

**DEPARTMENT OF TRANSPORTATION**

OFFICE OF THE DIRECTOR

P.O. BOX 942873, MS-49

SACRAMENTO, CA 94273-0001

PHONE (916) 654-5266

FAX (916) 654-6608

TTY 711

www.dot.ca.gov

*Serious drought.  
Help save water!*

October 3, 2016

Ms. Susan Bransen  
Executive Director  
California Transportation Commission  
1120 N Street, Room 2233 (MS-52)  
Sacramento, CA 95814

Dear Ms. Bransen:

This letter is to inform you that the legislation providing the limited waiver of sovereign immunity necessary for the California Department of Transportation (Caltrans) to continue carrying-out the federal government's responsibilities to review and approve projects pursuant to the National Environmental Policy Act (NEPA) will expire January 1, 2017. Without the limited waiver of sovereign immunity, the existing Memorandums of Understanding (MOUs) between Caltrans and the Federal Highway Administration (FHWA) will be nullified, and Caltrans will lose its ability to perform those reviews and approvals for the program known as NEPA Assignment.

The NEPA requires federal agencies to evaluate and to disclose the environmental impacts of proposed federal actions in comparison to reasonable alternatives, solicit input from potentially affected entities, and presents unbiased conclusions regarding the direct, indirect, and cumulative environmental impacts of proposed federal actions. Federal agencies must consider this information when making final decisions on proposed actions.

In 2005, as part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act, a Legacy for Users, Congress authorized a pilot for the U.S. Secretary of Transportation to enter into agreements with five state transportation departments to assume the NEPA Assignment which allows states to perform the federal government's responsibility for reviewing and approving projects pursuant to NEPA. Federal law made this assignment of authority conditional on a state assuming sole responsibility and sole liability for complying with, and carrying out federal law through the limited waiver of sovereign immunity. The program intended to streamline the federal environmental process by eliminating one layer of government review, while maintaining federal protection of environmental resources, only California participated in this pilot program.

Based in part on California's success, this federal program was made permanent in 2012 with the passage of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21).

As noted above, the limited waiver of sovereign immunity is required to accept liability and consent to federal court jurisdiction. As such, the following State legislation has been enacted for this authority:

**AB 1039 (Núñez, Chapter 31, Statutes of 2006)** Provides a limited waiver of the State's sovereign immunity under the Eleventh Amendment of the United States Constitution for suits filed in federal court on decisions made through January 1, 2009. The waiver applied to only those suits regarding Caltrans's program to carry out the federal government's responsibilities to review and approve projects pursuant to NEPA. The statute required Caltrans to submit a report to the Legislature by January 1, 2008, regarding the performance of the program.

**AB 2650 (Carter, Chapter 248, Statutes of 2008)** Extends the State's limited waiver of sovereign immunity provided in **AB 1039 (Núñez, Chapter 31, Statutes of 2006)** for decisions made through January 1, 2012. The statute required Caltrans to submit two reports to the Legislature by January 1, 2009, and January 1, 2011, regarding the performance of the program. The report requirements were expanded to include an assessment of time spent on all project delivery phases from the start of environmental studies to the time projects were ready for construction bids.

**AB 892 (Carter, Chapter 482, Statutes of 2012)** Extends the State's limited waiver of sovereign immunity provided in **AB 2650 (Carter, Chapter 248, Statutes of 2008)** for decisions made through January 1, 2017. The statute requires Caltrans to submit a report to the Legislature by January 1, 2016, regarding the performance of the program. The report requirements were expanded to include an assessment of time spent on local agency sponsored projects requiring federal environmental review and approval.

In February 2016, new legislation to make the State's limited waiver of sovereign immunity permanent was introduced the Assembly (AB 2034). On April 20, 2016, the bill received a unanimous "yes" vote, passed out of the Assembly, and was assigned to Senate Transportation on May 5, 2016. Around the same time, the waiver language was included in the special session transportation funding package, now SB 16. Since the language was in both bills, and to avoid potential conflict with the funding bill, AB 2034 was allowed to die in Senate Transportation. The idea was that funding bill would be voted on at the end of the legislative session which expired on August 31, 2016. In addition, there were attempts to add the language to bills at the end of the session, but they were unsuccessful.

