

# Ten Things to Know About USDOT's New NEPA and Section 4(f) Regulations for Highway, Transit and Rail Projects

[New regulations](#) took effect last month governing the federal environmental review process for highway, public transit and some railroad projects. This update highlights 10 important changes in the new regulations, as well as other important clarifications of existing requirements.

## Background

Congress has sought to improve and expedite environmental reviews for transportation projects by enacting a series of reforms in recent legislation, including the laws known as MAP-21 (2012) and the FAST Act (2015). Those reforms affect compliance with the National Environmental Policy Act and Section 4(f) of the U.S. Department of Transportation Act, as well as the environmental review process established in [23 USC 139](#).

The responsibility for implementing those reforms falls primarily on three USDOT agencies: the Federal Highway Administration, the Federal Transit Administration and the Federal Railroad Administration. In their recent rulemaking, those three agencies have jointly updated and adopted two sets of regulations: 23 CFR Part 771, which governs NEPA process, and 23 CFR 774, which governs Section 4(f) compliance. The final rules were issued on October 29, 2018, and took effect on November 28, 2018.

## Key Changes in the Regulations

### 1. Part 771 Updated to Reflect MAP-21 and FAST Act

The final rule updates Part 771 to reflect the changes made to Section 139 in MAP-21 and the FAST Act. Those statutory changes took effect upon enactment, but to date, they have been implemented only through guidance, and the regulations have been inconsistent with the statute. Practitioners can now refer to Part 771 as a roadmap for complying with the Section 139 process.

With the adoption of this final rule, the agencies will turn next to updating their guidance. The [existing Section 139 guidance](#) was issued in 2006 and does not reflect any of the changes made in MAP-21 or the FAST Act. The final rule commits to issuing updated Section 139 guidance but does not give any indication as to when it will be issued.

### 2. All Newly Initiated FRA Projects Must Follow Part 771

The final rule extends Part 771 for the first time to environmental reviews led by the FRA. Prior to this rulemaking, Part 771 applied only to FHWA and FTA, while FRA followed its own separate Environmental Procedures. As explained in the final rule, FRA's main reason for adopting Part 771 is that, under the FAST Act, FRA is now required to follow the Section 139 process "to the maximum extent feasible" for its projects. Since Section 139 requirements are woven into Part 771, the adoption of Part 771 provides a way for FRA to come into compliance with Section 139.

To avoid disrupting ongoing studies, FRA will apply Part 771 only to "newly initiated" environmental reviews for which FRA is the lead agency. FRA-led reviews that were under way as of November 28, 2018, will remain subject to FRA's 1999 Environmental Procedures. However, all FRA projects initiated since enactment of the FAST Act (December 4, 2015) must comply with Section 139, as stated in [FRA guidance](#).

### **3. FHWA, FTA and FRA Can Use Each Other's Categorical Exclusions**

The final rule amends Part 771 to allow any of these three USDOT agencies to apply a categorical exclusion found in any of the other agencies' categorical exclusion lists. Making the categorical exclusions interchangeable will broaden the universe of categorical exclusions available to each agency. There is a statutory provision in [49 USC 304](#) that allows similar flexibility, but it only allows one USDOT agency to use another's categorical exclusion for "multimodal" projects.

### **4. Categorical Exclusion for Projects in "Operational Right-of-Way" Expanded**

The final rule broadens the applicability of an existing categorical exclusion for projects constructed within the "operational right-of-way" for highway and transit facilities. When this categorical exclusion was first adopted in response to MAP-21, it was limited to right-of-way that was previously "disturbed" or "maintained for a transportation purpose." With the final rule, the agencies removed those requirements and adopted language that directly echoes the statute. The categorical exclusion now applies to "all real property interests acquired for the construction, operation, or mitigation of a project."

### **5. Electronic Distribution of EISs Allowed and Encouraged**

Before the new regulations were issued, Part 771 required hard-copy "printing" of NEPA documents. Part 771 now states that "[t]o minimize hardcopy requests and printing costs, the Administration encourages the use of project websites or other publicly accessible electronic means" to make NEPA documents available. The final rule also eliminates the reference to "printing" and instead refers to "publication" in the provision governing release of a Draft EIS (23 CFR 771.123(h)). Taken together, these changes make clear that electronic publication of NEPA documents is both allowed and encouraged.

