NEPA process and completion of any authorization necessary for construction. For major projects, the schedule, to the maximum extent practicable and consistent with Federal law, must be consistent with an agency average of not more than 2 years (23 U.S.C. § 139(g)(1)(B)(iii)) (see the Table of Timing Requirements in Appendix G).

[29] If there is an applicant that is not the project sponsor, the lead agency should also consult with the applicant. *See* 42 U.S.C. § 4336a(2)(D).

[30] NEPA provides that the timeframe to complete an EIS is 2 years and an EA is 1 year (42 U.S.C. § 4336a(g)). The timeframe for an EIS or EA begins on the date on which such agency determines that an EIS or EA is required; notifies the applicant that the application to establish a right-of-way for is complete; or issues a NOI to prepare the EIS or EA, whichever is sooner. For major projects, the Agencies note that the more specific timeframes prescribed in Section 139(g)(1)(B)(iii) will apply in lieu of 42 U.S.C. § 4336a(g).

The major project schedule should include all authorization decisions necessary for the completion of the project. For major projects, the authorization decisions must be completed no later than 90 days after the issuance of a ROD or FONSI (23 U.S.C. § 139(d)(10)). 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. For example, it may not be feasible for a project that involves phased construction to meet the prescribed deadlines, and therefore the lead agencies may determine it is necessary to extend the deadline for certain authorization decisions.

For projects that follow the Section 139 environmental review process but are not designated as a major project (see Questions 5 and 18), the Agencies should follow both the deadlines established in 42 U.S.C. § 4336a(g) and Section 139. Generally, this means that for non-major projects that require an EIS, the deadline to complete the EIS is 2 years from the date the NOI is issued. In addition, all other authorization decisions necessary for construction should be made no later than 180 days after the issuance of a ROD or 180 days after the date on which an application for the permit or license was submitted, whichever is later (23 U.S.C. § 139(g)(3)).

For projects requiring an EA that follow the Section 139 environmental review process but are not designated as a major project, the deadline to publish an EA is 1 year from the date the Agencies determine an EA is required or issue an NOI (optional) (42 U.S.C. § 4336a(g)(1)(B)). In addition, all other authorization decisions necessary for construction should be made no later than 180 days after the issuance of a FONSI or 180 days after the date on which an application for the permit or license was submitted, whichever is later. (see 23 U.S.C. § 139(g)(3)).

Question 53: 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).[31] 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. For any given project, the duration could be more or less than 2 years so long as the agency average is not more than 2 years. The permitting timetable should have a project schedule consistent with an agency average of not more than two years, measured from the publication date of the NOI to the issuance of a ROD for an EIS, or from the date the lead agency determines that an EA is required to the issuance of a FONSI (or decision to prepare an EIS) for an EA (see the Table of Timing Requirements in Appendix G).

[31] The deadlines for major projects in 23 U.S.C. § 139(g)(1)(B) apply in lieu of the deadlines in 42 U.S.C. § 4336a(g) (see Question 16).

Question 54: What factors should the lead agency consider when developing the project schedule?

Answer: When developing the project schedule, as part of the coordination plan, the lead agencies should specify all anticipated opportunities for review and comment by the public and participating/cooperating agencies. The lead agencies may determine the level of detail for the project schedule and whether to use specific dates or durations. When developing the project schedule, the lead agencies must consider the following five factors, listed in Section 139(g)(1)(B)(ii):

- Responsibilities of participating [and cooperating] agencies under applicable laws;
- Resources available to the cooperating agencies;
- 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;
- Overall size and complexity of the project; and
- Sensitivity of the natural and historic resources that could be affected by the project.

In addition, the lead agencies may also consider the following factors:

- The ability to have reviews to occur concurrently;
- The extent of prior planning and early scoping work that can be used in the environmental review process;
- Consideration of public controversy;
- The extent to which relevant information about the project or its impacts are already known and need to be refined or updated;
- Development of a combined FEIS/ROD to the maximum extent practicable, including identifying a Preferred Alternative in the DEIS when possible;
- Degree of local support for the project; and
- Timing of the commitment to fund the project through construction.

The lead agencies should ensure the project schedule provides adequate time to complete appropriate impact assessments and engineering studies and gather and consider public and participating/cooperating agency input in the decision-making process.

The Agencies may each develop their own more detailed guidance regarding the level of detail expected in the project schedule.

Question 55: How should the lead agencies establish the project schedule?

Answer: The lead agencies must develop the schedule after consulting with the project sponsor, and all participating/cooperating agencies (23 U.S.C. § 139(g)(1)(B)(i)).[32] The lead agencies must obtain concurrence from the project sponsor (see Question 51) and each participating/cooperating agency. For major projects, the lead agencies must develop a schedule, with concurrence from the project sponsor, that is consistent with an agency average of not more than 2 years.

A best practice for receiving concurrence from the participating/cooperating agencies on the schedule involves the lead agencies providing a draft schedule to participating/cooperating agencies for up to 30 days for review and comment prior to the NOI (23 U.S.C § 139(g)(2)(B)). The lead agencies should modify the schedule, as appropriate, based on agency input and provide a revised project schedule to the participating/cooperating agencies and request concurrence. This request for concurrence could include notice that the lead agencies will interpret a lack of response within the time period specified in the request for concurrence as concurrence with the project schedule. The lead agencies will ensure the participating/cooperating agencies receive the final project schedule. Another approach would be for the lead agencies to call a meeting, in person or through webinars or other technology, to collaborate on developing a project schedule that would then be sent around for a short, set period of time for any participating/cooperating agency to voice an objection.

If the project sponsor is serving as joint lead agency, the Federal lead agency should jointly develop the schedule with the project sponsor before seeking concurrence from participating/cooperating agencies. If the project sponsor is not serving as joint lead agency, the lead agency should seek concurrence on the schedule as it would with a participating/cooperating agency.

If any participating/cooperating agency has concerns about the schedule timeframes, the agency should discuss them with the lead agencies as soon as possible. During the development of the project schedule, the lead agencies will engage all appropriate resource and regulatory agencies (those that have a regulatory decision to be made or have special expertise that is required) in discussions regarding the timeframes needed for their agencies' statutory required reviews and decisions on approvals, permits or licenses. The final schedule should reflect all changes agreed upon by all agencies involved. If there are changes in the project schedule during the environmental review process, the lead agencies should ensure the revised schedule and permitting timetable are coordinated with the participating/cooperating agencies.[33]

[32] If there is an applicant that is not the project sponsor, the lead agency should also consult with the applicant. See 42 U.S.C. § 4336a(2)(D).

[33] A State agency may have a permitting or approval role but may not be a participating agency. In such cases, the lead Federal agency should coordinate with such agencies regarding the permitting timetable.

Question 56: What deadlines have been established under the Sec. 139 environmental review process for the public and participating/cooperating agencies to submit comments?

Answer: In accordance with 23 CFR 771.123(k), the DEIS comment period shall be no fewer than 45 days and no greater than 60 days, unless a different comment period is established by agreement of the lead agencies, the project sponsor, and all participating/cooperating agencies, or the Federal lead agency extends the deadline for good cause (23 U.S.C. § 139(g)(2)(A)(ii)). The DEIS comment period begins on the date that the United States Environmental Protection Agency (EPA) publishes the notice of availability of the DEIS in the *Federal Register*.

For EAs that follow the Sec. 139 environmental review process, the comment period must not exceed 30 days, unless a different comment period is established by agreement of the lead agencies, the project sponsor, and all participating/cooperating agencies or unless the Federal lead agency extends the comment period for good cause (23 U.S.C. § 139(g)(2)(B)).

Any other comment period (e.g., where the lead agencies provide an opportunity for involvement on the purpose and need or range of alternatives) shall not be more than 30 days, unless a different comment period is established by agreement of the lead agencies, the project sponsor, and all participating/cooperating agencies or unless the Federal lead agency extends the comment period for good cause (23 U.S.C. § 139(g)(2)(B)). If a shorter comment period is appropriate based on the volume and complexity of the materials to be reviewed, then the lead agencies may provide a comment period shorter than 30 days. The comment period is measured from the date the materials are made available.

Question 57: Can an established project schedule that has received concurrence be modified?

Answer: Yes**.** The lead agencies may lengthen or shorten an established schedule for good cause. 23 U.S.C. § 139(g)(1)(D)(i).[34]

After determining good cause to lengthen an established schedule, the lead agency should consult with the applicant[35] and determine the additional time necessary to complete the EIS or EA. The lead agency should revise the schedule, notify the participating/cooperating agencies and update the Permitting Dashboard with the revised schedule. For major projects, the lead agency may not lengthen a schedule for a cooperating Federal agency by more than one year after the latest deadline established for the major project by the lead agency. 23 U.S.C. § 139(g)(1)(D)(ii)(I).

[34] Section 139 supplements the requirements in NEPA that the lead agency must consult with the applicant when establishing a new deadline to provide only so much additional time as is necessary to complete such environmental impact statement or environmental assessment (42 U.S.C. § 4336a(g)(2)).

[35] In some instances, the applicant may be the project sponsor (see 23 CFR 771.107).

After determining good cause to shorten an established schedule, the lead agency should revise the schedule, seek concurrence from the participating/cooperating agencies before shortening the schedule, and update the Permitting Dashboard with the revised schedule. The 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 their relevant obligations for the project. 23 U.S.C. § 139(g)(1)(D)(ii)(II).

Any changes in the schedule and necessary concurrences must be appropriately documented and reported to the Permitting Dashboard (23 U.S.C. 139(o)).

Question 58: What is the process for an applicant to request an extension of the established schedule or deadline?

Answer: To request an extension to the schedule or deadline, the applicant should submit their request in writing to the lead agency at least 45 days before the established deadline, explaining the project's status, explaining why an extension is needed, and providing a proposed updated schedule. The NEPA federal lead agency will determine whether an extension will be granted.

A schedule extension should be requested if a project's schedule is not expected to meet a deadline for completion of the EIS or EA, consistent with 42 U.S.C. § 4336a(g) or 23 U.S.C. § 139(g) (for major projects).

Question 59: Should the lead agencies make the schedule available to the participating/cooperating agencies, the project sponsor, and the public?

Answer: Yes. The project schedule must be provided to all participating/cooperating agencies and the project sponsor and must also be made available to the public (23 U.S.C. § 139(g)(1)(F)). The project schedule also must be posted to the Permitting Dashboard (23 U.S.C. § 139(o)). Any additional methods by which the schedule is made available to the public is flexible. It may be posted on a project web site, distributed to recipients on a well-advertised project mailing list, or handed out at public and agency coordination meetings. If the schedule is modified, then the modified schedule must be shared with the public and other participants as described above (23 U.S.C. § 139(g)(1)(F)).

Question 60: What is the consequence of not adhering to the schedule established as part of the coordination plan?

Answer: Failure by the lead agencies to adhere to the schedule may invalidate the original schedule and require the lead agencies to develop a revised schedule. In that case, the lead

agencies should propose a revised schedule,[36] provide a reasonable time to the participating/cooperating agencies for review and comment (but not more than 30 days except for good cause), and seek concurrence on the revised schedule. Lead agencies should provide a reasonable time for this concurrence (but not more than 30 days except for good cause). Lead agencies should notify the participating/cooperating agencies that no comment or a lack of response will be interpreted by the lead agencies as concurrence with the project schedule.

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 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 and the Committee on Transportation and Infrastructure and make the report publicly available on the internet (23 U.S.C. § 139(g)(1)(E)). Failure to meet schedule deadlines by participating/cooperating agencies for decisions is a trigger for the issue resolution process under 23 U.S.C. § 139(h) (see Question 68). Depending on the timing of the missed deadline, the financial penalty provisions under 23 U.S.C. § 139(h)(7) might also be applicable.

A project sponsor concerned about a potential delay in meeting a project schedule should consider seeking enhanced technical assistance and accelerated project completion under section 139(m) (see Questions 61-64), issue resolution under section 139(h)(6) (see Questions 68-69),[37] or both. If an agency fails to meet the one-year or two-year deadline for a non-major project, the project sponsor may petition a court of competent jurisdiction to review the alleged failure. If the court finds that the agency has failed to act in accordance with an applicable deadline, the court will set a schedule and deadline for the agency to act as soon as practicable. The court will set a deadline not exceeding 90 days from the date the court order is issued, unless the court determines a longer time period is necessary to comply with applicable law (42 U.S.C. 4336a(g)(3)).

[36] If the EIS or EA is not completed in accordance with the established schedule, the lead agencies should consult with the applicant to develop the revised schedule, which should provide only so much additional time as is necessary to complete such environmental impact statement or environmental assessment (42 U.S.C. § 4336a(g)(2)). If the EIS or EA is complete, the lead agencies may consult with the applicant at the discretion of the lead agencies.

[37] Under NEPA, a project sponsor may obtain judicial review of an alleged failure by an agency to act in accordance with an applicable deadline established under 42 U.S.C. § 4336a(g)(1)-(2). *See* 42 U.S.C. § 4336a(g)(3). This provision applies only to the deadline to complete the EIS or EA, as applicable. This section does not apply to deadlines prescribed in Section 139 that apply to the ROD and any authorizations issued after issuance of a ROD or FONSI.

Enhanced Technical Assistance for Covered Projects

Question 61: Which projects are eligible for enhanced technical assistance under 23 U.S.C. § 139(m)?

Answer: Projects eligible for enhanced technical assistance under 23 U.S.C. § 139(m) are referred to as "covered projects". For the purposes of the Sec. 139 environmental review process, the term "covered project" does not have the same meaning as the term covered project as described in FAST-41. A covered project is a project with an ongoing EIS process and for which at least 2 years have elapsed since the publication of the NOI and for which a ROD has not been issued. Enhanced technical assistance for FHWA and FTA covered projects was effective as of October 1, 2012, but it can apply to those projects with NOIs published prior to October 1, 2012. For FHWA and FTA projects, at any time after October 1, 2012, if the NOI for a project is at least two years old and a ROD has not yet been issued, the project sponsor or Governor may request assistance under this provision. For FRA projects, enhanced technical assistance will only apply to railroad projects for which FRA published an NOI after December 4, 2015.

In addition, projects covered under a NEPA Assignment agreement that have an ongoing EIS and for which at least two years have elapsed since the NOI without the issuance of a ROD may request enhanced technical assistance from the Agencies. See FHWA guidance entitled Changes to 23 U.S.C. §§ 326 & 327 through Implementation of Sections 1307 and 1308 of the FAST Act for more information.

Question 62: What enhanced technical assistance is available, upon request, for a covered project?

Answer: At the request of a project sponsor or Governor of a State in which a covered project is located, FHWA, FRA, or FTA is required to provide enhanced technical assistance for any outstanding issues and project delay (23 U.S.C. § 139(m)(2)). This assistance may include:

- Providing additional staff, training, and expertise;
- Facilitating interagency coordination;
- Promoting more efficient collaboration; and
- Supplying specialized onsite assistance.

Question 63: What are the requirements for a schedule set for the completion of a covered project that receives enhanced technical assistance?

Answer: FHWA, FRA, or FTA must establish a scope of work that describes what actions will be taken to resolve outstanding issues and project delays for covered projects that

receive enhanced technical assistance under the Sec. 139 environmental review process (23 U.S.C. § 139(m)(3)). Additionally, FHWA, FRA, or FTA must establish and meet a project schedule for the completion of any permit, approval, review, or study required for the covered project by a date that is not later than four years after the date on which the NOI for the covered project was issued (23 U.S.C. § 139(m)(3)(B)). This schedule must be concurred upon by CEQ, all participating/cooperating agencies for the project, and the State in which the covered project is located or the project sponsor, as applicable (23 U.S.C. § 139(m)(3)(B)(ii)(II)). In any instance where it is impracticable to set a date for a permit, approval, review, or study of less than 4 years after the NOI for the covered project, then the lead agencies, with concurrence of the parties just noted, will set a schedule for completion as soon as practicable.

Question 64: What is the consequence of not adhering to the schedule established as part of the request for enhanced technical assistance?

Answer: Failure by the lead agencies to adhere to the schedule may invalidate the original schedule and require a revised schedule to be developed. If a revised schedule is needed, FHWA, FRA, or FTA should follow the coordination and concurrence process described in Question 57.

Failure to meet schedule deadlines by participating or cooperating agencies is a trigger for the issue resolution process under 23 U.S.C. § 139(h) (see Question 67). For projects that did not develop a schedule pursuant to 23 U.S.C. § 139(g)(1)(B) due to an NOI being issued prior to the schedule requirement, failure by a Federal agency to render a required decision within a particular timeframe may result in financial penalties in accordance with 23 U.S.C. § 139(h)(7) (see Question 70).

Concurrent Reviews

Question 65: What are the requirements for each Federal lead agency to carry out its obligations under other Federal laws in relationship to the Sec. 139 environmental review process?

Answer: Section 139(d)(7) directs each Federal participating and cooperating agency to carry out its obligations under other Federal laws concurrently and in conjunction with the Sec. 139 environmental review process, unless doing so concurrently would impair the ability of the Federal agency to conduct needed analysis or otherwise carry out those obligations. Other Federal laws include Section 404 of the Clean Water Act, Section 106 National Historic Preservation Act, and Section 7 of the Endangered Species Act. As further discussed in Questions 45-47, to facilitate concurrent compliance with other Federal laws, FHWA, FRA, or FTA may approve the completion of a higher level of design for the Preferred Alternative in the DEIS. Additionally, all participating and cooperating agencies will formulate and implement mechanisms to ensure the completion of the Sec. 139 environmental review process in a timely, coordinated, and environmentally responsible manner. For example, a higher level of design could facilitate a NEPA/404 merger agreement concurrence point where a preliminary Least Environmentally Damaging

Practicable Alternative determination is made by USACE prior to the FHWA NEPA determination. Another example would be the EPA completing their Clean Air Act Section 309 review prior to issuance of the FHWA or FTA combined FEIS/ROD.

The Department of Transportation has developed a multimodal Memorandum of Understanding (MOU) among the U.S. Coast Guard (USCG) and FHWA, FTA, and FRA to improve coordination and collaboration with the U.S. Coast Guard. In addition, the 2014 Memorandum of Agreement (MOA) between the U.S. Coast Guard (USCG) and the FHWA is an example of a concurrent environmental review process implemented to facilitate bridge planning and permitting.

Question 66: What does the use of a single environmental document mean?

Answer: The use of a "single environmental document" means that a single environmental document (EA, NOI, EIS, FONSI and ROD) prepared by the lead agency for the Sec. 139 environmental review process must satisfy the requirements for all Federal authorizations and reviews required for a project (23 U.S.C. § 139(d)(8)(A)).[38] To the maximum extent practicable and consistent with Federal law (except where inconsistent with concurrent review requirements), all Federal authorizations and reviews for a project shall rely on a single environmental document for each kind of environmental document prepared under NEPA (23 U.S.C. § 139(d)(8)).[39] In addition, for major projects, the final EIS or EA should include an adequate level of detail to inform the decisions necessary for the participating/cooperating agencies (see 23 U.S.C. § 139(d)(10)(B)).

Under this provision, a Federal agency required to make an approval or take an action for a project relying on a single environmental 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 or as joint lead agency (see Question 24) for the project.

For projects that follow the Section 139 environmental review process, consistent with 23 U.S.C. § 139(d)(8)(D), the lead agency may waive the requirement to prepare a single environmental document if:

- The project sponsor requests separate documents;
- The NEPA obligations of a cooperating agency or participating agency have already been satisfied; or

[38] Section 139 supplements the requirements in 42 U.S.C. § 4336a(b) by further requiring the agencies to rely on a single NOI and ROD to the maximum extent practicable. In addition, Section 139 provides specific criteria for the lead agency to waive this requirement. 23 U.S.C. § 139(d)(8)(D).

[39] Although 42 U.S.C. § 4336e(5) defines environmental document as an EIS, EA or FONSI, a ROD and NOI are also documents prepared under NEPA for purposes of Section 139 and should conform to the requirements in 23 U.S.C. § 139(d)(8)(A).

- The lead agency determines that a single environmental document would not facilitate timely completion of the environmental review process for the project.

If the single environmental document requirement is waived, the lead agency should document the reason for the waiver in the project file.

Issue Resolution

Question 67: How is issue resolution addressed under the Sec. 139 environmental review process?

