

ALASKA STATE LEGISLATURE
SENATE TRANSPORTATION STANDING COMMITTEE

February 14, 2006

1:40 p.m.

MEMBERS PRESENT

Senator Charlie Huggins, Chair
Senator John Cowdery, Vice Chair
Senator Gene Therriault
Senator Hollis French

MEMBERS ABSENT

Senator Albert Kookesh

COMMITTEE CALENDAR

SENATE BILL NO. 271

"An Act authorizing the commissioner of transportation and public facilities to participate in certain federal highway programs and relating to that authorization; relating to powers of the attorney general to waive immunity from suit in federal court related to those programs; and providing for an effective date."

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 271

SHORT TITLE: AUTHORIZE HWY PROGRAM PARTICIPATION

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/08/06	(S)	READ THE FIRST TIME - REFERRALS
02/08/06	(S)	TRA, FIN
02/14/06	(H)	TRA AT 1:30 PM CAPITOL 17

WITNESS REGISTER

John MacKinnon, Deputy Commissioner
of Highways and Public Facilities
Department of Transportation and Public Facilities
3132 Channel Drive
Juneau, AK 99801-7898

POSITION STATEMENT: Presented SB 271 and answered questions.

Peter Putzier, Senior Assistant Attorney General

Transportation Section
Civil Division (Juneau)
Department of Law
PO Box 110300
Juneau, AK 99811-0300

POSITION STATEMENT: Answered questions relating to SB 271.

Bill Ballard, Statewide Environmental Coordinator
Division of Design and Engineering Services
Department of Transportation and Public Facilities
3132 Channel Drive
Juneau, AK 99801-7898

POSITION STATEMENT: Answered questions on SB 271.

ACTION NARRATIVE

CHAIR CHARLIE HUGGINS called the Senate Transportation Standing Committee meeting to order at [1:40:16 PM](#). Present were Senators Hollis French, John Cowdery and Chair Charlie Huggins. Senator Gene Therriault arrived during the course of the meeting.

SB 271-AUTHORIZE HWY PROGRAM PARTICIPATION

CHAIR HUGGINS announced SB 271 to be up for consideration.

JOHN MacKINNON, Deputy Commissioner of Highways and Public Facilities, Department of Transportation and Public Facilities (DOTPF), began by indicating that members had been provided a fact sheet relating to SAFETEA-LU [Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users] and NEPA [National Environmental Policy Act of 1969].

He explained that passage of SAFETEA-LU in August 2005 included a NEPA-delegation pilot program for five states only: Alaska, California, Oklahoma, Ohio and Texas. The five states are eligible to apply for delegation of the NEPA responsibilities from the Secretary of Transportation. Secondarily, they also may apply for delegation of some or all of the Secretary's review and consultation under other federal environmental laws. The scope of delegation will be determined through an application to the Secretary and execution of a memorandum of understanding (MOU).

He said this is a six-year pilot program from the date of signing of SAFETEA-LU, August 10 [2005], and will terminate August 10, 2011. The Secretary of Transportation is required to promulgate regulations that establish this delegation

application. What those regulations will say isn't known, and it isn't known whether NEPA delegation will be a good thing for Alaska. However, the desire is to be in position in case it is advantageous so that the state can move ahead and assume the responsibility.

He explained that after the rule making is done, the state may submit its application, and then public comment must be solicited; after the application is approved, an MOU will be executed, and then delegation may proceed. By the time the rules come out and the state is ready to apply, a year might have passed. He highlighted the opportunity to do this and accelerate the NEPA process, if advantageous.

SENATOR THERRIAULT arrived at [1:44:30 PM](#).

MR. MacKINNON, in response to questions from Chair Huggins, said [DOTPF] is in regular communication with the other five states. He mentioned working with the Federal Highway Administration (FHWA) about rule making. He said if it's a successful program, there is a good probability of expansion [to other states]. Emphasizing this isn't a reduction in environmental protections, he said the state will still have the federal rules to follow. The advantage is more control over the timeframe. It's not unusual for some environmental documents to sit on a desk somewhere for weeks or months. When the state is responsible, it's easy to pick up a phone and move the process along. The goal is greater accountability in the state, including elected officials and the department, and a more streamlined process that saves time.

