



U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Subject: **INFORMATION**: FAST Act § 1440
At-Risk Project Pre-Agreement Authority
for Preliminary Engineering

Date: March 19, 2019

From: Derrell Turner /s/
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Infrastructure

In Reply Refer To:
HISM-10

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To: Associate Administrators
Division Administrators
Directors of Field Services

Section 1440 (§ 1440) of the Fixing America's Surface Transportation Act (FAST Act) (Pub.L.114-94) authorizes FHWA to reimburse Federal-aid Highway Program (FAHP) recipients or subrecipients for preliminary engineering (PE) costs incurred before project authorization by FHWA on eligible Title 23 projects. Under § 1440(d), recipients and subrecipients using this authority assume all risks for PE costs incurred before project authorization. Until a project is authorized in the Fiscal Management Information System (FMIS), and Federal funds obligated, there is no guarantee of Federal funding for any pre-authorization PE work.

The FAST Act § 1440 does not waive FAHP requirements, except for allowing the reimbursement of PE costs incurred prior to project authorization. Section 1440 contains several conditions when using the at-risk PE project agreement authority. Recipients and subrecipients may not advance a project beyond PE before completing the environmental review process. Before a project is authorized, recipients and subrecipients must demonstrate to the Secretary that the project meets all applicable cost eligibility conditions. If the project is located in an area that is subject to transportation conformity, all conformity requirements of the Clean Air Act must be met.

States may continue to request, and Divisions may authorize Advance Construction (AC) for PE projects in accordance with 23 U.S.C. 115.

The following Questions and Answers may be accessed on the FAST Act website (<http://www.fhwa.dot.gov/fastact/>) and the Policy Guidance Center, (<https://www.fhwa.dot.gov/pgc/>). Please direct questions to Ms. Kathleen Hulbert (202-809-4758), Mr. David Bartz (512-417-5191) or Mr. Everett Matias (202-366-6454) of the Office of Stewardship, Oversight and Management.

Attachment

FAST Act § 1440 At-Risk Project Pre-Agreement Authority¹
Questions and Answers

Question 1. How is preliminary engineering (PE) defined for the purposes of this provision?

Answer 1. For the purpose of implementing this provision, § 1440(a) defines PE as allowable preconstruction project development and engineering costs. Permissible PE activities do not include costs for planning activities, right-of-way acquisition, physical construction, or any other activities not included as PE² for an eligible Federal-aid project.

Question 2. What conditions and restrictions apply to the use of § 1440?

Answer 2. Conditions and restrictions are stated in § 1440(c) and (e).

To be reimbursed for work that was performed before FHWA authorized the project, the work must have been eligible under the Federal-aid Highway Program (FAHP) and have met applicable requirements of title 23, United States Code at the time those costs were incurred (§ 1440(c)(1)). The FHWA must also concur that the costs would have been eligible if incurred after the date of project authorization (§ 1440(c)(3)). If the project is located within an air quality nonattainment or maintenance area or an area that is subject to transportation conformity³, the project must satisfy conformity requirements of the Clean Air Act (§ 1440(c)(2)). In order to meet the requirement under § 1440, for PE associated with projects in nonattainment / maintenance areas, the actual reimbursement cannot occur until the underlying project has met the conformity requirements. Up until that point, the PE work prior to authorization does not meet eligibility requirements under § 1440.

Section 1440 does not waive FAHP requirements for a project, other than establishing the eligibility of PE costs incurred before FHWA authorized the project. This section does not authorize the project to advance beyond PE before the environmental review process is completed. FHWA Order 6640.1A⁴ defines permissible project related activities that may be advanced prior to the conclusion of the National Environmental Policy Act (NEPA) process. Until the project is authorized, and Federal funds obligated, there is no guarantee that the project will be eligible for FAHP funding.

Question 3. What is the difference between § 1440 and 23 CFR 1.9(b)?

¹ FAST Act § 1440, At-Risk Project Preagreement Authority, is included as a note to 23 U.S.C. 121, available at <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title23-section121&num=0&edition=prelim>.

² See the March 11, 2015, “Guidance on Preliminary Engineering Authorizations in FMIS”, available at <http://www.fhwa.dot.gov/pgc/results.cfm?id=5617> for an explanation of PE under the Federal-aid program generally.

³ On September 14, 2018, the U.S. Court of Appeals for the D.C. Circuit issued an order that requires conformity determinations for the 1997 ozone standard on planning and project actions in certain areas as of February 16, 2019.

