

COMMENTS:

- 1) *Purpose.* The author states that over the past 10 years, Caltrans' participation in the NEPA Assignment Program has streamlined the environmental process for both state and local transportation projects without compromising compliance with environmental laws and regulations. Because of this program, state and local transportation projects have been delivered earlier, resulting in substantial cost savings. If the limited waiver of sovereign immunity is not renewed, Caltrans and local transportation entities will be unable to realize these benefits.

- 2) *What is the NEPA Assignment Program?* The federal Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005 established a Surface Transportation Delivery Pilot Program, later known as the NEPA Assignment. This pilot program designated California as one of five states eligible to participate in a multiyear program that delegates responsibilities of US DOT and the US 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 US 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 the NEPA Assignment Program, 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, a state had to obtain a limited waiver of its 11th Amendment sovereign immunity, thereby allowing it to be sued in federal court and providing it the ability to defend against claims that might be brought against the NEPA document.

- 3) *California's NEPA Assignment.* In 2006, as part of a larger infrastructure package, the Legislature passed AB 1039 (see "Related Legislation" below) 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 (MOU) with FHWA to participate in the NEPA Assignment Program effective July 1, 2007. In addition to granting the waiver of sovereign immunity, AB 1039 required Caltrans to report to the Legislature regarding the costs and benefits of the state's participation in the program. Subsequent legislation extended the waiver until 2017. Although several bills were introduced last year to extend the program, they were held pending the larger transportation funding discussion and ultimately none of these bills made it to the Governor's desk.

- 4) *Who's handling NEPA documents now?* Because Caltrans' statutory authorization for the limited waiver of sovereign immunity sunsetted on January 1, 2017, it is no longer authorized to approve NEPA documents or to consult directly with federal resource agencies for permits. The responsibility for approval of NEPA documents has shifted back to FHWA. Because FHWA downsized its environmental program in the wake of the NEPA Assignment, it no longer has the staff available to take on this workload. Consequently, Caltrans expects significant delays in obtaining review and approval of NEPA documents for state and local transportation projects. These delays will ultimately affect project completion and will likely delay the start of construction on many new transportation projects.

To mitigate this situation, Caltrans began working with US DOT in the fall of 2016 to revive a defunct agreement between US DOT and Caltrans that authorized Caltrans to review and approve lower-level NEPA documents such as Categorical Exemptions. The revival of this agreement allows Caltrans to continue approving lower-level NEPA documents despite the sunset of the NEPA Assignment. Higher-level NEPA documents, however, must be approved by FHWA, unless and until Caltrans' limited waiver of sovereign immunity is re-enacted.

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 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 took two years when the program was originally established. The December 2016 MOU provides Caltrans with a 90-day grace period in which to re-enact the authority. If the authority is re-established by March 31, 2017, Caltrans can begin approving NEPA documents as soon as FHWA confirms that the limited waiver is in place. If the waiver is not in place by March 31, however, Caltrans must reapply for NEPA Assignment.

- 5) *Sunset of NEPA Assignment will impact project delivery.* In reports provided to the Legislature pursuant to AB 1039 and subsequent legislation, Caltrans reported significant reductions in processing times for NEPA documents. Caltrans reports that under NEPA Assignment, there has been a median time savings of 10.7 months in approving draft Environmental Assessment documents (EAs) and 11.5 months for final EAs. Caltrans also reports a nearly 23-month time savings in finalizing draft Environmental Impact Statements (EISs). If Caltrans is unable to re-establish the waiver, it estimates a project

impact of approximately \$11 billion, affecting 314 state and local projects across the state.

