

MAP-21: What Will it Do to Expedite Project Delivery?

TRB Transportation Law Workshops

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Overview

- Historical Context
- Overview
- Preliminary Observations
- Key Changes to Project Delivery in MAP-21
- Some Other Changes of Note
- Issues to Watch

Historical Context

Each of the last three reauthorizations has included provisions to expedite project delivery ...

- TEA-21 - 1998
- SAFETEA-LU - 2005
- MAP-21 - 2012

Trends ...

- Lengthier
- More detailed, more prescriptive
- More emphasis on expediting

MAP-21 – Expediting Project Delivery

Section	Topic
1301	Declarations of Policy
1301	Project Delivery Initiative
1302	ROW Acquisition during NEPA
1303	Contracting
1304	Innovative Methods
1305	6002 – Tweaks
1306	6002 – Issue Resolution
1307	6002 – Funding MOUs
1308	6002 – Stat. of Limitations
1309	6002 – ‘4-Year EIS’
1310	Planning-NEPA Linkage
1311	Programmatic Mitigation

Section	Topic
1312	CE Delegation
1313	Full NEPA Delegation
1314	CEs - Multimodal Projects
1315	CEs – Emergency Projects
1316	CEs – Projects in ROW
1317	CEs – Projects with Low Fed \$
1318	Additional CEs; Programmatic
1319	Combined FEIS/ROD
1320	Early Coordination MOUs
1321	FHWA/FTA Procedures
1322	Study: Fed/State Duplication
1323	Reports: NEPA Process Times

Preliminary Observations

Sheer number and variety of changes

- 23 separate provisions in Title I, Subtitle C
- Soup to nuts ... Environmental process, ROW, contracting, CEs, EISs, planning-NEPA linkage, programmatic, SOLs ...

Aggressiveness

- Clearly prioritizes **speed, finality, flexibility** - even when in tension with NEPA principles - such as:
 - Allowing ROW acquisition with Fed \$ during NEPA
 - Requiring CE for (all?) projects in existing ROW
 - Allowing combined FEIS and ROD

Preliminary Observations

Opportunities for ‘better’, not just ‘faster’

- Many ideas, if they take root, could make the process better over time ...
 - Early coordination
 - Planning-NEPA linkage
 - Programmatic mitigation plans
 - Delegation of NEPA responsibilities to States
 - Use of innovative technologies
 - Designating projects for ‘experimental’ approaches

Preliminary Observations

Complexity

- Goal is a streamlined process, but some of statutory language is far from simple ...
- Some examples:
 - Framework for NEPA-Planning Linkage
 - Process for applying CEs to multimodal projects
 - Changes to “issue resolution” in 6002 process
 - “Financial penalties” for permitting agencies
- *“How will this work in the real world?”*

Preliminary Observations

What didn't happen ...

- No deadlines to complete NEPA
- No exemptions from NEPA
- No increased authority of lead agency over other agencies
- No changes to standards for sufficiency of EIS
- No changes to substantive statutes
 - ESA, 404, CAA, Section 4(f), etc.
- No substitution of Section 106 for 4(f)
- No substitution of State mini-NEPA for NEPA

Project Delivery Provisions in MAP-21: A Quick Tour

Project Delivery – What You Need to Know

- 1) Effective Date/Date of Enactment
- 2) Early Right-of-Way Acquisition
- 3) Changes to 6002 Process - esp. financial penalties
- 4) Ability to Combine FEIS and ROD
- 5) New/Modified CEs
- 6) Planning-NEPA Linkage
- 7) Opportunity for Delegation
- 8) 150-Day Statute of Limitations

1. Effective Date/Date of Enactment

- Effective date = **October 1, 2012**
- “Date of enactment” means “effective date”
- Therefore:
 - None of these provisions are in effect now.
 - All changes to existing law take effect October 1.
 - All rulemaking deadlines run from October 1.

2. ROW Acquisition Before/During NEPA

Current Law

- Federal \$ can be used for hardship/protective acquisitions
- State \$ can be used to extent authorized by State law
 - May be reimbursed at time of construction with *EPA and USDOT* concurrence that NEPA was not affected

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- With Federal \$: allowed if State certifies and USDOT concurs that NEPA review will not be affected.
- With State \$: allowed; now can be reimbursed at time of construction if USDOT concurs that NEPA was not affected.
 - *EPA concurrence no longer needed*

3. Section 6002 Process

Current Law

- ‘environmental review process’ in 23 USC 139 must be followed for all EISs for highway/transit projects
- Includes ‘issue resolution process’

