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ENVIRONMENTAL STREAMLINING PROVISIONS IN MAP-21
Summary and Comments by Cindy Burbank of Parsons Brinckerhoff

MAP-21 contains significant provisions to streamline the environmental review process – 22 different sections. Below is a list of these 22 provisions, which allows you to jump directly to the text of each provision. On the next page, there is a section-by-section explanatory summary, including comments by Cindy Burbank of PB, based on her prior experience overseeing environmental and planning activities of the Federal Highway Administration, 1999-2006. Yellow highlights denote particularly significant provisions.

DATE OF EFFECTIVENESS: These provisions do not take effect immediately. In general, they will take effect on 10/1/2012. Some, however, have specific timeframes in the language of the provision. Many will require rulemaking from US DOT, which can take a year or longer.

MODAL SCOPE: These provisions were written primarily to apply to Title 23 programs (highways and bridges). It is possible that US DOT will interpret some of these provisions to also apply to public transportation projects. At this point, it does not appear that these provisions apply to FRA or HSR projects, although there may be some limited applicability (e.g., Section 1313, which specifically cites "railroad, public transportation, or multimodal projects). US DOT will need to provide clarification on which provisions apply to programs beyond Title 23 highway programs and projects.

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Subtitle C--Acceleration of Project Delivery

Yellow highlighting indicates provisions of significant interest to PB:

SEC. 1301. DECLARATION OF POLICY AND PROJECT DELIVERY INITIATIVE. This is a policy statement, declaring "…it is in the national interest to expedite delivery of surface transportation projects by substantially reducing the average length of the environmental review process" Also directs that "Each Federal agency shall cooperate with [DOT] to expedite the environmental review process …" *[CJB Comment: This is helpful, but policy is policy – and this does not waive the 45+ Federal environmental laws that apply to transportation projects.]*

SEC. 1302. ADVANCE ACQUISITION OF REAL PROPERTY INTERESTS. Before completing NEPA for a project, a state may use its own funds to acquire property for the project. However, if a state wishes to use Federal funds for acquisition, US DOT must complete the NEPA process for the acquisition and the state must certify to 8 conditions listed in the legislative language. *[CJB comment: Allowing a state to use its own funds to acquire property, without NEPA, can be particularly helpful in situations where there is strong development pressure on a corridor that is expected to be needed for a Federally funded transportation project.]*

SEC. 1303. LETTING OF CONTRACTS. This allows 2-phase contracts to a construction manager or a general contractor, for (a) preconstruction and (b) construction services. Preconstruction services include scheduling, cost engineering, constructability, cost estimating, and risk identification. Also, prior to completing NEPA, a state DOT or other agency may issue RFPs, award a contract for preconstruction services, and issue notices to proceed with preliminary design "to the extent that those actions do not limit any reasonable range of alternatives." Further, "a contracting agency may proceed, at the expense of the agency, with design activities at any level of detail" before completion of NEPA, "without affecting subsequent approvals required for the project" -- but such design contracts must include a termination clause in the event of a no-build decision under NEPA. *[CJB comment: This is likely to be very helpful in more efficient and timely project delivery.]*

SEC. 1304. INNOVATIVE PROJECT DELIVERY METHODS. Allows 100% Federal share for innovative project delivery methods and technologies, such as ITS, elevated performance standards, and new construction business practices that improve safety, accelerate timeliness, and reduce congestion related to construction. There are some conditions and limits. *[CJB comment: Higher Federal share is likely to be most attractive in states where Federal funding is proportionately large.]*

SEC. 1305. EFFICIENT ENVIRONMENTAL REVIEWS FOR PROJECT DECISIONMAKING. Contains a variety of provisions, including: (a) requires US DOT to conduct a rulemaking to allow programmatic approaches for environmental reviews; (b) allows US DOT to designate a single DOT modal agency as lead agency for environmental review of projects requiring approval of more than one modal administration; (c) amends prior law to require concurrence of participating agencies for environmental review schedules developed by U.S. DOT. *[CJB comment: See also Section 1318 below on programmatic agreements. The provision above on concurrence in schedules appears to be a step back from the environmental streamlining emphasis of the rest of MAP-21.]*

