

Section 1404 of the FAST Act, Section 11129 of the IIJA

Questions & Answers

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Except for the statutes and regulations cited, the contents of this document do not have the force and effect of law and are not meant to bind the States or the public in any way. This document is intended only to provide information regarding existing requirements under the law or agency policies.

The *Fixing America's Surface Transportation Act (FAST Act)* (Public Law 114-94) was signed into law on December 4, 2015. The *Infrastructure Investment and Jobs Act (IIJA)* (Public Law 117-58, also known as the "Bipartisan Infrastructure Law") was signed into law on November 15, 2021. This document provides questions and answers regarding section 1404 of the FAST Act and section 11129 of IIJA, Design Standards.

Q1: Section 1404(b) of the FAST Act and section 11129 of IIJA provide local jurisdictions with additional flexibilities to local jurisdictions developing Federal-aid projects, or projects on the NHS, on roadways under their ownership. What are the requirements for using an alternate roadway design publication preferred by the local jurisdiction?

A1: The requirements for using an alternate roadway design publication depend on whether the project is located on a roadway that is part of the National Highway System (NHS). FHWA published a memo on November 16, 2023, titled [Design Standards, FAST Act and Infrastructure Investment and Jobs Act Provisions](#), that details these requirements.

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: Direct recipients are entities that receive funds directly from the Federal Highway Administration without funds going through another entity (pass-through). Entities include 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. Local governments are also eligible to be direct recipients under certain competitive grant programs such as the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) and the Safe Streets and Roads for All (SS4A) 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 RAISE or Safe Streets and Roads for All, 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, one should look at the language authorizing the funding in order to determine the meaning of direct recipient. For RAISE or Safe Streets and Roads for All, the local jurisdiction may be a direct recipient. Note that a local jurisdiction that directly receives Federal funds through a competitive 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 and section 11129 of IIJA authorizes local jurisdictions to use alternate roadway 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: See FHWA memo titled [Design Standards, FAST Act and Infrastructure Investment and Jobs Act Provisions](#), November 16, 2023, for more information regarding FHWA recognition of alternate roadway design guides. Local jurisdictions are responsible for ensuring that the project design is fully compliant with all applicable State and 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 an alternate roadway design publication under FAST 1404(b)?

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.

Q7: How will adoption of these local publications affect when design exceptions are required?

A7: The FHWA's 2016 change to the controlling criteria (81 Fed. Reg. 27187 (May 5, 2016); see also 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 ≥ 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.

Q8: 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?

A8: 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 (PBDP) effort provides guidance on scoping projects to meet the core purpose and need, while using available design flexibilities. Information on PBDP is available at www.fhwa.dot.gov/design/pbpd/.

Q9: 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)?

A9: Each FHWA Division Office should work with its respective States to ensure that State policies and procedures comply with the provisions of 23 U.S.C. 109(c)(1). When designing projects on the NHS, agencies must 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 include consideration of access on and across the project by bicyclists, pedestrians and transit, where appropriate. See the FHWA memo titled [Design Standards, FAST Act and Infrastructure Investment and Jobs Act Provisions](#), November 16, 2023, for more information and recognized documents that can assist agencies in designing for all modes of transportation. 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.

Q10: Do agencies have to document the cost savings found by using existing flexibility on every design on the NHS?

A10: 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.