CHAIR HUGGINS asked about legal ramifications.

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PETER PUTZIER, Senior Assistant Attorney General, Transportation Section, Civil Division (Juneau), Department of Law (DOL), agreed there'd be no change or lessening of environmental protections. The State of Alaska would be "standing in the shoes" of FHWA. There'd be no change in how the law is applied, but the state would have more immediate control over it.

He explained that [SB 271] contains a requirement that was part of SAFETEA-LU, a waiver of Eleventh Amendment immunity. He said it shouldn't be of particular concern because NEPA is primarily a procedural statute that relates to deciding about different levels of environmental action, including a categorical

exclusion, an environmental assessment (EA) or an environmental impact statement (EIS). Usually, challenges are along the lines of [requests for] injunctive relief, trying to halt the process or have a court rule that something must be done again. Thus there is potential exposure to attorney fees.

He continued, saying it's stated upfront in the bill because it's required. The bill says the attorney general "may" decide to waive Eleventh Amendment immunity, language chosen because of a potential separation-of-powers issue. Instead of the legislature saying "shall," this simply authorizes the attorney general to make that waiver. Indicating DOL had reviewed it, he said the department sees no particular concerns that the state should have.

CHAIR HUGGINS asked whether the state would be assuming the liability.

MR. PUTZIER affirmed that.

CHAIR HUGGINS asked whether that causes Mr. Putzier concern.

MR. PUTZIER reiterated that it's primarily a procedural statute. More often than not, someone says that rather than an EA, an EIS should have been done, for example; then the court decides which process should have been followed, or the court might kick the matter back and require additional studies or consideration of other alternatives or impacts. He opined that those kinds of rulings aren't of particular concern to the state.

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MR. PUTZIER, in response to Senator French, noted three primary references to federal statutes on page 2 of SB 271: 23 U.S.C. 325, 23 U.S.C. 326 and 23 U.S.C. 327. The first involves recreational trails and transportation-enhancement activities. He said at this point there is no intent by the state to adopt that authority, to his knowledge, but another administration might have a different philosophy. It was included because if it isn't authorized through legislation, the ability to opt in at some point would be lost. The second, 23 U.S.C. 326, is a delegation of categorical exclusions. Certain categories of projects are defined as not requiring an EIS. Thus it's a statutory list of certain projects that don't require further analysis.

SENATOR FRENCH asked what sorts of projects wouldn't need an EIS.

MR. MacKINNON replied that it would be a repavement project or small reconstruction of a roadway. Each year the department does about 150 categorical exclusions, does fewer than 10 environmental assessments and, on average, starts or completes 2 environmental impact statements. In further response, he offered a correction, saying that in the overall scheme of things, [DOTPF] performs all the work for an EIS or an EA; it is done either by the department or, primarily, through consultants, but with [FHWA] oversight. The NEPA delegation would remove that federal oversight and put it within [DOTPF] headquarters, "through a firewall."

MR. PUTZIER, in further response to Senator French, explained that 23 U.S.C. 327 is the NEPA pilot program.

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SENATOR FRENCH referred to the fiscal notes from DOTPF and the Department of Environmental Conservation (DEC). He asked whether DOL is concerned about expenses that may be incurred as it defends against these injunctions and so forth.

MR. PUTZIER pointed out that the analysis in the DOTPF [fiscal note] indicates DOL anticipates adding one position. He surmised it would be an attorney skilled in the area of environmental litigation, and NEPA in particular. He said this is a specialty field for which the department doesn't currently do defense work; rather, the [FHWA] attorneys in San Francisco usually undertake that defense.

SENATOR FRENCH asked whether lawsuits would be filed in federal court. Suggesting such lawsuits would be brought by public-interest litigants, he cited the Knik Arm Bridge as an example. He asked whether this might stir up a hornet's nest in taking over the responsibility for defending such suits.