### **6. FRA's Categorical Exclusions Updated and Moved into Part 771**

The final rule brings FRA's categorical exclusions into Part 771 and also make several substantive changes to FRA's categorical exclusions, which previously were included in FRA's Environmental Procedures. Key changes include the following:

- Adding a categorical exclusion for geotechnical and other investigations that are needed to provide information for preliminary design and for environmental analyses and permitting. Previously, only FHWA and FTA had a categorical exclusion for these activities.
- Broadening a categorical exclusion for emergency repair projects to include "upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the rail facility's original construction."

- Broadening a categorical exclusion for "environmental restoration" activities to include explicit coverage for "mitigation" activities and by dropping language that limited the categorical exclusion to activities "proximate to" railroad infrastructure.

## **7. Third-Party Contracting Allowed for FRA Projects**

The final rule amends Part 771 to authorize the use of "third-party contractors" to prepare EISs on projects where FRA is the lead agency. Under this practice, a private-sector project sponsor could retain a consultant to prepare the EIS, subject to the control and direction of FRA. This practice is well-established in the NEPA procedures for other federal agencies that routinely prepare EISs for privately sponsored projects, including the Surface Transportation Board.

Two caveats should be noted. First, the regulations allow any applicant—including a private-sector entity—to prepare an EA and submit the document to FRA (or FHWA or FTA) for consideration. Second, the regulations allow a state or local government when acting as a project sponsor to be directly involved in preparing an EIS as a joint lead agency; in that role, a state or local government can directly retain a consultant to prepare the EIS.

## **8. Section 4(f) Regulations Apply to FRA**

The final rule extends the Section 4(f) regulations to apply for the first time to FRA projects. The preamble to the rule also confirms that FRA intends to continue using FHWA's Section 4(f) guidance, known as the [Section 4\(f\) Policy Paper](#). The practical significance of this change is modest, because FRA has generally looked to the Part 774 regulations and Policy Paper as guidance. Even so, FRA's adoption of Part 774 is a significant step because those regulations now are legally binding requirements, not merely guidance, for FRA projects.

Unlike Part 771, Part 774 does not include a provision limiting those to "newly initiated" FRA projects. Therefore, Part 774 applies to ongoing as well as newly initiated FRA projects.

## **9. New Section 4(f) Exemptions for Historic Transportation Facilities**

The final rule updates Part 774 to incorporate statutory Section 4(f) exemptions for two types of historic transportation facilities: (1) "common post-1945 concrete or steel bridges and culverts" and (2) projects involving improvements to historic railroad and rail transit lines, except for train stations and certain bridges and tunnels on those rail or transit lines. The categories of resources covered by these Section 4(f) exemptions are also covered by "program comments" issued by the Advisory Council on Historic Preservation for [post-1945 bridges](#) and for [railroad rights-of-way](#) under Section 106 of the National Historic Preservation Act. The Council's program comments eliminate the need for project-level review under Section 106, while the Section 4(f) exemptions do the same under Section 4(f).

## **10. Private-Sector Project Sponsors Can Be Held Responsible for Implementing Environmental Mitigation Commitments**

The final rule amends 23 CFR 771.109 to clarify that a "project sponsor" can be made responsible for implementing mitigation commitments required in a NEPA decision document. The term "project sponsor" is defined to include private-sector as well as public entities.

## **Other Clarifications**

- Lead agencies can assume a participating agency's concurrence in a project schedule if the participating agency does not concur within the time allowed for comment.
- Participating agencies are "are expected to comment within their area of special expertise or jurisdiction."
- Private-sector project sponsors are limited to "providing technical studies and commenting on environmental review documents."
- Private-sector project sponsors "cannot be lead agencies or contract directly with consultants to prepare a Draft EIS," except with a third-party contracting arrangement.
- Identifying a preferred alternative in the Draft EIS is the norm. If a preferred alternative is *not* identified in the Draft EIS, the lead agencies must publicly identify the preferred alternative and invite public comment on it *before* making a final decision.
- The preferred alternative may be developed to a higher level of detail to facilitate the development of mitigation measures or compliance with permitting requirements.
- FRA will adopt FHWA and FTA's practice of preparing "reevaluations" under 23 CFR 771.129 as the basis for determining whether a supplemental EIS is required.
- FTA will require project sponsors to determine the scope of the project—with FTA concurrence—before finalizing a consultant contract to prepare an EA.

## Next Steps

With the Part 771 and 774 regulations issued, the environmental streamlining provisions in MAP-21 and the FAST Act have largely been implemented. Practitioners should be on the lookout for guidance implementing these regulations. FHWA, FTA and FRA will be issuing new guidance on Section 139, and FRA will be issuing guidance on the transition from its Environmental Procedures to Part 771.

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