SEC. 1306. ACCELERATED DECISIONMAKING. 30 days after a DEIS is issued, US DOT may convene a meeting with resource agencies and others to ensure all are on schedule to meet decision deadlines for the project. Establishes an issue resolution and elevation process in case of problems. In event of a dispute, elevate first to heads of disputing agencies, then to CEQ, then to the President. Imposes financial penalties ($10K-20K per week) on agencies that fail to meet specified deadlines for decisions under NEPA and under other laws. Allows US DOT to waive the penalties under certain conditions. *[CJB Comment: Note that this provision applies to other environmental laws besides NEPA, such as wetland permits, ESA*

determinations, etc.. With respect to dispute resolution, there is already an elevation process under prior law, but it is rarely, if ever, exercised, because staff is reluctant to elevate to higher levels, for a variety of reasons. The financial penalties could be a powerful incentive for Federal environmental agencies to meet deadlines – but for US DOT it could be like a nuclear bomb option – so powerful that DOT is reluctant to exercise it due to potential repercussions from the affected agency.]

SEC. 1307. ASSISTANCE TO AFFECTED FEDERAL AND STATE AGENCIES. This amends prior law, which permits state DOTs to use Federal funds to pay for Federal and state resource agency staff and other costs to expedite environmental reviews and permits. This amendment requires an MOU be established between the state DOT and the resource agency to specify priorities and projects covered by the funding. *[CJB comment: Quite a few state DOTs have been paying Federal and state resource agencies for expedited reviews, and it appears to be helpful – and many already have MOUs that spell out priorities and expectations. Handing over funds to another agency should really always be tied to an MOU to specify the priorities and expectations.]*

SEC. 1308. LIMITATIONS ON CLAIMS. Amends prior law to shorten the time period in which lawsuits can be filed after a FEIS is issued. Previously, litigation had to be initiated within 180 days; this shortens it to 150 days. *[CJB comment: This might be helpful in shortening the time that state DOTs have to wait to see if they will be sued, but in some cases it might induce environmental opponents to initiate a lawsuit prematurely.]*

SEC. 1309. ACCELERATING COMPLETION OF COMPLEX PROJECTS WITHIN 4 YEARS. This applies to EISs that have been underway for 2 years (from date of NOI) without a decision. For these EISs, US DOT must provide additional technical assistance and must establish a schedule for completing permits, approvals, etc., within 4 years of the NOI. The schedule must have concurrence of CEQ and participating agencies. *[CJB comment: A 4-year time frame, from date of NOI, seems ambitious for more complex/controversial projects. For significant, complex, or controversial projects, obtaining concurrences on a schedule from CEQ and participating agencies will be no small undertaking – especially when the schedule covers permits as well as the NEPA process. Finally, this could be a two-edged sword for state DOTs, which in some cases may need extra time to resolve controversies within the state and finalize funding for project initiation.]*

SEC. 1310. INTEGRATION OF PLANNING AND ENVIRONMENTAL REVIEW. The federal lead agency may adopt and use "planning products" in proceedings for any class of action in the environmental review process. The planning products may be used in their entirety or in part. It may occur at the time of project scoping – or later. "Planning products" that may be adopted for environmental reviews include: (a) tolling or other special financing determinations; (b) modal choice; (c) description of environmental setting; (d) analytical methodologies to be used; (e) programmatic mitigation; (f) travel demand; (g) regional growth and development; (h) land use and growth management plans; (i) population and employment; (j) natural and built environmental conditions; (k) environmentally sensitive areas and resources; (l) cumulative effects and other potential environmental effects; and (m) mitigation needs. "Any planning product adopted by the Federal lead agency in accordance with this section **may** be incorporated directly into an environmental… document." However, 10 conditions are spelled out in statute -- and participating agencies, the lead agency, and project sponsors must all concur that these conditions have been met. The statute also specifies that this section shall not be construed to subject the planning process, transportation plans, or transportation programs to environmental review. *[CJB comment: This is major reinforcement for ongoing efforts to use planning products in NEPA, without having to revisit them in the NEPA stage. This could be very helpful – although obtaining concurrence of all affected agencies that the 10 conditions have been met is likely to be a challenge in many cases, especially for controversial projects.]*

SEC. 1311. DEVELOPMENT OF PROGRAMMATIC MITIGATION PLANS. The state or MPO may develop programmatic mitigation plans. *[CJB comment: This section appears to be entirely*

permissive and already covered by the preceding section.]