Answer: When there is disagreement on important issues of concern, FHWA, FRA, or FTA will decide whether the most effective approach would be to work out the disagreement in either a formal or informal way. In 2006, U.S. DOT issued revised guidance to facilitate the resolution of interagency disputes at lower levels of decision-making. The methods presented in that guidance, developed by FHWA and the U.S. Institute for Environmental Conflict Resolution (USIECR) on behalf of U.S. DOT, *Collaborative Problem Solving: Better and Streamlined Outcomes for All*, remain valid and should be considered by the lead agencies when appropriate. The Agencies support the implementation of the principles and practices identified in the Memorandum on Environmental Collaboration and Conflict Resolution, issued by the Office of Management and Budget (OMB) and CEQ on September 7, 2012.

Section 139(h) provides a formal process for resolving issues that may delay the Sec. 139 environmental review process or that may result in denial of approvals required for the project under other applicable laws (23 U.S.C. § 139(h)). Per 23 U.S.C. § 139(h)(4), any issue resolved by the lead agency with the concurrence of participating/cooperating 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 including the concurrence of the affected participating/cooperating agencies.

Question 68: What is the accelerated issue resolution and referral process in 23 U.S.C. § 139(h)?

Answer: The accelerated issue resolution and referral section of 23 U.S.C. § 139(h) describes two distinct issue resolution processes:

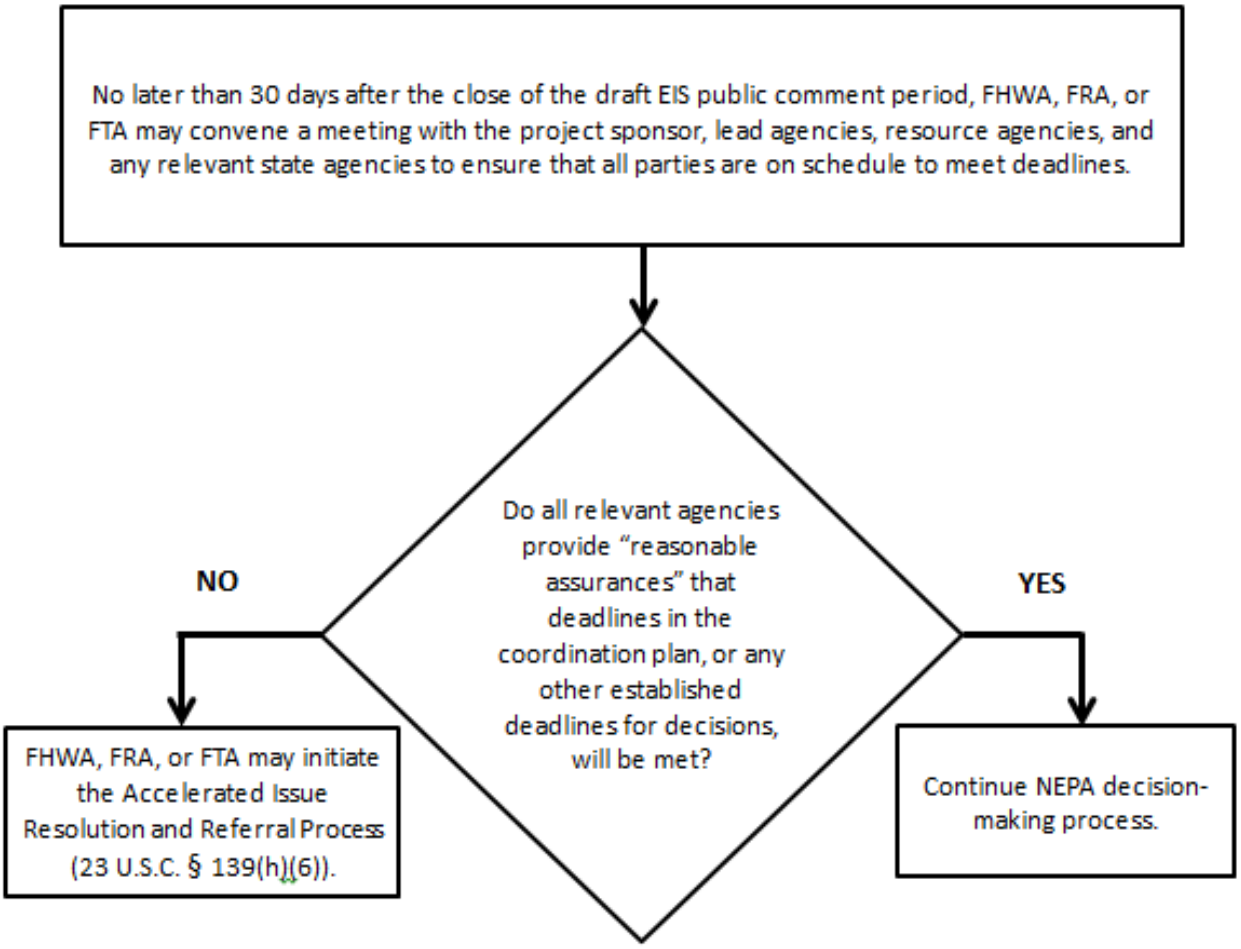
- One to accelerate interim decision-making (23 U.S.C. § 139(h)(5)); and
- One that involves a revised issue resolution and referral process (23 U.S.C. § 139(h)(6)).

Under 23 U.S.C. § 139(h)(5), FHWA, FRA, or FTA may convene a meeting no later than 30 days after the DEIS public comment period closes with the project sponsor, lead agency,

resource agencies, and any relevant State agencies to ensure all parties are on schedule to meet deadlines for decisions on the project (compared to either the schedule developed as part of the coordination plan or other deadlines set by the lead agencies in consultation with the project sponsor and other relevant agencies) (23 U.S.C. § 139(h)(5)(B)). If the relevant agencies cannot provide reasonable assurances that deadlines will be met, FHWA, FRA, or FTA may initiate the issue resolution and referral process under 23 U.S.C. § 139(h)(6) at that time or at any time during the environmental review process.

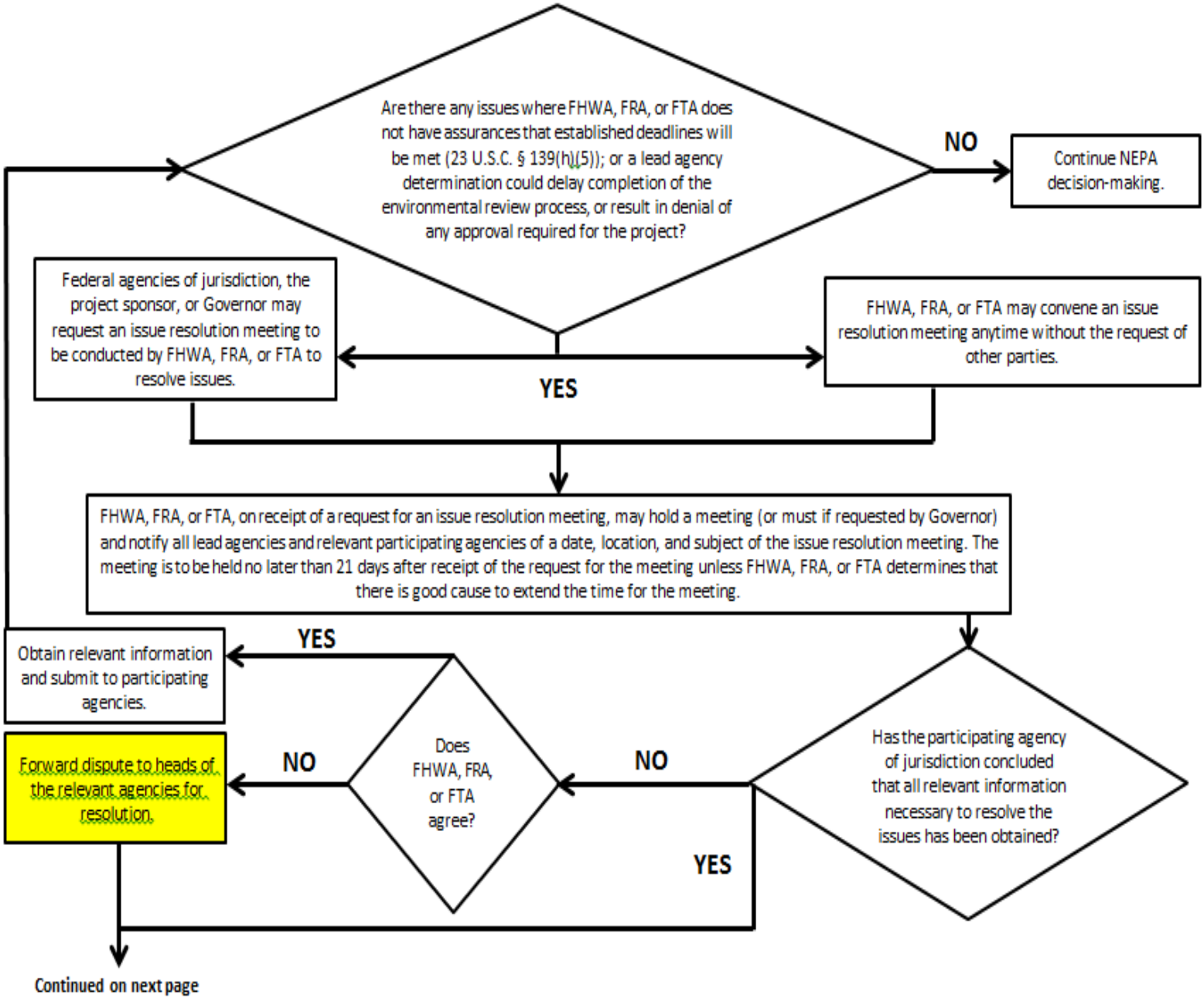
Section 139(h)(6) establishes an issue resolution and referral process that progressively escalates unresolved issues from a Federal agency of jurisdiction, project sponsor, or Governor, to FHWA, FRA, or FTA (Federal lead agency), to the Secretary, to CEQ, and finally to the President, as necessary. The scope of the process is limited to issues that could delay completion of the environmental review process or result in denial of any approvals required for the project under applicable laws (23 U.S.C. § 139(h)(6)(A)(ii)). The issue resolution and referral process is distinct from the interim decision-making process; the 23 U.S.C. § 139(h)(5) process is not a precondition for the initiation of the 23 U.S.C. § 139(h)(6) issue resolution process. See below for flowcharts that show the 23 U.S.C. §§ 139(h)(5) and 139(h)(6) processes.

Interim Decision on Achieving Accelerated Decision-making:
23 U.S.C. § 139(h)(5)

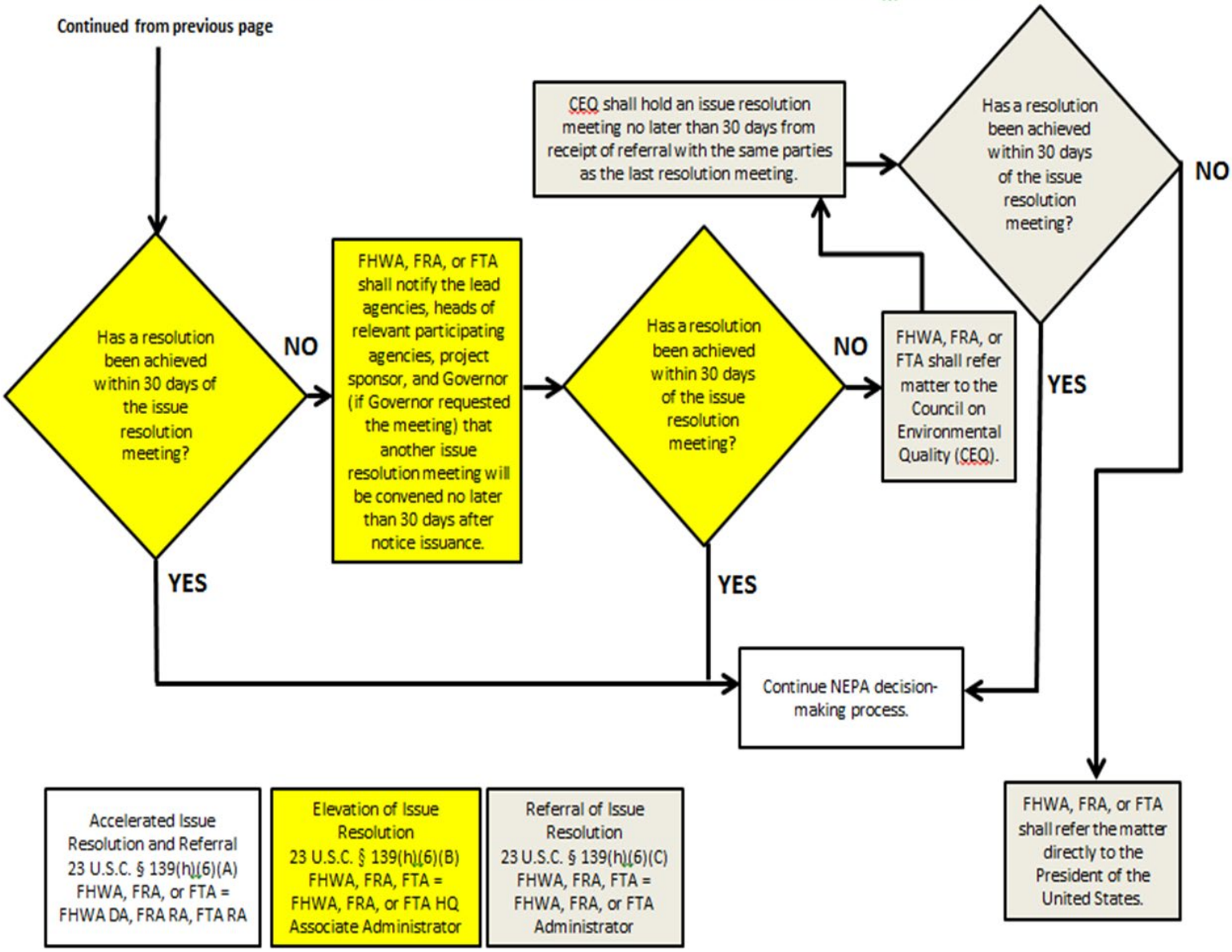


(continued)

Accelerated Issue Resolution and Referral: 23 U.S.C. § 139(h)(6)



Accelerated Issue Resolution and Referral: 23 U.S.C. § 139(h)(6) cont.



Question 69: Who can initiate the 23 U.S.C. § 139(h)(6) issue resolution process?

Answer: A Federal agency of jurisdiction, a project sponsor, or the Governor of a State in which the project is located may request an issue resolution meeting to be conducted by the Federal lead agency (FHWA, FRA, or FTA). The Federal lead agency also may initiate the 23 U.S.C. § 139(h)(6) issue resolution process.

Question 70: What are the financial penalties for Federal agencies that do not comply with the established timeframes under 23 U.S.C. § 139?

Answer: Section 139(h)(7) establishes financial penalties for Federal agencies of jurisdiction that fail to issue or deny a permit, license, or other approval required for a project by certain timeframes.[40] The timeframes are as follows:

1. If a project schedule created pursuant to 23 U.S.C. § 139(g)(1)(B) exists, the date that is 30 days after the date for rendering a decision as described in the schedule; or

2. If no project schedule created pursuant to 23 U.S.C. § 139(g)(1)(B) exists, the later of:

   a) The date that is 180 days after the date on which an application for the permit, license, or approval is complete; and
   b) The date that is 180 days after the date on which the Federal lead agency issues a decision on the project under NEPA; or
   c) A modified date in accordance with the coordination plan.

FHWA and FTA issued separate guidance entitled MAP-21 Section 1306 Financial Penalties Questions & Answers on the financial penalty provisions in 23 U.S.C. § 139(h)(7). FRA will rely on the existing FHWA/FTA guidance on financial penalties but may issue FRA-specific guidance in the future.

Question 71: How does the dispute resolution and referral process in 23 U.S.C. § 139(h)(6) relate to the CEQ referral process in 40 CFR part 1504?

Answer: The dispute resolution and pre-decisional referral process in 40 CFR part 1504 applies to disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. The 23 U.S.C. § 139(h)(6) issue referral process is intended to resolve any issues that could (1) delay the completion of the environmental review process or (2) result in the denial of any approval required for the project under

[40] Under NEPA, a project sponsor may obtain judicial review of an alleged failure by an agency to act in accordance with an applicable deadline established under 42 U.S.C. § 4336a(g)(1)-(2). *See* 42 U.S.C. § 4336a(g)(3). This provision applies only to the deadline to complete the EIS or EA, as applicable. This section does not apply to deadlines prescribed in Section 139 that apply to the ROD and any authorizations issued after issuance of a ROD or FONSI.

applicable laws. The 23 U.S.C. § 139(h)(6) issue resolution process occurs prior to making a pre-decisional referral to CEQ under part 1504.

Funding Additional Agency Resources

Question 72: Is a public entity that is receiving title 23, U.S. Code, or chapter 53 of title 49, U.S. Code, funds allowed to provide funding for additional resources to an agency or Tribe to expedite and improve delivery of the projects within the State?

Answer: Yes. Section 139(j) authorizes public entities (e.g., State DOTs, public transportation agencies) receiving U.S. DOT funds under title 23, U.S. Code or chapter 53 of title 49, U.S. Code, to provide funds to Federal agencies, State agencies, and federally-recognized Tribes participating in the Sec. 139 environmental review process for a project or program.[41] Such funds may be provided only to support activities that directly and meaningfully contribute to expediting and improving permitting and review processes. Examples include transportation planning activities, dedicated staffing, training, and the development of programmatic agreements. FHWA, FRA, or FTA approval is required whenever the section 139(j) authority is used, even if funding for the section 139(j) activities comes from non-title 23 and non-title 49 sources. See 49 U.S.C. § 307 for similar but broader authorities applicable to public entities receiving funding under any U.S. DOT authority.

Federal agencies, State agencies, and federally-recognized Tribes that receive Federal-aid highway or Federal transit funds from a public entity can only use the funds to pay for the additional resources FHWA, FRA, or FTA determines necessary to meet the time limits established for environmental reviews of projects (23 U.S.C. § 139(j)(4)). Those time limits must be less than the customary time necessary for such reviews (23 U.S.C. § 139(j)(5)). Where a State wishes to fund activities that are not project-specific, such as process improvements or development of programmatic agreements, the criteria relating to environmental review time limits will be deemed satisfied so long as the efforts are designed to produce a reduction in the customary time for environmental reviews. Additional information related to coordination and funding can be found on FHWA's Transportation Liaison Community of Practice webpage.[42]

Question 73: Are there additional requirements for using Section 139(j) to fund staffing for State or Federal agencies, or Tribes, participating in the Sec. 139 environmental review process?

Answer: Yes. Section 139(j)(6) requires that prior to providing approved funding for dedicated staffing, such as a liaison position, the public entity providing the funding and the

[41] Pursuant to Section 11503 of the FAST Act, Section 139(j) could apply to certain FRA-administered projects. Public entities interested in Section 139(j) agreements should consult FRA headquarters with questions regarding applicability of Section 139(j) to a specific project or program.

[42] https://www.environment.fhwa.dot.gov/env_initiatives/liaisonCOP.aspx

agency receiving the funding must enter an agreement establishing the projects and priorities to be addressed by the funding and position. If an existing agreement does not already specify the projects and priorities to be addressed by the funding, then the new or revised agreement should list specific projects and priorities, if known, or the process that will be used to identify or change projects or priorities during the term of the agreement. Such funds may be provided only to support activities that directly and meaningfully contribute to expediting and improving transportation project planning and delivery of projects. Agreements may also include performance measures to be used for the evaluation of the expediting effects of the funding. Additional information can be found on FHWA's Transportation Liaison Community of Practice webpage.

Improving Transparency in Environmental Review

Question 74: What are the new requirements to improve transparency in the Section 139 environmental review process?

Answer: Section 139(o) requires the Agencies to use the Permitting Dashboard to make publicly available the status and progress for EIS and EA documents. It also directs the Agencies to publish the names of any participating/cooperating agencies that are not participating in the development of the project purpose and need and range of alternatives. The Agencies will only include a participating/cooperating agency on that list if it sends a written response (e.g., letter, email) declining participation in the development of those milestones.

The Federal agencies participating in the environmental review or permitting process for a project must provide project status/progress updates to the Secretary (23 U.S.C. § 139(o)(2)). The specific process (established by each Federal lead agency) requires that the participating/cooperating agencies submit update information to the Federal lead agency, which will then be responsible for updating the Permitting Dashboard. The Secretary encourages State and local agencies to provide the status and progress of their approvals for publication on the Permitting Dashboard.

Question 75: Are States with assigned NEPA responsibilities under 23 U.S.C. § 327 required to comply with the requirements of improving transparency in environmental reviews (23 U.S.C. § 139(o))?

