



- Board of Directors
Communications and Legislation Committee

4/10/2012 Board Meeting

8-5

Subject

Express support and seek amendments for H.R. 2538 (Calvert, R-CA) - Reducing Environmental Barriers to Unified Infrastructure and Land Development (REBUILD) Act of 2011

Description

Representative Ken Calvert introduced the Reducing Environmental Barriers to Unified Infrastructure and Land Development (REBUILD) Act of 2011. The legislation builds upon the National Environmental Policy Act (NEPA) Pilot Program, enacted as part of transportation bill or Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which was signed into law in August 2005.

SAFETEA-LU created a pilot program that allowed a limited number of states to take on the task of ensuring NEPA compliance for highway projects under the Federal Highway Administration. The goals of the program are to simplify the NEPA implementation practices, reduce the time and cost involved in preparing NEPA reviews, and improve the effectiveness of public engagement. In those states that chose to assume this responsibility, including California, the length of time to complete a project review was reduced by an average of 17 months while also ensuring the goals of the NEPA process were not compromised.

Analysis

H.R. 2538 ([Attachment 1](#)) would expand this pilot program to projects outside the transportation sector. It would add a new section to NEPA allowing any state to assume responsibility for NEPA compliance by entering into a Memorandum of Understanding (MOU) with a designated federal official, who has environmental review responsibilities under NEPA. Specifically, H.R. 2538:

1. Defines “responsible federal official” as: (1) the Secretary of the Interior; (2) the Secretary of Transportation; (3) the Administrator of the Environmental Protection Agency (EPA); (4) the Secretary of the Army; and (5) the head of a federal agency, with respect to the preparation of environmental impact statements for major federal actions.
2. Requires each responsible federal official to promulgate regulations that establish requirements relating to information required to be contained in state applications to assume such responsibilities.
3. Permits such official to approve an application only if: (1) public notice requirements have been met; (2) the state has the capability to assume such responsibilities; and (3) the head of the state agency having primary jurisdiction over covered projects enters into a written agreement with such official to assume such responsibilities and to maintain the financial resources necessary to carry them out.
4. Requires such federal official to audit state compliance with federal laws for which responsibilities are assumed and authorizes such official to terminate such responsibilities, after providing notice and an opportunity to take corrective action, if a state is not adequately carrying them out.

H.R. 2538 would provide a voluntary mechanism under which the environmental analysis for projects subject to overlapping federal and state jurisdiction could be conducted by a single point of contact within the state. This could avoid competing federal and state documents and timelines, and reduce overall process time. These types of problems have been exemplified with the recent permitting for desert solar and other energy projects in

California, where two separate processes evolved for many of the projects. This led to confusion regarding when comments were due, when approvals were actually effective or final, and what standards applied.

H.R. 2538 provides an opportunity to try a different method of NEPA-CEQA compliance in California, but it also raises some concerns. H.R. 2538 requires the states that assume responsibility for NEPA compliance to also assume responsibility for any challenges to the process, which would be heard in federal court. Some states have expressed concern about this provision, but California moved forward successfully with this concept in the transportation sector despite this assumption of responsibility.

H.R. 2538 focuses on delegating NEPA lead agency authority to the state, but it does not address continued obligations to work with other federal agencies for required federal permits, for example, Endangered Species Act or Clean Water Act permits required from the U.S. Fish and Wildlife Agency and the Army Corp of Engineers. However, consolidating the NEPA and CEQA lead to one state representative could still reduce permit processing time by reducing the number of negotiating parties.

Additionally, as written, the bill currently only allows delegation of federal NEPA authority to states, and thus would not include Metropolitan. Staff recommends working with the author to consider amendments to expand the definition to allow other divisions of the state, public agencies, and special districts to participate in the program, again on a voluntary basis.

Finally, H.R. 2538 requires the state to comply with all applicable terms of NEPA and CEQA, but does not address competing deadlines. CEQA has more stringent timelines and it may be helpful in some circumstances to define in the applicable MOU which timelines apply. Staff recommends working with the author to consider amendments that would allow the parties to the MOU to set deadlines for the process consistent with existing law. This could help reduce overall process time.

