

AASHTO PRACTITIONER'S HANDBOOK

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USING THE SAFETEA-LU ENVIRONMENTAL REVIEW PROCESS (23 U.S.C. § 139)

Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) established an environmental review process for highway and transit projects that involve preparation of an environmental impact statement (EIS). This Handbook provides assistance to practitioners in complying with the Section 6002 requirements, while also using this process to achieve better, faster, and more efficient environmental reviews.

Issues covered in this Handbook include:

- Initiating the Environmental Review Process
- Inviting Participating Agencies
- Establishing the Coordination Plan
- Including a Project Schedule in the Coordination Plan
- Setting Comment Deadlines
- Providing an "Opportunity for Involvement" to Agencies and the Public in Developing the Purpose and Need and the Range of Alternatives
- Defining the Purpose and Need
- Determining the Methodologies and Level of Detail for the Alternatives Analysis
- Resolving Issues of Concern
- Developing the Preferred Alternative to a Higher Level of Detail (Optional)
- Reporting Delays in Permit Decisions

The Practitioner's Handbooks are produced by the Center for Environmental Excellence by AASHTO. The Handbooks provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

The Handbooks are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each Handbook includes

- key issues to consider;
- a background briefing; and
- practical tips for achieving compliance.

In addition, key regulations, guidance materials, and sample documents for each Handbook are posted on the Center's web site at <http://environment.transportation.org>.



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Overview



In Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Congress established an environmental review process for highway and transit projects. This process must be followed for highway and transit projects that require the approval of the U.S. Department of Transportation (U.S. DOT) and involve preparation of an environmental impact statement (EIS). The process is intended to make environmental reviews more efficient and timely by clarifying agency roles and responsibilities, improving coordination, setting deadlines, and improving dispute resolution. This new process is now included in Section 139 of Title 23 of the U.S. Code (23 U.S.C. § 139).

This Handbook is intended to help practitioners ensure compliance with Section 139 and use the new opportunities in Section 139 to achieve the underlying goal of this process: bringing about a better, faster, and more efficient environmental review process. For additional information, readers should refer to Federal Highway Administration (FHWA) and Federal Transit Administration's (FTA) comprehensive guidance on Section 139: SAFETEA-LU Environmental Review Process Final Guidance ("FHWA/FTA Guidance").¹

Key Issues to Consider

Initiating the Environmental Review Process

- Are there decisions that you would like to carry forward from the planning process into National Environmental Policy Act (NEPA)—e.g., on the purpose and need and the range of alternatives? If so, how will these be addressed in the project initiation letter?
- Who will be designated as "lead agencies"? FHWA and state DOT only? Or will there be additional lead agencies for this project?
- How will responsibilities be divided among the lead agencies?

Inviting Participating Agencies

- Which Federal, state, local, and/or tribal agencies will be invited to serve as participating agencies?
- Of the participating agencies, which ones (if any) will be invited to serve as cooperating agencies?

Establishing the Coordination Plan and Schedule

- Is there a standard template that can be used in your state for developing the coordination plan?
- Are there any project-specific issues that will need to be given special consideration in developing the coordination plan for your project?
- What streamlining measures, if any, will be included in the coordination plan? For example, will the coordination plan designate primary points of contact for each agency? Establish regular meeting dates and locations? Define the types of documentation that will be shared with agencies and time frames for review?
- Will the coordination plan include dispute-resolution procedures?

¹ A link to this guidance is available on the Center's web site, <http://environment.transportation.org>, in the Practitioner's Handbook section.



- Will the coordination plan include a project schedule? If so, what regulatory requirements apply to your project that will need to be considered in developing the schedule?
- Will the coordination plan be incorporated into a Memorandum of Understanding (MOU) that is signed by the participating agencies?
- Will you incorporate the standard comment deadlines (60 days maximum for draft environmental impact statement [DEIS] comments; 30 days maximum for other comment periods)? Or are there reasons to set longer comment periods for this project?

Providing an “Opportunity for Involvement” to Agencies and the Public in Developing the Purpose and Need and the Range of Alternatives

- What opportunity for involvement will be provided to the participating agencies in determining the purpose and need and the range of alternatives? For example, what documentation will be shared with the agencies? What meetings or other opportunities will be provided for agency input?
- What opportunity for involvement will be provided to the public? Will this occur as part of a scoping meeting? Will there be additional opportunities, after the scoping meeting, for public input on these issues?
- Will the opportunity for involvement on the purpose and need occur separately from the opportunity for involvement on the range of alternatives? Or will these occur at a single point in time, as allowed by the FHWA/FTA Guidance?
- If agencies and/or the public provide comments on the proposed purpose and need and the range of alternatives, how and where will those comments be addressed? How will the comments and your responses be documented?
- Do you have a “merger” agreement that requires concurrence from specific agencies on the purpose and need and the range of alternatives? If so, how will the merger requirements be addressed?

