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*Practice Group(s):**Environmental, Land  
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## Federal Transportation Law MAP-21 Seeks to Expedite Environmental Reviews, Carves Out New Categorical Exclusions to NEPA Review

### New law paves way for elimination of EIS and EA for many road projects nationwide

**By Cliff L. Rothenstein, Ash S. Miller, and Christine Jochim Boote**

On October 1, 2012, the 2012 federal surface transportation reauthorization law, known as “Moving Ahead for Progress in the 21<sup>st</sup> Century” (or MAP-21),<sup>1</sup> goes into effect. The legislation was passed after intense partisan negotiations and signed into law by President Obama earlier this year. It includes several provisions, such as new categorical exclusions, intended to speed environmental reviews for federal transportation projects under the National Environmental Policy Act (NEPA).<sup>2</sup> These streamlining provisions respond to a perception that federal transportation projects have been bogged down in multi-year environmental review processes, which have only grown slower over the years. Most of the streamlining provisions revise 23 U.S.C. § 139 governing environmental review of Department of Transportation (DOT) projects, so MAP-21 applies primarily to road projects requiring DOT approval.<sup>3</sup>

MAP-21 grants DOT substantial authority to push for faster reviews and permit decisions, particularly where the NEPA process has already been ongoing for more than two years, and for projects within existing operational rights-of-way or utilizing limited federal funding. This authority may allow DOT to drive other federal agencies to complete these lengthy processes more quickly by use of deadlines and the threat of funding cuts for agencies who issue late decisions.

#### *New categorical exclusions*

The MAP-21 legislation contains two notable new categorical exclusions (CEs) from NEPA review. The first directs DOT to designate any project “within an existing operational right-of-way” as categorically excluded under NEPA, meaning an environmental impact statement (EIS) or environmental assessment (EA) need not be prepared if the CE applies.<sup>4</sup> Operational right-of-way is

<sup>1</sup> The text of the enrolled bill, H.R. 4348, can be found at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4348enr/pdf/BILLS-112hr4348enr.pdf>.

<sup>2</sup> MAP-21, Title I, Subtitle C, “Acceleration of Project Delivery.”

<sup>3</sup> 23 U.S.C. § 139(a)(6).

<sup>4</sup> MAP-21 § 1316(a). The designation is required to occur 180 days from October 1, 2012. This provision does not amend Title 23, but references the definition of project in 23 U.S.C. § 101(a). DOT is also directed to promulgate regulations implementing the section.

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defined broadly to include “all real property interests acquired for the construction, operation, or mitigation of a project ... including the locations of the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway.”<sup>5</sup>

The second CE relates to any project receiving less than \$5M in federal funds, or costing less than \$30M with less than 15% federal funding.<sup>6</sup> This CE is notable because the statute only refers to funding levels here, and does not consider the geographic scope of the project or its potential environmental impacts.<sup>7</sup>

### *Streamlining documentation*

In addition to the two CEs described above, the legislation also changes how existing CEs are administered in order to speed review. Specifically, MAP-21 directs DOT to promulgate regulations eliminating the need to “document” CEs for many types of DOT projects. This means that in order to invoke CE status, documentation may no longer be required to demonstrate that no significant environmental effects will result from the action. DOT must consider the following types of projects for possible inclusion in non-documented CEs: resurfacing, restoration, rehabilitation, reconstruction, adding shoulders or auxiliary lanes; safety or traffic operations improvements; bridge rehabilitation, reconstruction or replacement; grade separation construction to replace existing at-grade railroad crossings.<sup>8</sup> Depending on the extent of DOT regulations, these CE changes could be significant in scope and impact, making it simpler for projects to qualify for a CE. Together with the “operational right-of-way” CE, these exemptions could eliminate the need to prepare an EIS or EA for a broad swath of transportation projects nationwide.<sup>9</sup>

### *Enforcing deadlines for review*

Significantly, MAP-21 imposes deadlines on federal permitting activity, and sets financial penalties for late agency action. First, MAP-21 requires all federal agencies to act within 180 days after the NEPA process is complete.<sup>10</sup> Failure to meet this deadline results in a financial penalty: rescission of

<sup>5</sup> MAP-21 § 1316(b).

<sup>6</sup> MAP-21 § 1317. The term “project” is not defined by this section.

<sup>7</sup> MAP-21 directs DOT to promulgate regulations on this CE as well.

<sup>8</sup> MAP-21 § 1318(c). The legislation orders DOT to revise its own NEPA regulations to the extent consistent with Council on Environmental Quality (CEQ) regulations.

<sup>9</sup> MAP-21 makes specific reference to NEPA regulations promulgated by the CEQ and DOT, and should be read together with those regulations at 40 C.F.R. Part 1500 and 23 C.F.R. Part 771. It should be noted, however, that in the past CEs have been “documented” by studies demonstrating that the action meets the substantive requirements of CEQ regulations. Thus CEs do involve NEPA review, but not a full EIS or EA. MAP-21 also creates a CE for reconstruction of certain roads, highways or bridges damaged in declared emergencies, provided certain capacity and design characteristics remain the same as the original infrastructure. MAP-21 § 1315.

<sup>10</sup> Specifically, MAP-21 sets a deadline of “180 days after the date on which an application for the permit, license, or approval is complete” or “180 days after the date on which the Federal lead agency issues a decision on the project” under NEPA, whichever is later. MAP-21 § 1306 (creating 23 U.S.C. § 139(h)(6)).

