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MULTIMODAL NEPA – EXISTING PROCEDURAL CHALLENGES AND HOW THE FAST ACT COULD HELP

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INTRODUCTION

Large, complex projects involving multiple United States Department of Transportation (USDOT) modal administrations (modes) frequently encounter challenges as each mode implements the requirements of the National Environmental Policy Act (NEPA) differently, often reflecting the differences in project types under their authority as well as funding programs that trigger a NEPA review. Often the different requirements result in confusion on the part of the project proponent (State DOT, transit agency, or other funding recipient) about which procedures to follow. In other cases, a project that completes NEPA under one mode but seeks additional funding or approval from a different mode would have to revisit their analysis to ensure that it was sufficient to meet the second mode's requirements. The sum of this confusion results in potential delays and unnecessary and duplicative analysis.

This white paper identifies key statutory and regulatory differences among the modes in implementing NEPA on multimodal projects.¹ This discussion will help project sponsors understand the various requirements of the modes and highlight the central challenges in implementing multimodal projects. It also discusses the recent Fixing America's Surface Transportation (FAST) Act² authorization and the provisions of the FAST Act that target the challenges of multimodal projects.

The FAST Act changed the definition of "multimodal" in the statute regarding the environmental process for the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) effectively extending the environmental review process for FHWA/FTA³ to **all** multimodal projects, not just those receiving funds from FHWA or FTA. The FAST Act also provided for the shared use of Categorical Exclusions (CEs) for multimodal projects and authorized more direct adoption of documents among the modes. The paper will also discuss the provision in the FAST Act that directs the Secretary to adopt, to the extent feasible, the FHWA/FTA process for Federal Railroad Administration (FRA) projects. The language in the FAST Act provides for flexibility in implementation, and this paper will discuss possible strategies for adoption that would achieve the greatest benefit to project sponsors.

BASICS OF NEPA AND DEPARTMENTAL AND MODAL IMPLEMENTATION

NEPA was signed into law by President Nixon on January 1, 1970. It established a national policy "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans."⁴ In addition to establishing a national policy on the environment, it also created the Council on Environmental Quality (CEQ) tasked with, among other things, overseeing the implementation of NEPA.

¹ Multimodal projects require the approval of more than one DOT mode. For the purposes of the paper FAA actions considered are limited to airport capital improvement projects and airspace obstruction determinations and not air traffic operations

² Full text of FAST Act can be found here: <https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf>

³ FHWA and FTA share statutory language at 23 U.S.C. § 139 directing the "Efficient environmental reviews for project decisionmaking"

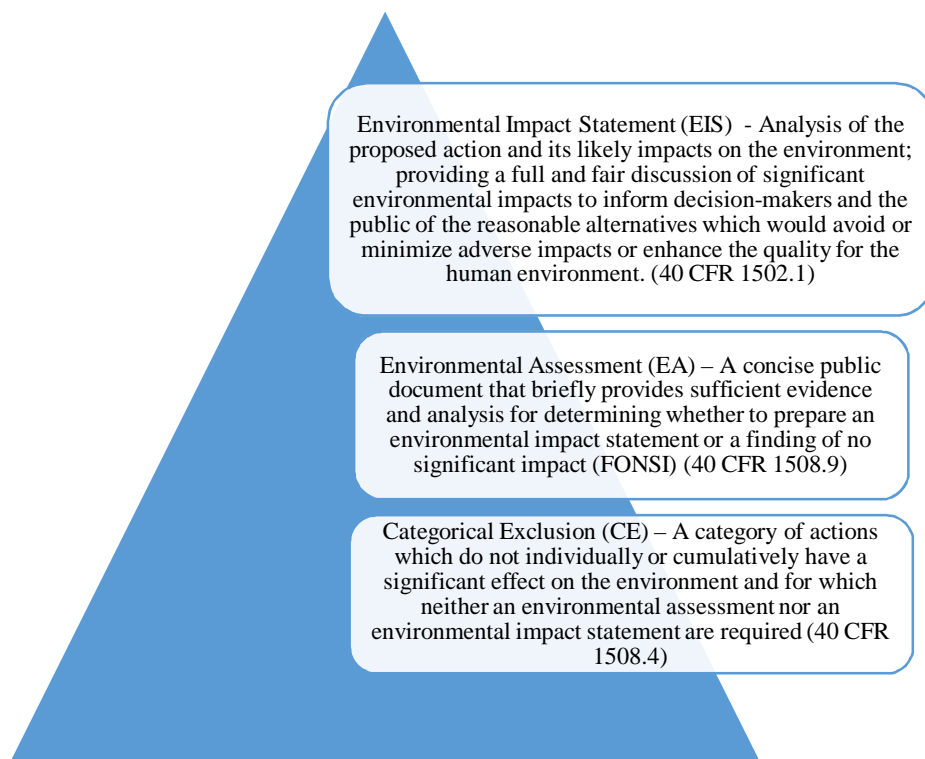
⁴ 40 U.S.C 4321 et seq.

NEPA applies to all “major [f]ederal actions”⁵ which includes funding decisions or other approvals required by federal law such as approvals under the Clean Air Act or Endangered Species Act. Thus, a project with multiple federal agencies including funding and permitting can result in NEPA analysis required of numerous agencies on a project.