SEC. 1312. STATE ASSUMPTION OF RESPONSIBILITY FOR CATEGORICAL EXCLUSIONS. This allows US DOT or the state to terminate the state's assumption of responsibility for CEs. [CJB comment: Again this is permissive. US DOT is unlikely to terminate a state's CE authority without sound reasons.]

SEC. 1313. SURFACE TRANSPORTATION PROJECT DELIVERY PROGRAM. This amends an existing pilot program which allowed a limited number of states to assume FHWA's role in the NEPA process (only California chose to exercise this option). This amendment would broaden prior authority by (a) allowing all states to assume this responsibility (if they meet program conditions) and (b) allowing coverage of "1 or more railroad, public transportation, or multimodal projects within the state." The section specifically excludes planning and conformity – i.e., those processes cannot be delegated to the state – and the provision does not provide for delegation of other environmental laws besides NEPA. *[CJB comment: As environmental law expert Bill Malley said, this change "could be transformational." Basically, the idea is that a state DOT could "step into the shoes" of FHWA in carrying out NEPA, including coordinating directly with Federal environmental agencies. This might be a time saver, by cutting out FHWA review. However, there are some drawbacks and limitations – and some states may not wish to take on this responsibility. It doesn't eliminate the need for coordinating with Federal environmental agencies during the NEPA process, so states that opt for this authority would have to do that themselves (instead of relying on FHWA). States' exposure to litigation might be increased. Prior to assuming NEPA responsibility, state DOTs would have to demonstrate that they have the capability to carry out this significant responsibility. Under prior law, which authorized a pilot program for this purpose, only one state – California – elected to assume this responsibility. Also, the provision doesn't extend to the many other Federal environmental laws – ESA, Clean Air Act, Clean Water Act, National Historic Preservation Act, etc. – which a state must also comply with. Bottom line: This may be helpful – as California believes based on its experience – but it brings significant responsibilities to the states that take this on, and it isn't a free pass on the environmental process by any means. Finally, with respect to FRA and HSR projects, it is not clear how this would apply, since the legislative language amends Title 23 – the Highway title in U.S. Code.]*

SEC. 1314. APPLICATION OF CATEGORICAL EXCLUSIONS FOR MULTIMODAL PROJECTS. This amends Title 49 to allow a DOT modal agency acting as lead authority for a multimodal project to apply a CE using the authority of another DOT modal agency that is also participating in the project, subject to certain conditions specified in the statutory language. *[CJB comment: This might be helpful, for example, for a project that has both highway and transit elements, for which FTA is lead agency and for which the highway element(s) meet FHWA CE requirements.]*

SEC. 1315. CATEGORICAL EXCLUSIONS IN EMERGENCIES. DOT must initiate a rulemaking to treat as CEs any repair or reconstruction activity for a road, bridge, or highway damaged by an emergency declared by the Governor or President, if the activity is "in the same location, with the same capacity, dimensions, and design as the original road, highway or bridge as before…" [CJB comment: This will help expedite emergency recovery – but unfortunately it apparently would not apply if the repair/reconstruction incorporates certain enhancements to reduce vulnerability to future emergency events – such as severe storms and other extreme weather. Thus, it appears that a reconstruction to elevate or relocate a bridge or highway based on changing climate conditions might not qualify for a CE under this section, and might require an EA or EIS.]

