

## MAP 21 Implementation Guidance Issues September 10, 2012

### Flexibility

MAP 21 Section 1509 permits States to transfer 50% of their program funds with the exception of sub allocated Surface Transportation funds, suballocated Transportation Alternative funds and Metropolitan Planning funds.

*Recommendation:* Guidance and regulations should recognize and adhere to this statutory provision without additional conditions beyond those specifically identified in the bill.

### Project Delivery

#### **1302: Right-of-Way Acquisition Prior to NEPA Completion**

- Recommendation: the guidance should implement the statutory language as written; FHWA should follow the statute without adding any conditions/restrictions.

#### **1303: Final Design Prior to NEPA Completion**

- Recommendation: the guidance should explicitly recognize that “A contracting agency may proceed, at the expense of the contracting agency, with design activities at any level of detail” prior to completion of NEPA, and that this is a federally reimbursable expense, under the provision that governs two-phase contracts.

#### **1305: 6002 Process - Schedules**

- Recommendation: the guidance should clarify that a Coordination Plan is not required to include a schedule. MAP-21 says that *if* a schedule is included, lead agencies must obtain concurrence of all participating agencies in the schedule. Previously, the schedule only required consultation; the shift to a ‘concurrence’ requirement makes this a potential sticking point with agencies. Obviously, schedules are important, but States should not be required to include them in a 6002 coordination plan.

#### **1307 Funding Agreements**

-Recommendation: the guidance should provide flexibility in establishing projects and priorities. As many states have 5-year agreements with permitting agencies, the states may not know what permits will be required for each project at the time of developing the agreement. The project and priority list should be established as a separate document that is easily amended.

#### **1310: Planning-NEPA Linkage**

- Recommendation: the guidance should ensure that existing flexibility is preserved; it should not become more difficult to adopt planning products for use in the NEPA process; see paragraph (f)(3), which says “This section shall not be construed to affect the use of planning products in the environmental review process pursuant to other authorities...” (Our concern is that the new process is potentially cumbersome, because it requires 10 separate findings, plus concurrence in those findings by all participating agencies with ‘relevant expertise’).

**1319(a): Condensed FEIS**

-Recommendation: the guidance should encourage the use of a DEIS with errata pages. The question is what is “minor” comments. FHWA should reach out to SCOE on this issue.

**1319(b): FEIS/ROD**

- Recommendation : guidance should clarify that a combined FEIS/ROD is now the norm, not the exception – because the statute says “shall ... unless” (it does not say “may” with regard to combined FEIS and ROD). The guidance also should clarify the exceptions – i.e., circumstances under which there will not be a combined FEIS and ROD. The key exception is “the final environmental impact statement makes substantial changes to the proposed action that are relevant to environmental or safety concerns.” The question is: what is a ‘substantial change’? FHWA should reach out to SCOE on this issue.

**1315-1318: CEs**

- Recommendation: we assume the CEs will not be a major focus of the guidance, because changes to CEs must be done through rulemakings. In general, our position is that the CEs should be implemented as specified in the statute; FHWA should not add limitations/restrictions that are not in the statute. We want to be involved in developing the proposed regulations, and of course will comment on the proposed regulations when they are issued.

- The regulation should define ‘existing operational right-of-way’ as this term is defined in the statute.
- CEs for emergencies: the regulation should allow for safety and adaptation upgrades.

**1312: Delegation**

- Recommendation: we encourage FHWA to disseminate templates and best practices based on experience of CA, AK, and UT (states that have assumed FHWA authorities under the SAFETEA-LU delegation programs). Areas that will require particular attention and support will include (1) waivers of sovereign immunity and (2) how to handle project-level conformity, which still cannot be delegated.

**CMAQ Program****Ability to use CMAQ funding for Highway and Transit Operations Activities**

- **MAP 21:** U.S. DOT currently places a 3-year limit on the use of CMAQ funds for highway and transit operations. MAP 21 specifically identifies operations activities as eligible and does not place a time limit on the use of federal funds for operations activities.  
*Recommendation:* U.S. DOT should discontinue this 3-year limit to enable states to use federal funds to support highway and transit operations on an ongoing basis which will contribute to reducing traffic congestion and improve air quality.

**Electric Vehicle Eligibility**

- **MAP 21:** MAP 21 provides for a state to obligate CMAQ funds for a project or program to establish electric vehicle charging stations or natural gas vehicle refueling stations for the use of battery powered or natural gas fueled trucks or other motor vehicles at any location in the state except that such stations may not be established or supported where commercial establishments serving motor vehicle users are prohibited.

*Recommendation:* U.S. DOT should provide the broadest flexibility in new electric vehicle requirements to support and encourage public-private partnerships.

### Transportation Alternatives

- MAP 21 (Sec. 1509) allows states to transfer 50% of their program funds from one category to another, including the ability to transfer the “other area” transportation alternative funds to other program categories. Since state DOTs are no longer an eligible entity to identify projects for Transportation Alternatives funding, TA funding will not be available for funding bike/ped or Safe Routes to School coordinators located in a State DOT nor for other state DOT enhancement-like projects.

*Recommendation:* U.S. DOT should adhere to the language in Sec. 1509 which permits the State DOT to transfer TA funds to the STP program, enabling the State DOT to use those funds for statewide projects such as State DOT bike/ped coordinators, Safe Routes to School Coordinators or statewide stormwater mitigation projects.