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- Allows single USDOT lead agency
- Allows programmatic compliance
- Requires participating agency ‘concurrence’ in schedule
 - If schedule is included in Coordination Plan
- Expands ‘issue resolution’ process with ‘**financial penalties**’
 - *Funds rescinded if agency misses decision deadline*

3. Section 6002 Process (cont'd)

- Financial Penalties – How would they work?
 - Deadline: 180 days after (1) lead agency has issued final decision *and* (2) complete permit application is filed.
 - Penalty: Funds rescinded from office of head of agency, or head of office to which permit decision was delegated.
 - Amount: *per week* after 180-day deadline passes –
 - \$20k if project requires a financial plan ('Major Project')
 - \$10k for all other projects
 - Exceptions: no funds rescinded if lead agency concurs that delay is not the fault of the permitting agency.

4. FEIS and ROD

Current Law

- ‘Condensed’ FEIS is allowed under FHWA 6640.8A
- CEQ regs require 30 days between FEIS and ROD

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- FEIS can consist of DEIS + errata pages
 - If only ‘minor’ comments on DEIS
- FEIS and ROD “shall” be issued together, unless:
 - 1) “substantial changes” to proposed action or,
 - 2) “significant new circumstances or information”.

5. New/Modified CEs

Current Law

- FHWA/FTA CEs are listed in 23 CFR 771.117
- Many States have ‘programmatic CE’ agreements
- A few States have been delegated CE authority

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- Requires new CEs to be issued for:
 - Emergency projects (replace or reconstruct)
 - Projects in existing “operational right-of-way”
 - Projects with limited federal assistance

5. New/Modified CEs (cont'd)

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- Changes to existing CEs
 - New process for applying CEs to multimodal projects
 - Move three CEs from (d) list to (c) list in 771.117
 - Propose 'new' CEs based on stakeholder comments
- Encourages programmatic agreements for CEs
 - And allows them to cover actions not listed in 771.117
- Delegation of CEs
 - Makes delegation more attractive

6. NEPA Delegation

Current Law

- CE delegation: allows State to issue CE.
- Full delegation: pilot program; open to 5 States; can include NEPA responsibilities for all project types.

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- Changes to both delegation programs:
 - Preserves all existing flexibility
 - Allows termination by State on 90 days' notice
 - Clarifies that legal expenses are eligible project costs

6. NEPA Delegation (cont'd)

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- Additional changes to full delegation program:
 - No longer a pilot
 - Now open to all States

Note: Only one State, California, has assumed 'full delegation' under existing law.

7. Linking Planning and NEPA

Current Law

- Planning decisions can be adopted in NEPA process based on guidance in 23 CFR 450, Appendix A.

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- Creates framework for adopting planning decisions in NEPA process
 - Modeled on 23 CFR 450, but differs in some ways – e.g., requires ‘concurrence’ by ‘relevant’ participating agencies
- Allows “programmatic mitigation plans” to be developed in transportation planning process.

8. Statute of Limitations

Current Law

- 180-day statute of limitations for lawsuits challenging federal agency approvals of highway and transit projects
- SOL period begins with publication of Federal Register notice

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- SOL period changed to **150** days; no other changes.
- Note:
 - Like other provisions, this takes effect on October 1.
 - Until then, SOL notices must include 180-day period.

Project Delivery: Other Items of Note in MAP-21

Project Delivery Policies and Initiatives

- Policy
 - Declares policy of expediting project delivery
 - Specifically encourages greater private sector involvement
- USDOT Initiatives
 - Promote best practices
 - Designate projects for ‘experimental’ practices
 - Up to 100% federal funding for innovative projects
 - Initiative to complete ongoing EISs within 4 Years from NOI
 - Reduce inconsistency between environmental procedures for highway and transit projects

Other Changes that Affect Project Delivery

Elsewhere in MAP-21 ...

- 1201-03: Performance measures required in planning
- 1503: State ability to approve PS&E for Interstate System
- 1505: State ability to approve Interstate access changes
- 1512: Expanded tolling authority in 23 USC 129
- 1521: Changes to Uniform Act (raises maximum \$\$)
- 1525: State autonomy in selecting culvert pipe
- 1529: Ability to use 'engineering judgment' under MUTCD
- 1534: PPPs – best practices, model agreements
- 2002: TIFIA

Some issues to watch ...

It will be interesting to see ...

- Pre-NEPA ROW acquisition – how far can you go?
- Combined FEIS/ROD – the new normal?
- Will more States take up ‘full delegation’ now?
- New CEs – *any* discretion to make exceptions?
- How will agencies react to financial penalties?
- Adopting planning decisions in NEPA: is it workable?
- How will performance measures affect P&N?

Thank You

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