⁴ See the October 1, 2010, “FHWA Policy of Permissible Project related Activities During the NEPA Process”, available at <https://www.fhwa.dot.gov/legisregs/directives/orders/66401a.cfm> for an explanation of permissible project related activities during the NEPA Process.

Answer 3. Generally, Federal funds cannot reimburse project costs incurred prior to authorization.⁵ Section 1440 and 23 CFR 1.9(b) provide conditional exceptions to this rule.

Section 1440 allows a recipient or subrecipient to receive reimbursement for PE costs incurred prior to project authorization when the conditions and restrictions discussed in Question 2 are met.

23 CFR 1.9(b) allows a State DOT to request Federal participation for costs incurred prior to authorization. The use of section 1.9(b) is applicable to any phase of the project and generally involves situations where the recipient or subrecipient is unaware costs are being incurred while the Project Authorization is not in place. However, the enactment of § 1440 effectively supplanted the use of 23 CFR 1.9(b) for PE costs incurred prior to authorization (see § 1440(e)(2)).⁶ Pursuant to 23 CFR 1.9(b), waivers may be granted if certain conditions are met as follows:

- the State DOT provides a detailed description of the relevant facts and an explanation regarding the necessity of incurring costs prior to FHWA authorization (23 CFR 1.9(c));
- the FHWA finds that:
 - there has been full compliance with requirements mandated by Federal statutes;
 - there has been substantial compliance with all other requirements prescribed by the FHWA Administrator;
 - the State DOT acted in good faith, and there exists no willful violation of Federal requirements;
 - approval will not adversely affect the public;
 - the cost is not in excess of the cost which would have incurred under authorization had there been full compliance; and
 - the quality of the work undertaken has not been impaired.

Question 4. May recipients or subrecipients request a waiver under 23 CFR 1.9(b) for PE costs incurred prior to authorization?

Answer 4. No. Upon enactment, the provisions in § 1440 established the exclusive method for addressing reimbursement of PE costs incurred prior to project authorization. Section 1.9(b) cannot be used to reimburse previously incurred PE costs. It is worth noting that recipients and subrecipients typically should find it easier to meet the conditions in § 1440 than the conditions in 23 CFR 1.9(b). Section 1.9(b) remains available to address non-PE prior incurred costs.

Question 5. Does § 1440 apply to costs incurred before enactment of the FAST Act?

Answer 5. No. The FAST Act was effective as of October 1, 2015 (FAST Act § 1003), thus PE costs that were incurred before October 1, 2015, cannot be reimbursed under the provisions of § 1440. For PE costs incurred prior to October 1, 2015, 23 CFR 1.9(b) applies.

⁵ 23 CFR 1.9(a)

⁶ See discussion in Question and Answer 4.

Question 6. To make use of § 1440, must the PE project be included in an approved Statewide Transportation Improvement Program (STIP) or Transportation Improvement Program (TIP) when the PE costs were incurred?

Answer 6. Yes. The project must have been in an approved STIP/TIP and have been consistent with the associated long-range transportation plans at the time the costs were incurred, pursuant to FAHP requirements.⁷

Question 7. If an engineering consultant has been used, must procurement of that consultant's services comply with 23 CFR part 172, Procurement, Management, and Administration of Engineering and Design Related Services?

Answer 7. Yes. Except as otherwise provided for in 23 CFR part 172, recipients or subrecipients must follow 23 CFR part 172 selection procedures to procure engineering and design related services using FAHP funds where those services are directly related to a construction project.

Question 8. Can a State seek reimbursement under § 1440 for eligible costs paid to utility companies for PE related to utility relocation?

Answer 8. Yes, if these costs would have been otherwise eligible if performed after receiving authorization (for example, there was a utility agreement in place when the preliminary engineering was performed). Subsurface utility engineering and other efforts by utility companies are often necessary as part of preliminary engineering. As per the requirements of 23 U.S.C. 123 and 23 CFR part 645, only work performed under the terms of an executed utility agreement between the State and utility, and paid for by the recipient or subrecipient, would be eligible and could be considered for reimbursement under § 1440.⁸

Question 9. How is use of § 1440 approved on a project?

Answer 9. FHWA approval under § 1440 for previously incurred costs is documented in the project authorization. Division Administrators have been delegated the authority for final disposition of State claims, including approval for payment.⁹ The authority to approve the reimbursement of PE costs incurred prior to project authorizations pursuant to § 1440 is within the scope of that delegation. Further delegation of this authority by Division Administrators shall be consistent with the FHWA Delegation Order.

