



At-Risk Preliminary Engineering

I. BACKGROUND

On March 19, 2019, the Federal Highway Administration (FHWA) issued a Memorandum titled “At-Risk Project Pre-Agreement Authority for Preliminary Engineering” which clarifies Section 1440 of the Fixing America’s Surface Transportation Act (FAST Act). Section 1440 of the FAST Act authorizes FHWA to reimburse recipients and subrecipients for preliminary engineering (PE) costs incurred prior to project authorization, assuming the costs are for otherwise eligible activities on eligible projects, and the project and phase are included in a federally-approved Federal Statewide Transportation Improvement Program (FSTIP) document or amendment. If eligible, and once federal authorization is received, incurred costs can be reimbursed back to the effective date of the FAST Act, October 1, 2015 or the federal approval date of the FSTIP, whichever occurs later.

Section 1440 of the FAST Act does not waive any additional Federal-Aid Highway Program requirements, projects must still meet all applicable cost eligibility conditions, and all conformity requirements of the Clean Air Act must be met. Section 1440 of the FAST Act does not waive any federal A&E requirements and approvals (as documented in Chapter 10 of the Local Assistance Procedure Manual), such as for Consultants in a Management Support Role (CMSR), nor does it release local agencies from establishing DBE goals and requirements and evaluating GFE’s.

However, until authorized and obligated, these funds are still considered “At-Risk”. There is no guarantee of Federal funding for any pre-authorized/pre-obligated PE work; recipients and subrecipients invoking Section 1440 authority assume all risk.

II. POLICY

Except for projects with federal funds that require allocation by the California Transportation Commission (CTC) (e.g., Active Transportation Program, Trade Corridor Enhancement Program, and State Transportation Improvement Program funds), local agencies may begin reimbursable PE work prior to receiving federal authorization for such work, assuming the project and phase are included in a federally-approved FSTIP document or amendment prior to incurring costs. Programming projects in the FSTIP or starting reimbursed work prior to authorization does not necessarily constitute eligibility of such projects for federal aid reimbursement.

For projects with federal funding that require CTC allocation, only costs incurred **after** CTC allocation are eligible for reimbursement.

Full funding for a subsequent phase of the project (final design, right-of-way acquisition, or construction) must be included in an approved FSTIP document or amendment before the NEPA document can be signed. Also, all project phases must be included in the fiscally constrained Regional/Metropolitan Transportation Plan before a NEPA document can be signed. If the “No Build” alternative is selected, the project may still be eligible for reimbursement under Section 1440.



III. PROCEDURE

To invoke the flexibilities allowed under Section 1440 of the FAST Act when submitting a request for authorization for the PE phase (LAPM 3-A), a local agency must provide both the original and current FSTIP document listing or amendment as supporting documents. As an alternative, only the current FSTIP listing may be provided if it references the date of the original FSTIP listing. However, in such instances, the original listing must be provided if requested by Caltrans to meet programming requirements or if there are any questions or concerns for funding authorizations. The original FSTIP federal approval date documenting inclusion of the PE phase will be the “Effective PE Reimbursement Date”, whereby all otherwise eligible costs incurred on or after this Effective PE Reimbursement Date will be reimbursable. The original FSTIP listing does **not** need to specify federal funds to begin reimbursable work; however, federal funds will need to be included in the current FSTIP when an agency submits their authorization request.

Note: The current FSTIP listing may reference the date of the original FSTIP listing and state that the original listing can be provided if requested to meet programming requirements. Caltrans, however, may request the original listing if there are questions or concerns for funding authorization.

Reimbursements of funds can begin after funds are authorized and obligated by FHWA via the E-76. To ensure timely processing of invoices, local agencies will need to include the Effective PE Reimbursement Date on all invoices (LAPM 5-A) for reimbursement of incurred PE costs on all projects invoking Section 1440 of the FAST Act.

IV. APPLICABILITY/IMPACTS

The At-Risk PE option is only available for the PE phase of federally funded projects. It is not available for the Right of Way, Construction, Construction Engineering, Non-Infrastructure, or Other phases.

LAPM 3-A and LAPM 5-A have been revised and are available for download at the Division of Local Assistance website. This new policy will be incorporated into Chapter 3 (Authorization) and Chapter 5 (Invoices) of the LAPM during the next LPP update.

