

## States Look To NEPA Review Power To Spur New Projects

By **Linda Chiem**

*Law360, New York (February 24, 2017, 9:41 PM EST)* -- As states wait for President Donald Trump to unveil a plan to increase investment in the nation's infrastructure, they could look to leverage a little-known program that expands their authority under the National Environmental Policy Act to expedite highway and other surface transportation improvement projects, experts say.

The Surface Transportation Project Delivery Program, sometimes called the NEPA Assignment Program, which allows states to assume the U.S. Department of Transportation's responsibilities for reviewing projects to make sure they square with NEPA, is picking up momentum as a means of advancing high-priority transportation projects that states want to get off the ground more quickly.

The benefit for states, experts say, is that having the NEPA assignment to take the reins can potentially shave years and millions of dollars off of project timelines and costs by having them move more quickly through the required review process.

"That's very innovative and could be effective in avoiding duplication, facilitating more rapid permitting," Gary S. Guzy, senior of counsel at Covington & Burling, said of the program. "It's moving along."

Florida became the latest state to snag approval to get a NEPA assignment from the DOT's Federal Highway Administration, when in December, its Department of Transportation executed an agreement with the FHWA that assigns FHWA's responsibilities under NEPA for federally funded highway projects to FDOT.

Under that NEPA assignment, Florida DOT would be legally responsible for ensuring that all federally funded highway projects continue to comply with all aspects of NEPA prior to approving any related NEPA documents, the agency said.

California, Texas and Ohio have already applied for and received this assignment from FHWA. But in order for a state to get that authority or assignment, it has to pass legislation acknowledging that it will assume the legal responsibilities that a federal agency would typically have when it comes to NEPA

actions and decisions concerning federally funded projects. And that would make the state agencies subject to federal court jurisdiction, should their NEPA decisions or actions on a particular project come up against a legal challenge.

“If they’re going to be assuming federal responsibility for carrying out the environmental reviews and permitting, the concept of the law is they should be subject to the same kinds of judicial review in federal court as would a federal agency action,” Guzy explained.

Utah currently has an application pending to get its NEPA assignment under the program.

“In California, we’ve waived our immunity before, and Caltrans [California Department of Transportation] has viewed it as very important to have some control in the environmental review process for Caltrans projects, so they willingly waived the immunity,” said William T. Eliopoulos, a Silicon Valley-based partner and co-chair of the construction law group at Rutan & Tucker LLP. “It’s saying, hey, instead of us putting disputes in state court, we’ll put it in federal court. I don’t think that’s been a major issue — that part of waiving immunity.”

The Obama administration had embraced modernizing the federal permitting and environmental review process to expedite infrastructure projects. And the Trump administration issued an executive order on Jan. 24 allowing for expedited reviews for "high priority" infrastructure projects as determined by the White House's Council on Environmental Quality, giving states a potential new tool to spur momentum in getting their projects shovel-ready, experts say.

Under the executive order, a state governor or head of any executive department or agency can ask the chairman of the White House Council on Environmental Quality to decide whether an infrastructure project qualifies as a “high priority” project. Getting the “high priority” label could result in fast-tracking the project through its environmental reviews and approvals.

“It empowers the chair [of the White House CEQ] uniquely, and it also recognizes that there’s opportunities for others to seek to nominate projects as high priority,” Guzy said. “What it doesn’t do is supplant the actual requirements. There are clearer set of deadlines for expediting actions, and [it] requires an explanation if a project doesn’t live up to those deadlines.”

Transportation stakeholders have been eagerly anticipating Trump’s promised investment proposal to shore up the nation's aging roads, bridges, highways, airports, waterways and other infrastructure.

Despite politicians on both sides of the aisle agreeing that government investment in infrastructure should be a priority, experts are expecting to see a pitched political battle centering on how to pay for upgrades to the nation’s roads, railways and ports for the long term.

Senate Democrats lobbed an opening salvo earlier this year with a \$1 trillion, 10-year infrastructure investment plan that experts described as big and bold, mirroring proposals in a \$1 trillion infrastructure plan put out by Trump’s advisers during the presidential campaign last year.

The Democrats' plan sparked concerns that it will add to the still-growing federal deficit by not addressing how to pay for crucial highway, road and other infrastructure upgrades over the long term, while in promising an infrastructure plan, Trump has focused on getting the private sector to invest in transportation infrastructure upgrades.

"Now, we haven't seen any real detail for that plan [and] we're all waiting to see that," Eliopoulos said of Trump's yet-to-be-unveiled infrastructure plan. "At some point, that plan is coming and states that don't have enabling legislation to allow them to take advantage of public-private partnerships are going to be sitting outside being spectators instead of players."

--Editing by Pamela Wilkinson and Philip Shea.

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