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CAUTION AHEAD: CHANGING LAWS TO ACCOMMODATE PUBLIC-PRIVATE PARTNERSHIPS IN TRANSPORTATION

*Get your motor runnin'
Head out on the highway
Lookin' for adventure
And whatever comes our way¹*

I. INTRODUCTION

Driving down a highway is a symbol of American independence.² In fact, novels such as *On the Road*, films such as *Easy Rider*, and songs such as "Born to Be Wild" exemplify the freedom of the open road.³ However, the reality of driving is often bumper-to-bumper traffic, long commutes, and flaring tempers. The solution to relieving congestion may be the increased use of Public-Private Partnerships ("PPPs"), although this freedom is likely to come at the price of a toll.⁴

Potentially, PPPs will increase the number of tolled facilities, like highways and bridges, in the United States.⁵ These PPP projects involve both government funding and private sector investors through complex

¹ STEPPENWOLF, *BORN TO BE WILD* (MCA Records 1968).

² Steve Proffitt, *Highway System at 50: Tuned into Driving Along in Our Automobiles* (National Public Radio broadcast June 28, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5518261> (quoting Joan Didion's novel, *Play It As It Lays*, about how the lure of the open road was an essential part of American culture). "To understand what was going on, it is perhaps necessary to have participated in the freeway experience, which is the only secular communion Los Angeles has. Actual participation requires a total surrender, a concentration so intense as to seem a kind of narcissis, a rapture-of-the-freeway. The mind goes clean. The rhythms take over." *Id.* For further discussion, see generally WILLIAM KASZYNSKI, *THE AMERICAN HIGHWAY: THE HISTORY AND CULTURE OF ROAD IN THE UNITED STATES* (McFarland 2000).

³ JACK KEROUAC, *ON THE ROAD* (Penguin Books 1957); *Easy Rider* (Columbia Pictures 1969); STEPPENWOLF, *supra* note 1.

⁴ Benjamin Perez & Steve Lockwood, *Current Toll Road Activity in the U.S.: A Survey and Analysis*, USDOT-FHWA Office of Transportation Policy Studies, Aug. 2006, available at http://www.fhwa.dot.gov/ppp/toll_survey_0906.pdf. The last three Federal Program Authorizations have increasingly promoted tolling. *Id.* In addition, the tabled summary of U.S. Toll Activity for the period between 1992-2006 reveals that: there are currently 43.4% of Toll Projects with No Private Involvement; 17.1% of Toll Projects with Possible Private Involvement; 16.6% Toll Projects with Private Involvement; and 22.6% of Toll Projects with Private Involvement yet to be Determined. *Id.*; Robert Poole, *Surface Transportation Innovations #16*, THE REASON FOUNDATION, May 2004, available at <http://www.reason.org/surfacetransportation16.shtml> (stating that the United States is entering a new era of large-scale-toll-funded partnerships).

⁵ *Id.*

legal agreements.⁶ As a type of privatization, PPPs in transportation take many forms and are implemented in a variety of ways.⁷ Predominantly, PPPs involve taking traditional public services, such as highway construction and maintenance, and turning them over to the private sector.⁸ Recently, PPPs have become an innovative and necessary way to finance public transportation infrastructure projects.⁹ Along with the financial benefits of PPPs, however, come social costs and legal conflicts.¹⁰ For example, PPPs may bar access to information or may circumvent traditional safeguards in project delivery.¹¹ Because of the inherent tension between PPPs and the traditional method of providing transportation facilities, there are often trade-offs between public policy and economic efficiency that must be considered in the planning and delivery of a project.¹²

⁶ The National Council for Public-Private Partnerships, <http://ncppp.org/howpart/> (last visited Jan. 28, 2007) [hereinafter NCPPP]. Public-Private Partnerships are defined as:

[A] contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.

Id.

⁷ BLACK'S LAW DICTIONARY 1234 (8th ed. 2004). Privatization is defined as "[t]he act or process of converting a business or industry from governmental ownership or control to a private enterprise." *Id.*

⁸ JOSÉ A. GÓMEZ-IBÁÑEZ & JOHN R. MEYER, GOING PRIVATE: THE INTERNATIONAL EXPERIENCE WITH TRANSPORT PRIVATIZATION I (Brookings Institution Press 1993) (noting that, while there are many forms of privatization, the three most common are (1) the sale of an existing state-owned enterprise, (2) use of private management and funds instead of public funds or management, and (3) outsourcing to private industry the public services traditionally provided by the government).

⁹ *Id.* "In the 1980s many countries turned to private sources to provide services formerly offered by public agencies. . . . Transport was no exception to this pattern; indeed, in many ways it was at the cutting edge." *Id.*

¹⁰ Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 70 (1995) (cautioning that the market does not fit all social purposes). Additionally, with privatization and its focus on efficiency, competition, and market forces, other interests that are also important to the public's social and economic well-being are not being taken into account. *Id.*

¹¹ 5 U.S.C. § 552 (2000) (codifying the Freedom of Information Act, which mandates that federal agencies shall make information and records available to the public). See 2 Am. Jur. 2d *Administrative Law* § 84 (2006) (for an explanation of state Sunshine Laws, which typically provide that meetings of public entities must be open to the public in order to promote accountability and prevent secrecy in government). See 23 U.S.C. § 112 (2000) (for the law regarding the letting of federal-aid highway projects, which involves a competitive bidding process where the contract is awarded to the lowest qualified bidder).

¹² Transportation for Illinois Coalition, Public/Private Partnership Policy Issues 1 (May 15, 2006), available at <http://www.tficillinois.org/pdf/Public-Private5-15.pdf>. Illinois, like

In addition to the balance that must be achieved between social and fiscal policy, there is a balance that must be achieved between an individual state and the federal government.¹³ In other words, there are certain policy measures in federal legislation that tie government funding to states' compliance with the legislation.¹⁴ Federal legislation is often in opposition to private investment in infrastructure projects.¹⁵ For

many other states, is considering enabling legislation for PPP projects. *Id.* "While such partnerships have the potential for benefiting the transportation system by providing up-front cash for transportation improvements and/or enabling quicker construction of needed toll road extensions, the partnerships are complex arrangements that have long-term policy implications." *Id.*

¹³ GAO-04-419, United States General Accounting Office—Report to Congressional Requesters, HIGHWAYS AND TRANSIT: PRIVATE SECTOR SPONSORSHIP OF AND INVESTMENT IN MAJOR PROJECTS HAS BEEN LIMITED 21-22 (Mar. 2004) [hereinafter GAO-04-419]. Because tolling is politically unpopular and the use of tolls on federally funded highways is not allowed on the Interstate System:

State and local governments traditionally build and finance highway projects using their federal-aid grant funds that pay around 80 percent of the costs of construction. These funds provide a powerful incentive to build these projects as untolled roads. This is reflected in the fact that fewer than 5,000 miles of the nation's 437,000 arterial road mileage—about one percent—is tolled.

Id. at 29; David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2562 (2005) (noting that the United States Constitution establishes certain functions for the federal government while leaving the remainder to the states and explaining how these two entities must work together in a coordinated fashion to work efficiently).

¹⁴ U.S. Department of Labor, *What Are the Davis-Bacon and Related Acts?*, <http://www.dol.gov/esa/programs/dbra/whatdbra.htm> (last visited Oct. 28, 2007). For example:

The Davis-Bacon Act, as amended, requires that each contract over \$2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair of public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. . . . In addition to the Davis-Bacon Act itself, Congress has added prevailing wage provisions to approximately 60 statutes which assist construction projects through grants, loans, loan guarantees, and insurance.

Id.; *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding the constitutionality of federal highway funds conditioned on the State's compliance with a minimum drinking age requirement).

¹⁵ Rick Callahan, *Lawsuit Seeks to Block I-69 Plan: Groups Claim Harm to the Environment*, LOUISVILLE COURIER-JOURNAL, Oct. 3, 2006, available at <http://www.elpc.org/documents/I-69.CourierJournalLawsuitSeekstoBlockI-69PlanOct3.2006.pdf>. For example, legislation such as NEPA and the Endangered Species Act promote certain environmental policies which are an impediment to public projects and even more so to privately funded ones because they often slow or stop projects. *Id.* "Federal tax, labor and grant/loan policies can place significant obstacles to development of public-private partnerships that promote the use of private-sector resources to meet public needs." NCPP, *supra* note 6. One example given is Section 13(c) of the Federal Transit Act, which provides that if a transit

example, when a project uses federal aid, certain federal labor and environmental policies must be followed.¹⁶ Consequently, at a time when many states are considering enabling legislation, there is also concurrent pressure to change federal policies to encourage the use of PPPs in transportation.¹⁷ Changing laws to accommodate PPPs will seriously impact transportation and everyone who travels.

Accordingly, this Note will first define PPPs and evaluate them in the context of transportation.¹⁸ Second, from this framework, this Note

authority worker, who is a member of a collective bargaining unit, loses her job due to a federal grant provision, she is entitled to up to six years of full salary. *Id.* Additionally, a provision that occurs in some grants is “contracting out of service[s].” *Id.*

¹⁶ *Old Town Neighborhood Ass’n Inc. v. Kauffman*, 333 F.3d 732, 734 (7th Cir. 2003). The City of Goshen, Indiana devised a scheme to widen a road through the city without federal funds. *Id.* In his opinion, Judge Easterbrook stated, “[i]t also offers the apparent advantage of sparing defendants from having to go through formal review of environmental and historic impacts of their desired course of action.” *Id.* The court held that if the project was not going to be treated as a federal undertaking, Goshen would be enjoined from asking for or accepting federal funds. *Id.* at 736. *See also* Policy letter from Dwight A. Horne, FHWA Director of Program Administration, to Mr. Timothy J. Helm, US Dep’t of Labor, Office of Employment Policy, Government Contracts Team (Apr. 17, 2000). In response to an inquiry as to why the Davis-Bacon Act did not apply to a non federal-aid project even though pre-construction activities, such as land acquisition, preliminary engineering, or utility relocation work, did utilize federal funds, “[n]on-federally funded highway construction contracts are not subject to DBRA coverage, regardless of the use of Federal funds in a prior phase of the project development process” *Id.* At that time, all federal funding of design and any further federal-aid was stopped. *Id.* Therefore, the project no longer was tied to federal policies like Davis-Bacon’s prevailing wage requirement for workers. *Id.*

The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the construction work performed on highway projects on the Federal-aid highways authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with [sections 3141-3144, 3146, and 3147 of title 40].

23 U.S.C. § 113(a) (2000).

¹⁷ GAO-04-419, *supra* note 13, at 5-6 (noting that currently only about half the states have enabling legislation, or the legal authority, to allow private sector participation in transportation projects and that the federal government cannot directly provide for private investment and participation). *See* USDOT-FHWA, PPP Legislation, <http://www.fhwa.dot.gov/ppp/legislation.htm> (last visited Jan. 28, 2008) (for an overview of states with enabling legislation and access to a state-by-state summary of provisions); *see also*, *Bonney v. Indiana Fin. Auth.*, 849 N.E.2d 473, 476 (Ind. 2006) (noting the Indiana Toll Road lease to private investors was contingent upon state legislation, and in late March of 2006, Governor Mitch Daniels signed House Enrolled Act 1008 (HEA 1008), or “Major Moves,” into law and the lease closed in June of that year).

¹⁸ *See infra* Parts II.A-B.

discusses environmental and labor programs, embedded in federal and state transportation legislation.¹⁹ Third, this Note studies changing laws encouraging PPP investment, which must be considered carefully if social policies are to be preserved.²⁰ Finally, this Note proposes an approach to states enabling legislation to permit the best outcome for future PPPs by preserving traditional social policies.²¹

II. BACKGROUND

Although many Americans may not recognize the term PPP, they may be more familiar with these projects than they think.²² For example, most residents of Indiana are aware of the recent lease of the Indiana Toll Road.²³ This project is the result of a bid by foreign investors to take over the operation and maintenance of the transportation facility for seventy-five years.²⁴ In exchange for toll revenue and subsequent depreciation on their investment, the private investors paid a total of approximately 3.85 billion dollars.²⁵ The Trans-Texas Corridor (“TTC”) is a massive multi-modal project in the preliminary planning phase.²⁶ With a cost estimate of 145.2 to 183.5 billion dollars for the entire system, the TTC will ultimately be part of the largest PPP in the United States.²⁷

¹⁹ See *infra* Parts II.C-D.

²⁰ See *infra* Part III.

²¹ See *infra* Part IV.

²² USDOT-FHWA, *PPP Legislation – Case Studies*, http://www.fhwa.dot.gov/ppp/case_studies.htm (last visited Jan. 26, 2007). Some well-known PPPs include the Chicago Skyway, Illinois; Hiawatha Light Rail, Minnesota; Dulles Greenway, Northern Virginia; and the Las Vegas Monorail, Nevada. *Id.*

²³ State of Indiana, *Major Moves: Building Roads. Creating Jobs*, <http://www.in.gov/indot/2276.htm> (last visited Nov. 13, 2006) (last visited Oct. 28, 2007). In June 2006, the deal closed on the 75-year lease of the Indiana Toll Road to Cintra-Macquarie. *Id.* It is the largest PPP agreement in the world to date, and the deal finances the 10-year Major Moves highway plan for the State. *Id.*; see also Bob Kasarda, *Illiana Evokes Emotions*, THE NORTHWEST INDIANA TIMES, Jan. 21, 2007, at A1 (discussing an early public meeting to discuss the new Illiana Expressway through southern Porter County presided over by staff from the public-private partnership office at the Indiana Department of Transportation).

²⁴ USDOT-FHWA, *PPP Legislation – Indiana Tollway*, http://www.fhwa.dot.gov/ppp/indiana_tollway.htm (last visited Jan. 26, 2007) (discussing how the ITR Concession Company LLC, a partnership between Cintra of Spain and Macquarie of Australia, submitted the winning bid in October 2005, enabling legislation enacted in March 2006, and finally the execution of the lease occurred in June of that year).

²⁵ *Id.*

²⁶ TxDOT, *Trans Texas Corridor, Homepage*, <http://www.keeptexasmoving.org> (last visited Jan. 26, 2007) (explaining that although a route has not been chosen, the TCC will incorporate highway, freight rail, high speed commuter rail, and infrastructure for utilities and pipelines).

²⁷ TxDOT, *Trans Texas Corridor, FAQs*, <http://www.keeptexasmoving.org/index.php/faqs> (last visited Oct. 28, 2007) (estimating the total cost of the project to be paid primarily

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Considering that the entire annual budget for the United States Department of Transportation (“USDOT”) is less than 66 billion dollars, the TTC would be an impossibility if dependant solely on state and federal funds.²⁸ Finally, although not currently a PPP, the New Mississippi River Bridge Project is attracting investors now that the environmental review process is complete.²⁹ Although each of these projects is a different type of PPP, each involves massive capital input and is extremely important to the states’ transportation plan.³⁰ Hence, the use of PPPs for financing future projects is clearly important to the future of United States transportation infrastructure.³¹

Accordingly, this Part will provide background information on PPPs and the laws which govern them.³² First, Part II.A defines PPPs in the context of transportation infrastructure projects.³³ Next, traditional project delivery is compared with PPPs in Part II.B. From this discussion, Part II.C contrasts the benefits of PPPs with the potential

through public-private partnership investors, state and federal funds, leases, and tolls); see Loren Faulkner, *Transportation Solutions Inter-Modal Designs, Increased Private Funding Topics at ARTBA Convention*, WESTERN BUILDER (Nov. 2, 2006) (noting that the Trans-Texas Corridor is part of the proposed interstate route from the Mexican border to the Canadian border which will run parallel to Interstate 35, where within 50 miles of this corridor, half the population in Texas resides).

²⁸ USDOT, 2007 Budget in Brief—FHWA, <http://www.dot.gov/bib2007/admins.html#fhwa> (last visited Jan. 26, 2007) (noting that the combined 2007 budget for the USDOT is \$65.6 billion with \$39.1 apportioned to the Federal Highway Administration); see also Susan Saulny & Jennifer Steinhauer, *Bridge Collapse Revives Question About Spending*, N.Y. TIMES, Aug. 7, 2007, at A1.