In 1977, CEQ issued implementing regulations (40 CFR 1500 – 1508) that provided the framework for NEPA compliance across the federal government. Each agency was directed to develop their implementing procedures to supplement the CEQ procedures (40 CFR 1507.3), catering the implementation of NEPA to their unique mission and considerations.

NEPA ANALYSIS

NEPA and the CEQ implementing regulations provide for three separate classes of action or levels of analysis to consider a proposed action’s impacts on the environment.



⁵ 40 U.S.C. § 4332

USDOT NEPA procedures in DOT Order 5610.1C establish “procedures for consideration of environmental impacts in decision-making on proposed Department of Transportation (DOT) actions.”⁶ The Department first issued the Order in 1979 with updates in 1982 and 1985. The DOT Order applies across the Department and provides a foundation for more specific modal implementing procedures. These modal specific procedures must be consistent with the DOT Order and CEQ Regulations but may provide greater detail on a process that is unique to their programs. Below is brief discussion of modal procedures for those modes most likely involved in multimodal projects:

- **FHWA and FTA** have an environmental process directed by statute and found at 23 U.S.C. § 139⁷ with implementing procedures in regulation at 23 C.F.R. Part 771.⁸ These regulations are updated to reflect changes made in authorization bills such as the Safe, Accountable Flexible Transportation Equity Act – A Legacy for Users (SAFTEA-LU) and the Moving Ahead for Progress in the 21st Century (MAP-21).
- **The FRA** published procedures for considering environmental impacts in the Federal Register Vol. 64, No. 101⁹ and updated those procedures with a notice in the Federal Register Vol. 78, No. 9¹⁰. In addition to these Federal Register noticed procedures, the FRA issued additional High-Speed Intercity Passenger Rail NEPA Guidance in 2009.¹¹
- **The Federal Aviation Administration (FAA)** has procedures in FAA Order 1050.1F¹² most recently updated in July of 2015. The FAA procedures apply to actions directly undertaken by the FAA and to activities undertaken by a non-federal entity where the FAA has the authority to condition a permit, license or other approval.

⁶ US DOT Order 5610.1C – “Procedures for Considering Environmental Impacts”:
<https://www.transportation.gov/office-policy/transportation-policy/procedures-considering-environmental-impacts-dot-order-56101c>

⁷ <https://www.law.cornell.edu/uscode/text/23/139>

⁸ http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title23/23cfr771_main_02.tpl

⁹ <https://www.fra.dot.gov/eLib/details/L02561>

¹⁰ <https://www.fra.dot.gov/eLib/Details/L04224>

¹¹ <https://www.fra.dot.gov/Page/P0262>

¹² http://www.faa.gov/documentLibrary/media/Order/FAA_Order_1050_1F.pdf

PART I - SUMMARY OF KEY CONSIDERATIONS AND SPECIFIC AREAS OF REGULATORY OR POLICY INCONSISTENCES IN MODAL PROCEDURES

The flexibility inherent in the CEQ regulations directing each agency to adopt procedures¹³ to supplement the CEQ regulations has led to policies and procedures within DOT that do not always align. There are few areas of *direct conflict* with specific statutory authority and regulations that address unique characteristics of the project types administered by each modal administration. The table below captures major areas of policy or procedure required for NEPA implementation across the modes and summarizes challenges where they exist. A broader discussion follows.

¹³ that “[w]hen the agency is a department, major subunits are encouraged....to adopt their own procedures” (40 CFR 1507.3)

TABLE 1 – KEY REGULATORY AND POLICY AREAS WITH POTENTIAL CONFLICT FOR MULTIMODAL PROJECTS

	FHWA	FTA	FRA	FAA
Transportation Planning	23 USC 134 ; 23 USC 135	23 USC 134 ; 23 USC 135	State Rail Plan Guidance Corridor Investment Plan	AC 150/5070-6B Airport Master Plans
Fiscal Constraint & NEPA	Planning regulations require that projects be included in the fiscally constrained Statewide or Metropolitan Transportation Plan before FHWA can sign ROD/FONSI or approve CE (23 CFR Part 450) see also 2011 Supplemental Guidance	No requirements addressing fiscal constraint	No requirements addressing fiscal constraint.	No requirements addressing fiscal constraint
Initiating the NEPA process	23 CFR 771.111: “...Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified.”	23 CFR 771.111: “...Applicants intending to apply for funds should notify the Administration at the time that a project concept is identified.” Projects funded through the Capital Improvement Grant program must follow 49 U.S.C. 5309 – within two years of initiating project development, NEPA must be complete; cannot enter engineering phase until completion of NEPA	“appropriate environmental documentation shall be commenced no later than immediately after the application [for funding] is received.”	FAA Order 1050.1F 2-2.2 “For applications to the FAA requiring an EA or EIS, preparation of the EA or EIS must begin immediately after the FAA receives the application or proposal.”
Categorical Exclusions	23 CFR 771.117	23 CFR 771.118	Federal Register Vol. 78, No. 9/ 1/14/13	FAA Order 1050.1F, Chapter 5

