

Section 1404 of the FAST Act QUESTIONS & ANSWERS

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The *Fixing America's Surface Transportation Act (FAST Act)* was signed into law on December 4, 2015. This document provides questions and answers regarding section 1404 of the FAST Act, Design Standards.

Q1: *Section 1404(b) of the FAST Act provides local jurisdictions that are direct recipients of Federal funds additional flexibility in the choice of design standards for specific projects. What are the requirements for using a local jurisdiction preferred design publication?*

A1: Under section 1404(b), several steps are involved. To be eligible for such consideration under this section, the local jurisdiction must be a direct recipient of Federal funds for a specific project [See Questions #2 and #3], and the project must be on a roadway under the ownership of the local jurisdiction and not be on the Interstate System. The local jurisdiction must obtain approval from the State in which it resides to use a publication that is different from the publication used by the State. The FHWA must also recognize such publication [See Question #4]. If these conditions are met, the local jurisdiction must adopt the design publication and ensure that designs fully comply with all applicable Federal laws and regulations (FAST Act § 1404(b)(2)-(3)).

Q2: *Section 1404(b)(1) of the FAST Act refers to a local jurisdiction that is a "direct recipient of Federal funds . . ." Who are direct recipients of Federal funds?*

A2: By statute, the term "direct recipients of Federal-aid Highway funds" refers to the 50 States, the District of Columbia, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa. However, local governments are eligible to be direct recipients under certain competitive grant programs such as the Transportation Investment Generating Economic Recovery (TIGER) and the new Fostering Advancements in Shipping and Transportation for the Long-term Achievement of National Efficiencies (FASTLANE) grant programs. Project sponsors should contact their FHWA Division Office if they have questions about specific projects.

Q3: *If my local jurisdiction directly receives Federal funds through a competitive grant program such as TIGER, is it then considered a "direct recipient of Federal funds" for all future projects?*

A3: No, not necessarily. The language of the applicable funding statute will determine eligible direct recipients. As a result, you must look at the language authorizing the funding in order to determine the meaning of direct recipient. For TIGER, the local jurisdiction may be a direct recipient. Note that a local jurisdiction that directly receives Federal funds through a competitive

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grant program is considered a direct recipient only for the specific project(s) for which the competitive grants were awarded.

Q4: *Section 1404(b) of the FAST Act authorizes local jurisdictions to use alternate design publications if certain provisions are met. One of those provisions is that the design publication is “recognized by the Federal Highway Administration.” What constitutes recognition by FHWA?*

A4: If a local jurisdiction desires to use a design publication that differs from the design publication used by the State in which it is located, it may seek approval from the State if it meets all of the requirements in section 1404(b) [See Question #1]. The design publications that FHWA currently “recognizes” are those listed in either the FHWA Memorandum dated August 20, 2013, regarding Bicycle and Pedestrian Facility Design Flexibility (available at www.fhwa.dot.gov/environment/bicycle_pedestrian/guidance/design_flexibility.cfm) or the related Questions and Answers (available at www.fhwa.dot.gov/environment/bicycle_pedestrian/guidance/design_flexibility_qa.cfm). The local FHWA Division Office may review and approve additional road design publications other than those that are currently recognized, and will communicate any such approvals with their respective State partner. The FHWA will periodically update and issue guidance containing the full list of recognized design publications. Local jurisdictions are responsible for ensuring that the project design is fully compliant with all applicable Federal laws and regulations.

Q5: *What constitutes “local adoption” of a design publication by a local jurisdiction?*

A5: Local jurisdictions have a variety of mechanisms under which they can adopt a design publication. Adoption of a specific publication for use by the local jurisdiction generally evolves from a deliberative process. This includes adoption by an ordinance or resolution either as a distinct action or through incorporation in local comprehensive plans, design guidelines, and manuals for the purpose of guiding the design of facilities within the local jurisdiction.

Q6: *What is the mechanism for a State to allow a local jurisdiction to use a different design publication?*

A6: State allowance processes will be set by each individual State. States may provide a statewide allowance for use of specific publications by eligible direct recipients, or they may provide case-by-case allowances. States should notify their FHWA Division Office of any allowances in this regard.