Determining the Methodologies for Alternatives Analysis

- What process will be used to collaborate with participating agencies on determining the methodologies for analyzing alternatives?
- Are there existing standard methodologies that can be followed without the need for additional collaboration?
- Are there methodology issues that will need to be discussed specifically with the agencies? Which agencies have applicable expertise in those issues?
- How will the participating agencies' involvement in developing the methodologies be documented?

Resolving Issues of Concern

- Are there existing dispute resolution procedures that will apply to this project? For example, does your state have an existing streamlining agreement that provides for dispute resolution?
- Are there known issues that are likely to result in disputes among agencies? If so, what steps can be taken to anticipate and address those issues?
- Will this project benefit from the use of a professional mediator or facilitator to assist in managing meetings among agencies?

Developing the Preferred Alternative to a Higher Level of Detail (Optional)

- Do you intend to develop the preferred alternative to a higher level of detail? If so, at what point in the process will this occur?
- What level of detail will be needed to ensure a fair comparison of all reasonable alternatives prior to selection of the preferred? What additional level of work will be performed solely for the preferred alternative?

Background Briefing

Key Terms in Section 139. Section 139 introduces some new terms and uses some familiar terms—e.g., “lead agency”—with a specific meaning that may differ from the meaning of those terms in other contexts. Practitioners should be familiar with the following key terms as used in Section 139:

- **Project.** The term “project” refers to a “highway project, public transportation capital project, or multimodal project that requires the approval of the [U.S. DOT].”² A multimodal project is defined as one that involves funding under Title 23 (highways) or Chapter 53 of Title 49 (transit) of the U.S. Code and requires approval from more than one agency within U.S. DOT.
- **Project Sponsor.** The term “project sponsor” refers to “the agency or other entity, including any private or public-private entity, that seeks approval of the Secretary for a project.”³ This means that a state DOT will typically be the “project sponsor” for federally funded highway projects. The project sponsor also can be a state or regional toll road agency, a local government, or a private entity.
- **Environmental Review Process.** The term “environmental review process” includes both the process of preparing an NEPA document *and* the “process for completion of any environmental permit, approval, review, or study required for a project under any Federal law” other than NEPA.⁴ Therefore, permitting under other statutes, such as Section 404 of the Clean Water Act, is considered part of the “environmental review process.”
- **Lead Agency.** The term “lead agency” includes the Federal lead agency—typically, FHWA for a highway project or FTA for a transit project—and any other governmental entity that is serving as a “joint lead agency.”⁵ The project sponsor must be designated as a joint lead agency if it directly receives funds under Title 23 or Chapter 53 of Title 49. For highway projects, the state DOT is the direct recipient and, therefore, must be a joint lead agency. Local governments that are sub-recipients of highway funds may be designated as joint lead agencies, at the discretion of U.S. DOT.⁶ The FHWA/FTA Guidance explains how “lead agency” decisions can be made:

Where not otherwise specified, the lead agencies are free to perform all tasks and make all decisions jointly, or to allocate their joint responsibilities and authorities among themselves by mutual written agreement. If the lead agencies do not agree on a particular matter under their joint authority, then they must work out their differences because that particular matter cannot progress until the lead agencies reach agreement.

- **Participating Agency.** The lead agencies are required to invite any agency that “may have an interest in the project” to be a participating agency. Upon being invited, a Federal agency is automatically designated as a participating agency, unless it declines the invitation (see Practical Tips, *Inviting Participating Agencies*, p. 8). Non-Federal agencies are designated as participating agencies only if they affirmatively accept the lead agencies’ invitation. The responsibilities of participating agencies are defined in Section 139. The FHWA/FTA Guidance includes sample letters for inviting participating agencies.
- **Cooperating Agency.** The term “cooperating agency” is not defined in Section 139. This term continues to have the same meaning that it has traditionally been given in the NEPA process under Section 1508.5 of the Council on Environmental Quality (CEQ) regulations, which define a cooperating agency as one with jurisdiction by law or special expertise regarding the proposed action. *Cooperating agencies are a sub-set of the participating agencies*: every cooperating agency will also be a participating agency, but many participating agencies will not be cooperating agencies.
- **Initiation Notice.** Section 139 requires the project sponsor to notify the U.S. DOT of a proposed project and request that the environmental review process be initiated. This document is referred to in the FHWA/FTA Guidance as an “initiation notice” or “notification letter.” It is distinct from the Notice of Intent (NOI), which is a separate document

² 23 U.S.C. § 139(a)(6).

