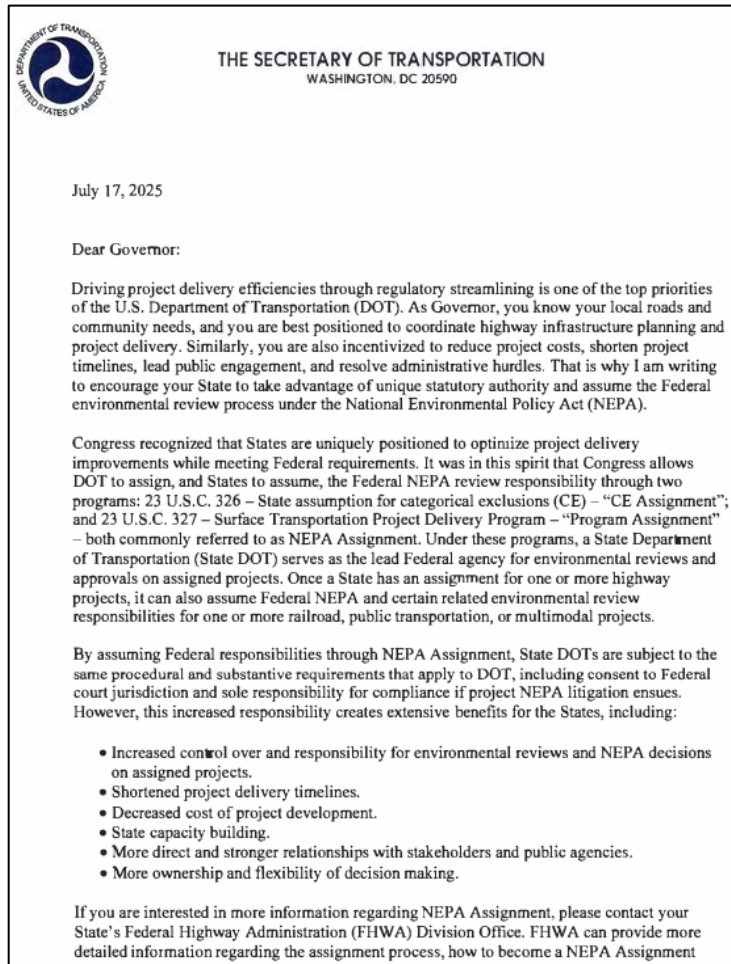


NEPA Assignment in the Current Policy Landscape



- July 17, 2025, letter from DOT Secretary Duffy to Governor's, State DOT Executives, and State Attorney Generals
- Many states have viewed this as a mandate and are now actively pursuing assignment



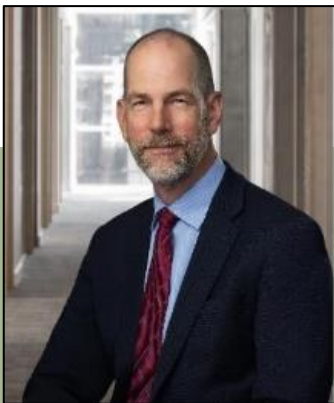
Meet our Experts



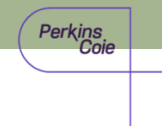
- **Elizabeth Breiseth, Environmental Protection Specialist**
 - 20+ years of private and public sector experience in cultural resource management and NEPA compliance for transportation, energy, and hazard mitigation initiatives. She is a Secretary of Interior-qualified architectural historian.
 - Held private sector roles in historic tax credit consulting and architectural history investigations and held public sector roles at FEMA and FTA where she served as the Federal Preservation Officer prior to joining QRSE.



- **Colleen Vaughn, Environmental Protection Specialist**
 - 25+ years of private and public sector experience in NEPA, Section 106, environmental policy, interagency permitting, and project delivery.
 - She served as the USDOT Federal Preservation Officer and agency liaison to the ACHP for 9 years.
 - Held roles at the Federal Railroad Administration, Maritime Administration, USDOT Office of the Secretary - where she was detailed to CEQ as Deputy Associate Director for NEPA - and the Federal Highway Administration. At FHWA, Colleen served as the team lead for NEPA Assignment..