Answer: Yes. The States with assigned NEPA responsibility under 23 U.S.C. § 327 are required to comply with 23 U.S.C. § 139(o). Those States with assigned authority for responsibilities under NEPA are required to supply project development and compliance status for all applicable projects to the Secretary by entering that information directly into the Permitting 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 Permitting Dashboard. The FRA Office of Environmental

Program Management will grant access rights to the Permitting Dashboard to State agency staff responsible for providing project information to the electronic platform for railroad projects.

Question 76: What reporting provision for the Agencies were established under the BIL?

Answer: The lead agencies have a new responsibility to calculate annually the average time taken by the lead agency to complete all environmental documents for each project during the previous fiscal year (23 U.S.C. § 139(c)(6)(D)).[43] For EAs and EISs completed in the previous fiscal year, lead agencies will calculate the time it took to complete each document from initiation to decision , and then determine the average (and median for FHWA) time it took, by class of action. The lead agencies will report the time it takes to complete environmental documents on the agency's website.

Additionally, BIL created a new requirement at 23 U.S.C. § 157 for NEPA data reporting, requiring that U.S. DOT submit an annual report to Congress regarding various CE, EA, and EIS data for FHWA. The FHWA 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 and the Committee on Transportation and Infrastructure for FHWA.

Errata Sheets and Combined FEIS/ROD Documents

Question 77: When is the use of a FEIS errata sheet allowed under 23 U.S.C. § 139(n)(1)?

Answer: Under 23 U.S.C. § 139(n)(1), an errata sheet is appropriate when comments received on a DEIS are minor and the Federal lead agency's responses to those comments are limited to factual corrections or explanations of why the comments do not warrant further response. When applying 23 U.S.C. § 139(n)(1), the lead agencies should include the errata sheet, including the information described in Question 78 below, as an attachment to the DEIS. An FEIS errata sheet must undergo legal sufficiency review, consistent with 23 CFR 771.125(b).

Question 78: What should be included in a FEIS errata sheet?

Answer: The statutory requirements are listed in 23 U.S.C. § 139(n)(1). Consistent with U.S. DOT Guidance on the Use of Combined Final Environmental Impact Statements/Records of Decision and Errata Sheets in National Environmental Policy Act Reviews (Apr. 25, 2019), at a minimum, an FEIS errata sheet must include:

[43] The head of each agency is also required to submit an annual report to CEQ that identifies any EA or EIS projects not completed according to the deadlines specified in 42 U.S.C. § 4336a(g) (see 42 U.S.C. § 4336a(h)).

- A list of the factual corrections made to the DEIS with references to the relevant page numbers in the DEIS, citing the sources, authorities, or reasons that support the position of the agency;
- A list and explanation of why the DEIS comments do not warrant further response in an FEIS, citing the sources, authorities, or reasons that support the position of the agency; and
- If appropriate, an indication of the specific circumstances that would trigger reappraisal or further response, particularly information that could lead to a re-evaluation or SEIS or EA.
- A web address or other indication of where a copy of the DEIS may be obtained.

In addition, the errata sheets should contain a separate section, including:

- Identification of the preferred alternative and a discussion of why it was identified, if different from the DEIS;
- Final Section 4(f) evaluation and finding, if applicable;
- Applicable findings, including any on wetlands, floodplains, and Section 106 effects, as well as any "reasonable assurance" findings where full compliance will occur after issuance of the FEIS;
- List of commitments for mitigation measures applicable to the preferred alternative;
- Copy or summary of comments received on the DEIS and responses (and identification of any coordination activities that have taken place since issuance of the DEIS), and a copy of the public hearing transcript, if applicable; and
- Identification of any other findings to be made in compliance with all applicable environmental laws, regulations, Executive Orders, and other related requirements (with associated agency consultation documentation) where there is reasonable assurance that full compliance will occur after issuance of the FEIS.

Question 79: What are the considerations of a combined FEIS/ROD document under 23 U.S.C. § 139(n)(2)?

Answer: Under 23 U.S.C. § 139(n)(2) the lead agency must, to the maximum extent practicable, expeditiously develop a combined document that consists of an FEIS and a ROD, unless: (1) the FEIS makes substantial changes to the proposed action that are relevant to environmental or safety concerns or (2) there are significant new circumstances or information relevant to environmental concerns and that bear on the proposed action or the impacts of the proposed action (see Question 81).[44] The requirements for a single environmental document should also be a consideration (see Question 66).

[44] Traditionally, and in accordance with the CEQ regulations (40 CFR 1506.10(b)(2)), FEIS and ROD documents are issued as separate documents with a minimum 30-day period between the FEIS and the ROD.

The lead agency must meet the applicable requirements for both an FEIS and a ROD before issuing a combined FEIS/ROD document and should follow all applicable guidance. For example, FHWA and FTA projects must be in the fiscally constrained Metropolitan Transportation Plan and TIP, from a fiscally constrained STIP (23 CFR part 450). Projects in air quality nonattainment and maintenance areas must comply with conformity regulations under the Clean Air Act and EPA requirements (42 U.S.C. § 7506(c) and 40 CFR part 93).

Question 80: Who decides whether to combine a FEIS and a ROD?

Answer: For FHWA or FTA, the applicable FHWA Division or Federal Lands Office or FTA Regional Office is responsible for determining whether it is necessary to separate the FEIS and the ROD for any particular project. For FRA, FRA HQ Office of Environmental Program Management will make this decision. The Agencies should document this decision in the project file and the decision should be made available in the same manner as other documents that are part of the NEPA decisionmaking process. FHWA, FRA, or FTA may use the interagency coordination process to advise cooperating and other participating agencies that it has decided to publish, or not to publish, a combined FEIS/ROD.

Projects eligible for processing as separate FEIS and ROD documents should include early coordination through their FHWA Division office with the FHWA HQ Office of Project Development and Environmental Review, FRA HQ Office of Environmental Program Management, or FTA HQ Office of Environmental Policy and Programs, as appropriate, and with the appropriate Office of Chief Counsel, to ensure internal NEPA consistency and legal sufficiency.

A legal sufficiency review is required for a combined FEIS/ROD (see 23 CFR 771.124(a)(4)). FHWA Division and Federal Lands Offices, and FTA Regional Offices should follow the existing process for submitting FEISs to their respective Office of Chief Counsel to obtain a legal sufficiency review of a proposed combined FEIS/ROD document. FRA HQ Office of Environmental Program Management will continue coordinating with FRA's Office of Chief Counsel to obtain legal sufficiency reviews.

A decision by FHWA, FRA, or FTA to issue a combined FEIS/ROD for a proposed project does not prevent a joint lead or cooperating agency from adopting the FEIS and issuing a separate ROD in accordance with its NEPA procedures, if that agency determines it is appropriate to do so.

Question 81: How will the Agencies determine that a separate FEIS and ROD are needed?

Answer: The decision on whether to separate the FEIS and the ROD documents is a project-specific determination. The Agencies should consult with the cooperating/participating agencies and will consider all relevant facts and circumstances related to the EIS. The Agencies may also consider the following:

1. *Are there any coordination activities that are more effectively completed after the FEIS is available?* For example, if there is a need to develop a more detailed mitigation plan.

2. *Are there any unresolved interagency disagreements over issues that need identification in the FEIS?* In these situations, it may be necessary to keep the FEIS and the ROD as separate documents, so that FHWA, FRA, or FTA can continue to work towards issue resolution prior to issuance of a ROD. For example, if publishing a separate FEIS will focus the issues and rationale for a proposed resolution, then separate FEIS and ROD documents will provide FHWA, FRA, or FTA a better opportunity to resolve such disagreements.

3. *Is there a substantial degree of controversy?* FHWA, FRA, or FTA may decide to issue separate FEIS and ROD documents if it believes that issuing the FEIS as a separate document could help to resolve the controversy. For example, the opportunity to review comments submitted after the FEIS may help FHWA, FRA, or FTA develop additional mitigation commitments to include in the ROD to address the controversy.

4. *Does the DEIS identify the preferred alternative from among the comparatively evaluated reasonable alternatives?*[45] If the DEIS does not identify the preferred alternative, then after the issuance of the DEIS, FHWA, FRA, or FTA should provide the participating/cooperating agencies and the public with an opportunity to assess the impacted resources and environmental concerns for the preferred alternative. This can occur prior to issuing the combined FEIS/ROD (preferred) or the separate FEIS. Whenever possible, FHWA, FRA, or FTA should work with the project sponsor or applicant(s) and appropriate participating/cooperating agencies to identify the preferred alternative prior to issuing the DEIS.

5. *Are there compliance issues related to substantive environmental laws that must be resolved before issuance of the ROD or that FHWA, FRA, or FTA wants to resolve before signing the ROD, but do not merit deferring issuance of the FEIS?* Section 139(n)(2) does not alter the compliance timing requirements of 23 U.S.C. § 139(d)(7)-(8) for substantive environmental laws. If FHWA, FRA, or FTA determines there are reasonable assurances of compliance and believes there are important benefits to the overall decisionmaking process if the FEIS is issued before such compliance matters are fully resolved, then FHWA, FRA, or FTA may decide not to combine the FEIS and the ROD. In such cases, FHWA or FTA can publish the FEIS using the reasonable assurances provisions in sections 771.125(a) and 771.133, and can update the compliance status in the ROD. For example, if FHWA or FTA cannot sign the ROD until conforming amendments are made to planning documents due to the need for a new Clean Air Act conformity determination, it may be beneficial for purposes of both transparency and the overall project timeline to issue the FEIS separately.

[45] Pursuant to 40 CFR 1502.14(d), agencies must "identify [their] preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference."

This provides the agencies and the public access to the FEIS information while the amendments are being made to the planning documents.

Section 139(n) does not alter requirements of other environmental laws. When determining the need for separating the FEIS and ROD documents, FHWA, FRA, or FTA will consider possible effects of this approach on the timing of required coordination under other laws and the need for any additional documentation. For example, having a separate FEIS may facilitate meeting requirements under other laws (given the reasonable assurance noted above).

Through the interagency coordination process, FHWA, FRA, or FTA should notify the participating/cooperating agencies as early as possible that it will be combining the FEIS and the ROD, unless it determines there is a need to keep the documents separate. This provides the agencies with an opportunity to express their views about the use of a combined FEIS/ROD for the specific proposed action. The views of the participating/cooperating agencies may assist FHWA, FRA, or FTA to determine whether separating the FEIS and the ROD document is needed.

Question 82: Should the intent to prepare a combined FEIS/ROD be identified in the DEIS?

Answer: Yes. The DEIS cover page should include a notice stating that FHWA, FRA, or FTA will prepare a combined FEIS/ROD under 23 U.S.C. § 139(n)(2) unless conditions are present that preclude combining the FEIS and the ROD. Any cooperating Federal agency that will be issuing the single environmental document required by Section 139(d)(8) should be included in the notice. A typical notice should read:

"[FHWA, FRA, or FTA] [and any other Federal agency that will be issuing the single environmental document] will issue a combined Final EIS and ROD pursuant to 23 U.S.C. § 139(n)(2), unless [FHWA, FRA, or FTA] determines there is a need to keep the documents separate."

Question 83: What is the appropriate format for a combined FEIS/ROD?

Answer: At a minimum, a combined FEIS/ROD must meet the applicable legal requirements for both an FEIS and a ROD (23 CFR 771.124(a)(4)). The format of the combined FEIS/ROD is flexible depending on the complexity of the project and other considerations such as accommodating the needs of cooperating and joint lead agencies. One possible approach for combining an FEIS and a ROD is to attach a ROD to the FEIS or to include the ROD as part of the EIS summary of the FEIS, identifying the ROD in the table of contents for the combined FEIS/ROD.

Question 84: Should a combined FEIS/ROD document for a single project include an errata sheet, pursuant to both 23 U.S.C. § 139(n)(1) and (2)?

Answer: Yes. Errata sheets and the combined FEIS/ROD provisions should be incorporated, as long as the conditions of both 23 U.S.C. § 139(n)(1) and (2) are met. When both provisions are used together, the combined final environmental document would consist of a DEIS, errata sheet(s), responses to DEIS comments, information required in the FEIS, and a ROD.

Question 85: Is there a time requirement for issuing the combined FEIS/ROD once the comment period closes for the DEIS?

Answer: Yes. The Agencies' environmental regulations and the Sec. 139 environmental review process have no explicit language regarding the timing of issuing a combined FEIS/ROD after DEIS publication. However, because there is no direct conflict between the 90-day post-DEIS waiting period in 40 CFR 1506.10(b)(1), the Agencies are continuing to apply that regulation to the timing of agency decisionmaking. The FHWA, FRA or FTA will not make a decision (i.e., issue a combined FEIS/ROD) on the proposed action until 90 days after the publication of notice of availability for the DEIS, per 40 CFR 1506.10(b)(1). Therefore, when the intent is to issue a combined FEIS/ROD, the Agencies will wait at least 90 days after the notice of availability of the DEIS before issuing the combined FEIS/ROD.

Page limits

Question 86: What are the page limits for EIS and EA projects?

Answer: The page limit for an EIS is 200 pages or fewer, to the maximum extent practicable (23 U.S.C. § 139(n)(3)).[46] The page limit applies to the text of an EIS, and includes the following sections: purpose and need, alternatives, and affected environment. The lead agency needs to approve any new page limit for an EIS that is projected to be more than 200 pages long.

The page limit requirement of 75 pages, not including citations or appendices, in 42 U.S.C. § 4336a(e)(2) applies to EAs that follow the Section 139 process. As such, the page limit for an EA is 75 pages of fewer, not including citations or appendices.

[46] The page limits described in Section 139 apply notwithstanding any other provision of law, and therefore are appropriate to apply to projects that follow the Section 139 environmental review process. *See* 23 U.S.C. § 139(n)(3). Although NEPA provides for a 300-page limit for an EIS for an extraordinarily complex action, an EIS following the Section 139 environmental review process must conform to the page limits described in Section 139. *See* 42 U.S.C § 4336a(e)(1)(B). If the EIS is expected to exceed 200 pages, the lead agencies should consider whether an exemption is necessary.

The Agencies should use the definition of a "page" from the CEQ regulations, which means a page is 500 words excluding tables and graphics. 40 CFR 1508.1(bb). For purposes of calculating page limits, refer to the Table of Page Limits in Appendix F.

Question 87: What is the process for requesting an exemption of the projects page limit requirement?

Answer: The lead agency may grant an exemption from the page limit requirement if a project's environmental document is expected to exceed 200 pages for an EIS.[47] An EIS for a project may exceed 200 pages, if the lead agency establishes a new page limit for the EIS for that project (23 U.S.C. § 139 (n)(3)(B) (see the Table of Page Limits in Appendix F). There is no exemption from the page limit requirement for EAs.

To request a page limit exemption, the applicant should submit their request in writing to the lead agency, explaining the project's current status, why an exemption is needed, to establish a new page limit. The NEPA federal lead agency will determine whether an exemption will be granted.

Question 88: Can an agency adopt another agency's environmental document?

Answer: Yes. Consistent with 23 U.S.C. § 139(c)(5), an agency may adopt, either in part or whole, a draft or final EIS or EA if it meets the requirements of Section 139, NEPA, CEQ's regulations and 23 CFR part 771. Agencies that want to adopt an environmental document should coordinate with their Headquarters office.

Part 3 Statute of Limitations

Section 139(l) establishes a 150-day SOL on claims[48] against FHWA, FTA, and other Federal agencies for certain environmental and other approval actions. FAST Act § 11503 (codified at 49 U.S.C. § 24201(a)(4)) establishes a 2-year SOL on claims for railroad projects requiring the approval of the Secretary under NEPA. The applicable SOL can apply to a permit, license, or approval action by a Federal agency if:

- The action relates to a project (see Question 6 e); and
- A SOL notification is published in the *Federal Register* announcing that a Federal agency has taken a final agency action on a project.

[47] As the page limit for EISs is established in 23 U.S.C. § 139(n)(3)(A), the lead agencies should establish a new page limit consistent with 23 U.S.C. § 139(n)(3)(B).

[48] FTA uses the term "Limitation on Claims" notices and the corresponding acronym (LOC).

If no SOL notice is published in the *Federal Register*, then the applicable statutory or regulatory period for filing claims applies. For example, 28 U.S.C. § 2401(a) imposes a 6-year statute of limitation for every civil action brought against the U.S. unless there is another law that creates a specific statute of limitations period.

Because the Agencies' programs differ, the Agencies have developed slightly different processes for implementing the SOL provision. Part 3A covers the FHWA process, Part 3B covers the FTA process and Part 3C covers the FRA process. Appendix C, which contains detailed guidance on implementing the SOL provisions, applies only to FHWA and projects for which FHWA is a Federal lead agency.

The Agencies are expected to publish all SOL notices under 23 U.S.C. § 139. On multimodal projects, the Agencies typically will issue separate SOL notices, although there may be situations where a single notice is appropriate (i.e., when there is a joint ROD).

Despite the differences in the Agencies' implementation procedures, the Agencies note that they interpret the scope and intent of the 23 U.S.C. § 139 SOL provision in the same way and that their implementation decisions are based solely on administrative differences in the Agencies' programs.

PART 3A: FHWA Process for Implementing the Statute of Limitations

This part discusses publication of SOL notices for Federal agency actions on highway projects and public transportation capital projects. The SOL notice may be published for a single project or a batch of multiple projects.

The SOL provision is intended to expedite the resolution of issues affecting projects. Whether a SOL notice is needed or is the best way to achieve such resolution on a project is a risk management decision. A determination should include consideration of the nature of the Federal laws under which decisions were made for the project, the litigation risk, and the potential effects if litigation were to occur several years after the FHWA NEPA decision or other Federal agency decisions.

The FHWA Office of Chief Counsel provides advice on these considerations to assist the Division Offices to determine if a SOL notice is appropriate for a particular project. Division Offices must coordinate with FHWA field counsel when preparing the SOL notice. In addition, consistent with 23 CFR 771.139 and internal delegations of authority, the Office of Chief Counsel must review all SOL notices within NEPA non-assignment states for legal sufficiency. Interagency coordination on the notices is critically important. FHWA Divisions should work with their counterparts in other Federal agencies to ensure that there is agreement on which decisions are complete and ready for inclusion in the notice.

An SOL notice can be used for a highway project regardless of the type of process or documentation used for compliance under NEPA (e.g., CE, EA/FONSI, FEIS/ROD). FHWA publishes notices for most EIS projects and many EA projects. It is very rare for FHWA to issue

SOL notices to be used for projects that are CEs under 23 CFR 771.117(c). The notice may be appropriate in limited circumstances for documented CE projects under 23 CFR.771.117(d).

FHWA encourages efforts to help stakeholders and the public to understand this law. For that reason, FHWA believes that it is useful to include a statement summarizing the SOL provision in environmental documents.

Appendix C provides more detailed guidance on FHWA's process for handling SOL notices.

Part 3B: FTA Process for Implementing the Statute of Limitations

This part discusses publication of SOL notices for Federal agency actions on federally-funded public transportation projects.

FTA uses rolling publication of *Federal Register* notices announcing its environmental approvals. An SOL notice (Limitation of Claims (LOC) notice), can be used for a public transportation project regardless of the type of process or documentation used for compliance under NEPA (e.g., CE, EA/FONSI, FEIS/ROD).

In addition, FTA or the project sponsor posts the FTA approval document (combined FEIS/ROD, ROD, FONSI, etc.), including any attachments, on the Internet. The *Federal Register* notice directs any interested party to the web site where the FTA approval document of interest is posted. The *Federal Register* notice also names an FTA contact person who can provide a copy of any FTA approval document, upon request.

Part 3C: FRA Process for Implementing the Statute of Limitations

This part discusses the publication of SOL notices for Federal agency actions on FRA's railroad projects.

FRA's Headquarters office will decide whether to publish an SOL notice for a railroad project on a case-by-case basis. If FRA decides to publish an SOL notice, it may do so for each individual project or use a rolling publication and batch multiple SOL notices together. FRA may publish an SOL notice for any railroad project regardless of the type of process or documentation used for compliance under NEPA (e.g., CE, EA/FONSI, FEIS/ROD).

