

**TESTIMONY OF DAN ASHE, DIRECTOR
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BEFORE
THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
ON
THE IMPLEMENTATION OF MAP-21 SUBTITLE C**

September 18, 2013

Introduction

Chairman Boxer, Ranking Member Vitter, and Members of the Committee, I am Dan Ashe, Director of the U.S. Fish and Wildlife Service (Service) within the Department of the Interior (Department). Thank you for the opportunity to testify on the implementation of the Moving Ahead for Progress in the 21st Century Act, or MAP-21 (P.L. 112-141), specifically the environmental streamlining provisions. Oversight hearings such as this provide an important opportunity to lay the groundwork for the future reauthorizations of major public works legislation. The Administration strongly supports future reauthorization of MAP-21. Reauthorization will ensure continued work on critical infrastructure projects that create jobs and provide key transportation corridors that benefit the nation's economy and its citizens.

The Service's key interest in MAP-21 and future reauthorizations is ensuring that environmental considerations are addressed early in the process of developing major transportation projects. When this is done effectively, environmental impacts are minimized and overall project costs can be reduced. We believe effective engagement strategies result in mitigation and conservation actions that are coordinated to benefit species and habitat at a larger, landscape level.

Background of MAP-21

MAP-21 reauthorized the Federal-aid highway program for two fiscal years. Subtitle C of MAP-21, also known as the "Project Delivery" section, included several provisions aimed at increasing innovation, efficiency, and accountability in the planning, design, engineering, construction, and financing of transportation projects. Many of these provisions focus on the environmental review and permitting processes associated with project delivery. Several provisions (Sections 1315-1317) require rulemakings for new categorical exclusions under the National Environmental Policy Act (NEPA). Further, Section 1306 creates a dispute resolution process for settling differences between cooperating agencies and includes a financial penalty provision for permitting delays. In addition, MAP-21 has placed a strong emphasis on early coordination between Federal, State, and local agencies. Section 1320 of MAP-21 encourages early coordination activities to avoid delays later in the process, and Section 1311 encourages the development of programmatic mitigation plans to help identify mitigation needs earlier in the transportation planning process to streamline future project reviews and target conservation in a more effective manner.

The Service supports the majority of MAP-21, including many of the Project Delivery provisions. We appreciate the collaborative approach taken by the U.S. Department of Transportation (DOT) in crafting these provisions and the guidance and regulations that have followed. The Federal Highway Administration (FHWA) has been a close partner with the

Service in advancing sustainable transportation planning, with particular regard to their innovative landscape-level approach called “Eco-Logical” and their funding support for transportation liaisons – Service biologists working solely on transportation planning. Our testimony will lay out the Service’s role in major infrastructure planning and will describe the key provisions in MAP-21 that will take us forward to a more effective and strategic transportation planning process. We will provide some examples of on-the-ground projects and our engagement. Our testimony will also address a section of the legislation that is well-intentioned but presents serious problems. We believe Section 1306 on accelerated decision-making should be reconsidered during reauthorization.

The Service Role in Infrastructure Planning

The Service created field offices across the country in 1946, which are now called Ecological Services field offices. The primary purpose of these offices has always been to provide scientifically sound advice and assistance to other agencies, industries and the public in planning major infrastructure development activities and other projects. At their outset, the majority of this work involved federal water projects, but the work quickly grew to include transportation and energy infrastructure activities. Today, 80 Ecological Services field offices provide expertise in meeting the requirements of numerous federal statutes, including the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), Clean Water Act section 404 regulations, the Fish and Wildlife Coordination Act and the Federal Power Act. The Service collaborates with State Departments of Transportation (State DOTs) and other agencies to identify fish and wildlife resources at risk and ways in which to avoid or lessen those risks, including potential impacts to threatened and endangered species.

The work of the Service’s Ecological Services field offices with other entities is generally a productive, efficient process resulting in “win-win” solutions for our nation’s economy and environment. In rare instances, projects present significant impacts to fish and wildlife and very real challenges in mitigating those impacts. However, as a number of studies have shown, most project delays are related to project funding issues, lack of community support, or multiple changes in project design – not environmental reviews.

Development of Programmatic Mitigation Plans (Section 1311)

Section 1311 of MAP-21 specifically authorizes State DOTs and Metropolitan Planning Organizations (MPOs) to develop programmatic mitigation plans as part of the statewide or local planning process, in order to address the potential environmental impacts of future transportation projects. The Service views this section as beneficial to integrating efficient, strategic conservation into the transportation planning process, particularly at a larger landscape level. The Service applauds the conservation focus in Section 1311 and suggests that this provision be strengthened in reauthorization through the inclusion of a pilot program that would provide funding to States or MPOs to undertake programmatic mitigation planning. In addition, State wildlife agencies are critically important to resource conservation in their States. All States have State Wildlife Action Plans, which among other things, set goals and objectives for wildlife populations and habitats. State DOTs should work closely with their State wildlife agencies as well as the Service to develop programmatic mitigation plans for transportation projects.