- **Ted Boling, Partner at Perkins Coie, Environment, Energy & Resources**
 - Over 15 years, Edward (Ted) Boling served as General Counsel, Deputy General Counsel and an Associate Director at the Council on Environmental Quality (CEQ) in the Executive Office of the President. Ted served as a Deputy Solicitor and Counsel to Assistant Secretaries at the U.S. Department of the Interior and as a trial attorney in the Environment and Natural Resources Division of the U.S. Department of Justice in Democratic and Republican administrations. His experience includes deep involvement in federal infrastructure permitting issues and the 2020 comprehensive revision of CEQ's NEPA regulations.
 - Drawing on over 30 years of high-level public service, Ted currently advises leaders on infrastructure development projects, agencies that must hire outside counsel, and the environmental professionals that support them on the development of energy, critical minerals, water resource development, transportation and transmission infrastructure



Meet our Experts



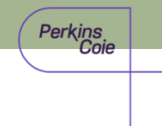
- **Shirley Nichols, Environmental Planning Director**

- 35+ years of progressive experience in NEPA compliance, environmental analyses, and public engagement in the planning and infrastructure field. Conducted and led multi-disciplinary teams in the completion of multiple complex EIS and EA level projects along with 100+ CEs.
- Deputy PM for the **TxDOT NEPA Assignment Program** on the consulting side and the subsequent implementation of the program on the client side with TxDOT.



- **Michael Smith, Ph.D., National Practice Leader - Environmental Process, Policy and Assessment**

- 30+ years leading complex NEPA reviews for transportation and other infrastructure projects as well as providing strategic advice on strategies for expediting NEPA and other environmental permitting processes.
- Assisted in the implementation of **NEPA Assignment for the CA High-Speed Rail Authority**, as well prepared and delivered training for staff on the NEPA Assignment program and on NEPA requirements.



Foundational NEPA Cases and CEQ Regulations

Supreme Court: 18 NEPA Opinions

- Eight “early” opinions provide the analytical framework for reviewing NEPA compliance
- Major impact was to characterize NEPA as a “procedural statute” and deference to agency “scoping” of agency action and effects
- CEQ Regulations - codified caselaw and CEQ guidance under E.O. 11991
- Effective July 30, 1979, only amended once – 40 C.F.R. § 1502.22 (1986) – incomplete or unavailable information
- Provided step-by-step instructions on the implementation of NEPA
- Entitled to “substantial deference.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989)
- CEQ Regulations comprehensively revised for the first time, 85 Fed. Reg. 43304-76 (July 16, 2020)

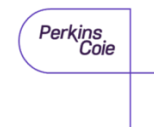
NEPA Reforms

S.C. § 4370m et seq., as amended by TITLE VIII—FEDERAL PERMITTING IMPROVEMENT of the Infrastructure Investment and Jobs Act, Pub. L. 117-58.

“Efficient environmental reviews for project decisionmaking,” 23 U.S.C. § 139, as amended by section 1304 of the FAST Act, Pub. L. 114-94.

Water Resources Development Act of 2007, 33 U.S.C. § 2348, as amended by section 1005 of the Water Resources Reform and Development Act of 2014, Pub. L. 113-121.

Various “one off” statutes deeming NEPA not required (e.g., Building CHIPS in America Act), or deeming existing analyses adequate (e.g., Mountain Valley Pipeline EIS).



NEPA: Recent Developments

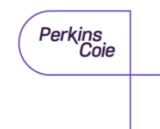
CEQ regulations amended: 2020 (Trump Administration codification of E.O 13807),
2022 (Biden Admin. Phase I Rule)

2023: Fiscal Responsibility Act Amendments and implementing regulations (2024 Phase II Rule)

