

NCHRP 25-25 Task 99 LESSONS LEARNED FROM STATE DOT NEPA ASSIGNMENT

White Paper/Final Report

Prepared for:

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Disclaimer

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Executive Summary

This white paper summarizes the activities conducted as part of NCHRP 25-25 Task 99: Lessons Learned from State DOT NEPA Assignment. Research activities included an online survey regarding National Environmental Policy Act (NEPA) assignment sent to all state departments of transportation (state DOTs), phone interviews conducted with each state DOT that would participate in the peer exchange, and a peer exchange that was held on November 10, 2015. These efforts captured lessons learned from state DOTs regarding NEPA assignment from both state DOT staff and Federal Highway Administration (FHWA) staff as well as the views from state DOTs regarding barriers to entering into NEPA assignment. The peer exchange allowed state DOTs that are entering or have entered into NEPA assignment to share experiences with state DOTs that are considering entering NEPA assignment. FHWA staff was also present at the peer exchange.

For those state DOTs not in NEPA assignment and not intending to pursue NEPA assignment, the key reasons behind their decision related to concerns with:

1. Sovereign immunity/liability/risk
2. Cost of program/assuring adequate financial resources
3. Audits/monitoring
4. Availability/capacity of staff
5. Other federal agency views regarding application/assignment
6. Application process length and difficulty
7. Quality assurance/quality control (QA/QC) and additional administrative requirements
8. Technical knowledge/training of staff

The lessons learned through the peer exchange process include ideas and best practices associated with the pre-application, application, and implementation processes of assuming NEPA assignment under 23 USC 326 and 23 USC 327. In addition, specific information was shared with regard to the primary reasons that state DOTs are not currently in NEPA assignment and not intending to pursue NEPA assignment. The following is a brief summary of the fundamental best practices associated with each of these concerns.

- Sovereign Immunity/Liability/Risk
 - Make sure that the state legislature understands that the waiver of sovereign immunity needed under NEPA assignment is *limited* to only those projects that fall under the NEPA assignment program.

- Educate state legislatures using a phased approach that starts with those legislators that are attorneys and who may be better able to understand sovereign immunity and waivers; then let those legislators educate their peers.
- Consider obtaining waiver of sovereign immunity legislation that authorizes participation under both 23 USC 326 and 23 USC 327 (regardless of whether one or both assignments are initially planned).
- Cost of Program/Assuring Adequate Financial Resources
 - Build on cost and time savings data from Caltrans and Ohio DOT in order to market and garner the necessary “start-up” resources.
 - Right-size the NEPA assignment to individual state circumstances. State DOTs do not have to take on all environmental responsibilities for all projects under NEPA assignment. There is flexibility for each state to tailor its scope of assignment based on its resources and expertise.
- Audits and Monitoring
 - Be proactive with the audits. Having FHWA do a review of the state DOT program before and immediately after NEPA assignment is effective in identifying any issues before project-level reviews occur. Consider conducting quarterly self-assessment reviews so that any issues are identified and addressed before an audit.
 - Work collaboratively with FHWA staff before, during, and after the audits so that expectations, findings, and corrective actions are well-vetted in order to minimize misunderstandings and ease apprehension.
- Availability/Capacity of Staff
 - Reallocate existing staff or consider splitting responsibilities for newly-hired staff. State DOTs currently in the program have minimized the need to hire new staff by reallocating existing staff to NEPA assignment activities or splitting time between NEPA assignment activities and other work (e.g., permitting).
 - Supplement staff with consultants. This can allow smaller DOTs that do not have all the staffing resources and subject matter expertise in-house to implement NEPA assignment. Even larger DOTs are using consultants to fill in staffing “gaps.” This includes using on-call contracts for legal services.
- Other Federal Agency Views Regarding Application/Assignment
 - Make contact with other federal agencies though the application and assignment process. It provides the ability to understand federal agency concerns as the state DOT moves forward in assuming FHWA responsibilities for the environmental review process.
- Application Process, Length, and Difficulty

- Use available resources. State DOTs considering entry into the program should review examples of approved applications/executed MOUs and tailor those to the needs of their state DOT programs.
- Keep the dialogue going between FHWA and state DOTs. As FHWA continues to review and approve NEPA assignments, the application process length and efficiency will continue to improve.
- QA/QC and Additional Administrative Requirements
 - Implement a QA/QC program focused on the documentation of environmental reviews and decisions. Having a program in place would not only help with audits and monitoring, it would also reduce liability and risk, as the project-level environmental reviews and decisions would be well-documented.
- Technical Knowledge/Training of Staff
 - Review the state DOT program and identify where staff should be added or consultants should be engaged, especially as it relates to subject matter expertise (technical knowledge).
 - Use the resources developed or updated for the application process (training manuals, guidance, and policies) to enhance technical knowledge and training of staff.

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1. Introduction

The purpose of this White Paper/Final Report is to document the benefits and challenges associated with National Environmental Policy Act (NEPA) assignment as drawn from a NEPA Assignment Peer Exchange held on November 10, 2015 in Washington DC. The NEPA Assignment Peer Exchange attendees included five of the eight members of the NCHRP 25-25 Task 99 technical working group, as well as representatives from four additional state departments of transportation (state DOTs). The technical working group consists of various state DOT officials and is tasked with helping to guide the research project. The peer exchange group constituted a mix of those state DOTs with experience in NEPA assignment, those applying for the first time, and those considering whether to apply for the program. Additional attendees included representatives from the Federal Highway Administration (FHWA) and the American Association of State Highway and Transportation Officials (AASHTO).

A summary of the peer exchange discussions is provided in Section 3.3 of this document. Preparation for the peer exchange consisted of a web-based survey of NEPA assignment key issues and concerns directed at state DOT environmental managers from all 50 states, and detailed interviews with nine state DOTs (see Section 2, “Peer Exchange Preparation”). The remainder of this introductory section provides a literature review, including background information on NEPA assignment terminology, the evolution of the NEPA assignment program through statute and regulations, the status of NEPA assignment by state, and published information regarding time/cost savings associated with NEPA assignment. This report is not guidance on NEPA assignment. The Federal Highway Administration (FHWA) is developing a NEPA assignment guidebook that is expected to be available in 2016.

1.1 Definitions and Terminology

For purposes of this report, the term “NEPA assignment” refers to a state DOT that has assumed FHWA’s responsibility for compliance with NEPA and other federal environmental laws addressed in the environmental review process under the “NEPA umbrella,” such as the Endangered Species Act, National Historic Preservation Act, Section 4(f) of the Department of Transportation Act, Clean Water Act etc. NEPA assignment is distinguishable from other streamlining initiatives such as Programmatic Agreements for Categorical Exclusions (CEs) [23 CFR 771.117(g)] where FHWA may enter a programmatic agreement with a state to allow a state DOT to make a NEPA CE approval on FHWA’s behalf under certain conditions specified in the agreement for CEs specifically listed in paragraphs (c) and (d) of 23 CFR 771.117. FHWA is still the responsible party and retains liability for the decisions. Under NEPA assignment, FHWA no longer has a project-level environmental decision-making role in the administration of the state DOT environmental program, but instead transitions to a program oversight role in ensuring federal requirements and commitments made by the state in the MOU are met through audits and/or monitoring.

This report uses the term “full assignment” to refer to assignment of all NEPA classes of action (categorical exclusion (CE), environmental assessment (EA) and environmental impact statements (EIS)

under 23 USC 327. The term “CE assignment” is used when discussing the assignment of categorical exclusions only pursuant to 23 USC 326.

The term “NEPA delegation” is not used in this report because “delegation” implies that FHWA is still ultimately responsible and liable for NEPA compliance. Under NEPA assignment, the state DOT is legally responsible for the decisions it makes, and has agreed to defend any claims of projects in federal court.

1.2 NEPA Assignment Program Background

1.2.1 Safe Accountable Flexible Efficient Transportation Equity Act-A Legacy for Users (SAFETEA-LU)

NEPA assignment originated in 2005 from the environmental streamlining measures enacted as part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Section 6004 created a CE assignment program and Section 6005 created a full NEPA assignment pilot program.

Section 6004 State Assumption of Responsibility for Categorical Exclusions

Under SAFETEA-LU Section 6004, a permanent program open to any state was created for assuming FHWA environmental responsibilities for project-level decision making (except government-to-government tribal consultation) for actions classified as categorical exclusions; this section was codified in 23 USC 326. Section 6004 is not limited to highway projects; a state could potentially request assignment of both highway and transit CE projects, although no state has been assigned responsibilities for transit projects. Under CE assignment, the state DOT becomes “solely responsible and solely liable” for complying with and carrying out the assigned environmental compliance responsibilities for CEs and is “deemed a federal agency” for purposes of complying with NEPA and other related environmental laws, regulations, and executive orders. The CE assignment program allows states to make project-level conformity decisions as required by the Clean Air Act Amendments for projects, which is a specific responsibility that cannot be assigned under the Section 6005 full assignment program (23 USC 327(2)(B)(iv)(II)). Section 6004 requires the state DOT and FHWA to enter into a memorandum of understanding (MOU) specifying the terms and conditions for CE assignment (including specific exceptions regarding types of projects or other responsibilities assigned). As discussed further in Section 1.4, “NEPA Assignment Status by State,” California, Alaska, and Utah are currently in the Section 6004 program. No application process is required to enter the CE assignment program, but an opportunity for public notice and comment is required. SAFETEA-LU did not require the promulgation of regulations for the CE assignment program; however, FHWA has prepared a Section 6004 questions and answers document¹ and a template MOU.² The template MOU was updated on September 30, 2013 to take into account MAP-21.

¹ http://www.fhwa.dot.gov/hep/hep_research/resources/categorical_exclusions/6004qa.cfm

² http://www.fhwa.dot.gov/hep/hep_research/resources/categorical_exclusions/

The CE assignment MOU may have a term not to exceed three years and is renewable. Before entering into the agreement, a state must first formally accept the jurisdiction of federal courts for the resolution of legal action related to the MOU and this typically requires action by the state legislature (i.e., limited waiver of sovereign immunity). FHWA is required to “monitor the compliance of the state” with the MOU and the provision of the state of financial resources to carry out the MOU. FHWA must consider the outcomes of the monitoring when considering renewal of the MOU. However, Section 6004 does not require formal audits for CE assignment, so the specific nature of the monitoring is left to FHWA to determine. The MOU is required to address procedures for termination if the state is not adequately carrying out the assigned responsibilities. The administrative requirements to obtain CE assignment are reduced in comparison to the requirements for obtaining full assignment for all classes of action as discussed below. For example, as previously mentioned, no formal application process is required to enter the CE program. After the state has waived its sovereign immunity thereby consenting to and accepting the jurisdiction of the federal courts for matters relating to the MOU, the signed MOU is sufficient for implementing the CE Assignment.

Section 6005 Surface Transportation Project Delivery Pilot Program

SAFETEA-LU Section 6005, termed the “Surface Transportation Project Delivery Pilot Program” allowed full NEPA assignment for one or more highway projects for up to five states (Alaska, California, Ohio, Oklahoma, and Texas). This section was codified in 23 USC 327. The term of the pilot program was six years and the overall intent was to test if project delivery efficiency gains could be obtained through NEPA assignment. As discussed further in Section 1.4, “NEPA Assignment Status by State,” California was the only state to enter the original SAFETEA-LU pilot program. Similar to the CE assignment program, the full assignment program would make a state “solely responsible and solely liable” for assigned projects, but such assigned projects could include EAs and EISs, as well as CEs. The state DOT becomes responsible for FHWA’s project-level NEPA and related environmental decision-making, but this does not affect the authority or responsibility of non-US Department of Transportation (USDOT) agencies. The state DOT coordinates directly with the non-USDOT federal agencies in the environmental review process.

Section 6005 requires a “written agreement,” which is in the form of an MOU, to establish the details of the responsibilities assigned to the state and those activities that remain the responsibility of FHWA. Transportation project-level conformity determinations, government-to-government consultation with federally-recognized tribes and FHWA responsibilities related to metropolitan and statewide transportation planning cannot be assigned under Section 6005.

Section 6005 required the promulgation of regulations on the implementation of the pilot program and specified certain minimum application requirements, including identification of the classes of projects to be assigned, verification of financial resources to carry out FHWA environmental responsibilities under the program, and evidence of solicitation of public comments on the application. FHWA is required to solicit the views of other federal agencies if the state is assuming a statute requiring consultation with non-USDOT federal agency. FHWA is required to determine whether the state has the “capability, including financial and personnel, to assume the responsibility.”