APPENDICES

Appendix A
Abbreviations

Appendix B
Sample Project Initiation Template, Participating/cooperating Invitation Letters, and Tribal Government Invitation Letter

Appendix C
FHWA Guidance on the Statute of Limitations (SOL) provision under 23 U.S.C. § 139(l)

Appendix D
FRA Sample Statute of Limitations Template

Appendix E
23 U.S.C. § 139 Statutory Language

Appendix F
Table of Page Limits

Appendix G
Table of Timing Requirements

Appendix H
EIS and EA Process Charts

Appendix A – Abbreviations

Sec. 139 environmental review process (Section 139)	Environmental Review Process, codified at 23 U.S.C. § 139
BIL	Bipartisan Infrastructure Law (see also IIJA, below)
BLM	Bureau of Land Management
CE	categorical exclusion
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
CID	Corridor Identification and Development
DEIS	draft environmental impact statement
DOT	Department of Transportation
EA	environmental assessment
EIS	environmental impact statement
EPA	United States Environmental Protection Agency
FAST Act	Fixing America's Surface Transportation Act (Public Law 114-94)
FEIS	final environmental impact statement
FHWA	Federal Highway Administration
FONSI	finding of no significant impact
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
IIJA	Infrastructure Investment and Jobs Act (Public Law 117-58)
MAP-21	Moving Ahead for Progress in the 21st Century (Public Law 112-141)
MOA	memorandum of agreement
MOU	memorandum of understanding
MPO	Metropolitan Planning Organization, as defined in 23 CFR part 450

NEPA	National Environmental Policy Act of 1969
NOI	notice of intent
NPS	National Park Service
PEL	Planning and Environment Linkages
ROD	record of decision
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
Section 139	23 U.S.C. § 139
SEIS	supplemental environmental impact statement
SOL	Statute of Limitations
STIP	Statewide Transportation Improvement Program
TIP	Transportation Improvement Program
U.S.C.	United States Code

Appendix B – Sample Project Initiation Template, Participating/Cooperating Invitation Letters, and Tribal Government Invitation Letters

A sample project initiation template, and sample letters of invitation to a potential participating or cooperating agency or Tribal government are provided separately for FHWA, FRA, and FTA below.

U.S. Department of Transportation
Federal Highway Administration

FHWA Sample Project Initiation Template

1200 New Jersey Ave., SE
Washington, D.C. 20590

In Reply Refer To:_____

[Insert Agency Representative]

[Insert Agency Name and Address]

RE: Request for Project Initiation per 23 USC § 139(e)

Dear [ADDRESSEE]:

The Federal Highway Administration (FHWA) received the [PROJECT SPONSOR] project initiation notification for [PROJECT NAME], received on [DATE]. This notification must be completed as part of the Sec. 139 environmental review process for all EISs (and EAs where it has been determined by the lead agency that the Sec. 139 environmental review process will apply).

We are in receipt of the following documentation for the subject project as it relates to the initiation of the Sec. 139 environmental review process:

_____ Project Description, including type of work, termini, length, and general location of proposed project;

_____ Map of proposed project area;

_____ List of anticipated Federal permits, approvals, reviews or studies that are required for the proposed project;

_____ Identification of the reasonable availability of funds for the major project, as appropriate .

_____ A proposed schedule for the Sec. 139 environmental review process and proposed permitting timeline; and

_____ For EIS, a draft notice of intent (NOI) in compliance with current CEQ regulations for publication in the *Federal Register* announcing the preparation of an

environmental review for the project and requested date for its publication and any additional documentation to be included in a *Federal Register* docket.

Our office made the following determination regarding initiation of the environmental review process:

_____ Initiate the environmental review process for the subject project. For an EIS, FHWA anticipates an expected date of publication of the NOI in the *Federal Register* on [DATE].

_____ Decline the application (a detailed explanation for this decision is attached to this letter).

_____ We require additional information before we can respond to your request to initiate the environmental review process. Please provide the following:

The FHWA Division Office Contact assigned to this request is _____. Please contact us for further coordination and assistance related to this project.

Sincerely yours,

_____
Division Administrator

U.S. Department of Transportation
Federal Highway Administration

FHWA Sample Letter of Invitation (Participating/Cooperating Agencies)
[Insert Agency Representative]

[Insert Agency Name and Address]

Re: Invitation to Participate in the Environmental Review Process for *[Insert Project Name]*

Dear [Agency Representative]:

The purpose of this letter is to invite your agency's participation in the environmental review process to prepare an [*insert* Environmental Impact Statement or Environmental Assessment] for the [insert project name] as a participating agency. [FHWA also requests the participation of the *[Insert Agency Name]* as a cooperating agency in the preparation of the DEIS and FEIS, in accordance with 40 CFR 1501.8 of the Council on Environmental Quality's (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.]

The Federal Highway Administration (FHWA), in cooperation with the *[Insert State Name]* Department of Transportation *[Insert Abbreviation]* is initiating a *[Insert Type of Environmental Document]* for proposed *[Insert Project Name]*. The project limits are *[Insert Project Description, including general map location]*. The purpose of the project, as currently defined, is to *[Insert Basic Statement of the Project's Purpose and Need].* We believe your agency may have an interest in this project. Your agency's participation will not imply that your agency supports the proposal.

FHWA's environmental review process provides for transparency and defined opportunities for agency participation. Pursuant to 23 United States Code (U.S.C.) section 139, participating agencies are responsible to identify, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project. By participating, your agency's role in the development of the above project would include the following as they relate to your area of expertise:

- Providing meaningful and early input on defining the purpose and need, the range of alternatives to be considered, and the methodologies and level of detail required in the alternatives analysis.
- Participating in project meetings and joint field reviews as appropriate.
- Timely reviewing and commenting on the environmental documents and documentation that reflect the views and concerns of your agency on the adequacy of the documents, alternatives considered, and the anticipated impacts and mitigation.
- Concurring on the project schedule that is prepared as a part of the coordination plan, and

<Insert one of the following two sections, for invitations to Federal and non-Federal agencies, respectively.>

Federal agencies:

You, as a representative of your agency may decide not to accept this invitation. **If, you elect for your agency not to become a participating agency, you must decline this invitation in writing**, otherwise we will assume your agency will be participating. In declining this invitation (pursuant to 23 U.S.C. § 139(d)(3)), please confirm the following in writing in your response: that your agency has (1) no jurisdiction or authority with respect to the project, (2) no expertise or information relevant to the project, and (3) does not intend to submit comments on the project. In considering this invitation, please note that 23 U.S.C. § 139(d)(8) requires all Federal authorizations and reviews for a project shall rely on a single environmental document. [If the project is a major project then also add "In addition, 23 U.S.C. § 139(d)(10) requires all authorization decisions for the construction of a major project be completed no later than 90 days after the date of issuance of the ROD"]. Your reply may be e-mailed to *[insert e-mail address]*; please include the title of the official responding.

Please respond to FHWA in writing with an acceptance or denial of the invitation no later than *[Insert Deadline] (Deadline - No More Than 30 days from the Date of Letter).* If you have questions about this project or would like to discuss this invitation, please contact [insert individual and their phone and email contacts].

Non-Federal agencies:

If you elect to become a participating agency, we would appreciate your acceptance in writing. Please respond with an acceptance or denial of the invitation no later than *[Insert Deadline] (Deadline - No More Than 30 days from the Date of Letter).*

If you have any questions or would like to discuss in more detail the project or our agencies' respective roles and responsibilities during the preparation of this *[Insert Type of Document]*, please contact *[Insert Contact Name and Phone Number]*.

Thank you for your cooperation and interest in this project.

Sincerely,

Division Administrator

Enclosure Attach Project NOI if applicable

cc:

U.S. Department of Transportation
Federal Highway Administration

FHWA Sample Letter of Invitation (Tribal Governments)
[Insert Tribal Representative (Tribal Chair or equivalent); Use "The Honorable"]

[Insert Tribe Name and Address]

Re: Invitation to Participate in the Environmental Review Process for *[Insert Project Name]*

Dear [Chairman/Chairwoman Last Name]:

The Federal Highway Administration (FHWA), in cooperation with the *[Insert State Name]* Department of Transportation *[Insert Abbreviation]* is initiating a *[Insert Type of Environmental Document]* for proposed *[Insert Project Name] and would like to invite your agency's participation in the environmental review process* (23 United States Code (U.S.C.) section 139) as a participating agency. The project limits are *[Insert Project Description, including general map location]*. The purpose of the project, as currently defined, is to *[Insert Basic Statement of the Project's Purpose and Need].* Because of the project's location and nature we believe your Tribe may be interested in participating in its environmental review.

FHWA acknowledges its obligation to interact with your Tribe in a manner respectful of your Tribe's sovereignty. If you wish for us to engage in government-to-government consultation, please identify the Tribe's designated representative in your response to this letter. We are particularly interested in your help to identify the project's potential effects to places of traditional religious and cultural importance to your community, and otherwise participate in the project's environmental review process. Regardless of whether you chose to become a participating agency in the environmental review for this project, your community's role as a consulting party for Section 106 of the National Historic Preservation Act remains unchanged.

If you decide your Tribe should participate actively in the development of this project as a participating agency, your designee will have the opportunity to provide input on the purpose of and need for the project and the range of alternatives. In addition, your designee will be invited to:

- Provide input on the methodologies and level of detail the project team would analyze reasonable alternatives;
- Participate in meetings, and conference calls;

- Provide comments on sections of draft environmental documents and technical studies; and
- Review and concur in the project schedule that is prepared as a part of the coordination plan.

If you decide your Tribe should become a participating agency, we ask that you reply to this invitation in writing within 30 days. Your acceptance may be e-mailed to *[insert e-mail address]*; If accepting, please identify the name and title of your designee. While we encourage your participation, we cannot provide financial assistance for your participation. If you have questions regarding this invitation, please contact *[insert name and telephone number]*.

Sincerely,
Division Administrator
Enclosure Attach Project NOI if applicable
cc:

FRA Sample Letter of Invitation (Participating/Cooperating Agencies) and Response Form

U.S. Department
of Transportation
Federal Railroad
Administration
1200 New Jersey Avenue, SE
Washington, DC 20590
(Date)

Salutation» «NAME»
«TITLE»
«Agency»
«ADDRESS»
«ADDRESS»
«CITY», «STATE» «ZIP»

Re: *[Insert Project Name]* Scoping and Invitation to Participate in the Environmental Review Process

Dear «Salutation» «NAME»:

The Federal Railroad Administration (FRA), in coordination with [insert Grantee or Joint Lead Agency, if applicable] is preparing an [Insert type of environmental document. This template uses an EIS] for the [Insert project name]. The Proposed Action is [Insert short project description, specify project limits]. The EIS will be prepared in accordance National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et. seq.) (NEPA), Council on Environmental Quality NEPA regulations (40 CFR parts 1500–1508), 23 CFR part 771, Efficient Environmental Reviews for Project Decisionmaking and One Federal Decision (23 U.S.C. § 139), Section 106 of the National Historic Preservation Act (Section 106), Section 4(f) Requirements, and related statutes and regulations.

The purpose of this letter is to:

- Invite «Agency» to be a participating agency [and cooperating agency] for the *[insert EIS/EA name].*
- *[If Applicable]* announce a XX-day EIS scoping comment period beginning ***[insert date]***

Project Background

[Provide project background. At minimum include location info and preliminary purpose and need. Additional information could include legal authority, name of grant program, history/background leading up to current project]

Agency Involvement

FRA is the Federal lead agency for the *[insert project name]* under NEPA, and *[insert other agency name/role (e.g., joint lead agency, sponsor, and/or grantee)].* As part of the environmental review process, lead agencies must identify, as early as practicable, any other Federal and non-Federal agencies that may have an interest in the project, and invite such agencies to become participating and/or cooperating agencies in the environmental review process. A participating agency is any Federal or non-Federal agency, or Native American Tribe, that may have an interest in the project. A cooperating agency is any such agency or Tribe that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposed project or project alternative. Neither designation implies that an agency supports the Proposed Action.

Your agency has been identified as having a potential interest in the *[insert project name].* With this letter, your agency is invited to be a participating agency in accordance 23 U.S.C. § 139(d) [and a cooperating agency in the preparation of the DEIS and FEIS, in accordance with the Council on Environmental Quality's (CEQ) Regulations for Implementing the Procedural Provision of the National Environmental Policy Act.]

FRA suggests that your agency's role as a participating agency [and cooperating agency] could include the following:

1) Provide comments, responses, studies, or methodologies on those areas within the special expertise or jurisdiction of the agency;
2) Use the process to address any environmental issues of concern to the agency;
3) Identify, as early as practicable, any issues of concern regarding the Proposed Action’s potential environmental or socioeconomic impacts (cooperating agency only);
4) Provide meaningful and early input in defining the purpose and need, determining the range of alternatives to be considered, and identifying the

methodologies and level of detail needed in the assessment of impacts (cooperating agency only);

5) Participate in coordination meetings, study team meetings, and joint field reviews as appropriate and to the extent agency resources allow (cooperating agency only); and/or

6) Timely review and comment on environmental documentation (cooperating agency only).

FRA requests that you respond to this invitation by completing the attached form and returning to FRA no later than *[insert date – no more than 30 days from letter date*]. If your agency declines, the response should state your reason for declining the invitation. Please see attached form for further guidance.

EIS Scoping (if applicable)

The goal of the EIS is to provide FRA with information to assess alternatives that will meet the Proposed Action's purpose and need; evaluate potential environmental impacts that could result from the alternatives; identify avoidance/mitigation measures associated with potential environmental impacts; and select a Preferred Alternative.

A Notice of Intent (NOI) to prepare the EIS will be published in the Federal Register. Following the NOI publication, a 30-day public scoping period will commence on [insert date]. [Insert other appropriate details such as scoping meeting dates and instructions for submitting comments]. Written EIS scoping comments will be accepted through [insert date].

If you are not the point of contact for your agency, please provide FRA with the appropriate contact information. Thank you in advance for your consideration. We look forward to receiving your response to the participating agency [and cooperating agency] request and working cooperatively with you on this project. You may submit questions and any other requests for additional information to *[insert name, title, mailing address, and email address of FRA EPS or grantee POC].*

Sincerely,

XXX
Chief, Environment and Project Engineering Division

Attachment: *[list]*
cc: [EPS, Grantee POC, etc.]

FTA Sample Letter of Invitation (Participating/Cooperating Agencies)

U.S. Department
of Transportation
Federal Transit
Administration

[Insert Date]

[Insert Agency Representative]

[Insert Agency Name and Address]

Re: Invitation to Participate in the Environmental Review Process for *[Insert Project Name]*

Dear [Agency Representative]:

The Federal Transit Administration (FTA), in cooperation with [*Insert Sponsoring Transit Agency*], is initiating the preparation of an environmental impact statement for the proposed *[Insert Project Name]*. The proposed project would *[briefly describe action]* in *[describe project location]*. Its purpose, as currently defined, is to *[insert preliminary statement of the project's purpose and need]*. The scoping information packet *[(enclosed) or link to a project website]* provides more details.

Section 139 of title 23, U.S. Code (U.S.C.), as amended by section 11301 of the "Bipartisan Infrastructure Law (BIL)" / "Infrastructure Investment and Jobs Act (IIJA),'' enhances the environmental review process for certain FTA projects, including this one, providing more transparency and defining opportunities for participation. Therefore, the lead agencies must identify any other Federal and non-Federal agencies that may have an interest in the project and invite them to become participating agencies in the environmental review process. We have preliminarily identified your agency as one that may be interested because *[give reasons, such as adverse impacts, resources affected, etc., why agency may be interested]*. Accordingly, we invite *[Agency]* to become actively involved as a participating agency in the environmental review process for the project. *[If applicable, add additional language about why also inviting as a cooperating agency.]*

As a participating agency, you will have the opportunity to be involved in defining the purpose of and need for the project and determining the range of alternatives to be considered for the project. In addition, you will be invited to:

- Provide input on the impact assessment methodologies and level of detail within your agency's area of expertise;
- Participate in coordination meetings, conference calls, and joint field reviews, as appropriate, and identify any environmental issues of concern your agency may have;
- Provide studies, methodologies, responses, or comments within your agency's expertise or jurisdiction on sections of the pre-draft or pre-final environmental documents, the alternatives considered, and the anticipated impacts and mitigation; and
- Concur on the project schedule that is prepared as a part of the coordination plan.

<Insert one of the following two sections, for invitations to Federal and non-Federal agencies, respectively.>

Federal agencies:

Your agency does not have to accept this invitation. **If, however, you elect not to become a participating agency, you must decline this invitation in writing**, indicating that your agency has no jurisdiction or authority with respect to the project, no expertise or information relevant to the project, and does not intend to submit comments on the project. Such a notice should be e-mailed to *[insert e-mail address]*; please include the title of the official responding.

In order to give your agency adequate opportunity to weigh the relevance of your participation in this environmental review process, a written response to this invitation is not due until after the interagency scoping meeting scheduled for *[insert date/time] at [insert location]*. We invite you or your delegate to represent your agency at this meeting. Your agency will be treated as a participating agency unless we receive your written response declining such designation as outlined above not later than *[insert date not more than 30 days later unless FTA determines there is good cause; if the scoping meeting is scheduled for more than 30 days later, adjust response deadline accordingly]*.

Non-Federal agencies:

If you elect to become a participating agency, you must accept this invitation in writing. The acceptance may be e-mailed to *[insert e-mail address]*; please include the title of the official responding. In order to give your agency adequate opportunity to weigh the relevance of your participation in this environmental review process, a written response to this invitation is not due until after the interagency scoping meeting, scheduled for *[insert date/time] at [insert location]*. We invite you or your delegate to represent your agency at this meeting. A written response accepting designation as a participating agency should be transmitted to this office not later than *[insert date not more than 30 days later unless FTA determines there is good cause; if the scoping meeting is scheduled for more than 30 days later, adjust response deadline accordingly]*.

Additional information will be forthcoming during the scoping process. If you have questions regarding this invitation, please contact *[insert name and telephone number]*.

Sincerely,

[Insert FTA Regional Environmental Protection Specialist, Regional Planning Director, Deputy Regional Administrator, Regional Administrator, etc.]

Attachments: Scoping Information Packet [if applicable, or provide link to website in text above]

cc (by e-mail): [Sponsoring Transit Agency]

FTA Sample Letter of Invitation (Tribal Governments)

U.S. Department
of Transportation
Federal Transit
Administration

[Insert Date]

[Insert Tribal Representative (Tribal Chair or equivalent); Use "The Honorable"]

[Insert Tribe Name and Address]

Re: Invitation to Initiate Government-to-Government Consultation and Participate in the Environmental Review Process for *[Insert Project Name]*

Dear [Chairman/Chairwoman Last Name]:

The Federal Transit Administration (FTA), in cooperation with [*Insert Sponsoring Transit Agency*], is initiating the preparation of an environmental impact statement for the proposed *[Insert Project Name]*. The proposed project would *[briefly describe action]* in *[describe project location]*. Its purpose, as currently defined, is to *[insert preliminary statement of the project's purpose and need]*. The scoping information packet *[(enclosed) or link to a project website]* provides more details. To honor the government-to-government relationship between the [*Tribe Name*] and the U.S. Federal Government, we invite you to consult with us about the project's potential effects, especially on places with traditional religious and cultural importance, and otherwise participate in the project's environmental review process.

We are initiating government-to-government consultation under Section 106 of the National Historic Preservation Act, the National Environmental Policy Act (NEPA), and other Federal authorities to help identify tribal concerns. We are especially interested in places that may have traditional religious and cultural importance or be of historical significance to the [*Tribe Name*]. Please note that we are specifically requesting information on such places that you believe may be impacted by the proposed project, so that we may work to avoid impacts.

In addition to engaging in government-to-government consultation, we invite you to participate in the environmental review process. Section 139 of title 23, U.S. Code (U.S.C.), as amended by section 11301 of the "Bipartisan Infrastructure Law (BIL)" / "Infrastructure Investment and Jobs Act (IIJA)'', enhances the environmental review process for certain FTA projects, including this one, providing more transparency and defining opportunities for participation. Therefore, the lead agencies must identify any other Federal and non-Federal agencies that may have an interest in the project and invite them to become participating agencies in the environmental review process. We have preliminarily identified your Tribe as one that may be interested because *[give reasons, such as adverse impacts, cultural resources affected, etc., why Tribe may be interested]*. Accordingly, we invite the *[Tribe Name]* to become actively involved as a participating agency in the environmental review process for the project.

As a participating agency, the Tribe will have the opportunity to be involved in defining the purpose of and need for the project and determining the range of alternatives to be considered for the project. In addition, you will be invited to:

- Provide input on the impact assessment methodologies and level of detail within your Tribe's area of expertise;
- Participate in coordination meetings, conference calls, and joint field reviews, as appropriate, and identify any environmental issues of concern your Tribe may have;
- Provide studies, methodologies, responses, or comments within your Tribe's expertise or jurisdiction on sections of the pre-draft or pre-final environmental documents, the alternatives considered, and the anticipated impacts and mitigation; and
- Concur on the project schedule that is prepared as a part of the coordination plan.

