



MAP-21: Overview of Project Delivery, Environmental, and Planning Provisions

This paper provides an overview of the project delivery provisions in the Moving Ahead for Progress in the 21st Century Act (MAP-21). It also briefly summarizes environmental funding provisions in MAP-21 and the changes made by MAP-21 to the transportation planning process. Topics in this paper include the following:

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Background

The Moving Ahead for Progress in the 21st Century Act (MAP-21) was signed into law on July 6, 2012, and took effect on October 1, 2012. MAP-21 authorized approximately \$105 billion in spending for federal highway and public transportation programs for FY2013 and FY2014 combined. It also made major changes to the structure of those federal funding programs. The six core highway funding programs were consolidated into five programs, and many smaller funding programs were eliminated or consolidated. MAP-21 also increased the proportion of highway funding that is distributed by formula to States, reduced the amount that is distributed by USDOT through discretionary grants, and eliminated earmarks. Transit funding programs also were consolidated.

In addition to its funding provisions, MAP-21 also included policy changes that were intended to increase efficiency and accountability in the use of federal transportation funding. The policy changes included a new requirement for States and metropolitan planning organizations (MPOs) to establish performance targets based on a national set of performance measures, and to report on their progress toward those targets in their transportation plans. The policy changes also included a package of measures to accelerate project delivery.

Project Delivery Provisions in MAP-21

Overview

Subtitle C of Title I of MAP-21 includes 23 separate provisions related to accelerating project delivery for highway and transit projects. These provisions touch on many aspects of project delivery, from transportation planning to environmental review to procurement.

For State DOTs and public transit agencies, these changes are significant for several reasons:

- *Project sponsors will have increased flexibility to carry out some project development activities in parallel rather than sequentially.* For example, Section 1302 provides increased flexibility to acquire land for right-of-way and mitigation prior to completion of the environmental review process.
- *The environmental review process may be shortened, both for large, complex projects and for projects with minor impacts.* For example, Sections 1305-1307 include changes that will simplify the environmental review process required for all EISs under Section 6002 of SAFETEA-LU and create a more robust process for resolving disagreements among federal agencies. Sections 1315-1318 require a series of rulemakings to expand the availability of categorical exclusions (CEs). Section 1319 allows the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) to be combined.
- *There is a new process for linking transportation planning and environmental review, which is different from the process previously established in regulation.* Section 1310 allows FHWA and FTA to adopt certain decisions and analyses from the transportation planning process for use in the NEPA process. This new process has some potential benefits, but includes some important conditions, such as the need to obtain concurrence from other agencies.
- *Programmatic approaches are encouraged.* For example, Section 1311 allows the development of “programmatic mitigation plans” as part of the transportation planning process. Other

provisions encourage use of programmatic approaches for the environmental review process, as well as programmatic approaches for CEs.

- *Innovative project delivery methods are encouraged.* For example, Section 1304 allows the federal share of project costs to be up to 100 percent for projects that use innovative project delivery methods, as determined by the USDOT.
- *Opportunities for delegation of USDOT authority are expanded.* Sections 1312 and 1313 expand programs created in SAFETEA-LU, under which USDOT can assign certain responsibilities in the environmental review process to States. These programs are now open to all States.

FHWA and FTA have begun to implement the project delivery provisions in MAP-21 through rulemakings and guidance. These implementation activities remain under way and will likely continue for a number of years following the enactment of MAP-21. Rulemakings and guidance issued under MAP-21 are posted on [FHWA's MAP-21 website](#).¹

In addition, the USDOT Office of the Inspector General (OIG) is tracking the implementation of the project delivery provisions in MAP-21. The OIG periodically issues reports regarding the implementation status of these provisions, available on the [OIG website](#).² The OIG's most recent product included a [table summarizing the implementation status](#) of each of the 23 project delivery provisions in MAP-21.³

Section 1301: Declaration of Policy

Section 1301 declares that it is in the national interest to “accelerate project delivery and reduce costs” and to ensure that transportation project development “is done in an efficient and effective manner, promoting accountability for public investments and encouraging greater private sector involvement ... while enhancing safety and protecting the environment.”

Section 1301 also directs the USDOT to establish a “project delivery initiative.” The initiative is intended to “develop and advance the use of best practices to accelerate project delivery and reduce costs across all modes of transportation and expedite the deployment of technology and innovation.” This section also authorizes USDOT to “select eligible projects for applying experimental features to test innovative project delivery techniques.”

No regulations or guidance have been issued or are required under this section. However, the Secretary of Transportation sent a [letter](#) to the Chairwoman of the Council on Environmental Quality on December 19, 2012, summarizing the principles that guide USDOT's approach to implementing the project delivery provisions in MAP-21.⁴

1302: Early Acquisition of Right-of-Way

Section 1302 amends 23 USC 108, which governs acquisition of real property for transportation use prior to completion of the NEPA process for the transportation project. This section amended 23 USC 108 in three important ways:

- replaces “right-of-way” with “real property interest”, which clarifies that the authorities granted in Section 108 can be exercised with regard to “any interest in land” as well as “a

¹ <http://www.fhwa.dot.gov/map21/>.

² <http://www.oig.dot.gov/library-item/5998>.

³ <http://www.oig.dot.gov/sites/dot/files/MAP21LongStatement.pdf>.

⁴ <https://www.fhwa.dot.gov/map21/guidance/principles.cfm>

contractual right to acquire any interest in land” and “any other similar action to acquire or preserve rights-of-way for a transportation facility.”

- allows Federal funds to be used for right-of-way acquisition prior to NEPA completion for the transportation project, provided that certain findings are made by the State with concurrence of USDOT, including a finding that the acquisition will not limit the consideration of alternatives in the NEPA process. This authority can only be used for acquisitions that are negotiated “without the threat of condemnation.”
- makes it easier for States to obtain Federal reimbursement for right-of-way acquired with State funds prior to completion of the NEPA process for the transportation project, by requiring concurrence only by USDOT (not EPA) that the early acquisition did not affect the NEPA process.

Taken together, these changes to 23 USC 108 should broaden States’ ability to acquire right-of-way prior to completion of the NEPA process for the transportation project, using both Federal and non-Federal funds. FHWA has issued [Q&A guidance](#) implementing this provision.

Section 1303: Contracting

Section 1303 of MAP-21 allows a contracting agency (e.g., a State) to enter into “2-phase contracts” -- also known as construction manager/general contractor (CM/GC) contracts -- prior to completion of the NEPA process. A two-phase contract is one that includes both preconstruction and construction services. This section is analogous to the existing provisions in 23 USC 112(b)(3) that authorize States to enter into design-build contracts prior to completion of the NEPA process.

There is some uncertainty about whether, and to what extent, a contracting agency is allowed to proceed with design work prior to NEPA completion under this type of contract. One part of this section implies that final design cannot be initiated until after the NEPA process is completed; another part indicates that the contracting agency can proceed at its own expense with design activities “at any level of detail” prior to NEPA completion.

Section 1303 requires FHWA to promulgate regulations implementing this section, but does not set a deadline for the rulemaking. The regulations have not yet been issued. FHWA has issued [Q&A guidance](#) explaining this provision.⁵

Section 1304: Innovative Project Delivery Methods - 100 Percent Federal Share

Section 1304 declares that it is in the national interest “to promote the use of innovative technologies and practices that increase the efficiency of construction of, improve the safety of, and extend the service life of highways and bridges.” In support of that goal, it provides that the Federal share “may, at the discretion of the State, be up to 100 percent” of the project cost, if the USDOT confirms that the project uses innovative project delivery methods.