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funding from the relevant office at the delinquent agency at a weekly rate ranging from \$10,000 to \$25,000.<sup>11</sup> These penalties could create difficult situations for the agency and applicants where complex permitting decisions remain after NEPA review. Second, where an EIS or EA process has already been ongoing for two or more years, a project sponsor or governor of a state may request DOT assistance, which triggers an obligation for DOT to set a deadline to complete project approvals, reviews, or permits within four years of the start of the NEPA review.<sup>12</sup> For projects that have already been in process more than four years, this provision might be invoked to request DOT to set an immediate deadline to complete review, and the financial penalties described above would apply. How these sections will be enforced and applied by DOT remains to be seen, but these provisions give DOT substantial authority to accelerate project reviews and approvals.<sup>13</sup>

### *Unlawful segmentation and reasonable alternatives*

In addition, MAP-21 seeks to help states acquire property interests prior to completion of the NEPA review process.<sup>14</sup> At times, such early acquisitions have been considered risky because they may limit an agency's choice of reasonable alternatives for future action, or cause significant adverse environmental impacts, which would contravene Council on Environmental Quality (CEQ) regulations.<sup>15</sup> MAP-21 acknowledges this concern by requiring a state to certify that: (i) the transaction will not limit the agency's ability to make an "impartial decision as to whether to accept an alternative," and (ii) no adverse environmental impacts will result from the acquisition.<sup>16</sup>

The legislation also seeks to protect states from accusations of unlawful "segmentation" of a project into multiple component parts to evade review, by reference to a standard for a separate project developed in case law called the "independent utility" standard. Generally speaking, this standard, developed in case law, provides that actions with independent utility may be reviewed separately under NEPA, and otherwise, actions part of a larger project or plan should be reviewed together.<sup>17</sup> Under current law, a project opponent may argue that an early purchase of property violated NEPA because it lacked independent utility separate from the overall project, and a court may review whether in fact the property served independent utility. By contrast, MAP-21 provides that "[t]he

<sup>11</sup> *Id.* (new 23 U.S.C. § 139(h)(6)(B)).

<sup>12</sup> MAP-21 § 1309 (creating 23 U.S.C. § 139(m)).

<sup>13</sup> DOT has indicated it intends to track project delivery times for CEs, EAs, and EISs, pre- and post-MAP-21 implementation, to assess the impact of the project acceleration provisions. Federal Highway Administration, *Moving Ahead for Progress in the 21st Century Act (MAP-21), A Summary of Highway Provisions*, at 8 (July 17, 2012), available at [http://www.fhwa.dot.gov/map21/docs/map21\\_summary\\_hgwy\\_provisions.pdf](http://www.fhwa.dot.gov/map21/docs/map21_summary_hgwy_provisions.pdf)

<sup>14</sup> MAP-21 § 1302.

<sup>15</sup> 20 C.F.R. § 1506.1 ("Until an agency issues a record of decision ... no action concerning the proposal shall be taken which would: 1. Have an adverse environmental impact; or 2. Limit the choice of reasonable alternatives.").

<sup>16</sup> See MAP-21 § 1302(c) (amending 23 U.S.C. § 108) for a full list of required certifications. MAP-21 § 1303 seeks to facilitate letting of contracts prior to NEPA review completion.

<sup>17</sup> See, e.g., *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985).

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acquisition of a real property interest ... *shall* be treated as having independent utility ...,”<sup>18</sup> which may entirely supersede review of this question by a court. This provision could allow a NEPA review to occur independently, or not at all, for property acquisitions prior to completion of the NEPA review for the overall project.

### *Increased DOT authority over tolled facilities*

In addition to granting DOT additional NEPA authority, MAP-21 also increases DOT’s authority over tolled facilities. While the limits on use of funds collected by tolled facilities remain largely the same as prior law, the statute now grants DOT the ability to order a tolling authority to discontinue collecting tolls in the event of noncompliance with such limits.<sup>19</sup> An order to discontinue toll collection, which could threaten the income stream of a tolling authority, is a substantial power to be placed in DOT’s hands and would provide strong incentive for compliance.

### *Additional streamlining provisions*

The legislation also seeks to encourage the use of programmatic reviews, directing DOT to initiate a rulemaking designed to eliminate “repetitive discussions of the same issues.”<sup>20</sup> Programmatic mitigation is also encouraged as part of state and metropolitan transportation planning.<sup>21</sup>

### *Conclusion*

As a practical matter, MAP-21 may have less streamlining effect in states such as Washington, California, and New York, where state law requires environmental review. For example, in some cases a full state EIS may be required for an action that is categorically excluded by MAP-21 from DOT NEPA review.

DOT regulations and designations will clarify the practical impacts of some of these provisions; however, it is already clear that recent economic conditions have created the political will to exclude significant categories of projects from more detailed DOT environmental review.

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#### **Authors:**

##### **Cliff L. Rothenstein**

cliff.rothenstein@klgates.com

+1.202.778.9381

##### **Ash S. Miller**

ash.miller@klgates.com

+1.206.370.7962

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<sup>18</sup> *Id.* (creating 23 U.S.C. § (d)(4)(B)) (emphasis supplied).

<sup>19</sup> MAP-21 § 1512(a) (amending 23 U.S.C. § 129(a)(3)(C)).

<sup>20</sup> MAP-21 § 1305 (amending 23 U.S.C. § 139(b)).

<sup>21</sup> MAP-21 § 1311. The legislation allows for the integration of environmental reviews with existing planning documents. MAP-21 § 1310 (creating 23 U.S.C. § 168(b)(1)).

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**Christine Jochim Boote**

christine.boote@klgates.com

+1.202.778.9222

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