- 6) *NEPA is not a substitute for CEQA.* The California Environmental Quality Act (CEQA) requires state and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible. NEPA is essentially the federal version of CEQA, though it is generally not as stringent as CEQA. Caltrans and other agencies that undertake infrastructure projects must follow the requirements of both CEQA and NEPA; Caltrans' assumption of the NEPA delegation does not exempt it from CEQA requirements.
- 7) *Reporting requirements.* In recognition of the success of the NEPA Assignment Program, the Legislature has twice extended the limited waiver of sovereign immunity. These extensions have included requirements for Caltrans to report to the Legislature on the program. In addition, Caltrans has successfully completed five years of FHWA audits. The author states that because the program has been successfully in place for more than 10 years, this bill does not include a reporting requirement. Caltrans will, however, be required to continue reporting to FHWA on the effectiveness of the NEPA Assignment Program pursuant to the MOU; these reports will be available to the Legislature for review.
- 8) *Amendments.* The current version of this bill provides Caltrans with a permanent limited waiver of sovereign immunity. However, concerns have been expressed about changes that may occur to the NEPA Assignment Program, and to NEPA itself, given the uncertainty surrounding the new presidential administration. **Therefore, the author will accept amendments to place a two-year sunset on the waiver, extending it to January 1, 2019 rather than making it permanent.**

RELATED LEGISLATION:

SB 1 (Beall, 2017) — is a transportation funding bill that, among other things, permanently provides Caltrans with a limited waiver of sovereign immunity from lawsuits brought in federal court for the purposes of participation in the NEPA Assignment Program. *This bill is set to be heard in the Senate committee on Governance and Finance on 3/1/17.*

AB 1 (Frazier, 2016) — is also a transportation funding bill that, among other things, permanently provides Caltrans with a limited waiver of sovereign immunity

from lawsuits brought in federal court for the purposes of participation in the NEPA Assignment Program. *This bill is in the Assembly Natural Resources Committee.*

SBX1 1 (Beall, 2016) — was a transportation funding bill that, among other things, would have permanently 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. *This bill died in the 1st Extraordinary Session Committee on Appropriations.*

ABX1 26 (Frazier, 2016) — was also a transportation funding bill that, among other things, would have permanently 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. *This bill died in the 1st Extraordinary Session Committee on Transportation and Infrastructure Development.*

AB 2034 (Salas, 2016) — would have permanently 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. *This bill died in the Senate Transportation and Housing Committee.*

AB 892 (Carter, Chapter 482, Statutes of 2011) — extended the sunset date from January 1, 2012, to January 1, 2017, on Caltrans' limited waiver of sovereign immunity from lawsuits brought in federal court for the purposes of participation in the NEPA Assignment Program.

AB 2650 (Carter, Chapter 248, Statutes of 2008) — extended the sunset date from January 1, 2009, to January 1, 2012, on Caltrans' limited waiver of sovereign immunity from lawsuits brought in federal court for the purposes of participation in the NEPA Assignment Program.

AB 1039 (Núñez, Chapter 31, Statutes of 2006) — among other things, provided Caltrans a limited waiver of sovereign immunity from lawsuits brought in federal court for the purposes of participation in the NEPA Assignment Program, until January 1, 2009.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

POSITIONS: (Communicated to the committee before noon on Wednesday, February 22, 2017.)

SUPPORT:

Self Help Counties Coalition (Sponsor)
Alameda County Transportation Commission
American Council of Engineering Companies, California
American Society of Civil Engineers
Association of Environmental Professionals
CH2MHill
California Association of Councils of Governments
California Department of Transportation
California State Association of Counties
California State Council of Laborers
California Transportation Commission
City of Bakersfield
City of Elk Grove
City of La Verne
City of San Diego
City/County Association of Governments of San Mateo County
Coachella Valley Association of Governments
Fresno Council of Governments
Fresno County Transportation Authority
Imperial County Transportation Commission
Kern Council of Governments
Los Angeles County Metropolitan Transportation Authority
Marin County Board of Supervisors
Merced County Association of Governments
Metropolitan Transportation Commission
Mobility 21
Monterey County
Monterey County Board of Supervisors
Orange County Business Council
Orange County Transportation Authority
Professional Engineers in California Government
Riverside County Transportation Commission
San Bernardino Associated Governments
San Diego Association of Governments
San Diego County Board of Supervisors
San Francisco County Transportation Authority
San Joaquin Valley Regional Policy Council
Santa Barbara County
Santa Barbara County Association of Governments

Santa Clara County Board of Supervisors
Santa Clara Valley Transportation Authority
Society for California Archeology
Solano Transportation Authority
Sonoma County Transportation Authority
Transportation Agency for Monterey County
Transportation Authority of Marin
Transportation California
Transportation Corridor Agencies
Tulare County Association of Governments
Ventura County Transportation Commission

OPPOSITION:

1 individual

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