The written agreement under Section 6005 must be executed by the governor of the state or a top transportation official. Among other requirements, the state must accept the jurisdiction of the U.S. district courts for legal actions related to assigned responsibilities, and certify the state has the legal authority and financial resources to carry out the actions assumed and that the state's public records access law is comparable to the Freedom of Information Act (FOIA). Legal standards and requirements are governed by the requirements that would apply if FHWA had taken the action.

To ensure compliance with the written agreement, Section 6005 required semiannual audits during each of the first two years of state participation; and annual audits during the third and fourth years of state participation (for a total of six audits over a span of four years), and monitoring during the final year. The draft audit report is required to be provided to the public for review and comment and FHWA must consider public comments in finalizing the audit report within 60 days of the close of the comment period. FHWA is required to submit a report to congress on the implementation of the program.

1.2.2 Moving Ahead for Progress in the 21st Century (MAP-21)

The Moving Ahead for Progress in the 21st Century Act (MAP-21) was the surface transportation reauthorization enacted in 2012. MAP-21 modified the requirements for CE assignment (Section 1312) and made full NEPA assignment a permanent program open to all states (Section 1313).

MAP-21 Section 1312 adds a provision to CE assignment on “preservation of flexibility,” stating that state DOTs cannot be required “to forego project delivery methods that are otherwise permissible for highway projects” as a condition of CE assignment. Section 1312 also provides an option for a state DOT to initiate termination of CE assignment (with a minimum 90-day notice to USDOT) and clarifies that legal fees incurred by a state as a result of taking over FHWA's responsibility may use federal funds if those actions are eligible actions associated with the project.

In addition to making full NEPA assignment a permanent program open to all states as opposed to six-year pilot program, Section 1313:

- Allows a state DOT to be assigned federal environmental responsibilities for railroad, public transportation, or multimodal projects, in addition to highway projects. In a state that has assumed responsibility for transit projects, a federal transit funding recipient can request USDOT maintain responsibilities for one or more public transportation projects. To date, no states have utilized this provision to assume responsibility for transit, rail and multimodal projects.
- Includes the same “preservation of flexibility” measure as discussed for CE assignment under Section 1312 to ensure NEPA assignment does not preclude flexibilities, such as alternative project delivery methods.
- Clarifies that a state may use its federal transportation funding for legal fees incurred by a state as a result of taking over FHWA's responsibility if they are for eligible as actions related to project costs.

- With respect to the “written agreement” between the state and USDOT, Section 1313 adds a statement that states are required to provide to USDOT any information USDOT considers necessary to ensure that the state is adequately carrying out the responsibilities assigned to the state.
- The written agreement/MOU is required to have a term of not more than five years and be renewable.
- Semiannual audits are required for the first and second years of the written agreement. Annual audits are required for the third and fourth years of the written agreement. After the fourth year, FHWA review would occur by monitoring. USDOT is required to “monitor compliance by the state with the written agreement, including the provision by the state of financial resources to carry out the written agreement.”
- Similar to the CE assignment changes, a provision is added allowing a state to terminate participation in the program with a minimum 90-day notice.

1.3 Surface Transportation Project Delivery Program Application Requirements and Termination (23 CFR 773)

With the signing of MAP-21, the full NEPA assignment program is no longer considered a pilot program and is now open to all state DOTs upon successful application. The Surface Transportation Project Delivery Program is codified in 23 USC 327 and FHWA, Federal Transit Administration (FTA) and Federal Railroad Administration (FRA) have established joint regulations at 23 CFR 773 implementing the application procedures and requirements for the full NEPA assignment program. At the time of this report, the latest regulation became final on September 16, 2014, implementing the changes enacted under MAP-21. A future modification to the rule is possible to account for the changes to the program under the Fixing America’s Surface Transportation Act (FAST Act).

1.3.1 State Eligibility Requirements for Assignment

States are required to consent to the jurisdiction of federal courts (limited waiver of sovereign immunity), have state laws in effect that allow it to carry out the program responsibilities, and have laws in effect comparable to the federal Freedom of Information Act (FOIA) (including opportunity for court review of state decisions regarding the public availability of a requested document). Adequate financial and personnel resources are required. The regulation makes it clear that a state must obtain NEPA assignment for highway projects to obtain NEPA assignment for railroad or public transportation projects (e.g., it is not possible to assume railroad and public transportation projects only; assuming one or more highway projects is prerequisite).

1.3.2 Responsibilities Eligible for Assignment

Appendix A to 23 CFR 773 provides an example list of the laws, regulations and executive orders that may be assigned to a state DOT. The regulations also delineate responsibilities that must be maintained by FHWA and cannot be assigned to states, including transportation project-level conformity determinations, decisions that are not part of the environmental review process (e.g., engineering decisions, interstate access approvals, and safety approvals), USDOT NEPA responsibilities for operating administrations other than FHWA, FTA and FRA, projects crossing state borders, and projects at or crossing international borders.

1.3.3 Pre-Application Requirements

The regulation requires a coordination meeting between the state DOT and the applicable USDOT operating administration (e.g., FHWA for NEPA assignment for highway projects) prior to the state DOT soliciting public comment. The state is required to give public notice of its intent to participate in the program and solicit public comment by publishing the complete application in accordance with the appropriate state public notice laws.

A waiver of sovereign immunity is required to exclusive federal court jurisdiction related to the assigned responsibilities. The state must identify and complete the process required by applicable state laws for “consenting and accepting exclusive federal court jurisdiction with respect to compliance, discharge, and enforcement of any of the responsibilities being sought” (23 CFR 773.107(c)). The waiver is limited in the sense that it applies only to the assigned project-level environmental review responsibilities assumed by the state. The state must verify that it “has laws that are in effect that authorize the state to take actions necessary to carry out the responsibilities the state is seeking and a public records access law that is comparable to FOIA.” (23 CFR 773.107(d)).

1.3.4 Application Requirements, Renewal, and Termination

Requirements of the application include information on the projects or classes of projects assigned for which the state is requesting to assume federal environmental review responsibilities under NEPA, each federal environmental law, review, consultation, or other environmental responsibility to be assumed, and how it intends to carry out the responsibilities. The state must describe its current procedures for implementing the environmental review process, proposed changes to the environmental program in conjunction with NEPA assignment (such as additional training or staff), procedures for legal review of environmental documents, and verification of adequate personnel and financial resources. Special additional requirements and considerations apply to assuming transit, railroad and multi-modal projects.

The state’s application must be made publicly available within 30 days of its submittal to USDOT, and the state’s outreach efforts need to solicit views from other state agencies, tribal agencies, and other federal agencies. To assume FTA responsibilities, views of transit providers need to be solicited. The state is required to submit all comments received and provide responses/disposition of substantive comments.

After considering public comment on the application, the USDOT operating administration(s) can execute the MOU with the state DOT. The approved MOU and application must be posted on the state website.

The regulation provides procedures for amendments to the MOU and determining whether the nature of the amendment warrants additional opportunity for public comment. The regulation also covers the procedures for renewal of existing MOUs. The state DOT must notify USDOT of the intent to renew at least 12 months before the expiration of the MOU (MOUs have terms of up to five years). The renewal application package requirements are delineated and the package must be submitted at least 180 days before the expiration of the current MOU. Conditions under which a state may continue to operate under an expired MOU are provided. Finally, provisions for termination and an orderly transition of responsibility back to USDOT are provided for. To date, the termination procedures have not been utilized.

1.4 NEPA Assignment Status by State

Table 1 summarizes the status of states with, or in the process of obtaining, NEPA assignment under 23 USC 326 and/or 23 USC 327 at the time this report was prepared. California Department of Transportation (Caltrans) was the only state to obtain full NEPA assignment under the SAFETEA-LU 23 USC 327 Pilot Program in 2007. Currently, three state DOTs have full NEPA assignment: Caltrans, Texas Department of Transportation (TxDOT) and Ohio Department of Transportation (Ohio DOT). Alaska Department of Transportation (Alaska DOT), Florida Department of Transportation (FDOT), Idaho Transportation Department (ITD) and Utah Department of Transportation (UDOT) are in the process of applying for full NEPA assignment, though Idaho has not yet waived its sovereign immunity.

Caltrans, Alaska DOT, and UDOT currently have CE assignment under 23 USC 326. Caltrans executed an MOU for CE assignment in 2007. TxDOT previously had CE assignment, but subsequently decided to include all CEs under 23 USC 327 in order to have single NEPA assignment program and reduce administrative requirements associated with two separate programs (including the need for separately renewing both programs). TxDOT, Alaska DOT, and UDOT all took the path of obtaining and successfully implementing CE assignment before applying for full assignment. Caltrans applied for both CE assignment and full assignment roughly at the same time; full assignment started less than year after CE assignment. Alaska DOT has had CE assignment since 2009 and UDOT has had CE assignment since 2008. Minnesota Department of Transportation (MnDOT) (not shown in **Table 1**) is considering pursuing CE assignment, but had not taken formal action as of December 2015.

Table 1: Status of NEPA Assignment by State as of May 2016

State	Status as of Dec. 2015	Waiver of Sovereign Immunity	23 USC 326 CE Assignment		23 USC 327 Full NEPA Assignment				
			Date of First Executed MOU	Date of Latest Renewal	Letter of Interest	Application	FHWA Public Notice	First Executed MOU	Date of Latest Renewal
Alaska	Has CE Assignment, applying for Full Assignment	6/2007	9/22/2009	9/18/2015	2/19/2015	Draft Application circulated for public comment on 4/25/2016. Final Application expected to be submitted to FHWA 07/2016			
California	Has CE Assignment and Full Assignment, applying for Full Assignment renewal	2006, 2011 (requires renewals)	6/7/2007	6/7/2013	N/A	5/18/2007 (Pilot Program)		7/1/2007	9/25/2012 (renewal in process)
Florida	Applying for Full Assignment	Pending	NA	NA	9/3/2015	Draft Application circulated for public comment on 4/15/2016			
Idaho	Applying for Full Assignment	Pending	NA	NA	1/20/2015	Submittal Pending			
Ohio	Full Assignment	4/1/2015	NA	NA	10/21/2014	5/28/2015	10/15/2015	Signed 12/11/2015, Effective 12/28/2015	
Texas	Previously had CE Assignment, transitioned to have only Full Assignment	5/18/2013	12/6/2013	NA	3/14/2014	5/28/2014	10/10/2014	12/17/14	
Utah	Has CE Assignment, applying for Full Assignment	3/25/15	7/1/2008	6/30/2014	6/5/2015	12/1/2015			

1.5 Cost/Time Savings Data

NEPA assignment has the potential to result in direct time and cost savings during project delivery by eliminating the need for state DOTs to obtain project-specific approvals from FHWA. Instead, the state is able to prioritize their own resources to prepare, review, and approve environmental documents, decreasing the likelihood of delay in FHWA review. In addition to this direct time/cost savings, the process of applying for and maintaining NEPA assignment frequently results in improvements to the clarity and consistency of the state DOT environmental program, including guidance documents, and standard operating procedures. Such operational changes may result in indirect cost/time savings by ensuring environmental issues are identified and appropriately addressed early in the NEPA process and by reducing delay associated with uncertainty if state DOT environmental process guidance is vague or inconsistent. Under NEPA assignment, a state DOT is empowered to make project environmental decisions and thus has a greater stake in making sure the right balance between environment and transportation needs is made, and that the decision backed up with documentation.

No comprehensive nationwide study of NEPA assignment cost/time savings data has been completed. No information is available regarding the costs of NEPA assignment in terms of additional resources required to implement the program to formally weigh the costs and benefits. In addition, the available information from some states is not sufficient to identify a specific cause of changes in project delivery timeframes. For example, California's state legislature-mandated time savings reporting of pre- and post-NEPA assignment project delivery times does not tell us how much time was saved by the elimination of FHWA reviews versus other environmental program changes that were implemented at the same time as NEPA assignment. In addition, there is no information to control for other factors that affect project delivery, such as changes in environmental regulations or delays due to non-environmental factors that may be as or more important to overall delivery timeframes (such as a change in project funding status putting the project on-hold or a delay in the completion of design work necessary to advance the environmental review).³ With these caveats, the available time and cost savings data is summarized below.

1.5.1 Caltrans

Table 2 summarizes Caltrans's environmental review time savings data based on comparison of a select number of baseline projects approved prior to NEPA assignment against all of the projects completed under NEPA assignment (i.e., since July 1, 2007).⁴ The establishment of a baseline for purposes of analyzing time savings was required by the California Legislature as a condition of authorizing Caltrans to assume federal NEPA responsibilities. The data shows a reduction in the median time for an EA/FONSI of nearly one year (from 54.1 months to 42.6 months). The median time savings from Notice of Intent to the Final EIS is 130.8 months (10.9 years), however this time savings is in comparison to a baseline of only five Final EISs with a median completion time of over 16 years. Caltrans EIS processing time under NEPA assignment (median duration of 63.1 months from NOI to Final EIS) compares favorably with

³ http://environment.transportation.org/pdf/proj_delivery_stream/crs_report_envrev.pdf

⁴ http://www.dot.ca.gov/hq/env/nepa/pdf/nepa_assignment_fact_sheet_q33_oct2015_rev.pdf

available national data, such as the FHWA's calculation of an average EIS duration of 79 months from NOI to ROD for 23 projects approved in FY2011.⁵ No time savings data is available for CEs, although it is notable that Caltrans processed 9,326 CEs under 23 USC 326 and 134 CEs under 23 USC 327 between July 1, 2007 and September 30, 2015.