This section lists four categories of innovative methods that allow a State to qualify for the 100 percent federal share, including the use of methods that “accelerate project delivery while complying with other applicable Federal laws (including regulations) and not causing any significant adverse environmental impact.” Thus, an innovative approach to the NEPA process can enable a State to receive a 100 percent Federal share. FHWA has issued [Q&A guidance](#) on this provision.⁶

Sections 1305-1307: Changes to SAFETEA-LU Environmental Review Process

⁵ <http://www.fhwa.dot.gov/map21/qandas/qaconstcontprov.cfm>

⁶ <https://www.fhwa.dot.gov/map21/qandas/qaipd.cfm>

Section 6002 of SAFETEA-LU (23 USC 139) established an “environmental review process” for highway and transit projects. The process is required to be followed when an EIS is prepared, and is optional for other projects.

Section 1305 - Modifications to Environmental Review Process

Section 1305 of MAP-21 amends the Section 6002 environmental review process in several ways. These include:

- Clarifying that requirements established in Section 6002 can be met through programmatic approaches, and directing USDOT to issue regulations allowing “the use of programmatic approaches to conduct environmental reviews.”
- Allowing USDOT to designate a single modal agency to act as the lead for USDOT on a project when a project requires approval of two or more modal agencies.
- Clarifying that participating agencies (not just the lead agencies) are bound by the requirements in 23 USC 139.
- Strengthening the requirement for concurrent compliance with other laws (i.e., laws other than NEPA), and applying this requirement to “each participating agency and cooperating agency”, whereas previously it applied to “Federal agencies”.
- Allowing the “project initiation notice” requirement to be met by submitting a draft Notice of Intent to FHWA/FTA for publication in the Federal Register.
- Requiring the lead agencies to obtain “concurrence” of all participating agencies in the project schedule, if the schedule is included in a coordination plan adopted under 23 USC 139. Previously, only “consultation” was required. Lead agencies are not required to include a schedule in a coordination plan.

In April 2014, FHWA and FTA jointly initiated an [on-line dialogue on programmatic approaches](#) to environmental decision-making.⁷ The on-line dialogue is intended to provide an opportunity for public input into the development of proposed regulations regarding the use of programmatic approaches. Following the on-line dialogue, FHWA will begin a rulemaking process, which will include an opportunity for comment on the proposed regulations.

Section 1306 - Issue Resolution and Financial Penalties

Section 1306 of MAP-21 also amends the Section 6002 process. These changes involve the methods for resolving interagency disputes and ensuring prompt decisions on permit applications:

- Revising the “issue resolution” process so that disputes can now be elevated not only to agency heads, but also to the CEQ and ultimately the President.
- Automatically imposing financial penalties on permitting agencies for delays in issuing permits or other required approvals. The penalties would be triggered if the permitting agency does not issue its approval within 180 days after (1) the USDOT has issued its approval and (2) a complete permit application has been filed. The penalty applies automatically unless FHWA or FTA certifies that the delay was not the fault of the permitting agency.

⁷ <http://www.dot.gov/mission/open/national-online-dialogue-map-21-section-1305-programmatic-approaches>

On March 28, 2014, FHWA and FTA jointly issued [guidance](#) regarding implementation of the financial penalties provisions in MAP-21.⁸ The guidance clarifies the applicability of this provision and the way it is to be implemented:

- **Applicability.** This provision applies to any federal agency “with jurisdiction over an approval, including a permit, license, request, or other approval” for a highway project, transit project, or multimodal project for which FHWA or FTA prepares an EIS or EA. Appendix A to the guidance includes a table that lists some common approvals that would be subject to this requirement.
- **180-Day Period.** The 180-day period begins to run on “the later of FHWA/FTA's issuance of a FONSI or a ROD, or the date on which an application or formal request for the permit, license, or approval is complete.” The responsibility for determining completeness rests with the ‘reviewing agency’ - e.g., the Corps - not with FHWA or FTA. The guidance says that the reviewing agency ‘should’ inform the applicant within 30 days after receipt of an application if the agency considers the application to be incomplete.
- **“No fault” determinations.** By statute, the penalty does not apply if FHWA (or FTA) determines that the reviewing agency’s failure to make a decision by the 180th day was “no fault of the agency.” The guidance clarifies that FHWA and FTA generally (but not always) will not make this determination until after the 180-day period has ended.
- **Additional information requests.** If an application is technically complete, but the reviewing agency informs the applicant that additional information is needed to make a decision, the 180-day clock will be paused until the applicant submits the requested information.
- **Significant new information/changes in the project.** The 180-day clock will be paused if there is “significant new information” that the reviewing agency needs to consider, including a “substantial change in the scope and design of the project.” The guidance specifically notes that this standard is broader than the standard for supplementation of an EIS under NEPA; therefore, the 180-day clock can be stopped based on “significant new information” even if there is no need to prepare a supplemental EIS.
- **Extensions.** There is no provision in the statute that authorizes FHWA to grant an extension of the 180-day period - e.g., based on the reviewing agency’s limited resources or staffing limitations. FHWA can issue a finding of “no fault”, but that finding can only be based on circumstances outside the control of the reviewing agency, such as the applicant’s failure to submit required information.
- **Enforcement.** The reviewing agency is responsible for implementing any financial penalties on itself, and for conducting any oversight to ensure that the penalties have been properly implemented. FHWA and FTA are not involved in imposing penalties or conducting oversight.

Section 1306 also requires reporting by the President to the transportation committees in Congress, every 120 days after the date of enactment of MAP-21, with regard to the status of two categories of projects:

- Projects for which a financial plan is required under 23 USC 106(i) - i.e., project with an estimated cost between \$100 million and \$500 million; and

⁸ <http://www.fhwa.dot.gov/map21/qandas/qasect1306.cfm>.

- “a sample of not less than 5 percent of the projects requiring preparation of an EIS or EA in each State.”

On March 4, 2013, the USDOT submitted its first [report to Congress](#) pursuant to Section 1306 of MAP-21 on the status and progress of a sample set of EAs and EISs.⁹ To date, that is the only such report posted on the FHWA website.

Section 1307 - Funding Agreements

Section 1307 of MAP-21 makes a slight change to the provision in 23 USC 139 that allows a State to enter into a funding agreement with another agency to assist in expediting environmental reviews for a transportation project. The new language requires the State to “enter into a memorandum of understanding that establishes the projects and priorities to be addressed by the use of the funds.”

Section 1308: Statute of Limitations

Section 1308 of MAP-21 amends the statute of limitations in 23 USC 139, which was first enacted as part of SAFETEA-LU. Under SAFETEA-LU, the time period for filing lawsuits was set at 180 days. In MAP-21, it has been shortened to 150 days.

