

TRANSPORTATION RESEARCH BOARD

Legal Issues Regarding NEPA
Assignment for Federal Transportation
Programs

Wednesday, October 9, 2019
2:00-4:00 PM ET

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REGISTERED CONTINUING EDUCATION PROGRAM



Purpose

To provide an overview of legal issues associated with the National Environmental Policy Act (NEPA) Assignment Program for federal transportation programs.

Learning Objectives

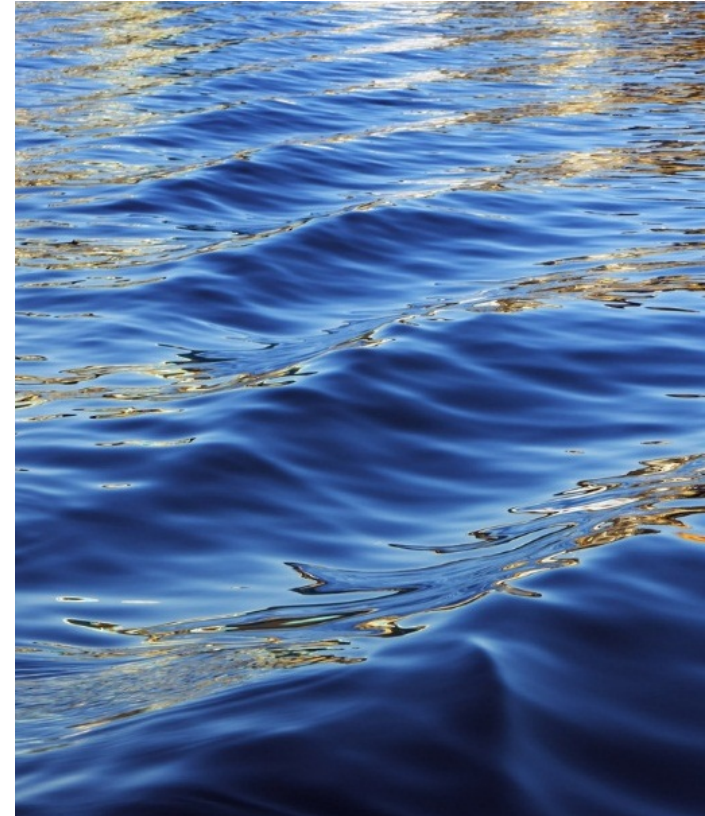
At the end of this webinar, you will be able to:

- Identify legal challenges in the NEPA Assignment process
- Utilize current practices in the negotiation and implementation of NEPA Assignment
- Identify potential improvements in the area of NEPA Assignment for transportation projects



TRB AL050: Environmental Issues in
Transportation Law Committee

Legal Issues on
NEPA Assignments
for Federal
Transportation
Programs



Presenters:

- ***Sean Lynch*** – Assistant Attorney General, Alaska Department of Law
- ***Rich O'Connell*** – Associate General Counsel, Texas Department of Transportation
- ***Bill Malley*** – Partner, Perkins Coie LLP
- ***Jomar Maldonado*** – Chair of the Environmental Issues in Transportation Law Committee