Table 2: Median Times Savings for Caltrans Environmental Approvals and Coordination Completed under NEPA Assignment Program

NEPA Environmental Approval Processing Milestones	Pre-NEPA Assignment Program Median Duration in Months (# of approvals)	NEPA Assignment Program Median Duration in Months (# of approvals)	Median Time Savings Realized in Months
Begin Environmental Studies to Draft Environmental Assessment	42.3 (31)	31.6 (167)	10.7
Begin Environmental Studies to Finding of No Significant Impact Approval	54.1 (31)	42.6 (146)	11.5
Notice of Intent to Draft Environmental Impact Statement	69.9 (8)	47.0 (19)	22.9
Notice of Intent to Final Environmental Impact Statement	193.9 (5)	63.1 (12)	130.8
Begin Coordination with USFWS/NMFS to Completion of FESA Section 7	11.0 (25)	5.9 (110)	5.1

Data: July 1, 2007 through September 30, 2015 for Caltrans Capital and Local Assistance programs.

1.5.2 TxDOT

TxDOT estimates that post-assignment, the timeframe for EAs has been reduced to two years, compared to an average of three years pre-assignment.⁶ TxDOT is early in the implementation of full assignment and therefore does not yet have any major EISs started and completed under NEPA assignment.

1.5.3 Ohio DOT

Based on the experience of Caltrans and TxDOT, Ohio DOT estimated a 20% time savings in the delivery of their overall program, translating into a \$45 million dollar savings to Ohio DOT's program as a result of NEPA assignment.⁷

⁵ <https://www.environment.fhwa.dot.gov/strmlng/nepatime.asp>

⁶ <https://oversight.house.gov/wp-content/uploads/2015/12/12-8-2015-Transportation-Subcommittee-Hearing-on-MAP21-Swonke-TX-DOT-Testimony.pdf>

⁷ <http://www.dot.state.oh.us/NEPA-Assignment/Documents%20Related%20to%20NEPA%20Assignment/NEPA%20Assignment%20in%20Ohio%20presentation%20to%20state%20and%20federal%20agencies%2012-1-14.pptx>

2. Peer Exchange Preparation

Preparation for the NEPA Assignment Peer Exchange included a web survey of state DOTs and follow-up interviews with those state DOTs with NEPA assignment, in the process of applying, or considering applying for NEPA assignment. The overall purpose of these activities was to identify the critical issues that it would be most helpful to focus on during the peer exchange.

2.1 Web Survey of State DOTs

A web-based survey was implemented in order to gather information from state DOTs regarding the perceived barriers to and costs-benefits of considering, entering, and implementing CE assignment or full assignment.

A link to the survey was sent via email to a mailing list of state DOT environmental managers. The mailing list for the survey was developed from the AASHTO Standing Committee on the Environment (SCOE) members list⁸ and updated based on the environmental lead listed on state DOT websites to account for states with no current SCOE representative and for recent staff changes. The survey was available online from July 19, 2015 to August 17, 2015. An email reminder to take the survey was sent on August 11, 2015. A total of 33 respondents from 24 states⁹, with one anonymous respondent, took the survey. This represents a 46 percent response rate by state DOTs.

Table 3, below, summarizes the status of each responding state with respect to NEPA assignment.

Table 3: Summary of Results for State DOTs Level of NEPA Assignment Consideration

Level of NEPA Assignment Consideration	Number by DOTs
Currently have NEPA assignment	3 (1 has not completed public review)
In application process	2
Actively exploring NEPA assignment but undecided	2
Explored NEPA assignment but decided not to apply	8
Not much NEPA assignment research, but decided it's not for them	6
Not considered at all	1
Other: Applied but could not get waiver of sovereign immunity	1

⁸ <http://scoe.transportation.org/Pages/Members.aspx>

⁹ Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New Mexico, North Dakota, New York, Oklahoma, Oregon, South Carolina, Texas, Vermont, Washington, and Wyoming

In order to assess respondents' views of and involvement with NEPA assignment, the survey guided the respondents through questions based on a state's status or level of consideration of NEPA assignment. Respondents for states that were already in NEPA assignment or are in the process of applying for NEPA assignment were given a similar but different set of questions than states that were not in and/or not considering NEPA assignment.

Both series of questions allow the respondent to identify concerns, deterrents from implementation, and recommendations for tools, information and resources that would be useful regarding NEPA assignment. The survey questions and summary of responses are provided in Appendix A.

2.1.1 Survey Results

States Not In and/or Not Considering NEPA Assignment

For those states that were not in and/or not considering applying for NEPA assignment, 93% of respondents stated that their state is "not likely" to pursue NEPA assignment under 23 USC 327 ("full assignment") and 71% states that their state is "not likely" to pursue NEPA assignment under 23 USC 326 ("CE assignment"). No states indicated that they were "likely" to pursue NEPA assignment under either program.

When asked about the costs versus the perceived benefits of NEPA assignment, the respondents for those states not in NEPA assignment overwhelmingly responded that the relative costs of NEPA assignment were too high given the perceived benefits.

Survey respondent comments indicated that the states that are not in NEPA assignment and/or not applying for NEPA assignment are satisfied with their relationship with FHWA staff and their state's programmatic categorical exclusion agreement(s):

Our FHWA relationship is beneficial in project delivery and with other streamlining programs we have implemented, the time savings would not really be that helpful compared to the liability the DOT would acquire.

We have an excellent working relationship with our FHWA office and their involvement in more complex projects does not create an impediment to NEPA approvals.

Cost was not the reason for denying NEPA assignment. It would take a change in state statute for this to happen.

Majority of our projects are CEs and our Programmatic Agreement with FHWA regarding processing of CEs allows us to process over 98% of our projects that are CE's under this agreement as Programmatic CE's.

Based on the responses of the states not in or considering NEPA assignment, the respondents' top five concerns regarding NEPA assignment were:

1. Sovereign immunity/liability/risk
2. Cost of program/assuring adequate financial resources
3. Audits/monitoring
4. Availability/capacity of our staff
5. Other federal agency views regarding application/assignment

Representative comments received on the above concerns are listed below:

The loss of support from our FHWA office and possible loss of staffing by the feds due to perceived less involvement by them. This would be a huge negative result in our opinion.

Additions to legal staff needed.

Relationships with federally-recognized tribes; value of our current streamlining efforts especially the programmatic agreements

Out of the above “top five” concerns for states not in or considering NEPA assignment, the majority of respondents felt that obtaining a waiver of sovereign immunity would remain a “deal breaker” regardless of any additional guidance or information. Respondents were evenly split on whether additional guidance could help with the cost of program/assuring adequate financial resources. For the remaining three concerns, the respondents felt that additional guidance or information may be helpful.

States Undertaking NEPA Assignment

For those states that are or have applied for NEPA assignment, the survey asked respondents to assess the concerns they had at the time of the application process. The top five concerns as identified in the survey included:

1. Application process length and difficulty
2. Audits/monitoring
3. Sovereign Immunity/liability/risk
4. Quality assurance/quality control (QA/QC) and additional administrative requirements
5. Cost of program/assuring adequate financial resources

For those states that are already actively implementing NEPA assignment, the survey asked the respondents to assess the difficulty or intensity of resources required for several aspects of the NEPA assignment program. The following were identified as the most difficult or resource intensive:

1. Application process length and difficulty
2. Audits/monitoring
3. Technical knowledge/training of staff
4. Sovereign immunity/liability/risk
5. Other federal agency views regarding application/assignment

The one comment received on this question noted the following:

Managing expectations from local partners that NEPA assignment would somehow change the requirement to comply with federal laws and regulations. Many hours have been spent informing local partners of the laws and regulations.

For the states that have implemented NEPA assignment, below are some successes and challenges they identified in responses to the survey:

- Successes
 - Shortened document review and approval time for NEPA documents
 - Audit results demonstrating successful processes and decisions
 - Establishment of the QA/QC process, which has improved consistency statewide
- Challenges
 - Pre-audit, audit, and post-audit process- time consuming and inconsistent
 - Training on the new QA/QC processes
 - Responding to information requests from FHWA in their audit role
 - Helping local partners understand NEPA responsibilities
 - Maintaining uniform procedures through staff turnover
 - In early years, federal agencies had difficulty accepting state agency as federal lead agency

With Respect to the White Paper and Peer Exchange

Additionally, respondents were asked what information, tools, and resources they would like to see in a white paper regarding NEPA assignment. Below are some common responses and requests from respondents:

- Distribution of frequently asked questions
- NEPA assignment template or flowchart (information with the steps of NEPA assignment, necessary staffing qualifications)

- Information on obtaining a waiver of sovereign immunity
- Information on cost savings from implementation
- Flowchart on how to determine whether NEPA assignment is right for a state
- Assistance with developing a summary document to inform upper management of the pros and cons of NEPA assignment
- List of responsibilities and drawbacks vs. benefits
- Information on how to change state statute to allow for assignment of this type of responsibility from the federal government
- Information regarding staffing levels (including legal staff) and amount spent consultants needed to deliver program each year
- Number of regions in the state and whether is it centralized/decentralized
- What types of projects to the states who have implemented commonly deliver
- What are the time/cost savings
- When FHWA would become involved in the process, if at all
- Create an AASHTO hosted information archive site; collect applications, outreach information, audits from each state (this would save time going to each state DOT's website)
- Note the creation of AASHTO SCOE NEPA assignment workgroup; solicit participation if states are interested in joining
- Tracking of the FHWA auditing process, state DOT time required to fulfill audit needs, and how the process can be improved
- Information regarding performance measures and metrics used by FHWA in the audit process
- NEPA document time savings nationwide, in order to understand the time it takes for other states to initiate and approve NEPA documents would be helpful
- Information on how other states develop online resources, work with local government/districts, and develop forms and processes.

2.1.2 Conclusions from Online Survey

The main goal of the survey was to discern what factors are making some state DOTs hesitate or decide not to enter NEPA assignment. The survey results show that the decision on whether NEPA assignment is worth the cost depends on the specific circumstances of the state, including program size and FHWA Division Office capacity. For states not considering assignment, the overall conclusion reached is that the costs (financial and otherwise) of entering NEPA assignment outweigh the benefits (potential time-

savings, etc.). The states currently in the program or considering applying took the view that the benefits outweighed the costs.

The survey helped identify issues that are the key drivers behind state DOTs' decisions regarding whether or not to enter NEPA assignment. The top specific concerns regarding NEPA assignment identified across all responding states include:

1. Sovereign immunity/liability/risk
2. Cost of program/assuring adequate financial resources
3. Audits/monitoring
4. Availability/capacity of our staff
5. Other federal agency views regarding application/assignment
6. Application process length and difficulty
7. QA/QC and additional administrative requirements
8. Technical knowledge/training of staff

These concerns formed the basis for some of the questions asked during the subsequent telephone interviews.

2.2 State DOT Phone Interviews

Building on the results of the web survey, detailed phone interviews were conducted with each of the state DOTs invited to the NEPA Assignment Peer Exchange on November 10, 2015. The purpose of the interviews was to explore their experiences in greater depth and help ensure the format of the peer exchange would be as relevant and beneficial as possible to the diverse array of attendees.

The project team conducted phone interviews with nine state DOTs in September 2015: Alaska, California, Florida, Idaho, Ohio, Oregon, Minnesota, Texas and Utah. With the exception of Idaho, these state DOTs were represented at the peer exchange. The objective of the phone interviews with state DOTs was to obtain their rationale for entering the program, their perceptions of implementation challenges (in terms of preparing for assignment, applying for assignment, and post-assignment reporting and audits), and their preferences on the potential structure and focus of the peer exchange. The project team also interviewed FHWA Headquarters staff involved in the NEPA assignment program on their perspectives on best practices in the implementation of NEPA assignment, as well as the most common misconceptions and pitfalls. The interview questions were tailored to each state to include only questions relevant to where each state is in the process of obtaining NEPA assignment and provided to each survey participant in advance of the phone interview (see Appendix B).

The remainder of this chapter provides an overall summary of the phone interviews, highlighting the “recurring themes” that emerged from discussions with multiple state DOTs, followed by detailed interview results for each state DOT and FHWA.