If you elect to become a participating agency, you must accept this invitation in writing. The acceptance may be e-mailed to *[insert e-mail address]*; please include the title of the official responding. In order to give your Tribe adequate opportunity to weigh the relevance of your participation in this environmental review process, a written response to this invitation is not due until after the interagency scoping meeting, scheduled for *[insert date/time] at [insert location]*. We invite you or your delegate to represent your Tribe at this meeting. A written response accepting designation as a participating agency should be transmitted to this office not later than *[insert date not more than 30 days later unless FTA determines there is good cause; if the scoping meeting is scheduled for more than 30 days later, adjust response deadline accordingly]*.

Additional information will be forthcoming during the scoping process. If you have questions regarding this invitation, please contact *[insert name and telephone number]*.

Sincerely,

[Insert Regional Administrator]

Attachments: Scoping Information Packet [if applicable, or provide link to website in text above]

cc (by e-mail): [if known, the tribal environmental staff member]
[Sponsoring Transit Agency]

Appendix C – FHWA Guidance on the Statute of Limitations (SOL) provision under 23 U.S.C. § 139(l)

Although the SOL provision in 23 U.S.C. § 139(l) also applies to FRA and FTA, this guidance, which addresses FHWA procedures, only applies to FHWA and its recipients. The SOL provision can expedite project delivery, which includes avoiding delayed or unexpected litigation. The FHWA Division Offices must work closely with their FHWA field legal counsel to determine whether and when to publish a SOL notice, and to determine the content of SOL notices for each project. A FHWA template SOL notice follows the questions and answers in this appendix. This template can be used for a single project SOL notice, a post-ROD action SOL notice, and a tier 1 SOL notice, and with endnotes to address a multiple-projects SOL notice.

Question C-1: What is the "limitations on claims" provision in 23 U.S.C. § 139(l)?

Answer: The limitations on claims (referred to as "SOL") provision in 23 U.S.C. § 139(l) prohibits Federal courts from having jurisdiction to hear legal claims for the review of a permit, license, or approval issued by a Federal agency for a highway project if the claims are filed more than 150 days after the publication of an SOL notice in the *Federal Register*. The law provides certainty and predictability in the transportation decision-making process and program implementation. The SOL notice must declare that there have been one or more final Federal agency actions (decisions) taken with regard to one or more highway or public transportation capital projects.

Question C-2: What happens if no SOL notice is published in the *Federal Register*?

Answer: If the claim is for review of a Federal action under NEPA, then the limitation period found in 28 U.S.C. § 2401 applies to the final agency action. That law provides a claims period of six (6) years. Other time periods for limitations on claims can vary under other Federal laws applicable to the project, when no SOL notice is published.

Question C-3: Which Federal agency actions are included under the "permit, license, or approval" language of 23 U.S.C. § 139(l)?

Answer: An SOL notice can be used for any final action by a Federal agency that is required for a highway or public transportation capital project and that is subject to judicial review. Examples of these decisions include those by other Federal agencies that apply to the project, such as Clean Water Act Section 404 permits by the U.S. Army Corps of Engineers or the final Biological Opinion through FHWA's Section 7 Consultation under the Endangered Species Act. The SOL Notice also includes Federal agency decisions that FHWA considers when making its own decisions in accordance with the NEPA process.

Question C-4: How does FHWA determine whether a decision is "final" within the meaning of the SOL provision?

Answer: Generally, a Federal agency action is considered final if the agency has completed its decision-making process under the relevant law and the action is one that determines rights or obligations, or is an action from which legal consequences will flow. The FHWA's signing of a FEIS/ROD or a ROD, for example, is the final action in FHWA's decision-making process under NEPA with respect to issues such as project alternatives, potential environmental effects of the project, and the avoidance and minimization of impacts. Under 23 U.S.C. § 139(*l*), "final" includes decisions in Tier 1 EIS proceedings that the deciding agency does not expect to revisit during Tier 2 proceedings in the absence of substantial new and relevant information that may affect the outcome of the agency's decision (see Question C-11).

In most instances, staff at the FHWA Division Office will be able to determine finality for purposes of the SOL provision based on their knowledge of the project and its coordination/consultation efforts with other Federal agencies. If questions arise in this area, the Division Office staff should raise this issue with the FHWA Office of Chief Counsel in their coordination on the SOL notice.

Question C-5: What is required for the SOL notice to apply to claims under Federal laws other than NEPA?

Answer: SOL notices should list or describe all permits, licenses, and approvals by Federal agencies that relate to and are within the scope of the project and are final as of the date the notice is issued. The SOL notice should include the key laws under which the Federal agencies took final action. The FHWA may issue more than one SOL notice for one project if there are permit, license, or approval decisions that occur at different times (see Question C-19 and C-20).

Question C-6: What kind of coordination or concurrence is required in order for FHWA to publish a notice that covers another Federal agency's decision?

Answer: Interagency coordination on the notices is critically important. The FHWA Division Offices should work with their counterparts in other Federal agencies to ensure that there is agreement on which decisions are complete and ready for inclusion in the notice. Formal concurrence is not required, but the other Federal agency making the permit, license, or approval decision should clearly acknowledge that the decision is final within the meaning of the SOL provision. For Tier 1 EIS notices, this means that the deciding agency does not plan to revisit the issue later in the Tier 2 environmental review process, unless substantial new information arises that is material to the agency's decision. (see Question C-11).

A deciding agency may acknowledge that it has made a final decision within the meaning of the SOL provision by means of interagency discussions or through e-mail. However, it is recommended that lead agencies obtain the acknowledgement in the deciding agency's comments on the project to track and verify the acknowledgement later. Failure to track this acknowledgement, however, does not affect the SOL validity.

Question C-7: Can another Federal agency publish an SOL notice for a highway or public transportation capital project that has no FHWA-administered funding but requires decisions by FHWA as part of its permitting or review process?

Answer: Yes, another Federal agency may publish an SOL notice but only if there is a legal requirement for approval of the project by FHWA or another operating administration or secretarial office within the U.S. DOT (see 23 U.S.C. § 139(a)(9)). The Federal lead agency for NEPA would be the agency that determines whether to publish a SOL notice for such project.

Question C-8: Does the limitations on claims provision apply to all NEPA classes of action?

Answer: The process can be used for any NEPA class of action that results in a decision. These projects include CEs, EAs, and EISs. Before deciding to publish a notice, the FHWA Division Office, in consultation with the project sponsor and FHWA field legal counsel, should consider whether publication is justified. This justification assessment is discussed below.

Question C-9: How does the project's NEPA class of action (CE, EA, EIS) affect whether the SOL notice should be issued?

Answer: The likely benefits of the SOL notice, as well as the risk and potential effects of litigation, generally are different for each NEPA class of action. The FHWA anticipates that all major projects and projects for which an EIS is prepared will merit use of the SOL notice. EIS projects typically are substantial in size and complexity and the potential effects of delay due to litigation will be the greatest. EA projects may be candidates for an SOL notice, depending upon the nature of the project, the types of issues decided, the estimated likelihood of litigation, and the potential effects of litigation. For example, publication of an SOL notice might be appropriate if an EA is used on a project involving an action that is listed in 23 CFR 771.115(a) as normally requiring an EIS. By contrast, the use of an SOL notice for a CE should be relatively rare. The FHWA does not expect SOL notices to be used for projects that are CEs under 23 CFR 771.117(c). It is FHWA's view that the notice is generally more appropriate for CE projects under 23 CFR 771.117(d).

Question C-10: What kinds of risk management factors should be considered when deciding whether to publish a SOL notice?

Answer: It is important to consider the context, scope, and level of controversy surrounding the project, among other factors, when deciding whether to publish an SOL notice. Each FHWA Division Office determines whether publication of the SOL notice is the best course in light of all factors affecting the project. The FHWA Division Offices must work with their field legal counsel when making these determinations, which includes discussion of risk management issues. Risk management discussions should consider the interplay among applicable laws; the source, level, and nature of project opposition; and other important conditions or factors. Important questions and rationales to consider include:

1. Will publication of the SOL notice trigger unnecessary litigation? For example, is there an ongoing effort to resolve project disputes that is likely to eliminate the possibility of future litigation? In such a situation, the publication of an SOL notice might cause project opponents to file "protective" litigation in case the discussions fail to reach a satisfactory conclusion.

2. Is the project funded and ready to proceed to construction within the next year? If not, then publication of an SOL notice may be premature and generate unnecessary litigation. What would be the impacts on the project if publication of the SOL notice were delayed until dispute resolution efforts are complete, or until funding for construction is available? In some situations, SOL notices have been filed for projects that lack funding to proceed to construction, resulting in FHWA defending lawsuits over projects not likely to be built in the near future.

3. How likely is it that there are opponents committed to suing? What is the nature and intensity of any controversy over issues like natural resource or community impacts, sources of funding, or other "hot button" issues?

4. Are there non-FHWA approvals, licenses, or permits yet to be obtained or public or political dynamics affecting the project that are likely to trigger litigation later after another final Federal agency project decision? If so, then publication of an SOL notice could be premature, may generate unnecessary litigation, and be an unnecessary expenditure of FHWA funds should another SOL notice be published.

5. Is an SOL notice necessary or useful? Are other defenses available and more effective in these circumstances?

6. What is the risk to FHWA from an adverse decision? What issues might be litigated? How important are those issues to FHWA's program? How likely is it that litigation would result in an adverse precedent for the Federal-aid highway or Federal Lands Highway Program?

7. Is defense of this project in litigation a good expenditure of FHWA resources?

8. Has litigation on the project started? Would the notice help in identifying all potential plaintiffs and ensure timely filing of claims against the project?

An SOL notice may be useful in cases where there are no known potential litigants, but where there is a desire to ensure that the project can move into implementation in the short-term without the risk of unexpected claims against it. An SOL notice will define the time period during which "newly" interested parties must act on their views. If a project has no substantial known or likely opposition, or if the timeline for implementation does not require the protection afforded by the SOL notice, then there may be little benefit from publication of an SOL notice.

Question C-11: Can the limitations on claims process be used for Tier 1 NEPA processes and programmatic environmental documents?

Answer: Yes, the SOL notice provision can apply to a Tier 1, or programmatic, NEPA process to the extent that the final Tier 1 or programmatic document results in final decisions.

Because Tier 1 proceedings decide a narrower range of issues than a project-specific NEPA process, it is important that the NEPA determination clearly describe which decisions are being made that are considered final within the meaning of the SOL provision in 23 U.S.C. § 139(*l*). Among the decisions that might be made in Tier 1 processes, and could be covered by an SOL notice, are corridor location, modal choice, alternatives eliminated from further analysis, alternatives to be carried forward for Tier 2 analysis, and jurisdictional determinations made under Federal law. The Tier 1 SOL notice may refer generally to the Tier 1 environmental documentation for detailed discussions of the decisions made. However, because of the "phased" nature of tiered processes, the notice also should include information on the specific decisions covered by the Tier 1 SOL notice. The objective is to identify issues that will not be open for further analysis or discussion in the Tier 2 process(es) absent substantial changes in the proposed action or significant new and relevant information. For example, it is appropriate to list the Tier 1 alternatives eliminated from the Tier 2 analysis.

A programmatic environmental document under 42 U.S.C. §§ 4336b & 4336e(11) is an EIS or EA analyzing all or some of the environmental effects of a policy, program, plan, or group of related actions. Programmatic environmental documents can be used to satisfy the Sec. 139 environmental review process when the requirements in 23 U.S.C. § 139(b)(3)(B) are followed.

Question C-12: How does the SOL notice provision apply to a determination based on a supplemental environmental document?

Answer: Pursuant to 23 U.S.C. § 139(*l*), a supplemental environmental document requires a separate SOL notice. An SOL notice published for earlier environmental documents or for earlier Federal agency decisions would not suffice for matters contained in the supplemental NEPA process or for decisions made based on the supplemental NEPA process.

Question C-13: How does the SOL notice provision apply to reevaluations of approved environmental documents?

Answer: A separate SOL notice is not required for reevaluations completed pursuant to 23 CFR 771.129, though FHWA may choose to publish an SOL notice for a project in appropriate circumstances (e.g., a highly controversial or visible project).

Question C-14: Can SOL notices for several projects be consolidated for publishing as a single notice in the *Federal Register* to save time and cost?

Answer: Yes. This approach may be cost effective if FHWA is publishing several notices in the same timeframe. To help readers identify the key laws involved with each project, FHWA suggests that each individual project description reference the primary laws applicable to that project.

Question C-15: Who decides whether an SOL notice gets published in the *Federal Register*? Can agencies other than FHWA publish the SOL notice, especially when there is a considerable amount of time between the FHWA NEPA determination and the other agency's action?

Answer: The decision whether to use the SOL notice process is one that the FHWA Division Office will make in consultation with the other lead agencies. For Federal Lands Highway projects, consultation should take place with the lead agency for NEPA, if it is an agency other than FHWA. If Federal Lands Highways has assumed joint lead agency responsibilities, the two agencies will decide together.

Federal agencies other than FHWA may publish the notices. However, as a practical matter it is preferable for FHWA, as a Federal lead agency, to handle the publication for all affected Federal agencies regardless of the amount of time that may pass between the FHWA NEPA determination and the last Federal agency decision.

As discussed in Question C-6, the FHWA Division Office should ensure that there is coordination with other Federal agencies whose decisions are covered by an SOL notice. It is important for those agencies to be aware of the intention to publish a notice, especially if the notice directs readers to those other agencies for information about their actions on the project. Such coordination also is important because it allows FHWA to confirm that there are no other pending actions or proceedings at the other Federal agency that might affect that agency's project decision.

Question C-16: What information should be included in an SOL notice?

Answer: The notice is to provide enough information to give the public reasonable notice of the general nature and location of the project and of the fact that there has been action by one or more Federal agencies that is final and subject to the 150-day limitation period. The notice should specify that claims will be barred at the end of the 150-day period and state the legal authority for agency action and the 150-day limitation.

The FHWA's notices often will cover actions by several Federal agencies and a number of agency decisions, rather than just the FHWA's NEPA action. In such cases, the SOL notice should state that it applies to the actions of those other Federal agencies and to all laws under which Federal agencies took action. It is not necessary to list in the SOL notice every agency whose decision is covered, so long as the project documents that are referenced in the notice contain the information about the individual agencies and their decisions. However, it makes sense to specifically name those agencies responsible for major decisions covered by the notice and to direct the reader's attention to the relevant agency's records that relate to the agencies'

decisions (for example, by including the U.S. Army Corps of Engineers explicitly in the SOL notice when it covers a Section 404 permit decision). The notice should refer readers to project records for detailed information on Federal actions and related laws.

Another factor to consider in drafting a SOL notice is how best to direct readers to one or more sources for detailed information about the project and Federal agency decisions. The SOL notice contains only very abbreviated information about the project and the Federal actions. The burden is on the reader to seek detailed information. For these reasons, the instructions for obtaining additional information are important. Web sites are an excellent resource for this purpose, although alternative means for obtaining information still will be important for those who do not have easy access to the Internet. Contact information for other Federal agencies that made a project decision may be included in the notice but is not required as long as the information about the decisions of those Federal agencies is available from the FHWA or State contacts.

The SOL notices must comply with *Federal Register* technical requirements, as discussed in FHWA guidance entitled *Federal Register* Notices at https://www.environment.fhwa.dot.gov/nepa/memo_fedRegisterPubs.aspx and in the "*Federal Register* Document Drafting Handbook," available online at https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf. The FHWA sample template reflects the necessary format. Some important points to remember:

1. An FHWA official with appropriate delegated authority must sign the notice. The issuance (date must be the same date as when the notice actually is signed. Pre- or post-dating is not acceptable.
2. The person whose name is inserted in the signature block must be the person who signs the notice. It is not permissible to sign for another person.
3. The signatory must sign three (3) originals of the notice.
4. There should not be a page number on the first page of the notice.
5. There should be two spaces between the period at the end of one sentence and the first letter at the beginning of the next sentence.
6. The notice should be double spaced and single sided.

Question C-17: How is the FHWA SOL sample template used?

Answer: The sample template that follows these questions and answers includes instructions (in bold and bracketed text) for inserting project information into the notice. When using the sample template, professional judgment is needed to adapt the template to meet the needs of the project and decisions addressed by the SOL notice. Field legal counsel should be consulted when questions arise about the appropriate content for a particular SOL notice, and all SOL notices are to be reviewed by field legal counsel prior to issuance.

One example of where independent judgment is required is in completing the section that lists the primary Federal laws under which the Federal agencies have made final decisions on the project. The purpose of the notice is to advise the public that actions have been taken that trigger the limitation period. The list of laws is intended to inform readers about the matters decided by the Federal agencies. It is *not* intended to be an all-inclusive list of the laws relevant to Federal

agency decision-making. However, for many projects, it may be appropriate to list only the key laws under which Federal agencies took their actions, such as the Federal-aid Highway Act, NEPA, Section 4(f), Section 106, and the Clean Air Act. In some situations, a more extensive list may be useful if other laws create the authority (or the obligation) for decisions that are potentially controversial, or are of high interest to major stakeholders or the general public. As a resource in preparing an SOL notice with applicable laws, FHWA has a summary list of laws that affect transportation.

Question C-18: How much detail should be included in the SOL notice's description of the project?

Answer: The description of the project should be brief and contain only the information that is critical to a reader's identification of the project and comprehension of the general nature of the project. It is not necessary to describe the project history or details about how or why decisions were made. The project's geographic location and overall project scope, such as whether it is new alignment, and its length, termini, and roadway type with number of lanes and access information, is usually adequate.

Question C-19: How should publication of SOL notices be timed if Section 404 or other permits or approvals remain outstanding as of the date of the FHWA ROD, FONSI, or CE?

Answer: An SOL notice will not be effective unless the Federal agency action covered by the notice qualifies as "final" within the meaning of the SOL provision in 23 U.S.C. § 139(*l*). The best time to publish the SOL notice is when all Federal agency permits, licenses, and approvals are in place. However, this timing may not be practicable in all cases. For example, it may make sense to proceed with publication of the SOL notice immediately after FHWA issues its NEPA determination if the remaining Federal decisions are not expected to occur within a reasonable period of time. Another reason not to wait might be if the remaining Federal decisions pertain to noncontroversial matters that no one is likely to litigate. Once the other Federal agencies have completed their decision-making processes, a decision can be made whether to publish an additional SOL notice. If more than one SOL notice is published for a project, the 150-day claims period will run separately for the Federal agency actions covered by each respective SOL notice.

Question C-20: If a later SOL notice is published for a separate permit (such as a Section 404 permit) or for supplemental environmental documents that is then challenged in a lawsuit, will that lawsuit open up the previous FHWA environmental document for review even though an earlier SOL notice covered it?

Answer: To date, courts have found that a challenge to a permit or supplemental environmental document submitted after the expiration of the SOL for the original NEPA determination does not reopen that original NEPA determination. Thus, FHWA's position is that NEPA decisions affected and revisited by the subsequent NEPA decision are not subject to further review since they are not being altered by the subsequent reviews and decisions. This interpretation is

consistent with the language in 23 U.S.C. § 139(*l*) and policy stated in MAP-21 (Pub. L. 112-141) section 1301 to accelerate project delivery and reduce delay.

For supplemental environmental documents and SOL notices associated with those determinations, the effect of a SOL notice on decisions covered by a SOL notice published for an earlier NEPA determination will depend on the circumstances. Litigation of earlier decisions that are unrelated to topics addressed by the supplemental environmental document would be foreclosed by the expiration of the 150-day period after the publication of the SOL notice covering those earlier decisions.

Question C-21: Should a reference to the SOL provision be included in environmental documents?

Answer: The FHWA recommends that all environmental documents include a statement setting forth the SOL provisions so that readers of the environmental documentation are aware of the statutory provision and its effects. A sample SOL statement appears below:

> FHWA may publish a notice in the Federal Register, pursuant to 23 U.S.C. § 139(l), indicating that FHWA and one or more other Federal agencies have taken final action on permits, licenses, or approvals for this project. If such notice is published, claims seeking judicial review of those Federal agency actions will be barred unless such claims are filed within 150 days after the date of publication of the notice, or within such shorter time period as is specified in the Federal laws pursuant to which judicial review of the Federal agency action is allowed. If no notice is published, then the periods of time that otherwise are provided by the Federal laws governing such claims will apply.

Question C-22: Does the SOL provision affect how a project's administrative record is compiled?