	FHWA	FTA	FRA	FAA
Delegation and/or Assignment of NEPA	FHWA can assign full NEPA responsibilities to states for a project or program of projects, FHWA may also assign responsibility only for CE determinations to States, or FHWA may develop programmatic CE agreements that define the circumstances under which a State may make CE determinations.	States can assume NEPA responsibilities for a single project or a program of projects if the State has also already assumed responsibility for FHWA NEPA. Additionally, as with FHWA, FTA can assign authority to make CE determinations to a State.	States can assume NEPA responsibilities for a single project or a program of projects if the State has also already assumed responsibility for FHWA NEPA.	States can assume NEPA responsibilities for a single project or a program of projects if the State has also already assumed responsibility for FHWA NEPA.
Clean Air Act Conformity	Transportation Conformity	Transportation Conformity	General Conformity	General Conformity
Noise & Vibration	23 CFR 772 : applies to any highway project or multimodal project that requires FHWA approval or is funded with Federal-aid highway funds	Transit Noise and Vibration Impact Assessment : addresses noise and vibration impacts of all construction projects seeking FTA funds.	Transit Noise and Vibration Impact Assessment – FRA relies on FTA procedures in evaluating improvements to conventional passenger rail lines and stationary rail facilities and for horn noise assessment. High-Speed Ground Transportation Impact Assessment : addresses noise and vibration impacts of high-speed train operations using the same methodology as the FTA manual.	FAA Order 1050.1F Appendix B
Section 4(f) of the 1966 Department of Transportation Act	23 CFR 774 Nationwide section 4(f) evaluations FHWA 4(f) Policy Paper	23 CFR 774 and also uses the FHWA 4(f) Policy Paper	No regulations, generally rely on FHWA/FTA regulations and the FHWA 4(f) Policy Paper	No regulations, generally rely on FHWA/FTA regulations

	FHWA	FTA	FRA	FAA
Section 106 of the National Historic Preservation Act	Delegation to States for consultation	FTA may, in some cases, administratively delegate some consultation authorities to project sponsors, usually on a case-by-case basis.	No delegation to states	No delegation to states
Public Comment/Public Involvement	60 Days on DEIS (23 USC 139(g)(2); FHWA must approve each State's procedures approved to carry out a public involvement/public hearing program under 23 U.S.C. 128 and 139 and CEQ regulation	60 Days on DEIS (23 USC 139(g)(2) 23 CFR 771.111 – Early coordination, public involvement, and project development	45-day minimum duration on DEIS starting the Friday after EPA receives DEIS; FRA NEPA procedures – Section 9 “Citizen Involvement”;	DEIS review for 45 days, possibly extended to 75 by EPA.; FAA Order 1050.1F 2-5 Public Involvement; paragraphs 6-2.2 & 7-1.2

TRANSPORTATION PLANNING

Highways and transit have well-established transportation planning processes for statewide plans and Metropolitan Planning Organizations (MPOs) created by statute and implemented through regulations. These planning processes include the public and consider land use, development, safety, and security. The statewide and metropolitan planning processes inform long-range transportation plans and set the priorities for investment by State DOTs, MPOs, and transit operators. These planning processes and decisions made are not considered to be federal actions and therefore not subject to NEPA.

FHWA and FTA also enjoy the authority to leverage decisions made in the planning process to focus their analysis on project-level NEPA. Planning and Environmental Linkages (PEL) represents a collaborative and integrated approach to transportation decision-making. It considers environmental, community and economic goals early in the transportation planning process and uses the information, analysis, and products developed during planning to inform the environmental review process. MAP-21 created a new approach to PEL that was then amended by the FAST Act. Insufficient implementation of this new approach prevents a determination of its effectiveness at this time.

Similar to highways and transit, the FAA has a process for integrated airport system planning as well as a process for considering master plans for individual airports ranging in size from small general aviation to large commercial service facilities. As with the statewide and metropolitan planning process, the airport master planning process requires significant public involvement to ensure that the agency considers the views and interests of the stakeholders. FAA guidance states that “[a]irport planning should be complete or nearly so when the airport sponsor begins preparing its EA or FAA begins preparing its EIS.”¹⁴

Section 303 of the Passenger Rail Investment and Improvement Act of 2008 tasked States with establishing or designating a State rail transportation authority responsible for developing statewide rail plans. These plans set policy involving freight and passenger rail transportation within their boundaries, establish priorities and implementation strategies to enhance rail service in the public interest and serve as the basis for Federal and State rail investments in the state.¹⁵ Plans are coordinated with other State transportation planning programs and clarify long-term service and investment needs and requirements. FRA has also sponsored the development of corridor investment plans that set long-range objectives and implementation steps for new or improved passenger rail service in particular corridors connecting metropolitan areas.

Coordinating state rail plans with the long-range statewide transportation plan required by FHWA may enable states to leverage the PEL authority and support a more efficient planning and environmental review process. Should state rail plans develop independently from the long-range planning process, the PEL authority may not be available and thus present the potential for conflict with multimodal projects developed under the different planning processes.

INITIATING THE NEPA PROCESS

Although different regulations and policies apply to the modes, all encourage starting NEPA as soon as possible, consistent with CEQ regulations. However, the action by the mode will dictate what “early”

¹⁴ http://www.faa.gov/documentLibrary/media/Advisory_Circular/150-5070-6B-Change-2-Consolidated.pdf, pg.122

¹⁵ [Federal Railroad Administration Overview, Highlights and Summary of the Passenger Rail Investment and Improvement Act of 2008 \(PRIIA\), March 10, 2009](#)

means for their purposes. When serving as a funding agency, all agencies encourage beginning NEPA early in project development. FAA and FRA both direct the start of NEPA immediately after receiving the application for funding while FHWA & FTA direct the applicant to notify the Administration “at the time that a project concept is identified.”