2.2.1 Phone Interviews Summary

State DOTs provided relatively similar top reasons for implementing or considering NEPA assignment, namely time and cost savings through eliminating FHWA review/approvals on a project-by-project basis. Ohio DOT has developed quantitative time and cost savings estimates for NEPA assignment, while most other states have more general goals such as speeding up environmental approval timeframes.

Many states indicated they had a good working relationship with their FHWA Division office and wanted to emphasize that the relationship was not a factor in their decision regarding NEPA assignment, while other states reported a challenging relationship with their division office was a consideration in their decision to pursue NEPA assignment. Several states emphasized that if a particular state is not experiencing delays in projects due to FHWA reviews, then there would be very little reason to consider implementing NEPA assignment. States need to consider the overall context for their program and the goals they hope to accomplish through NEPA assignment.

States with substantial NEPA assignment experience (i.e., Caltrans, TxDOT) noted that there are some unforeseen benefits to NEPA assignment in terms of quality of the state's environmental program and improved consistency of environmental procedures statewide. FHWA noted that having greater responsibility can lead to states making better and more carefully considered decisions on project environmental issues. In this way, NEPA assignment can be empowering to state DOT environmental programs and have major effects on the relationship between headquarters and district offices within a state DOT.

The top concern among the interviewed states regarding NEPA assignment is the audit process. Also high among state concerns was the application process length and difficulty. Obtaining a waiver of sovereign immunity (the top issue from the web-survey) was mentioned as a top concern only by those states early in the process of considering NEPA assignment. Ohio DOT shared strategies for obtaining support from the state legislature by making clear the financial and time-savings benefits to the state of entering the program, explaining that the waiver is limited to the decisions made on the specific projects that fall under the NEPA assignment and that the state faces very few environmental lawsuits on transportation projects.

States considering NEPA assignment for the first time share many common concerns and questions. These include uncertainty about the overall application process timeline, the changes in agency processes needed to get ready for NEPA assignment, the details of the audit process, and the role of FHWA Division Offices and the FHWA Headquarters during the application process and during NEPA assignment.

States provided many valuable tips on things they wish they had known when first applying for NEPA assignment. These included the importance of having strong environmental procedures (including QA/QC) and guidance in place before applying for assignment. This allows for these existing and working procedures to be documented in the application. The importance of electronic recordkeeping and project tracking systems was emphasized by multiple states and FHWA. States noted it is very important to understand the 23 USC 326 program benefits in terms of reducing the universe of projects subject to audits when deciding whether to apply for both 23 USC 326 and 23 USC 327, or to include CEs, EAs, and EISs all under the 23 USC 327 program.

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3. NEPA Assignment Peer Exchange

The NEPA Assignment Peer Exchange was held on November 10, 2015 in Washington DC, with the objective of facilitating the exchange of lessons learned from the process of preparing, applying, and implementing state DOT assumption of FHWA federal environmental review responsibilities under 23 USC 326 and 23 USC 327.

3.1 Participants

The peer exchange was designed to include a mix of states that have already implemented or are in the process of applying of NEPA assignment, as well as states that may be considering assignment, but have not yet taken formal steps to advance application into the program. In addition to state DOTs, the peer exchange was attended by representatives of FHWA, NCHRP and AASHTO. A complete list of attendees is provided in **Table 4**. For the state DOTs listed in **Table 4**, the status of NEPA Assignment is also listed.

Table 4: NEPA Assignment Peer Exchange Attendees and NEPA Assignment Status As Applicable

DOT Participants	Status of NEPA Assignment
Caltrans	Full Assignment and CE Assignment
Alaska DOT&PF	CE Assignment, Applying for Full Assignment
TxDOT	Full Assignment
UDOT	CE Assignment, Applying for Full Assignment
FDOT	Applying for Full Assignment
Ohio DOT	Full Assignment (Executed MOU Dec. 2015)
Oregon DOT	Considering Full Assignment
MnDOT	Considering CE Assignment
Georgia DOT	Not currently pursuing NEPA Assignment
Massachusetts DOT	Not currently pursuing NEPA Assignment
Non-DOT Participants	
FHWA	
AASHTO	
NCHRP	
Project Team/Environmental Science Associates	
Project Team/Louis Berger	

3.2 Agenda and Format

The format for the peer exchange was developed based on input from the participants during phone interviews and from the project panel. Attendees had concerns that they would miss important material if small breakout groups were used. Therefore, the format of the peer exchange consisted of a moderator leading full-group open discussions organized around the stages of NEPA assignment: pre-application, application/MOU, and implementation/renewal (see Section 1.3 for a more detailed overview of the NEPA assignment process). A copy of the agenda is provided in Appendix C.

The peer exchange discussions and lessons learned are summarized in Sections 3.3 through 3.5 by the NEPA assignment stage. At the beginning of the peer exchange, FHWA staff informed the group that FHWA is in the process of drafting a guidebook on NEPA assignment within the next year that will provide more detail on the NEPA assignment program (both 23 USC 326 and 23 USC 327), including sample documents. FHWA staff emphasized how important the NEPA assignment program and its success are to the administration. With full NEPA assignment no longer being a program limited to five states and no longer a pilot program, FHWA staff are having to adjust as well. They are wrestling with how to take on the heavier work load coming from states applying for NEPA assignment as well as the corresponding increase in audit and monitoring workload once states are in the program. However, keeping the application, MOU, and audits formalized is seen as important in order to ease the concerns of the program's detractors by showing that the states are capable and are succeeding.

3.3 Pre-Application

3.3.1 Deciding Whether to Pursue NEPA Assignment

States noted a variety of factors driving the decision to pursue NEPA assignment, including project delivery time savings, more independent decision making, and more consistency in the implementation of the environmental review process.

One state said NEPA assignment and the associated shift in decision making responsibility puts them in the “driver's seat” of their destiny. States that previously have had CE assignment (such as Alaska DOT) noted that the success of CE assignment was a factor in the decision to go for full assignment (23 USC 327).

Instead of asking the question should we enter into NEPA assignment Texas DOT asked, “Why not?”

TxDOT reframed the question when discussing internally and asked “why not?” implement NEPA assignment. In the case of TxDOT and several other represented state DOTs, there was no compelling reason not to take on NEPA assignment given the size of their program, environmental program staffing/resources, and the opportunity for time savings and improved quality/consistency. However, for state DOTs not experiencing delays in reviews due to FHWA Division office resources or for states with smaller programs and robust programmatic categorical exclusion (PCE) agreements, there may not be a

benefit to pursuing assignment. This highlights the importance of the decision to pursue NEPA assignment being highly dependent on state specific circumstances.

NEPA assignment requires an honest assessment of the rigor of a state's environmental review procedures to "get ready" for assignment. A key lesson learned is to update procedures and guidance manuals in advance of applying for NEPA assignment to minimize the number of program changes with assignment. A potential downside of NEPA assignment is a loss of flexibility as procedures become more rigid (an outcome of more standardized/consistent operating procedures). Audits and monitoring focus on whether the state DOT is complying with the commitments made in the MOU.

UDOT noted a benefit of CE assignment over CE programmatic agreements was the ability to complete individual Section 4(f) evaluations for CE projects under 23 USC 326. Such projects would be excluded from coverage under most CE programmatic agreements and would thus require individual FHWA review and approval without NEPA assignment.

Another advantage of NEPA assignment is the ability for state DOTs to further build their own relationships with federal agencies and to have more immediate communications between the practitioners doing the work in the field and the agency staff granting permits and approvals.

One common question expressed in the surveys conducted before the peer exchange was what are the respective roles of FHWA Headquarters, Division, and Resource Center staff under NEPA assignment or phrased another way, "What becomes of our relationship with our FHWA Division staff—would they still be involved in our projects?" The answer to this question was seen by some state DOTs as an important decision-driver when deciding whether to take on NEPA assignment. As clarified at the peer exchange, FHWA Division staff would continue to be involved with their state DOT counterparts but the relationship would shift. Rather than being involved in the day-to-day project level decisions, Division staff would instead be involved in program/policy level milestones like the NEPA assignment application, MOU, audits/monitoring, and trainings. FHWA Headquarters and Resource Center staff, particularly under 23 USC 327 assignment, would also participate in those milestones.

FHWA Division staff would not be available to give project-specific advice or make project-level decisions because the NEPA assignment makes the state DOT the environmental decision maker. MOUs preclude FHWA involvement in those project level decisions. Despite this prohibition, some representatives at the peer exchange did voice that they feel they have more access to help from FHWA

Why Would a State DOT with a Robust Programmatic Categorical Exclusion Agreement Take on CE Assignment (23 USC 326)?

- **Ability to make all other environmental decisions**
- **Stepping stone to full assignment (23 USC 327)**
- **Control over documentation/ability to be innovative**
- **Way to bolster the DOT's environmental program both from a staffing and process/policy perspective**
- **Ability to work more closely with federal agencies**
- **Ability to add new actions/project types as categorical exclusion**

Division staff assistance under assignment because division staff are “freed-up” from the day-to-day project activities. In terms of getting advice and guidance, those representatives expressed that it is all about how a state DOT phrases the request for help. For example, rather than asking, “Does the project’s right-of-way take at the Greenvale Golf Course constitute a Section 4(f) use?” reframe to ask, “How does Section 4(f) apply to golf courses?” Still, some state DOTs with traditionally positive relationships with FHWA Division staff acknowledged the loss of not having FHWA staff involved in meetings to give input. There was also an acknowledgement that some FHWA staff may choose to leave a state with NEPA assignment because of the inability to attain project-level work experience. FHWA emphasized that the ability to make environmental review program policy is not assigned and that responsibility remains with FHWA.

3.3.2 Wearing Multiple Hats

FHWA emphasized that NEPA is all about decision-making and that NEPA assignment shifts that decision-making to the state DOT. One of the challenging aspects of NEPA assignment is that it can create a tension between the state DOT’s role as a project sponsor and role as a NEPA environmental decision-maker balancing transportation, environmental, and public interest considerations pursuant to 23 USC 109(h). Without NEPA assignment, FHWA functions as the NEPA environmental decision-maker and state DOTs sometimes rely on FHWA to make the difficult decisions when there may be tremendous political or public pressure. With NEPA assignment, these sometimes competing roles both rest with the state DOT. FHWA indicated that addressing this conflict is an important part of the NEPA assignment application. Recent 23 USC 327 applications (i.e., UDOT and TxDOT) provide an example discussion of “independent environmental decision-making” and the specific organizational measures taken to ensure independence and objectivity in the face of inevitable pressure to get needed transportation improvements implemented on schedule. UDOT’s application committed to a “Signatory Official” from outside the Environmental Services Division to sign certain environmental documents and decision documents to further ensure the independence of environmental decisions.

3.3.3 Effective Outreach Practices

Obtaining stakeholder buy-in is essential to the success of a NEPA assignment application. Ohio DOT shared some of their effective outreach/marketing practices, including:

- A dedicated NEPA assignment website¹⁰
- Presentations to brief other agencies on the implications of NEPA assignment¹¹
- Asking other agencies for recommendations
- Developing a plan for public outreach and disclosure

¹⁰ <http://www.dot.state.oh.us/NEPA-Assignment/Pages/default.aspx>

¹¹ <http://www.dot.state.oh.us/NEPA-Assignment/Documents%20Related%20to%20NEPA%20Assignment/NEPA%20Assignment%20in%20Ohio%20presentation%20to%20state%20and%20federal%20agencies%2012-1-14.pptx>

By engaging other federal agencies during the application process, state DOTs can understand specific agency views and concerns on particular topics prior to coordinating on particular projects. Once the state DOT has accepted the NEPA assignment, previous outreach and coordination with other federal agencies and considering these agencies' recommendations will enhance project-level communication and coordination.