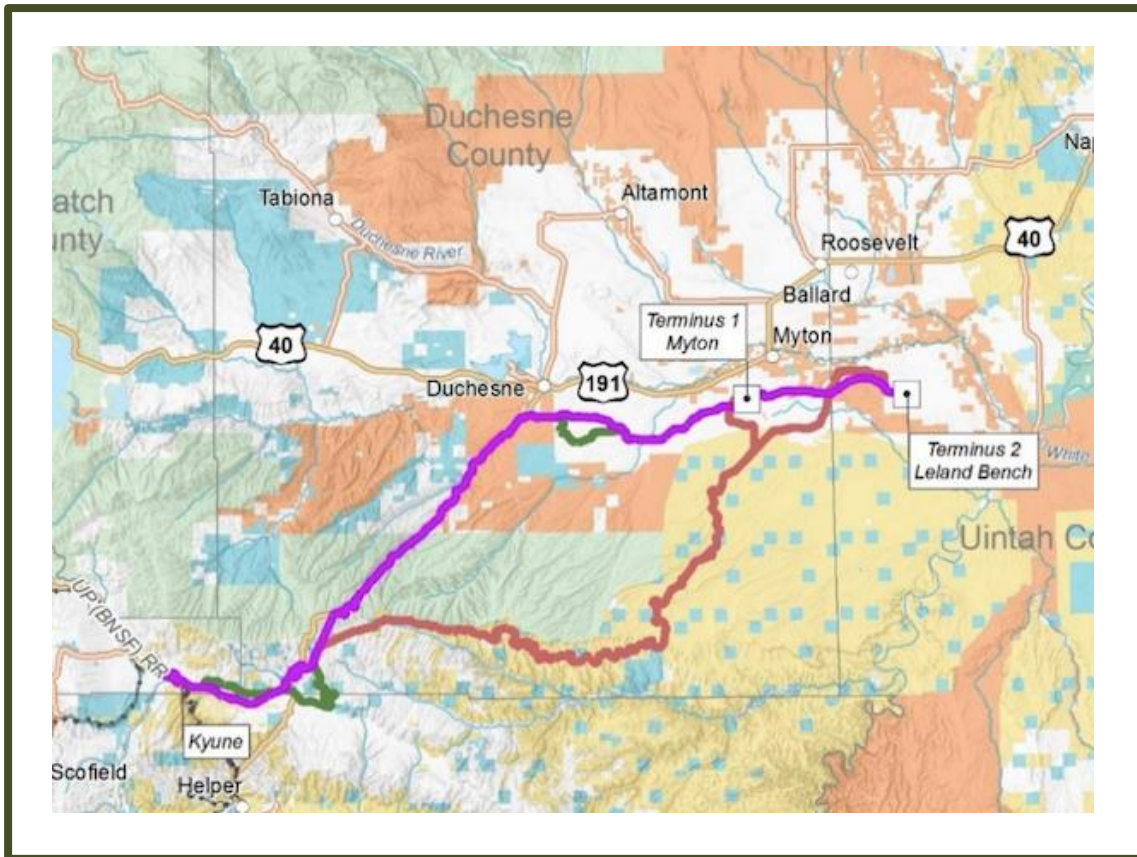
2024: Supreme Court grants cert. in case about scope of agency review statute requires (*Seven County*)

2024: D.C. Circuit sua sponte invalidation of CEQ authority (*Marin Audubon*)

2025: NEPA Executive Order, CEQ Interim Final Rulemaking, and CEQ Guidance Documents, SPEED Act



MAY 29, 2025: SEVEN COUNTY INFRASTRUCTURE V. EAGLE, COUNTY COLORADO



- Federal agencies need not evaluate environmental effects they have no legal authority to prevent or mitigate
- D.C. Circuit failed afford the Board the substantial judicial deference required in NEPA cases
- Court should just confirm that the agency addressed environmental consequences and feasible alternatives
- Ensure the final decision was “reasonably explained”
- D.C. Circuit incorrectly required the Board to consider environmental effects of upstream and downstream projects that are **separate in time and place** from the Unita Basin Railway.
- Separate projects break the “chain of proximate causation”
- Applied *Public Citizen* holding

Agency NEPA Rulemaking Post- Seven County

Department of Transportation, Notice of availability, 90 FR 29621 (updating DOT Order 5610.1C “Procedures for Considering Environmental Impacts”)

- Update incorporates provisions from the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU); Moving Ahead for Progress in the 21st Century Act (MAP-21); the Fixing America's Surface Transportation (FAST) Act, the Infrastructure Investment and Jobs Act (IIJA); and the Fiscal Responsibility Act of 2023 (FRA 2023) related to the environmental review process.
- FHWA, FRA, and FTA NEPA implementing procedures will remain in 23 CFR part 771 because those agencies have specific statutory provisions related to 23 U.S.C. 139 projects that do not apply departmentwide. In addition, FAA NEPA implementing procedures will remain in separate procedures in FAA Order 1050.1. Both 23 CFR part 771 and Order 1050.1 have been revised to be consistent with this Order to the extent possible.
- There have been no modifications to any OA CEs.
- However, the Department does plan to supplement this Order in the near future to establish new CEs and to revise existing CEs, including needed technical corrections.

CEQ Memo and Template for NEPA Implementing Procedures (September 29, 2025)

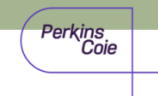
Updates and replaces CEQ guidance from February 19, 2025, based on the *Seven County* opinion, the efforts of the interagency working group, and the statutory amendments to NEPA.

Provides a template to assist agencies in developing revisions to their individual agency-level NEPA implementing procedures.