Answer: No. However, the limitations on claims provision highlight the importance of good documentation and of tracking of agency decisions. It also is important to ensure that copies of the decisions and supporting documents for actions taken by other Federal agencies are included in the FHWA project documents, even if those agencies acted after the FHWA NEPA decision, because the SOL notice will direct readers to FHWA or the State for information on all the decisions relating to the project. For this reason, it is important that both agencies have project documents readily available for public inspection as of the date of the publication of the SOL notice.

Question C-23: How is publication in the *Federal Register* handled?

Answer: The publication of the SOL notice should follow the same process used for authorization and publication of a notice of intent under NEPA. This applies regardless of a State's participation in the environmental review assignment programs under 23 U.S.C. §§ 326 or

327. In general, FHWA must handle publication of the notice in the *Federal Register* because of Government Printing Office requirements.

Question C-24: Who pays for the notices?

Answer: Until a system is in place for State reimbursement of the costs of publishing SOL notices as an eligible project cost, FHWA will pay for the publication of the notices. Notices should use billing code 4910-RY, as shown on the FHWA sample template.

FHWA Sample Template
(Note: see the endnotes for specific template language to use for specified projects in their SOL Notice.)
DEPARTMENT OF TRANSPORTATION [4910-RY]

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in [*fill in state name*]

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by [fill in Federal Agency(ies), if applicable. If FHWA, use FHWA abbreviation as established above, but spell out other Federal Agency names with an abbreviation for its use later in the SOL].

SUMMARY: This notice announces actions taken by the [fill in Federal Agency(ies) listed in the ACTION section above] that are final. The actions relate to a proposed highway project, [fill in highway name/number and starting and ending cities or other points] in the County [fill in county name(s)], State of [fill in state name]. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. § 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before [INSERT DATE 150 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*] ***[previous phrase must be included as written, including the brackets, since it is an instruction to the Federal Register]***. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For FHWA [if FHWA is the Federal lead agency; i.e., NEPA is not assigned to the State]: [fill in FHWA contact information, including name, title, agency name, office address and regular office hours, telephone, and e-mail]. For [fill in name of Federal agency, as applicable]: [fill in Federal agency contact information, including name, title, agency name, office address and regular office hours, telephone, and e-mail]. For [fill in name of State agency or direct recipient local government entity]: [fill in State or direct recipient local government entity contact information, including name, title, agency name, office address and regular office hours, telephone, and e-mail].

SUPPLEMENTARY INFORMATION: Notice is hereby given that **[*insert Federal agencies with final agency action decisions included in this SOL*]** has/have taken final

agency action(s) subject to 23 U.S.C. § 139(*l*)(1) by issuing licenses, permits, and approvals for the following highway project in the State of **[*fill in state name*]**: **[*Fill in brief description of project (target is no more than three to five sentences): project location, project/construction type, length of project, general purpose, FHWA project reference number, etc.*]**. The actions by the agencies, and the laws under which such actions were taken, are described in the **[*fill in last Environmental document: Final Environmental Impact Statement (FEIS), Supplemental Final Environmental Impact Statement (FEIS), Environmental Assessment (EA), Revised Environmental Assessment (EA), or Categorical Exclusion (CE)*]** for the project, approved on **[*fill in date*]**, in the **[*fill in FHWA or applicable agency] [fill in NEPA decision document: Record of Decision (ROD), Finding of No Significant Impact (FONSI), or Categorical Exclusion (CE)*]** issued on **[*fill in date*]**, and in other documents in the project records. The **[*fill in last Environmental document*]**, **[*fill in NEPA decision document*]**, and other project records are available by contacting **[*fill in "FHWA or" if FHWA is the Federal lead agency (i.e. NEPA is not assigned to the State*]**: the **[*fill in name of State agency or direct recipient local government entity*]** at the addresses provided above. The **[*fill in last Environmental document: Final Environmental Impact Statement (FEIS), Supplemental Final Environmental Impact Statement (FEIS), Environmental Assessment (EA), Revised Environmental Assessment (EA), or Categorical Exclusion (CE)*]** and ***[fill in NEPA decision document: Record of Decision (ROD), Finding of No Significant Impact (FONSI), or Categorical Exclusion (CE)]*** can be viewed and downloaded from the project Web site at **[*fill in the link*]**, or obtained from any contact listed above. The **[*fill in name of Federal agency, if applicable*]** decision and **[*fill in Federal agency action, e.g. permit*] *[fill in permit reference]***) are available by contacting **[*fill in name of Federal agency, if* applicable]** at the address provided above, and can be viewed and downloaded from **[*fill in the link to Federal agency or project web site, or delete this electronic availability text if not applicable*]**, or obtained by contacting the individuals listed above.

This notice applies to all Federal agency decisions that are final as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to **[*Insert the key laws under which Federal agencies have made final, documented decisions about the project; any law or Executive Order that does not apply to the project, or for which the Federal agency decision is not final should not be listed. Below is a sample list and their citations of potentially applicable laws*]**:

- General: National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.; Federal-Aid Highway Act (23 U.S.C. §§ 109, 139, and 128).
- Air: Clean Air Act (42 U.S.C. §§ 7401–7671q).
- Land: Section 4(f) Requirements (49 U.S.C. § 303; 23 U.S.C. § 138); Landscaping and Scenic Enhancement (Wildflowers) (23 U.S.C. § 319).
- Wildlife: Endangered Species Act (16 U.S.C. §§ 1531–1544 and 1536); Marine Mammal Protection Act (16 U.S.C. §§ 1361–1423h); Fish and Wildlife Coordination Act (16 U.S.C. §§ 661–667d); Migratory Bird Treaty Act (16 U.S.C. §§ 703-712).
- Historic and Cultural Resources: Section 106 of the National Historic Preservation Act of 1966, as amended (54 U.S.C. § 306108); Archeological

Resources Protection Act of 1977 (16 U.S.C. §§ 470aa–470mm); Archeological and Historic Preservation Act (54 U.S.C. §§ 312501-312508); Native American Grave Protection and Repatriation Act (NAGPRA) (25 U.S.C. §§ 3001–3013).

- Social and Economic: American Indian Religious Freedom Act (42 U.S.C. § 1996); Farmland Protection Policy Act (FPPA) (7 U.S.C. §§ 4201–4209).
- Wetlands and Water Resources: Clean Water Act (Section 404, Section 401, Section 319) (33 U.S.C. §§ 1251–1387); Land and Water Conservation Fund (LWCF) (16 U.S.C. §§ 4601–4604); Safe Drinking Water Act (SDWA) (42 U.S.C. § 300f–300j–26)); Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401–406); Wild and Scenic Rivers Act (16 U.S.C. §§ 1271-1287); Emergency Wetlands Resources Act, (16 U.S.C. §§ 3901, 3921); Wetlands Mitigation (23 U.S.C. §§ 119(g) and 133(b)(14)); Flood Disaster Protection Act, (42 U.S.C. §§ 4012a, 4106).
- The analysis pertaining to any applicable Executive Order considered during the environmental review process to the extent such analysis may be challenged in court. Such Executive Orders may include, E.O. 11593, Protection and Enhancement of the Cultural Environment; E.O. 11988, Floodplain Management; E.O. 11990, Protection of Wetlands; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 13007, Indian Sacred Sites; E.O. 13112, Invasive Species, as amended by E.O. 13751, Safeguarding the Nation from the Impacts of Invasive Species; E.O. 13175, Consultation and Coordination with Indian Tribal Governments; E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government; E.O. 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis; E.O. 14008, Tackling the Climate Crisis at Home and Abroad; E.O. 14096 Revitalizing Our Nation's Commitment to Environmental Justice for All.

Authority: 23 U.S.C. § 139(*l*)(1)
Issued on: [Date Signed]

_____
[Signatory Name]
[Signatory Title]
[City]
Endnotes

- **Supplemental EIS NEPA Decision included in SOL Notice:** For the "SUMMARY", "DATES", and "Authority" sections of the *Federal Register* SOL notice, use the template below. Also, use the same authority citation ("23 U.S.C. §

139(*l*)(1)–(2)") that is shown in the dates section below for the citation at the end of the "SUPPLEMENTARY INFORMATION" section.

SUMMARY: This notice announces actions taken by the **[*fill in Federal Agency(ies) listed in the ACTION section above*]** that are final. The actions relate to various proposed highway projects in the State of **[*fill in state name*]**. Those actions grant licenses, permits, and approvals for the projects.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. § 139(*l*)(1)-(2). A claim seeking judicial review of the Federal agency actions regarding the listed highway project(s) will be barred unless the claim is filed on or before [INSERT DATE 150 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*] ***[previous phrase must be included as written, including the brackets, since it is an instruction to the Federal Register]***. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

SUPPLEMENTARY INFORMATION: ***[After description of the project but before the list of laws include the following statement]***: This notice of limitation on claims pertains to final permit, license, and approval decisions made as part of the Supplemental ***[NEPA Decision (e.g., EIS, EIS/ROD, EA)]***. The limitations on claims for final permit, license, and approval decisions made under the previous notice remain unaltered by this subsequent notice.

Authority: 23 U.S.C. § 139(*l*)(1)-(2)

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- **Post-ROD Decision SOL Notice:** For the "SUPPLEMENTARY INFORMATION" section of the *Federal Register* SOL notice, use the following template section:

SUPPLEMENTARY INFORMATION: On **[*fill in date*]**, FHWA published a "Notice of Final Federal Agency Actions on Proposed Highway in **[*fill in State name*]**" in the *Federal Register* at **[*fill in Federal Register reference*]** for the following highway project: **[*fill in brief description of project from the previous SOL notice that addresses: project location, project/construction type, length of project, general purpose, FHWA project reference number, type(s) of FHWA Environmental document(s), and date(s) issued*]**. Notice is hereby given that, subsequent to the earlier FHWA notice, the **[*fill in name of Federal agency(ies)*]** has taken final agency actions within the meaning of 23 U.S.C. § 139(*l*)(1) by **[*fill in final Federal agency action, e.g. issuing permits*]** and approvals for the highway project. The action(s) by the **[*fill in name of Federal agency(ies)*]**, associated final actions by other Federal agencies, and the laws under which such actions were taken, are described in the **[*fill in name of Federal agency(ies)*]** decisions and its project records, referenced as **[*fill in any reference information, if applicable such as permit number(s)*]**. That information is available by contacting the **[*fill in name of Federal agency(ies)*]**at the address provided above.

Information about the project and project records also are available from the **[*fill in name of any applicable Federal agency, e.g. FHWA*]** and the **[*fill in name of State agency*]** at the address(es) provided above. The **[*insert references to FHWA Environmental documents, such as FEIS and ROD or EA and FONSI*]** and **[*insert decision(s) that are the subject of this SOL notice*]** can be viewed and downloaded from the project Web site

at [***fill in the link***] or obtained from any contact listed above. This notice applies to all Federal agency final actions taken after the issuance date of the FHWA *Federal Register* notice described above. The laws under which actions were taken include, but are not limited to **[*Insert the key laws and Executive Orders under which Federal agencies have made final, documented decisions about the project since the date of the first section139(l) notice; any law or Executive Order that does not apply to the project, or for which the Federal agency decision is not final should not be listed.*]**:

1. [insert laws and Executive Orders in numbered list here per sample template above.]
2. [Insert additional projects into the numbered list with information listed in #1 above.]
3. [Repeat until all projects to be addressed by the SOL notice are listed.]

****

- **Multiple Projects SOL Notice:** For the "SUPPLEMENTARY INFORMATION" section of the *Federal Register* SOL notice, use the following template section:

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the highway projects in the State of **[*fill in state name*]** that are listed below. The actions by the Federal agencies on a project, and the laws under which such actions were taken, are described in the categorical exclusion (CE), environmental assessment (EA), environmental impact statement (EIS), or supplemental EIS (SEIS) issued in connection with the project **[*delete here, and elsewhere, references to any document types that are not included in this notice*]**, and in other project records. The CE, EA, FEIS, Findings of No Significant Impact (FONSI), Record of Decision (ROD), or SEIS, and other project records for the listed projects are available by contacting the **[*fill in FHWA, if applicable, i.e. NEPA is not assigned to the State agency*]** or the **[*fill in name of State agency*]** at the address(es) provided above. For some of the projects, the FEIS, SEIS, EA, ROD, or FONSI documents **[*delete references to any document types that do not apply to projects in this notice*]** can be viewed and downloaded from the project Web site **[*fill in the link*]**. The **[*fill in name of Federal agency, if applicable*]** decision and **[*fill in Federal agency action, e.g. permit*]** (**[*fill in permit reference]***) are available by contacting **[*fill in name of Federal agency, if* applicable]** at the address provided above, and can be viewed and downloaded from **[*fill in the link to Federal agency or project web site, or delete this electronic availability text if not applicable*]**, or obtained by contacting the individuals listed above.

This notice applies to all Federal agency decisions on the listed projects as of the issuance date of this notice and all laws under which such actions were taken. The laws under which Federal agency decisions were made on the projects listed in this notice include, but are not limited to **[*insert the key laws and Executive Orders under which a Federal agency made a final, documented decision for at least one (or more) of the projects covered by this notice; any law or Executive Order that does not apply to at least one of the projects, or for which the Federal agency decision is not final should not be listed. Include abbreviated forms of reference for each law listed in this section (e.g., Section 404, Section 106) to facilitate cross-referencing the laws within the project description below.*]**:

1. [Insert laws and Executive Orders in numbered list here per sample template above.]

2. [Insert additional projects into the numbered list with information listed in #1 above.]

3. [Repeat until all projects to be addressed by the SOL notice are listed.]

The projects subject to this notice are:

1. Project location: [fill in city name, county name, highway number]. Project reference number: [fill in FHWA project reference number]. Project type: [fill in brief description of project (target is no more than 3-5 sentences): project location, project/construction type, length of project, general purpose]. Final actions taken under: [fill in the references to the key laws (listed above) under which Federal agencies have taken final action on this project; in the case of a nationwide Section 404 permit, include the permit number]. FHWA Environmental documents: [fill in Environmental document type and ROD/FONSI (if applicable), date of issuance, and Web address location if applicable].

2. [Insert additional projects into the numbered list with information listed in #1 above.]

3. [Repeat until all projects to be addressed by the SOL notice are listed.]

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- **Tier 1 SOL Notice:** For the "SUMMARY" and "SUPPLEMENTARY INFORMATION" section of the *Federal Register* SOL notice, use the following template section:

SUMMARY: This notice announces actions taken by FHWA and other Federal Agencies that are final. The actions relate to a proposed highway project corridor **[*fill corridor location description or highway name/number, including starting and ending cities or other points*]** in the County **[*fill in county name(s)*]**, State of **[*fill in state name*]**. The Federal decisions of a tiered environmental review process under the National Environmental Policy Act, 42 U.S.C. § 4321*, et seq.* (NEPA), and implementing regulations on tiering, 40 CFR 1501.11 and 40 CFR 1508.1(oo), determined certain issues relating to the proposed action. Those Tier 1 decisions will be used by Federal agencies in subsequent proceedings, including decisions whether to grant licenses, permits, and approvals for highway project(s).

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA has issued a Tier 1 Record of Decision (ROD) in connection with a proposed highway project in the State of **[*fill in state name*]**: **[*fill in brief description of project (target is no more than 3-5 sentences): corridor area or project location, general purpose, FHWA project reference number and decisions made in Tier 1 NEPA process such as mode, general location, alternatives being carried forward, Section 4(f), and ROW acquisition; any decisions to be finalized in Tier 2 NEPA processes should not be included.*]**.

The Tier 1 final Federal agency decisions, and the laws under which such actions were taken, are described in the Tier 1 Final Environmental Impact Statement (FEIS), approved on **[*fill in date*]**, in the Record of Decision (ROD) issued on **[*fill in date*]**, and in other documents in the project records. The FEIS, ROD, and other documents in the project file are available by contacting the **[*fill in FHWA, if applicable, i.e. NEPA is not assigned to the State agency*]** or the **[*fill in name of State agency*]** at the addresses provided above. The FEIS and ROD can be viewed on the project Web site at **[*fill in the link*]**, or obtained by contacting the individuals listed above.

This notice applies to all Federal agency decisions that are final within the meaning of 23 U.S.C. §139(*l*)(1) as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to: **[*Insert the key laws and Executive*

***Orders under which Federal agencies have made final, documented decisions about the project; any law or Executive Order that does not apply to the project, or for which the Federal agency decision is not final within the meaning of section 139(l) should not be listed.*]**:

1. [Insert laws and Executive Orders in numbered list here per sample template above.]
2. [Insert additional projects into the numbered list with information listed in #1 above.]
3. [Repeat until all projects to be addressed by the SOL notice are listed.]

Appendix D – FRA Sample Statute of Limitations (SOL) Template

[Billing Code]

DEPARTMENT OF TRANSPORTATION

FEDERAL RAILROAD ADMINISTRATION

Notice of Final Federal Agency Action[s] on Proposed Railroad Project

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice.

SUMMARY: This notice announces final environmental action[s] taken by the Federal Railroad Administration (FRA) for [insert project name(s)]. The purpose of this notice is to advise the public of the time limit to file any claims that may challenge these decisions and other Federal permits, licenses, and approvals for the project[s].

DATES: A claim seeking judicial review of Federal agency actions for the listed rail transportation project will be barred unless the claim is filed on or before [INSERT DATE TWO YEARS AFTER PUBLICATION IN THE FEDERAL REGISTER]. If the Federal law that authorizes judicial review of a claim provides a time period of less than two years for filing such claim, then the shorter time period applies.

FOR FURTHER INFORMATION CONTACT: For further information related to this notice, please contact [Contact Name], [Contact Title], [Contact Office Name], 1200 New Jersey Avenue SE, Washington, DC 20590; telephone: [INSERT]; email: [INSERT].

SUPPLEMENTARY INFORMATION: Notice is given that FRA has taken final agency action[s] by issuing certain approvals for the railroad project[s] listed below. The action[s] on the project, as well as the laws under which such action[s] was[/were] taken, are described in the

documentation issued for the projects to comply with the National Environmental Policy Act (NEPA) and related environmental laws.

This notice applies to all decisions on the project[s] as of the issuance date of this notice and all Federal laws under which such actions were taken, including but not limited to, NEPA (42 U.S.C. 4321-4375), Section 4(f) requirements (23 U.S.C. 138, 49 U.S.C. 303), Section 106 of the National Historic Preservation Act (54 U.S.C. 306108), the Clean Air Act (42 U.S.C. 7401-7671q), the Endangered Species Act (16 U.S.C. 1531), [the Clean Water Act (33 U.S.C. 1251), the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Coastal Zone Management Act of 1972 (16 U.S.C. 1451)]. This notice does not, however, alter or extend a shorter limitation period that may exist for challenges of project decisions covered by this notice. The project[s] that is[/are] the subject of this notice follows.

Project name and location: [Insert project name and location].

Project sponsor: [insert name of project sponsor].

Project summary: [insert brief 1-3 paragraph project description including: proposal, class of action, findings and determination].

Authority: 49 U.S.C. § 24201(a)(4) and 23 U.S.C. 139(*l*)(1).

Dated: [Insert Date]

[Signature]

Appendix E – 23 U.S.C. § 139 Statutory Language

As amended through November 16, 2022

Efficient environmental reviews for project decisionmaking and One Federal Decision

(a) Definitions.— In this section, the following definitions apply:

(1) Agency.— The term "agency" means any agency, department, or other unit of Federal, State, local, or Indian tribal government.

(2) Authorization.— 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.

(3) Environmental document.— The term "environmental document" includes an environmental assessment, finding of no significant impact, notice of intent, environmental impact statement, or record of decision under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(4) Environmental impact statement.—The term "environmental impact statement" means the detailed statement of environmental impacts required to be prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(5) Environmental review process.—

(A) **In general.—** The term "environmental review process" means the process for preparing for a project an environmental impact statement, environmental assessment, categorical exclusion, or other document prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(B) **Inclusions.—** The term "environmental review process" includes the process and schedule, including a timetable for and completion of any environmental permit, approval, review, or study required for a project under any Federal law other than the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(6) Lead agency.— The term "lead agency" means the Department of Transportation and, if applicable, any State or local governmental entity serving as a joint lead agency pursuant to this section.

(7) Major project.—

(A) In general.— 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 environmental impact statement 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.

(B) Clarification.— In this section, the term "major project" does not have the same meaning as the term "major project" as described in section 106(h).

(8) Multimodal project.— The term "multimodal project" means a project that requires the approval of more than 1 Department of Transportation operating administration or secretarial office.

(9) Project.—

(A) In general.— The term "project" 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 operating administration or secretarial office within the Department of Transportation.