- MAP 21 requires State DOTs to have a competitive process for submission/selection of projects from eligible governmental entities. States have competitive processes set up and administered under the Transportation Enhancements Program.

*Recommendation:* Give the State DOTs broad flexibility to use existing, modified or new competitive processes designed to meet the needs of their respective States.

### Freight

- MAP 21 permits the Secretary to approve a federal match of up to 95% for freight projects that come from a state freight plan

*Recommendation:* As of October 1 until the details are established for what a state freight plan should embody, an interim approach is recommended: Allow projects that are identified in or are consistent with the identified needs, policies or project priorities from an existing State Freight Plan or Freight Element of a Statewide Long Range Plan.

- Special Permits During Periods of National Emergency – MAP 21 allows states to issue special permits during a Presidentially declared emergency for overweight vehicles and loads that are delivering relief supplies.

*Recommendation:* Adhere to the statutory language without additional imposing conditions.

### Highways

- **Sec. 1104: NATIONAL HIGHWAY SYSTEM.**

*Recommendation:* AASHTO recommends that the designation of the new, expanded NHS be handled through cooperation with the State DOTs, as was done in the original designation in 1995. As specified in MAP-21, the simple addition of urban and rural principal arterial routes will result in hundreds or unconnected sections of NHS that do not have logical termini, resulting, at a minimum, in difficulties in determining eligibility of projects on or near these roadway sections for NHPP funding.

- **Sec. 1106: NATIONAL HIGHWAY PERFORMANCE PROGRAM.**

Recommendation: The “Penalty” portions of the section on “Interstate System and NHS Bridge Conditions” are inconsistent with an asset management approach, which is required in other sections of MAP-21. These penalties effectively “trump” the asset management plan and will lead states to a “worst first” approach, which is more costly and will not likely achieve overall improvements in the long run. AASHTO recommends conducting an analysis of this section of the bill prior to releasing guidance to determine potential negative effects and how they can be compensated.

- **Sec. 1405: HIGHWAY WORKER SAFETY**

Recommendation: AASHTO recommends allowing as much flexibility as possible in the proposed rule-making on positive protection to account for differing project conditions (including speed, traffic volume, duration, size of project, etc.), at the discretion of the State DOT, which has the responsibility for the health and welfare of its citizens.

- **Sec. 1512: TOLLING.**

Recommendation: The requirement for interoperability of toll collection programs, which are evolving quickly as technology evolves, within 4 years will incur significant expense to established operators and will limit options for those that are currently planning or deploying systems. While this is a laudable long-term goal, a 4-year turn-around does not seem likely. Thus, federal guidance needs to allow such activities as “the development of longer-term plans for achieving the goal of interoperability” as addressing the requirement to “...implement technologies or business practices that provide for...interoperability...”.

- **Sec. 1514: HOV FACILITIES.**

Recommendation: AASHTO recommends flexibility in establishing the “minimum average operating speed performance standard”—potentially by state or local area—as changes to HOV facility operations can potentially degrade the operation of the general purpose lanes, which in turn can affect air quality conformity.

- **Sec. 1518: BUY AMERICA PROVISIONS.**

Recommendation: The revised Buy America provisions will likely have significant impacts on some projects, particularly mega-projects, where lack of availability of materials (due to quantities needed or innovative products not produced in the United States) can slow project delivery, and increased material costs that may significantly drive up overall project costs. AASHTO recommends that actions implementing this section be delayed to allow for an impact study focused on two issues: 1) the cost associated with implementation of this change and 2) the availability of US- based materials to meet the Buy America requirement. If this is not possible, AASHTO recommends providing flexibility in guidance or rule-making to grandfather projects that are already underway, and to exclude subcontracted tasks from the provision, such as utilities, for which agencies do not have the authority to require Buy America.

## Highway Safety

### *Strategic Highway Safety Plans Section 1112:*

- Updating a state’s SHSP:
  - What steps does an “update” involve? Guidance on the process for updating SHSPs in the context of MAP-21 requirements would be helpful. *Recommendation:*

Flexibility is essential to the States

- What does “regular” mean, with respect to frequency of updates?

*Recommendations:*

- The AASHTO work group is asking states, specifically Subcommittee on Safety Management members, for information on how often their SHSPs are updated and how long the process takes. The AASHTO recommendation may be to require a specific timeframe for the SHSPS (such as update at least every 5 years) or a milestone-based update period (such as when an annual review of data and programs indicates the need for a full scale review of the SHSP and potential update).
- Some states update their SHSPs annually, or annually update their SHSP action plans.
- Some engineering countermeasures will take several years to construct and evaluate, in order to determine whether the applicable portion of the SHSP should be revised.
- State budgeting cycles should be considered.
- How will states currently updating their SHSPs be affected by this requirement?  
*Recommendation:* SHSPs updated prior to MAP-21 ,or after map21 enactment but prior to guidance issued ,and meeting the MAP-21 requirements be approved as is.
- Will there be a common date for every state to submit an updated SHSP?  
*Recommendation:* If so, it needs to take into account the timing required for target setting by the states, which is one year after the requirements are established—or April 1,2014; plus 180 days to coordinate MPO targets ; so Jan1,2015!!

*Performance Measures:*

- The performance measures states report to FHWA and NHTSA should be coordinated.  
*Recommendation:* 5-year moving averages should be used for all rate- and number-based measures, and the targets should be based on a 3-5 years projection of the five year moving average data. (Note: NHTSA’s performance measures take affect October 1st.)