However, if the action by the mode is regulatory or permissive in nature such as FAA’s obstruction determination¹⁶, project design must be advanced sufficiently to inform the decision by the reviewing agency. In the case of FAA’s determination of obstructions to air navigation and navigational aids or facilities, it must be known if a structure will exceed 200 ft. in height or if it meets other criteria for the hazard determination.

This need for advanced design introduces the FAA at the later stages of project development and can lead to conflicts as the proposed project nears.

Because funding approvals are the primary driver for NEPA in project development, unique requirements of the funding programs can further complicate the process. For example, the New Starts and Core Capacity programs for FTA require that FTA complete NEPA is complete within two years from entry into the Project Development phase and that it is complete before a project enters the engineering phase. Should a New Starts project also require FRA approval which does not have similar restrictions, the need for coordination and the opportunity for confusion increases.

CATEGORICAL EXCLUSIONS

Within each mode’s NEPA procedures, there are lists of CEs unique to their programs, describing common actions that have been determined not to have a significant individual or cumulative impact on the environment. These CEs apply only to actions undertaken by the implementing mode, and they are not “transferable” across modes. The lack of transferability presents a challenge when implementing a multimodal project, and one of the modes has a CE for an action while the other mode does not have a similar CE. In such cases, and before the FAST Act, such a project could require an EA from the mode that did not have the CE for the action. Part II discusses implications of the FAST Act on multimodal projects and CEs.

An example of this would be an emergency replacement of a bridge requiring both FHWA and FRA approval. FHWA has a CE at [23 CFR 771.117\(c\)\(9\)\(ii\)](#) that allows for “[t]he repair, reconstruction, restoration, retrofitting or replacement of any road, highway, bridge, tunnel, or transit facility” and allows construction to commence **within two years of the declaration**. FRA has a CE #12 that allows the “temporary replacement of an essential rail facility if **repairs are commenced immediately after** the occurrence of a natural disaster or catastrophic failure.” The discrepancy in the timing of the action allowed by the two CEs could result in FRA requiring an EA for the same action that FHWA can categorically exclude.

The FAST Act addressed this issue by updating the language created in MAP-21 allowing for multimodal CEs. The fix does remedy these particular situations. However, it does not enable the full “sharing” of CEs across the Department. Further discussion of this issue is in the next section.

¹⁶ 14 C.F.R. Part 77

ASSIGNMENT OF NEPA AUTHORITY

Authority exists for the delegation or assignment of the Secretary of Transportation's NEPA responsibilities to a State, provided they satisfy certain requirements.¹⁷ This assignment authority allows a State to assume responsibilities under NEPA on one or more highway projects within the State. After a State has met the conditions for assignment of highway projects, the State may also assume responsibility for all or part of the functions of the Secretary for one or more railroad, public transportation, or multimodal projects within the State.¹⁸

Requiring that a State first assumes responsibility for highway projects before assuming responsibilities for other projects creates a unique challenge for multimodal projects with a State potentially serving as the Secretary for NEPA on highway elements and the Department retaining their role as federal lead for other elements. With this expanded authority still under implementation, the full effects of varying levels of NEPA Assignment are not yet known.

States may assume the responsibility of the Secretary under NEPA for determining whether certain designated activities related to highway and transit projects are included within classes of action identified in regulation by the Secretary that are categorically excluded from requirements for environmental assessments or environmental impacts statements¹⁹. This authority only applies to States and thus other federal grant recipients such as a city or regional transit agency or airport cannot pursue CE assignment. Similar to the broader NEPA assumption challenge referenced above, this discrepancy in authority for CE determinations can create challenges when implementing multimodal projects.

FISCAL CONSTRAINT AND NEPA

Under the FHWA planning requirements, a project must be included in the fiscally constrained Metropolitan or Statewide Transportation Plan before a ROD or FONSI is signed, or a CE is approved. This requirement creates a burden to establish that funding for executing the project, or, at least, initial phases of the project, is secured or reasonably foreseeable. This requirement is unique to the planning process for FHWA and thus does not apply to FTA, FRA or FAA.

This discrepancy among the modes can present opportunities for conflict as financial planning requirements for large multimodal projects are inconsistent. Flexibility exists under FHWA planning requirements to allow projects to advance without full funding identified, thereby avoiding a situation with FRA able to sign a ROD but FHWA unable to do so because the project is not in a fiscally constrained transportation plan.

FHWA issued supplemental guidance in 2011 that describes the transportation planning requirements and their relationship to NEPA process completion. This guidance provides various strategies for satisfying fiscal constraint requirements on large projects, including multimodal projects, that may have a variety of funding sources and not all of them secured (but reasonably expected) at the time that NEPA is complete.

¹⁷ First authorized in SAFETEA-LU and then expanded in MAP-21 and then revised again in the FAST Act.