³ 23 U.S.C. § 139(a)(7).

⁴ 23 U.S.C. § 139(a)(3).

⁵ 23 U.S.C. § 139(a)(4).

⁶ For further information, see Question 16 in the FHWA/FTA Guidance.

published by the Federal agency in the *Federal Register*. The FHWA/FTA Guidance notes that requirement for an initiation notice can be satisfied programmatically or by “batching” notification for multiple projects into a single notice.

- **Coordination Plan.** A “coordination plan” refers to a document prepared by the lead agencies that defines the process for meeting the agency coordination and public involvement requirements in the environmental review process, including both NEPA and related laws. This document must be developed early in the environmental review process. It does not require concurrence of the participating agencies.
- **Issue of Concern.** An “issue of concern” is defined as an issue, raised by a participating agency, that “could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.” The participating agencies are responsible for identifying issues of concern as early as practicable in the process. The scoping process can be used to identify issues of concern. These issues also can be identified later in the process as additional information is developed.

Projects That Must Follow Section 139. The environmental review process in Section 139 must be used for any highway, transit, or “multimodal” (highway and transit) project that requires U.S. DOT approval and involves the preparation of an EIS.⁷ The process also can be used for projects that involve other types of NEPA documents. The responsibility for deciding whether to apply this process to non-EIS projects rests with U.S. DOT. In guidance, FHWA and FTA have clarified several key points:

- *The Section 139 requirements apply only to EISs initiated after the date of enactment of SAFETEA-LU—August 10, 2005.*⁸ An EIS initiated before that date can continue under pre-existing procedures or can transition to the Section 139 process—a decision that must be made by the U.S. DOT agency.
- *The Section 139 requirements will be applied to some supplemental EISs initiated after the date of enactment of SAFETEA-LU.* The general rule is that a supplemental EIS (SEIS) initiated after June 10, 2005, does *not* need to follow the Section 139 process if it involves issues of limited scope—e.g., new information about a specific environmental issue or re-consideration of alternatives in a specific section of the project. By contrast, if the SEIS involves re-assessing or re-scoping of the entire action, it may need to follow the Section 139 process.⁹
- *The “default” assumption is that the Section 139 process will not be used for environmental assessments.*¹⁰ This means that there is no need to document a decision *not* to use the Section 139 process for an environmental assessment (EA). The decision about whether to use Section 139 for an EA will be made by the FHWA Division Office or FTA Regional Office on a case-by-case basis, with the concurrence of any other lead agencies.
- *FHWA and FTA do not intend to use the Section 139 process for categorical exclusions at all.* This means that the use of Section 139 is not being considered, even on a case-by-case basis, for categorical exclusions (CEs).
- *The opportunity to “opt out” has passed.* Section 139 includes a “grandfather clause” that allows states to opt out of the Section 139 process and instead continue to follow streamlining procedures that were approved by U.S. DOT under Section 1309 of the Transportation Equity Act for the 21st Century (TEA-21).¹¹ In guidance, FHWA and FTA required any opt-out requests to be submitted by March 31, 2007. That deadline has now passed. The only state that received permission to opt out was Florida, which will continue to follow its Efficient Transportation Decision Making (ETDM) process. All other states must follow the Section 139 process.

Key Steps in the Section 139 Process. The environmental review process defined in Section 139 provides a framework for carrying out existing requirements under NEPA and other laws; it does not supersede those existing procedures. In other words, the Section 139 process is best understood as an “overlay” on existing environmental review procedures, which continue to apply to highway and transit projects. The key new steps in this process include:

- **Submit the Initiation Notice.** The project sponsor must submit a notice to the U.S. DOT initiating the environmental review process. For a highway project, this notice is submitted to the FHWA Division Administrator.

⁷ 23 U.S.C. § 139(b).

⁸ FHWA/FTA Guidance, pp. 9 and 12.