(B) Considerations.— In determining whether a project is a project under subparagraph (A), the Secretary shall take into account, if known, any sources of Federal funding or financing identified by the project sponsor, including any discretionary grant, loan, and loan guarantee programs administered by the Department of Transportation.

(10) Project sponsor.— The term "project sponsor" means the agency or other entity, including any private or public-private entity, that seeks approval of the Secretary for a project.

(11) State transportation department.— The term "State transportation department" means any statewide agency of a State with responsibility for one or more modes of transportation.

(b) Applicability.—

(1) In general.— The project development procedures in this section are applicable to all projects, including major projects, for which an environmental impact statement is prepared under the National Environmental Policy Act (42 U.S.C. 4321 et seq.) of 1969 and may be applied, as requested by a project sponsor and to the extent determined appropriate by the Secretary, to other projects for which an environmental document is prepared pursuant to such Act.

(2) Flexibility.— Any authorities granted in this section may be exercised, and any requirements established under this section may be satisfied, for a project, class of projects, or program of projects.

(3) Programmatic compliance.—

(A) In general.— The Secretary shall allow for the use of programmatic approaches to conduct environmental reviews that-

(i) eliminate repetitive discussions of the same issues;

(ii) focus on the actual issues ripe for analyses at each level of review; and

(iii) are consistent with-

(I) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(II) other applicable laws.

(B) Requirements.— In carrying out subparagraph (A), the Secretary shall ensure that programmatic reviews—

(i) promote transparency, including the transparency of-

(I) the analyses and data used in the environmental reviews;

(II) the treatment of any deferred issues raised by agencies or the public; and

(III) the temporal and spatial scales to be used to analyze issues under subclauses (I) and (II);

(ii) use accurate and timely information, including through establishment of-

(I) criteria for determining the general duration of the usefulness of the review; and

(II) a timeline for updating an out-of-date review;

(iii) describe—

(I) the relationship between any programmatic analysis and future tiered analysis; and

(II) the role of the public in the creation of future tiered analysis;

(iv) are available to other relevant Federal and State agencies, Indian tribes, and the public; and

(v) provide notice and public comment opportunities consistent with applicable requirements.

(c) Lead Agencies.—

(1) Federal lead agency.—

(A) In general.— The Department of Transportation, or an operating administration thereof designated by the Secretary, shall be the Federal lead agency in the environmental review process for a project.

(B) Modal administration.— If the project requires approval from more than 1 modal administration within the Department, the Secretary may designate a single modal administration to serve as the Federal lead agency for the Department in the environmental review process for the project.

(2) Joint lead agencies.— Nothing in this section precludes another agency from being a joint lead agency in accordance with regulations under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(3) Project sponsor as joint lead agency.— Any project sponsor that is a State or local governmental entity receiving funds under this title or chapter 53 of title 49 for the project shall serve as a joint lead agency with the Department for purposes of preparing any environmental document under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and may prepare any such environmental document required in support of any action or approval by the Secretary if the Federal lead agency furnishes guidance in such preparation and independently evaluates such document and the document is approved and adopted by the Secretary prior to the Secretary taking any subsequent action or making any approval based on such document, whether or not the Secretary's action or approval results in Federal funding.

(4) Ensuring compliance.— The Secretary shall ensure that the project sponsor complies with all design and mitigation commitments made jointly by the Secretary and the project sponsor in

any environmental document prepared by the project sponsor in accordance with this subsection and that such document is appropriately supplemented if project changes become necessary.

(5) Adoption and use of documents.— Any environmental document prepared in accordance with this subsection may be adopted or used by any Federal agency making any approval to the same extent that such Federal agency could adopt or use a document prepared by another Federal agency.

(6) Roles and responsibility of lead agency.— With respect to the environmental review process for any project, the lead agency shall have authority and responsibility-

(A) to take such actions as are necessary and proper, within the authority of the lead agency, to facilitate the expeditious resolution of the environmental review process for the project;

(B) to prepare or ensure that any required environmental impact statement or other document required to be completed under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) is completed in accordance with this section and applicable Federal law;

(C) to consider and respond to comments received from participating agencies on matters within the special expertise or jurisdiction of those agencies; and

(D) to calculate annually the average time taken by the lead agency to complete all environmental documents for each project during the previous fiscal year.

(7) Process improvements for projects.—

(A) In general.— The Secretary shall review—

(i) existing practices, procedures, rules, regulations, and applicable laws to identify impediments to meeting the requirements applicable to projects under this section; and

(ii) best practices, programmatic agreements, and potential changes to internal departmental procedures that would facilitate an efficient environmental review process for projects.

(B) Consultation.— In conducting the review under subparagraph (A), the Secretary shall consult, as appropriate, with the heads of other Federal agencies that participate in the environmental review process.

(C) Report.— Not later than 2 years after the date of enactment of the Surface Transportation Reauthorization Act of 2021, the Secretary shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report that includes—

(i) the results of the review under subparagraph (A); and

(ii) an analysis of whether additional funding would help the Secretary meet the requirements applicable to projects under this section.

(d) Participating Agencies.—

(1) In general.— The lead agency shall be responsible for inviting and designating participating agencies in accordance with this subsection.

(2) Invitation.— Not later than 45 days after the date of publication of a notice of intent to prepare an environmental impact statement or the initiation of an environmental assessment, the lead agency shall identify any other Federal and non-Federal agencies that may have an interest in the project, and shall invite such agencies to become participating agencies in the environmental review process for the project. The invitation shall set a deadline for responses to be submitted. The deadline may be extended by the lead agency for good cause.

(3) Federal participating agencies.— Any Federal agency that is invited by the lead agency to participate in the environmental review process for a project shall be designated as a participating agency by the lead agency unless the invited agency informs the lead agency, in writing, by the deadline specified in the invitation that the invited agency—

(A) has no jurisdiction or authority with respect to the project;

(B) has no expertise or information relevant to the project; and

(C) does not intend to submit comments on the project.

(4) Effect of designation.—

(A) Requirement.— A participating agency shall comply with the requirements of this section.

(B) Implication.— Designation as a participating agency under this subsection shall not imply that the participating agency—

(i) supports a proposed project; or

(ii) has any jurisdiction over, or special expertise with respect to evaluation of, the project.

(5) Cooperating agency.— A participating agency may also be designated by a lead agency as a "cooperating agency" under the regulations contained in part 1500 of title 40, Code of Federal Regulations.

(6) Designations for categories of projects.— The Secretary may exercise the authorities granted under this subsection for a project, class of projects, or program of projects.

(7) Concurrent reviews.— Each participating agency and cooperating agency shall—

(A) carry out the obligations of that agency under other applicable law concurrently, and in conjunction, with the review required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), unless doing so would impair the ability of the Federal agency to conduct needed analysis or otherwise carry out those obligations; and

(B) formulate and implement administrative, policy, and procedural mechanisms to enable the agency to ensure completion of the environmental review process in a timely, coordinated, and environmentally responsible manner.

(8) Single environmental document.—

(A) In general.— Except as inconsistent with paragraph (7) and except as provided in subparagraph (D), to the maximum extent practicable and consistent with Federal law, all Federal authorizations and reviews for a project shall rely on a single environmental document for each kind of environmental document prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) under the leadership of the lead agency.

(B) Use of document.—

(i) In general.— To the maximum extent practicable, the lead agency shall develop environmental documents sufficient to satisfy the requirements for any Federal approval or other Federal action required for the project, including authorizations by other Federal agencies.

(ii) Cooperation of participating agencies.— Other participating agencies shall cooperate with the lead agency and provide timely information to help the lead agency carry out this subparagraph.

(C) Treatment as participating and cooperating agencies.— A Federal agency required to make an approval or take an action for a project, as described in subparagraph (B), shall work with the lead agency for the project to ensure that the agency making the approval or taking the action is treated as being both a participating and cooperating agency for the project.

(D) Exceptions.— The lead agency may waive the application of subparagraph (A) with respect to a project if-

(i) the project sponsor requests that agencies issue separate environmental documents;

(ii) the obligations of a cooperating agency or participating agency under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) have already been satisfied with respect to the project; or

(iii) the lead agency determines that reliance on a single environmental document (as described in subparagraph (A)) would not facilitate timely completion of the environmental review process for the project.

(9) Participating agency responsibilities.— An agency participating in the environmental review process under this section shall—

(A) provide comments, responses, studies, or methodologies on those areas within the special expertise or jurisdiction of the agency; and

(B) use the process to address any environmental issues of concern to the agency.

(10) Timely authorizations for major projects.—

(A) Deadline.— Except as provided in subparagraph (C), all authorization decisions necessary for the construction of a major project shall be completed by not later than 90 days after the date of the issuance of a record of decision for the major project.

(B) Detail.— The final environmental impact statement for a major project shall include an adequate level of detail to inform decisions necessary for the role of the participating agencies and cooperating agencies in the environmental review process.

(C) Extension of deadline.— The head of the lead agency may extend the deadline under subparagraph (A) if—

(i) Federal law prohibits the lead agency or another agency from issuing an approval or permit within the period described in that subparagraph;

(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.

(e) Project Initiation.—

(1) In general.— The project sponsor shall notify the Secretary of the type of work, termini, length and general location of the proposed project (including any additional information that the

project sponsor considers to be important to initiate the process for the proposed project), together with a statement of any Federal approvals anticipated to be necessary for the proposed project, for the purpose of informing the Secretary that the environmental review process should be initiated.

(2) Submission of documents.— The project sponsor may satisfy the requirement under paragraph (1) by submitting to the Secretary any relevant documents containing the information described in that paragraph, including a draft notice for publication in the *Federal Register* announcing the preparation of an environmental review for the project.

(3) Review of application.— Not later than 45 days after the date on which the Secretary receives notification under paragraph (1), the Secretary shall provide to the project sponsor a written response that, as applicable—

(A) describes the determination of the Secretary—

(i) to initiate the environmental review process, including a timeline and an expected date for the publication in the *Federal Register* of the relevant notice of intent; or

(ii) to decline the application, including an explanation of the reasons for that decision; or

(B) requests additional information, and provides to the project sponsor an accounting regarding what documentation is necessary to initiate the environmental review process.

(4) Request to designate a lead agency.—

(A) In general.— Any project sponsor may submit to the Secretary a request to designate the operating administration or secretarial office within the Department of Transportation with the expertise on the proposed project to serve as the Federal lead agency for the project.

(B) Secretarial action.—

(i) In general.— If the Secretary receives a request under subparagraph (A), the Secretary shall respond to the request not later than 45 days after the date of receipt.

(ii) Requirements.—The response under clause (i) shall—

(I) approve the request;

(II) deny the request, with an explanation of the reasons for the denial; or

(III) require the submission of additional information.

(iii) Additional information.— If additional information is submitted in accordance with clause (ii)(III), the Secretary shall respond to the submission not later than 45 days after the date of receipt.

(5) Environmental checklist.—

(A) Development.— The lead agency for a project, in consultation with participating agencies, shall develop, as appropriate, a checklist to help project sponsors identify potential natural, cultural, and historic resources in the area of the project.

(B) Purpose.— The purposes of the checklist are—

(i) to identify agencies and organizations that can provide information about natural, cultural, and historic resources;

(ii) to develop the information needed to determine the range of alternatives; and

(iii) to improve interagency collaboration to help expedite the permitting process for the lead agency and participating agencies.

(f) Purpose and Need; Alternatives Analysis. —

(1) Participation.— As early as practicable during the environmental review process, the lead agency shall provide an opportunity for involvement by participating agencies and the public in defining the purpose and need for a project.

(2) Definition.— Following participation under paragraph (1), the lead agency shall define the project's purpose and need for purposes of any document which the lead agency is responsible for preparing for the project.

(3) Objectives.— The statement of purpose and need shall include a clear statement of the objectives that the proposed action is intended to achieve, which may include—

(A) achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan;

(B) supporting land use, economic development, or growth objectives established in applicable Federal, State, local, or tribal plans; and

(C) serving national defense, national security, or other national objectives, as established in Federal laws, plans, or policies.

(4) Alternatives analysis.—

(A) Participation.—

(i) In general.— As early as practicable during the environmental review process, the lead agency shall provide an opportunity for involvement by participating agencies and the public in determining the range of alternatives to be considered for a project.

(ii) Comments of participating agencies.— To the maximum extent practicable and consistent with applicable law, each participating agency receiving an opportunity for involvement under clause (i) shall limit the comments of the agency to subject matter areas within the special expertise or jurisdiction of the agency.

(iii) Effect of nonparticipation.— A participating agency that declines to participate in the development of the purpose and need and range of alternatives for a project shall be required to comply with the schedule developed under subsection (g)(1)(B).

(B) Range of alternatives.—

(i) Determination.— Following participation under subparagraph (A), the lead agency shall determine the range of alternatives for consideration in any document which the lead agency is responsible for preparing for the project.

(ii) Use.— To the maximum extent practicable and consistent with Federal law, the range of alternatives determined for a project under clause (i) shall be used for all Federal environmental reviews and permit processes required for the project unless the alternatives must be modified—

(I) to address significant new information or circumstances, and the lead agency and participating agencies agree that the alternatives must be modified to address the new information or circumstances; or

(II) for the lead agency or a participating agency to fulfill the responsibilities of the agency under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) in a timely manner.

(C) Methodologies.— The lead agency also shall determine, in collaboration with participating agencies at appropriate times during the study process, the methodologies to be used and the level of detail required in the analysis of each alternative for a project.

(D) Preferred alternative.— At the discretion of the lead agency, the preferred alternative for a project, after being identified, may be developed to a higher level of detail than other alternatives in order to facilitate the development of mitigation measures or concurrent compliance with

other applicable laws if the lead agency determines that the development of such higher level of detail will not prevent the lead agency from making an impartial decision as to whether to accept another alternative which is being considered in the environmental review process.

(E) Reduction of duplication.—

(i) In general.— In carrying out this paragraph, the lead agency shall reduce duplication, to the maximum extent practicable, between-

(I) the evaluation of alternatives under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(II) the evaluation of alternatives in the metropolitan transportation planning process under section 134 or an environmental review process carried out under State law (referred to in this subparagraph as a "State environmental review process").

(ii) Consideration of alternatives.— The lead agency may eliminate from detailed consideration an alternative proposed in an environmental impact statement regarding a project if, as determined by the lead agency—

(I) the alternative was considered in a metropolitan planning process or a State environmental review process by a metropolitan planning organization or a State or local transportation agency, as applicable;

(II) the lead agency provided guidance to the metropolitan planning organization or State or local transportation agency, as applicable, regarding analysis of alternatives in the metropolitan planning process or State environmental review process, including guidance on the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and any other Federal law necessary for approval of the project;

(III) the applicable metropolitan planning process or State environmental review process included an opportunity for public review and comment;

(IV) the applicable metropolitan planning organization or State or local transportation agency rejected the alternative after considering public comments;

(V) the Federal lead agency independently reviewed the alternative evaluation approved by the applicable metropolitan planning organization or State or local transportation agency; and

(VI) the Federal lead agency determined—

(aa) in consultation with Federal participating or cooperating agencies, that the alternative to be eliminated from consideration is not necessary for compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); or

(bb) 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.

(g) Coordination and Scheduling.—

(1) Coordination plan.—

(A) In general.— Not later than 90 days after the date of publication of a notice of intent to prepare an environmental impact statement or the initiation of an environmental assessment, the lead agency shall establish a plan for coordinating public and agency participation in and comment on the environmental review process for a project or category of projects. The coordination plan may be incorporated into a memorandum of understanding.

(B) Schedule. —

(i) In general.— The lead agency shall establish as part of such coordination plan, after consultation with and the concurrence of each participating agency for the project and with the State in which the project is located (and, if the State is not the project sponsor, with the project sponsor), a schedule for completion of the environmental review process for the project.

(ii) Factors for consideration.— In establishing the schedule, the lead agency shall consider factors such as-

(I) the responsibilities of participating agencies under applicable laws;

(II) resources available to the cooperating agencies;

(III) overall size and complexity of the project;

(IV) the 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; and

(V) the sensitivity of the natural and historic resources that could be affected by the project.

(iii) Major project schedule.— To the maximum extent practicable and consistent with applicable Federal law, in the case of a major project, the lead agency shall develop, in concurrence with the project sponsor, a schedule for the major project that is consistent with an agency average of not more than 2 years for the completion of the environmental review process for major projects, as measured from, as applicable-

(I) the date of publication of a notice of intent to prepare an environmental impact statement to the record of decision; or

(II) the date on which the head of the lead agency determines that an environmental assessment is required to a finding of no significant impact.

(C) Consistency with other time periods.— A schedule under subparagraph (B) shall be consistent with any other relevant time periods established under Federal law.

(D) Modification.—

(i) In general.— Except as provided in clause (ii), the lead agency may lengthen or shorten a schedule established under subparagraph (B) for good cause.

(ii) Exceptions.—

(I) Major projects.— In the case of a major project, the lead agency may lengthen a schedule under clause (i) for a cooperating Federal agency by not more than 1 year after the latest deadline established for the major project by the lead agency.

(II) Shortened schedules.— The lead agency may not shorten a schedule under clause (i) 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 project.

(E) Failure to meet deadline.— If a cooperating Federal agency fails to meet a deadline established under subparagraph (D)(ii)(I) —

(i) the cooperating Federal agency shall submit to the Secretary a report that describes the reasons why the deadline was not met; and

(ii) the Secretary shall—

(I) transmit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a copy of the report under clause (i); and

(II) make the report under clause (i) publicly available on the internet.

(F) Dissemination.— A copy of a schedule under subparagraph (B), and of any modifications to the schedule, shall be—

(i) provided to all participating agencies and to the State transportation department of the State in which the project is located (and, if the State is not the project sponsor, to the project sponsor); and

(ii) made available to the public.

(2) Comment deadlines.— The lead agency shall establish the following deadlines for comment during the environmental review process for a project:

(A) For comments by agencies and the public on a draft environmental impact statement, a period of not more than 60 days after publication in the *Federal Register* of notice of the date of public availability of such document, unless—

(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

(ii) the deadline is extended by the lead agency for good cause.

(B) For all other comment periods established by the lead agency for agency or public comments in the environmental review process, a period of no more than 30 days from availability of the materials on which comment is requested, unless—

(i) a different deadline is established by agreement of the lead agency, the project sponsor, and all participating agencies; or

(ii) the deadline is extended by the lead agency for good cause.

(3) Deadlines for decisions under other laws.— In any case in which a decision under any Federal law relating to a project (including the issuance or denial of a permit or license) is required to be made by the later of the date that is 180 days after the date on which the Secretary made all final decisions of the lead agency with respect to the project, or 180 days after the date on which an application was submitted for the permit or license, the Secretary shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives and publish on the Internet—

(A) as soon as practicable after the 180-day period, an initial notice of the failure of the Federal agency to make the decision; and

(B) every 60 days thereafter until such date as all decisions of the Federal agency relating to the project have been made by the Federal agency, an additional notice that describes the number of decisions of the Federal agency that remain outstanding as of the date of the additional notice.

(4) Involvement of the public.— Nothing in this subsection shall reduce any time period provided for public comment in the environmental review process under existing Federal law, including a regulation.

(h) Issue Identification and Resolution.—

(1) Cooperation.— The lead agency and the participating agencies shall work cooperatively in accordance with this section to identify and resolve issues that could delay completion of the environmental review process or could result in denial of any approvals required for the project under applicable laws.

(2) Lead agency responsibilities.— The lead agency shall make information available to the participating agencies as early as practicable in the environmental review process regarding the environmental and socioeconomic resources located within the project area and the general locations of the alternatives under consideration. Such information may be based on existing data sources, including geographic information systems mapping.

(3) Participating agency responsibilities.— Based on information received from the lead agency, participating agencies shall identify, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts. In this paragraph, issues of concern include any issues that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.

(4) Issue resolution.— Any issue resolved by the lead agency with the concurrence of participating agencies may not be reconsidered unless significant new information or circumstances arise.

(5) Interim decision on achieving accelerated decisionmaking.—

(A) In general.— Not later than 30 days after the close of the public comment period on a draft environmental impact statement, the Secretary may convene a meeting with the project sponsor, lead agency, resource agencies, and any relevant State agencies to ensure that all parties are on schedule to meet deadlines for decisions to be made regarding the project.

(B) Deadlines.— The deadlines referred to in subparagraph (A) shall be those established under subsection (g), or any other deadlines established by the lead agency, in consultation with the project sponsor and other relevant agencies.

(C) Failure to assure.— If the relevant agencies cannot provide reasonable assurances that the deadlines described in subparagraph (B) will be met, the Secretary may initiate the issue

resolution and referral process described under paragraph (6) before the completion of the record of decision.

