



MAP-21 Creates Potential to Accelerate Project Delivery

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This E-Alert, the second in our four-part series (read parts one, three and four), focuses on the changes to federal environmental law to accelerate project delivery.

On June 29, 2012 Congress passed a compromise measure to reauthorize transportation funding through the end of 2014. A bipartisan and bicameral measure, the new bill contains meaningful reforms that, although marred by some missed opportunities, collectively represent a significant improvement in federal surface transportation law.

In our series of E-Alerts on MAP-21, we elucidate four topics important to transportation financing and development of large transportation projects: (1) TIFIA, (2) environmental streamlining, (3) tolling and (4) public-private partnerships.

MAP-21 is the product of a robust effort by transportation advocates to streamline the lengthy, complex, and cumbersome federal environmental process. Nossaman played an important role in this debate. As was widely reported during the Congressional debate, it requires an average of 15 years to obtain approvals to build a major new transportation project. It is not uncommon for large projects to languish in NEPA (National Environmental Policy Act) purgatory for decades. The House and Senate versions of MAP-21 sought to reduce materially the time required to deliver major transportation improvements, but without sacrificing the environment.

MAP-21 reflects considerable horse trading by conferees on environmental streamlining. Whether the ultimate product will achieve the stated legislative objective will depend on the terms of regulations to implement MAP-21 and continued vigilance by the transportation community.

Meaningful Reform:

- **Environmental Process Deadlines.** Intended to encourage timely decisions by environmental agencies, the bill authorizes a process for USDOT and the environmental agencies to establish deadlines for issuance of project approvals and an elevation of disputes among agencies. The bill imposes automatic monetary penalties on agencies that fail to render a project decision by the agreed upon deadlines.
- **NEPA Delegation.** The bill expands the existing NEPA delegation pilot program to authorize delegation of NEPA responsibilities to other states that satisfy NEPA delegation requirements.
- **Programmatic Regulatory Authority.** The bill directs USDOT to adopt rules regarding programmatic approaches to environmental reviews. The USDOT could exercise this authority to adopt rules that require project-level NEPA reviews to avoid duplicating re-evaluation of corridor-level issues such as mode choice, cumulative impacts, and growth inducement.
- **Operational Right-of-Way Categorical Exclusion.** The bill requires USDOT to adopt a categorical exclusion from NEPA for projects within existing "operational rights-of-way." The provision has the potential to accelerate a number of HOV, HOT, and other projects that can be built within existing rights-of-way.
- **Limited Federal Funding Categorical Exclusion.** MAP-21 mandates adoption of a categorical exclusion from NEPA for projects receiving less than \$5 million in federal funds. This provision may provide meaningful regulatory relief for PPP (P3) projects that will not use federal funding.

Missed Opportunities:

- MAP-21 excluded provisions modeled on the Clean Water Act but were included in the House-passed bill to use certified state environmental reviews in lieu of NEPA reviews.
- MAP-21 fails to impose firm deadlines on the federal environmental review process and relies on collaboration with environmental agencies and the threat of funding penalties to encourage timely reviews and decisions by environmental agencies.
- MAP-21 fails to establish any safe harbor against NEPA litigation where the lead agency has followed approved regulatory approaches to environmental evaluations.
- MAP-21 does not limit the ability of project opponents to challenge individual project environmental documents that rely on corridor selection, mode choice and other transportation planning decisions.

Read part 1: MAP-21: Surface Transportation Reauthorization Ushers in Significant Changes to TIFIA

Read part 3: MAP-21: Tolling Rights Expand Under Surface Transportation Reauthorization

Read part 4: MAP-21: Treatment of Public-Private Partnerships Under Surface Transportation Reauthorization