¹⁸ [23 U.S.C. § 327\(a\)\(B\)\(ii\)](#)

¹⁹ [23 U.S.C. § 326](#)

CLEAN AIR ACT CONFORMITY

The Clean Air Act (CAA) requires that federal agencies do not adopt, accept, approve or fund activities that are not consistent with air quality goals. Transportation and general conformity regulations provide the framework for meeting this CAA requirement.²⁰ EPA has promulgated two sets of regulations to implement section 176(c)²¹ of the CAA addressing transportation conformity and general conformity. Transportation conformity regulations apply to highways and mass transit and require a determination of whether transportation plans, programs, and projects funded under title 23 U.S.C. or the Federal Transit Act conform to the State Implementation Plan (SIP).²² General conformity regulations apply to all other federal actions including FRA and FAA actions and ensure that actions or projects do not contribute to new violations or worsening existing violations of the National Ambient Air Quality Standards (NAAQS).

Projects that include federal actions on FHWA/FTA highway or transit elements, as well as federal actions on other components of the project are required to comply with both general and transportation conformity requirements. For example, if an airport expansion project includes widening the airport access road using FHWA highway funds and runway extension requiring FAA approval, transportation conformity requirements would apply to the road widening action, and general conformity requirements would apply to the runway extension action.²³

National Ambient Air Quality Standards (NAAQS) – codified at 40 CFR Part 50, sets standards for pollutants considered harmful to public health and the environment. NAAQS exist for six criteria pollutants (carbon monoxide, lead, nitrogen dioxide, ozone₃, particle pollution, sulfur dioxide).

State Implementation Plan (SIP) – A plan developed by state and local air quality management agencies that demonstrate that the State has the basic air quality management program in place to implement NAAQS and identifies the emission control requirements the state will rely upon to attain and/or maintain the NAAQS.

NOISE AND VIBRATION ANALYSIS

Noise and vibration impacts are unique to the type of project considered and as such, each modal administration has regulations or policies specific to their programs. Challenges may develop when implementing a multimodal project that requires approval from modal administrations that have different guidelines or requirements for considering these impacts. For example, the FHWA has noise regulations²⁴ that apply to any project requiring FHWA funding or approval, and this can include multimodal projects. FTA has guidance²⁵ on assessing transit noise and vibration that FRA also follows. Opportunities for confusion exist when a project has elements of both highway and transit or rail requiring that the highway elements follow the FHWA regulations while the transit or rail elements follow the FTA guidance. Early coordination on the methodology to ensure full understanding of the requirements is important.

²⁰ FHWA Memorandum – General and Transportation Conformity Frequently Asked Questions, April 2011 - <http://dec.alaska.gov/air/anpms/conf/Conformity%20Docs/SIGNED%20Conformity%20FAQs%20Memo.pdf>

²¹ <https://www.law.cornell.edu/uscode/text/42/7506>

²² [58 FR 62188](#)

²³ FHWA Memorandum – General and Transportation Conformity Frequently Asked Questions, April 2011 - <http://dec.alaska.gov/air/anpms/conf/Conformity%20Docs/SIGNED%20Conformity%20FAQs%20Memo.pdf>

²⁴ [23 CFR 772](#)

²⁵ [Transit Noise and Vibration Impact Assessment:](#)

SECTION 4(F) OF THE 1966 DEPARTMENT OF TRANSPORTATION ACT

The 1966 Department of Transportation Act created a substantive requirement for transportation projects to avoid using land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and private historical sites unless the following conditions apply:

- There is no feasible and prudent avoidance alternative to the use of the land; and
- The action includes all possible planning to minimize harm to the property resulting from such use

Or

- The Administration determines that the use of the property will have a de minimis impact.²⁶

Congress codified DOT's 4(f) requirements in two different places – [23 U.S.C. § 138](#) and [49 U.S.C. 303](#). The first citation applies only to the Federal-Aid Highway Program while the Title 49 citation applies to the Department as a whole. Implementing these provisions, FHWA and FTA have joint regulations.²⁷ The FRA and FAA do not have regulations implementing the requirements of 4(f) and currently rely on the FHWA/FTA regulations.

Relying on the same set of regulations for implementation minimizes conflict between the modes when addressing 4(f) requirements. However, the FHWA has created programmatic evaluations²⁸ under 4(f) that facilitate more efficient reviews for certain actions. These programmatic evaluations are not all available to other modes creating the opportunity for conflict when an FHWA element can leverage a programmatic evaluation for 4(f), but another mode may still require an individual analysis to support a de minimis finding.

PUBLIC INVOLVEMENT

A central element of NEPA is the opportunity for the public to participate in the process. The CEQ regulations establish minimum standards for public participation with directions for scoping and public comment or review periods on NEPA documents at both the draft and final stages of development. As with other elements of NEPA implementation, each Department and major agency have their procedures to comply with NEPA and the CEQ regulations providing another opportunity for inconsistency in approach.

The FHWA and FTA share regulations directing the process for public involvement with specific language in 23 CFR 771.111(c) addressing potential conflicts. “When both the FHWA and FTA are involved in the development of a project, or when the FHWA or FTA acts as a joint lead agency with another federal agency, a mutually acceptable process will be established on a case-by-case basis.” These same shared regulations then provide instructions for the Federal-Aid Highway Program (23 CFR 771.111(h)) and applicants for capital assistance in the FTA program (23 C.F.R. 771.111(i)). The procedures are general enough not to be in direct conflict, but the individual application of the regulations by project sponsors could lead to confusion on which process prevails for multimodal projects.