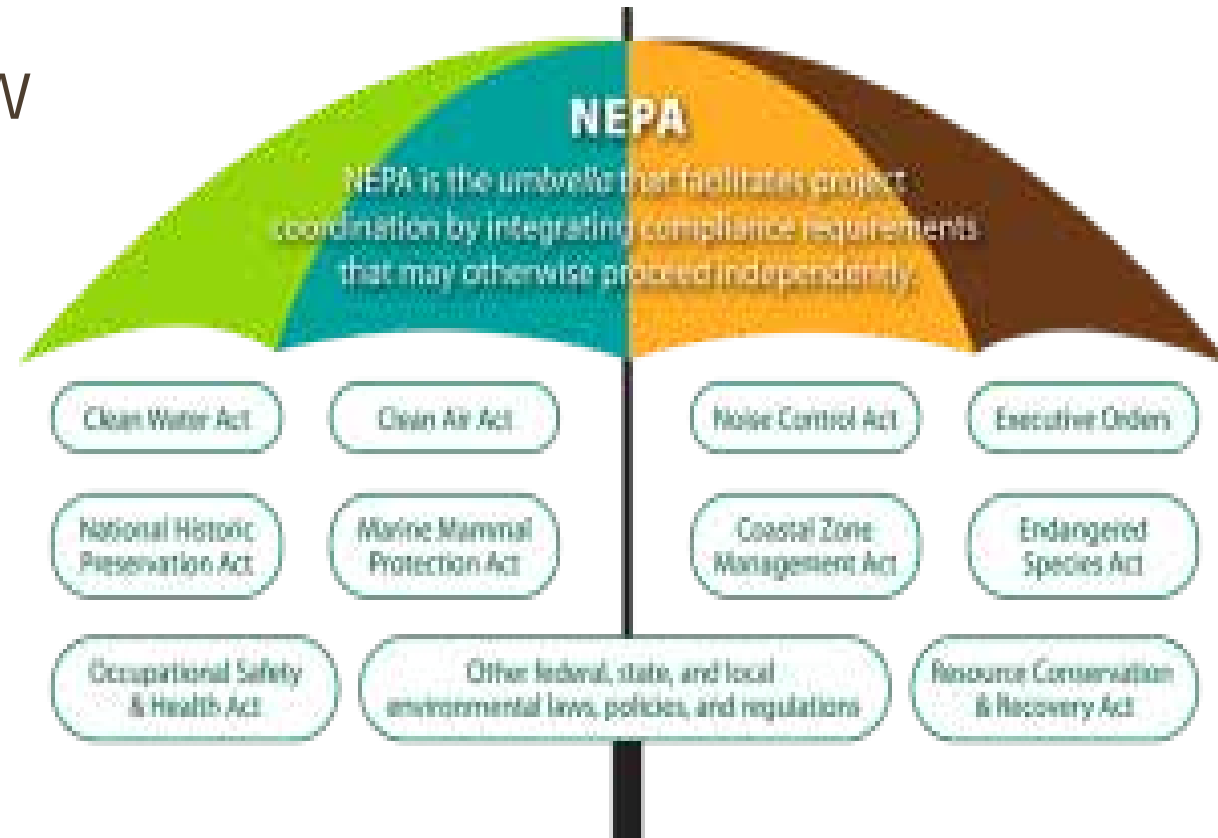
What is NEPA Assignment?

- Pilot under SAFETEA-LU (2005) and, then, permanent program under MAP-21 (2012)
- Statewide highway, railroad, or public transportation agency responsible for Federal environmental reviews
- State agency makes and defends environmental review decisions
- 5-year with renewal option



What is included?

- Assignment may involve responsibilities for:
 - Categorical Exclusion projects (23 U.S.C. 326)
 - All NEPA classes of action (23 U.S.C. 327)
- And all other environmental review responsibilities
- Program of projects or specific projects
- There may be exceptions



What steps are required?

- Expression of interest and application
- Memorandum of Understanding with:



- Responsibilities assigned
- Projects or program of projects assigned
- Waiver of sovereign immunity
- Commitment of resources
- Training commitments
- Litigation considerations
- Oversight process
- Renewal options

Which States have NEPA Assignment?

- CE Assignment: California, Utah, Arizona, Nebraska
- Full program Assignment:
 - California
 - Texas
 - Ohio
 - Florida
 - Utah
 - Alaska
 - Arizona

TRB AL050: Environmental Issues in
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The Application Process and MOU Negotiation

By Sean Lynch, Assistant Attorney
General, Alaska Department of Law



The Application Process:

a) Establish a FHWA working group

- i. Division Office; Resource Center; Chief Counsel's Office
- ii. Letter of Interest (once committed)

b) Subject matter experts/ manuals and processes/ legal counsel

The Application Process:

c) Sovereign Immunity Waiver

- i. 23 U.S.C 327(c)(3)(B): The State expressly consents to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the Secretary assumed by the State.
- ii. May require legislative action.