Section 1309: Technical Assistance to Complete Ongoing EISs in 4 Years

Section 1309 of MAP-21 allows USDOT to provide technical assistance to assist in completing an EIS within 4 years following initiation of the NEPA process. This program is open to current EISs; it requires adoption of a schedule that allows for completion within four years from initiation of the study. FHWA has issued [Q&A guidance](#) explaining this provision.¹⁰

Section 1310: Planning-NEPA Linkage

Before the enactment of MAP-21, planning-NEPA linkage was authorized by FHWA and FTA through their statewide and metropolitan planning regulations (23 CFR 450.212 and [23 CFR 450.318](#)), and in guidance attached to the regulations ([23 CFR 450, Appendix A](#)).¹¹ Those regulations allowed a wide range of decisions and analyses to be adopted in the NEPA process, including decisions on purpose and need and the range of alternatives to be considered. Additional information is available on [FHWA’s planning-NEPA linkage website](#).¹²

In Section 1310 of MAP-21, Congress created a new framework for adopting planning products for use in the NEPA process. The Section 1310 process - codified in 23 USC 168 - differs from the pre-MAP-21 process for planning-NEPA linkage in several ways:

- It requires “concurrence” by “participating agencies with relevant expertise” before planning-level decisions and analyses can be adopted in the NEPA process. The pre-MAP-21 process only required consultation, not concurrence.
- It allows a planning product to be adopted only if it has been “approved by the State, all local and tribal governments where the project is located, and by any relevant metropolitan planning organization.” This approval requirement was not included in the pre-MAP-21 process.

⁹ <https://www.fhwa.dot.gov/map21/reports/sec1306report.cfm>.

¹⁰ <http://www.fhwa.dot.gov/map21/qandas/qaaccelcompletion.cfm>.

¹¹ <http://www.fhwa.dot.gov/hep/guidance/#t23>.

¹² <http://www.environment.fhwa.dot.gov/integ/related.asp>.

- It lists a series of planning products that can be adopted for use in the NEPA process, but the list does not include the purpose and need and range of alternatives. The pre-MAP-21 process specifically lists purpose and need and range of alternatives among the planning decisions that can be adopted for use in the NEPA process.

Section 1310 also specifically preserves the option of using the pre-MAP-21 process for planning-NEPA linkage, by stating that it “shall not be construed to affect the use of planning products in the environmental review process pursuant to other authorities under any other provision of law ...”.

On September 10, 2014, FHWA and FTA issued [proposed regulations](#) to implement Section 1310 of MAP-21.¹³ The proposed rules acknowledge that the Section 1310 process is “in addition to” the authority for planning-NEPA linkage in existing regulations; thus, the proposed regulations would specifically preserve the ability to use the pre-MAP-21 process for planning-NEPA linkage.

In addition, the proposed rules would clarify several points:

- The adoption of a planning product could occur during the scoping stage or at a later time during the NEPA process.
- An “approval” or “concurrence” required under 23 USC 168 can be explicit or implicit; implicit concurrence occurs when an agency is given notice of a proposed decision does not object within 60 days after the notice.
- Planning decisions that are not specifically listed in the statute (e.g., purpose and need, range of alternatives) can be adopted in the NEPA process pursuant to 23 USC 168; the list in the statute only provides a “list of illustrative examples” and is “not an exhaustive list.”

Comments on the proposed rule are due by November 10, 2014.

Section 1311: Programmatic Mitigation Plans

Section 1311 of MAP-21 creates a new 23 USC Section 169. This section allows States and MPOs to develop “programmatic mitigation plans” as part of the statewide or metropolitan transportation planning process. Such a plan “may be developed on a regional, ecosystem, watershed, or statewide scale” and “may encompass multiple environmental resources within a defined geographic area or may focus on a specific resource, such as aquatic resources, parkland, or wildlife habitat.”

The recommendations in a programmatic mitigation plan are not binding. A Federal agency may consider that plan in determining appropriate mitigation for a project when carrying out its responsibilities under NEPA, but is not required to do so.

FHWA has issued [Q&A guidance](#) on programmatic mitigation plans.¹⁴

In addition, as part of the [June 2, 2014 NPRM](#), FHWA and FTA have proposed regulations to implement the MAP-21 provisions regarding programmatic mitigation plans.¹⁵ The rulemaking would clarify that a programmatic mitigation plan can be developed as part of statewide or metropolitan transportation planning and may include any of the following:

¹³ <https://www.federalregister.gov/articles/2014/09/10/2014-21439/additional-authorities-for-planning-and-environmental-linkages>.

¹⁴ <http://www.fhwa.dot.gov/map21/qandas/qaprogrammitplans.cfm>

¹⁵ <https://www.federalregister.gov/articles/2014/06/02/2014-12155/statewide-and-nonmetropolitan-transportation-planning-metropolitan-transportation-planning>.

- An assessment of the existing condition of natural and human environmental resources within the area covered by the plan;
- An identification of environmental resources within the geographic area that may be impacted and considered for mitigation;
- An inventory of existing or planned environmental resource banks for the impacted resource categories;
- An assessment of potential opportunities for strategic mitigation - e.g., the prioritization of parcels for acquisition;
- Adoption or development of standard measures or operating procedures for mitigating certain types of impacts;
- Establishing parameters for determining appropriate mitigation for certain types of impacts - e.g., mitigation ratios;
- Adaptive management procedures - e.g., protocols for monitoring actual impacts and adjusting mitigation measures in response to the monitoring;
- Acknowledging specific statutory or regulatory requirements that must be satisfied when determining appropriate mitigation for certain types of resources.

The proposed regulations recommend providing an opportunity for agency consultation and public involvement in preparing the programmatic mitigation plan. They also recognize that other Federal agencies “may use” recommendations in a programmatic mitigation plan when carrying out their responsibilities under NEPA or other laws.

The comment period on the proposed regulations ended on September 2, 2014.

Sections 1312-1313: Assignment of USDOT Responsibilities to States

Sections 1312 and 1313 of MAP-21 amended existing authorities that allow the USDOT to assign certain responsibilities and decision-making authority to a State in the environmental review process for a transportation project.

In SAFETEA-LU, Congress created two assignment programs - one that authorized assignment of USDOT environmental responsibilities for projects that qualify for Categorical Exclusions (CEs), and another that authorized assignment of USDOT responsibilities for the full range of project types - EISs, EAs, and CEs.

MAP-21 modifies both of the assignment programs in three ways:

- Clarifies that a State cannot be required, as a condition of obtaining delegation, to forego any project delivery method that is otherwise permissible.
- Allows a State to terminate delegation on 90 days’ notice to USDOT, subject to conditions that USDOT may establish in the delegation agreement.
- Clarifies that any legal fees incurred by a State as a result of taking over FHWA’s responsibility are eligible for federal reimbursement as project costs.

In addition, MAP-21 makes three additional changes to the “full assignment” program:

- Makes the full delegation program permanent (not a pilot), and opens it up to all States (instead of only five).
- Allows delegation of USDOT responsibilities not only for highway projects, but also for other surface transportation modes: transit, passenger rail, and multimodal projects.

- Ends the audit requirement after the State’s fourth year in the program; from that point onward, the State is subject only to “monitoring.”

MAP-21 retained the following provisions in the assignment programs:

- A State still must waive its sovereign immunity as a condition of entering the program. This means the State must consent to be sued in federal court in litigation challenging approvals issued by a State (on behalf of the USDOT) under this program.
- Air quality conformity determinations for the full-delegation program still cannot be assigned. Therefore, both regional and project-level conformity determinations under that program still must be made by USDOT.

FHWA released an [updated MOU template](#) for the CE assignment program September 30, 2013.¹⁶ No regulations have been issued for the CE assignment program, nor were any required by MAP-21.