While these revisions are ongoing, “agencies should continue to follow their existing practices and procedures for implementing NEPA to the extent consistent with the text of NEPA, E.O. 14154, case law, and this guidance. Agencies should not delay pending or ongoing NEPA analyses while undertaking these revisions.”

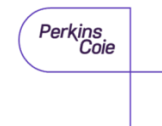
“agencies should consider voluntarily relying on [rescinded CEQ regulations] in completing ongoing NEPA reviews or defending against challenges to reviews completed while those regulations were in effect.”

CEQ expects project sponsors to coordinate with Federal agencies before submitting a request under Section 112 of NEPA, “Project Sponsor Opt-in Fees for Environmental Reviews.”



CEQ Template for NEPA Implementing Procedures

- *Seven County* noted that the 2023 FRA amendments, by establishing deadlines and page limits, “strictly *prohibit*” the NEPA process from going on too long in time or in volume.
- Template is a non-binding, informational resource intended to support agencies and coordinate agency efforts to provide for consistency, coordination, and use of best practices in their implementation of NEPA’s procedures requirements.
- For procedures that are not being established or revised by rulemaking, the agency’s new or revised NEPA implementing procedures are effective after the conclusion of the [CEQ] consultation. The agency should make the procedures available to the public, such as through publication in the Federal Register.
- The following types of action are generally “major”:
 - [Insert a list of examples from agency experience that the agency knows will usually or always trigger an EIS. Many agencies already have such a list in their existing NEPA procedures], or
 - Informed by the content of the list generated in (A), Agency should consider distilling from that list an anticipatory (but nonbinding) monetary threshold above which an action will be deemed “major.” This threshold can be calculated, to the extent the agency can substantiate it: 1) by project costs; and/or 2) by overall economic impact, e.g., regulatory costs].
- No provisions for CEQ resolution of interagency disagreements, public comment on draft EA/EIS, or Record of Decision



NEPA Assignment: Statutory Authority

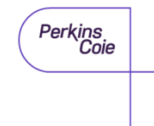
SAFETEA-LU (Safe, Accountable, Flexible, Efficient, Transportation Equity Act) signed into law in 2005

Section 6003 - Pilot program for full NEPA responsibility (Alaska, California, Ohio, Oklahoma, Texas) Only CA moved forward at this time.

Section 6004 - allowed States to assume responsibility for CEs (Alaska, Texas, Utah and California).

MAP-21 (Moving ahead for Progress in the 21st Century Act) 2012

Section 1313 : Pilot program made permanent (NEPA Assignment Program)



NEPA Assignment Fundamentals

Core Concepts of NEPA Assignment

- ▶ NEPA Assignment lets states assume complete or partial responsibility for federal environmental review and decision-making roles for certain transportation projects

Pathways for Assignment

- ▶ Two types of assignment exist: full Program (23 U.S.C. 327) and CE-only (23 U.S.C. 326)

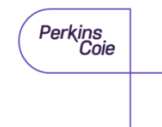
Shift in Authority and Risk

- ▶ Responsibility for compliance, documentation, and perhaps most importantly, legal risk shifts from the federal agency to states

Impact on Coordination and Management

- ▶ Understanding NEPA Assignment is key for managing coordination, timelines, oversight, and litigation risks across jurisdictions

NEPA Assignment does not change any existing environmental laws. Legal requirements remain the same!



Why waive sovereign immunity?

- *Section 702 of the APA* waives federal sovereign immunity in federal actions "seeking relief other than money damages and stating a claim that an agency ... Acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702.
- Caselaw has confined this right of review to cases in which a plaintiff can "identify some 'agency action' affecting him in a specific way" and "show that he has 'suffered legal wrong because of the challenged agency action, or is adversely affected or aggrieved by that action within the meaning of a relevant statute.'" *Ala.-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990)).
- "Agency action" can encompass agency *inaction* as well, and the statute provides redress to plaintiffs aggrieved by an agency's failure to act by requiring courts to "compel agency action unlawfully withheld" in § 706(1).
- The Supreme Court has held that a claim under § 706(1) "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55, 64 (2004).