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Q7: *Can a local jurisdiction use its design publication (“if the State allows”), that was NOT adopted by FHWA in 23 CFR Part 625, to design roads on the National Highway System (NHS) (non-Interstate) in its jurisdiction?*

A7: Yes, for the specific project(s) on roads owned by the local jurisdiction and for which the local jurisdiction directly receives Federal funds, a State may allow a local jurisdiction to use a design publication the jurisdiction has adopted and FHWA has recognized. Refer to Question #1 for further information.

Q8: *How will adoption of these local publications affect when design exceptions are required?*

A8: The FHWA’s recent change to the controlling criteria (See www.fhwa.dot.gov/design/standards/160505.cfm) means that there are fewer controlling criteria where design exceptions will be required for approval by FHWA. The revised policy reduced the number of controlling criteria from 13 to 10 for Interstate highways, other freeways, and roadways with design speed \geq 50 miles per hours (mph), and from 13 to 2 criteria on low speed roadways (non-freeways with design speed $<$ 50 mph). The policy also clarified when design exceptions are needed and the documentation that is expected to support such requests. These changes will give local jurisdictions who own low-speed NHS roadways additional flexibility to design projects that improve communities while meeting transportation needs. More information on the controlling criteria changes is available at www.fhwa.dot.gov/programadmin/standards.cfm.

The FHWA will apply the remaining controlling criteria to the appropriate standard for a particular project. For example, if a local jurisdiction is a direct recipient of Federal funds for a project on an NHS roadway under its ownership that is not on the Interstate System, and it adopts the National Association of City Transportation Officials (NACTO) *Urban Street Design Guide* (which FHWA has recognized) as the standard for the project and the State allows the use of this publication, a design exception will only be required by FHWA for this project if the criteria contained in the NACTO *Urban Street Design Guide* are not met for a controlling criteria. More information on design exceptions is available at www.fhwa.dot.gov/design/standards/qa.cfm.

Q9: *We understand that the FAST Act requires consideration of the NACTO “Urban Street Design Guide” and the American Association of State Highway and Transportation Officials (AASHTO) “Highway Safety Manual” when developing design criteria under section 109(c)(1) of title 23, United States Code (U.S.C.). How will FHWA consider both of these guides when developing design criteria for the NHS?*

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A9: Section 109(c)(2) of title 23, U.S.C. requires the Secretary to consider a number of design publications when developing design criteria for the NHS. The FAST Act amended 23 U.S.C. 109(c)(2) to add the NACTO *Urban Street Guide* and the AASHTO *Highway Safety Manual* to the list of publications. The FHWA will consider the *Urban Street Design Guide* and the *Highway Safety Manual*, in addition to the other design publications listed in 23 U.S.C. 109(c), when developing design criteria for the NHS. The FHWA will update the design criteria on a periodic basis in order to ensure that highways on the NHS are built in accordance with the most up-to-date design publications.

The FHWA encourages design flexibility and full consideration of community context in transportation projects, including consideration of the NACTO *Urban Street Design Guide* in conjunction with other resources when developing projects on urban streets. The FHWA previously issued guidance at www.fhwa.dot.gov/environment/bicycle_pedestrian/guidance/ to encourage the use of this and other publications to develop bicycle and pedestrian facilities. Additionally, although Section 1404(b) is limited to direct recipients of Federal funds for the project, under 23 U.S.C. 109(c)(1), all agencies receiving Federal funds must consider access for other modes of transportation for projects on the NHS.