Section 1313 required USDOT to amend the regulations that establish the application requirements for the full-assignment program (23 CFR Part 773). FHWA, FTA, and the Federal Railroad Administration (FRA) jointly issued a [proposal](#) to amend the regulations on August 30, 2013.¹⁷ The [final regulations](#) were issued on September 16, 2014.¹⁸

The final rule recognizes that the statute now allows for assignment of USDOT responsibilities for railroad, public transportation, and multimodal projects, in addition to highway projects. In addition, the final rule:

- Creates several new definitions, including definitions of “public transportation project” and “railroad project.”
- Describes the entities eligible to receive assignment of USDOT responsibilities for highway, rail, public transportation, and multimodal projects.
- Excludes certain types of projects from assignment - for example, the proposed regulations would not allow assignment of projects that cross State boundaries and projects that are adjacent to or cross international boundaries.
- Clarifies that a State is required to accept assignment of USDOT responsibilities for one or more highway projects in order to obtain assignment of USDOT responsibilities for rail, public transportation, and/or multimodal projects.
- Creates a presumption that assignment by an Operating Administration (e.g., FHWA) will include environmental review responsibilities for multimodal projects' elements that would otherwise fall within that Operating Administration's authority (e.g., the highway element of a multimodal project).
- Defines the requirements that a State must meet prior to submitting an application - e.g., waive sovereign immunity and have State laws in place that are equivalent to the federal

¹⁶ http://www.fhwa.dot.gov/hep/map-21_research/resources/categorical_exclusions/index.cfm.

¹⁷ <https://www.federalregister.gov/articles/2013/08/30/2013-20912/surface-transportation-project-delivery-program-application-requirements>.

¹⁸ <http://www.gpo.gov/fdsys/pkg/FR-2014-09-16/html/2014-22080.htm>.

Freedom of Information Act.

- Allows applications to be submitted electronically, and allows joint applications to be filed when an applicant is seeking assignment from more than one modal administration within USDOT - e.g., from FHWA and FTA.
- Requires the application to describe any “otherwise permissible project delivery methods the State intends to pursue” - for example, early acquisition of right-of-way - and “the process it will use to decide whether pursuing those project delivery methods and being responsible for the environmental review meet the objectivity and integrity requirements of NEPA.”
- Requires the application to describe any “comparable State environmental review procedures” (under State laws similar to NEPA), including any differences between those State procedures and the Federal environmental review process.
- Requires the draft MOU, together with the application for assignment, to be made available for public review and comment through publication in the Federal Register.
- Clarifies that, for assignment of FHWA responsibilities, the MOU may be signed by the “the top ranking transportation official in the State who is charged with responsibility for highway construction” rather than by the Governor. The Governor’s signature is still required for assignment of responsibilities for transit or railroad projects.
- Clarifies the procedures for renewal of assignment, including the conditions under which an additional opportunity for public comment may be required by USDOT, if the renewal includes significant changes or assignment of additional responsibilities.

Since the enactment of MAP-21, only one State - Texas - has applied for assignment under 23 USC 327. The Texas Department of Transportation (TxDOT) released a [draft application](#) for full assignment in March 2014.¹⁹ TxDOT’s [final application, together with its draft MOU](#), was released for public comment by publication in the Federal Register on October 10, 2014. The comment period for the application ends on November 10, 2014.²⁰

Section 1314: Applying Categorical Exclusions to Multimodal Projects

Section 1314 of MAP-21 establishes a process for applying categorical exclusions (CEs) to multimodal projects. This process is included in an amended section of the U.S. Code - 49 USC 304.

Several conditions need to be met in order for one USDOT agency (the lead authority) to apply the CE of another USDOT agency (the cooperating authority) to a multimodal project:

- the project is funded under one grant agreement, which must be administered by the lead authority;

¹⁹ <http://ftp.dot.state.tx.us/pub/txdot-info/env/toolkit/final-draft-application-030614.pdf>.

²⁰ <https://www.federalregister.gov/articles/2014/10/10/2014-24327/application-from-the-state-of-texas-under-the-surface-transportation-project-delivery-program-and>.

- the project “has components that require the expertise of a cooperating authority to assess the environmental impacts of the components”;
- the component of the project to be covered by CE of the cooperating authority “has independent utility”;
- the cooperating authority, in consultation with the lead authority, has determined that its CE applies; and
- the lead authority has determined that the complete project - including all components - “does not individually or cumulatively have a significant impact on the environment” and there are no “extraordinary circumstances” that would preclude use of the CEs.

This provision does not require a rulemaking. On February 12, 2014, FHWA issued a [guidance](#) document that summarizes and explains this provision.²¹ The guidance clarifies several points:

- If this process is not used, each USDOT agency “may apply its own CE to its project component that has independent utility or, in the absence of an appropriate CE, ... [the agency] should prepare an EA.”
- The “lead authority” is not necessarily the USDOT agency with the largest role in the project; however, the lead authority must administer the grant agreement.
- If a State has assumed USDOT’s responsibilities under a NEPA assignment program (as provided in 23 USC 326 or 326), the State could act as the “lead authority” or “cooperating authority” for purposes of this provision.
- A single grant agreement can include funding from multiple sources (e.g., FHWA and FTA).
- The Office of the Secretary of Transportation (OST) can be “lead authority” or “cooperating authority” for purposes of this provision.

Sections 1315-1318: New and Modified Categorical Exclusions (CEs)

Sections 1315 through 1318 direct the USDOT to issue new CEs, revise some existing CEs, and undertake other actions that support the increased use of CEs for highway and transit projects.

Section 1315: New CE for Emergency Projects

Section 1315 directs USDOT to establish a new CE that covers a project to repair or reconstruct a facility that was damaged in either (1) an emergency declared by the President or (2) an emergency declared by the Governor and concurred in by the Secretary of the USDOT. As described in Section 1315, this new CE would only be available if the repaired or reconstructed facility is “in the same location and with the same capacity, dimensions, and design as the original road, highway, or bridge.”

On February 19, 2013, FHWA and FTA issued a [final rule](#) that creates two new CEs - one for highway projects, in 23 CFR 771.117, and one for transit projects, in 23 CFR 771.118. The new CEs incorporate, and extend beyond, the CE for emergency projects that had existed in 23 CFR

²¹ <https://www.fhwa.dot.gov/map21/qandas/qacemp.cfm>.

771.117(c)(9) prior to MAP-21.²² The new CEs also are broader than the CE described in Section 1315 of MAP-21.

Key points to note regarding the new CEs:

- They apply only if the project is constructed within the existing right-of-way.
- They apply if the project “substantially conforms” to the design standards of the facility that is being repaired or replaced. This wording means that the new facility can include “upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction.”
- Exceptions for “unusual circumstances” still apply, as is the case for existing CEs in the FHWA and FTA regulations. This means, in essence, that the CE cannot be applied if the proposed action would have significant impacts or is inconsistent with applicable laws.
- Requirements under other environmental laws still apply - for example, Section 4(f) of the USDOT Act, Section 404 of the Clean Water Act, and the Endangered Species Act.

On February 12, 2014, FTA issued [guidance](#) on implementing FTA’s new and modified CEs for transit projects, including the CE for emergency projects.²³ The guidance clarifies that the CE for emergency projects can be applied to any “transit facility” or “ancillary transit facility,” not just to the examples listed in the regulation (ferry docks, bus stations, pedestrian and bicycle facilities).

Section 1316: New CE for Projects in Existing Operational Right-of-Way

Section 1316 requires USDOT to establish a CE for projects that are built entirely within an “existing operational right-of-way.” The term “operational right-of-way” is defined in the statute to mean “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.”