H.R. 2538 is supported by the Riverside County Transit Authority, and has bipartisan support from several California representatives as cosponsors of the bill. H.R. 2538 was referred to the House Committee on Natural Resources and currently awaits consideration.

Recommendation

Staff recommends supporting H.R. 2538 because it is voluntary and provides a unique opportunity to reduce the time and process involved in analyzing projects subject to both federal and state jurisdiction. Staff recommends working with the author to secure amendments to the scope of the definition of state agencies and applicable timelines.

Policy

Policy Principle on California Environmental Quality Act, M.I. 42820 - February 10, 1998

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options

Option #1

Adopt the CEQA determination and express support and seek amendments to H.R. 2538.

Fiscal Impact: None

Business Analysis: H.R. 2538 could reduce the environmental analysis process time on projects relevant to Metropolitan.

Option #2

Take no position on H.R. 2538 at this time.

Fiscal Impact: None

Business Analysis: Without amendments and should the bill fail to pass, Metropolitan would not benefit from potential reductions in time associated with the streamlined federal and state environmental review.

Staff Recommendation

Option #1



Linda Waade
Deputy General Manager, External Affairs

3/28/2012

Date



Jeffrey Kightlinger
General Manager

3/28/2012

Date

Attachment 1 – H.R. 2538 (Calvert—R-CA), introduced July 14, 2011

Ref# ea12617779

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(Original Signature of Member)

112TH CONGRESS
1ST SESSION

H. R.

To amend the National Environmental Policy Act of 1969 to authorize assignment to States of Federal agency environmental review responsibilities, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. CALVERT introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the National Environmental Policy Act of 1969 to authorize assignment to States of Federal agency environmental review responsibilities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Reducing Environ-
5 mental Barriers to Unified Infrastructure and Land De-
6 velopment Act of 2011 Act” or the “REBUILD Act”.

1 **SEC. 2. ASSIGNMENT TO STATES OF FEDERAL ENVIRON-**
2 **MENTAL REVIEW RESPONSIBILITIES.**

3 Title I of the National Environmental Policy Act of
4 1969 (42 U.S.C. 4331 et seq.) is amended by adding at
5 the end the following new section:

6 **“SEC. 106. ASSIGNMENT TO STATES OF ENVIRONMENTAL**
7 **REVIEW RESPONSIBILITIES WITH RESPECT**
8 **TO CERTAIN PROJECTS IN THE STATE.**

9 “(a) ASSUMPTION OF RESPONSIBILITY.—

10 “(1) IN GENERAL.—Subject to the other provi-
11 sions of this section, with the written agreement of
12 the responsible Federal official and a State, which
13 may be in the form of a memorandum of under-
14 standing, the responsible Federal official may assign,
15 and the State may assume, the responsibilities of the
16 responsible Federal official under the National Envi-
17 ronmental Policy Act of 1969 (42 U.S.C. 4321 et
18 seq.) with respect to one or more covered Federal
19 projects of the responsible Federal official within the
20 State.

21 “(2) ADDITIONAL RESPONSIBILITY.—If a State
22 assumes responsibility under paragraph (1) the re-
23 sponsible Federal official may assign to the State,
24 and the State may assume, all or part of the respon-
25 sibilities of the responsible Federal official for envi-
26 ronmental review, consultation, or other action re-

1 required under any Federal environmental law per-
2 taining to the review or approval of covered projects
3 of the responsible Federal official.

4 “(3) PROCEDURAL AND SUBSTANTIVE RE-
5 QUIREMENTS.—A State shall assume responsibility
6 under this section subject to the same procedural
7 and substantive requirements as would apply if that
8 responsibility were carried out by the responsible
9 Federal official.

10 “(4) FEDERAL RESPONSIBILITY.—Any respon-
11 sibility of the responsible Federal official not explic-
12 itly assumed by the State by written agreement
13 under this section shall remain the responsibility of
14 the responsible Federal official.