²⁹ *New Mississippi River Bridge Project*, http://www.newriverbridge.org/1d_funding.htm (last visited Jan. 29, 2007). In an eight-lane new bridge proposal between East St. Louis, Illinois and St. Louis, Missouri, “[t]he National Environmental Policy Act (NEPA) requires that alternative funding options for ‘mega’ projects such as the NMRB be identified and considered but not decided upon at this planning level.” *Id.*; *New Mississippi River Bridge Toll Endorsed*, ST. LOUIS BUSINESS JOURNAL, Feb. 1, 2006, available at 2006 WLNR 5080813 (noting that after the federal commitment of close to \$300 million, there is still a \$611 million shortfall in funding that could be reached with private investment).

³⁰ Robert Poole, *What Now for Tolling and PPPs? Movement Towards Privatization a Bipartisan Effort*, PRIVATE WORKS FINANCING (Nov. 2006), available at http://www.reason.org/commentaries/poole_20061100.shtml. Former Congressman Dick Gephardt commenting on the TTC states that projects like the TTC, “reflect a progressive and democratic tradition of pragmatic public works that have served working people well and driven the state’s prosperity.” *Id.* But see Mike Fitzgerald, *Gephardt Tied to Efforts to Build a Bridge but He Also Consults for Firm Campaigning for New Tollways*, BELLVILLE NEWS DEMOCRAT, June 25, 2006, at A1 (commenting that Dick Gephardt works for Goldman Sachs, one of the major investment firms interested in PPPs).

³¹ See *supra* notes 22-30 and accompanying text.

³² See *infra* Part II.A.

³³ See *infra* Part II.A.

pitfalls of these types of projects.³⁴ Starting from this basic framework, Part II.D.1 launches into the history of transportation legislation and discusses how projects are delivered through public sector resources.³⁵ Because an important part of a project is the environmental review process, Part II.D.2 examines the past and current state of the National Environmental Policy Act or NEPA.³⁶ Furthermore, Part II.D.3 considers other public policy goals, inherent in regulation, from the perspective of complementary legislation.³⁷ Finally, Part II.E strikes a balance between proposed legislative and regulatory changes in state and federal laws.³⁸ Additionally, Part II.E scrutinizes four critical elements a state must include in enabling legislation, as identified by the USDOT.³⁹ The goal of this introspection is to reconcile traditional social policy goals and private investment objectives to provide the best way to incorporate PPPs.⁴⁰

A. *Transportation PPPs in the United States*

A PPP is an agreement to provide infrastructure projects with more private input than is customary.⁴¹ Although PPPs are not a new approach to transportation projects, they are not widely used in the United States when compared with their use overseas.⁴² The minimal

³⁴ See *infra* Part II.C.

³⁵ See *infra* Part II.D.1.

³⁶ See *infra* Part II.D.2.

³⁷ See *infra* Part II.D.3.

³⁸ See *infra* Part II.E.

³⁹ See *infra* Part II.E; see also USDOT-FHWA, PPP Legislation, *supra* note 22 (identifying “key elements” posed as questions applied to existing state legislation which was updated in August 2006).

⁴⁰ See *infra* Part III.

⁴¹ GAO/GDD-99-71, United States General Accounting Office, *Public-Private Partnerships: Terms Related to Building and Facility Partnerships* 6 (Apr. 1999), <http://www.gao.gov/archive/1999/gg99071.pdf> (last visited Oct. 28, 2007) [hereinafter GAO/GDD-99-71]. A PPP is an agreement formed between public and private partners where the private partner is allowed more participation than usual. *Id.* Often the agreements will involve the government agency contracting with the private company to perform traditional government duties such as construction, operation and maintenance of a transportation facility. *Id.* Typically, the government will retain ownership while the private partner will dictate how the project will be finished. *Id.*; see also USDOT, REPORT TO CONGRESS ON PUBLIC-PRIVATE PARTNERSHIPS 43-45 (Dec. 2004), available at www.pppcouncil.ca/pdf/dot122004.pdf [hereinafter REPORT TO CONGRESS ON PPPS] (summarizing the value of PPPs in Norway, New Zealand, Australia, South Africa, Ireland, Portugal, the Netherlands, and Finland). See generally GÓMEZ-IBÁÑEZ & MEYER, *supra* note 8.

⁴² REPORT TO CONGRESS ON PPPS, *supra* note 41, at 7.

Although not widely used today, public-private partnerships are not a new model for providing surface transportation infrastructure. For

use of PPPs in the United States is partially due to legal and public policy impediments to privatization.⁴³ However, the success of PPPs overseas has increased the interest of the United States in entering these agreements.⁴⁴ For example, when Great Britain faced problems with declining infrastructure and lack of funding in the 1990s, it turned to PPPs to provide the necessary improvements.⁴⁵ Similarly, PPPs in the United States strive for the popularity of overseas PPPs while operating within the context of federal and state laws.⁴⁶

As PPPs become more popular in the United States, some of the following forms are adopted: "Design-Build," "Build-Own-Operate," and "Long Term Lease Agreements."⁴⁷ "Design-Build" projects typically mean that a contractor undertakes the design and subsequent

decades, the Federal Highway Administration (FHWA) and State Departments of Transportation (DOTs) have experimented with ways to increase the involvement of the private sector in financing and operating surface transportation facilities. The results of these early experiments are not widely known and many of the new partnership arrangements have not been widely adopted.

Id.; see also, Katherine Hope Francis et al., *Privatization of Public Development Projects*, 82 AM. SOC'Y INT'L L. PROC. 578, 578 (1988). From the remarks by Katherine Hope Francis, stating that privatizing public projects is not new, but that large scale privatization is relatively new to the United States. *Id.* Worldwide privatization has been especially attractive for countries with debt that find privatizing large infrastructure projects provides much needed funding. *Id.* "The privatization of public projects is not an entirely new concept; denationalization of projects and companies is neither a novel idea nor an uncommon occurrence." *Id.*

⁴³ GAO/GDD-99-71, *supra* note 41 (noting that there are several federal laws that were specifically enacted to promote public policy goals, including Buy America and Davis-Bacon, which also increase a project's cost and its complexity). See also 41 U.S.C. § 10b (2000). The Buy America Act provides that contractors must preference United States produced goods over foreign goods. *Id.*

⁴⁴ GÓMEZ-IBÁÑEZ & MEYER, *supra* note 8, at 122 (discussing Spain's successful policy of privatization which started in the 1960s with a mixed approach and where by 1990, there were over 2,000 kilometers of private toll roads); see also Peter Samuel, *Should States Sell Their Toll Roads?*, THE REASON FOUNDATION, Policy Study 334 (May 2005) (identifying the pros and cons of PPPs overseas and in the United States).

⁴⁵ Michael Saunders, *Bridging the Financial Gap with PPPs*, 70 PUBLIC ROADS 16 (July/Aug. 2006) (remarking that delays and prohibitive costs of infrastructure improvements were remedied by the infusion of PPP investment in Great Britain allowing for 90% of PPP projects to be completed on time).

⁴⁶ *Id.* While the United States is among the last of all highly developed nations to enter PPPs, it is eager to enter into these types of agreements under its own terms. *Id.* "FHWA noted some important differences between the project delivery philosophy of Britain's Highways Agency [] that of State departments of transportation in the United States." *Id.*

⁴⁷ USDOT-FHWA, PPP Case Studies, http://www.fhwa.dot.gov/ppp/case_studies.htm (last visited Oct. 28, 2007) (identifying projects mentioned in this Note plus additional types of PPPs).

construction of the project.⁴⁸ Similarly, “Build-Own-Operate” projects transpire when the contractor builds the transportation facility and maintains it through tolls.⁴⁹ In contrast, “Long Term Lease Agreements” involve roads that are acquired by private investors.⁵⁰ Significantly, interest in “Long Term Lease Agreements” is currently limited to existing toll roads because of the laws surrounding the Interstate System.⁵¹ Nonetheless, several examples of these types of PPPs now exist in the United States.⁵² Overall, the increase in PPPs fuels the notion that there is a bright future for privately financed transportation projects in the United States.⁵³

⁴⁸ Saunders, *supra* note 45, at 8. Design-build is defined as, “a project delivery method that combines two, usually separate services into a single contract. The designbuilder assumes responsibility for the majority of the design work and all construction activities” *Id.*

⁴⁹ *Id.* at 10. Build-Own-Operate is defined as, “a private company is granted the right to develop, finance, design, build, own, operate, and maintain a transportation project.” *Id.* In this way, the private partner owns the project and retains the risk of operation and the revenues in perpetuity. *Id.*

⁵⁰ USDOT-FHWA, PPP Legislation—Indiana Tollway, *supra* note 24 (identifying a Long-Term Lease Agreement as the lease of the Indiana Toll Road for 75 years where at the end of the lease term it will revert back to the State).

⁵¹ 23 U.S.C. § 101(a)(13) (2000) (defining Eisenhower’s Interstate System and Defense Highways, and referencing 23 U.S.C. § 103(c) (2000) for a further description of the laws specific to it). See Ken Belson, David W. Chen & Richard G. Jones, *Option to Rent: Great New Jersey Views, Near All Transportation*, N.Y. TIMES, Jan. 26, 2007, at B1. New Jersey is one of two dozen states that have formed PPPs or passed legislation to allow for PPPs. *Id.* “Despite the pitfalls, long-term lease agreements for toll roads, perhaps the most lucrative source of funds for governments these days, are increasingly common.” *Id.*; *Paying for Paving through Partnerships*, CENTRE DAILY TIMES, Jan. 23, 2007, at A6 (the Pennsylvania Turnpike may be leased in the near future); Michael Dresser, *Pa. Hopes Turnpike Can Turn Big Profit Privatized Roads Might Also Become an Option for MD.*, BALTIMORE SUN, Dec. 22, 2006, at 1A (Maryland Governor Martin O’Malley is open to the idea of the future sale or lease of existing toll facilities); Mac Daniel, *Toll Removal Might be Illegal, Official Says: Inspector General Cites Possible Financial Issues*, BOSTON GLOBE, Dec. 29, 2006, at 4B (where lease agreements may also include service plazas, as in a Massachusetts plan).

⁵² See *supra* notes 22-30 and accompanying text.

⁵³ Rick Capka, FHWA Acting Administrator, PPP Basics—A Practical One-Day Seminar, Remarks prepared for delivery at America’s Summit in Washington D.C. (Dec. 5, 2005) [hereinafter *Rick Capka Seminar*], available at <http://www.fhwa.dot.gov/pressroom/re051205.htm>:

In many states, they’re [PPP] not yet part of the toolbox for delivering highway and bridge projects. But, we’re starting to get the message out. We’re demonstrating how PPPs can deliver projects more efficiently, faster and at less cost to taxpayers. We’re showing state and local governments how PPPs can turn their highway infrastructure from liabilities into assets.

In the coming year, I see PPPs as the tool in many more toolboxes—a tool that is grabbed more confidently and more often.

B. *Public Input in Transportation Projects*

Because PPPs shift the authority for decisions from the public to the private partner, public access to information may decrease with these types of projects.⁵⁴ Conventionally, there are many avenues for stakeholder input when a project is proposed.⁵⁵ Moreover, federal aid projects and many state programs mandate public contribution through the state or municipal agent that develops the project.⁵⁶ For example, prior to the issuance of certain state environmental permits, citizens may review the draft permits and submit final comments before the final permit is released.⁵⁷ Like most major legislative acts, United States transportation reauthorization legislation traditionally entwines social

Id.

⁵⁴ Mays, *supra* note 10 at 45. "Placing the decision-making, policy-making, and other discretionary functions of local government in private hands will seriously affect city residents who are consumers of the privatized facility." *Id.* Memorandum from FHWA on Private Sector FOIA Concerns with Regard to PPP (on file with author) Explains the function of the Freedom of Information Act ("FOIA") requiring an agency to give records when a request is made for them. *Id.* However, there are nine categories of FOIA exemptions which prevent disclosure of the records. *Id.* These exemptions are discretionary and responses to the requests by the agency are on a case-by-case basis. Recent trends establish the role of FOIA in privatization projects:

The current FOIA policy, as outlined in an October 12, 2001 memo by Attorney General John Ashcroft, highlights the importance of, among other things, protecting sensitive business information. In this policy memo, agencies are specifically advised that "[a]ny discretionary decision to disclose information protected under FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interest that could be implicated by disclosure of the information." In accordance with this policy, the following practical tools to withhold proprietary information should be sufficient to address the concerns of those in the private sector who are hesitant to enter into a public-private partnership (PPP).

Id. See generally USDOT regulations that provide guidance for FOIA and Public Availability of Information, 49 C.F.R. pt. 7 (2006).

⁵⁵ Indiana Department of Environmental Management ("IDEM"), *IDEM's Guide for Citizen Participation* (2006), available at http://www.in.gov/idem/your_environment/community_involvement/ej/ (provides information and solicits public comments and participation in environmental decision making).

⁵⁶ *Id.* (for example, prior to the issuance of certain state environmental permits, citizens may review the draft permits and submit comments for the final permit issued by the state). See *Friends of Marolt Park v. USDOT*, 382 F.3d 1088, 1096 (10th Cir. 2004) (contending that the USDOT deprived the public of the opportunity to comment on the final Environmental Impact Statement ("EIS") even though comments were considered for a prior Draft EIS under NEPA); *Sierra Club v. Atlanta Reg'l Comm'n*, 255 F. Supp. 2d 1319, 1330 (N.D. Ga. 2002) (stating the plaintiffs sued in part because the USDOT approved projects without sufficient compliance with the Administrative Procedures Act ("APA") in providing an opportunity for public comment).

⁵⁷ See generally IDEM, *supra* note 55.

policy measures into funding distributions.⁵⁸ Thus, many hidden programs, such as those involving the environment, labor, and aesthetic value of the roadside, are a part of most transportation projects.⁵⁹ In this way, a proposed highway route in a community can impact peoples' lives in more ways than simply providing a new route to work.⁶⁰ Through public participation, individuals who value social programs may solicit an agency with personal concerns when a highway project is proposed.⁶¹ Consequently, public participation is considered an important part of pre-planning and project development—input which may not be welcomed by private investors.⁶²

C. *Benefits and Potential Problems with PPPs*

Increasingly, huge infrastructure projects, or “mega-projects,” are considered to have PPP potential because sufficient funding is not available through traditional methods.⁶³ Usually, large projects have

⁵⁸ Linda Luther, *Environmental Provisions in Surface Transportation Reauthorization Legislation Proposed During the 108th Congress*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 1 (updated Dec. 8, 2004) (commenting how transportation legislation is reauthorized for five year periods); Oliver A. Pollard, III, *Smart Growth and Sustainable Transportation: Can We Get There From Here?*, 29 FORDHAM URB. L.J. 1529, 1540 (Apr. 2000) (stating that ISTEA expanded the focus of the national transportation system to combine mobility, economic efficiency, and environmental concerns in order to compete in the global economy, while subsequently, TEA-21, the reauthorization legislation for ISTEA, also reduced the amount of federal funding directed solely to highway construction).

⁵⁹ See *infra* Part II.D.

⁶⁰ See *infra* Part II.D.

⁶¹ ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION LAW SCIENCE AND POLICY 39 (5th ed. 2006) (suggesting that advances in electronic technology make it easier for the public to participate because of a federal website [<http://www.regulations.gov>] permitting public comments for any notice or proposed rule). See also Walter Williams, *Repeal the Davis Bacon Act of 1931*, CAPITALISM MAGAZINE, Dec. 7, 2003, available at <http://www.capmag.com/article.asp?ID=3357>. Numerous attempts to repeal the Davis Bacon Act have been made over the years because of its impediment to capitalism and racist origins. *Id.* Many feel it has survived repeal because of support from labor unions to both Democrats and Republicans. *Id.*

⁶² Martha Minow, Symposium, *Public Values in an Era of Privatization: Public and Private Partnerships: Accounting For the New Religion*, 116 HARV. L. REV. 1229, 1234 (Mar. 2003). Analogous to transportation privatization, other privatization activities may reduce public participation opportunities. *Id.* As the role of the traditional public partner lessens, the role of the private partner increasingly makes decisions regarding schooling, social services, prisons, and health care. *Id.* Therefore, the public no longer may exert influence through administrative and political processes when these decisions are under control of the private sector. *Id.* Accordingly, access to information is diminished when under private control and the citizen becomes a mere consumer rather than an active participant in the governmental process. *Id.*

⁶³ See *supra* notes 26-28 and accompanying text.