²⁶ <https://www.environment.fhwa.dot.gov/4f/index.asp>

²⁷ [23 C.F.R. 774](#)

²⁸ <https://www.environment.fhwa.dot.gov/4f/4fnspeval.asp>

Under the Federal-Aid Program, FHWA must approve procedures for each State to carry out a public involvement/public hearing program under 23 U.S.C. 128 and 139 and CEQ regulations. These procedures must provide for coordinating public involvement and hearings with NEPA as well as early and continuing opportunities for public participation during project development, identifying social, economic and environmental impacts, among others.²⁹ The result of this is that each State has their process for public involvement, consistent with the requirements of 23 CFR 450.210 but unique to the State's needs.

FRA procedures provide for “citizen involvement” and focus on identifying stakeholders and the process of publishing a Notice of Intent to prepare an EIS, circulating the draft EIS and response to comments. The FRA NEPA procedures do not specifically require developing a public engagement or outreach plan. A plan is typically required as part of a grant agreement, however.

Airports at FAA have a chapter³⁰ in their NEPA implementing instructions that focus on public participation as well as extensive discussion in their recently updated NEPA Order 1050.1F³¹ that describe the standards that FAA requires for public participation in NEPA. Public involvement in the Airport Improvement Program is required, including the opportunity for a public hearing to consider the economic, social and environmental effects of its actions.³²

Beyond the basics of public engagement and outreach, there are defined durations for public comment on NEPA documents that are not consistent across the modes, and that can create conflicts on multimodal projects:

	Duration for Public Comment on DEIS	Citation
FHWA/FTA	Not more than 60 days unless a different period is established or the deadline is extended for good cause	23 USC 139(g)(2)(A)
FRA	Minimum of 45 Days (starting first Friday after EPA receives DEIS)	FRA Environmental Assessment Procedures; F.R. Vol 64, No. 101
FAA	Minimum of 45 days, potential to extend up to 30 additional days	FAA Order 10501.F, pg. 7-7

Table 1 - Public comment periods by mode

SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

Section 106 of the National Historic Preservation Act of 1966 (106) requires federal agencies to take into account the effects of their undertakings on historic properties and reach an agreement with “consulting parties” on the treatment of affected historic properties. State Historic Preservation Officers (SHPOs) administer the national historic preservation program at the state level, consulting with federal agencies

²⁹ <https://www.law.cornell.edu/cfr/text/23/450.210>

³⁰ Chapter 4 in NEPA Implementing Instructions for Airport Actions (Order 5050.4B, April 2006 http://www.faa.gov/airports/resources/publications/orders/environmental_5050_4/media/chapter4.pdf)

³¹ http://www.faa.gov/documentLibrary/media/Order/FAA_Order_1050_1F.pdf

³² [49 U.S.C. § 47106\(c\)\(1\)\(A\)\(i\)](https://www.ecfr.gov/current/title-23/chapter-I/subchapter-B/part-450/subpart-1/section-450.210)

during the 106 process. Differences in the assigned roles and responsibilities for coordination and consultation under 106 can create challenges.

The modes have the authority to enter into programmatic agreements that delegate some or all of the federal obligations under 106.³³ Similar to the issues discussed with NEPA assignment and 4(f) programmatic reviews, FHWA and the States have established numerous agreements with varying delegation of federal responsibilities for compliance with 106. Other modal administrations do not have many, if any, similar agreements in place, owing much to the types of grantees with whom they work (State DOTs v. local transit agencies or airport authority for example). As a result, if they are not signatories to the agreements between FHWA and State DOTs, certain decisions made under a programmatic 106 agreement may not satisfy the requirements of other modes potentially resulting in unnecessary and duplicative efforts.

NEPA AND THE INTERSECTION WITH OTHER FEDERAL LAWS

The breadth of environmental impacts considered under the “NEPA umbrella” leads to further conflicts with unique modal compliance with other federal laws. Where alternative procedures for compliance may exist, such as a programmatic agreement that does not apply to the whole Department, the efficiency afforded one modal administration may not apply to another mode, creating additional opportunities for conflict. The Department has pursued remedies for some of these multimodal conflicts in recent years, but many others remain. Below are two examples of recent administrative actions to align procedures for compliance with regulatory requirements on multimodal projects:

Example 1: In 1986, the United States Coast Guard (USCG) and FHWA executed an MOU³⁴ coordinating the preparation of environmental documents for projects that require a USCG bridge permit. The MOU established roles and responsibilities for the development and review of NEPA documents supporting the FHWA and USCG actions on bridge projects. Because the MOU was between only FHWA and USCG, other modes such as the FTA were not able to benefit from the established procedures in the MOU which led to inconsistent approaches in multimodal bridge projects requiring approval from FHWA, FTA, and USCG. These inconsistencies eventually resulted in the development of a broader MOU³⁵ between the USCG, FHWA, FTA and FRA in 2013 to ensure that multimodal bridge projects followed consistent policies and procedures.