The Service's habitat conservation programs have extensive experience in brokering mitigation packages for large-scale projects through their on-the-ground capabilities. The Service has embraced a Strategic Habitat Conservation approach to mitigating the impacts of infrastructure and other development across large biological regions of our landscape. We stand ready to work with DOT on this important endeavor. The example below is a good case study.

Programmatic Mitigation Planning: Little Niangua River, Missouri

In order to begin planning early and address anticipated impacts to streams from ongoing and future road projects proposed for central Missouri, the Missouri Department of Transportation (MoDOT) coordinated with Federal and State agencies to develop advanced mitigation banks for wetlands and ESA-listed species. The Service's Columbia Missouri Field Office, though a previously established a partnership with the Missouri Department of Conservation, replaced low water crossings within the range of the threatened Niangua darter in the Ozarks. Early communication and coordination between these agencies and the MoDOT led to a proposal by MoDOT to replace four consecutive low water crossings in the Little Niangua River to act as an aquatic mitigation bank for future transportation projects. Federal and State agencies collaborated with MoDOT to determine the mitigation credit value on replacing four low water crossings, and the bank was approved by the Interagency Review Team as compensatory mitigation for future MoDOT project impacts to wetlands and the threatened Niangua darter. Early development of a mitigation plan for a species frequently impacted by transportation projects was key in providing more meaningful conservation and a streamlined review process for future transportation projects in Missouri.

Memoranda of Agency Agreements for Early Coordination (Section 1320)

Section 1320 of MAP-21 established a process for early coordination to avoid project delays, streamline the review process, and provide for better natural resource conservation. The Service supports these efforts and believes there may be additional ways to facilitate this type of cooperation. Early coordination activities listed in Section 1320 are used to identify potential impacts to natural resources and consider ways to avoid and minimize potential environmental impacts from transportation activities. This early coordination provides for more efficiency as planning efforts are carried into the project delivery and environmental permitting phases. This approach aims to:

1. Improve resource agency understanding of transportation projects at an early planning stage and throughout the project development.
2. Improve the project proponent's understanding of environmental regulatory requirements.
3. Serve the transportation needs of the community.
4. Improve transportation decision-making.
5. Reduce time and costs to implement transportation improvements.
6. Obtain broader, landscape level conservation.

Early Coordination: Floyds Fork Greenway Project

In July 2010, the Kentucky Ecological Services Field Office concluded coordination and ESA consultation with the Federal Highway Administration, Kentucky Transportation Cabinet, and 21st Century Parks (a non-profit organization) on the Floyds Fork Greenway Project. The project is located in Louisville, Jefferson County, Kentucky, and involves the development of multi-use recreational trails, water trails, canoe landings, community parks, natural and cultural resource interpretation areas, and upgrading and expanding infrastructure, including roadways, on approximately 3,860 acres over an 18-mile corridor. The Floyds Fork Greenway Project posed several challenges during the project development and consultation process due to the involvement of both federal and private funds, the complexity of interrelated and interdependent actions, and potential adverse effects on federally listed species. In order to address these challenges, the Kentucky Ecological Services field office provided technical assistance prior to ESA consultation and made recommendations for streamlining the consultation process. Early coordination between project proponents and the Kentucky Ecological Services field office resulted in the inclusion of environmental goals and commitments into the project master plan to address several trust resource concerns. To provide for flexibility in project timing and predictability, the project proponents entered into a Conservation Agreement for the Indiana bat, which provided recovery-focused conservation benefits to the species. Early project planning and coordination accelerated the eventual delivery of this complex project by identifying and resolving issues before the permitting phase.

Accelerated Decision-Making (Section 1306)

Section 1306 of MAP-21 creates a dispute resolution process for settling differences between cooperating agencies, and includes a financial penalties provision for failure to make permitting/authorizing decisions within a specific timeframe. This MAP-21 provision appears to be based on an inaccurate assumption that a significant number of transportation project delays are due to environmental reviews. Transportation projects affect communities in different ways: some are benign, some cause significant impacts to neighborhoods, natural resources, historic resources, and other values citizens hold dear. The NEPA process is a way to bring consideration of all of those potential impacts into a public forum. Citizens and agencies that care about those resources use the NEPA process to ensure full public disclosure of proposed project impacts.