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corresponding high economic costs.⁶⁴ Sharing these costs and responsibilities through a PPP agreement is attractive to both the public and private parties to the agreement.⁶⁵ Additionally, when a private partner is involved, some argue that the overall cost of project delivery is more efficient.⁶⁶ In addition to economic concerns, there are many social concerns due to size, construction, and implementation of the project.⁶⁷ Transportation infrastructure often impacts a community more significantly than other privatized facilities.⁶⁸ Accordingly, intricate planning which accounts for economic and social factors is essential.⁶⁹ Typically, this planning and development is undertaken by state agencies along with federal oversight by a USDOT agency.⁷⁰ Because of

⁶⁴ See *supra* notes 26-30 and accompanying text.

⁶⁵ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 7-8 (discussing how high costs of a project are an incentive for both the agency and private investor to enter PPP agreements).

⁶⁶ GÓMEZ-IBÁÑEZ & MEYER, *supra* note 8, at 3. Identifying three different motives for PPPs, the primary one is the profit motive, “[a] privately managed enterprise or a private contractor, motivated by the possibility of profit, may have stronger incentives to be more cost conscious, efficient, and customer oriented than a public enterprise.” *Id.*; REPORT TO CONGRESS ON PPPs, *supra* note 41, at 32 (commenting that cost savings on a privatization project are due to the close “team” relationship between the designer and contractor which allows them to resolve issues efficiently before they arise in the field).

⁶⁷ *Mid States Coal. for Progress v. Surface Transp. Bds.*, 345 F.3d 520 (8th Cir. 2004) (noting that in this case there were over 200 defendants because of a proposed 280 miles of new rail line and an upgrade to 600 miles of existing rail line). See ALAN ALTSHULER & DAVID LUBEROFF, MEGA-PROJECTS: THE CHANGING POLITICS OF URBAN PUBLIC INVESTMENT 4 (The Brookings Institution 2003).

Such projects involve huge commitments of public resources and often entail significant threats to some interests and values even as they promise great benefits to others. Because the stakes are so high, the struggles over project authorization, planning, and implementation often draw in powerful actors whose activities are normally camouflaged or who stay out of lesser political disputes, confident that others will adequately protect their interests.

Id.

⁶⁸ ALTSHULER & LUBEROFF, *supra* note 67, at 28. In this regard, building a new prison typically does not affect the physical landscape in the same way as a transportation project that spans several miles. *Id.* Also, remarks on the fact that during the 1970s, proposed mega-projects, whether transportation related or not, had to avoid harming the natural landscape and communities. *Id.*

⁶⁹ Illinois Dep’t of Transp., *Multi-Year Highway Program Development: Bringing a Project to Construction*, <http://www.dot.il.gov/gif/project.html> (last visited Jan. 29, 2007) [hereinafter IDOT] (listing the sequence of events required to bring a project from the planning phases to as-built completion).

⁷⁰ Illinois Dep’t of Transp., *What is CSS?*, <http://www.dot.state.il.us/css/basics.html> (last visited Jan. 31, 2007). IDOT’s planning approach, “Context Sensitive Solutions,” is as follows:

[A]n interdisciplinary approach that seeks effective, multimodal transportation solutions by working with stakeholders to develop, build and maintain cost-effective transportation facilities which fit into

this time consuming duty, USDOT agencies, like the Federal Highway Administration (“FHWA”) are especially interested in PPP involvement to facilitate highway construction.⁷¹

In addition to cost concerns, the actual time it takes to deliver a project is a major issue among agencies.⁷² Because the traditional model of providing a large scale infrastructure project involves environmental studies, design, contracting and bidding, building of the project, and finally the actual construction, it may take decades to complete a highway or bridge.⁷³ Because PPPs provide necessary funding and

and reflect the project’s surroundings– its “context”. Through early, frequent, and meaningful communication with stakeholders, . . . seeking to preserve and enhance the scenic, economic, historic, and natural qualities of the settings through which they pass.

Id.; see also U.S. Department of Transportation/DOT Agencies, *DOT Agencies* <http://www.dot.gov/DOTAgencies.htm> (last visited Jan. 29, 2007) (providing a list of USDOT agencies that oversee and build projects, including the Federal Aviation Administration (“FAA”), Federal Highway Administration (“FHWA”), Federal Transit Administration (“FTA”), and the Federal Railroad Administration (“FRA”).)

⁷¹ 2007 Budget in Brief, *supra* note 28. The FHWA 2007 comments on the need for alternative funding sources and the need to attract investors:

Fuel tax revenues may become insufficient to finance highway improvements needed to reduce congestion, maintain mobility, and assure that our highway systems serve the needs of our growing economy. Furthermore, current financing mechanisms provide very few incentives to improve the operational performance of the existing highway system, particularly during peak periods.

Id.

⁷² *Davis v. Brown*, 851 N.E.2d 1198, 1200 (Ill. 2006). In this case about corridor preservation, the State of Illinois, by statute, is able to record a map where a future project may take place. *Id.* at 1209. Here the map for the Prairie Parkway project was filed with the relevant county authorities in 2002. *Id.* at 1201. One of the plaintiffs’ complaints was the fact that there was no statute of limitations regarding this map and therefore the “option to take” by the State remained open in perpetuity. *Id.* at 1202. Thus, property could be burdened for the decades that a transportation project might be built on the area “preserved” by the map. *Id.* at 1205. Plaintiffs’ contended that the Corridor Preservation Act “is an attempt by the State to freeze property values in anticipation of possible, future land acquisitions . . .” *Id.* at 1202; *Prairie Parkway Study: Planning for the Region’s Future*, FAQs- Why Not Just Widen IL-47?, <http://www.prairie-parkway.com/faqs/default.asp#5> (last visited Feb. 1, 2007) (staging of the project indicates that the environmental studies should be complete in 2007 although the built project may not be completed for another 8-10 years, depending on funding).

⁷³ See *Ware v. U.S. Fed. Highway Admin.*, No. Civ.A. H-04-2295, 2006 WL 696551, at *1-3 (S.D. Tex. Mar. 15, 2006) (noting that in this case the environmental studies were first undertaken in the late 1980s and underwent subsequent revisions until the release of the 2004 re-evaluation). See REPORT TO CONGRESS ON PPPs, *supra* note 41, at 13 (simplifying the phases of a project to planning, design, build, operate/maintain). See also IDOT, *supra* note 69. The steps to bring a project to delivery are: feasibility studies, location studies, environmental studies, archeological investigations, public input, construction plan

expertise, it is argued that a project can be delivered much more quickly than conventional methods.⁷⁴ Accordingly, like federal agencies, many states are promoting PPPs as the best way to provide much needed transportation facilities.⁷⁵

Since proponents of PPPs ground their arguments in economics, the discussion of benefits for these types of projects often is focused on tolls and user fees.⁷⁶ In fact, the emergence of PPPs is due to the extremely

preparation, land acquisition, utility adjustment, advertising unsolicited bids, awarding the contract, and construction. *Id.* Thus, it takes a considerable amount of time for a major construction project to go from idea to implementation. *Id.* For example, feasibility, location, environmental studies, public hearings, soil tests, and hazardous materials testing can take five to ten years to prepare. *Id.* Next, the preparation of preliminary plans, land acquisition, revised plans, and utility relocation can also add years to a project. *Id.* Finally, the advertising for bids and awarding of the contract must occur before construction even begins. *Id.* That adds up to about 8 to 13 years if there is no public opposition which often adds years with litigation or stops the project. *Id.* This litigation often arises in the context of sensitive areas that will be crossed by the project, such as wetlands, parks, or historic districts. *Id.*

⁷⁴ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 13 (commenting that public agencies desiring cost and time savings may benefit by entering PPPs).

⁷⁵ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 42.

Although data comparing the use of innovative contracting with traditional procurement is rare, the case studies reviewed by Battelle found that the use of performance-based contracting, a form of public-private partnership, can result in a cost savings ranging from 6 to 40 percent.

...
Evidence of the financial benefits of public-private partnerships has also been collected by the Florida Department of Transportation (Florida DOT), one of the States actively utilizing innovative contracting methods. The Florida DOT compared traditional low-bid contracts with those awarded using seven different nontraditional methods. In every case, the nontraditional method had lower cost overruns and was delivered closer to schedule than the average traditional low-bid contract.

Id.

⁷⁶ Kurt Paulsen, *Sprawl, Residential Density, and Exclusionary Zoning*, 20 JUN PROB. & PROP. 23, 25 (May-June 2006). Proposal of an economic theory to congestion problems:

Actually, the solution to excessive driving is known to economists, yet not so obvious to politicians: user charges, gasoline taxes, and congestion tolls. User charges per mile of road could pay for acquisition of rights-of-way, construction, maintenance, repair, and enforcement. Charges ideally should be per mile, which can be approximated with a gasoline tax. Well-designed gasoline taxes should encourage less driving or more fuel-efficient cars. Congestion tolls should vary with roads and time of day. Adjusting electronic tolls for congestion is technologically simple, if politically unrealistic. Yet, if the true costs of automobile travel are not fully borne by each driver, auto travel is artificially cheap.

high costs of implementing large infrastructure projects and the lack of state and federal funds to pay for them.⁷⁷ Since PPPs use fewer dollars per project than traditional methods, some argue that more highways could be built and maintained with toll revenues.⁷⁸ More highways will reduce congestion and meet consumer demand.⁷⁹ Likewise, user fees, or “pay-to-play” systems, ensure that those who are using the roads are the ones paying for them.⁸⁰ However, under current federal laws, it is illegal to toll existing freeways on the Interstate System unless certain exceptions are met.⁸¹ PPPs may avoid this problem by building new toll

Id. For a lively eulogy of free-market and privatization champion, see Nobel Prize Winner Milton Friedman; Mark Skousen, *Milton Friedman: Little Giant of Free Market Economics*, 62 HUMAN EVENTS, Dec. 14, 2006, at 16.

⁷⁷ GAO-04-419, *supra* note 13, at 1. The FHWA estimates that the nation will spend about \$76 billion more each year (to year 2020) in order to maintain the nation’s highways and bridges. *Id.* Additionally, about \$107 billion will be needed for improvements of the nation’s highways. *Id.* Many analysts are concerned because budget deficits are looming in the years ahead due to the demographic shift to older Americans which will strain Social Security and Medicare costs. *Id.* In this way, the discretionary nature of transportation funding is threatened. *Id.*; see Humberto Sanchez, *With More Public-Private Deals, Congress May Step In*, BOND BUYER, Oct. 20, 2006, at 7 (citing a report from the American Association of State and Highway Transportation Officials (“ASHTO”) which estimates spending levels would have to increase by 95% to improve roads and 45% simply to maintain them); see also ALTSHULER & LUBEROFF, *supra* note 67, at 243 (linking escalating costs in infrastructure projects to the new environmental requirements of the 1970s, such as NEPA).

⁷⁸ *Rick Capka Seminar, supra* note 53. “It’s [PPPs] a way to get the most bang for our transportation buck.” *Id.*; see also Raphael Lewis & Sean P. Murphy, *Lobbying Translates into Clout*, BOSTON GLOBE, May 28, 2003 (Bechtel, as one of the world’s largest construction companies, is headquartered in San Francisco, California but was part of the team to build the largest mega-project in the United States for many years, Boston’s underground highway, the Big Dig. Furthermore, Bechtel and Parsons Brinckerhoff have reputations as “industry titans” because of world-renown projects like the Hoover Dam, the Alaska Pipeline, the English Channel Tunnel, an entire city in Saudi Arabia, and part of the New York City subway system).

⁷⁹ See *Rick Capka Seminar, supra* note 53. “Leveraging infrastructure investment through non-traditional-innovative-financing will help us tackle the biggest problem in surface transportation-congestion. . . . We need innovative financing to give a boost to our highway system.” *Id.* “Basically, people drive too much, and too many people try to drive on the same roads at the same time of day. The true social costs of driving include the construction and maintenance costs of roads, air pollution, and congestion.” Paulsen, *supra* note 76, at 25.

⁸⁰ H.R. 721, 24th Leg. (Haw. 2007). User fees in PPPs are defined as, “the rates, tolls, fees, or other charges imposed by the private entity for use of all or a portion of a qualifying transportation facility pursuant to the interim or comprehensive agreement.” *Id.*; see also Taylor Whitehouse, *Taxes on Gas Beat Complicated Tolls*, RICHMOND TIMES DISPATCH, Jan. 19, 2007, at A10 (arguing that the gasoline tax also acts as a user fee for car users, the same as tolls).

⁸¹ 40 AM JUR. 2D *Highways, Streets, and Bridges* § 697 (2006) (commenting that all roads constructed under the Federal-Aid Highway Act must remain toll-free, although

roads as alternative routes to the existing Interstate System without federal funds.⁸² Thus, tolls and financing are important incentives for PPPs, though many others exist.⁸³

D. Existing Laws Affecting Transportation

In general, critics of privatization argue that, because PPPs are profit-driven, social policies may suffer.⁸⁴ Avoiding litigation based on social policy concerns is a powerful incentive for private investors.⁸⁵ An illustration of this concept is the late entry of the private partner to agreements, thereby avoiding the risk of litigation over environmental and labor laws by citizen groups and individuals.⁸⁶ Accordingly, a legitimate belief exists that important social programs must yield to pro-

exceptions exist through a pilot program under TEA-21 and certain toll bridge and tunnel statutes).

⁸² See *supra* note 16.

⁸³ Corridors of the Future Program, 71 Fed. Reg. 52364, 52365 (Sept. 5, 2006). The "Corridors to the Future Program," promotes PPP development by ensuring an expedited process in project delivery, solicits PPP projects to include faster and more convenient access, environmental benefits, and increased travel speeds which will reduce congestion. *Id.* at 52364-65; REPORT TO CONGRESS ON PPPs, *supra* note 41, at 41 (stating that benefits to PPPs include both cost and time savings, enabling projects to be built sooner and thus with less disruption to the traveling public). See generally Rick Capka Seminar, *supra* note 53.

⁸⁴ Minow, *supra* note 62, at 1229. New versions of privatization follow marketplace competition which may harm public policies that are incompatible with economic efficiency. *Id.* at 1230. Consequently, constitutional equal protection issues may exist because "[p]rivatization may also undermine public commitments both to ensure fair and equal treatment and to prevent discrimination on the basis of race, gender, religion, or sexual orientation." *Id.*

⁸⁵ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 18. Federal procurement laws and regulations may also hinder privatization. *Id.* Both the states and federal government have systems of procurement and oversight which may chill the innovation that PPPs may provide. *Id.* One recent example was the FHWA's new design-build regulations whereby the states must complete the environmental review process before proposing projects to the FHWA. *Id.* at 176. This limits the private sector involvement in a project during the early design phase. *Id.* Furthermore, many federal laws, like Davis-Bacon and Buy America, which are tied to important public policies, increase the cost and complexity of the project. *Id.*

⁸⁶ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-51 (1989) (explaining the NEPA process pursuant to which federal agencies must evaluate environmental effects before a project may proceed to final design and construction); *Env'tl. Def. Fund v. EPA*, 167 F.3d 641 (D.C. Cir. 1999) (holding that grandfather provisions were unlawful and the transportation project could no longer receive local approval and federal funding unless the plan conforms to current provisions); see also *Prof'l Engineers in Cal. Gov't v. Dep't of Transp.*, 13 Cal. App. 4th 585, 588 (Cal. Ct. App. 1993) (challenging the State constitution due to privatization of government jobs). *Contra Sloan v. Greenville County*, 590 S.E.2d 338, 343 (S.C. Ct. App. 2003) (noting a taxpayer suit against the county for failing to comply with ordinances in the procurement of three public works projects).

PPP measures in order to implement these types of projects successfully.⁸⁷

1. Recent Transportation Legislation

The link between public policy and transportation legislation emerged in the late 1960s with the creation of the USDOT.⁸⁸ Subsequently, the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"),⁸⁹ the Transportation Equity Act for the Twenty-First Century of 1998 ("TEA-21"),⁹⁰ and, most recently, the Safe, Accountable,

⁸⁷ See generally Minow, *supra* note 62.

⁸⁸ ALTSCHULER & LUBEROFF, *supra* note 67, at 86.

The growth of antihighway sentiment during the late 1960s and early 1970s was fueled in part by rising environmental consciousness. The primary legislative successes achieved by the environmental movement in the early 1970s, moreover, greatly enhanced the weaponry of antihighway activists. The National Environmental Policy Act (NEPA), most notably, which became law in January 1970, required environmental impact statements for all major federally aided projects.

Id.; see Richard F. Weingroff, *The Battle of Its Life*, PUBLIC ROADS, May-June 2006, at 34-37 (discussing how President Johnson announced the need for a department of transportation in his January 1966 State of the Union Address and later that year, signed the Department of Transportation Act).