MR. PUTZIER answered that he believes the threat of litigation would exist either way. It just would be a different set of attorneys defending it. He said he doesn't foresee additional time constraints or negative repercussions to the state. The defense would be done in-house, so to speak, within Alaska. He emphasized that the best estimate, after talking to FHWA counsel in San Francisco, is that one attorney likely would suffice.

MR. MacKINNON added that he doesn't believe Knik Arm or any other ongoing environmental document would be shifted over to the department. This is for new environmental documents, for new projects, once the pilot program is in place and the MOU is executed.

He offered his belief that in the last 20 years, the state or federal government has been sued on two environmental documents: the Iliamna-Nondalton bridge, an EA for which the department is now refreshing the EA to make it comply, as well as the Whittier Tunnel. "We prevailed on both of those," he added.

MR. PUTZIER added that the program has flexibility. It isn't all or nothing. Although the final rule making hasn't been completed by FHWA, his understanding is based on reading the statutes and informal discussions with FHWA. If a project is foreseen to be problematic beyond the state's ability to do it, possibly the state could give particular projects to FHWA for its oversight.

MR. MacKINNON remarked that the language says, in essence, that the department may assume responsibility for any or all, which [DOTPF] is interpreting as the ability to pick and choose.

SENATOR FRENCH said it seems, if the duties are assumed, that immunity must be surrendered. Thus it really isn't a "may" in that regard.

MR. PUTZIER agreed that FHWA wouldn't proceed unless the attorney general provided some kind of formal waiver of immunity. He pointed out that it could be "NEPA-wide" or on a project-by-project basis. He said it's still open for discussion with FHWA.

SENATOR FRENCH cautioned about surrender of immunity. He noted, however, that it seems the testifiers envision passing sometimes on assuming those responsibilities and surrendering immunity, and only would accept projects when there is a comfort level.

MR. PUTZIER replied, "That's correct. We have thought about that, and that's on the table right now."

CHAIR HUGGINS asked whether there would be a series of MOUs, by project.

MR. PUTZIER answered that the structure likely could take several forms. There could be a master agreement that sets out

general duties, and then agreements on a project-by-project basis. Because FHWA's final rule making isn't completed, however, it isn't clear exactly how the program will run. Thus [SB 271] simply provides authority to continue those discussions with FHWA. It doesn't adopt anything.

CHAIR HUGGINS observed that the language talks about 270 days to have the regulations.

MR. MacKINNON noted that the clock started August 10 [2005], when the [federal] bill was signed into law.

CHAIR HUGGINS mentioned positions for \$650,000. He offered his experience that, whatever number of positions is called for, there usually is "creep over" because the task is larger than envisioned. He asked whether that's a genuine concern.

MR. MacKINNON agreed it's a genuine concern. He pointed out that these are CIP [capital improvement project] receipts; this provides a bit of comfort, since the project pays for these positions - it's not general fund money. He opined that if it improves the performance and speeds up the process of getting these projects out, it's a worthwhile investment.

CHAIR HUGGINS asked about recruitment of people who have critical skills, and competition in that area.

MR. MacKINNON agreed a valid concern is that people will be lost to other agencies - not just environmental analysts, but also engineers and right-of-way agents. What the department can do is offer good wages, benefits and a great place to work, he suggested.

CHAIR HUGGINS asked whether this is well-intended legislation by [Congressman] Young that will help Alaska, or was pushed by FHWA, perhaps at the state's expense.

MR. MacKINNON suggested FHWA personnel, if pressured for a reply, would say they don't like this. He added that it's well-intentioned legislation by Congressman Young and other members of the [U.S. House] Transportation Committee.

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BILL BALLARD, Statewide Environmental Coordinator, Division of Design and Engineering Services, Department of Transportation and Public Facilities, informed members that he is the

department's lead representative for this pilot program. In response to Chair Huggins, he said the biggest advantage is that it gives control for project oversight and approval to the department so it can set the priorities and have a consistent set of rules, thereby being able to expedite the project-approval process.