Section 1316 requires USDOT to issue a proposed rule implementing this provision within 150 days after the date of enactment of MAP-21, and to issue a final rule within 180 days after the date of enactment.

On January 13, 2014, FHWA and FTA jointly issued a [final rule](#) under this section. The final rule establishes two new CEs - one for highway projects in 23 CFR 771.117, and one for transit projects in 23 CFR 771.118.²⁴ These CEs describe the types of facilities or landscape features that are considered part of the “existing operational right-of-way.” The key concepts in both proposed CEs are the same:

- For the CE to apply, the project must “take place entirely within the existing operational right-of-way.”
- The “existing operational right-of-way” is defined to mean the “right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose.”

²² <https://www.federalregister.gov/articles/2013/02/19/2013-03494/environmental-impact-and-related-procedures>.

²³ http://www.fta.dot.gov/documents/Section_118_Guidance-February_2014_dated_02-12-14.pdf.

²⁴ <https://www.federalregister.gov/articles/2014/01/13/2014-00370/environmental-impact-and-related-procedures>.

The preamble to the final rule clarifies several points:

- “Within.” It is the “final project” - not the construction work zone - that must be entirely within the operational right-of-way. Therefore, the project can meet the criteria for the CE even if some construction activities take place outside the operational right-of-way.
- “Maintained.” An area can be “maintained” through “[n]atural methods of managing roadside vegetation.” Therefore, applicants “do not need to develop or engage in regular maintenance actions within these areas.”
- “Transportation Purpose.” The CE is intended to “include areas that may not be traditionally considered a transportation facility but are maintained to serve a transportation purpose for an existing transportation facility such as clear zones and areas for safety and security of the transportation facility.”
- “Existing Operational.” The CE does not apply to “uneconomic remnants or excess right-of-way that is secured by a fence to prevent trespassing, or that are acquired and held for a future transportation project,” because they are not part of the “existing operational” right-of-way.
- “Transportation Facility.” The term “transportation facility” includes “bicycle and pedestrian facilities.”

As with the final rule on CEs for emergency projects, the final CE for projects within the existing right-of-way is subject to the following limitations:

- Exceptions for “unusual circumstances” still apply, as is the case for existing CEs in the FHWA and FTA regulations. This means, in essence, that the CE cannot be applied if the proposed action would have significant impacts or is inconsistent with applicable laws.
- Requirements under other environmental laws still apply - for example, Section 4(f) of the USDOT Act, Section 404 of the Clean Water Act, and the Endangered Species Act.

The effective date of this final rule was February 12, 2014. On the same date, FTA issued [guidance](#) regarding implementation of all new and modified CEs for transit projects.²⁵ The guidance clarified a few points regarding the CE for projects within the existing operational right-of-way:

- “A transportation facility that has fallen into disuse may require an assessment to determine if it is still being maintained for a transportation purpose and, therefore, qualifies as an operational right-of-way.”
- “Public transportation facilities often have non-contiguous features that are part of a transportation system and are, therefore, part of the operational right-of-way. Examples include substations, including transit power substations, transit maintenance yards, transit venting structures, and parking facilities, which includes both surface lots and parking structures.”

²⁵ http://www.fta.dot.gov/documents/Section_118_Guidance-February_2014_dated_02-12-14.pdf.

Section 1317: New CE for Projects with Limited Federal Assistance

Section 1317 requires USDOT to establish a CE for projects that receive limited federal assistance. This CE would cover either (1) a project that receives less than \$5 million in Federal funds or (2) a project with a total estimated cost of not more than \$30 million and Federal funding in an amount that comprises less than 15 percent of the total cost.

Section 1317 requires USDOT to issue regulations implementing this section within 180 days after the date of enactment of MAP-21.

On January 13, 2014, FHWA and FTA jointly issued a [final rule](#) under this section. The final rule establishes two new CEs - one for highway projects in 23 CFR 771.117, and one for transit projects in 23 CFR 771.118.²⁶ The CE includes the dollar thresholds specified in MAP-21. It also includes the same conditions that are included in the final rule on CEs for emergency projects - i.e., the exception for “unusual circumstances” and the requirement to comply with other federal laws.

The preamble to the final rule clarifies several points:

- **Federal Approvals.** The proposed rule would have limited the CE to actions “that do not require Administration actions other than funding.” The final rule removes this limitation. The CE is available for any project within the financial thresholds established by Congress, even if another FHWA or FTA approval is required - e.g., FHWA approval for a change in access to the Interstate System.
- **Inflation Adjustment.** Commenters recommended that the thresholds be adjusted for inflation. FHWA and FTA did not make this change, because the funding amounts are set in the statute.
- **Reevaluations.** After completion of the NEPA process, a reevaluation is needed if “if there is an increase in the amount of Federal funds for the project beyond the established thresholds, and there is still an FHWA and/or FTA action that needs to be taken when these changes occur.” The preamble also notes that, “Even when a change occurs, the project may continue to qualify for a CE under other CEs designated in part 771, if it meets the requirements of the CE.”

The effective date for this final rule was February 12, 2014. In [guidance](#) issued on the same date, FTA emphasized that “Because this CE is dependent on a funding threshold, it is important to obtain accurate cost estimates and to carefully evaluate whether application of this CE is appropriate, especially when a project’s cost estimate is close to the established threshold.”²⁷

Section 1318: New, Modified, and Programmatic CEs

Section 1318 contains several provisions requiring changes to the CE provisions in the FHWA and FTA regulations:

- Section 1318(a) requires USDOT to survey the use of existing CEs for transportation projects since 2005 and to solicit requests for new CEs. Section 1318(b) requires USDOT to publish a notice of proposed rulemaking to propose new categorical exclusions after considering the results of the survey.

²⁶ <https://www.federalregister.gov/articles/2014/01/13/2014-00370/environmental-impact-and-related-procedures>.

²⁷ http://www.fta.dot.gov/documents/Section_118_Guidance-February_2014_dated_02-12-14.pdf.

- Section 1318(c) requires USDOT to move three CEs from the “(d)” list to the “(c)” list in Section 771.117 of the FHWA/FTA regulations.²⁸ These include:
 - Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing).
 - Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting.
 - Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings.
- Section 1318(d) of MAP-21 directs the USDOT to “seek opportunities to enter into programmatic agreements with the States that establish efficient administrative procedures for carrying out environmental and other required project reviews.” This section also confirms that a programmatic agreement can authorize a State to issue CEs for activities that are not specifically listed as CEs in 23 CFR 771.117 or 771.118.

The USDOT has completed the survey required in Section 1318 and published a final report summarizing the survey results on November 28, 2012. The final report is “[U.S. Department of Transportation National Environmental Policy Act Categorical Exclusion Survey Review](#),” Publication No: FHWA-HEP-13-003.²⁹

On September 19, 2013, FHWA and FTA jointly issued [proposed regulations](#)³⁰ to implement this section, and issued final regulations on [October 6, 2014](#).³¹ The final rule:

- Creates four new CEs for FHWA actions, and five new CEs for FTA actions. For FHWA actions, the proposed new CEs would cover:
 - Geotechnical, archeological, wetland surveys, and other investigations conducted in connection with environmental reviews;
 - Environmental restoration and pollution abatement actions, including retrofitting of stormwater management systems;
 - Purchase, construction, replacement, and rehabilitation of ferry vessels; and
 - Rehabilitation or reconstruction of ferry facilities.
- Moves the three CEs from the (d) list to the (c) list, but only to the extent that the covered activities satisfy six “constraints” that are specified in the regulation - e.g., the action must not involve the acquisition of “more than a minor amount of right-of-way”, must not involve an adverse effect to historic properties, and must not require formal consultation

²⁸ The “c” list includes actions that generally can be approved as CEs with limited documentation. The “d” list includes actions that can be approved as CEs, with documentation supporting the absence of the potential for significant impacts.