⁸⁹ Edward V.A. Kussy, *Environmental Considerations in Highway Planning*, SK008 ALI-ABA 281, 293 (1994). Local and national significance of projects became more important with the passage of ISTEA because more projects identified by funding categories, rather than on system classification, are eligible for federal funds. *Id.*

⁹⁰ Robert I. McMurry, *Overview of Selected Federal Activity Affecting Transportation*, SD14 ALI-ABA 1069, 1071 (Aug. 1998) (continuing where ISTEA left off, TEA-21 also improved programs to improve safety, enhance communities, and the environment). See also, Mattie C. Condray & Dennis C. Gardner, *Transit Law: State of the Practice*, TRANSP. RES. BOARD (2000), available at <http://gulliver.trb.org/publications/millennium/00118.pdf>. TEA-21 encourages the use of innovative finance techniques through credit assistance programs for PPPs and revised regulations will promote environmental justice and social equity. *Id.* Also, the Congestion Mitigation and Air Quality Improvement program provides flexible funding to help state and local governments conform with the Clean Air Act requirements. *Id.* See also Exec. Order 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994):

To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.

Id.

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Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") emerged to promote public policies.⁹¹ ISTEA first established funding categories for transportation facilities.⁹² Subsequently, TEA-21 continued to improve many of the policies from ISTEA.⁹³ Lastly, SAFETEA-LU further progresses by incorporating new policies to promote PPPs.⁹⁴ For example, Federal Highway Administrator, Rick Capka, cited SAFETEA-LU's "increased flexibility" and noted how many programs are "designed to attract private sector investment and participation."⁹⁵ In total, these comprehensive congressional acts roll a variety of social policy measures into each successive transportation bill.⁹⁶ Therefore, transportation legislation provides more benefits to a community than simply a new highway, and is now shifting to additionally support PPPs.⁹⁷

2. NEPA and Other Environmental Laws

One of the most important pieces of legislation affecting early project development is the National Environmental Policy Act of 1969 ("NEPA").⁹⁸ NEPA applies whenever there are "major Federal actions

⁹¹ Vicki Glenn, *Acting Now, Building for the Future*, PUBLIC ROADS, May-June 2006, at 20. In terms of SAFETEA-LU:

Congress incorporated a number of provisions related to workforce development into the recently enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The legislation provides resources that enable the U.S. Department of Transportation (USDOT) and its public and private sector partners to bolster existing activities and develop new ones to help nurture and prepare a new generation of transportation professionals to succeed in the workforce.

Id. See generally REPORT TO CONGRESS ON PPPs, *supra* note 41 (commenting that the precursor to SAFETEA-LU encouraged states to use private sector resources and made legal recommendations to continue the trend towards PPPs).

⁹² Kussy, *supra* note 89, at 293. Local and national significance of a project became more important with the passage of ISTEA and the new funding categories. *Id.*

⁹³ *Id.*

⁹⁴ Karen J. Hedlund & Nancy C. Smith, "SAFETEA-LU" Promotes Private Investment in Transportation, Aug. 1, 2005, available at <http://www.transportation1.org/aashtonev/docs/pabs.doc> (noting that SAFETEA-LU contains provisions to encourage PPPs and the billions of dollars this kind of private investment can bring to the Nation's transportation programs).

⁹⁵ Saunders, *supra* note 45, at 14.

⁹⁶ See *supra* notes 88-91 and accompanying text.

⁹⁷ Rick Capka Seminar, *supra* note 53. "SAFETEA-LU changes in the area of design-build will make innovative contracting procedures much more commonplace. The private sector can get involved earlier in the process." *Id.*

⁹⁸ See generally Linda Luther, *The National Environmental Policy Act: Streamlining NEPA*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 1 (Feb. 8, 2006), available at

significantly affecting the quality of the human environment”⁹⁹ Thus, most large infrastructure projects require the application of the NEPA process.¹⁰⁰ First passed in 1970, NEPA’s purpose was laid out by Congress in strong language.¹⁰¹ Past environmental problems, where the

<http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8944:1> (discussing how certain federal actions, like highway construction, are subject to the NEPA process).

⁹⁹ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2000). The FAA’s review under NEPA is governed in part by guidelines promulgated by the Council on Environmental Quality (“CEQ”), which are binding on federal agencies. 42 U.S.C. § 4332(C) (2000). See also *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 681 (D.C. Cir. 2004). An example of how FAA funding for an airport improvement project is a major Federal action that will require NEPA review. *Id.* In this way, the FAA is required to prepare an Environmental Impact Statement (“EIS”) to weigh the alternatives of the environmental consequences of the project. *Id.*

¹⁰⁰ PERCIVAL ET AL., *supra* note 61, at 39 (remarking that the NEPA process is an economic cost-benefit analysis of social and environmental factors for federal actions). See 23 C.F.R. 771.111(a) (2006). “Early coordination with appropriate agencies and the public aids in determining the type of environmental document an action requires, the scope of the document, the level of analysis, and related environmental requirements. This involves the exchange of information from the inception of a proposal for action to preparation of the environmental document.” *Id.*; see Robin M. Fields, *Freedom of Information Act Appeals Involving Environmental Records: What You Need to Know*, FHWA 2006 Environmental Conference (July 27, 2006), available at http://www.environment.fhwa.dot.gov/conference/ppt2006/fields_foia_appeals.ppp#1 (instructing that the Freedom of Information Act, 5 U.S.C. § 552, implemented under 49 C.F.R. Part 7, allows access to public records although exemptions exist). See Kussy, *supra* note 89, at 285. Typically, the steps involved in documenting the environmental impact of a project by an agency are: notice of intent to prepare an EIS; Draft EIS (“DEIS”) or Environmental Assessment (EA); public participation, often through a hearing or meetings; the Final EIS (“FEIS”) or Finding of No Significant Impact (“FONSI”); and, finally, a Record of Decision (“ROD”) and project approval from a Federal agency. *Id.* See generally GÓMEZ-IBÁÑEZ & MEYER, *supra* note 8, at 186 (commenting how new roads, whether public or private, are likely to face environmental challenges directed at the EIS, potential negative economic growth, and property takings issues).

¹⁰¹ *Andrus v. Sierra Club*, 442 U.S. 347, 349 (1979). The purposes of NEPA are as follows: “To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation” *Id.* See also 42 U.S.C. § 4331(b) (2000):

In order to carry out the policy set forth in this chapter [Act], it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

impact of a project ignored natural resources like wetlands and streams, spurred Congress to pass this legislation.¹⁰² Congress understood that the application of environmental protection to federal decisions would be complex, as is confirmed by the way NEPA operates today.¹⁰³

NEPA is a process which includes environmental studies and constant input from stakeholders, from the pre-planning phase to the design phase of a federal project.¹⁰⁴ Initially, the pre-planning phase includes public meetings to allow participation in early project decisions.¹⁰⁵ Subsequently, a substantial document, the Environmental Assessment ("EA") or Environmental Impact Statement ("EIS"), will be drafted by consultants for the state agency presenting the project.¹⁰⁶ The federal agency in charge of the project will then issue a Record of Decision ("ROD") or Finding of No Significant Impact ("FONSI")

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Id.

¹⁰² Andrus, 442 U.S. at 351. Where past environmental factors have often been ignored during the initial stages of planning the result is that, without congressional intervention, unnecessary degradation occurs. *Id.* See generally S. Rep. No. 91-296 (1969).

¹⁰³ Andrus, 442 U.S. at 349-50. "Congress recognized, however, that these desired goals could be incorporated into the everyday functioning of the Federal Government only with great difficulty." *Id.*; see S. Rep. No. 91-296, 19 (1969) (stating the legislative intent of the Senate in the passage of NEPA).

¹⁰⁴ 40 C.F.R. § 1502.1 (2006). The purpose of the EIS is to ensure policies and goals of NEPA are included in federal programs and actions. *Id.* It also shall serve to inform both decision makers and the public about the alternatives and adverse impacts of the project. *Id.* Kussy, *supra* note 89, at 286. "Typical of such requirements are those relating to the Endangered Species Act, the various laws and order protecting wetland, historic preservation, § 4(f), and many others." *Id.* Section 4(f) controls projects through parks, historic places, and endangered species. *Id.* In early phases of project development, NEPA and other environmental laws are triggered. *Id.* at 284.

¹⁰⁵ 40 C.F.R. § 1501.7 (2006). Scoping is the term used to define the lead agency's responsibility in inviting participation of other affected agencies and interested persons into the NEPA process. *Id.*

¹⁰⁶ Shawna M. Blingh, *Did NEPA Sink New Orleans?*, NAT. RESOURCES & ENV'T, Spring 2006, at 60, 61. "Where the culmination of the NEPA process is the preparation of an EIS, the EIS must present a thorough review of all of the reasonably foreseeable environmental impacts associated with a contemplated federal action." *Id.*

statement.¹⁰⁷ After the ROD or FONSI is delivered, the final design, land acquisition, and construction may proceed.¹⁰⁸ Although controversy may emerge at early public meetings, actual litigation often starts after the preferred alternative is chosen due to alleged insufficient NEPA documents.¹⁰⁹ Because judicial review of NEPA documents is minimal, this review exists only to ensure that the agency complied with regulations in an informed manner.¹¹⁰ Therefore, proper implementation of NEPA by the agencies involved is the key to a successful process.¹¹¹

¹⁰⁷ 40 C.F.R. § 1505.2 (2006). “At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision.” *Id.* The ROD must, “[i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable.” 40 C.F.R. § 1505.2(b) (2006). 40 C.F.R. 1506.1(a) (2006) provides, in part, that “[u]ntil an agency issues a record of decision . . . no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives.” 40 C.F.R. 1506.1(a) (2006). *See* 23 C.F.R. 771.113(a) (2006) (in the case of an EA, the decision may be to require an EIS or a Finding of No Significant Impact (“FONSI”). *See also* 40 C.F.R. § 1508.4 (2006). Small projects, such as intersections or resurfacing, may be a Categorical Exclusion (“CE”), defined as, “a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency . . . for which, therefore, neither an environmental assessment nor an environmental impact statement is required.” *Id.*

¹⁰⁸ *See supra* note 107.

¹⁰⁹ *Compare* Burkholder v. Peters, 58 F. App’x 94, 94 (6th Cir. 2003) (holding that the state agency violated regulations governing the process of making environmental assessment (EA) under NEPA because the contractor hired to produce the EA was also hired for the final design of the project), *with* Ass’ns Working for Aurora’s Residential Env’t v. Colorado Dep’t of Transp., 153 F.3d 1122, 1129 (10th Cir. 1998) (Colorado Department of Transportation contracted with a private company to produce the EIS and final design work did not violate the NEPA process. Here, the court formulated an “oversight test” to ensure agency provided proper oversight over the contractor). *See also*, ALTSHULER & LUBEROFF, *supra* note 67, at 86.

As strictly interpreted by federal courts during the 1970s, these proved to be requirements of enormous significance in the hands of environmental organizations and their lawyers. The Clean Air Act amendments of 1970 gave rise to numerous local controversies about whether new highways would induce so much more traffic as to vitiate their benefits, and whether continued rapid growth in motor vehicle usage was sustainable. The Clean Water Act amendments of 1972, finally, made it far more difficult to fill wetlands or build highways whose runoff might pollute water resources.

Id.

¹¹⁰ *Cmtys. Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 685 (D.C. Cir. 2004) (stating that the judicial role exists to ensure the agency has reviewed the environmental impact of its actions and did not make a decision that was “arbitrary or capricious”).

¹¹¹ *Id.*

Because contractors typically produce the EIS for PPPs and conventional projects, both types of projects may face challenges for inadequate documentation.¹¹² In addition, the engineering or environmental firm which develops the document must fulfill the federal requirements of NEPA and, concurrently, may not have a greater interest in the project.¹¹³ Because the private partner avoids the risk of litigation

¹¹² Wendy B. Davis, *The Fox is Guarding the Henhouse: Enhancing the Role of the EPA in FONSI Determinations Pursuant to NEPA*, 39 AKRON L. REV. 35, 53-54 (2006). "In addition to a lack of environmental expertise in the lead agency, another problem with the drafting of the EIS is the use of professional authors, . . . It is not reasonable to expect a hired contractor to undermine the desires of its employer by emphasizing adverse environmental harm or criticizing the proposed project." *Id. Contra*, Nat'l Res. Def. Council v. Callaway, 524 F.2d 79, 87 (2d Cir. 1975) (which uses similar reasoning to discredit agency-produced EIS documents). "The evil sought to be avoided . . . is the preparation of the EIS by a party, usually a state agency, with an individual 'axe to grind', i.e., an interest in seeing the project accepted and completed in a specific manner as proposed. Authorship by such a biased party might prevent the fair and impartial evaluation of a project envisioned by NEPA." *Id. See also* Michael B. Gerrard, *The Dynamics of Secrecy in the Environmental Impact Statement Process*, 2 N.Y.U. ENV'T L. L.J. 279, 282 (1993). Thus, where the developer hires the consultant . . . the discretionary choices will tend to be made in one particular direction. In environmental impact statements for projects in New York City, for example, almost no EISs have predicted that the projects will cause violations of air quality standards, except in a very few instances where, despite the most favorable assumptions, the absence of violations could not plausibly be projected. *Id.*

¹¹³ *Burkholder*, 58 F. App'x. at 99-100. No violation of NEPA was found when the FHWA issued a FONSI for a 16 mile highway in Ohio. *Id.* This was because the FHWA exercised "substantial independent oversight" and "independent analysis" of an EA submitted by the Ohio Department of Transportation ("ODOT"). *Id.* at 100. Therefore, because FHWA was aware the contractor potentially had a conflict of interest in producing the NEPA documents and later design and construction work, there was no violation by the FHWA despite ODOT's abuse of the process. *Id.* Pursuant to 42 U.S.C. § 4332(C) the environmental documentation required by NEPA, either an EA or an EIS, must address the following:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. 40 C.F.R. § 1506.5(c) (2006).

Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating

by entering the PPP agreement after environmental controversies are settled, there is only a slight possibility that the contractor will be involved with the EIS and the subsequent plans.¹¹⁴ In fact, it may be several years after the initial project proposal that a private investor first becomes involved.¹¹⁵ Because of this lengthy time period, traditional projects could benefit from an expedited NEPA process by allowing earlier land acquisition and engineering.¹¹⁶ Conversely, recent changes to federal regulations under SAFETEA-LU, which allow private partners to enter contracts before the environmental review process is complete, may erode the purpose of NEPA in ensuring that proper environmental documentation is produced before project planning begins.¹¹⁷

agencies, or where appropriate by a cooperating agency to avoid any conflict of interest.

Id.; see also FAA, *Best Practice for Environmental Impact Statement Management*, http://www.faa.gov/airports_airtraffic/airports/environmental/eis_best_practices/index.cfm?sect=consultantselection (last visited Nov. 13, 2006) (noting that consultants provide the majority of the technical analyses for EIS statements).

¹¹⁴ Luther, *supra* note 98, at 11. "Some members of Congress have expressed concerns that the environmental review process, particularly for large, complex surface transportation projects, can be inefficient leading to delays in completion of these projects." *Id.* The report also notes that TEA-21 legislation introduced the concept of "Environmental Streamlining" to facilitate the review process and that many members of Congress declared more measures were still needed to expedite the process. *Id.* at 17.

¹¹⁵ See *supra* note 29 and accompanying text.

¹¹⁶ Jonathan H. Adler, *Road Warriors: How Environmentalists Affect Transportation Projects*, NATIONAL REVIEW (June 28, 2006), available at http://www.findarticles.com/p/articles/mi_m1282/is_12_51/ai_54864474. One critic of environmental activism has stated that taxpayers are the ones who pay for the "war on roads being waged around the country." *Id.* Furthermore, because most local transportation projects are financed by gas-tax revenues with conditions attached, like drinking age and auto-emissions tests, federal intervention would be decreased with a decrease in federal highway spending and the gas tax. *Id.* The solution would be for local agencies to build their roads without federal funding thus freeing the local agencies from the federal strings. *Id.* But cf. *W. Land Exch. Project v. U.S. Bureau of Land Mgmt.*, 315 F. Supp. 2d 1068 (D. Nev. 2004) (commenting how the privatization of a tract of desert land owned by the federal government was challenged by environmental organizations under NEPA). See also REPORT TO CONGRESS ON PPPs, *supra* note 41, at 21. "However, a few public-private partnerships are formed before project concepts have developed to a point where they can be analyzed in a NEPA document. In these unusual cases, the FHWA believes further flexibility may be warranted." *Id.*; *Stewart Park & Reserve Coal., Inc. v. Slater*, 352 F.3d 545 (2nd Cir. 2003) (noting groups brought a lawsuit against government agency claiming state and federal environmental and transportation laws were violated by the approval of the NEPA documentation because of insufficient review).