3.3.4 Waiver of Sovereign Immunity

Early in considering NEPA assignment, the need for a waiver of sovereign immunity can be a barrier to engaging in the process. The peer exchange discussion revealed that the key to overcoming this barrier is educating all the stakeholders and legislators about what the waiver of sovereign immunity really entails. The inability to secure the needed waiver of sovereign immunity was a barrier to Ohio DOT to entering the SAFETEA-LU Section 6005 Pilot Program. Ohio DOT has since been able to enter into NEPA assignment as of December 2015 by rethinking its approach to getting the waiver. The important change in its messaging and approach was to emphasize the limited nature of the waiver of sovereign immunity needed for the program—specifically that it was not a universal waiver of all the state's immunity, that it was limited only to transportation projects that would be in the NEPA assignment program, and that those projects would not include projects that didn't have federal aid money, and that in general, few Ohio DOT transportation projects are ever litigated pursuant to NEPA. With this necessary context, it became clear to

Initially the way we packaged our waiver of sovereign immunity didn't pass through our legislature. It wasn't until we emphasized that it was a limited waiver that we were able to get it passed.

~~~Ohio DOT

legislative decision-makers that the waiver pertains to a very narrow area of risk and does not have broader legal implications outside the delivery of transportation projects.

TxDOT also shared effective outreach practices on briefing the legislature. Part of the messaging used by TxDOT was that the waiver is the price of admission into a program that would likely save the state time and money. TxDOT also emphasized that they get sued under NEPA less than once a year, and that when they do get sued, the state's lawyers are already involved in any litigation. In essence, this would entail the state's lawyers switching from the second chair into the first.

UDOT shared that one way they worked with their state legislature was to identify those legislators that were attorneys and started the education process with them first so that after they were briefed they could explain the waiver to their fellow legislators, who were not as familiar with sovereign immunity and waivers.

As an example of the relatively low risk associated with waiving sovereign immunity, California indicated that since taking on NEPA assignment they have had about six lawsuits/settlements versus thousands of projects being approved under NEPA assignment.



Alaska's waiver of sovereign immunity legislation was identified as a best practice because it authorized participation under both 23 USC 326 and 23 USC 327 (even though only CE assignment was initially planned at the time). UDOT was required to get the waiver of sovereign immunity twice because the initial waiver applied to CE assignment only. Alaska's legislation also did not require renewals of the waiver or have any state-specific reporting requirements.

In contrast, California's waiver legislation sunsets every five years, requiring Caltrans and FHWA to plan for a possible transition out of the program in the event the legislature does not act on renewal of the waiver. Because California was the first state to enter into NEPA assignment and costs and benefits were unknown, California's legislation also had extensive reporting requirements related to time and cost savings that are different from the reporting requirements under the MOU with FHWA. With respect to the waiver of sovereign immunity, Caltrans staff advised other states to "keep it simple, shape it, and contain it."

Other states considering assignment should try to limit the amount of additional state-level reporting requirements, or harmonize those requirements with the reporting required by FHWA to reduce the administrative burden/cost.

### 3.3.5 Legal Sufficiency and Staffing

Another barrier that the group identified as important to some state DOT's decisions regarding entering into NEPA assignment was legal staffing. Massachusetts DOT specifically stated that for them, this is a key struggle with taking on NEPA assignment.

This started a discussion about how states that are in the NEPA assignment process/program handled the legal staffing element. TxDOT has attorney general and internal legal staff; they added one legal staff member. Ohio DOT hired an environmental attorney that now sits in the same office with their environmental staff so that the attorney gets totally immersed in the NEPA program. Alaska DOT likewise was able to get one attorney position funded for NEPA assignment. FDOT has a central office structure that the state's attorneys report to; they used the state attorney general's lawyer for the waiver of sovereign immunity and have hired a consultant attorney to help with the NEPA assignment application and MOU process. Caltrans already had internal environmental legal staff before taking on NEPA assignment. UDOT did not have inside counsel in the beginning but now has an attorney from the attorney general's office that sits in their office; they also have an on-call contract for legal services and the attorney general's office is the contract holder for that on-call contract.

When asked at what point state DOTs that have entered into or are entering into NEPA assignment would recommend bringing in legal counsel, all states replied that they felt it was important to have counsel involved from the beginning of the application process so that legal staff can review the applications and MOUs from other states and work collaboratively on what might work for their state. The peer exchange group agreed that legal counsel was useful in comparing and contrasting the MOUs and helping to explore where the risks were and what elements of the MOU required more intense focus.

For FHWA, chief counsel headquarters staff and field staff participate in the reviews of both the application and the MOU.



### 3.3.6 Which Path to NEPA Assignment, 326, 327, or Both?

The group talked about each state DOT's thought process regarding taking on NEPA assignment under 23 USC 326 (CE assignment), 23 USC 327 (full assignment), or taking on assignment under both provisions.

Caltrans maintained separate CE assignment and full assignment programs, with a key factor in the decision being the ability to make transportation conformity determinations for projects processed under CE assignment. Transportation conformity determinations cannot be assigned under 23 USC 327.

TxDOT originally had CE assignment only, and decided to move to solely having full assignment (not maintaining CE assignment). The rationale for the TxDOT decision was that it would reduce administrative requirements to have one NEPA assignment program compared to needing to maintain two separate programs. In retrospect, TxDOT staff felt that maybe they would rethink that because of the difference in audits/monitoring requirements under 23 USC 326 versus 23 USC 327. There are no audits under 23 USC 326. By maintaining a CE assignment program, it would be possible to greatly limit the number of projects that fall under the universe of 23 USC 327 audits.

UDOT decided to keep both 23 USC 326 and 23 USC 327 because 95% of their program is delivered under 23 USC 326 and the monitoring requirements are more favorable. Alaska DOT also indicated they will renew CE assignment and not replace it with full assignment.

A short discussion was had about whether a state DOT that is taking on CE assignment should keep its programmatic categorical exclusion (PCE) agreement active during CE assignment. FHWA staff did recommend that state DOT's keep their PCE agreements active in case circumstances arise like the CE assignment MOU expiring before it is renewed; it can be useful as back-up.

### 3.3.7 Scope of Assignment

Although each state can decide the scope of their assignment program, most states that have or are entering into NEPA assignment chose to take responsibilities for all related federal environmental laws as well. The decision to "take it all" relates back to some of the key drivers for states to enter NEPA assignment—that is, the ability to make decisions themselves and the corresponding efficiencies that come from being the sole decision-maker on their transportation projects. Most states entering into full assignment have, however, selected a small group of specific projects that will be excluded from assignment under this program. These projects are usually the larger, more complex projects that are substantially along in the NEPA process or projects that are not eligible for assignment such as projects that cross state or international borders.

Excluding specific projects, especially those that are complex or require more resources than a state DOT can provide, is a way to address the concerns of availability and capacity or staff. Conversely, reviewing the state DOT program and identifying projects during the application process can serve as a way for the state DOT to understand where it makes sense to add staff or where it might be necessary to engage a consultant to fill a project-level role, especially as it relates to a subject matter expert (technical knowledge).

For example, at the time Alaska DOT first entered into its CE assignment program in 2009, they elected not to have individual Section 4(f) evaluations or Section 7 consultation be part of the scope of their assignment because they felt they did not have that specialized expertise and necessary staffing. In Alaska DOT's 2015 CE assignment MOU, however, Alaska DOT has now taken on responsibilities for Section 7 consultation as well. This is an example of how each state DOT can tailor the assignment to their state's individual circumstances and how the scope can change over time.

## 3.4 Application/MOU

At the peer exchange, FHWA staff provided a broad overview of the procedural steps to take on NEPA assignment under both 23 USC 326 and 23 USC 327 (see **Figure 1** for overview of 23 USC 327 process).

### 3.4.1 Application Process for Full Assignment (23 USC 327)

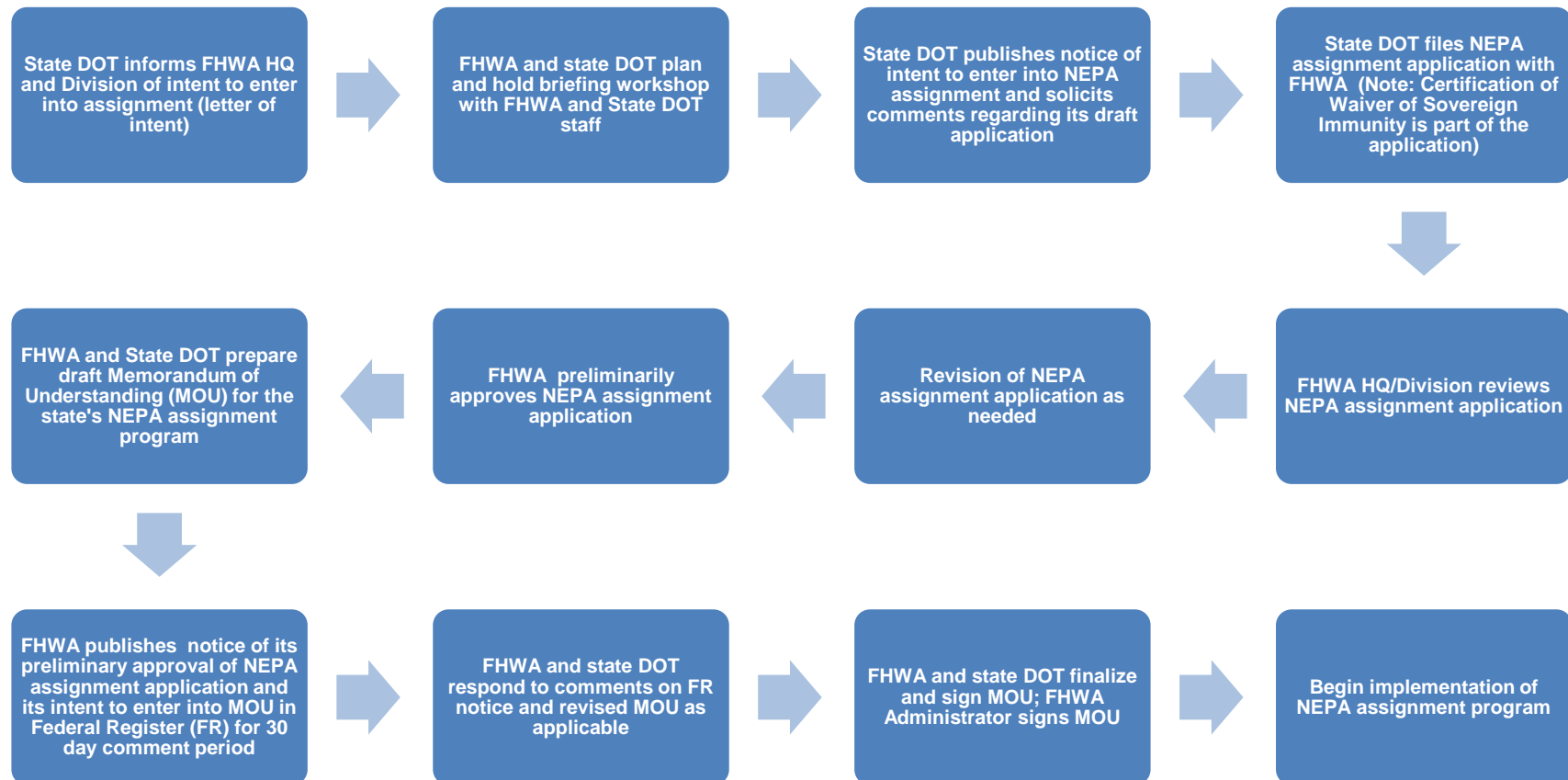
For full assignment, a formal application process complete with public notice is required in addition to the development and approval of an MOU. The application, MOU, and public notice are overseen mainly by FHWA Headquarters staff although the FHWA Division staff and Resource Center staff are involved in the process as well. FHWA staff commented that it takes about 12-18 months complete the application and MOU process for full assignment.

An important first step in taking on full assignment is to establish an understanding between the state DOT and FHWA regarding expectations, what is needed to enter into and be successful with the program, and how best to begin and phase in the process and program. As a way to kick-off the process, writing a letter of interest to FHWA is still seen as a best practice. After this step, work can begin on planning the briefing workshop between state DOT and FHWA staff. The briefing workshop can go forward without the state having the waiver of sovereign immunity in place; however, there does need to be reasonable assurance that the waiver will be forthcoming. Having the waiver introduced to the state's legislature can satisfy the requirement of reasonable assurance.

The briefing workshop is typically 1½ days long and includes state DOT environmental and legal staff; sometimes consultants working for the state DOT are also included. Representatives for FHWA typically include FHWA Division staff, including the Assistant Division Administrator and Division Administrator, FHWA Headquarters and Resource Center environmental staff, and an attorney from the FHWA Counsel's Office. Topics at the briefing workshop may include: discussion of the roles, responsibilities, and expectations under NEPA assignment with both FHWA and the state DOT sharing information about their programs and current thoughts on assignment specific and individualized for that state; an overview of the application and MOU process is given; and a preliminary discussion of audit and monitoring requirements.

After the briefing workshop, typically a smaller working group consisting of key state DOT and FHWA staff is formed to work collaboratively on the application and the MOU. For Ohio DOT, this working group met twice per month during the process.

**Figure 1: Basic Process for Entering into NEPA Assignment under 23 USC 327**



## Time and Cost to Get Through Application/MOU Process

FHWA staff acknowledged that both FHWA and state DOT staff are on a learning curve when it comes to the NEPA assignment program and that some of the challenges associated with the application/MOU process come from how each state DOT is unique—each state has different environmental sensitivities, different agency relationships, and differences in staffing and training. Because of this uniqueness, the application and MOU process can vary in its length and overall content.

Because Ohio DOT had access to both the Caltrans and TxDOT applications for NEPA assignment, Ohio DOT had a preliminary draft application prepared before the briefing workshop. It took Ohio DOT about 12 months from the time of the briefing workshop to get to FHWA's notice of intent to approve Ohio DOT's entry into the NEPA assignment program. For TxDOT, it took about 18 months from the time of the approval of the waiver of sovereign immunity to the approval of the MOU.

Ohio DOT, TxDOT, and UDOT have posted copies of their application and other supplemental materials on their websites. FDOT's website includes the schedule for pending NEPA assignment and supplemental materials. Caltrans as well as the other state DOTs that have entered into full assignment under 23 USC 327 have their state's NEPA assignment MOU(s) posted on their websites.

No state had readily available data on the costs (labor hours) spent in entering into NEPA assignment. Those states that have completed the process to enter into full NEPA assignment acknowledged that the time spent internally preparing was significant, especially the time spent to develop and deliver training and update manuals, guidance, and policies. However, many states acknowledged that much of that work was needed regardless of entering into NEPA assignment; NEPA assignment just provided the momentum, resources, and justification to finally do it. Some states also brought on electronic database systems as well to help with the tracking needed for the full assignment program once implementation began. Ohio DOT emphasized that it had a lot of control over how much guidance to change and distribute, and when to hit start on implementing the assignment program.

### State DOT NEPA Assignment Websites

#### Alaska:

<http://dot.alaska.gov/stwddes/desenviron/resources/nepa.shtml>

#### California:

<http://www.dot.ca.gov/hq/env/nepa/>

#### Florida:

<http://www.dot.state.fl.us/emo/NEPAAssignment.shtml>

#### Ohio:

<http://www.dot.state.oh.us/NEPA-Assignment/Pages/default.aspx>

#### Texas:

<https://www.txdot.gov/inside-txdot/division/environmental/nepa-assignment.html>

### 3.4.2 Differences in Process for 23 USC 326 and 23 USC 327

In general, the process to enter into full assignment (23 USC 327) is lengthier and more formalized than the process to enter into CE assignment (23 USC 326). When entering into CE assignment under 23 USC 326, the FHWA Division takes on more of the MOU preparation and coordination and unlike full assignment because there is no formal application more steps can run concurrently. For example, FHWA and the state DOT can begin drafting the MOU immediately, hold face-to-face meetings, and the state DOT and division staff can do the needed tribal and resource agencies coordination all before the state has its waiver of sovereign immunity. Once the state DOT has secured the waiver of sovereign immunity then the 23 USC 326 MOU can be signed. For full assignment (23 USC 327), certification of the waiver of sovereign immunity is part of the formal application for the program. In terms of approval of the MOU, FHWA HQ does review the MOUs for the CE assignment program (23 USC 326) but the Division office performs all the initial work of MOU development; The Division Administrator is the signatory on the MOU. For MOUs under full assignment (23 USC 327), the FHWA Administrator signs the MOU. The average time to complete the 23 USC 326 MOU process is 5-6 months.