SEC. 1316. CATEGORICAL EXCLUSIONS FOR PROJECTS WITHIN THE RIGHT-OF-WAY. Within 180 days after enactment of MAP-21, the Secretary must designate as a CE any project "within an existing project operational right of way." The term "operational right of way" is defined in this section. *[CJB comment: This should be helpful for some projects, including lane additions as long as they are within existing ROW. This clearly applies to Title 23/highway projects, but it is not clear if it also applies to Title 49/transit projects. Watch for US DOT guidance or regulations to clarify this point. Possibly, as a matter of practice, transit projects within ROW*

may already be treated as CEs.]

SEC. 1317. CATEGORICAL EXCLUSION FOR PROJECTS OF LIMITED FEDERAL ASSISTANCE. This expands CEs to include any project that receives less than $5 million in Federal funding; and any project that is less than $30 million in total cost, with less than 15% Federal share. *[CJB comment: This appears to apply only to projects funded under Title 23/highway title. Title 23 funds can be used for transit projects, however, and thus transit projects funded under Title 23 might qualify for this type of CE. Watch for US DOT guidance or regulations to clarify this point.]*

SEC. 1318. PROGRAMMATIC AGREEMENTS AND ADDITIONAL CATEGORICAL EXCLUSIONS. Within 120 days of enactment of MAP-21, US DOT must publish rulemaking to propose new CEs. This rulemaking must be based on US DOT review of CEs used since 2005 and a solicitation of new CEs from state DOTs, MPOs, transit agencies, and others. In addition, US DOT must propose rulemaking to move from subsection (d) to subsection (c) certain CE activities in 771.117 of the CFR (highway 4R projects, shoulders, auxiliary lanes, highway safety or traffic operational improvements, and bridge 3R projects, and railroad grade crossing replacements). Further, DOT must seek opportunities for programmatic agreements with states that establish efficient administrative procedures for environmental reviews. *[CJB comment: These are all helpful, albeit incremental improvements in streamlining.]*

SEC. 1319. ACCELERATED DECISIONMAKING IN ENVIRONMENTAL REVIEWS. When minor modifications are needed in a FEIS, it is OK to use errata sheets rather than rewriting the draft EIS. Also, the lead agency should use a single document for the FEIS and ROD, as much as possible, unless there are substantial changes or there are significant new circumstances or information changes. *[CJB comment: Combining FEIS and ROD could eliminate 30 days that typically has been allowed for.]*

SEC. 1320. MEMORANDA OF AGENCY AGREEMENTS FOR EARLY COORDINATION. In order to achieve early coordination, this section (a) requires US DOT and Federal resource agencies to provide technical assistance, "to the extent practicable and appropriate," if requested by a state or MPO; and (b) allows the lead agency to establish MOAs with other agencies, if requested by a state or MPO. The section lists 8 early coordination activities. *[CJB comment: Early coordination is key to environmental streamlining, and this provides added reinforcement – albeit not a magic potion.]*

SEC. 1321. ENVIRONMENTAL PROCEDURES INITIATIVE. US DOT "shall establish an initiative to review and develop consistent procedures for environmental permitting and procurement requirements" under Title 23 (highways) and Title 49/Chapter 53 (transit). *[CJB comment: The provision is specifically limited to formula grant programs; i.e., it does not apply to discretionary programs like New Starts and highway discretionary programs.*]

SEC. 1322. REVIEW OF STATE ENVIRONMENTAL REVIEWS AND APPROVALS FOR THE PURPOSE OF ELIMINATING DUPLICATION OF ENVIRONMENTAL... Requires a review and evaluation by GAO, to determine which states have state environmental laws and protections that are comparable to Federal requirements, and to determine the frequency and cost of duplicative environmental reviews at the state and Federal level. *[CJB comment: This will be a much more difficult undertaking than it sounds.]*

SEC. 1323. REVIEW OF FEDERAL PROJECT AND PROGRAM DELIVERY. Requires US DOT to compare time required for environmental reviews in 3 different periods of time, for CEs, EAs, and EISs, and to report on it to Congress. *[CJB comment: This could entail a significant effort by U.S. DOT, but the results will be interesting.]*

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