¹¹⁷ Design Building Contracting, 71 Fed. Reg. 30100 (May 25, 2006) (affecting 23 C.F.R. Parts 630, 635 and 636).

The FHWA proposes to revise its regulations for design-build contracting as mandated by section 1503 of the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users"

Because NEPA is a time-consuming process, there is an increased interest in expediting or “streamlining” the process.¹¹⁸ While beneficial to traditional projects as well, “streamlining” NEPA will attract PPP involvement in projects.¹¹⁹ “Streamlining” NEPA consists of a number of measures allowing for earlier planning during the environmental assessment phase.¹²⁰ For example, concurrent review of the environmental documentation by the lead agency and other participating agencies is considered streamlining.¹²¹ Furthermore, the

(SAFETEA-LU). The primary revision would involve a statutory requirement that FHWA not preclude State transportation departments or local transportation agencies from issuing request-for-proposal documents, awarding contracts, and issuing notices-to-proceed for preliminary design work prior to the conclusion of the National Environmental Policy Act (NEPA) process. The FHWA also proposes to revise certain provisions in 23 CFR part 636 to facilitate the use of public-private partnerships.

Id. “Using qualification-based selection and performance based contracting, PPPs integrate risk sharing, streamline project development, engineering, and construction, and preserve the integrity of the NEPA process, to result in significant schedule and cost advantages over traditional infrastructure development processes.” Report to Congress on PPPs, *supra* note 41, at 6 (citing the House Report accompanying the FY 2004 DOT Appropriations Act). *But see* Daniel R. Mandelker & Charles Eccleston, *Comments on the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act Committee on Resources United States House of Representatives Initial Findings and Draft Recommendations*, SM004 ALI-ABA 731, 733 (Aug. 2006). “It is critical to point out that in virtually every case we have ever encountered, the root problems for inefficiencies or ineffective decisions has been the result of poor implementation or other related problems, and not due to the NEPA act itself. None of the proposed NEPA amendments are necessary.” *Id.*

¹¹⁸ Daniel R. Mandelker, *Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act: Initial Findings and Draft Recommendations*, SM004 ALI-ABA 725, 729 (Aug. 2006) (discussing how “delay” in the NEPA process may be linked to the fact that the process is longer today than in the past, affecting everyone related to the project or not).

¹¹⁹ *See generally* James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA’s Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74 (2003).

¹²⁰ *Id.* While defining concurrent review as the overlap of the NEPA process and the planning of the project, the article goes on to favor this streamlining because, “[c]oncurrent review ensures that environmental review is fully integrated into a planning process and, most importantly, that the public can participate in environmentally relevant phases of planning.” *Id.* at 90; *see also* Luther, *supra* note 98, at 11-14 (listing common streamlining provisions: coordinated compliance process; codifying existing regulations; delineating lead agency authority, delegating authority to states, and establishing limits on judicial review).

¹²¹ Luther, *supra* note 98, at 12 (codifying existing regulations would provide for a concurrent NEPA process with other planning and environmental review instead of consecutive review). *But see* Mandelker & Eccleston, *supra* note 116, at 733 (“Given the reports [sic] own admission that law suites [sic] are neither filed nor delay the overwhelming majority of projects, one must seriously question why the committee

lead agency may require other agencies to meet strict deadlines on project input.¹²²

Another plan to speed the NEPA process is a federal pilot program allowing some states to perform their own NEPA review without federal oversight.¹²³ Because some states have adopted their own environmental laws to address pre-project concerns, the federal pilot program allows further state control over the NEPA process.¹²⁴ Both the pilot program and “streamlining” changes to accelerate the NEPA process have been linked to the Bush Administration.¹²⁵ As a result of the increasing use of PPPs, many of these changes undermine NEPA’s original intent in favor of promoting PPPs.¹²⁶

believes there is such a pressing urgency to revise criteria defining who and how a suit can be lodged.”).

¹²² Luther, *supra* note 97, at 12 (noting the lead agency may set deadlines for other participating agencies in order to limit disputes).

¹²³ 23 C.F.R. § 773 (2007); *see also* Surface Transportation Project Delivery Pilot Program, 71 Fed. Reg. 17040 (Apr. 5, 2006). The Notice of Proposed Rulemaking (“NPRM”) for SAFETEA-LU under Section 6005 creates a pilot program to allow states to assume the Secretary of Transportation’s authority under NEPA for highway projects. *Id.* This means participating states may approve their own NEPA process and alternatives. *Id.* The only states invited to participate are Alaska, California, Ohio, Oklahoma, and Texas. *Id.* *See also* Corridor of the Future Program, 71 Fed. Reg. 52364, 52365 (Sept. 5, 2006). Other federal programs that promote PPPs include the Corridors of the Future Program (“Corridors”), which specifically promotes “exceptional environmental stewardship.” *Id.*

¹²⁴ *Cmty. Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 681-82 (D.C. Cir. 2004) (noting the project at issue in the instant case is also subject to the Massachusetts Environmental Policy Act (“MEPA”), a state-law analog of NEPA that requires Massachusetts state agencies sponsoring qualifying projects to prepare an environmental impact report. MEPA may be classified as a “mini-NEPA.”).

¹²⁵ Sharon Buccino, *Nepa Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. ENVTL. L.J. 50, 54 (2003). “Yet NEPA is now under assault. Numerous proposals from the Bush administration and members of Congress would weaken the environmental review and public participation now provided for under NEPA. These proposals seek to circumvent the NEPA process, rather than improve it.” *Id.* at 50.

¹²⁶ Daniel R. Mandelker, *supra* note 118, at 728. “[T]here are two distinct views of the NEPA process. The first is that the status quo is adequate The other perspective is that NEPA is a landmark law, but could use some improvements.” *Id.* This second view is generally the opinion of government agencies. *Id.* *See also* Buccino, *supra* note 125, at 60.

Even though the section of the transportation bill addressing project alternatives has the heading “Collaborative Development,” the language provides the opposite . . .

The impact of this language can be understood by looking at the transportation context. The language dramatically increases the authority of the United States Department of Transportation (USDOT) at the expense of other federal, state, and local agencies. Currently, the

3. Other Laws Entwined with Social Policies

Along with environmental concerns, labor programs and job creation are important aspects of any infrastructure project.¹²⁷ Accordingly, there are several federal pro-labor policies that are a part of transportation legislation.¹²⁸ In addition, states often have concurrent labor programs.¹²⁹ Obviously, because of the financial costs and the

FHWA (an agency within USDOT) has ultimate responsibility for the environmental analysis that accompanies its decisions.

Id.; see also 71 Fed. Reg. 30,100-101 (May 25, 2006) (affecting 23 C.F.R. Parts 630, 635 and 636 for Design-Build Contracting, when the FHWA issued the final rule for design-build contracting in 2002 PPPs were relatively new and few had experience in the process but now, several states have participated in PPPs). See REPORT TO CONGRESS ON PPPs, *supra* note 41, at 113 (“The private sector is reticent to invest in highway projects early in the project’s life because of the vagaries of the environmental permitting process. ...[P]roposed changes that would streamline the environmental process and make it more predictable; thus, making investment in surface transportation more attractive to the private sector.”). Commentors also suggested the FHWA adopt a new Memorandum of Understanding (“MOU”) to speed the NEPA process along with other environmental laws. *Id.* at 100. Furthermore, commentors also suggested that a programmatic approach to environmental laws could speed up the process. *Id.* Finally, certain activities such as land acquisition and design activities should be allowed conditionally before the NEPA process is finished but based on its final completion. *Id.* at 101.

¹²⁷ Mitch for Governor Campaign, *Major Moves: An Investment that Creates Jobs for Hoosiers*, http://www.mymanmitch.com/pdf_files/Investmentcreatesjobs.pdf (discussing how private transportation management companies often hire local companies; less than 200 jobs were affected by Major Moves and many were likely to be eliminated by electronic tolling; 650+ jobs were created for every state position affected through increased number of projects and new businesses taking advantage of improving infrastructure). See generally *Major Moves: Building Roads. Creating Jobs*, *supra* note 23. “In September 2005, Governor Daniels introduced his draft Major Moves highway plan. The plan included more than 200 new construction and 200 major preservation highway projects.” *Id.*

¹²⁸ See generally *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995). A contractor challenged the USDOT policy favoring disadvantaged business, minority and women, subcontractors. *Id.* The Supreme Court determined that strict scrutiny applied to any racially based discrimination. *Id.* The Court remanded the case to determine if there was evidence of prior discrimination. *Id.* For example, through TEA-21 transportation legislation, there is a provision for disadvantaged business enterprises, “[a] disadvantaged business enterprise (“DBE”) is defined as a small business owned and controlled by one or more individuals who are socially and economically disadvantaged.” *W. States Paving Co. v. Washington State Dep’t. of Transp.*, 407 F.3d 983, 988 (9th Cir. 2005). “The regulations do not establish a nationwide DBE program centrally administered by the USDOT. Rather, the regulations delegate to each State that accepts federal transportation funds the responsibility for implementing a DBE program that comports with TEA-21. The regulations accordingly explain that the 10% DBE utilization requirement established by the TEA-21 statute is merely ‘aspirational’ in nature.” *Id.* at 989.

¹²⁹ See generally *Prof’l Eng’rs in California Gov’t v. Dep’t of Transp.*, 13 Cal. App. 4th 585 (Cal. Dist. Ct. App. 1993) (noting that private sector engineers challenged California enabling legislation which allowed the California Department of Transportation (Caltrans) to enter into private contracts with developers). *But see* *Consulting Eng’rs & Land*

potential for discrimination of individuals traditionally excluded from the construction fields, labor programs are viewed as one of the principal impediments to private investment.¹³⁰ However, even in SAFETEA-LU, the latest reauthorization legislation, workforce development programs are encouraged through certain funding initiatives, such as apprenticeship opportunities for groups like women and minorities to work on highway projects.¹³¹ Therefore, policies valuing workers remain a significant part of transportation policy.¹³²

Surveyors of California, Inc. v. Prof'l Engineers, 44 Cal. Rptr. 3d 687, 689 (Cal. Dist. Ct. App. 2006). In this case the government employed engineers challenged California privatization legislation. *Id.* In California there have been many challenges by government employees against privatization, “[t]his dispute is another round in a long-standing battle by state employees to prevent the State of California from contracting out to private companies the performance of state services.” *Id.*; see also *Moore v. Dep’t of Transp. & Public Facilities*, 875 P.2d 765 (Alaska 1994) (discussing former DOT employee who challenged the privatization of his job); *Hornell v. Dep’t of Admin.*, 861 P.2d 1194 (Colo. 1993) (suing the state for privatizing their jobs, workers challenged the state constitution); *Konno v. County of Hawaii*, 937 P.2d 397 (Haw. 1997) (noting workers challenged the County violating collective bargaining laws by privatizing their jobs).

¹³⁰ *Williams, supra* note 61, at 3.

The effect of the Davis-Bacon Act is that of discriminating against contractor employment of non-union and lower skilled workers.

...

If the Davis-Bacon Act requires that any worker handling a hammer and a nail, for example, be paid \$25 an hour, no contractor in his right mind is going to hire a worker with \$10 an hour skills and pay him \$25. Any minimum wage law tends to discriminate against the employment of low-skilled workers; the Davis-Bacon Act is simply a super-minimum wage.

Id. See also *Samuel, supra* note 44, at 35. “Bids could be solicited with and without, say, union-only employment requirements, non-compete clauses on competing free capacity, toll rate controls or ‘clawback’ (or profit-sharing) provisions, etc.” *Id.* “Most concessionaires will likely want the freedom to hire their own workers ... But there will usually be no guarantees they won’t lose their jobs. It has to be said that manual toll collection—the major job category on toll roads—looks like a dying occupation regardless of ownership.” *Id.* at 36.

¹³¹ *Glenn, supra* note 91, at 23. TEA-21 allowed states to use Surface Transportation funds for employment programs while SAFETEA-LU funds 100% of workforce development programs. *Id.* Furthermore, workforce development is defined as “activities associated with surface transportation career awareness, student transportation career preparation, and training and professional development for surface transportation workers, including activities for women and minorities.” *Id.* See also *American Experience: The Alaska Pipeline* (PBS television broadcast Jan. 8, 2007) (transcript available at <http://www.pbs.org/wgbh/amex/pipeline/filmmore/pt.html>). Programs benefiting women go back to the 1970s with the building of the Alaska Pipeline where, “[t]housands of women got into construction for the first time on the pipeline, thanks to affirmative action requirements in the federal permit.” *Id.*

¹³² *Glenn, supra* note 91, at 23; see also *Loder v. City of Glendale*, 927 P.2d 1200, 1254 (Cal. 1997) (claiming the City’s drug testing of individuals was “to secure capable and

In addition to labor policies, aesthetic programs may inhibit PPP investment in transportation.¹³³ An attractive incentive for PPP investors is commercializing the right-of-way and allowing more advertising and businesses to operate along the roadside.¹³⁴ Right-of-way is the corridor for public travel alongside the highway.¹³⁵ Adjacent to this area, currently populated by a limited number of billboards, is the realm of the Highway Beautification Act ("HBA") and other state laws.¹³⁶ Although identified by private investors as an area of huge potential, changing the HBA may be in direct conflict to its legislative intent.¹³⁷ In

productive employees"); *Happiness (and How to Measure It)*, THE ECONOMIST, Dec. 23, 2006 (suggesting the value of job satisfaction with a new approach to quantify the value of happiness and well-being rather than Gross Domestic Product in a nation's economy).

¹³³ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 97-98 (noting that private sector investors are interested in the profit potential of commercialization of the right-of-way with businesses and billboards).

¹³⁴ 23 C.F.R. § 1.23(b) (2006). On public highways, the right-of-way must be devoted "exclusively to public highway purposes," with limited exceptions. *Id.*; see also REPORT TO CONGRESS ON PPPs, *supra* note 41, at 98 (discussing the Manual on Uniform Traffic Control Devices ("MUTCD") law, prohibiting the placement of advertising on traffic signs and signals because of their public highway purposes).

¹³⁵ BLACK'S LAW DICTIONARY 1351 (8th ed. 2004). Public right-of-way is defined as, "[t]he right of passage held by the public in general to travel on roads, freeways, and other thoroughfares." *Id.*

¹³⁶ 23 U.S.C. § 131(a) (2000).

The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

Id. The HBA dictates where signs may be erected or not, along with other limitations on lighting, size and proximity of signs. 71 Fed. Reg. 41258, 41259 (July 20, 2006). Along with these restrictions, the law allows states to remove signs that are not in compliance. *Id.* It is noted that since the HBA was drafted, there have been many changes in the technologies, practices, and local conditions of where signs are placed. *Id.* Consequently, a disconnect has developed between the HBA and the needs of the States, stakeholders, advertisers, property owners, and the traveling public. *Id.* See also State of Illinois, *First Lady's Wildflower Initiative*, <http://www.illinois.gov/firstlady/wildflowers.cfm> (last visited Nov. 14, 2006). The State Beautification Initiative was created to improve the quality of life in Illinois, promote tourism, restore Illinois ecology, and make Illinois more aesthetically pleasing. *Id.* Other states with successful beautification programs include Texas and North Carolina. *Id.*

¹³⁷ 71 Fed. Reg. at 41259.

In 1965, Congress passed the Highway Beautification Act (HBA), 23 U.S.C. 131, which substantially amended the original law and today governs the Federal outdoor advertising control program. . . . Most provisions of the HBA and the regulations have remained largely unchanged since their original adoption. Under the HBA, States are responsible for implementing the OAC program in a manner

fact, the purpose of attractive roadsides was promoted by “Lady Bird” Johnson in conjunction with the President’s America the Beautiful Program.¹³⁸ Like the HBA, states have similar statutes to promote aesthetics along the roadside, which go hand-in-hand with environmental policy.¹³⁹ Nonetheless, changes to these statutes will not cause the same type of irreversible harm as the construction of a new four-lane highway.¹⁴⁰ Thus, promoting PPPs by allowing commercialization is not as harmful as changing labor and environmental laws.¹⁴¹

E. *Proposed Changes in the Law*

Because government agencies desire PPPs both at the federal and state level, many intended rule changes to transportation and associated legislation are being attempted.¹⁴² Several of the proposed alterations in the law deal with environmental, employment, and contracting policies

consistent with the Federal law and regulations. Failure by a State to maintain effective control can result in the withholding of a portion of the State’s Federal-aid highway funds.