### 3.4.3 Role of Templates/Nationwide Program Consistency

Some states were concerned that they will be subject to template MOUs that will have been previously negotiated with other states and that will be difficult to modify the conditions. FHWA noted the importance of templates in maintaining nationwide consistency on policy issues, but modifications for specific states are allowed. FHWA noted that all states will have an opportunity to comment on upcoming MOUs, such as Caltrans's 23 USC 327 renewal MOU when it is publicly noticed in the Federal Register.

## 3.5 Implementation/Renewal

### 3.5.1 Audits and Monitoring

FHWA emphasized that monitoring and audits help to make the program a success and are necessitated by the fact that FHWA remains the policy lead for the overall NEPA assignment program and is responsible for the overall success of the Project Delivery Program and must ensure that any state assigned FHWA's environmental responsibilities is in compliance with the terms of the MOU.

FHWA staff indicated that they understand the fear that state DOTs have regarding being audited and reviewed, but that FHWA's main intent with the audits is trying to ensure that a state DOT's assignment program is consistent with the MOU and to work with the state DOTs in the event that the environmental review and decision-making process is consistent with the MOU. The audits and reviews have also yielded a lot of successful practices that FHWA has then been able to share internally and with other states.

Although audit training is given to both FHWA and state DOT staff, when it comes to the NEPA assignment program, and the audits in particular, both FHWA and the state DOTs are learning as they go

through the audit process. UDOT proposed an idea at the peer exchange about having outside consultants, totally neutral parties, do the NEPA assignment audits; this was also seen a potential means to handle the shortage of FHWA staff to do audits.

Some state DOTs had concerns over the content and focus of audits on what they perceived as nitpicky details as opposed to larger issues such as whether environmental laws were complied with or the documentation was legally sufficient. Both FHWA staff and the state DOTs present at the peer exchange agreed that NEPA is about decision making but the tension in the audit is on how to perform an audit without second-guessing a state's independent NEPA decision but does document compliance. For example, in an audit the state's decision about whether they decided to do a CE versus an EA is not on the table to be examined but the documentation regarding whether the state took into account unusual circumstances is examined.

One state DOT suggestion was to consider developing a foundation for the audit, similar to what an FHWA attorney may use for a legal sufficiency checklist. In other words, development of a tool for the audits that would keep the audit focused on documentation with the environmental review process and compliance with the MOU, rather than focused on specific project-level decisions.

One issue with an auditing checklist and the audits is that each state is so different in its terminology, internal culture and organization, and environmental and political settings. Additionally, finding a common way of conducting audits and audit preparation in each state is not likely and would change as additional state DOTs enter the program. For example, Caltrans expressed that they now have implemented their own rigorous program of monitoring themselves and will have proactive internal discussions before the problems get to reportable deficiencies and instances of non-compliance; however, other states may choose to take a different approach. FHWA and state DOTs present at the peer exchange agreed that it is important to keep refining the audit process and to continue the dialogue to allow lessons learned and any best practices to be shared among state DOTs in the program.

The audit report is a collaborative document and the state DOT has an opportunity to provide input. FHWA explained that some audit team members are trained in monitoring reviews, which are different from a program-level review. Just as states are improving their procedures, FHWA is working to improve the efficiency and focus of the audit process. One potential area for improvement would be considering minor changes in audit report terminology that could alter how the results are perceived. For example, rather than a "non-compliance" item, minor issues with procedures could be called a "reportable deficiency." The states suggested a working group involving states, AASHTO, and FHWA to continue the collaborative dialogue on audits and monitoring.

There was also a concern with the amount of time spent on audits.

Another concern raised by the state DOTs was the tendency for them to be subject to doing things the way Caltrans had since Caltrans has in many ways set the precedent under the program. Other state DOTs wanted to have the ability to work with FHWA on their own different way of doing things in their states. FHWA stated to the group that Caltrans has the most experience with monitoring and self-assessment but

acknowledged that each state will have its own unique experiences. FHWA will work with each state on how the audits and monitoring reviews are accomplished.

## State DOTs' Experiences with Audits/Monitoring

Caltrans and FHWA discussed the way the last 23 CFR 326 monitoring review was done. Prior monitoring reviews had involved FHWA doing desktop reviews of the CEs. This time Caltrans and FHWA did a joint review looking at the CE checklists and CEs themselves; the focus was on emergency projects. CEs to be examined were selected by both Caltrans and FHWA. Both Caltrans and FHWA were in a room together discussing the CEs and associated documentation so there could be real-time discussions about any potential findings. FHWA California Division drafted the review report.

TxDOT talked about their first audit under the full assignment program. Prior to the audit, TxDOT contacted Caltrans about preparing for the audit and what they might expect. Because the program was so new, the focus was on whether TxDOT had the components of the program in place; the auditors did not look at EAs or EISs. This fell in line with what was expected based on Caltrans' experience. In terms of process, FHWA sent TxDOT a list of requested information prior to the audit and TxDOT submitted a response to the pre-audit information request to FHWA.

TxDOT also talked about their second audit for which the final audit report was not yet available. TxDOT felt the second audit was like the first in some ways but the second audit did look more at project compliance. FHWA had the list of NEPA decisions that were made by TxDOT during the period of time to be audited. FHWA chose what they wanted to review for the audit, which included a range of information and program elements. Training and corrective actions taken in response to the first audit were also examined. FHWA told TxDOT which staff they wanted to interview for the audit ahead of time. This allowed TxDOT to ensure that those staff would be available and prepared for the interviews. The auditors were there for one week and went to TxDOT district and headquarters offices. TxDOT felt that the interviews were relatively painless and were more of a discussion in order to gauge the staff's understanding of the NEPA assignment program.

TxDOT expressed that they expect the program to get better so that with each audit there are fewer and fewer findings. TxDOT felt that the preparation for the audits is time consuming and that the frequency of the audits is an issue. The audits were seen as a substantial obligation for both TxDOT and FHWA, with most of the burden related not so much to the actual days spent during the audit but to all the pre-auditing reporting and scheduling and the post-audit activities around the actual audit report and subsequent corrective actions, rather than the number of days spent in the audit.

Caltrans echoed what TxDOT expressed in terms of frequency and level of effort. When the NEPA assignment was early in the pilot program, Caltrans would often have deliverables for three audits working at the same time because of all the pre-audit, audit, and post-audit activities. Now that Caltrans is no longer under the Pilot Program but is permanently in full assignment, it has transitioned to self-assessment reviews, which occur on a per fiscal year basis according to the state's fiscal year. All twelve of the Caltrans' district offices can be subject to self-assessment reviews as well as Caltrans Headquarters. Caltrans keeps an ongoing project list and does quarterly reviews and data collection for each of its



districts. This way all the materials are already ready for the annual self-assessment review. As part of the quarterly reviews, Caltrans selects the districts to be reviewed, and seven to nine people are involved as members of the review team. The review team members travel to the selected districts and review files; they also interview staff. The performance of the quarterly reviews takes a week and is done by consultants. Caltrans staff works with the review team to finalize the report and then sends the “self-assessment monitoring report” to FHWA. FHWA audits in California will be resuming at some point.

The peer exchange group discussed that the audit reports do not seem to document the good work that a state DOT is doing in compliance. They pointed out that there is not a section that specifically states all the ways that a state DOT *is* in compliance with NEPA and applicable federal environmental laws. They expressed concern that this results in an unbalanced view of how a state is performing under the NEPA assignment program. They felt the need to create a means to report out the “good news” as well.

## More from FHWA's Perspective on Audits

FHWA staff emphasized that the focus of a first audit under full assignment is on procedures, staff training, and knowledge about NEPA assignment, and the overall ramp up for the program. FHWA approaches the first audit with the attitude that they want the state DOT to succeed so they work to find what “gaps” the state DOT may have missed in its initial implementation. TxDOT indicated that they had FHWA do a program review right after TxDOT started assignment so that “gaps” could be found even before the first audit. At the first audit, the focus is not on individual projects but at the state DOT program-level implementation.

FHWA staff stated that the audits are about more than whether a particular decision is defensible; they are also about problem-solving and best practices that come out of the audits. FHWA staff acknowledged that audits are unpleasant and do take a lot of work for both sides. When FHWA staff find something in an audit, they work diligently to verify that what they found is really an issue. FHWA staff discuss potential findings with the state DOT staff and try to resolve and talk about issues. There is a lot of collaboration and dialogue during the audits and the post-audit activities.

FHWA staff also emphasized that the audits are based on the information documented in a project’s file, so missing or incomplete documentation is a problem.

All audit reports go through many levels of review before they are published in the Federal Register. As discussed above there is also a lot of vetting back and forth with the state DOT as well.

## Electronic Tracking Systems

Another aspect of implementing NEPA assignment that is related to audits and monitoring is tracking documents and procedures. This can be one reason why some state DOTs are hesitant to take on NEPA assignment. In fact, many states that have taken on or are preparing to take on NEPA assignment did not have electronic tracking systems in place prior to taking on NEPA assignment. TxDOT did not have a system in place but worked with Virginia DOT to adopt their program as the platform for a new TxDOT system. TxDOT used Virginia’s DOT platform partly to get around the lengthy and involved process that



would have been involved had their IT department had to start from scratch. Caltrans Local Assistance Division had a tracking system called LP2000, but it was limited to local, federal aid projects and not Caltrans' own projects. Caltrans used off-the-shelf software to create the STEVE tracking system that all Caltrans' districts now use. FDOT already has an electronic document management system in place, ETDM. FDOT will seek to marry its project management system with ETDM to accomplish the needed tracking. Ohio DOT has an electronic and totally paperless online system for its CEs; they are working on adding components to this system such as agency coordination and environmental commitment tracking in order to meet some of the NEPA assignment monitoring requirements. Many states voiced that one benefit of taking on NEPA assignment was the ability to secure funding for these types of systems and upgrades. Ohio DOT stated that their initial system was about \$250,000 and it is about \$50,000 for the add-ons. Lastly, UDOT is exploring whether an off-the-shelf software package can meet their needs.

### 3.5.2 Staffing and Organizational Changes for NEPA Assignment

The group also discussed whether and how state DOTs in NEPA assignment changed their staffing and/or organization structure. TxDOT added three to four staff specifically for NEPA assignment but other than that they simply allocated existing staff to do NEPA assignment activities. Ohio DOT added a total of three new positions—an environmental attorney, a NEPA assignment environmental manager, and an assistant to the NEPA assignment environmental manager, who also splits some time doing environmental permitting work. Ohio DOT is confident that even with the three additional staff, the DOT will still have costs savings when compared to the prior business as usual. FDOT had headquarters' Quality Assurance Review (QAR) staff already so they did not add any staff for that function. They did pull a position from a staffing pool that FDOT maintains in order to handle the extra volume of CEs; they also elevated a manager to sign documents.

Caltrans added and/or reallocated seven staff for the NEPA assignment program. These staff members are tied to the requirements for adequate financial resources, staffing, and training under the NEPA assignment program. Caltrans also maintains an on-call contract for a consultant team that supports the NEPA assignment program by performing work that includes but is not limited to performing self-assessment and supporting efforts to keep its guidance and policies up to date. Caltrans allocates about \$500,000 per year for this consultant support.

Alaska DOT added three positions for its CE assignment program, which effectively created an environmental office in their headquarters. Alaska DOT added two more staff for their full assignment program and tied that to the need to ensure compliance with their Section 106 Programmatic Agreement. In terms of organizational changes, UDOT did not add any new staff but did change its structure by recentralizing its environmental approval authority back to its headquarters. An important reason for doing this was so that environmental staff reported to an environmental manager rather than a construction engineer.

### 3.5.3 Role of FHWA after Assignment

As discussed in Section 3.3.1, “Pre-Application,” above, NEPA assignment MOU language precludes FHWA involvement in project-level decisions. FHWA staff talked about the importance of managing expectations both within FHWA and outside FHWA when it comes to the NEPA assignment program—this includes federal resource agencies. FHWA continues to do a lot of outreach to federal resource agencies and to remind the agencies that under NEPA assignment they need to deal with the state DOT.