Narrow Waiver of Sovereign Immunity Narrowly Construed

- Any ambiguities are construed "in favor of immunity," *id.* (citing *United States v. Williams*, 514 U.S. 527, 531 (1995))
- A waiver of sovereign immunity "will not be implied[.]" *Lane v. Pena*, 518 U.S. 187, 192 (1996).
- The government's waiver of sovereign immunity "must be 'unequivocally expressed' in statutory text." *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 290 (2012) (cleaned up). While sovereign immunity "must be 'unequivocally expressed,'" any "ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *Cooper*, 566 U.S. at 290 (citations omitted).
- *Friends of Del Norte v. Cal. DOT*, 2020 WL 1812175 (N.D. Cal. 2020) Plaintiffs suggest that the project should be defined as "a STAA truck corridor between Grants Pass, Oregon and Crescent City, California," via a daisy-chain of dictionary definitions. . . . But the only reasonable understanding of "project" in this case is the 197/199 Safe STAA Access Project, which according to the complaint, consists of five roadwork sites in California. Similarly, plaintiffs assert that "project" in Title 23, the highway code, should be synonymous with the Endangered Species Act's "action area," with no justification.

NEPA Assignment Legal Requirements



Consent to accept the jurisdiction of the Federal courts: Waiver of sovereign immunity



Authority to enter into the Memorandum of Understanding (MOU) for each program



Certify that Freedom of Information Act (FOIA) equivalents are in place

State Readiness Requirements



Waive
Sovereign
Immunity



Demonstrate
the capacity to
perform the
responsibilities



Maintain
adequate
financial and
staff resources



Maintain
appropriate
technical and
managerial
expertise



Perform
QA/QC and
self-
assessments



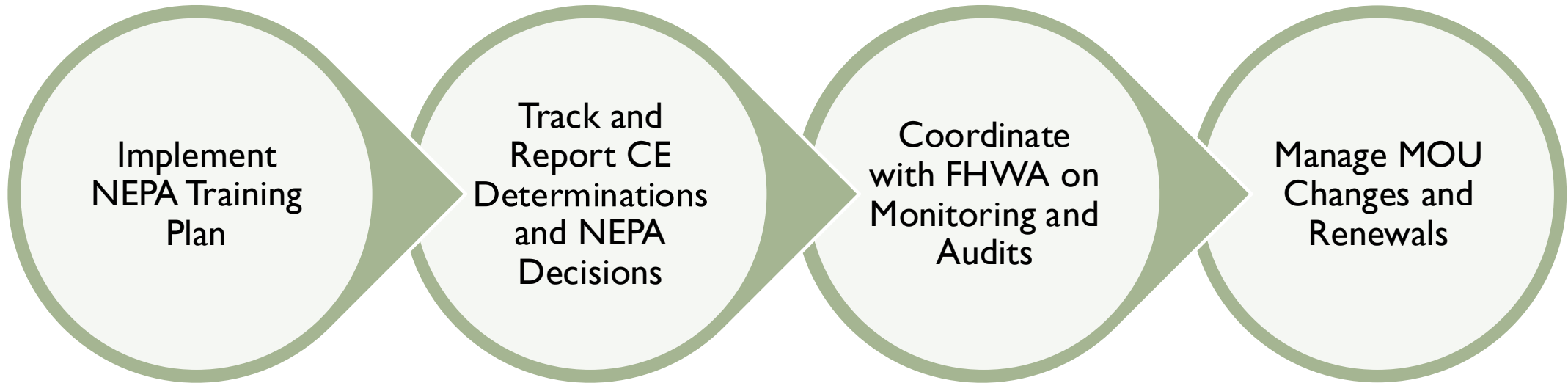
Document all
decisions



Maintain
records

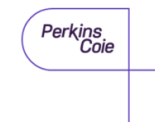


Your Agency Executed an MOU, Now What?



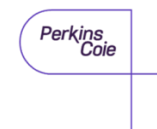
Case Study: TxDOT NEPA Assignment Experience

- Performed **gap analysis** and worked through results with FHWA.
- Worked directly with TxDOT and FHWA developing **TxDOT's application and the MOU** for NEPA Delegation.
- Negotiated terms and guidance based on existing policies and **programmatic agreements** with federal and state agencies. Facilitated workshops among SMEs and FHWA to develop updated and new guidance and policy.
- Developed **outreach program** and interagency teams to gather input, disseminate program information and collaboratively develop guidance, policy and procedure for MPOs, local governments and professional associations.
- Developed and implemented **statewide training plan** for TxDOT environmental staff on new policies and procedures for the NEPA Assignment Program.
- Successfully obtained FHWA's approval of the application and MOU for TxDOT's **NEPA Delegation of Authority, officially signed 10/16/2014.**



TxDOT Auditing and Monitoring Experience

- As the TxDOT Austin District Environmental Supervisor, led and directed the team in implementing TxDOT's NEPA Assignment Program, assuring projects complied with policies and procedures put forth in TxDOT's MOU with FHWA.
- Responded to internal project assessments and FHWA audits.
- Led team in preparation and response to audit events.
 - Team was awarded FHWA's "**Gold Star**" for response and perfect compliance in the first year.
- Continued to lead Austin District through 5 years of annual audits.
- Developed FHWA monitoring response collaboratively with TxDOT ENV Division
 - Implemented monitoring program and rapid response program during the monitoring phase.