Example 2: Similar challenges were present when considering aligning the requirements of the Clean Water Act Section 404 (404 permit) with the modal administration’s NEPA procedures. A 404 permit, administered by the United States Army Corps of Engineers (USACE) authorizes a project to discharge fill material into waters of the United States. The permit decision is a federal action under NEPA and requires that the USACE evaluate the action under NEPA. In 1988, the FHWA, USACE, the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (USFWS), and the National Oceanic and Atmospheric Administration (NOAA) developed guidance for “Applying the Section 404 Permit Process to Federal-Aid Highway Projects.” With its red cover, the guidance became informally known as the Red Book. After thirty years of policy changes accompanied by an increase in project types

³³ [36 C.F.R. 800.2\(c\)\(4\)](#)

³⁴ <https://www.fhwa.dot.gov/legisregs/directives/notices/n6640-22.cfm>

³⁵ https://www.environment.fhwa.dot.gov/strmlng/MOU_multimodal_bridge_permits.asp

impacting wetlands, the agencies modernized the Red Book with a new version issued in 2015.³⁶ This new Red Book incorporated elements of the USCG/FHWA/FTA/FRA MOU as well as expanded the application of the synchronization process across the Department of Transportation, enabling other modes to leverage the process and streamline their reviews. These administrative efforts to address conflicts and inconsistencies across modal administrations in their compliance with other federal laws has been effective, but more work remains.

³⁶ https://www.environment.fhwa.dot.gov/strmlng/Redbook_2015.pdf

PART II – FAST ACT AND MULTIMODAL NEPA

On December 4, 2015, President Obama signed the FAST Act, the first long-term surface transportation authorization in over ten years. Key elements of the FAST Act targeted the challenges encountered when delivering multimodal projects. Provisions in both the surface transportation title, as well as the rail title, addressed the different processes for NEPA and environmental reviews found in the DOT modal administrations. Although the statutory language promotes greater consistency across the Department, the challenge will be in implementing these changes to reflect the intent of Congress.

SECTION 1304 – EFFICIENT ENVIRONMENTAL REVIEWS FOR PROJECT DECISIONMAKING

Section 1304 of FAST made numerous changes to 23 U.S.C. § 139, the environmental process for FHWA and FTA. The key for multimodal projects was the amendment of the definition of “multimodal” at 23 U.S.C. 139 (a)(5):

Pre-FAST Act definition: (5) Multimodal project – The term “multimodal project” means a project funded, in whole or in part, under this title or chapter 53 of title 49 and involving the participation of more than 1 Department of Transportation administration or secretarial office.

Definition reflecting FAST Act changes: (5) 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.

Removing the funding requirement expands the applicability of “multimodal” to capture a project without an FHWA or FTA action. Multimodal in 23 U.S.C. 139 now reads to include an action with FAA and FRA actions, for example. This change extends the 139 process to all multimodal projects, regardless of the modes involved.

Additional changes in Section 1304 include language that authorizes a project sponsor to request that the Secretary of Transportation designate a modal administration as the federal lead agency for NEPA.³⁷ The ability to ask that the Secretary identify a federal lead may also help to avoid the challenges in completing environmental reviews on multimodal projects by taking the guesswork out of which agency’s procedures will prevail, promoting greater predictability in the process.

SECTION 1310 – APPLICATION OF CATEGORICAL EXCLUSIONS FOR MULTIMODAL PROJECTS

This section amends language from Section 1314 in MAP-21³⁸ that authorized the shared-use of Categorical Exclusions for multimodal projects. The language in MAP-21 relied on the definition for multimodal in 23 U.S.C. 139 stipulating that the project requires approval from more than one mode or operating administration and that it was also funded in whole or in part under Title 23 or Chapter 53 of Title 49, limiting the shared use of CEs to projects that include a highway or transit component.³⁹ Also, the MAP-21 process established a complicated process for application of a shared use CE, including

³⁷ 23 U.S.C. § 139(e)(4) as amended by the FAST Act.

³⁸ [49 U.S.C. § 304](#)

³⁹ FHWA CEs located at 23 CFR 771.117 and FTA CEs located at 23 CFR 771.118

establishing independent utility for the portion of the project subject to the CE of another modal administration.

The FAST Act enables the use of another mode's CE on projects requiring the approval of more than one mode or Secretarial office regardless of whether the project includes a highway or transit component. It does not, however, authorize the full "sharing" of CEs across the Department as envisioned in the Obama Administration's GROW AMERICA transportation authorization proposal.⁴⁰ Under the FAST language, a multimodal project (requiring approval from more than one DOT modal administration) provides an opportunity for shared use CEs. However, a project involving only one modal administration may not use a CE from another modal administration.

This change is effective upon enactment and will not likely require rulemaking though the Department may issue updated guidance on the use of multimodal CEs.

SECTION 1311 – ACCELERATED DECISIONMAKING IN ENVIRONMENTAL REVIEWS

This section amends language from Section 1319 in MAP-21 clarifying that it applies only to the Department of Transportation (the original MAP-21 language appeared to amend NEPA, which was not the intent) providing for a combined FEIS and ROD document. This section, in (c)(2), also allows modes to adopt a DEIS, FEIS or EA of another mode without recirculating to the public provided they certify that the "action is substantially the same as the project considered in the document to be adopted." Eliminating the need to recirculate FEIS documents can expedite completion of NEPA, particularly for projects that become multimodal late in project development as a result of new funding, for example.