The Application Process:

c) Sovereign Immunity Waiver

- iv. Alaska's AS 44.23.020(g): The Attorney General may, in cases that involve compliance, discharge, or enforcement of responsibilities assumed by the Department of Transportation and Public Facilities under AS 44.42.300, waive the state's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States.
- v. Alaska's 327 MOU ¶ 4.3.1: DOT&PF hereby expressly consents, on behalf of the State of Alaska, to accept the jurisdiction of the Federal courts in cases that involve the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary assumed by DOT&PF ... which constitutes a limited waiver of the State of Alaska's immunity under the Eleventh Amendment to the U.S. Constitution.

MOU Negotiation

a. Public Involvement

- i. Public notice and comment at solicitation, application, MOU, audits
- ii. Public records laws and judicial review of disclosures must be comparable to FOIA

b. Regulatory Agency Involvement

- i. Agency outreach not required by law, but very important
- ii. State DOT will assume ongoing consultations and interagency agreements

MOU Negotiation

c. Attorneys' Fees

- i. 23 USC 327(a)(2)(G) Legal fees. A State assuming the responsibilities of the Secretary under this section for a specific project may use funds apportioned to the State under section 104(b)(2) for attorneys' fees directly attributable to eligible activities associated with the project.

- ii. Alaska's 327 MOU ¶ 6.2.2: The DOT&PF will be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement, subject to appropriation by the Alaska legislature and subject to responsibility between DOT&PF and any co-defendant Federal agency.

MOU Negotiation

d) USDOJ and FHWA involvement in litigation

- i. Alaska's 327 MOU ¶ 6.2.5: The DOT&PF will not execute any settlement agreement until: (1) FHWA and USDOJ have provided comments on the proposed settlement; (2) indicated that they will not provide comments on the proposed settlement; or (3) the review period [reasonable period no less than 10 days, no more that 30 days] has expired, whichever occurs first.
- ii. Alaska's 327 MOU ¶ 6.2.6: The DOT&PF shall notify FHWA's Alaska Division Office and USDOJ within five days of filing a notice of appeal of a court decision.

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Implementation Issues

By Rich O'Connell, Associate General
Counsel, Texas Department of
Transportation



How to Implement a State Assignment Program

- ***Example -- the Texas experience***

- Full NEPA assignment by agreement dated December 2014
- In 2018, TxDOT issued more than 3200 approvals
- Application for renewal is pending. The public comment period has ended.

A. *Modify Programs and Policies*

- ***Improve agency processes***
 - Improve existing processes, and confirm compliance with federal requirements
 - Ensure consistent handling of similar projects and issues
 - Ensure a “paper trail” is created to document decisions, so the SDOT may show its work during a subsequent audit (discussed below)
- ***Rewrite manuals***
 - TxDOT replaced its “Environmental Manual” with an on-line “Tool Kit” that includes separate “handbooks” on specific topics
 - Confirm compliance with federal requirements
 - Add provisions on decision-making procedures
 - Specify signature authority to issue approvals for various types of documents
- ***Performance measures – create tracking procedures***
- ***Train agency staff, consultants, and employees of local governments***
 - TxDOT hired training staff, plus invited FHWA Resource Center staff to teach classes
- ***Establish a program review function***
 - Continuous review of completed projects to assess compliance with processes and policies
- ***Add project information to federal databases (National Permitting Dashboard)***
- ***Add process for legal sufficiency review***

B. Assessments, Audits and Monitoring

- ***FHWA Texas Division gives TxDOT regular notices of changes to FHWA policies***
- ***Each year FHWA prepares a “Risk Assessment” and TxDOT prepares a “Self Assessment”***
- ***Audits***
 - ***Initial agreement will require four annual audits***
 - ***FHWA reports are published in the Federal Register***
 - ***If FHWA identifies deficiencies then state DOT must implement corrective measures***
- ***Monitoring***

C. Litigation

- ***The Texas experience***

- Since the NEPA Assignment Agreement, there have been (completed or ongoing): (1) two court cases concerning alleged violations of the Endangered Species Act; (2) three court cases concerning alleged violations of NEPA; and (3) one Title VI administrative complaint filed with FHWA Office of Civil Rights