### 3.5.4 Assuring Adequate and Qualified Staff and Adequate Financial Resources

In addition to the discussion the group had about legal and environmental staffing at the time of pre-application, the group also discussed the need to continually assure that staffing and financial resources are available for a state DOT’s NEPA assignment program. The question was asked about what staffing level would be considered adequate for a state DOT’s program. FHWA staff indicated that there was not a clear cut answer; the key is whether state DOT staff are able to get the work done and do not feel like they are so overwhelmed that compliance is falling through the cracks.

In terms of both qualified and adequate staffing, the states discussed that high-risk areas or areas that are specialized or that come up infrequently can be handled by consultant staff. For state DOTs with smaller delivery programs and smaller staffs, consultant staffing may be essential for implementing the NEPA assignment program. Even large state DOTs, like Caltrans, use consultants to support the NEPA assignment program.

As part of this discussion, it was also emphasized that the NEPA assignment program is discretionary so that if circumstances change while a state DOT is in the program, that all or a portion of the assignment can be revised or terminated by either FHWA or the state DOT. To date, termination of all or a part of a state DOT’s NEPA assignment program has never happened. If the circumstances should arise, the intent would be to have both sides discuss the circumstances and proposed changes so that before termination, efforts could be made to get the MOU implementation back on track.

### 3.5.5 Messaging to the State DOT’s Districts

Most states that are in or are entering NEPA assignment have some form of centralized headquarters that mainly handles policy and procedures with decentralized districts that perform day-to-day project delivery. It was generally felt by the group that states that had a more centralized organizational structure would have an easier time with implementing NEPA assignment. The group discussed how a more decentralized or combination structure worked in terms of messaging and implementing NEPA assignment. FDOT headquarters staff working on the NEPA assignment application and MOU did two traveling tours to their districts to discuss organizational changes and to educate district staff on what was being proposed as part of NEPA assignment. For FDOT, the district staff will largely be doing the same

types of activities that they are doing now, pre-assignment. FDOT is a decentralized organization, but under NEPA Assignment, FDOT's Central Office will take on the role of FHWA.

UDOT did a similar approach—meeting with the regions and hearing their concerns specifically related to monitoring and reporting that the regions were not used to doing. UDOT also stepped back and asked themselves what a successful environmental program looks like within UDOT and what things would they need to do to be a success. Ohio DOT, which does have districts doing project delivery, stated that they anticipate some sharing of responsibilities across districts; for example, staff from one district performing a peer review for another district's documents. TxDOT's organization is that the approval for EAs and EISs and the DOT's subject matter experts are centralized. For Caltrans, their districts can approve CEs and routine EAs; legal sufficiency reviews and reviews of complex EAs and EISs are centralized but even then the final environmental documents are signed by district staff.

### 3.5.6 What Can a State DOT Do on Day One

Questions were asked about what happens to projects that are in mid-stream at the time of NEPA assignment and what happens in the case of re-evaluations. The answer from all the states was that the transfer of responsibility to the state DOT happens on the first day the MOU is effective; it is immediate. This includes projects that are in midstream and projects that may require re-evaluations; even if FHWA signed the original environmental document, the state DOT would be responsible for the re-evaluation and/or supplemental environmental document. The bottom line is that unless a state DOT specifically excludes a project or responsibility in the MOU, the state DOT is responsible for everything project-related for its NEPA program.

### 3.5.7 Implementing Quality Control and Quality Assurance

The peer exchange group also discussed how substantial the effort was to implement quality control and quality assurance under a NEPA assignment MOU. For most of the state DOTs entering into or already in NEPA assignment, there were quality control measures in place at the time of taking on NEPA assignment; the changes created by NEPA assignment related to the creation of new forms and checklists to better document the reviews. The state DOTs acknowledged that there was some ramp up in terms of getting all of their staff familiar with the forms and having the forms completed. One way Alaska DOT handled the forms was to make the forms themselves optional; although the forms are optional, the need to provide documentation is not. Alaska DOT is finding that staff are defaulting to using the forms rather than having to create their own means of documentation. The group agreed that the types of quality control measures that are in place with NEPA assignment are just good business practices regardless of whether a state DOT is in assignment or not.

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## Appendix A. State DOT Web Survey

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## **NCHRP 25-25 Task 99 NEPA Assignment State DOT Survey**

Welcome!

**The purpose of this survey is to gather information from State DOTs regarding perceived barriers to and costs-benefits of considering, entering, and implementing NEPA Assignment under 23 USC 326 and/or 23 USC 327. The results of this survey will help form the content for an upcoming peer exchange, white paper, and webinar on NEPA Assignment.**

**Under 23 USC 326, states may apply to assume responsibilities from FHWA for determining whether certain designated activities are included within classes of action that are categorically excluded and also may assume all or part of certain Federal responsibilities for environmental review, consultation, or other related actions required. Under 23 USC 327, sometimes termed "full assignment," a state may assume, the responsibilities from FHWA for one or more highway projects within the State under NEPA and may also assume all or part of the responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of a specific project subject to other requirements and limitations in 23 USC 327. MAP-21 expanded "full assignment" so that it is now available to all states.**

**Thanks for your time and input!**

## NCHRP 25-25 Task 99 NEPA Assignment State DOT Survey

### Base Information

1. What state's DOT do you represent?

State/Province

2. Name (optional):

3. Contact Information (e-mail and/or phone number) (optional):

Any personally identifying information will not be released as part of the survey results; contact information will only be used to allow the research team to follow-up to obtain additional information regarding responses if needed.

4. To what extent has your state considered taking on the NEPA assignments currently available from FHWA?

- ☐ We currently have a NEPA assignment MOU.
- ☐ We are in the application process for NEPA assignment.
- ☐ We have been actively exploring NEPA assignment but haven't decided whether to apply.
- ☐ We have explored NEPA assignment and decided not to apply.
- ☐ We haven't explored it much but we think NEPA assignment is not for us right now.
- ☐ We haven't considered it all.
- ☐ Other (please specify)



## NCHRP 25-25 Task 99 NEPA Assignment State DOT Survey

### Currently Not Actively Pursuing Assignment

5. In the future, how likely is your state to pursue assignment under:

|                                                                    | Not Likely            | Somewhat Likely       | Likely                |
|--------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|
| 23 USC 326<br>(Assumption of<br>Categorical Exclusions)            | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 23 USC 327 (Surface<br>Transportation Project<br>Delivery Program) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

6. Given the size and/or nature of our project delivery program, we believe the costs of applying for and assuming NEPA responsibilities outweigh the perceived benefits for our state.

- ☐ True
- ☐ False

Comment:

7. When considering NEPA assignment, how concerned is your state with the following:

|                                                                                                 | No Concern            | Slight Concern        | Neutral               | Some Concern          | Very Concerned        |
|-------------------------------------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Sovereign Immunity/Liability/Risk                                                               | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Uncertainty Regarding Benefits of Assignment                                                    | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Cost of Program/Assuring Adequate Financial Resources                                           | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Application Process Length and Difficulty                                                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Audits/Performance Reviews                                                                      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Other Federal Agency Views Regarding Application/Assignment                                     | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Public Views Regarding Application/Assignment                                                   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Political Context/Climate                                                                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Loss of Flexibility in How Projects are Delivered (e.g. early right of way, design activities)  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Fear of the Unknown                                                                             | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| QA/QC and Additional Administrative Requirements (e.g. project filing protocols, reviews, etc.) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Technical Knowledge/Training of Our Staff                                                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Availability/Capacity of Our Staff                                                              | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Need to Develop and Report Performance Measures                                                 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

Other Concern(s) and/or Comment(s):

8. Do you think additional information, guidance or assistance in the following areas would enable your state to pursue NEPA assignment? (In other words, can more guidance on a given concern change your state's decision on whether to take on NEPA assignment?)

|                                                                                                 | Yes, it could make a difference | No, this remains a "deal breaker" |
|-------------------------------------------------------------------------------------------------|---------------------------------|-----------------------------------|
| Sovereign Immunity/Liability/Risk                                                               | <input type="radio"/>           | <input type="radio"/>             |
| Benefits of NEPA Assignment                                                                     | <input type="radio"/>           | <input type="radio"/>             |
| Cost of Program/Assuring Adequate Financial Resources                                           | <input type="radio"/>           | <input type="radio"/>             |
| Application Process Length and Difficulty                                                       | <input type="radio"/>           | <input type="radio"/>             |
| Audits/Performance Reviews                                                                      | <input type="radio"/>           | <input type="radio"/>             |
| Other Federal Agency Views Regarding Application/Assignment                                     | <input type="radio"/>           | <input type="radio"/>             |
| Public Views Regarding Application/Assignment                                                   | <input type="radio"/>           | <input type="radio"/>             |
| Political Context/Climate                                                                       | <input type="radio"/>           | <input type="radio"/>             |
| Loss of Flexibility in How Projects are Delivered (e.g. early right of way, design activities)  | <input type="radio"/>           | <input type="radio"/>             |
| Fear of the Unknown                                                                             | <input type="radio"/>           | <input type="radio"/>             |
| QA/QC and Additional Administrative Requirements (e.g. project filing protocols, reviews, etc.) | <input type="radio"/>           | <input type="radio"/>             |
| Technical Knowledge/Training of Our Staff                                                       | <input type="radio"/>           | <input type="radio"/>             |
| Availability/Capacity of Our Staff                                                              | <input type="radio"/>           | <input type="radio"/>             |
| Need to Develop and Report Performance Measures                                                 | <input type="radio"/>           | <input type="radio"/>             |

Comment(s):

## NCHRP 25-25 Task 99 NEPA Assignment State DOT Survey

### Currently Pursuing NEPA Assignment

#### 9. Where is your state in the NEPA assignment process?

|                                                                    | Already Assigned      | Applying              | Considering           | Not Considering       |
|--------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| 23 USC 326<br>(Assumption of<br>Categorical Exclusions)            | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| 23 USC 327 (Surface<br>Transportation Project<br>Delivery Program) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

#### 10. How concerned was or is your state with the following when applying for NEPA assignment?

|                                                                                                             | No Concern            | Slight Concern        | Neutral               | Some Concern          | Very Concerned        |
|-------------------------------------------------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Sovereign<br>Immunity/Liability/Risk                                                                        | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Cost of<br>Program/Assuring<br>Adequate Financial<br>Resources                                              | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Application Process<br>Length and Difficulty                                                                | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Audits/Performance<br>Reviews                                                                               | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Other Federal Agency<br>Views Regarding<br>Application/Assignment                                           | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Public Views Regarding<br>Application/Assignment                                                            | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Political Context/Climate                                                                                   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Loss of Flexibility<br>in Project Delivery<br>(e.g. advancing design<br>activities)                         | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Fear of the Unknown                                                                                         | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| QA/QC and Additional<br>Administrative<br>Requirements (e.g.<br>project filing protocols,<br>reviews, etc.) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Technical<br>Knowledge/Training of<br>Our Staff                                                             | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