Case Study: NEPA Assignment and the California High-Speed Rail Authority

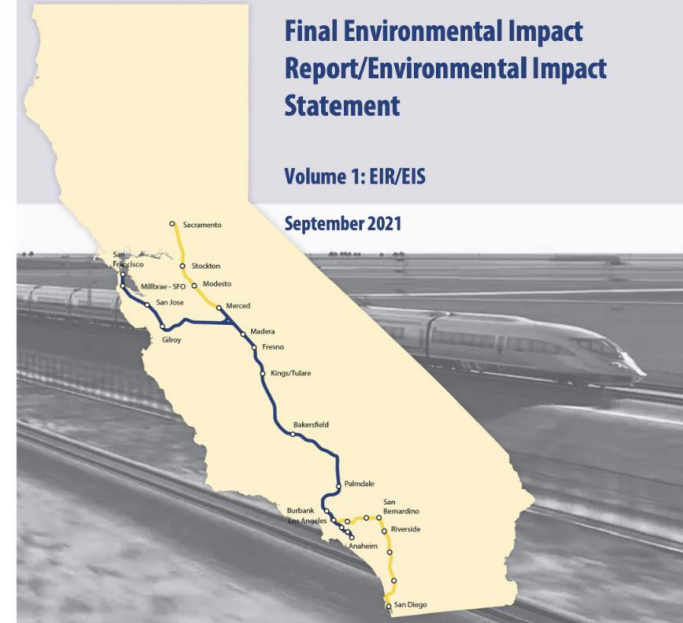
California High-Speed Rail Authority

Burbank to Los Angeles Project Section

Final Environmental Impact
Report/Environmental Impact
Statement

Volume 1: EIR/EIS

September 2021



 CALIFORNIA
High-Speed Rail Authority

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being or have been carried out by the State of California pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated July 23, 2019, and executed by the Federal Railroad Administration and the State of California.



Burbank to Los Angeles Build Alternative in EIR/EIS

Approximately 14 miles

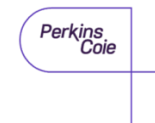
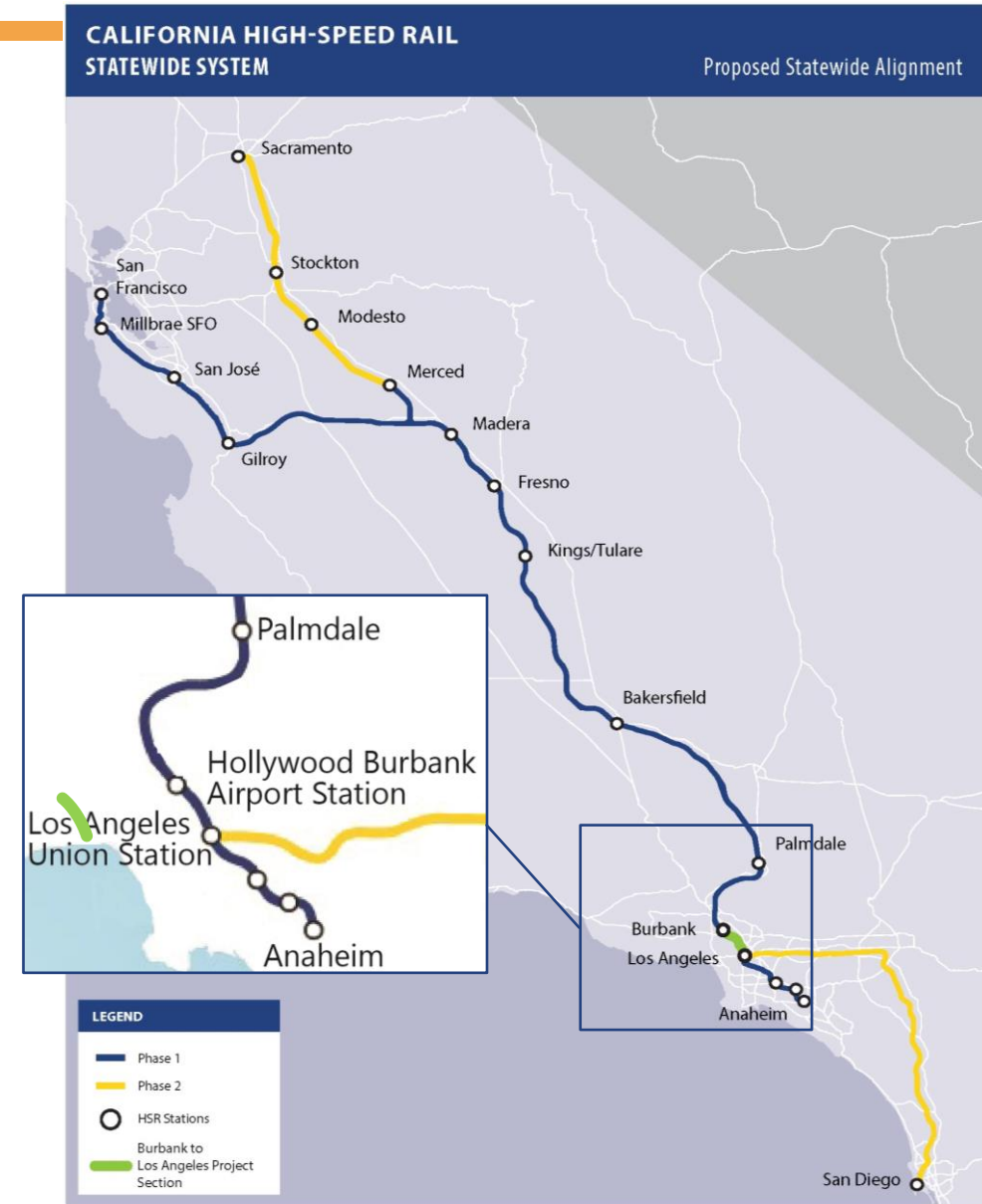
- Two new electrified HSR tracks will run in the existing rail corridor
- Blended rail corridor of passenger and freight.