⁹ FHWA/FTA Guidance, p. 13. Even for an SEIS that involves a full-scale re-assessment of the proposed action, the Section 139 process need not be followed if (a) the EIS was under “active development” during the eight months prior to June 10, 2005, and (b) the SEIS is being initiated “due to changes in project plans and priorities.” The FHWA Division Office or FTA Regional Office will determine whether these conditions are met.

¹⁰ FHWA/FTA Guidance, p. 12.

¹¹ SAFETEA-LU, Section 139(b).

- **Invite Participating Agencies.** The lead agencies must invite and designate participating agencies. This should be done “as early as practicable” in the process. Federal agencies that are invited to participate are automatically designated as participating agencies, unless they decline in writing and make findings required by the statute (which are discussed further below). Non-Federal agencies can accept or decline; a failure to respond is treated as declining.
- **Establish the Coordination Plan.** The lead agencies must establish a coordination plan, which defines a process for involving agencies and the public in accordance with Section 139. The coordination plan can include a project schedule, including comment deadlines. The coordination plan must be shared with the participating agencies and the public. When a schedule is included in the plan, the participating agencies must be consulted regarding that schedule.
- **Provide an Opportunity for Involvement in Defining the Purpose and Need.** The lead agencies must provide an “opportunity for involvement” to participating agencies and the public in developing the purpose and need. This can be combined with the opportunity for involvement in developing the range of alternatives.¹²
- **Provide an Opportunity for Involvement in Determining the Range of Alternatives.** The lead agencies must provide an “opportunity for involvement” to participating agencies and the public in determining the range of alternatives that will be considered in the EIS. This can be combined with the opportunity for involvement in determining the purpose and need.
- **Collaborate on Determining Methodologies for Studying Alternatives.** The lead agencies must determine the methodology and level of detail for the alternatives analysis in the EIS in collaboration with the participating agencies. This can occur at various points during the environmental review process. The collaboration should address approaches to screening alternatives as well as methodologies for evaluating impacts of the alternatives.
- **Notify Congress of Delayed Permit Decisions.** The lead agencies must submit a report to Congress if actions required under other laws—e.g., permit decisions—have not been taken within 180 days after the U.S. DOT has completed its decision-making process and a complete permit application has been filed.
- **Optional: Convene Issue Resolution Meetings.** The project sponsor or a Governor can request a meeting to resolve “issues of concern” as defined in Section 139. This meeting can be convened at any point in the process.
- **Optional: Advance Preferred Alternative to a Higher Level of Detail.** The lead agencies can develop the preferred alternative to a higher level of detail than the other alternatives considered in the EIS, as long as there is sufficient information about all alternatives to allow for an informed choice among the alternatives. The preferred alternative can be developed to a higher level of detail only (1) to facilitate the development of mitigation measures or (2) to facilitate concurrent compliance with other applicable environmental laws.¹³ It must be done in a manner that will not prevent the lead agencies from making an impartial decision.
- **Optional: Provide Funding to Expedite Agency Reviews.** Section 139 retains the authority granted in Section 1309 of TEA-21 to provide funding to other agencies in return for a commitment to expedite their reviews of environmental documents. This authority was slightly broadened in Section 139 to clarify that it can be used to fund programmatic activities that expedite reviews of individual projects. Programmatic activities eligible for funding include transportation planning activities that precede the initiation of the environmental review process; training of agency personnel; information gathering and mapping; and the development of programmatic agreements. Activities can be funded under this section only if they “directly and meaningfully contribute to expediting and improving transportation project planning and delivery for projects in that state.”

How Section 139 Can Streamline Reviews. While Section 139 contains many new requirements, its purpose is not to impose new burdens on the environmental review process. It is intended to *expedite* reviews by promoting a more rigorous approach to managing the complex interactions among numerous regulatory requirements. Fulfilling the intent of Section 139 requires a clear recognition of the following key changes that can help streamline reviews:

- *The lead agencies are responsible for making decisions and keeping the process moving.* Section 139 gives the lead agencies the “authority and responsibility” 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

¹² For further information, see FHWA and FTA's guidance on planning-NEPA linkage in 23 C.F.R. 450, Appendix A. A copy of Appendix A is available on the Center's web site, <http://environment.transportation.org>, in the Practitioner's Handbooks section.

¹³ FHWA and FTA have interpreted Section 139 to mean “concurrent compliance with other applicable environmental laws.” See FHWA/FTA Guidance, Question 40.