Q10: ***Section 1404(a)(1)(A)(iv) of the FAST Act inserted “cost savings by utilizing flexibility that exists in current design guidance and regulations” into section 109(c)(1)(C) of title 23, U.S.C. How do agencies consider cost savings found by utilizing existing flexibility?***

A10: Agencies will want to review existing policies and procedures to see if there are opportunities to take advantage of available flexibilities that can result in cost savings with respect to design criteria and other factors. Two key resources that can inform such an analysis are the AASHTO publication, *A Guide for Achieving Flexibility in Highway Design* (2004), and the FHWA publication, *Flexibility in Highway Design* (1997), which is available at www.fhwa.dot.gov/environment/publications/flexibility/ch00.cfm. Agencies may also consider a process such as value engineering to examine potential opportunities to reduce costs while still meeting the purpose and need of the project. The FHWA’s Performance-Based Practical Design (PBPD) effort provides guidance on scoping projects to meet the core purpose and need, while using available design flexibilities. Information on PBPD is available at www.fhwa.dot.gov/design/pbpd/. The FHWA’s forthcoming publication entitled *Achieving Multimodal Networks: Applying Design Flexibility and Reducing Conflicts* will also provide helpful information.

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Q11: *Section 1404(a)(1)(A)(i) now requires States to consider cost savings and other factors listed in 23 U.S.C. 109(c)(1) for highway projects on the NHS. What actions should FHWA Division Offices take to ensure States are considering those factors required by 23 U.S.C. 109(c)(1)?*

A11: Each FHWA Division Office should work with its State partners to ensure that State policies and procedures comply with the provisions of section 1404 of the FAST Act. When designing projects on the NHS, agencies must now consider cost savings, along with the constructed and natural environment of the area; the environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity; and access for other modes of transportation (23 U.S.C. 109(c)(1)). The FHWA Division Offices should review State manuals, policies, and procedures to ensure these factors are appropriately considered on NHS projects.

Compliance with FHWA's National Environmental Policy Act (NEPA) regulations (23 CFR 771) will generally describe how the design considers the constructed and natural environment of the area and the environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity as required by this section. An important resource for expediting full consideration of these issues as well as project approvals is the Planning and Environmental Linkages (PEL) approach, which addresses both environmental and community needs early in the project development process. More information on PEL is available at www.environment.fhwa.dot.gov/integ/index.asp.

To ensure that access for other modes of transportation is considered in the project design, FHWA would expect State policies and procedures to require consideration of access on and across the project by bicyclists, pedestrians and transit, where appropriate. The AASHTO publication entitled *Guide for Geometric Design of Transit Facilities on Highways and Streets* (2014) can inform State strategies for accommodating transit. The FHWA has a variety of resources available for States that can be helpful in ensuring multi-modal access, available on the Bicycle and Pedestrian Program web page (www.fhwa.dot.gov/environment/bicycle_pedestrian/index.cfm) and the Pedestrian and Bicycle Safety web page (http://safety.fhwa.dot.gov/ped_bike/). State policies and procedures are expected to also consider the cost savings that can be realized by using design flexibility; however, simply eliminating pedestrian or bicycle facilities from a project due to potential cost savings is not recommended as it may conflict with other statutory requirements (23 U.S.C. 109(m), 23 U.S.C. 217(g)(1)) and policy goals.

Q12: *Do agencies have to document the cost savings found by using existing flexibility on every design on the NHS?*

A12: Section 109 of title 23, U.S.C., does not direct agencies to document their considerations; however, agencies should be prepared to discuss with the public and elected officials their design alternatives, tradeoffs, and choices.

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Q13: *Which NHS projects in the pipeline today must consider access for all modes of transportation as required under 23 U.S.C. § 109(c)(1)(D) as modified by the FAST Act?*

A13: The FHWA recognizes that some lead time may be necessary after publication of this guidance for project sponsors to implement the section 109(c)(1)(D) requirement to consider all modes of transportation for projects on the National Highway System (NHS). For example, if FHWA were to require project sponsors to revisit the preliminary engineering (PE) phase (30% completion) to meet the section 109(c)(1)(D) requirement, this could cause delay or cost increases to projects. Accordingly, if an NHS project has already been authorized to proceed with preliminary engineering activities or is authorized to proceed with PE activities within 90 days after the publication of this FAST Act guidance, the project sponsor need not revisit the preliminary engineering phase. The FHWA expects that any projects on the NHS authorized to proceed with PE more than 90 days after publication of this guidance will consider access for all modes of transportation.