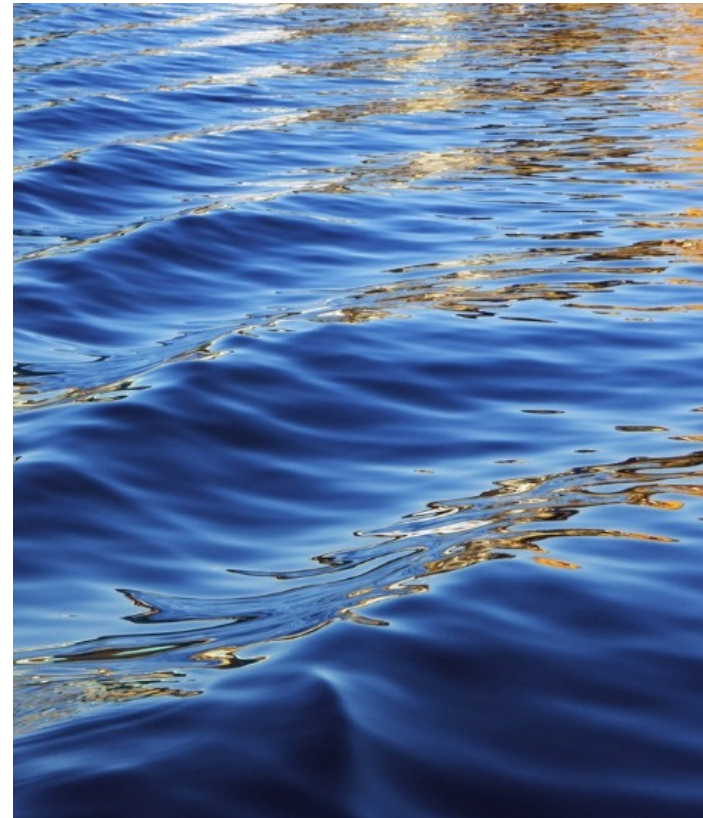
- ***Litigation Counsel***

- Office of the Texas Attorney General; private attorneys
- TxDOT (together with Texas Attorney General) prepares the administrative record
- Participation by USDOJ and FHWA
 - Notices; appeals of decisions; settlements



The Future of NEPA Assignment

Bill Malley, Perkins Coie LLP



Brief History of NEPA Assignment under 23 USC 327

- **SAFETEA-LU (2005)**
 - Pilot program
 - Limited to 5 States
 - Allows assignment of **FHWA's** responsibilities to States for compliance with NEPA and related laws
 - Prohibited assignment of air quality conformity determinations
- **MAP-21 (2012)**
 - Permanent program
 - Open to all States
 - Expanded to allow assignment of **FTA** and **FRA** responsibilities to States
- **FAST Act (2015)**
 - No change in overall program structure
 - Minor program adjustments – e.g., audits 1x/year for first 4 years, rather than 2x/year.
 - Created pilot “substitution” program allowing State law to be substituted for NEPA (open only to States with NEPA assignment)

Where We Are Today: FHWA

- **FHWA NEPA Assignment is expanding ...**
 - California was the early adopter (2011)
 - Pace has picked up --
 - Texas
 - Ohio
 - Florida
 - Utah
 - Alaska
 - Arizona (approved 2019)
 - Nebraska (application in progress)
- **With experience, FHWA NEPA assignment is becoming “normalized”...**
 - Sovereign immunity waivers
 - Application process and MOU terms
 - Audits, Litigation Coordination

Where We are Today: FTA and FRA

- **Limited experience with assignment for other modes**
 - FRA: just one State - California recently received assignment for High-Speed Rail program
 - FTA: no States.
- **Factors impeding expansion beyond FHWA**
 - Many FTA project sponsors are local governments (can't receive assignment)
 - FTA and FRA funding = discretionary grants (not formula)
 - Funding is less certain; need for FTA/FRA NEPA may be intermittent.
 - NEPA decisions are interwoven with grant decision – e.g., New Starts – that can't be assigned
- **Example: California High-Speed Rail Authority**
 - Early days... MOU was just executed in July.
 - MOU similar to FHWA assignment MOUs, with some differences.
 - Scope limited to HSR system and rail projects connected to that system.
 - Scale of program (800+ mile-system) warranted investment in assignment