²⁹ <http://www.fhwa.dot.gov/map21/reports/>.

³⁰ <https://www.federalregister.gov/articles/2013/09/19/2013-22675/environmental-impact-and-related-procedures-programmatic-agreements-and-additional-categorical>.

³¹ <https://www.federalregister.gov/articles/2014/10/06/2014-23660/environmental-impact-and-related-procedures-programmatic-agreements-and-additional-categorical>.

under the Endangered Species Act.

- Allows individual States and FHWA Division Offices to adopt specific criteria for determining when constraints have been met - for example, what constitutes “more than a minor amount of right-of-way.”
- Allows the three shifted CEs to continue being used as part of the (d) list - that is, with documentation to demonstrate the absence of significant impacts - in situations where the six constraints are not satisfied.
- Clarifies that, under a programmatic agreement, a State is authorized to make a CE determination on behalf of FHWA, without the need for FHWA’s approval.
- Establishes several new requirements that CE programmatic agreements must meet, and require all existing CE programmatic agreements to be amended within five years to be consistent with the new regulations.
- Clarifies that a programmatic CE agreement can only include activities that are “specifically listed” in FHWA’s regulations. Thus, programmatic CE agreements cannot be used to authorize issuance of CEs for additional activities beyond those listed in 23 CFR 771.117.

Section 1319: Condensed FEIS and Combined FEIS/ROD

Section 1319 of MAP-21 includes two provisions that are intended to shorten the time needed to complete an FEIS and ROD.

“Errata Pages” Format for FEIS

Section 1319(a) clarifies that the lead agency can issue an FEIS that consists of “errata pages” -- rather than a complete, stand-alone document -- if the agency received only “minor comments” on the DEIS.

This flexibility existed under the CEQ regulations even before the enactment of MAP-21. Section 1319(a) confirms that this format is acceptable. It also requires that errata pages “(1) cite the sources, authorities, or reasons that support the position of the agency” and “(2) if appropriate, indicate the circumstances that would trigger agency reappraisal or further response.”

FHWA and FTA issued [interim guidance](#) implementing this provision on January 14, 2013.³² The guidance describes the information that should be included in errata pages, and confirms that this documentation must undergo the legal sufficiency review required for an FEIS under 23 CFR 771.125.

Combined FEIS and ROD

Prior to MAP-21, FHWA and FTA were required by their own regulations and the CEQ regulations to provide a waiting period of at least 30 days between publication of the FEIS and issuance of the ROD. Section 1319(b) of MAP-21 overrode that requirement. It directs the lead agency to issue the FEIS and ROD as a single document “to the maximum extent practicable,” unless one of the following conditions is met:

³² <http://www.fhwa.dot.gov/map21/guidance/guideaccdecer.cfm>.

- the FEIS makes “substantial changes to the proposed action that are relevant to environmental or safety concerns” or
- “there are significant new circumstances or information relevant to environmental concerns and that bear on the proposed action or the impacts of the proposed action.”

FHWA and FTA issued [interim guidance](#) implementing this provision on January 14, 2013. The interim guidance calls for a case-by-case determination as to whether it is “practicable” to issue a combined FEIS and ROD.³³ The guidance also directs FHWA Division Offices and FTA Regional Offices to consult with headquarters before issuing a combined FEIS/ROD.

Section 1320: Early Coordination Activities

Section 1320 encourages agencies to coordinate with one another “at the earliest possible time” and include several specific provisions to encourage this approach:

- Requires the USDOT and other Federal agencies, at the request of a State or local planning agency, to provide technical assistance on early coordination activities.
- States that the USDOT, at the request of a State or local planning agency, “may” enter into memoranda of agreement with the project sponsor, State, and local governments and other appropriate entities to accomplish early coordination activities.

Section 1320 defines “early coordination activities” to include:

- Technical assistance on identifying potential impacts and mitigation issues in an integrated fashion.
- The potential appropriateness of using planning products and decisions in later environmental reviews.
- The identification and elimination from detailed study in the environmental review process of the issues that are not significant or that have been covered by prior environmental reviews.
- The identification of other environmental review and consultation requirements so that the lead and cooperating agencies may prepare, as appropriate, other required analyses and studies concurrently with planning activities.
- The identification by agencies with jurisdiction over any permits related to the project of any and all relevant information that will reasonably be required for the project.
- The reduction of duplication between requirements under NEPA and State and local planning and environmental review requirements, unless the agencies are specifically barred from doing so by applicable law.
- Timelines for the completion of agency actions during the planning and environmental review processes.
- Other appropriate factors.

Sections 1321-1323: Studies and Reports

³³ <http://www.fhwa.dot.gov/map21/guidance/guideaccdecer.cfm>.

Sections 1321 through 1323 require several studies and reports related to the project delivery process.

FHWA and FTA Review of Project Delivery Procedures

Section 1321 requires the Secretary to “review and develop consistent procedures for environmental permitting and procurement requirements” for a project carried out with federal highway or transit funds. It requires USDOT to publish a report documenting the results of this review. It does not set a deadline for publishing the report.

GAO Study of Duplicative Federal and State Reviews

Section 1322 requires the Comptroller General - that is, the Government Accountability Office (GAO) - to conduct a study of the costs involved in “environmental reviews carried out at the Federal level that are duplicative of State reviews that provide equivalent environmental protections and opportunities for public involvement.” This provision appears to refer to reviews carried out in States such as California, which have an environmental review process under State law that is similar to the requirements of NEPA. This section requires the GAO to submit its report to Congress within two years after the date of enactment of MAP-21.

Additional Reports

Section 1323 requires a series of reports to be submitted to Congress by the USDOT and GAO.

- Section 1323(a) requires USDOT to prepare two reports on the completion times for CEs, EAs, and EISs for projects funded under Title 23.
 - The first is due within one year after enactment of MAP-21, and must compare completion times for NEPA studies initiated before and after calendar year 2005.
 - The second must be submitted within five years after enactment of MAP-21, and must compare completion times for NEPA studies initiated before and after the date of enactment of MAP-21.
- Section 1323(b) requires USDOT to prepare a report on “the types and justification for the additional categorical exclusions granted under the authority provided under sections 1316 and 1317” - that is, the CEs for projects in the existing operational right-of-way and for projects with limited federal financial assistance. This report must be submitted within two years after the date of enactment of MAP-21.
- Section 1323(c) requires the USDOT’s Office of Inspector General to assess the reforms carried out the project delivery subtitle in MAP-21 and submit two reports to Congress:
 - an “initial report” within two years after the date of enactment ([report submitted](#) on May 22, 2013³⁴), and
 - a “final report” within four years after the date of enactment.

Environmental Funding Provisions in MAP-21

In addition to the project delivery provisions in Subtitle C of Title I, MAP-21 also contains other provisions that relate to environmental issues and/or project delivery, including:

³⁴ <https://www.oig.dot.gov/library-item/29145>.

- Changes to the Congestion Management and Air Quality (CMAQ) program, and
- Creation of the new Transportation Alternatives (TA) program.