(6) Accelerated issue resolution and referral.—

(A) Agency issue resolution meeting.—

(i) In general.— A Federal agency of jurisdiction, project sponsor, or the Governor of a State in which a project is located may request an issue resolution meeting to be conducted by the lead agency.

(ii) Action by lead agency.— The lead agency shall convene an issue resolution meeting under clause (i) with the relevant participating agencies and the project sponsor, including the Governor only if the meeting was requested by the Governor, to resolve issues that could—

(I) delay completion of the environmental review process; or

(II) result in denial of any approvals required for the project under applicable laws.

(iii) Date.— A meeting requested under this subparagraph shall be held by not later than 21 days after the date of receipt of the request for the meeting, unless the lead agency determines that there is good cause to extend the time for the meeting.

(iv) Notification.— On receipt of a request for a meeting under this subparagraph, the lead agency shall notify all relevant participating agencies of the request, including the issue to be resolved, and the date for the meeting.

(v) Disputes.— If a relevant participating agency with jurisdiction over an approval required for a project under applicable law determines that the relevant information necessary to resolve the issue has not been obtained and could not have been obtained within a reasonable time, but the lead agency disagrees, the resolution of the dispute shall be forwarded to the heads of the relevant agencies for resolution.

(vi) Convention by lead agency.— A lead agency may convene an issue resolution meeting under this subsection at any time without the request of the Federal agency of jurisdiction, project sponsor, or the Governor of a State.

(B) Elevation of issue resolution.—

(i) In general.— If issue resolution is not achieved by not later than 30 days after the date of a relevant meeting under subparagraph (A), the Secretary shall notify the lead agency, the heads of the relevant participating agencies, and the project sponsor (including the Governor only if the

initial issue resolution meeting request came from the Governor) that an issue resolution meeting will be convened.

(ii) Requirements.— The Secretary shall identify the issues to be addressed at the meeting and convene the meeting not later than 30 days after the date of issuance of the notice.

(C) Referral of issue resolution.—

(i) Referral to council on environmental quality.—
(I) In general.— If resolution is not achieved by not later than 30 days after the date of an issue resolution meeting under subparagraph (B), the Secretary shall refer the matter to the Council on Environmental Quality.

(II) Meeting.— Not later than 30 days after the date of receipt of a referral from the Secretary under subclause (I), the Council on Environmental Quality shall hold an issue resolution meeting with the lead agency, the heads of relevant participating agencies, and the project sponsor (including the Governor only if an initial request for an issue resolution meeting came from the Governor).

(ii) Referral to the president.— If a resolution is not achieved by not later than 30 days after the date of the meeting convened by the Council on Environmental Quality under clause (i)(II), the Secretary shall refer the matter directly to the President.

(7) Financial penalty provisions.—

(A) In general.— A Federal agency of jurisdiction over an approval required for a project under applicable laws shall complete any required approval on an expeditious basis using the shortest existing applicable process.

(B) Failure to decide.—

(i) In general.— If an agency described in subparagraph (A) fails to render a decision under any Federal law relating to a project that requires the preparation of an environmental impact statement or environmental assessment, including the issuance or denial of a permit, license, or other approval by the date described in clause (ii), an amount of funding equal to the amounts specified in subclause (I) or (II) shall be rescinded from the applicable office of the head of the agency, or equivalent office to which the authority for rendering the decision has been delegated by law by not later than 1 day after the applicable date under clause (ii), and once each week thereafter until a final decision is rendered, subject to subparagraph (C)—

(I) $20,000 for any project for which an annual financial plan is required under subsection (h) or (i) of section 106; or

(II) $10,000 for any other project requiring preparation of an environmental assessment or environmental impact statement.

(ii) Description of date.— The date referred to in clause (i) is—

(I) the date that is 30 days after the date for rendering a decision as described in the project schedule established pursuant to subsection (g)(1)(B);

(II) if no schedule exists, the later of—

(aa) the date that is 180 days after the date on which an application for the permit, license, or approval is complete; and

(bb) the date that is 180 days after the date on which the Federal lead agency issues a decision on the project under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); or

(III) a modified date in accordance with subsection (g)(1)(D).

(C) Limitations.—

(i) In general.— No rescission of funds under subparagraph (B) relating to an individual project shall exceed, in any fiscal year, an amount equal to 2.5 percent of the funds made available for the applicable agency office.

(ii) Failure to decide.— The total amount rescinded in a fiscal year as a result of a failure by an agency to make a decision by an applicable deadline shall not exceed an amount equal to 7 percent of the funds made available for the applicable agency office for that fiscal year.

(D) No fault of agency.— A rescission of funds under this paragraph shall not be made if the lead agency for the project certifies that—

(i) the agency has not received necessary information or approvals from another entity, such as the project sponsor, in a manner that affects the ability of the agency to meet any requirements under State, local, or Federal law; or

(ii) significant new information or circumstances, including a major modification to an aspect of the project, requires additional analysis for the agency to make a decision on the project application.

(E) Limitation.— The Federal agency with jurisdiction for the decision from which funds are rescinded pursuant to this paragraph shall not reprogram funds to the office of the head of the agency, or equivalent office, to reimburse that office for the loss of the funds.

(F) Audits.— In any fiscal year in which any funds are rescinded from a Federal agency pursuant to this paragraph, the Inspector General of that agency shall—

(i) conduct an audit to assess compliance with the requirements of this paragraph; and

(ii) not later than 120 days after the end of the fiscal year during which the rescission occurred, submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report describing the reasons why the transfers were levied, including allocations of resources.

(G) Effect of paragraph.— Nothing in this paragraph affects or limits the application of, or obligation to comply with, any Federal, State, local, or tribal law.

(8) Expedient decisions and reviews.— To ensure that Federal environmental decisions and reviews are expeditiously made—

(A) adequate resources made available under this title shall be devoted to ensuring that applicable environmental reviews under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) are completed on an expeditious basis and that the shortest existing applicable process under that Act is implemented; and

(B) the President shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate, not less frequently than once every 120 days after the date of enactment of the MAP–21, a report on the status and progress of the following projects and activities funded under this title with respect to compliance with applicable requirements under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.):

(i) Projects and activities required to prepare an annual financial plan under section 106(i).

(ii) A sample of not less than 5 percent of the projects requiring preparation of an environmental impact statement or environmental assessment in each State.

(i) Performance Measurement.— The Secretary shall establish a program to measure and report on progress toward improving and expediting the planning and environmental review process.

(j) Assistance to Affected State and Federal Agencies.—

(1) In general.—

(A) Authority to provide funds.— The Secretary may allow a public entity receiving financial assistance from the Department of Transportation under this title or chapter 53 of title 49 to provide funds to Federal agencies (including the Department), State agencies, and Indian tribes participating in the environmental review process for the project or program.

(B) Use of funds.— Funds referred to in subparagraph (A) may be provided only to support activities that directly and meaningfully contribute to expediting and improving permitting and review processes, including planning, approval, and consultation processes for the project or program.

(2) Activities eligible for funding.— Activities for which funds may be provided under paragraph (1) include transportation planning activities that precede the initiation of the environmental review process, activities directly related to the environmental review process, dedicated staffing, training of agency personnel, information gathering and mapping, and development of programmatic agreements.

(3) Use of federal lands highway funds.— The Secretary may also use funds made available under section 204 for a project for the purposes specified in this subsection with respect to the environmental review process for the project.

(4) Amounts.— Requests under paragraph (1) may be approved only for the additional amounts that the Secretary determines are necessary for the Federal agencies, State agencies, or Indian tribes participating in the environmental review process to meet the time limits for environmental review.

(5) Condition.— A request under paragraph (1) to expedite time limits for environmental review may be approved only if such time limits are less than the customary time necessary for such review.

(6) Agreement.— Prior to providing funds approved by the Secretary for dedicated staffing at an affected agency under paragraphs (1) and (2), the affected agency and the requesting public entity shall enter into an agreement that establishes the projects and priorities to be addressed by the use of the funds.

(k) Judicial Review and Savings Clause.—

(1) Judicial review.— Except as set forth under subsection (l), nothing in this section shall affect the reviewability of any final Federal agency action in a court of the United States or in the court of any State.

(2) Savings clause.— Nothing in this section shall be construed as superseding, amending, or modifying the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or any other Federal environmental statute or affect the responsibility of any Federal officer to comply with or enforce any such statute.

(3) Limitations.— Nothing in this section shall preempt or interfere with—

(A) any practice of seeking, considering, or responding to public comment; or

(B) any power, jurisdiction, responsibility, or authority that a Federal, State, or local government agency, metropolitan planning organization, Indian tribe, or project sponsor has with respect to carrying out a project or any other provisions of law applicable to projects, plans, or programs.

(l) Limitations on Claims.—

(1) In general.— Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project shall be barred unless it is filed within 150 days after publication of a notice in the *Federal Register* announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed. Nothing in this subsection shall create a right to judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.

(2) New information.— The Secretary shall consider new information received after the close of a comment period if the information satisfies the requirements for a supplemental environmental impact statement under section 771.130 of title 23, Code of Federal Regulations. The preparation of a supplemental environmental impact statement when required shall be considered a separate final agency action and the deadline for filing a claim for judicial review of such action shall be 150 days after the date of publication of a notice in the *Federal Register* announcing such action.

(m) Enhanced Technical Assistance and Accelerated Project Completion.—

(1) Definition of covered project.— In this subsection, the term "covered project" means a project-

(A) that has an ongoing environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(B) for which at least 2 years, beginning on the date on which a notice of intent is issued, have elapsed without the issuance of a record of decision.

(2) Technical assistance.— At the request of a project sponsor or the Governor of a State in which a project is located, the Secretary shall provide additional technical assistance to resolve for a covered project any outstanding issues and project delay, including by—

(A) providing additional staff, training, and expertise;

(B) facilitating interagency coordination;

(C) promoting more efficient collaboration; and

(D) supplying specialized onsite assistance.

(3) Scope of work.—

(A) In general.— In providing technical assistance for a covered project under this subsection, the Secretary shall establish a scope of work that describes the actions that the Secretary will take to resolve the outstanding issues and project delays, including establishing a schedule under subparagraph (B).

(B) Schedule.—

(i) In general.— The Secretary shall establish and meet a schedule for the completion of any permit, approval, review, or study, required for the covered project by the date that is not later than 4 years after the date on which a notice of intent for the covered project is issued.

(ii) Inclusions.— The schedule under clause (i) shall—

(I) comply with all applicable laws;

(II) require the concurrence of the Council on Environmental Quality and each participating agency for the project with the State in which the project is located or the project sponsor, as applicable; and

(III) reflect any new information that becomes available and any changes in circumstances that may result in new significant impacts that could affect the timeline for completion of any permit, approval, review, or study required for the covered project.

(4) Consultation.— In providing technical assistance for a covered project under this subsection, the Secretary shall consult, if appropriate, with resource and participating agencies on all methods available to resolve the outstanding issues and project delays for a covered project as expeditiously as possible.

(5) Enforcement.—

(A) In general.— All provisions of this section shall apply to this subsection, including the financial penalty provisions under subsection (h)(6).

(B) Restriction.— If the Secretary enforces this subsection under subsection (h)(6), the Secretary may use a date included in a schedule under paragraph (3)(B) that is created pursuant to and is in compliance with this subsection in lieu of the dates under subsection (h)(6)(B)(ii).

(n) Accelerated Decisionmaking in Environmental Reviews.—

(1) In general.-In preparing a final environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), if the lead agency modifies the statement in response to comments that are minor and are confined to factual corrections or explanations of why the comments do not warrant additional agency response, the lead agency may write on errata sheets attached to the statement instead of rewriting the draft statement, subject to the condition that the errata sheets—

(A) cite the sources, authorities, and reasons that support the position of the agency; and

(B) if appropriate, indicate the circumstances that would trigger agency reappraisal or further response.

(2) Single document.— To the maximum extent practicable, the lead agency shall expeditiously develop a single document that consists of a final environmental impact statement and a record of decision, unless—

(A) the final environmental impact statement makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or

(B) there is a significant new circumstance or information relevant to environmental concerns that bears on the proposed action or the impacts of the proposed action.

(3) Length of environmental document.—

(A) In general.— Notwithstanding any other provision of law and except as provided in subparagraph (B), to the maximum extent practicable, the text of the items described in paragraphs (4) through (6) of section 1502.10(a) of title 40, Code of Federal Regulations (or successor regulations), of an environmental impact statement for a project shall be 200 pages or fewer.

(B) Exemption.— An environmental impact statement for a project may exceed 200 pages, if the lead agency establishes a new page limit for the environmental impact statement for that project.

(o) Improving Transparency in Environmental Reviews.—

(1) In general.— Not later than 18 months after the date of enactment of this subsection, the Secretary shall—

(A) use the searchable Internet website maintained under section 41003(b) of the FAST Act-

(i) to make publicly available the status and progress of projects requiring an environmental assessment or an environmental impact statement with respect to compliance with applicable requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and any other Federal, State, or local approval required for those projects; and

(ii) to make publicly available the names of participating agencies not participating in the development of a project purpose and need and range of alternatives under subsection (f); and

(B) issue reporting standards to meet the requirements of subparagraph (A).

(2) Federal, state, and local agency participation.—

(A) Federal agencies.— A Federal agency participating in the environmental review or permitting process for a project shall provide to the Secretary information regarding the status and progress of the approval of the project for publication on the Internet website referred to in paragraph (1)(A), consistent with the standards established under paragraph (1)(B).

(B) State and local agencies.— The Secretary shall encourage State and local agencies participating in the environmental review permitting process for a project to provide information regarding the status and progress of the approval of the project for publication on the Internet website referred to in paragraph (1)(A).

(3) States with delegated authority.— A State with delegated authority for responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) pursuant to section 327 shall be responsible for supplying to the Secretary project development and compliance status for all applicable projects.

(p) Accountability and Reporting for Major Projects.—

(1) In general.— The Secretary shall establish a performance accountability system to track each major project.

(2) Requirements.— The performance accountability system under paragraph (1) shall, for each major project, track, at a minimum—

(A) the environmental review process for the major project, including the project schedule;

(B) whether the lead agency, cooperating agencies, and participating agencies are meeting the schedule established for the environmental review process; and

(C) the time taken to complete the environmental review process.

(q) Development of Categorical Exclusions.—

(1) In general.— Not later than 60 days after the date of enactment of this subsection, and every 4 years thereafter, the Secretary shall—

(A) in consultation with the agencies described in paragraph (2), identify the categorical exclusions described in section 771.117 of title 23, Code of Federal Regulations (or successor regulations), that would accelerate delivery of a project if those categorical exclusions were available to those agencies;

(B) collect existing documentation and substantiating information on the categorical exclusions described in subparagraph (A); and

(C) provide to each agency described in paragraph (2)-

(i) a list of the categorical exclusions identified under subparagraph (A); and

(ii) the documentation and substantiating information under subparagraph (B).

(2) Agencies described.— The agencies referred to in paragraph (1) are—

(A) the Department of the Interior;

(B) the Department of the Army;

(C) the Department of Commerce;

(D) the Department of Agriculture;

(E) the Department of Energy;

(F) the Department of Defense; and

(G) any other Federal agency that has participated in an environmental review process for a project, as determined by the Secretary.

(3) Adoption of categorical exclusions.—

(A) In general.— Not later than 1 year after the date on which the Secretary provides a list under paragraph (1)(C), an agency described in paragraph (2) shall publish a notice of proposed rulemaking to propose any categorical exclusions from the list applicable to the agency, subject to the condition that the categorical exclusion identified under paragraph (1)(A) meets the criteria for a categorical exclusion under section 1508.1 of title 40, Code of Federal Regulations (or successor regulations).

(C) Public comment.— In a notice of proposed rulemaking under subparagraph (A), the applicable agency may solicit comments on whether any of the proposed new categorical exclusions meet the criteria for a categorical exclusion under section 1508.1 of title 40, Code of Federal Regulations (or successor regulations).

Appendix F – Table of Page Limits

Initiation Date	EA Page Limit	EIS Page Limit	Sections Included*	Definition of "Page"
Prior to Sept. 14, 2020	No regulatory or statutory limit (CEQ guidance suggested 10-15 pages) [Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18026]	"shall normally be" 150 pages (300 pages for unusual scope/complexity) [40 CFR 1502.7]	EISs: Purpose of and need for action; alternatives including proposed action; affected environment; and environmental consequence [40 CFR 1502.7]	None
Sept. 14, 2020 – Sept. 30, 2021	75 pages [40 CFR 1501.5]	150 pages (300 pages for unusual scope/complexity) [40 CFR 1502.7]	EISs: Purpose of and need for action; alternatives including proposed action; affected environment; and environmental consequence [40 CFR 1502.7] EAs: The entire document, but not the appendices [40 CFR 1501.5]	500 words and does not include explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information [40 CFR 1508.1(v)]
October 1, 2021, to June 30, 2024	75 pages [40 CFR 1501.5]	200 pages [23 U.S.C. 139(n)(3)] – Section 139 has a provision at 23 U.S.C. 139(n)(3)(B) that allows the lead agency	EISs: Purpose of and need for action; alternatives including proposed action; affected environment; and environmental consequence [23 U.S.C. 139(n)(3)]	500 words and does not include explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information [The Agencies

		to establish a different page limit.	EAs: The entire document, but not the appendices [40 CFR 1501.5]	will use the CEQ regulatory definition for the Sec. 139 page limit for EISs].
July 1, 2024 – present	75 pages [40 CFR 1501.5]	200 pages [23 U.S.C. 139(n)(3)] – Section 139 has a provision at 23 U.S.C. 139(n)(3)(B) that allows the lead agency to establish a different page limit.	EISs: Purpose of and need for action; alternatives including proposed action; affected environment; and environmental consequence [23 U.S.C. 139(n)(3)] EAs: The entire document, but not the appendices [40 CFR 1501.5]	500 words and does not include explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information. [The Agencies will use the CEQ regulatory definition in 40 CFR 1508.1(bb) for the Sec. 139 page limit for EISs].

*Not included are page limits contained in the CEQ regulations for specific elements of environmental impact statements, such as the requirement that the cover "not exceed one page."

Appendix G – Table of Timing Requirements

Initiation Date	EA Timing Requirement	EIS Timing Requirement	Qualifying Language
Prior to Sept. 14, 2020	N/A	N/A	N/A
Sept. 14, 2020 – Sept. 30, 2021	1 year [40 CFR 1501.10]	2 years [40 CFR 1501.10]	A senior agency official may allow a longer time period. [40 CFR 1501.10]
October 1, 2021, to June 30, 2024	1 year [40 CFR 1501.10] For projects designated as major projects, the schedule must be consistent with an agency average of 2 years for major projects [23 U.S.C. 139(g)(1)(B)(iii)]	2 years [40 CFR 1501.10] For projects designated as major projects, the schedule must be consistent with an agency average of 2 years for major projects [23 U.S.C. 139(g)(1)(B)(iii)]	For non-major project EAs, a senior agency official may allow a longer time period. [40 CFR 1501.10] For EISs and for EAs designated as major projects, the timeline must be met to "the maximum extent practicable and consistent with applicable Federal law." [23 U.S.C. 139(g)(1)(B)(iii)]. The Agencies may lengthen or shorten a project schedule for good cause. [23 U.S.C. 139(g)(1)(D)(i)]
July 1, 2024 – present	1 year [40 CFR 1501.10] For projects designated as major projects, the schedule must be consistent with an agency average of 2 years for major projects [23 U.S.C. 139(g)(1)(B)(iii)]	2 years [40 CFR 1501.10] For projects designated as major projects, the schedule must be consistent with an agency average of 2 years for major projects [23 U.S.C. 139(g)(1)(B)(iii)]	For non-major project EAs, the lead agency may consider factors described in 1501.10(d) in determining the schedule and deadlines. For EISs and for EAs designated as major projects,

			the timeline must be met to "the maximum extent practicable and consistent with applicable Federal law." [23 U.S.C. 139(g)(1)(B)(iii)]. The Agencies may lengthen or shorten a project schedule for good cause. [23 U.S.C. 139(g)(1)(D)(i)]

*These tables do not include consideration of projects that were designated as "major infrastructure projects" under E.O. 13807 (Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects), issued August 15, 2017, and revoked on January 20, 2021, by E.O. 13990 (Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis).

Appendix H – EA and EIS Process Charts

Appendix H includes graphical representations of the recommended best practice timeline, to achieve the decisionmaking timelines required for the Sec. 139 environmental review process.