|                                                          | No Concern            | Slight Concern        | Neutral               | Some Concern          | Very Concerned        |
|----------------------------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Availability/Capacity of Our Staff                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Scope of Which Federal Laws to Assume                    | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Scope of Which NEPA Documents or Project Types to Assume | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Need to Develop and Report on Performance Measures       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Uncertainty Regarding Benefits of Assignment             | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

Other Concern(s) and/or Comment(s):

11. Has your state's application for NEPA assignment gone out for public review yet?

- ☐ Yes
- ☐ No

## NCHRP 25-25 Task 99 NEPA Assignment State DOT Survey

Already Applied for NEPA Assignment

12. My state has lessons learned, best practices, or other helpful information to share regarding the following concerns that may be *particularly* helpful to another state taking on NEPA assignment:

|                                                                                                 | Yes                   |
|-------------------------------------------------------------------------------------------------|-----------------------|
| Sovereign Immunity/Liability/Risk                                                               | <input type="radio"/> |
| Benefits of Assignment                                                                          | <input type="radio"/> |
| Cost of Program/Assuring Adequate Financial Resources                                           | <input type="radio"/> |
| Application Process Length and Difficulty                                                       | <input type="radio"/> |
| Audits/Performance Reviews                                                                      | <input type="radio"/> |
| Other Federal Agency Views Regarding Application/Assignment                                     | <input type="radio"/> |
| Public Views Regarding Application/Assignment                                                   | <input type="radio"/> |
| Political Context/Climate                                                                       | <input type="radio"/> |
| Loss of Flexibility in Project Delivery (e.g. advancing design activities)                      | <input type="radio"/> |
| Fear of the Unknown                                                                             | <input type="radio"/> |
| QA/QC and Additional Administrative Requirements (e.g. project filing protocols, reviews, etc.) | <input type="radio"/> |
| Technical Knowledge/Training of Our Staff                                                       | <input type="radio"/> |
| Availability/Capacity of Our Staff                                                              | <input type="radio"/> |
| Determining the Scope of What Responsibilities to Assume                                        | <input type="radio"/> |

Comment(s):

13. Is your state already actively implementing NEPA assignment (are you in the program)?

☐ Yes

☐ No



## NCHRP 25-25 Task 99 NEPA Assignment State DOT Survey

### Implementing NEPA Assignment

14. In implementing NEPA assignment, how difficult or resource intensive have the following turned out to be?

|                                                                                                 | Minimal               |                       | Somewhat              |                       | Very                  |
|-------------------------------------------------------------------------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Sovereign Immunity/Liability/Lawsuits                                                           | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Cost of Program/Assuring Adequate Financial Resources                                           | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Application Process Length and Difficulty                                                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Audits/Performance Reviews                                                                      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Other Federal Agency Views and Relationships                                                    | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Public Views and Concerns                                                                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Political Context/Climate                                                                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Loss of Flexibility in Project Delivery (e.g. advancing design activities)                      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Fear of the Unknown                                                                             | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| QA/QC and Additional Administrative Requirements (e.g. project filing protocols, reviews, etc.) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Technical Knowledge/Training of Our Staff                                                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Availability/Capacity of Our Staff                                                              | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

Other (comments)

15. Broadly speaking, what are your state's two biggest challenges and two best successes under NEPA assignment?

**Application Challenges/Successes**

16. Broadly speaking, what were your state's two biggest challenges and two best successes in the application process for NEPA assignment?

## NCHRP 25-25 Task 99 NEPA Assignment State DOT Survey

### Additional Input

17. Last question! (Even just a few bullets or phrases would help us.)

A NEPA assignment peer exchange is going to be held this year and a white paper (guidance) is going to be produced, what information, tools, or resources regarding NEPA assignment would be most helpful to your state?

## NCHRP 25-25 Task 99 NEPA Assignment State DOT Survey

Thank you

**Thank you for your time! We appreciate your participation and insights, and we look forward to sharing the overall research findings with you through the white paper and webinar.**

## Appendix B. State DOT Phone Interviews

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## **NCHRP 25-25 Task 99: Lessons Learned from State DOT NEPA Assignment**

### **Questions**

The following draft questions are proposed to form the framework for the phone surveys. Based on individual interviewee responses, short follow-up questions or additional clarifying questions may be asked.

#### For all state DOTs:

- We recognize that contemplating any change in a major program is daunting, no less regarding a change in your agency's approach to environmental compliance. What factors would you identify as making a compelling case for change towards NEPA assumption from the status quo? (pick 3)
  - Greater control over project schedules
  - Ability to consult directly with Federal agencies
  - Ability to rely exclusively on State staff for processing
  - Ability to make project decisions exclusive of FHWA staff
  - Ability to streamline compliance procedures to avoid delay
  - Ability to assume responsibility and liability for project decisions
  - Ability to reduce project costs
  - Other factor? Explain
- What are your current feelings towards NEPA assignment program?
- The following concerns were ranked the highest in our recent online survey, which 4-5 of these do you feel are most important to discuss in detail at the upcoming peer exchange? Which 2 give you the greatest concern?
  1. Sovereign immunity/liability/risk
  2. Cost of program/assuring adequate financial resources
  3. Audits/Self-Assessments
  4. Availability/capacity of our staff
  5. Other federal agency views regarding application/assignment
  6. Application process length and difficulty
  7. QA/QC and additional administrative requirements
  8. Technical knowledge/training of staff

For state DOTs that are approaching or in the application process:

- What guidance and help do you feel you most need as you are facing the application process and NEPA assignment implementation?
- What specific goals does your State hope to achieve by taking on NEPA assignment?
- Do you intend to take on all of FHWA's environmental responsibilities or just some? All levels of NEPA documentation or just a selection?

For FHWA:

- From your national perspective, what are some of the best practices or most valuable lessons learned that you have seen as states have taken on NEPA assignment?
- What are some of the most common misconceptions or misunderstandings about NEPA delegation/assignment from your perspective?
- What do you see as FHWA's environmental role in a State's highway project development process once that State has assumed FHWA's NEPA responsibilities?
- What should be FHWA's role and responsibility in the NEPA assignment program for States after all 6 audits have been completed?

For all participants regarding the peer exchange:

- What format or group processes have you experienced that worked well in other peer exchanges or similar group discussions?
- What do you most hope to get out of the peer exchange?
- What concerns listed above are you most interested in working on/sharing about?



## Appendix C. Peer Exchange Agenda

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**AGENDA**  
**NCHRP 25-25 Task 99: Lessons Learned from State DOT NEPA Assumption**  
**State DOTs/FHWA Peer Exchange**  
**November 10, 2015**

**Location: National Cooperative Highway Research Program |Transportation Research Board|**  
**500 5th Street NW | Washington, DC 20001**

**Invited Attendees:** State DOTs: Alaska, California, Florida, Idaho, Minnesota, Ohio, Oregon, Texas, Utah  
Other Invitees: NCHRP-TRB Program Officer, FHWA NEPA Assignment leads (Headquarters), NCHRP 25-25 Panel Members, AASHTO Liaison(s)

**MEETING PURPOSE:** Provide forum to share lessons learned from State DOTs who have applied or are in the process of applying for NEPA assumption with other states who are considering assumption

**Agenda Topics**

| Time        | Topic                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Who                |
|-------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| 8:30-8:45   | <b>Welcome, Introduction, and Meeting Overview</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Kelly Dunlap/Panel |
| 8:45-9:05   | <b>Brief Presentation by FHWA</b><br>Quick overview of NEPA assignment process and clarification regarding roles of FHWA HQ, Division, and Resource Center staff                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Owen Lindauer      |
| 9:05-10:00  | <b>Information Gathering Concerns/Lessons at Key NEPA Assignment Milestones</b><br>Using an interactive “post-it” note exercise, participants will share their questions, experiences, and lessons learned at NEPA assignment milestones. Milestones will be: 1) Pre-application, 2) Application/MOU, 3) Implementation/Renewal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | All                |
| 10:00-10:20 | <b>BREAK</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | All                |
| 10:20–11:00 | <b>Pre-Application Discussion</b><br>Building on information gathered during the “post-it” exercise, group will discuss the concerns/process of deciding to enter NEPA assignment and share pre-application experiences <ul style="list-style-type: none"> <li>• <i>Why are states pursuing assignment?</i></li> <li>• <i>What factors weighed in decision?</i> <ul style="list-style-type: none"> <li>○ <i>DOT Staffing (HQ and districts)</i></li> <li>○ <i>FHWA staffing</i></li> <li>○ <i>Nature of existing policies, procedures and guidance</i></li> </ul> </li> <li>• <i>Getting to the MOU</i> <ul style="list-style-type: none"> <li>○ <i>Sovereign immunity waiver- identify challenges and how overcame.</i> <ul style="list-style-type: none"> <li>▪ <i>Legal sufficiency review responsibility for state</i></li> <li>▪ <i>Consider state past experience with NEPA-based legal challenges</i></li> </ul> </li> </ul> </li> <li>• <i>Potential advantages/disadvantages to taking on both 326 and 327?</i></li> </ul> | All                |

|             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |     |
|-------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 11:00–12:00 | <b>Application/MOU Discussion Part</b><br>Building on information gathered during the “post-it” exercise, group will discuss their concerns and experience with the application and MOU processes. <ul style="list-style-type: none"> <li>• <i>MOU Process</i> <ul style="list-style-type: none"> <li>• <i>What is the process? Who has sample schedules?</i></li> <li>• <i>What was calendar time from initiating to approved MOU?</i></li> <li>• <i>Who, how much effort?</i> <ul style="list-style-type: none"> <li>• <i>Buy-in from others, internal and external?</i></li> </ul> </li> </ul> </li> <li>• <i>Did states already have cost/time tracking system in place?</i> <ul style="list-style-type: none"> <li>◦ <i>Does state include staffing, training, record-keeping?</i></li> </ul> </li> <li>• <i>Staffing</i> <ul style="list-style-type: none"> <li>◦ <i>Staff capabilities prior to delegation?</i></li> <li>◦ <i>How did state assess where you were and where needed to be prior to seeking assignment?</i></li> <li>◦ <i>What procedures and training did state have in place before/during and after assignment?</i></li> <li>• <i>Did FHWA require a certain benchmark before granting delegation?</i></li> </ul> </li> <li>• <i>Did states have to make office/organizational changes?</i></li> <li>• <i>QA/QC</i> <ul style="list-style-type: none"> <li>◦ <i>What QA/QC process did states have in place before assignment?</i></li> <li>◦ <i>How substantial was the “lift” to meet FHWA requirements?</i></li> <li>◦ <i>Was much of the new work contracted out or internal?</i></li> </ul> </li> </ul> | All |
| 12:00–1:15  | LUNCH                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | All |
| 1:15–2:45   | <b>Implementation/Renewal Discussion</b><br>Building on information gathered during the “post-it” exercise, group will discuss their concerns and experience with implementing NEPA assignment. A particular focus of this discussion will be on audit preparation, sharing of audit experiences, and post-audit activities. <ul style="list-style-type: none"> <li>• <i>What is the required commitment to staffing levels and/or training?</i></li> <li>• <i>How delivered?</i></li> <li>• <i>States DOTs centralized or decentralized and how do both models work?</i></li> <li>• <i>QA/QC</i> <ul style="list-style-type: none"> <li>◦ <i>How are tools working so far?</i></li> <li>◦ <i>What type of FHWA project assistance have states received post-MOU?</i></li> </ul> </li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | All |
| 2:45-3:05   | BREAK                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | All |
| 3:05-4:30   | <b>Additional Discussion</b><br>This time will be used for participants to have further discussions regarding their concerns and questions regarding NEPA Assignment—time may be dedicated to identifying what gaps/questions remain unaddressed, what may need to be looked at further regarding differences between 23 USC 326 and 23 USC 327, what further information participants want/need regarding NEPA assignment <ul style="list-style-type: none"> <li>• <i>What have states learned, surprises?</i></li> <li>• <i>Metro transit agency becoming interested in NEPA delegation – any states interested in assignment?</i></li> <li>• <i>Highlight benefits/time/cost savings.</i></li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | All |
| 4:30-5:00   | <b>Wrap-Up/Adjourn</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | All |