He further responded that the litigation side doesn't give him a lot of concern. He's the senior person in the environmental staff and has been doing this for 25 years. In that time, there have been only two or three court cases. He explained, "We are threatened an awful lot but, by and large, our staff does a very good job. And we haven't ... been challenged except for those few times, and we've prevailed."

CHAIR HUGGINS mentioned litigation involving the Whittier Tunnel. He asked about the timeframe and approximate dollars at stake.

MR. BALLARD said he didn't know; he'd been working in the private sector for a short time then. He added that he thought it cost about three years for the project. That case went to the 9th Circuit [Court of Appeals], where the state prevailed. He recalled that the issue was whether Section 4(f) of the federal Department of Transportation Act applied to the project. That is one of the most extreme environmental regulations, he asserted. Section 4(f) applies to parks, recreational areas, wildlife refuges and historic sites; it says the Secretary of Transportation will not approve a project that affects those resources unless there is no prudent or feasible alternative.

SENATOR FRENCH referred to Mr. Ballard's statement that "we've prevailed" and asked whether it was the state or federal government that was sued.

MR. BALLARD clarified that it was the federal government, and it was the project that prevailed. Under FHWA regulations, state transportation agencies are authorized to prepare environmental documents on behalf of FHWA, with FHWA oversight and approval. Thus the state prepared that document, and [FHWA] approved it. He added, "They're the action agency, so ... they represented that project in federal court."

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SENATOR FRENCH remarked that it sounds like a good situation: Alaska's state workers get to make decisions, but the federal

government defends those in court and spends its money on federal attorneys backing up the state. He asked how much money the federal government spent defending that suit - the kinds of legal expenses that the state will be putting itself on the hook for if SB 271 is implemented.

MR. MacKINNON agreed to get that information for Senator French.

CHAIR HUGGINS commented that Senator French brought up a good point. He said he trusts that [Congressman] Don Young was trying to do the right thing for Alaska, but expressed concern about getting caught in an unintended trap. He requested further information about the benefits.

MR. MacKINNON replied that having it overseen by Alaskans allows the state to tailor the documents to Alaska. He said he, too, is concerned about additional cost to the state, and added that he suspects the defense of a lawsuit over an environmental document would be paid for out of federal project funds, as happens currently.

CHAIR HUGGINS asked whether basically the same types of people would be doing the project, but the state would have control.

MR. MacKINNON affirmed that. He reported that one of the many steps in an environmental document, especially an EIS, is that it goes through regular reviews for what is called legal sufficiency - whether the document and procedure being used comply with NEPA and are legally sufficient. "We regularly get those reviews from [FHWA], and then the project - the document - goes out for public review towards the end," he added.

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CHAIR HUGGINS suggested the need to develop a comfort level with this new concept and then revisit the issue.

MR. PUTZIER offered a final point: Assuming the state was defending a lawsuit brought in federal court, the state would be subject to the Equal Access to Justice Act (EAJA). The plaintiffs would have to prevail, first of all, and then the court would have to make a finding that the state's position was not "substantially justified." Thus no automatic liability would accrue to the state. The plaintiffs suing the state would have to jump some hurdles before the state would have to pay for their attorney fees.

CHAIR HUGGINS asked Mr. Putzier to rate his degree of concern about liability, on a scale of 1 to 10.

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MR. PUTZIER replied that it's only about 3 because it isn't a big unknown. "Primarily, it's talking about 'procedurally, go back and do something over again,'" he added. Agreeing that potential liability must be weighed against the benefits, he opined that the benefits discussed by Mr. MacKinnon probably outweigh the relative risk of an attorney-fee award.

MR. MacKINNON added that the lawsuits cannot be prevented. However, the state can do its best job in preparing the environmental documents so they're as defensible as possible, and then go through the process.

CHAIR HUGGINS asked whether anyone else wished to discuss the liability issue and then concluded the hearing. [SB 271 was held over.]

There being no further business to come before the committee, Chair Huggins adjourned the meeting at [2:16:45 PM](#).