CMAQ Program

Section 1113 of MAP-21 modifies the existing Congestion Management and Air Quality Improvement (CMAQ) funding program in 23 USC 149. The CMAQ program provides funding to States with areas designated as “nonattainment” or “maintenance” status for certain air pollutants. The funding allocation for each state is determined by the state’s overall share that the CMAQ apportionment represented of each state’s total highway program in FY2009. Important changes in Section 1113 relate to eligibility, prioritization, and program evaluation.

Eligibility

Section 1113 amends the list of projects eligible for CMAQ funding, adding language to confirm and clarify the eligibility of the following types of projects:

- projects that improve traffic flow by adding turning lanes;
- programs or projects to improve incident and emergency response or improve mobility, such as through real-time traffic, transit, and multimodal traveler information;
- project or programs that shift traffic demand to nonpeak hours or other transportation modes, increase vehicle occupancy rates, or otherwise reduce demand for roads through such means as telecommuting, ridesharing, carsharing, alternative work hours, and pricing;
- programs or projects 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, except at locations where commercial rest areas are prohibited.

Prioritization and Set-Asides for PM2.5

MAP-21 modifies the prioritization requirements for CMAQ funds to emphasize actions that reduce PM2.5 emissions. In areas designated as nonattainment or maintenance for PM2.5, State DOTs must now give priority in allocating CMAQ funds to “projects that are proven to reduce PM2.5, including diesel retrofits.”

In addition, MAP-21 requires States with PM2.5 nonattainment or maintenance areas to commit a portion of their CMAQ funds to projects that reduce PM2.5 emissions in those areas. States are allowed, but not required, to meet this requirement by obligating funds to “install diesel emission control technology on nonroad diesel equipment or on-road diesel equipment that is operated on a highway construction project within a PM2.5 nonattainment or maintenance area.”

The set-aside for PM2.5 emission reductions is defined as “25 percent of the funds apportioned to each State under section 104 (b)(4) for a nonattainment or maintenance area that are based all or in part on the weighted population of such area in fine particulate matter nonattainment.” To calculate this amount, it is first necessary to determine how much of the State’s total CMAQ apportionment was based on the share of the State’s population living in PM2.5 non-attainment or maintenance areas. Twenty-five percent of that amount is required to be dedicated to projects that reduce PM2.5 emissions.

To implement the set-aside, FHWA issued [interim guidance](#) in November 2013. The interim guidance established “weighting factors” to be used for determining how much of a State’s CMAQ apportionment was based on population living in CMAQ non-attainment areas.³⁵ The weighting factor for PM2.5 areas was set at 1.2, which was in the mid-point of the range of factors used in the CMAQ program prior to MAP-21.

On August 4, 2014, FHWA issued [proposed regulations](#), which would require a weighting factor of 5.0 for PM2.5 areas, rather than the 1.2 factor used in the November 2013 guidance.³⁶ The heavier weighting factor would increase the amount of CMAQ funds required to be dedicated to reducing PM2.5 emissions. The proposed regulations did not include any adjustment for areas in which transportation resources make an insignificant contribution to PM2.5 emissions.

The comment period for the proposed regulations ended on October 3, 2014. The final rule has not yet been issued.

Operating Assistance

Section 1113(b)(6) of MAP–21 amended 23 U.S.C. 149 to include a new paragraph (m), which allows States to obligate CMAQ funds for operating assistance. In the [interim guidance](#) issued in November 2013, FHWA interpreted this provision to allow CMAQ funds to be used for start-up and transition operating costs but not for long-term operating assistance “because such costs are akin to maintenance and normal system operating costs that are the responsibility of the States and local governments.”³⁷

In January 2014, as part of an [omnibus appropriations bill](#), Congress amended 23 USC 149(m) to eliminate any time limitation on the use of CMAQ funds for operating assistance for certain activities. As amended, the statute prohibits the imposition of a time limitation for operating assistance eligibility on a system “for which CMAQ funding was made available, obligated or expended in fiscal year 2012.”

To implement that change, FHWA issued [revised interim guidance](#) on CMAQ operating assistance in July 2014.³⁸ This revised guidance interprets the phrase “made available” to apply only to projects designated for CMAQ operating assistance in statute or to projects for which CMAQ funds were actually committed during FY2012. The guidance states that “There must be official documentation demonstrating that there was a specific commitment in FY 2012 to provide CMAQ funding for operating assistance for a particular project or service.” Thus, the relief from the time limitation applies only to specific projects; it does not lift the time limitation for all CMAQ-eligible activities.

Evaluation and Reporting

MAP-21 also modifies the reporting and evaluation requirements for the CMAQ program. Prior to MAP-21, the USDOT was required to maintain a database describing the impacts of projects funded under the CMAQ program. This requirement is now more specific: the database must now be publicly available in an electronic format and must include “specific information about each project, such as the project name, location, sponsor, cost, and, to the extent already measured by the project sponsor, cost-effectiveness, based on reductions in congestion and emissions.” In addition, the

³⁵ http://www.fhwa.dot.gov/environment/air_quality/cmaq/policy_and_guidance/2013_guidance/.

³⁶ <https://www.federalregister.gov/articles/2014/08/04/2014-17786/congestion-mitigation-and-air-quality-improvement-cmaq-program>.

³⁷ http://www.fhwa.dot.gov/environment/air_quality/cmaq/policy_and_guidance/2013_guidance/.

³⁸ http://www.fhwa.dot.gov/environment/air_quality/cmaq/policy_and_guidance/cmaq13ig.cfm.

USDOT must maintain a table that “illustrates the cost-effectiveness of a range of project types” eligible for CMAQ funding.

Performance Plans

MAP-21 requires “performance plans” to be developed by MPOs in metropolitan areas with a population of more than 1 million, if they include nonattainment or maintenance areas. The performance plan must include a baseline assessment of traffic-congestion and mobile-source emissions, with regard to the pollutants for which the area has been designated as nonattainment or maintenance. The plan also must describe progress made in achieving the performance targets related to mobile-source emissions in the metropolitan areas, and a description of projects identified for funding under this section and how such projects will contribute to the performance targets. Performance plans must be updated biennially.

For additional information regarding changes to the CMAQ program, refer to FHWA’s [Q&A guidance regarding Section 1113 of MAP-21](#)³⁹.

In addition, FHWA issued [interim guidance](#) in November 2013.⁴⁰ The interim guidance replaces a 2008 guidance document. The guidance took effect immediately, but remained open for comment through January 13, 2014. The guidance primarily focuses on the eligibility and prioritization requirements related to the use of CMAQ funds. Issues addressed in the guidance include:

- apportionment of CMAQ funds to the States, under MAP-21 funding levels;
- increased emphasis on cost-effectiveness in project selection;
- prioritization of diesel retrofit projects;
- set-aside for projects to reduce PM2.5 emissions in PM2.5 nonattainment areas;
- use of public-private partnerships to deliver CMAQ projects; and
- development of a CMAQ performance plan, including performance measures.

Transportation Alternatives (TA) Program

Section 1122 of MAP-21 creates a new Transportation Alternatives (TA) funding program in 23 USC 213. This new program provides funding for a range of projects, including many of the project types that formerly were eligible for Transportation Enhancements (TE) funding. Funds under this program are distributed to the States by formula; the formula is based on the State’s proportionate share of TE funding in FY 2009. States are allowed to transfer up to 50 percent of their TA funds for use under other federal-aid funding programs, subject to certain conditions.

