

Date of Hearing: January 30, 2017

ASSEMBLY COMMITTEE ON TRANSPORTATION

Jim Frazier, Chair

AB 28 (Frazier) – As Introduced December 5, 2016

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

**SUMMARY:** Re-enacts the California Department of Transportation's (Caltrans') authority to waive its 11th Amendment right to sovereign immunity from lawsuits brought in federal court so that it can continue indefinitely to assume the role of the United States 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) Authorized 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) Required 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:** 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 U.S. DOT and the United States Federal Highway Administration (FHWA) under NEPA to the states. States participating in the program would be subject to the same procedural and substantive requirements as if the NEPA requirement 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, 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, 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. The purpose of NEPA Assignment was to streamline the environmental review process and get projects delivered more quickly to the traveling public.

In 2006, the Legislature passed AB 1039 (Núñez), Chapter 31, Statutes of 2006, which, among other things, granted the necessary limited waiver of sovereign immunity to Caltrans until January 1, 2009. AB 1039 also required Caltrans to report to the Legislature with information regarding the cost and benefit to the state. With the waiver in place, Caltrans spent nearly two years working with FHWA to craft a memorandum of understanding (MOU) to participate in NEPA Assignment. The MOU was completed and Caltrans undertook NEPA decision making on July 1, 2007.

According to Caltrans, NEPA Assignment has been shown to significantly reduce environmental document processing times and to greatly accelerate transportation project delivery. For example, Caltrans reports that under NEPA Assignment, there has been a median time savings of 10.7 months in approving draft Environmental Assessment (EA) documents and 11.5 months for final EAs. It also reports a nearly 23-month time savings in finalizing draft Environmental Impact Statements (EISs).

Because the NEPA Assignment has proven to successfully streamline the environmental process and has been shown to be cost effective, the Legislature has twice extended Caltrans' 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. With each of these extensions, Caltrans was required to continue reporting to the Legislature while also reporting to U.S. DOT per the MOU. Caltrans' most recent report to the Legislature was submitted in January, 2016.

SB 892 extended the sunset for the limited waiver of sovereign immunity to January 1, 2017. Last year, Caltrans sponsored AB 2034 (Salas of 2016) to delete the sunset for the limited waiver of sovereign immunity (making Caltrans' authority permanent) and eliminate further legislative reporting. AB 2034 passed on a unanimous, bipartisan vote from both the Assembly Transportation and Appropriations Committees as well as from the Assembly Floor in the spring of 2016. AB 2034, however, was held in the Senate Transportation and Housing Committee because similar language was included both SBX1 1 and ABX1 26 of the 2015-16 First Extraordinary Session.

Unfortunately, neither transportation funding bill was enacted and the authorization for the limited waiver of sovereign immunity sunset on January 1, 2017. As a result, Caltrans is no longer authorized to approve NEPA documents or consult directly with federal resource agencies for permits and the responsibility for approval of NEPA documents shifted back to FHWA. Because FHWA has downsized their environmental program in the wake of the NEPA Assignment, staff is no longer available to take on this workload. Consequently, it is expected that there will be significant delays in reviewing and approving NEPA documents for state and local transportation projects. These delays will ultimately affect project completion and it is expected that many new transportation projects will not begin construction on schedule.

To help mitigate this crisis, Caltrans began working with the U.S. DOT in the fall of 2016 to revive a defunct agreement between U.S. DOT and Caltrans that authorized Caltrans to review and approve lower level NEPA documents such as Categorical Exclusions (CEs). The revival of this agreement will allow Caltrans to continue approving lower level NEPA documents (such as CE's) beyond the January 1, 2017, sunset. Higher level NEPA documents (EAs and EISs), however, cannot be approved by Caltrans unless the limited waiver of sovereign immunity is re-

enacted. Until such time, FHWA is required to approve all NEPA documents and project delivery delays are expected.

Because the original NEPA Assignment MOU did not address a possible lapse of the limited waiver of sovereign immunity, it was unclear how the sunset of the authority would affect the program. Using a strict interpretation of the MOU, Caltrans would be required to resubmit their application for NEPA Assignment and redraft and sign a new MOU - a process that would take many months (or possibly even several years) to accomplish. To avoid this, Caltrans and U.S. DOT entered into a separate MOU (dated December 23, 2016) to establish a process by which Caltrans can reinitiate the existing NEPA Assignment MOU after the limited waiver of sovereign immunity is re-enacted. The December 2016 MOU provides Caltrans with a 90-day grace period in which to establish the limited waiver of sovereign immunity. If Caltrans re-enacts the limited waiver by March 31, 2017, they can begin approving NEPA documents as soon as FHWA confirms that the limited waiver is in place. If the limited waiver is not in place by March 31, 2017, then Caltrans will be required to reapply for NEPA Assignment. Caltrans estimates that completing the application process and reinitiating the MOU would take 6 months to 2 years and require an estimated 3-6 personnel years of staff time to complete.

In an effort to secure the limited waiver of sovereign immunity before March 31, 2017, the author has introduced AB 28, with an urgency clause, which would re-enact Caltrans' limited waiver of sovereign immunity so that it can continue to participate in the NEPA Assignment program. Furthermore, because the program has been successfully in place for over ten years, AB 28 does not include reporting requirements or a sunset date, both of which accompanied the earlier authority granted for the original pilot program. It is important to note, however, that Caltrans will be required to continue reporting to FHWA on the effectiveness of the NEPA Assignment program per the MOU and that these reports will be available to the Legislature for review.

*Previous legislation:* ABX1 26 (Frazier) of the 2015-16 First Extraordinary Session, would have, among other things, provided Caltrans with a limited waiver of sovereign immunity from lawsuits brought in federal court for the purposes of participation in the NEPA Assignment Program. ABX1 1 was referred to this committee and was returned to the Chief Clerk without being heard.

SBX1 1 (Beall) of the 2015-16 First Extraordinary Session, would have, among other things, provided Caltrans with a limited waiver of sovereign immunity from lawsuits brought in federal court for the purposes of participation in the NEPA Assignment Program. SBX1 1 was referred to the Senate Appropriations Committee and was returned to the Secretary of the Senate without being heard.

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**

Self-Help Counties Coalition (Sponsor)  
Alameda County Transportation Commission  
American Council of Engineering Companies  
Association of Environmental Professionals  
California Association of Councils of Government  
California State Association of Counties  
California Transportation Commission  
City of Elk Grove  
City of La Verne  
City/County Association of Governments of San Mateo County  
Coachella Valley Association of Governments  
Fresno Council of Governments  
Imperial County Transportation Commission  
Los Angeles County Metropolitan Transportation Authority  
Marin County Board of Supervisors  
Merced County Association of Governments  
Metropolitan Transportation Commission  
Mobility 21  
Monterey County  
Orange County Transportation Authority  
Professional Engineers in California Government  
Regional Climate Protection Authority  
Riverside County Transportation Commission  
San Bernardino Associated Governments  
San Diego County Board of Supervisors  
San Francisco County Transportation Authority  
San Joaquin Valley Regional Planning Agencies  
Santa Barbara County Association of Governments  
Sonoma County Transportation Authority  
Transportation Agency for Monterey County  
Transportation California  
Tulare County Association of Governments  
Ventura County Transportation Commission

**Opposition**

None on file

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