Id.; see also Weingroff, *supra* note 88, at 35 (Prior to the HBA, the America the Beautiful initiative created problems between private property owners and public interests. In the Federal-Aid Highway Act of 1958, the control of billboards was defined as a “public interest.”).

¹³⁸ Weingroff, *supra* note 88, at 26. One of the ways Lady Bird Johnson promoted pleasing highway views, was her “Landscape-Landmark Tour” in northern Virginia, complete with homemade cookies. *Id.* During this time, President Johnson promoted his America the Beautiful program promoting a trash-free country. *Id.*

¹³⁹ See generally *Outdoor Media Dimensions, Inc. v. Dep’t of Transp.*, 132 P.3d 5 (Or. 2006). Here a billboard advertising company challenged the Oregon Motorist Information Act (“OMIA”). *Id.* This is because OMIA requires a fee-based permit for highway billboards. *Id.*

¹⁴⁰ David Barnhizer, *Waking From Sustainability’s “Impossible Dream”: The Decisionmaking Realities of Business and Government*, 18 GEO. INT’L ENVTL. L. REV. 595, 644 n.118 (2006). “Through ignorance or indifference we can do massive and irreversible harm to the earthly environment . . .” *Id.*; see also Klara B. Sauer, *Where Are We in Cleaning Up Contaminated Sites?*, 4 ALB. ENVTL. OUTLOOK 35, 37 (1999). Noting that environmental value is not equated with economic value because the “difficult task of evaluating each alternative’s costs and benefits, which invariably gives less weight to environmental values because they are difficult to quantify. This approach will dictate selecting less costly, rather than most effective, alternatives.” *Id.*

¹⁴¹ See *supra* Parts II.D.2-3.

¹⁴² 67 Fed. Reg. 59225 (Sept. 20, 2002) (stating that the proposed rules were withdrawn because of disparity and diversity of generated comments). FHWA proposed rules for “NEPA and related procedures for Transportation Decisionmaking, Protection of Public Parks, Wildlife and Waterfowl Refuges, and Historic Sites.” *Id.*; see also 71 Fed. Reg. 30100 (May 25, 2006) (proposing rules for Design-build contracting). “FHWA and FTA Notice of availability; request for comments on guidance for SAFETEA-LU for projects funded by both agencies.” 71 Fed. Reg. 37156 (June 29, 2006).

which have been a part of transportation legislation for over a decade.¹⁴³ Still, within the federal laws, states do have control over what policies they wish to promote and preserve.¹⁴⁴

1. Federal Regulations

Many of the policy measures interwoven with transportation legislation are counter to the profit motive of private investment, such as the limited ability to toll the Interstate System, limited commercialization along the highway, labor policies, and environmental concerns.¹⁴⁵ Consequently, in order to attract PPPs by encouraging private investment, changes must be made in the federal regulations to

¹⁴³ REPORT TO CONGRESS ON PPPs, *supra* note 40, at 72. Report lists impediments to PPPs in state and federal laws. *Id.*

¹⁴⁴ Pollard, *supra* note 58, at 1542.

ISTEA and TEA-21 still provide massive funding for highway construction, and many of the funding innovations they contain merely make it possible for states to use federal transportation funds for alternatives to highways. Federal transportation law does not require states to significantly increase their transit funding, and many have not, continuing to use the bulk of the federal funds they receive for highway projects.

Id.

¹⁴⁵ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 92. "23 U.S.C. 129 does not permit a toll-free Interstate System highway to be converted to a toll facility, except bridges and tunnels. Nevertheless, two other provisions of Federal law provide limited opportunity for such tolling." *Id.*

Commercialization of the highway right-of-way is attractive to the private sector. The two most popular ideas concerning privatization focus upon advertising signs on the right-of-way and commercial utilization of Interstate rest areas. Since current law prohibits such use, a public-private partnership would not be allowed to advance such proposals without changes in statute and regulation.

Id. at 97. Condray & Gardner, *supra* note 90, at 4. For example, privately owned transit systems were run by a unionized workforce. *Id.* After these systems became public, the unions stayed and the collective bargaining in federal transit continued, with wage scales higher than comparable private-sector wages. *Id.* Additionally, one lingering law was 13(c) which allows transit workers displaced by privatization to receive certain benefits. 13(c) challenges are numerous. *Id.* See also REPORT TO CONGRESS ON PPPs, *supra* note 41, at 97. "The FHWA asked several States, construction companies, law firms, and consulting firms that specialize in innovative contracting for their views on whether and how laws, regulations, or practices should be changed to remove impediments to the formation of public-private partnerships." *Id.* at 99. FHWA should certify the environmental review process faster, because of the substantial litigation that delays project construction and financing. *Id.* Finally, commentators noted that a shorter statute of limitations would also reduce litigation delays. *Id.*

accommodate them.¹⁴⁶ However, to be successful, state laws must also accommodate PPPs in conjunction with federal regulatory changes.¹⁴⁷

2. State Enabling Legislation

Currently, many states do not allow privatization of transportation facilities and must therefore pass enabling legislation.¹⁴⁸ Analogous to the privatization of the penal system, transfer of the traditionally publicly provided highway or transit system requires deregulation and definition of important state policies.¹⁴⁹ Along with the interest in funding projects through deep private pockets, states may be fighting individuals and activists who are against the further development of the highway system.¹⁵⁰

¹⁴⁶ Condray & Gardner, *supra* note 90, at 7. Because the Federal Transit Administration has embraced the notion of effective and efficient procurement, the FTA's Third Party Contracting Guidelines have been updated recently. *Id.* Each subsequent update has loosened restrictions on local agencies to provide greater flexibility. *Id.* However, the overall purpose of promoting free-market competition is retained through the bidding process. *Id.* When the state and local laws permit this approach, the design and construction agreements may be negotiated under one contract. *Id.*

¹⁴⁷ Saunders, *supra* note 45, at 12. "Many States have laws and regulations that directly or indirectly inhibit PPPs. Strictures range from requirements for low-bid awards on construction contracts to prohibitions against design-build or outsourcing certain agency functions. There are also prohibitions against tolling or commingling public and private funds." *Id.*

¹⁴⁸ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 75 (stating that as of February 2004, about half the states have passed enabling legislation or amended state constitutions to allow PPP projects).

¹⁴⁹ Curtis R. Blakely & Vic W. Bumphus, *Private Correctional Management: A Comparison of Enabling Legislation*, 60 FED. PROBATION 49 (June 1996) (reviewing privatization-enabling legislation for prisons and how this traditional function of the government is increasingly being delegated to the private sector). *But cf.* Kristan E. Curry, *Historic Districts: A Look at the Mechanics in Kentucky and a Comparative Study of State Enabling Legislation*, 11 J. NAT. RESOURCES & ENVTL. L. 229, 247 (1995-1996). Comments regarding historic preservation enabling legislation policy, "[s]tates that enact historic preservation-related enabling legislation usually include some common items in their statutes. Such legislation articulates a public policy which prefers historic structures over modern buildings for use by state agencies." *Id.*

¹⁵⁰ Pollard, *supra* note 58, at 1538.

[T]ransportation investments shape the rate and location of development, and road-centered policies have fueled sprawling development and consumed tremendous amounts of land. . . . The focus on building new roads as the solution to transportation problems has had a profound adverse impact. It has demolished and divided communities and made them less livable by generating noise, pollution, and pedestrian hazards.

Id.

The USDOT has compiled a list of states that have enacted enabling legislation or amended constitutions to allow PPPs.¹⁵¹ In all, twenty-three states have already adopted this type of legislation.¹⁵² Through an examination of these new statutes and amendments, there are two categories that are especially insightful: level of public involvement and level of private protection of information.¹⁵³

Both public and private partners want to enter into PPP agreements.¹⁵⁴ However, there is still pressure between the two sides that must be relieved.¹⁵⁵ One way of approaching this predicament is to look at state enabling legislation and identify the critical provisions that are most conducive to promoting traditional social policies, while at the same time allowing the private investor to make a profit.¹⁵⁶ In fact, the USDOT identified twenty-eight key elements of particular importance to the FHWA in state enabling legislation.¹⁵⁷ Because social policy and

¹⁵¹ USDOT-FHWA, PPP Legislation, *supra* note 17 (listing states with enabling legislation, last updated August 2006).

¹⁵² *Id.*

¹⁵³ *Id.* A private law firm and the FHWA created a list of "28 Key Elements" identifying these policies. *Id.* For example, in addressing public involvement one element identifies legislation that provides for protection of documents and information from the public, thereby giving the private partner confidentiality. *Id.*; accord Hedlund & Smith, *supra* note 94.

¹⁵⁴ Rick Capka Seminar, *supra* note 53 (stating that, at the federal level, incentives for private sector investing are increasing, while at the state level many restrictions to PPPs remain).

¹⁵⁵ Mays, *supra* note 10, at 59-60.

A private corporation must have the making of money as its primary goal. If it fails to thrive financially, the private corporation faces ruin. . . . Conversely, the duties of a public corporation go beyond the desire for monetary gain. . . . A city is not a business designed to make a profit. It exists to assist its inhabitants by supplying them with products and services that will inure to the benefit of the community as a whole.

Id.

¹⁵⁶ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 1. The USDOT has encouraged PPP project development in the states by providing guidance and "tools." *Id.* Additionally, "the Administration has recommended a number of legal changes that will continue this trend." *Id.* See also, Condray & Gardner, *supra* note 88, at 7-8. In addition to legal issues associated with new and emerging procurement methods, a significant number of statutory and regulatory requirements associated with most transit procurement activities will continue to dictate that transit lawyers carefully scrutinize and monitor their agencies' procurement activities to ensure compliance. For example, federal law mandates that certain content and assembly activities meet "buy America" requirements. Another example of continuing legal involvement is in compliance with federal, state, and local statutes providing for participation in transit agency contracts by economically disadvantaged business enterprises [DBEs]. *Id.*

¹⁵⁷ See *supra* note 153.

economic efficiency are diametrically opposed, it is difficult to reconcile the two in enabling legislation.¹⁵⁸ Nevertheless, the attempt must be made in order to preserve important social and environmental values, since PPPs are likely to become the chief way transportation is financed in the United States.

III. ANALYSIS

Changes to statutes and regulations which promote the implementation of PPPs must be cautiously considered in order to maintain important public policies and environmental concerns.¹⁵⁹ Once changed, harm to labor and to the environment may be irreversible or difficult to restore.¹⁶⁰ However, changes are not presumptively bad and often strive to meet important competing interests.¹⁶¹ Many legislative changes that seemingly promote PPPs may, in fact, affect labor and the environment in both negative and positive ways.¹⁶² For example, an increase in PPP projects may reduce the availability of well-paying

¹⁵⁸ USDOT-FHWA, PPP Legislation, *supra* note 17. Some of the issues identified as “key elements” are posed as questions applied to existing state legislation: whether unsolicited projects are allowed; whether existing roads may be converted to PPPs; whether there are restrictions on the revenues gained from PPPs; are alternative routes to toll roads required; what the specifications of the review process are; and, what level of confidentiality exists for PPP projects during negotiations. *Id.*

[T]he public/private partnership concept should be carefully reviewed to determine if such arrangements are feasible. The TFIC Issue Paper identifies an initial series of issues that must be addressed by the legislative and executive branches of Illinois State government, as well as by the public at large, as part of this review process. . . . [T]he partnerships are complex arrangements that have long-term policy implications.

Transportation for Illinois Coalition, *supra* note 12, at 1; see also Samuel R. Staley, *Viewpoint: Ohio Should Consider Public Private Partnership Law to Spur Transportation Improvements*, The Buckeye Institute for Public Policy Solutions, Oct. 25, 2005, <http://www.buckeyeinstitute.org/> (last visited Sept. 30, 2006) (remarking that Ohio does not have Public Private Partnership legislation in place which is likely deterring important transportation investments).

¹⁵⁹ See *supra* Parts II.D.2-3.

¹⁶⁰ See *supra* note 141 and accompanying text.

¹⁶¹ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 1 (changing laws to promote PPPs are to improve efficiency in project delivery). “Rapidly increasing demand for new capacity has resulted in many States considering the benefits of public-private partnerships. U.S. DOT has encouraged this both administratively and by recommending changes to Congress.” *Id.* “American environmentalism comprises a mix of value systems, beliefs, and perspectives, and draws on a complex historical, philosophical, and religious traditions.” PERCIVAL ET AL, *supra* note 61, at 9. These perspectives may be, “human-centered (or anthropocentric), bio-centered, and eco-centered, respectively.” *Id.* at 10.

¹⁶² See Buccio, *supra* note 125, at 50 (stating how proposed changes will negatively impact communities and reduce public participation).

construction and maintenance jobs in the transportation industry.¹⁶³ On the other hand, an increase in PPPs may provide a higher quantity of jobs because more projects are being built and restored.¹⁶⁴ In the same way, more PPP projects lead to the increased manipulation and potential harm to the physical landscape.¹⁶⁵ Conversely, more roads and highways mean less congestion, resulting in less air pollution, which could benefit the environment.¹⁶⁶ PPPs' economic efficiency goals must be squared with these other value systems which are not measured by dollars, and before substantial destruction of natural resources occur.¹⁶⁷ In order to achieve equilibrium between these two arguably competing interests, federal and state laws must work together to best accommodate public concerns about PPPs.¹⁶⁸

Accordingly, Part III.A discusses how NEPA may be affected under a new policy of promoting PPP project delivery because of the competing values of economic efficiency and environmental protection.¹⁶⁹ Part III.B discusses the influence of PPPs on labor policies within transportation legislation, while Part III.C discusses the barriers to PPPs' economic potential due to state policies promoting aesthetic values of the American highway.¹⁷⁰ Finally, in Part III.D the importance of federal and state laws working together, and not in opposition, is examined as the best way to retain important social policies while at the same time allowing for the economic benefits of PPPs for the taxpayer.¹⁷¹

¹⁶³ See NCPP, *supra* note 6 (noting that federal tax, grant, and labor policies impede PPP projects that propose the use of private sector funds to complete the public financing needs).

¹⁶⁴ See *supra* note 127 and accompanying text (illustrated in Indiana Governor's "Major Moves" initiative).

¹⁶⁵ See *supra* note 140 and accompanying text. See generally Science & Environmental Health Network, *Precautionary Principle*, available at <http://www.sehn.org/ppfaqs.html> (noting that scientific certainty is not necessary to protect the environment because of the risks at stake).

¹⁶⁶ See *supra* note 122; 71 Fed. Reg. 52364, 52364-52365 (Sept. 5, 2006) (regarding the federal notice for the Corridors of the Future Program ("CFP") which highlights the potential benefits such as reduced travel time, increased safety and environmental benefits).

¹⁶⁷ See *supra* note 140 and accompanying text.

¹⁶⁸ See *supra* Part II.C.

¹⁶⁹ See *supra* notes 75-82 and accompanying text (for economic arguments for PPPs); *supra* note 116 and accompanying text (for examples of environmental challenges).

¹⁷⁰ See *supra* note 86 and accompanying text.

¹⁷¹ See *supra* Part II.E. "To facilitate the formation of public-private partnerships, States should create the right climate to attract, encourage, and facilitate the participation of the private sector in the development, financing, and operation of public-private transportation projects." REPORT TO CONGRESS ON PPPs, *supra* note 41, at 75.

A. *PPPs Are Not NEPA Friendly*

Because PPPs are tied to fiscal goals, the trends in transportation law are to promote economic efficiency.¹⁷² The principle problem facing transportation agencies is the lack of revenue to maintain and operate facilities.¹⁷³ As a result, many proposed changes to the latest transportation legislation, SAFETEA-LU, involve financing and cost-cutting measures.¹⁷⁴ Furthermore, private investment is encouraged as a way to offset the shortfalls in funding.¹⁷⁵

In contrast, environmental concerns are not necessarily linked to fiscal values.¹⁷⁶ The value of the physical landscape is instead tied to aesthetic, health, global warming, and other significant matters.¹⁷⁷ Because environmental concerns are long-term and affect both individuals living within the vicinity of a project and individuals outside the scope of the project, there are many interested parties when a project is proposed.¹⁷⁸ Thus, NEPA becomes especially important in light of the call to “streamline” the process.¹⁷⁹

Because of the long and burdensome environmental review process of NEPA, the federal government recently proposed and implemented changes to allow concurrent review of the documentation.¹⁸⁰ “Streamlining” the NEPA process allows the lead agency, usually a state department of transportation in charge of the project and other agencies, to review the environmental documents and public comments concurrently, rather than with the independent oversight of the federal

¹⁷² See GÓMEZ-IBÁÑEZ, *supra* note 66, at 3 (commenting on the profit motive behind private investment).