Question 10. What documentation does FHWA require to demonstrate that all applicable cost eligibility conditions are met?

Answer 10. There is no specified format for the documentation. However, the recipient or subrecipient must ensure and demonstrate to the division office that Federal laws and regulations have been satisfied, and the conditions of § 1440 were satisfied (§ 1440(d)(2)). If documentation

⁷ Transportation planning requirements are available under 23 U.S.C. 134 and 135 and associated regulations.

⁸ 23 CFR 645.101(a) and 645.113.

⁹ Pursuant to FHWA Order M1100.1A, Chapter 5, Section 3, 24(c)

does not provide satisfactory evidence to the division, the division may not authorize reimbursement of the prior incurred costs. The recipient or subrecipient must retain documentation supporting costs incurred in accordance with documentation retention requirements¹⁰ (i.e., 3 years after final voucher for Federal reimbursement). The State is responsible for assuring compliance with Federal laws and requirements and retaining appropriate documentation. Division verification should be consistent with division practice and in conformance with the Stewardship and Oversight agreement in the applicable State. Division verification may include but is not limited to compliance with requirements for metropolitan and statewide planning; satisfaction of conformity requirements; and procurement of engineering and design related service contracts.

Question 11. How should divisions, recipients, and subrecipients document the use of § 1440 in the Federal-aid Project Agreement?

Answer 11. The division must ensure that the Federal-aid project agreement includes a statement in the Fiscal Management Information System (FMIS) recipient remarks field indicating (1) FAST Act § 1440 is being employed and § 1440 required conditions are met, (2) costs were incurred prior to the project agreement in compliance with applicable Federal laws and regulations, and (3) the time period and amount of such costs. The following statement, or similar, is recommended to be included in the recipient remarks field.

“The State requests authorization for reimbursement of prior incurred preliminary engineering costs in accordance with Section 1440 of the Fast Act. All Federal requirements for such costs were met. The costs were incurred between xx/xx/xxxx and xx/xx/xxxx and in the amount of \$xx.”

The PE effective authorization date is the date that such costs were authorized by FHWA (i.e., the third signature on the Federal-aid project agreement or modification, unless PE was previously authorized for other purposes).

Question 12. Does § 1440 affect the Federal share for projects?

Answer 12. No. Nothing in § 1440 changes the Federal share for a project.

Question 13. How should a division apply the “10 year PE rule” under 23 U.S.C. 102(b)?

Answer 13. Section 1440 did not change 23 U.S.C. 102(b), so the “10-year PE rule” applies¹¹. As with projects not making use of § 1440, the 10-year period starts at the end of the fiscal year that FHWA authorized the PE project agreement. If neither on-site construction nor acquisition of right-of-way has begun within the 10-year period after the PE was authorized, any costs reimbursed through the PE project agreement, including those reimbursed under § 1440, must be repaid to the Highway Trust Fund under 23 U.S.C. 102(b).

¹⁰ 2 CFR 200.333

¹¹ Pursuant to FHWA Order 5020.1A “Repayment of Preliminary Engineering Costs”, available at <https://www.fhwa.dot.gov/legsregs/directives/orders/50201a.cfm#q3>

Question 14. What is the difference between § 1440 and requesting Advance Construction (AC) on a FMIS project agreement?

Answer 14. AC is a technique used to authorize a Federal-aid project without the commitment or obligation of Federal funds¹². After FHWA authorizes AC, a project can move forward with State or local funds. Federally-eligible costs incurred after AC authorization are eligible for reimbursement after the project modification to obligate a Federal source of funds. AC may be used for any phase of the project, while § 1440 only applies to PE phase.

While both AC and § 1440 require FHWA authorization prior to the reimbursement of funds, § 1440 establishes the eligibility of PE costs that were incurred prior to FHWA authorization. AC requires authorization before eligible costs are incurred on the project. The AC authorization establishes the eligibility of costs incurred and documents that the State intends to obligate Federal-aid funding on the project in the future.

Question 15. Can approval of § 1440 be assumed by the State under 23 U.S.C. 106(c)¹³?

Answer 15. No. Cost eligibility, reimbursement, and project authorization decisions cannot be assumed by the State under 23 U.S.C. 106(c).

¹² 23 U.S.C. 115

¹³ 23 U.S.C. 106(c)