

Interim Guidance on Application of 49 U.S.C. 307: Improving State and Federal Agency Engagement in Environmental Reviews

This interim guidance addresses implementation of Section 1312 of the Fixing America's Surface Transportation Act (FAST Act), which amends Title 49, adding the new Section 307, Improving State and Federal agency engagement in environmental reviews.¹ This guidance addresses the use of funds by eligible public entities to support Federal agencies, States agencies and Indian tribes participating in environmental planning and review processes. The U.S. Department of Transportation (DOT) expects this process to be used primarily for individual projects, although the statute provides the flexibility to apply it to a group of projects or to a program of projects. This type of program has been successful in promoting efficient project delivery through early engagement and issue identification. This interim guidance is effective immediately.

1. How does the new 49 U.S.C. 307 relate to in the pre-existing provision 23 U.S.C. 139(j), Assistance to Affected State and Federal Agencies?

While 49 U.S.C. 307 applies to the entire DOT, 23 U.S.C. 139(j) applies only to public entities receiving financial assistance under title 23 or chapter 53 of title 49 U.S.C. Section 307(f) explicitly recognizes that 23 U.S.C. 139(j) continues to be in effect and is not superseded by section 307. Public entities receiving financial assistance from DOT under title 23 or chapter 53 of title 49 may continue to establish funding arrangements that comply with 23 U.S.C. 139(j). Alternatively, those public entities may use the section 307 authority if they wish to do so.

2. What is a "public entity" under 49 U.S.C. 307?

A public entity includes any State or local government; any department, agency, special purpose district, or other instrumentality of one or more State or local governments; Indian tribes and any public or governmental transportation agency that receives financial assistance from the DOT for one or more projects for a public purpose.

3. Who is eligible to receive funding from a public entity?

Federal agencies, including DOT, State agencies, and Indian tribes participating in the environmental planning and review process for one or more projects or a program of projects are eligible to receive funds from a public entity. This guidance refers to these as "receiving agencies." It is the decision of the public entity whether to request from the Secretary, or otherwise delegated DOT Operating Administration (OA), approval for this funding option.

¹ Section 1304(i) of the FAST Act amended a similar provision at 23 U.S.C. 139(j).

4. What activities are eligible for funding?

Funded activities must directly and meaningfully contribute to expediting and improving the permitting and environmental review processes to facilitate transportation project planning and delivery. Examples of such activities include transportation planning activities that precede the initiation of the environmental review process, activities directly related to the environmental review and permitting process, dedicated staffing, training of agency personnel, information gathering and mapping, and the development of programmatic agreements.

5. Are there limitations to how the funding may be used?

Public entities may provide funds only to support activities that directly and meaningfully contribute to expediting and improving permitting and review processes, including planning, approval, and consultation processes for one or more projects or a program of projects. This means that the receiving agency must agree that with the assistance of the additional resource, it will conduct environmental reviews and reviews of planning documents in a period of time that is shorter than the time it would ordinarily have taken to complete this review. However, to the maximum extent practicable, expediting and improving the process must not adversely affect the timeline for review and permitting by Federal or State agencies, Indian tribes, or other entities that have not contributed funds under this section. The baseline “customary time” for a review should be based on the best data available or should reflect the best estimate of the receiving agency based on its historical experience. Additionally, funds provided under this program may not impact impartial decision making of receiving agencies with respect to environmental reviews or permits, either substantively or procedurally. Public entities and receiving agencies should provide a mechanism to ensure such impartiality.

6. How does the public entity obtain approval for use of funds?

A public entity receiving DOT financial assistance should request in writing to the OA from which it receives financial assistance for permission to provide funds to a receiving agency. Public entities should provide the OA with sufficient information to ensure all of the statutory criteria would be met. The Secretary is responsible for allowing the public entity to provide funds to a receiving agency, and the OA will facilitate Secretarial review and approval.

7. What type of agreement is necessary between the public entity and the receiving agency?

Prior to providing any additional funding for dedicated staffing at a Federal agency under 49 U.S.C. 307, the receiving agency and the requesting public entity must enter into a written agreement that establishes a process to identify projects or priorities to be addressed by the use of the funds. Funding agreements must be in compliance with applicable Federal and State contracting and finance laws and procedures. For examples of such agreements, visit <https://www.environment.fhwa.dot.gov/strmlng/igdocs/index.asp>.

8. If an entity chooses not to provide funds under section 307, will the timeline for review and permitting of projects be adversely affected?

No. Section 307 does not penalize public entities that choose not to provide funds under Section 307, nor does it allow receiving agencies to prioritize entities that do provide funds under this Section. Because the funding is to provide increased capacity, there should not be any adverse effect on the receiving agency's performance with respect to other projects and programs. However, each agreement must include language specifying that the receiving agency represents its acceptance and use of funds, to the maximum extent practicable, will not adversely affect the timeline for review and permitting for projects or programs not covered by the agreement, including projects and programs of other public and private entities.

9. How will DOT ensure that funding made available to a receiving agency under section 307 will not impact, either substantively or procedurally, impartial decision making with respect to environmental review or permits?

Each agreement between a public entity and receiving agency should include language specifying that both parties understand that the acceptance and use of funds under the agreement must not impinge on the receiving agency's exercise of independent judgment in its review or alter the receiving agency's obligations under applicable laws and policies.

10. How will DOT maintain and make publicly available a list of projects or programs for which review or permits have been carried out using funds authorized under this section?

The Permitting Dashboard will have the ability to identify those projects utilizing this provision.