¹⁷³ See *supra* notes 76-82 and accompanying text.

¹⁷⁴ See *supra* note 95.

¹⁷⁵ Nicole M. Smith, *Seeking a ‘More Mobile Maryland,’ State Eyes Public-Private Partnerships*, BOND BUYER, Oct. 23, 2006, at 2. “Whereas in past generations revenues for road construction would have been generated through a federal fuel tax, inflation coupled with increasingly better gas mileage have all but burned up that source of income, making it necessary for transportation officials to look at new ways to finance road improvements.” *Id.*

¹⁷⁶ Eric T. Freyfogle, *Ecology, Ethics, and Private Land* (Feb. 10, 2004), available at http://www.lifesci.consortium.umn.edu/conferences/ericfreyfogle_2004.php (remarking that private rights in property must be reconciled with the public interest, in that property concerns of environmental degradation, recreation, and core economic and political values, are in play).

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* note 116.

¹⁷⁹ See *supra* note 98 and accompanying text.

¹⁸⁰ See *supra* notes 118-26 and accompanying text.

agency.¹⁸¹ The intent is to make the review process faster and allow for the project to enter into the design phase sooner.¹⁸² As a result, there is more certainty in the timeline of the project for stakeholders.¹⁸³ Investors are often interested in entering PPPs as soon as the risk of stopping or modifying the project passes.¹⁸⁴ Therefore, if there is a particularly contentious project with pending NEPA litigation, the private investor may easily withdraw from the project completely.¹⁸⁵ However, when the challenge to the potential project is based on the lack of considering viable alternatives, it may still be built after the court battle, allowing a private partner entry into the project.¹⁸⁶ Because the governmental agency is given deference and a great deal of control over the NEPA process, and standing is sometimes difficult for a plaintiff to achieve, most courts uphold the agency's decision to go forward with a project.¹⁸⁷ In this way, the outcome of the NEPA litigation favors the agency where it might not succeed if defended by a private company.¹⁸⁸ If more projects are proposed and passed through the NEPA process because PPP financing is available, a higher likelihood of environmental harm simply due to an overall increase in construction exists.¹⁸⁹

Review of the environmental study is the primary role of NEPA in ensuring that undue harm is not done to the environment until alternatives are explored in detail.¹⁹⁰ Thus, the sequential review process of the local agency and FHWA allows all parties to review the EIS, including the stakeholders.¹⁹¹ In this way, the EIS may be redrafted and edited before the final ROD is issued.¹⁹² Although the same may be true

¹⁸¹ See *supra* notes 113, 120-22.

¹⁸² See *supra* notes 72-75 and accompanying text.

¹⁸³ See *supra* note 72 and accompanying text (illustrating why stakeholders want certainty when a project is proposed).

¹⁸⁴ See *supra* note 114 and accompanying text.

¹⁸⁵ See *supra* note 29 and accompanying text.

¹⁸⁶ See *supra* note 114 and accompanying text; see also *American Experience: The Alaska Pipeline*, *supra* note 131 (noting that despite numerous NEPA based lawsuits, the embargo on oil shipments to the U.S. in October 1973 led to an oil crisis which allowed for the passage of the Trans-Alaska Pipeline Authorization Act in Congress, barring further legal challenges).

¹⁸⁷ See *supra* note 110 and accompanying text.

¹⁸⁸ See *supra* note 116.

¹⁸⁹ See *supra* note 127.

¹⁹⁰ 40 C.F.R. § 1502.1 (2006). An EIS should, "provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *Id.*

¹⁹¹ See *supra* note 117.

¹⁹² See *supra* note 113 and accompanying text.

when the process is streamlined, the coordinated effort may not provide an additional opportunity for “checks and balances” by all invested parties to review the documents.¹⁹³ Another problem with concurrent reviews is the strict deadlines which may result in limited public involvement.¹⁹⁴ This public participation is the key to decreasing mistrust and controversy among members of the community where the project will be located.¹⁹⁵

Another issue with the EIS is that it is often drafted by consultants or private firms contracted by the local agency.¹⁹⁶ This means there could be a potential conflict of interest if the firm that produces the EIS is also a potential PPP investor.¹⁹⁷ The purpose of the EIS is to explore alternatives and find the best geographical fit for the project with minimal impacts on the social and physical landscape.¹⁹⁸ Therefore, when a potential investor is involved in the pre-planning environmental review process, there may be motivation to choose a particular alternative over another based on later financial needs of the project.¹⁹⁹ Even where a project is not a potential PPP, the fact that a consultant is used may inhibit the process because of the motivation to provide the alternative that the public agency favors.²⁰⁰ Since the production of an EIS can take several years, government agencies are often unable to devote staff to creating an EIS.²⁰¹ The fact that consultants are used for the EIS is an inherent weakness in the entire NEPA process, whether it is a public or private project.²⁰² While the public partner may have budgetary concerns, it is not motivated solely to make a profit on the project like a private partner.²⁰³

¹⁹³ See *supra* notes 120-22 and accompanying text.

¹⁹⁴ See Luther, *supra* note 98, at 5 (noting that critics find the limitations inherent in the streamlining process, including strict deadlines, which could ultimately limit public participation).

¹⁹⁵ *Id.*

¹⁹⁶ See *supra* notes 99, 113 and accompanying text.

¹⁹⁷ See *supra* note 99 and accompanying text.

¹⁹⁸ See *supra* note 149 (explaining the purpose of NEPA).

¹⁹⁹ See *supra* note 99 and accompanying text.

²⁰⁰ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (illustrating how the Supreme Court reviewed the Secretary of Transportation’s decision to construct a highway through a public park and whether the Secretary acted within the scope of his authority to determine no feasible alternatives existed).

²⁰¹ See *supra* note 112 and accompanying text.

²⁰² *Cmtys. Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 686 (D.C. Cir. 2004) (noting the contractor must state it has “no financial or other interest in the outcome of the project” per CEQ NEPA guidelines).

²⁰³ *Id.*

If the solution to the problems inherent in the NEPA process is not streamlining, perhaps individual states may provide further procedural safeguards while still attracting PPP investors.²⁰⁴ One idea, identified as a “key element” for enabling legislation, is for states to allow a “local veto” for projects that are unpopular.²⁰⁵ Thus, early conflicts and disapproval of a project may be exposed before substantial time and money are spent on producing an EIS statement.²⁰⁶ However, the problem with allowing a public referendum is that it is possible that few PPP projects would be approved.²⁰⁷ Nevertheless, those projects that are able to garner approval may reduce the number of challenges to the EIS because there would be public support for the project.²⁰⁸ As a result, projects that receive prior public approval may actually attract private investors who undertake the risk that the EIS will go unchallenged.

A new way in which states can play a more substantial role in the NEPA process is through a proposed federal pilot program allowing private investors to work with the state agency instead of both the state and federal agencies.²⁰⁹ This pilot program will also likely reduce the amount of time for the NEPA review process, much like streamlining.²¹⁰ Consequently, a PPP may be formed earlier between the local agency and the private investor because the process is under the domain of the state from the outset, without the need for federal approval.²¹¹ Although this is a recent program, it may have a substantial impact on the earlier

²⁰⁴ See *supra* note 125 and accompanying text.

²⁰⁵ Bill Mongelluzzo, *Voters OK Calif. Transport Bonds*, J. Com. (Nov. 8, 2006) (noting that California voters approved PPPs to fund goods movement projects in the freight industry and that projects closest to completion of the NEPA process will likely receive funds first).

²⁰⁶ See *supra* notes 72-75 and accompanying text.

²⁰⁷ Hedlund & Chase, *supra* note 94, at 4 (discussing that when a state subjects the PPP to a “local veto,” private investors are often unwilling to undertake the additional costs relating to project development and negotiations when the public may not approve the project in a vote or referendum).

²⁰⁸ Bill Mongelluzzo, *Voters OK Calif. Transport Bonds*, J. COM. (Nov. 8, 2006). In a referendum for bond measures for freight transportation infrastructure, “voter approval of the bond measures is considered a major success . . . because it affirms the support of the state government for public-private partnerships to fund goods movement projects.” *Id.* Additionally, the article states that, “[p]rojects that have attracted local support and are making the greatest progress in the environmental review process will most likely be among the first projects that the state commission will choose for appropriations.” *Id.*

²⁰⁹ See *supra* note 123 and accompanying text.

²¹⁰ See *supra* note 123 and accompanying text.

²¹¹ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 12. Despite control by the private partner in many aspects of the project, “[e]ven when the private sector has a high level of participation, the government will continue to play a role in granting permits, ensuring safety, verifying fulfillment of environmental requirements, or even exercising its power of eminent domain to obtain land for rights-of-way.” *Id.*

formation of PPP projects because, by removing safeguards to the NEPA process, the likelihood for potential harm increases.²¹²

On the other hand, many argue that new PPP projects may help the environment, apart from the NEPA review process, by promoting new technologies and promoting “intermodal” options.²¹³ The long term implications of promoting cutting edge methods in construction and design may limit environmental impacts.²¹⁴ Moreover, the use of bicycle paths and light rail lines alongside highways may reduce congestion and provide the necessary alternatives for travelers on the system.²¹⁵ As a result, PPPs may be a good long term solution to environmental issues in transportation by reducing air emissions, promoting the use of public transportation, and using the latest technology to promote environmental stewardship.²¹⁶ Perhaps fewer challenges would occur when these options are part of the transportation project proposal, because positive implications of long-term highway alternatives on the environment, like public transit, are favorable to many individuals.²¹⁷

Finally, to prevent NEPA challenges while still promoting PPPs, a state may limit privatization efforts solely to existing roads and transportation facilities.²¹⁸ With a focus on converting existing public

²¹² 71 Fed. Reg. 52364, 52364 (Sept. 5, 2006). With the new “Corridors of the Future Program” one of the main objectives is to expedite major transportation projects as well as promote innovation and exceptional stewardship in the environmental process. *Id.* “Executive Order 13274, ‘Environmental Stewardship and Transportation Infrastructure Project Review.’ For these projects, Federal agencies shall to the maximum extent practicable expedite their reviews for relevant permits or other approvals, and take related actions as necessary, consistent with available resources and applicable laws.” *Id.* at 52366.

²¹³ See *supra* note 49 and accompanying text.

²¹⁴ 71 Fed. Reg. at 52366. The proposals for a new federal program promoting PPPs, “should describe any proposed innovative methods for completing the environmental review process effectively, and/or any exceptional proposed measures for avoiding or mitigating air, noise, or water impacts, or impacts to environmental or cultural resources.” *Id.*

²¹⁵ See *supra* note 26 and accompanying text; see also Stephanie I. Cohen, *Transit Saves Commuter Hundreds, Saves Economy Billions: Study*, MARKETWATCH, Jan. 9, 2007 (marking on the recent upsurge in public transportation user due to the increase in public transit availability over the past decade).

²¹⁶ *Supra* notes 166-67 and accompanying text.

²¹⁷ See *supra* note 49; American Public Transportation Association, *Public Transportation Energy Consumption and Environmental Benefits Statistics*, available at <http://www.apta.com/research/stats/energy/index.cfm> (mile-per-mile comparisons of transit systems to automobiles show less energy is consumed by transit).

²¹⁸ Hedlund & Chase, *supra* note 94, at 3. A key element recognized in state enabling legislation is whether the legislation allows the “conversion of existing or partially constructed highways into toll roads.” *Id.* While allowing these conversions promotes flexibility they also can be controversial.

roads to private roads, the environmental disruption is likely to be minimal.²¹⁹ In fact, the NEPA process may be avoided entirely when project improvements, such as repaving or adding interchanges, are proposed and fit into a Categorical Exclusion ("CE") or a Finding of No Significant Impact ("FONSI").²²⁰ Although there are other criticisms of privatizing toll roads, this type of PPP will not harm the physical landscape in the manner of new projects.²²¹ As with other types of PPPs, like design-build, there should still be a measure of public input to address Environmental Justice concerns.²²² Also, like the NEPA process, the importance of public input should be a part of the PPP process whether it is a new or an existing transportation facility.²²³

In sum, states have many options to preserve the environment while still promoting PPPs.²²⁴ By taking an approach to PPPs which involves careful public input and concerns, the private investor may be enticed by the stability of the project and the boost of public support.²²⁵ Although it is likely that NEPA lawsuits will continue to occur while the public

²¹⁹ See *supra* note 107 and accompanying text.

²²⁰ See *supra* note 107 and accompanying text.

²²¹ Local-Opinions, *Legislative Failure on Roads*, VA PILOT-STAR 12 (Oct. 31, 2006). In response to an editorial called *Toll Roads Oversold as Good Solution* (Oct. 28, 2006), Mr. Kent Irwin writes:

Our state legislators continue to be ineffective in reaching any solution to Virginia's transportation crisis. If anything is done it will be via public/private partnerships, resulting in toll roads [lanes]. . . . Every citizen of this state benefits from the free flow of road transport, whether they can drive or not. . . . Improving traffic flow while restricting it via tolls is lunacy.

Id. See also Cliff Hightower, *State Seeks Alternative Funding for Roads*, CHATTANOOGA TIMES (Oct. 31, 2006).

State Sen. Mark Norris, RCollierville [sic] and the chairman of the state Senate's Transportation Committee, said last week there are concerns from some legislators about paying for toll roads some feel have 'already been paid for' by taxpayer dollars and about who would own the roads in public-private partnerships.

Id.

²²² See *supra* note 90 and accompanying text.

²²³ See USDOT, *Public Involvement Techniques*, available at <http://www.planning.dot.gov/Pitool/toc-foreword.asp> (emphasizing the importance of public participation in transportation projects).

²²⁴ See *supra* notes 131-76 and accompanying text.

²²⁵ Hedlund & Chase, *supra* note 94, at 9. Another key element recognized in state enabling legislation is whether the law allows the confidentiality of PPP proposals prior to when an agreement is made between the public and private partner. *Id.* "These provisions require a delicate balancing between competing considerations. On the one hand, disclosure of proposed projects is necessary for them to gain public legitimacy. On the other hand, the private sector will be unwilling to participate if certain information about them and their business secrets must be disclosed." *Id.* at 10.

partner is in control of the project, fewer challenges may increase the level of interest from the private sector.²²⁶ As a result, PPPs and environmental concerns should be reconciled in a way which values both the economic and environmental value of projects.²²⁷

B. Potential Labor Issues and PPPs

While PPPs reduce congestion and lessen government expenditure on transportation, at the same time, they may compromise traditional labor policies.²²⁸ Significantly, PPPs provide funding for projects, which allow more projects to be built.²²⁹ As a result, the increased number of construction projects fuels the amount of jobs available in a state.²³⁰ However, the trend in the construction industry is to have a mega-contractor bring workers from out-of-state to build projects.²³¹ Thus, the workers benefiting from the new projects are not always local, but the prospect of more local construction jobs is often a reason for public support of the project in the first place.²³² Also, if a project receives sufficient private funds along with state funds, no federal funds may be needed; hence, federal labor policies do not need to be followed.²³³ Still, most states have their own labor policies which would require compliance by the contractor.²³⁴ However, because states are competing for private funds, laws to minimize the obligations of the contractor may be implemented.²³⁵ As a result, jobs may have lower wage scales, and public policy programs may disappear.²³⁶ The overall increase in jobs may both help and hinder the labor movement in most states.²³⁷ Whether it is beneficial for a state to encourage PPPs relates directly to the labor policies protected by the project.²³⁸

²²⁶ *Id.* at 4.

²²⁷ *See supra* notes 114-23 and accompanying text.

²²⁸ *See supra* notes 88-92 and accompanying text.

²²⁹ *See supra* notes 52-56 and accompanying text.

²³⁰ *See supra* note 127.

²³¹ *See supra* note 77.

²³² *See supra* note 127; *supra* notes 88-92 and accompanying text.

²³³ *See supra* note 43 and accompanying text (explaining how federal policies like Buy America and prevailing wage must be adhered to when federal funds are accepted for projects).

²³⁴ *See supra* note 113 and accompanying text.

²³⁵ *See supra* notes 105-07 and accompanying text.

²³⁶ *See supra* notes 88-92 and accompanying text.