15 “(5) NO EFFECT ON AUTHORITY.—Nothing in
16 this section preempts or interferes with any power,
17 jurisdiction, responsibility, or authority of an agen-
18 cy, other than the agency of the responsible Federal
19 official for a covered project, under applicable law
20 (including regulations) with respect to the project.

21 “(b) STATE PARTICIPATION.—

22 “(1) APPLICATION.—Not later than 180 days
23 after the date of enactment of this section, each re-
24 sponsible Federal official shall promulgate regula-
25 tions that establish requirements relating to infor-

1 mation required to be contained in any application
2 of a State to assume responsibility under this section
3 with respect to covered Federal projects of the re-
4 sponsible Federal official, including, at a min-
5 imum—

6 “(A) the projects or classes of projects for
7 which the State anticipates exercising the au-
8 thority that may be granted under this section;

9 “(B) verification of the financial resources
10 necessary to carry out the authority that may
11 be assigned under this section; and

12 “(C) evidence of the notice and solicitation
13 of public comment by the State relating to as-
14 sumption of responsibility under this section by
15 the State, including copies of comments re-
16 ceived from that solicitation.

17 “(2) PUBLIC NOTICE.—

18 “(A) IN GENERAL.—Each State that sub-
19 mits an application under this subsection shall
20 give notice of the intent of the State to submit
21 such application not later than 30 days before
22 the date of submission of the application.

23 “(B) METHOD OF NOTICE AND SOLICITA-
24 TION.—The State shall provide notice and so-
25 licit public comment under this paragraph by

1 publishing the complete application of the State
2 in accordance with the appropriate public notice
3 law of the State.

4 “(3) SELECTION CRITERIA.—A responsible Fed-
5 eral official may approve the application of a State
6 under this section only if—

7 “(A) the regulatory requirements under
8 paragraph (2) have been met;

9 “(B) the responsible Federal official deter-
10 mines that the State has the capability, includ-
11 ing financial and personnel, to assume the re-
12 sponsibility; and

13 “(C) the head of the State agency having
14 primary jurisdiction over covered projects with
15 respect to which responsibility would be as-
16 signed to the State pursuant to the application
17 enters into a written agreement with the re-
18 sponsible Federal official described in sub-
19 section (c).

20 “(4) OTHER FEDERAL AGENCY VIEWS.—If a
21 State applies to assume a responsibility of a respon-
22 sible Federal official that would have required the
23 responsible Federal official to consult with another
24 Federal agency, the responsible Federal official shall

1 solicit the views of the Federal agency before ap-
2 proving the application.

3 “(c) WRITTEN AGREEMENT.—A written agreement
4 under this section shall—

5 “(1) be executed by the Governor of the State
6 or the head of the State agency referred to in sub-
7 section (b)(3)(C);

8 “(2) be in such form as the responsible Federal
9 official may prescribe; and

10 “(3) provide that the State—

11 “(A) agrees to assume all or part of the re-
12 sponsibilities of the responsible Federal official
13 described in subsection (a);

14 “(B) expressly consents, on behalf of the
15 State, to accept the jurisdiction of the Federal
16 courts for the compliance, discharge, and en-
17 forcement of any responsibility of the respon-
18 sible Federal official assumed by the State;

19 “(C) certifies that State laws (including
20 regulations) are in effect that—

21 “(i) authorize the State to take the
22 actions necessary to carry out the respon-
23 sibilities being assumed; and

24 “(ii) are comparable to section 552 of
25 title 5, including providing that any deci-

1 sion regarding the public availability of a
2 document under those State laws is review-
3 able by a court of competent jurisdiction;
4 and

5 “(D) agrees to maintain the financial re-
6 sources necessary to carry out the responsibil-
7 ities being assumed.

8 “(d) JURISDICTION.—

9 “(1) IN GENERAL.—The United States district
10 courts shall have exclusive jurisdiction over any civil
11 action against a State for failure to carry out any
12 responsibility of the State under this section.

13 “(2) LEGAL STANDARDS AND REQUIRE-
14 MENTS.—A civil action under paragraph (1) shall be
15 governed by the legal standards and requirements
16 that would apply in such a civil action against the
17 responsible Federal official had the responsible Fed-
18 eral official taken the actions in question.