Two Stations

- Burbank Airport Station
- Modified Los Angeles Union Station

Two Alternatives Under Study

- Build Alternative
- No Project Alternative



Burbank to Los Angeles– Public Involvement

■ **Since 2014, the Authority has hosted over 400 meetings with the general public, stakeholders, and agencies. Outreach includes:**

- **150+** Community Presentations and Workshops
- **300+** Briefings to Cities, Agencies and Stakeholders
- **48,000+** FEIR/S Notices distributed via mail throughout corridor
- **20,000+** stakeholders received emailed FEIR/S notice or news release
- Materials translated in **Eight** Languages
- **23** FEIR/S Advertisements in local newspapers

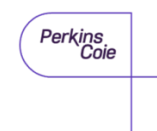
- Stakeholder Input Informed project changes, including
 - Minimizing impacts to community residents and businesses
 - Minimizing impacts to existing and planned bike paths
 - Minimizing impacts from grade separations



WHAT IS THE NEPA ASSIGNMENT TEAM'S GENERAL ROLE?

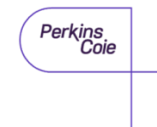
The primary role of the NEPA Assignment Team is to review and recommend environmental documents for approval by the Director of Environmental Services, which includes the following responsibilities:

- Implement the environmental policies and practices related to the NEPA Assignment responsibilities assigned under the NEPA Assignment MOU both for Authority projects and for Locally Sponsored projects.
- Develop and obtain FRA approval for any policy and guidance relating to actions FRA retains authority for under the MOU, including conformity determinations under Section 176 of the Clean Air Act, Section 4(f) constructive use determinations, government-to-government consultation with Tribes, and requests to FRA for approval of additional assigned rail projects that are not identified in the MOU.
- Provide strategic advice to regional project section teams regarding federal environmental regulatory compliance.
- Maintain documentation of reviews to support internal and FRA audits of NEPA Assignment activities.
- Conduct the Authority's self-assessment audit for compliance with defined NEPA Assignment responsibilities, coordinate with FRA on its audits of the Authority's implementation of NEPA Assignment, and work with Authority staff to address comments received on FRA audits.



What Are the NEPA Assignment Team's Key Responsibilities?

- The **NEPA Assignment Team Manager** is responsible for:
 - Ensuring that the Authority and NEPA Assignment Team are meeting the requirements established under the MOU
 - Ensuring that Strategic Delivery Office and Environmental Services Branch teams are adhering to NEPA Assignment policies and procedures in the environmental document development and review process
 - Developing and disseminating comprehensive program-wide NEPA-related environmental guidance, policies, and procedures
 - Reviewing, approving, and recommending environmental documents to be approved by the Director of Environmental Services (including EA, FONSI, EIS, ROD, CE documentation, and Step 2 environmental reexamination), as well as public outreach materials
 - Periodically briefing CalSTA on NEPA Assignment implementation



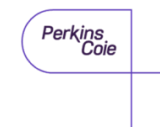
What Are the NEPA Assignment Team's Key Responsibilities? (Cont.)