Currently, we have two opportunities for legislation to continue the limited waiver of sovereign immunity prior to the expiration of AB 892 on January 1, 2017. One is the passage of the SB 16, and the second is an urgency bill passed on December 5, 2016, when the legislature returns for a one-day session.

Caltrans is also exploring non-legislative options for providing the necessary limited waiver of sovereign immunity.

If the waiver of sovereign immunity expires, Caltrans will be unable to sign any Categorical Exclusions (CEs), Draft Environmental Documents (DEDs) or Final Environmental Documents (FEDs) for all FHWA funded projects on or off the State Highway System. In addition, Caltrans will not be able to consult directly with the federal resource agencies on approvals and/or permits for State and local projects. The responsibility for signing NEPA approvals would shift back to the California Division of FHWA. Since Caltrans was assigned NEPA responsibilities in 2007, the FHWA has attrited and down sized their environmental division to three staff members who will not be able to take on the additional project level work and turn it around in a timely manner.

In order to mitigate this challenge, we are working on the following items:

- Developing a transition plan with the FHWA.
- Developing a strategy plan to have urgency legislation introduced in January.
- Developing a Programmatic Categorical Exclusion Agreement with FHWA that will allow Caltrans to approve "simple" projects with no impact to the environment.
- Advancing any environmental documents, if possible, that are scheduled for DED or FED in January through December, per the Environmental Deputy District Directors.
- Notifying additional local partners on October 26, 2016, at the quarterly teleconference with the Self-Help Counties.

In addition, the environmental team notified the Transportation Cooperative Committee at their meeting on September 22, 2016.

The impacts to the state will be significant if the limited waiver of sovereign immunity is not passed by the legislature by December 31, 2016. The following outlines the impacts:

- The FHWA is not staffed to take on the additional work to approve projects. This will have an enormous impact on FHWA in California and potentially other geographical locations that will be called in to assist with the workload.
- Few federal regulatory agencies have pre-NEPA Assignment experience working with the FHWA as federal lead, and only have experience working with Caltrans as federal lead. The time delays and fiscal impacts are difficult to quantify. However, with NEPA Assignment we have saved 5.2 months in the processing of Section 7 Biological Assessments/Biological Opinions. The delay to the processing of Section 404 permits with the U.S. Army Corps of Engineers during the plans, specifications and estimate phase will affect when projects will be ready to list and advertise.

Ms. Susan Bransen

October 3, 2016

Page 4

- There will be a transition period for the regulatory agencies to learn new review/approval procedures and will result in longer review and approval timeframes. In addition, a determination will need to be made on the action necessary for projects where Caltrans has initiated consultation as the federal lead and the responsibilities will be shifted to the FHWA.
- Additional staff time to revert NEPA guidance and job aids back to reflect pre-NEPA Assignment requirements, and to revise interagency MOUs that notify relevant federal agencies regarding new procedures.
- Loss of national leadership since Caltrans has led the nation on NEPA Assignment and provides guidance to states that have recently assumed or are thinking of assuming NEPA responsibilities.

Over the course of the NEPA Assignment program, Caltrans has provided four reports to the legislature as required by the enacted legislation. In January 2016, Caltrans submitted its report to the Legislature as required by AB 892. The report can be found at:  
[http://www.dot.ca.gov/hq/env/nepa/html/documents\\_reports.htm#legrpts](http://www.dot.ca.gov/hq/env/nepa/html/documents_reports.htm#legrpts).

Sincerely,



MALCOLM DOUGHERTY

Director

c: Brian P. Kelly, Secretary, California State Transportation Agency  
Kristina Assouri, Chief Deputy Director, California Transportation Commission