19 “(3) INTERVENTION.—The responsible Federal
20 official shall have the right to intervene in any ac-
21 tion described in paragraph (1).

22 “(e) EFFECT OF ASSUMPTION OF RESPONSI-
23 BILITY.—A State that assumes responsibility under sub-
24 section (a) shall be solely responsible and solely liable for
25 carrying out, in lieu of the responsible Federal official, the

1 responsibilities assumed under subsection (a), until the
2 termination of such assumption of responsibility.

3 “(f) LIMITATIONS ON AGREEMENTS.—Nothing in
4 this section permits a State to assume any rulemaking au-
5 thority of the responsible Federal official under any Fed-
6 eral law.

7 “(g) AUDITS.—

8 “(1) IN GENERAL.—To ensure compliance by a
9 State with any agreement of the State under sub-
10 section (c) (including compliance by the State with
11 all Federal laws for which responsibility is assumed
12 under subsection (a)), for each State participating in
13 the program under this section, the responsible Fed-
14 eral official shall conduct—

15 “(A) semiannual audits during each of the
16 first 2 years of the effective period of the agree-
17 ment; and

18 “(B) annual audits during each subsequent
19 year of such effective period.

20 “(2) PUBLIC AVAILABILITY AND COMMENT.—

21 “(A) IN GENERAL.—An audit conducted
22 under paragraph (1) shall be provided to the
23 public for comment for a 30-day period.

24 “(B) RESPONSE.—Not later than 60 days
25 after the date on which the period for public

1 comment ends, the responsible Federal official
2 shall respond to public comments received
3 under subparagraph (A).

4 “(h) REPORT TO CONGRESS.—Each responsible Fed-
5 eral official shall submit to Congress an annual report that
6 describes the administration of this section by such offi-
7 cial.

8 “(i) TERMINATION BY RESPONSIBLE FEDERAL OFFI-
9 CIAL.—The responsible Federal official with respect to an
10 agreement with a State under this section may terminate
11 the agreement and any responsibility or authority of the
12 State under this section with respect to such agreement,
13 if—

14 “(1) the responsible Federal official determines
15 that the State is not adequately carrying out the re-
16 sponsibilities assumed by the State under this sec-
17 tion;

18 “(2) the responsible Federal official provides to
19 the State—

20 “(A) notification of the determination of
21 noncompliance; and

22 “(B) a period of at least 30 days during
23 which to take such corrective action as the re-
24 sponsible Federal official determines is nec-

1 essary to comply with the applicable agreement;

2 and

3 “(3) the State, after the notification and period
4 provided under subparagraph (B), fails to take satis-
5 factory corrective action, as determined by respon-
6 sible Federal official.

7 “(j) DEFINITIONS.—In this section:

8 “(1) COVERED FEDERAL PROJECT.—The term
9 ‘covered Federal project’ means—

10 “(A)(i) except as provided in clause (ii)
11 and subparagraph (B), any project that is fund-
12 ed by, carried out by, or subject to approval or
13 disapproval by a responsible official, including
14 any project for which a permit or other author-
15 ization by a responsible Federal official is re-
16 quired; and

17 “(ii) in the case of projects funded, carried
18 out by, or subject to review, approval, or dis-
19 approval by the Secretary of the Army, and ex-
20 cept as provided in subparagraph (B), includes
21 only such projects of the Corps of Engineers;
22 and

23 “(B) the preparation of any statement re-
24 quired by section 102(2)(C).

1 “(2) RESPONSIBLE FEDERAL OFFICIAL.—The
2 term ‘responsible Federal official’ means—
3 “(A) the Secretary of the Interior;
4 “(B) the Secretary of Transportation;
5 “(C) the Administrator of the Environ-
6 mental Protection Agency;
7 “(D) the Secretary of the Army; and
8 “(E) the head of a Federal agency, with
9 respect to the preparation of statements under
10 section 102(2)(C) for major Federal actions (as
11 that term is used in that section) of the agen-
12 cy.”.