- At a minimum, the NEPA Assignment Team will review the analysis and conclusions of environmental documents, approve the documents, and recommend them for approval by the Director of Environmental Services, including the following:
 - Class of Action determination
 - Notice of Intent
 - Draft EIS/Final EIS
 - Draft EA/Final EA
 - Categorical Exclusion
 - FONSI/ROD
 - Step 2 Environmental Reexamination
 - Section 4(f) Statement of Findings and *de minimis* Determination
 - Section 6(f) clearance
 - Biological Assessment
 - Checkpoint A, B, and C documents (NEPA/Section 404 and 408)
- ▶ The NEPA Assignment Team also coordinates FRA's review of draft air quality conformity determinations.



What Are Some NEPA Assignment Challenges?

- Historically, the FRA has only been a regulatory agency and not a funding agency. For projects initiated before November 28, 2018, the agency's environmental regulations from 1999 apply, and where issues arise, the agency has looked to either FHWA or FTA guidance. For projects initiated after November 28, 2018, 23 CFR Part 771 applies, which provides specific regulations for FRA.
- The role of the NEPA Assignment Coordinators requires a steep learning curve to read and absorb program information (all key NEPA checkpoints for the entire EIS) and learn the rules of engagement with Strategic Delivery staff, Environmental Services staff, EEC/RC team members, Legal, and federal and state regulatory agencies.
- NEPA Assignment coordinators fall within the Environmental Services Branch organization, making it challenging at times to maintain a firewall within Environmental Services while defining the NEPA Assignment Team's status, role, and responsibilities as separate from Environmental Services, Legal, and Strategic Delivery. NEPA Assignment Team coordinators need to be proactive when working with project section Environmental Managers (Strategic Delivery), especially with regards to agency issues and coordination.





9 states with some form of assignment; 5–6 more exploring



TxDOT: ~2,500–3,000 environmental approvals/year across 25 districts



ODOT saved tens of millions of dollars in 10 years with NEPA Assignment in place.



FDOT (2019–2025): ~6,000 approvals; ~800 federal approvals in 2025; \$13.7B work program

Participation and Metrics

Common Challenges



Securing sovereign immunity (legislation/AG opinion; ensure broad, multimodal-ready language)



Initial audits/monitoring resource lift; documentation & admin record management



Staffing/training; consultant QA/QC; local program oversight



Updating programmatic agreements; Clean Air Act conformity nuances

State Reported Benefits



Faster delivery & cost savings (e.g., ODOT estimates \$32M saved over 3.5 years in construction delays and inflation costs)



Greater control over schedule, risk, and consistency (templates, annotated outlines)



DOT Capacity building & clearer accountability



Stronger direct coordination and relationships with resource agencies (USFWS, SHPO, USACE)



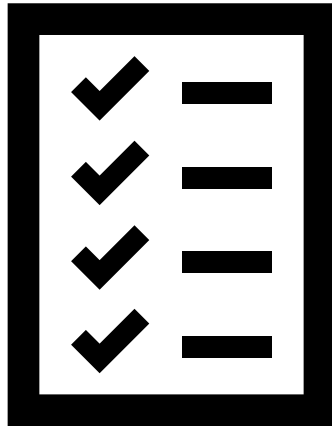
Flexibility to adapt to evolving federal policy guidance

Looking Forward FRA, FTA and more...

- While Texas is currently working on NEPA assignment with FRA; other states have written letters of interest to the USDOT for FTA and FRA assignment.
- Utah and Alaska have indicated interest in expanding beyond FHWA assignment to FTA and FRA
- Other agencies are investigating adding NEPA Assignment to their Toolbox



AASHTO January Peer Exchange Takeaways



- **Two pathways:**
 - 326 (CE-only): quicker to implement; **state** does project-level air conformity for assigned CEs.
 - 327 (Program): CE/EA/EIS; **FHWA** retains project-level conformity; application required; initial audits and monitoring.
- **Sovereign Immunity:** mandatory; limit to assumed responsibilities; **AG certification** often required; draft broadly (e.g., “transportation”) for future FRA/FTA.
- **Audits → Monitoring:** early years are the heavy lift; focus is compliance with **MOU**, not second-guessing decisions; corrective actions are primarily **process improvements**.

Lessons Learned