²³⁷ *See supra* note 127 and accompanying text (it must also be noted that while some of the investment attracted by the new infrastructure of Major Moves includes Toyota and new tech parks, it also includes Wal-Mart and Dollar General).

²³⁸ *See supra* notes 127-32 and accompanying text.

Because most lawsuits against privatization involve labor, states must be careful about PPP implementation.²³⁹ Often there are claims that a project, or private agency taking over a facility, violates state constitutions when some government workers are fired in order to provide jobs for non-governmental workers.²⁴⁰ The original intent of these laws was to provide secure government jobs with a livable wage for working families.²⁴¹ Therefore, when changes to government employee policies are made along with the enabling legislation for PPPs, states need to weigh the original purpose of this legislation against private investment dollars.²⁴²

Finally, states may desire to change their labor and employment laws to accommodate PPPs because the financial costs are high to both the public and the private partners.²⁴³ Labor policies often are expensive, and eliminating them will reduce the cost of project delivery.²⁴⁴ Therefore, it is attractive to private investors to minimize these policies and control their own wage scales.²⁴⁵ However, policies such as prevailing wage requirements, Buy America, and Disadvantaged Business Enterprises have a non-economic value in providing workers with well-paying, skilled employment.²⁴⁶ Moreover, the secondary effects of these policies create happy workers who contribute to the economy as consumers.²⁴⁷ Consequently, good jobs are good for the state and should not be abandoned in the name of PPPs. In conclusion, when changes to labor policies in favor of PPPs are made at the state and federal levels, a balance should be struck between economic values and the employees' worth as satisfied, productive citizens.²⁴⁸

²³⁹ See cases cited *supra* note 86 and accompanying text.

²⁴⁰ See *supra* note 16 (noting that the *Bonney* case was a state constitutional challenge); see also *supra* note 89 and accompanying text.

²⁴¹ See *supra* notes 88-92 and accompanying text.

²⁴² See *supra* note 86 and accompanying text.

²⁴³ Williams, *supra* note 61, at 3 (noting how prevailing wage requirements can inflate wages); see also Samuel, *supra* note 44, at 35 (noting that private investors will likely want to hire their own workers rather than take on government employees).

²⁴⁴ See *supra* notes 90-91 and accompanying text.

²⁴⁵ Williams, *supra* note 61, at 3 (periodically politicians seek to repeal the Davis-Bacon Act because its provisions are likely to be important to the public partner in lowering project costs).

²⁴⁶ See *supra* notes 114-16 and accompanying text.

²⁴⁷ See *supra* note 132 and accompanying text.

²⁴⁸ See *supra* note 132 and accompanying text.

C. *Preserving the Highway Beautification Act and PPPs*

Because the intent of the HBA was preserving aesthetic value, it also deserves consideration before changes are made to regulations.²⁴⁹ Additionally, many states have legislation to improve the view from the roadside.²⁵⁰ While these programs have an important value to most travelers, they are also a potential encumbrance to PPPs.²⁵¹ Commercialization of the right-of-way is another way for private investors to realize a return on their investments.²⁵² With loosened restrictions on the number of billboards permitted and on what types of businesses may operate near the highway, the private partner will be able to profit from the highway project.²⁵³ Although important, changes to beautification statutes are unlike changes to environmental regulations because these beautification law changes may not cause substantial, permanent harm.²⁵⁴ Consequently, these changes provide less long-term risk to the physical landscape.²⁵⁵

D. *Cooperation between Federal and State Laws*

Federal laws and regulations, along with state legislation, should work in conjunction to promote the right kind of privatization. A balance must be made to accomplish the private partner's profit goals while retaining the social programs of the public partner.²⁵⁶ Particularly, when using state legislation to enable PPP projects, a practical scheme should be implemented to ensure that vital ideals are honored.²⁵⁷ Through an examination of four key elements of state legislation, as set forth by the USDOT, a "best approach" for states emerges.²⁵⁸

²⁴⁹ See *supra* notes 93-96 and accompanying text.

²⁵⁰ See *supra* note 136 and accompanying text.

²⁵¹ See *supra* notes 133-41 and accompanying text.

²⁵² See *supra* notes 133-41 and accompanying text.

²⁵³ See *supra* notes 91-92 and accompanying text.

²⁵⁴ See *supra* note 96.

²⁵⁵ See *supra* notes 98-103 and accompanying text; *supra* notes 137-39 and accompanying text.

²⁵⁶ REPORT TO CONGRESS ON PPPs, *supra* note 41, at 6 ("Using qualification-based selection and performance-based contracting, PPPs integrate risk sharing, streamline project development, engineering, and construction, and preserve the integrity of the NEPA process, to result in significant schedule and cost advantages over traditional infrastructure development processes.").

²⁵⁷ Sauer, *supra* note 140, at 37 (noting that environmental values are not quantifiable like economic values).

²⁵⁸ See generally Hedlund & Chase, *supra* note 94.

IV. CONTRIBUTION

As more and more states contemplate enabling legislation for PPPs, it is important to focus on the long-term implications for citizens. According to federal transportation officials, there are several key points that should be addressed in enabling legislation.²⁵⁹ Four of these elements are especially important in light of USDOT recommendations, because of the enduring impact the legislation will have on PPP project delivery in states.²⁶⁰ Even though each of these elements has the purpose of promoting PPPs, they may also be used to protect valuable resources and policy measures because of their implications on public participation.²⁶¹ Accordingly, a new approach for each element to be included in enabling legislation should provide a means of practical application to PPPs with the goal of balancing the needs of both partners.²⁶²

This Note suggests that the four key elements to be addressed in state PPP enabling legislation are:

- whether the enabling legislation allows unsolicited bids by contractors;²⁶³
- whether prior legislative approval of projects is needed;²⁶⁴
- whether the public agency may hire its own consultants;²⁶⁵ and
- whether the enabling legislation will protect the confidentiality of PPP proposals and pre-contract negotiations.²⁶⁶

A. *Whether the Legislation Allows Unsolicited Bids by Contractors*

Although the USDOT recommends allowance of unsolicited bids, this is contrary to the underlying reasons for the bidding process.²⁶⁷ By

²⁵⁹ See *supra* Part II.C.2.

²⁶⁰ See *supra* notes 110-12 and accompanying text.

²⁶¹ See *supra* notes 28-35 and accompanying text; *supra* note 67 and accompanying text.

²⁶² See *infra* Parts IV.A-D.

²⁶³ See *infra* Part IV.A.

²⁶⁴ See *infra* Part IV.B.

²⁶⁵ See *infra* Part IV.C.

²⁶⁶ See *infra* Part IV.D.

²⁶⁷ See *supra* note 11. The importance of this element is that “[s]olicited proposals enable the responsible public entity to communicate its transportation project priorities. Unsolicited proposals, by contrast, enable the private sector to propose projects that the public entity might not otherwise have considered.” Hedlund & Smith, *supra* note 94, at 1.

allowing the private sector to enter an unsolicited bid, many projects may become potential PPPs which would otherwise not be considered.²⁶⁸ Additionally, many would argue that an unsolicited bid has an appearance of impropriety and invites misconduct.²⁶⁹ On the other hand, solicited bids protect contractors and the public from these concerns.²⁷⁰ The reason for solicited bids is to provide a fair playing field for all contractors and to provide notice of a project, specifications, and costs through an estimate.²⁷¹ Reconciling the solicited versus unsolicited debate, the USDOT proposes that unsolicited bids may be accepted when certain criteria are satisfied.²⁷² However, there is no need to compromise with broad statutory language allowing solicited bids and inviting lawsuits from contractors left out of the bidding process.²⁷³ Rather, the traditional approach of solely accepting solicited bids is in accordance with public expectations and fairness to all contractors, both local and global.²⁷⁴ In this way, the public will know in advance what the proposed impacts will be for their community.²⁷⁵ At the same time, all contractors may provide bids on projects that are accepted by the public partner for a PPP construction or lease.²⁷⁶ For this reason, unsolicited proposals should not be included in state enabling legislation.

B. Whether Prior Legislative Approval of Projects is Needed

Consistent with USDOT recommendations, prior legislative approval should not be required for PPP projects.²⁷⁷ Lobbying and waiting for legislative approval on a PPP project may be seen as a hindrance to the private investor.²⁷⁸ Furthermore, launching a public

²⁶⁸ See *supra* note 11.

²⁶⁹ See Mark Brown, *Chicago's Wards Still Land of Opportunity for Corruption*, CHICAGO-SUN TIMES, Jan. 9, 2007 (quoting Alderman Arenda Troutman from a secretly recorded conversation, "Well, the thing is, most aldermen, most politicians are ho's." She also allegedly accepted a bribe from a person acting as a land developer in Chicago).

²⁷⁰ See *supra* note 11 and accompanying text.

²⁷¹ See *supra* Part III.

²⁷² Hedlund & Smith, *supra* note 94, at 1 (providing a sample provision to include, "unsolicited proposals will also be accepted provided that they satisfy the criteria outlined in accordance with this chapter").

²⁷³ For example, LA. REV. STAT. ANN. § 48:2084B (West Supp. 2006) allows a private entity to submit an unsolicited proposal after receiving approval from the authority.

²⁷⁴ See *supra* note 78.

²⁷⁵ See *supra* note 72 and accompanying text.

²⁷⁶ See *supra* note 11.

²⁷⁷ Hedlund & Smith, *supra* note 94, at 4. The importance of this element is that "[p]rivate entities are less likely to be willing to incur significant proposal development costs due to the added uncertainty of whether legislative approval will thereafter be obtained." *Id.*

²⁷⁸ See *supra* note 43.

relations campaign in support of a project does not necessarily increase public involvement and may actually work to misinform many individuals.²⁷⁹ The NEPA process already works because of substantial public input, and, therefore, there is little need for legislators to speak for these same individuals.²⁸⁰ Even in states that require legislative approval, the private investor may simply wait to become involved until lawmakers endorse a project, much like waiting for the approval of NEPA documents.²⁸¹ On the other hand, the benefit of legislative approval is political accountability through voting.²⁸² In sum, adequate measures for project approval and review are in place through a lengthy NEPA process, and legislative approval is superfluous to a practical outcome for stakeholders. Therefore, a provision requiring legislative approval is not warranted.

C. *Whether the Public Agency May Hire its Own Consultants*

Encouraging a public agency to hire its own consultants is another key element that supports privatization within privatization.²⁸³ In this way, further reliance on the private sector for project delivery is manifested in the legislation for PPPs.²⁸⁴ This critically impacts the labor policies of many states and is often the reason for lawsuits against privatization.²⁸⁵ Although many transportation agencies currently hire outside engineers, attorneys, and specialists, there is little need to promote further shifts away from public sector employees.²⁸⁶ A better option would be proper training in management and ethics to provide a workforce better equipped to oversee the private partner.²⁸⁷ Thus, there

²⁷⁹ JOHN STAUBER & SHELDON RAMPTON, *TOXIC SLUDGE IS GOOD FOR YOU* 95 (1995) (illustrating the powerful public relations campaign mounted against health reform by the insurance and drug industries). *See generally* Mandelker & Eccleston, *supra* note 117.

²⁸⁰ *See supra* Part II.B.2.

²⁸¹ Theodore Kim, *Lawmaker Will Hold Talks about Toll Road Bypass*, INDIANAPOLIS STAR, Jan. 8, 2007. “[Indiana Governor] Daniels wants a private company to pay for, build and operate the 75-mile project. . . . The plan, which requires legislative approval, was expected to begin in the House, which is required to take up revenue-raising bills before the Senate does.” *Id.*

²⁸² Mimi Yahn, *Democracy, Drowning in New Orleans, Too*, PITTSBURGH-POST GAZETTE, Sept. 3, 2006, at H1 (commenting on the accountability of those politicians involved in the post-Katrina rebuilding of New Orleans).

²⁸³ Hedlund & Smith, *supra* note 94, at 7. The importance of this element is that “[i]t also represents one good indicator for the private sector that the responsible public entity intends to dedicate the human and financial resources that are required to successfully deliver a PPP project in a timely manner.” *Id.*

²⁸⁴ *See supra* notes 148-55 and accompanying text.

²⁸⁵ *See supra* Part II.B.3 (discussing litigation arising out of privatization).

²⁸⁶ *See supra* notes 112-13 and accompanying text.

²⁸⁷ *See generally* Kussy, *supra* note 89.

should not be additional laws encouraging consultants for PPPs because they are not necessary in most states.²⁸⁸

D. Whether the Legislation Will Protect the Confidentiality of PPP Proposals and Pre-contract Negotiations

Finally, allowing confidentiality of PPP proposals and negotiations directly conflicts with the public's right to have access to information about a project.²⁸⁹ The reasoning behind non-public disclosure of a potential PPP is to protect the interests of the private partner.²⁹⁰ This is especially true when unsolicited bids are accepted by the state.²⁹¹ Knowledge about a project allows stakeholders to determine the potential impact of the project on the environment, commercialization, and labor policies that will be promoted through the project.²⁹² For these reasons, disclosure of government records through the Freedom of Information Act ("FOIA"), and state "Sunshine Laws," should allow citizens access to project information for research.²⁹³ However, there are many exceptions to these laws that already protect sensitive information from reaching the public.²⁹⁴ In order to reconcile the public's rights and the private partner's interests, the sample provision for this legislation provides that procurement information will be disclosed and the private partner must submit reasons for requesting confidentiality.²⁹⁵ However, public records should be open and available to citizens in order for communities to involve themselves in project development early.²⁹⁶ Earlier involvement allows for greater control over the ultimate outcome

²⁸⁸ *Supra* notes 111-13 and accompanying text.

²⁸⁹ *See supra* notes 28-35 and accompanying text. The importance of this element is that: These provisions require a delicate balancing between competing considerations. On the one hand, disclosure of proposed projects is necessary for them to gain public legitimacy. On the other hand, the private sector will be unwilling to participate if certain information about them and their business secrets must be disclosed.

Hedlund & Smith, *supra* note 94, at 10.

²⁹⁰ *See supra* Part III.

²⁹¹ *See supra* Part III; *supra* notes 216-20 and accompanying text.

²⁹² *See supra* notes 69-72.

²⁹³ *See supra* note 69.

²⁹⁴ *See supra* note 69.

²⁹⁵ Hedlund & Smith, *supra* note 94, at 10. The importance of this element is that: These provisions require a delicate balancing between competing considerations. On the one hand, disclosure of proposed projects is necessary for them to gain public legitimacy. On the other hand, the private sector will be unwilling to participate if certain information about them and their business secrets must be disclosed.

Id.

²⁹⁶ *See supra* notes 55-62 and accompanying text.

of the project.²⁹⁷ Therefore, overly protective confidentiality measures should not be included in state legislation.

In sum, several key elements identified by the USDOT seemingly promote PPP project development at the cost of public information and interests.²⁹⁸ States must carefully exclude overly protective measures for the private investor in PPP enabling legislation and protect the long term rights of its citizens. Thus, the hidden benefits of a PPP project, meaning public policy measures and environmental protections, are preserved in subsequent years.²⁹⁹

V. CONCLUSION

Anyone who has witnessed bulldozers, backhoes, and endless trucks on her street can tell you that construction is disruptive. But construction often provides improved safety and shorter commutes with less congestion, reminding you of the ultimate American obsession, driving down the highway. The price of a toll on a PPP seems like a small price to pay for this freedom.

From the need for construction and the limited availability of funds to build these projects, PPPs have entered the arena to vie for money through tolls or taxes. Although the services relied on from a public agency may have been sufficient in the past, faster completion of road construction, at a lower economic cost, is more likely with PPP financing. However, away from the dust and noise, there are many hidden benefits to the traditional method of project delivery through the local government agency. For example, important environmental studies and protection, labor policies providing good jobs, and a limited number of billboards to count on a family trip are goals of traditional projects. With PPPs, will individuals be willing to relinquish these values? Perhaps if a state adopts appropriate enabling legislation based on a balancing of these values, these aspects of a project can be retained.

PPPs are a significant aspect of future transportation infrastructure delivery in the United States. As a result, it is important to implement them in a way that does not discard many decades of public policy in transportation. With the proper approach to legislation, consideration of the size of the project, conditions under which it is proposed,

²⁹⁷ See *supra* note 69.

²⁹⁸ See generally Hedlund & Smith, *supra* note 94.

²⁹⁹ See *supra* notes 59-60 and accompanying text.

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environmental issues, and potential labor resources, these important public concerns may be preserved.

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To Mateo: Yes, there's gas in the car.