SECTION 11503 – EFFICIENT ENVIRONMENTAL REVIEWS

Section 11503 of the Rail Title (Title XI) in the FAST Act directs the Secretary of Transportation to "apply the project development procedures, to the greatest extent feasible, described in Section 139 of Title 23 to any railroad project that requires the approval of the Secretary under [NEPA]." The section then goes on to require incorporation of these project development procedures into agency regulations and procedures. There is no deadline to adopt the 139 procedures for railroad projects.

TITLE XLI – FEDERAL PERMITTING IMPROVEMENT

Title XLI authorizes a new federal permitting process that applies to multiple sectors and agencies. Many of the requirements in Title XLI are similar to the requirements of 139 such as requiring an integrated project plan (coordination plan in 139), establishing a project schedule and setting timelines for decisions. The language in Title XLI explicitly exempts projects subject to 139 from its requirements, though that exemption does not cover other transportation projects not subject to 139, such as FAA or FRA projects. There is an additional savings clause in the rail title that is more broad and **exempts all transportation projects** from the requirements of Title XLI.

Section 11503(b) of the FAST Act states that "...the requirements and other provisions of title 41 of this Act shall not apply to...programs administered now and in the future by the Department of Transportation or its operating administrations under title 23, 46, or 49..." This savings clause avoids confusion with the Title XLI requirements and those of 139 for both multimodal and rail projects.

⁴⁰ Section 1007 - https://www.transportation.gov/sites/dot.gov/files/docs/GROW_AMERICA_Act_1.pdf

IMPLEMENTING THE MULTIMODAL ELEMENTS OF THE FAST ACT

As previously noted, Section 1304 of the FAST Act expands the definition of multimodal in 23 U.S.C. § 139 to include multimodal projects not involving FHWA or FTA. An important element of implementation will be clarification from the Department and its modal administrations regarding how the 139 process will affect multimodal projects without an FHWA or FTA action. If multimodal projects are interpreted to apply to all modes, regardless of FHWA and FTA involvement, then the other modes would be subject to 139 for multimodal projects. These modes would have to issue guidance and/or update their procedures for multimodal projects. The following are potential options for implementing the multimodal provisions of the FAST Act.

Departmental NEPA procedures in the DOT Order 5610.1C, first published in 1979 with updates in 1982 and 1985, apply to all modes and provide the minimal requirements for complying with NEPA and the CEQ regulations. This Order, though in need of an update, serves as the single common element for NEPA compliance across the Department and could be a vehicle for establishing standard procedures across modes for implementing the 139 process. However, before such an update can occur, the consensus within the Department on how to implement FHWA/FTA procedures for non-highway and transit agencies should be achieved. Leveraging the DOT Order to extend the 139 process to multimodal projects could also serve as the policy vehicle to apply the 139 process to rail projects. Once the Department promulgates procedures for multimodal projects, those same procedures could apply to rail projects, providing a single policy update to implement two significant changes in environmental processes for the Department. However, Section 11503 of the FAST Act provides for discretion by the Secretary in “choos[ing] not to incorporate into agency regulations and procedures pertaining to railroad projects... such project development procedures that could only feasible apply to highway projects, public transportation capital projects, and multimodal projects.” No such discretion appears to exist when extending 139 to multimodal projects potentially creating an inherent conflict in this approach.

Another approach to implementation could address multimodal projects and FRA railroad projects in separate procedures. Such an approach requires developing procedures for multimodal projects that reflect the changes in FAST and apply the 139 process while also updating FRA NEPA procedures to use the 139 process to the greatest extent feasible to railroad projects. This approach would provide greater flexibility to the FRA in adopting the 139 process and would avoid the need for Department-wide consensus on applying the 139 process to railroad projects as envisioned in a single update to the NEPA Order. However, it would require more rulemaking and updates to policy and guidance.

WILL FULLY IMPLEMENTING THE FAST ACT ADDRESS THE CHALLENGES OF MULTIMODAL NEPA?

Implementing the Fast Act to provide a consistent approach to the environmental review process across the Department could address many of the challenges that project sponsors experience when delivering a multimodal project. Standardized requirements for coordination and public outreach, as well as defined roles of agencies involved in the process, will ensure that all members of the project team including sponsors, federal regulatory or permitting agencies and the DOT modes all have a standard approach. If successfully implemented, this consistency will promote greater predictability in the process, and should help to accelerate project delivery.

The consistent approach does not, however, address issues related to other required federal laws such as 106 delegations or transportation versus general conformity and PEL. It also won't solve all of the problems encountered when a project becomes "multimodal" halfway through NEPA or after NEPA is complete due to new funding sources though the ability to adopt documents without recirculating may partially address this issue. As previously discussed, the process of conducting the NEPA analysis may be different between the modes, but it is only one part of the project delivery process. Several other factors determine the timing to initiate the environmental review such as the requirements for individual funding programs administered by the modes.

The provisions of the FAST Act move towards addressing the challenges of multimodal project delivery, but they will not address all of the issues that project sponsors face. The approach taken by the Department in implementing these multimodal provisions will determine what issues will remain, but the opportunity to harmonize NEPA procedures across the Department is unprecedented and should produce efficiencies throughout Departmental programs.