Future of NEPA Assignment under 23 USC 327

- **Growth of FHWA NEPA Assignment**
 - Continuing growth in # of State DOTs with assignment seems likely ...
 - Is assignment becoming the norm for larger States?
 - If it becomes the norm, what are the implications for FHWA's NEPA program
 - Evolution of FHWA's role
 - Need for greater coordination among States to ensure consistency?
- **First example of *FTA* NEPA Assignment?**
 - Uncertain, but could happen – likely in a State with a Statewide public transit agency *and* ample pipeline of New Starts projects (i.e., a clear need for FTA NEPA over long time period).
 - Key challenge: What does NEPA assignment mean for New Starts?
 - Complete NEPA, then apply for New Starts? Or seek to run in parallel?
- **Amend statute to allow assignment of project-level AQ conformity?**
 - Conformity currently can't be assigned at all.
 - Requires FHWA/FTA/FRA to be involved in project-level decision-making on a single issue.

NEPA *Substitution*

- New program, enacted in 2015. Codified at 23 USC 330.
- Allows any State with NEPA assignment to apply to USDOT to substitute a State environmental law for compliance with NEPA and 23 USC 139.
 - Example: In California, substitute CEQA for NEPA.
- Limitations:
 - State law must be “at least as stringent” as the corresponding federal law.
 - Does not allow for substitution of other federal laws (e.g., ESA, Sec. 4(f), Sec. 106, CAA).
 - Requires waiver of sovereign immunity
 - Lawsuits challenging compliance with State law are heard in federal court.
 - “the United States district courts shall have exclusive jurisdiction over any civil action against a State relating to the failure of the State ... to follow the alternative environmental review and approval procedures approved pursuant to this section.”
- Status
 - Proposed regs issued 9/28/2017; final rule not yet issued.

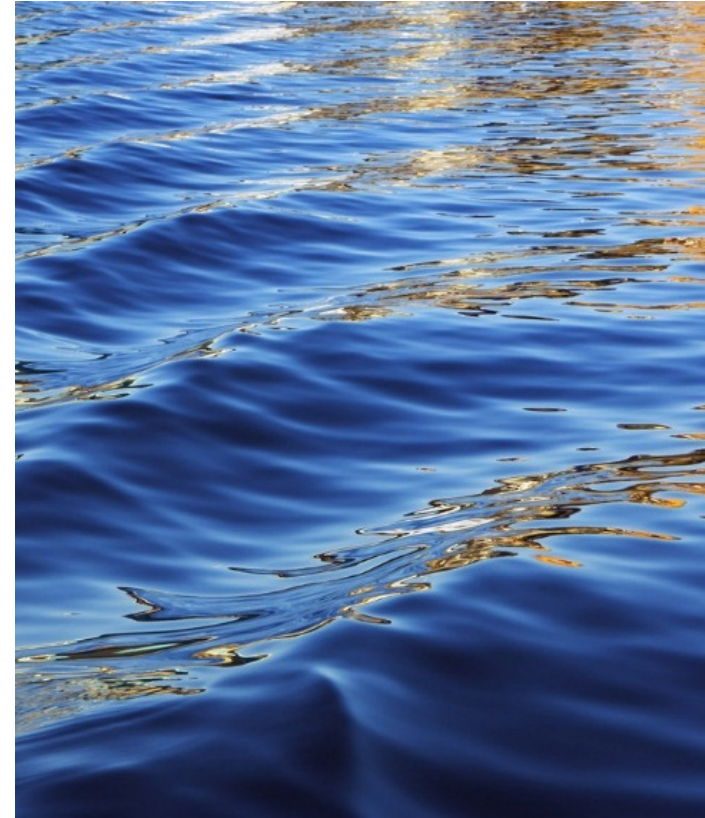
Legislatively Expand Assignment Authority?

- *Expand beyond USDOT ...* by authorizing other agencies to assign NEPA responsibilities to States.
- *Expand beyond environmental ...* by authorizing State DOTs to assume some or all of FHWA's responsibilities for approving right-of-way acquisition.
- *Remove limits on environmental responsibilities ...* by eliminating prohibition on assigning AQ conformity and clarifying that floodplain and noise regulations.
- Note: These concept were included in the 2018 White House Infrastructure Proposal, "*Legislative Outline for Rebuilding Infrastructure in America.*"
<https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf>




Questions?

Thanks for participating!



Today's Speakers

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