Four categories of projects are eligible for TA funding:

- “Transportation alternatives” as defined in 23 USC 101. This category includes a wide range of project types. Examples include: on-road and off-road trails for pedestrians and bicyclists; conversion of abandoned railroad corridors for use as recreational trails; construction of turnouts, overlooks, and viewing areas; control and removal of outdoor advertising; preservation and rehabilitation of historic transportation facilities; vegetation management in transportation rights-of-way; archeological activities in transportation rights-of-way; and environmental mitigation activities, including stormwater management.

³⁹ <http://www.fhwa.dot.gov/map21/qandas/qacmaq.cfm>.

⁴⁰ http://www.fhwa.dot.gov/environment/air_quality/cmaq/policy_and_guidance/2013_guidance/.

- Projects eligible under the recreational trails program in 23 USC 206.
- Project eligible under the “safe routes to school” program established in section 1404 of the SAFETEA-LU.
- Projects involving the construction of “boulevards and other roadways largely in the right-of-way of former Interstate System routes or other divided highways.”

For more detailed information regarding the TA program, including the allocation of funding and restrictions on the use of funding, refer to FHWA’s TA program [guidance](#), which was issued on June 10, 2013 and revised on March 6, 2014.⁴¹

Changes to the Transportation Planning Process

Sections 1201 through 1203 of MAP-21 included a series of changes to the statewide and metropolitan transportation planning requirements in 23 USC 134. These changes address four main issues:

- *MPO Membership.* MAP-21 requires MPOs serving in “transportation management areas” - that is, areas with a population over 200,000 - to include representation by providers of public transportation. This requirement must be met within 2 years after the effective date of MAP-21 - that is, by October 1, 2014.
- *Performance Management.* MAP-21 establishes new requirements for performance management in statewide and metropolitan transportation planning. The USDOT is required to establish “performance measures” on specific topics, such as congestion, pavement condition, safety, and emissions. States and MPOs will then be required to adopt “performance targets” based on those performance measures and to report on their progress in achieving those targets. The national performance measures will be established by USDOT through a series of rulemakings.
- *Scenario Planning.* MAP-21 allows MPOs to develop and consider multiple scenarios during the development of a metropolitan transportation plan. It lists several factors that MPOs are encouraged to consider if they choose to engage in scenario planning.
- *RTPOs in Non-Metropolitan Areas.* MAP-21 gives States the option of establishing “Regional Transportation Planning Organizations” to assist the State in addressing the needs of nonmetropolitan areas. It provides that an RTPO must be a multijurisdictional organization, comprised of volunteer nonmetropolitan local officials or their designees and volunteer representatives of local transportation systems.

On July 9, 2014, FHWA issued updated [Q&As on performance management requirements](#).⁴² The updated Q&As announced a plan to issue eleven separate rulemakings implementing these requirements, including:

- Establishing performance measures. FHWA will conduct three rulemakings to establish performance measures for the federal highway system. These will cover (1) safety, (2) pavement and bridge condition, and (3) system performance, freight movement, congestion, and air emissions.

⁴¹ <http://www.fhwa.dot.gov/map21/guidance/guidetap.cfm>.

⁴² <http://www.fhwa.dot.gov/map21/qandas/qapm.cfm>.

- Planning process changes: FHWA and FTA will jointly conduct a rulemaking to modify the statewide and metropolitan transportation planning regulations (23 CFR 450), to incorporate the performance measurement requirements into the planning process.
- Other rulemakings. FHWA and FTA will conduct a series rulemakings to incorporate performance measurement into other programs, such as the Highway Safety Improvement Program, asset management programs, and transit safety programs.

To date, FHWA and FTA have initiated three of the eleven rulemakings.

- On March 11, 2014, FHWA [proposed the safety performance measures](#) for the highway system.⁴³ The comment period for that rule ended on June 30, 2014.
- On March 28, 2014, FHWA [proposed regulations to incorporate performance measures into the Highway Safety Improvement Program](#).⁴⁴ The comment period for that rule ended on June 30, 2014.
- On June 2, 2014, FHWA and FTA [proposed changes to the statewide and metropolitan transportation planning regulations](#).⁴⁵ The comment deadline was initially September 2, 2014, but was later [extended to October 2, 2014](#).⁴⁶ This rulemaking would implement several MAP-21 provisions, including:
 - ensuring that public transportation providers are included as voting members of MPOs;
 - incorporating performance measurement into the planning process;
 - designating RTPOs and making other changes related to transportation planning in non-metropolitan areas;
 - incorporating scenario planning into the metropolitan planning process; and
 - developing programmatic mitigation plans.

For more information on changes to the transportation planning process, refer to FHWA's [Q&As on overall changes to the planning process](#)⁴⁷ and [Q&As on performance management requirements](#). In addition, FHWA maintains a [web page on performance measurement](#), which includes links to rulemaking notices, guidance, and other materials.⁴⁸

⁴³ <https://www.federalregister.gov/articles/2014/03/11/2014-05152/national-performance-management-measures-highway-safety-improvement-program>.

⁴⁴ <https://www.federalregister.gov/articles/2014/03/28/2014-06681/highway-safety-improvement-program>.

⁴⁵ <https://www.federalregister.gov/articles/2014/06/02/2014-12155/statewide-and-nonmetropolitan-transportation-planning-metropolitan-transportation-planning>.

⁴⁶ <https://www.federalregister.gov/articles/2014/09/02/2014-20885/statewide-and-nonmetropolitan-transportation-planning-metropolitan-transportation-planning>.

⁴⁷ <http://www.fhwa.dot.gov/map21/qandas/qaplanning.cfm>.

⁴⁸ <http://www.fhwa.dot.gov/tpm/>,

Major Projects Financial Plans

Under 23 USC 106, States are required to prepare financial plans for all “major projects.” In Section 1503(a)(4) of MAP-21, Congress amended this requirement in two ways:

- it allowed a “phased” financial plan to be prepared, and provides that a phased plan will satisfy the fiscal constraint requirements in the transportation planning process; and
- it required a financial plan to include consideration of the appropriateness of using a public-private partnership (PPP).

For environmental practitioners, this change in MAP-21 is significant because it provides some new flexibility in meeting the fiscal constraint requirement prior to completion of the NEPA process. With MAP-21, the project sponsor now has the option of meeting that requirement by submitting a phased financial plan. This flexibility can be helpful in situations where full funding to complete the project has not been identified at the time the NEPA process is completed.

On September 6, 2013, FHWA issued [draft guidance](#) implementing the changes to the major projects financial plan requirements.⁴⁹ The draft guidance would supersede several previous guidance documents, including [interim guidance](#) issued on September 24, 2012.⁵⁰ The draft guidance provides some additional detail regarding the changes made in MAP-21:

- It clarifies that a phased financial plan should include “[d]etailed information about each funded phase” and also should “document the entire project’s scope, cost, and schedule.”
- It lists the topics that should be covered in a financial plan regarding the potential use of a PPP for the project. These topics include the existence of legislative authority to use a PPP; the benefits and disadvantages of using a PPP; the risks of using a PPP; and the effect of a PPP on the cost of capital.

⁴⁹ <http://www.fhwa.dot.gov/ipd/pdfs/2013-21738.pdf>.

⁵⁰ <http://www.fhwa.dot.gov/map21/guidance/guidemajorproj.cfm>.