

Date of Hearing: April 4, 2016

ASSEMBLY COMMITTEE ON TRANSPORTATION

Jim Frazier, Chair

AB 2034 (Salas) – As Amended March 17, 2016

SUBJECT: Department of Transportation: environmental review process: federal program

SUMMARY: Deletes the January 1, 2017, sunset for the California Department of Transportation (Caltrans) to waive its 11th Amendment right to sovereign immunity from lawsuits brought in federal court so that Caltrans can continue, indefinitely, to assume the role of the U.S. Department of Transportation (U.S. DOT) for National Environmental Policy Act (NEPA) decision making.

EXISTING LAW:

- 1) Specifies that Caltrans has full possession and control of state highways.
- 2) Establishes the NEPA Assignment program, under federal law, wherein states may assume federal responsibilities for NEPA actions as long as the states also assume associated risks, including responding to citizen lawsuits filed in federal court.
- 3) Authorizes Caltrans, until January 1, 2017, to waive the state's 11th Amendment sovereign immunity rights and to consent to the jurisdiction of the federal court when sued by any person seeking to enforce rights pursuant to the NEPA delegation program.
- 4) Requires Caltrans to submit a report to the Legislature, on or before January 1, 2016, containing, among other things, a cost benefit analysis with regard to its participation in the NEPA Assignment program.

FISCAL EFFECT: Unknown

COMMENTS: According to the author, AB 2034 will allow Caltrans to continue indefinitely the NEPA Assignment program thereby allowing for the continued expediting of environmental review of critical transportation projects. By allowing projects to be completed sooner than would otherwise be the case, the author believes that NEPA Assignment will create circumstances by which transportation projects can be delivered more quickly to the traveling public resulting in job creation as well as transportation system improvements.

In the 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) established a Surface Transportation Project Delivery Pilot Program (later called the NEPA Assignment). This pilot program designated California as one of five states eligible to participate in a multi-year program that delegates responsibilities of United States Department of Transportation (U.S. DOT) and the U.S. Federal Highway Administration (FHWA) under NEPA to the states. These responsibilities subjected states to the same procedural and substantive requirements as if they were carried out by U.S. DOT. The delegation of this authority to the state made Caltrans the lead agency for environmental reviews for projects subject to NEPA. To participate in NEPA Assignment, participating states were required to accept the financial costs associated with the delegated authority, as well as full

liability for lawsuits filed under NEPA in federal court. Therefore, in order to participate, participating states were required to obtain a limited waiver of their 11th Amendment sovereign immunity thereby allowing them to be sued in federal court and providing them the ability to defend against claims that may be brought against the NEPA document.

In 2006, the Legislature passed AB 1039 (Núñez), Chapter 31, Statutes of 2006, which, among other things, granted the necessary waiver of sovereign immunity to Caltrans until January 1, 2009. With the waiver in place, Caltrans entered into a memorandum of understanding with FHWA to participate in NEPA Assignment effective July 1, 2007. In addition to granting the waiver of sovereign immunity, AB 1039 also required that Caltrans report to the Legislature with information regarding the costs and benefits the state's participation in the program.

In reports provided to the Legislature pursuant to AB 1039, as well as subsequent legislation, Caltrans has reported significant reductions in processing times for NEPA documents and, as a result, the Legislature has twice extended the limited waiver of sovereign immunity first with the passage of AB 2650 (Carter), Chapter 248, Statutes of 2008, and again with the passage of SB 892 (Carter), Chapter 482, Statutes of 2011. Each of these extensions continued Caltrans' reporting requirement, with the last required report submitted to the Legislature on January 1, 2016.

To date, NEPA Assignment has apparently been successful in reducing the amount of time for reviews and approvals of NEPA documents and also resulted in streamlining the environmental review process for joint NEPA/CEQA documents. For example, since undertaking NEPA Assignment, Caltrans reports a 20% reduction in the time to complete Final Environmental Assessments (EAs) and a 72% reduction in the time to complete Final Environmental Impact Studies (EISs).

In addition to reporting to the Legislature, Caltrans is also required to report to FHWA pursuant to NEPA Assignment responsibilities. Caltrans data reported to both the Legislature and FHWA shows that NEPA Assignment has been a success with median time savings of 10.7 months in approving draft EAs, 11.5 months for final EAs, 22.9 months for draft EISs, and 130.8 months for final EISs.

When AB 1039 first passed, providing Caltrans with the ability to participate in NEPA Assignment, the Legislature added a sunset provision to the limited waiver of sovereign immunity so that the program could be discontinued in the event that Caltrans' involvement in the program proved costly. To date, however, Caltrans' has been involved in a seven minor NEPA lawsuits and has expended minimal time, comparatively, addressing these lawsuits. With respect to cost and time savings achieved by NEPA Assignment, the benefits clearly outweighed by the costs.

With regard to reporting, Caltrans has continued responsibility to report to U.S. DOT with regard to the program along with ongoing FHWA monitoring requirement. Caltrans provides the results of this reporting on its Internet Web site so all the documentation with regard to the program continues to be accessible, making the need for ongoing reporting to the Legislature unnecessary.

Previous legislation: SB 892 (Carter), Chapter 482, Statutes of 2011, provided for an extension of Caltrans' NEPA delegation authority by extending a waiver of sovereign immunity.

AB 2650 (Carter), Chapter 248, Statutes of 2008, extended the state's existing limited waiver of its 11th Amendment sovereign immunity from citizens' lawsuits, thereby enabling Caltrans to continue its assumption of NEPA responsibilities under an ongoing pilot program.

AB 1039 (Núñez), Chapter 31, Statutes of 2006, was part of a package of bills placing several infrastructure-related bond authorizations on the November 7, 2006, statewide ballot that contained other environmental streamlining provisions and allowed Caltrans to waive the state's 11th Amendment sovereign immunity from lawsuits as a prerequisite for taking on the federal responsibilities.

REGISTERED SUPPORT / OPPOSITION:**Support**

Automobile Club of Southern California
California Transportation Commission

Opposition

None on file

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