This policy should lead to expedited delivery of local projects, fewer Inactive projects, more timely obligations, and fewer PE>10 projects.

Approved: Original Signature By
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Date

At-Risk Preliminary Engineering - FAQs

1. Does an agency need to “invoke their rights under Section 1440 of the FAST Act” at time of authorization?
Yes, that’s a good analogy.
2. How far into Design can we go? Can we request PE and CON Authorizations at the same time?
There is not a limit on how far into design an agency can go before requesting authorization of At-Risk PE.
Yes.
3. A&E Issues with Design Consultants?
Locals still need to follow the federal requirements including the LAPM 10-C, FHWA approval required for CMSR (Consultant in a Management Support Role) prior to advertisement, DBE requirements and reporting, etc. Also, ICRP rates must be approved before contract execution.
4. How do agencies show that their project was programmed at the time work was performed? How do we satisfy the requirement for programming?
The project must have funds for the PE phase programmed in an approved FSTIP or approved Amendment prior to start of work for which the agency is seeking At-Risk PE reimbursement. This is referred to as the original FSTIP document listing, and this original FSTIP listing does not need to show a federal funding presence to establish an “Effective PE Reimbursement Date.” When a local agency is ready to request an authorization of federal funds, the project must be included in a current approved FSTIP or Amendment, and the federal funds requested must be shown as programmed.
5. What about multiple-funded projects, such as CTC Allocated funds - how does this affect getting reimbursed for work prior to Authorization? Can agencies identify multiple reimbursement dates, one for federal, one for state?
CTC Allocated projects that have federal funds embedded in the programs (ATP, TCEP, STIP) will only be able to invoke Section 1440 reimbursement for costs incurred AFTER CTC Vote and Programming. The CTC considers individual votes for the ATP, TCEP and STIP projects to cover State and Federal funds, so beginning work on these program projects prior to the CTC Vote will not be reimbursable.
6. Apportionment Impacts? OA Impacts?
Programming will handle by deducting when it comes in; Programming sees no additional risk beyond the current process.
7. Do we require an E-76 prior to NEPA Document? Prior to PES?
No and No, but the NEPA environmental review process can begin without demonstrating fiscal constraint, however, full funding for a subsequent phase of the project (e.g., final design, right-of-way (ROW) acquisition, or construction) must be included in the approved FSTIP before the Record of Decision (ROD), Finding of No Significant Impact (FONSI), or Categorical Exclusion can be signed. All project phases (e.g., PE, final design, ROW, utility relocation, construction, and/or construction phases) planned within the life of the transportation plan have to be included in the fiscally constrained RTP/MTP in order for Caltrans to sign the ROD, FONSI or approve the CE.
8. How far back can charges go?
The effective date is the same as the FAST Act: October 1, 2015.
9. Do At-Risk options apply to “Other” phase?
No, At-Risk PE only applies to the PE phase and cannot be invoked on the “Other” phase, which may still be federally eligible, but is not the PE phase.
10. Can we go “back in time” on a previously authorized PE request?
Yes, this is allowable, but a PE modification electing Section 1440 At Risk PE would be required. Agencies can get reimbursed for eligible work back to October 1, 2015 if they can show the project was programmed in an approved FSTIP or Amendment at that time.
11. What if the “No Build” option is selected in the NEPA document?
The project would still be eligible for reimbursement under Section 1440.



12. If the PE Phase is programmed in the FTIP but outside the Four-Year Element - does this qualify for the At-Risk PE?
No. PE needs to have been programmed within the Four-Year Element to qualify for At-Risk PE.
13. Where can I find more information regarding this policy?
FHWA's March 19, 2019 Memorandum titled "At-Risk Project Pre-Agreement Authority for Preliminary Engineering" and FAQ's can be found on FHWA's website.
14. What date is used when applying the "10 year PE rule"?
The date of federal authorization of PE is the date used not the effective reimbursement date established by invoking Section 1440 of the FAST Act (AKA At-Risk PE).
15. What amount is eligible for federal reimbursement?
FSTIP programming utilized to determine effective PE reimbursement date only determines start date not amount of reimbursement eligible. Any federal reimbursement will occur after authorization and is limited to funds authorized.