In 2000, the FHWA Headquarters Office of NEPA Facilitation conducted a nationwide inquiry (which can be found here: <http://environment.fhwa.dot.gov/strmlng/eisdelay.asp>) into projects for which an environmental impact statement had been in preparation for 5 years or longer. The results of the inquiry indicated that the reasons most frequently associated with project delay were the following: (1) lack of funding or low priority - 32.5% (29/89); (2) local controversy - 16% (14/89) and complex project; or (3) no specific reason - 13% (12/89). Of the 89 projects studied, the ESA was found to affect only 7 percent of the projects, and only 8 percent of projects were delayed due to resource agency review. The majority of delays were caused by the degree of complexity of the project, lack of local support, lack of funding, or low priority – not by environmental reviews.

To that end, in Fiscal Years 2008-2012, the Service concluded 1,669 formal ESA consultations on major transportation and water resource infrastructure projects. Service tracking data shows that approximately 75 percent were concluded during the regulatory time frame of 135 days, with the median number of days needed for completion being approximately 65. The majority of the remaining 25 percent that took longer than the regulatory requirement of 135 days were delayed due to changes in project design that required the applicant and the Service to analyze new information. Not all infrastructure projects require formal ESA consultations, but most require some form of NEPA. During this same time period, the Service's Ecological Services field offices assisted over 30,000 projects of all kinds by providing technical assistance associated with NEPA reviews. The majority of these reviews were timely and productive, with over 5 million acres of high-value wetlands and uplands conserved in strategic locations across our nation. This is a process that works.

Beyond our belief that environmental review is not a primary cause of delay in delivery of transportation projects, the Service is concerned with the language in Section 1306 that sets a 180-day deadline for completing permits or other authorizations for a project. The sufficiency of the information submitted by the lead agency directly impacts the timeliness of the environmental review process. A deadline can only be met if the lead agency fulfills its obligations under NEPA and submits sufficient information in a way that permitting agencies such as the Service can accurately conduct a review and ensure compliance with Federal laws and regulations. DOT is well aware of this need, and has diligently accounted for it in the recently drafted guidance associated with Section 1306. The problem with Section 1306 is that these requirements mandate an elaborate system of documenting when information arrives, certifying its adequacy and then reporting when an authorization is complete. This process requires staff time and will lessen already limited resources to get reviews and authorizations completed. Overall, we believe this additional bureaucracy will slow the review process on large projects and result in poorer project outcomes.

Section 1306, along with a similar provision in S. 601, the Water Resources Development Act of 2013 (WRDA), seeks to expedite the review process so that transportation and water projects will be delivered more quickly. The likely unintended consequence of this provision is that it will cause resource agencies, such as the Service, to issue preliminary negative responses to requests for authorizations. We will still have statutory mandates to meet. If we are unable to work with action agencies to devise sound projects that achieve project purposes and meet environmental mandates, we will likely be required to act conservatively and notify action agencies that proposed projects are likely inconsistent with federal statutes. In other words, instead of getting to "yes" faster, we believe these "streamlining" provisions may serve to get to "no" faster. This is contrary to our preference to work with DOT and action agencies to reach an agreement that balances conservation with development. Our goal is to support projects that are well-designed, achieve project purposes, achieve environmental compliance, and are better positioned to withstand judicial review. When complex issues require more time to resolve, the process-forcing mechanisms of Section 1306 in MAP-21 and Section 2033 of S. 601 are likely to result in fewer creative solutions and increased litigation.

Status of Implementation of MAP-21 Provisions

Service representatives have been working closely with DOT officials and representatives of other agencies to implement MAP-21 through the Administration's Transportation Rapid Response Team (Transportation RRT) coordinated by the Council on Environmental Quality and the White House Office of Management and Budget. DOT staff has actively sought Service input and review of MAP-21 Subtitle C implementing policies and regulations. The DOT has not yet published draft regulations on Section 1306; however, they have developed a question and answer document regarding the penalty provisions and have incorporated comments provided by resources agencies, including the Service. The guidance question and answer document itself has taken several months to develop, an indication of the complexities of this section and the difficulties faced in enforcing penalties on agencies. The Service appreciates the collaborative approach taken by DOT on MAP-21 implementation, and we will work closely with the DOT and FHWA on proposed regulations and guidance needed to implement Subtitle C provisions.

Conclusion

The Service supports what we believe is a more effective approach to accomplishing the objectives of Subtitle C in MAP-21. However, we believe the punitive measures outlined in Section 1306 will ultimately slow the review process by injecting an entirely new system of monitoring and certifying planning steps, and will ultimately reduce the overall effectiveness of the existing planning process. The Service is supportive of measures that increase efficiency, facilitate early coordination, and balance economic interests with conservation. We look forward to working with the Committee and others as we move forward to implement the provisions of MAP-21.

Thank you, Chairman, for the opportunity to testify on behalf of the Service, I am happy to answer any questions you may have.