H. R. 4336

To amend the National Environmental Policy Act of 1969 to provide for project delivery programs, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 1, 2021

Mr. SCHWEIKERT (for himself, Mrs. LESKO, and Mr. NEWHOUSE) introduced the following bill; which was referred to the Committee on Natural Resources, and in addition to the Committee on Transportation and Infrastructure, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

A BILL

To amend the National Environmental Policy Act of 1969 to provide for project delivery programs, and for other purposes.

Be it enacted by the Senate and House of Representa-...
(1) by redesignating section 105 (42 U.S.C. 4335) as section 106; and

(2) by inserting after section 104 (42 U.S.C. 4334) the following:

“SEC. 105. PROJECT DELIVERY PROGRAMS.

“(a) Definition of Agency Program.—In this section, the term ‘agency program’ means a project delivery program established by a Federal agency under subsection (b)(1).

“(b) Establishment.—

“(1) In general.—The head of each Federal agency, including the Secretary of Transportation, shall carry out a project delivery program.

“(2) Assumption of Responsibility.—

“(A) In general.—Subject to subparagraph (B), the head of each Federal agency shall, on request of a State, enter into a written agreement with the State, which may be in the form of a memorandum of understanding, in which the head of each Federal agency may assign, and the State may assume, the responsibilities of the head of the Federal agency under this title with respect to 1 or more projects within the State that are under the jurisdiction of the Federal agency.
“(B) EXCEPTION.—The head of a Federal agency shall not enter into a written agreement under subparagraph (A) if the head of the Federal agency determines that the State is not in compliance with the requirements described in subsection (c)(4).

“(C) ADDITIONAL RESPONSIBILITY.—If a State assumes responsibility under subparagraph (A)—

“(i) the head of the Federal agency may assign to the State, and the State may assume, all or part of the responsibilities of the head of the Federal agency for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of a specific project;

“(ii) at the request of the State, the head of the Federal agency may also assign to the State, and the State may assume, the responsibilities of the head of the Federal agency under this title with respect to 1 or more projects within the State that are under the jurisdiction of the Federal agency; but
“(iii) the head of the Federal agency may not assign responsibility for any regional conformity determination required under section 176 of the Clean Air Act (42 U.S.C. 7506) currently made by a Metropolitan Planning Organization.

“(D) PROCEDURAL AND SUBSTANTIVE REQUIREMENTS.—A State shall assume responsibility under this section subject to the same procedural and substantive requirements as would apply if that responsibility were carried out by the Federal agency.

“(E) FEDERAL RESPONSIBILITY.—Any responsibility of a Federal agency not explicitly assumed by the State by written agreement under subparagraph (A) shall remain the responsibility of the Federal agency.

“(F) NO EFFECT ON AUTHORITY.—Nothing in this section preempts or interferes with any power, jurisdiction, responsibility, or authority of an agency, other than the Federal agency for which the written agreement applies, under applicable law (including regulations) with respect to a project.
“(G) PRESERVATION OF FLEXIBILITY.—
The head of the Federal agency may not re-
quire a State, as a condition of participation in
the agency program of the Federal agency, to
forego project delivery methods that are other-
wise permissible for projects under applicable
law.

“(H) LEGAL FEES.—A State assuming the
responsibilities of a Federal agency under this
section for a specific project may use funds
awarded to the State for that project for attor-
neys’ fees directly attributable to eligible activi-
ties associated with the project.

“(c) STATE PARTICIPATION.—

“(1) PARTICIPATING STATES.—Except as pro-
vided in subsection (b)(2)(B), all States are eligible
to participate in an agency program.

“(2) APPLICATION.—Not later than 270 days
after the date of enactment of this section, the head
of each Federal agency shall amend, as appropriate,
regulations that establish requirements relating to
information required to be contained in any applica-
tion of a State to participate in the agency program,
including, at a minimum—
“(A) the projects or classes of projects for which the State anticipates exercising the authority that may be granted under the agency program;

“(B) verification of the financial resources necessary to carry out the authority that may be granted under the agency program; and

“(C) evidence of the notice and solicitation of public comment by the State relating to participation of the State in the agency program, including copies of comments received from that solicitation.

“(3) PUBLIC NOTICE.—

“(A) IN GENERAL.—Each State that submits an application under this subsection shall give notice of the intent of the State to participate in an agency program not later than 30 days before the date of submission of the application.

“(B) METHOD OF NOTICE AND SOLICITATION.—The State shall provide notice and solicit public comment under this paragraph by publishing the complete application of the State in accordance with the appropriate public notice law of the State.
“(4) **SELECTION CRITERIA.**—The head of a Federal agency may approve the application of a State under this section only if—

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

“(B) the head of the Federal agency determines that the State has the capability, including financial and personnel, to assume the responsibility; and

“(C) the head of the State agency having primary jurisdiction over the project enters into a written agreement with the head of the Federal agency as described in subsection (d).

“(5) **OTHER FEDERAL AGENCY VIEWS.**—If a State applies to assume a responsibility of the Federal agency that would have required the head of the Federal agency to consult with the head of another Federal agency, the head of the Federal agency shall solicit the views of the head of the other Federal agency before approving the application.

“(d) **WRITTEN AGREEMENT.**—A written agreement under subsection (b)(2)(A) shall—

“(1) be executed by the Governor or the top-ranking official in the State who is charged with responsibility for the project;
“(2) be in such form as the head of the Federal agency may prescribe;

“(3) provide that the State—

“(A) agrees to assume all or part of the responsibilities of the Federal agency described in subparagraphs (A) and (C) of subsection (b)(2);

“(B) expressly consents, on behalf of the State, to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the Federal agency assumed by the State;

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

“(i) authorize the State to take the actions necessary to carry out the responsibilities being assumed; and

“(ii) are comparable to section 552 of title 5, including providing that any decision regarding the public availability of a document under those State laws is reviewable by a court of competent jurisdiction;

and

“(D) agrees to maintain the financial resources necessary to carry out the responsibilities being assumed;
“(4) require the State to provide to the head of the Federal agency any information the head of the Federal agency reasonably considers necessary to ensure that the State is adequately carrying out the responsibilities assigned to the State;

“(5) have a term of not more than 5 years; and

“(6) be renewable.

“(e) JURISDICTION.—

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

“(2) LEGAL STANDARDS AND REQUIREMENTS.—A civil action under paragraph (1) shall be governed by the legal standards and requirements that would apply in such a civil action against the head of a Federal agency had the head of the Federal agency taken the actions in question.

“(3) INTERVENTION.—The head of a Federal agency shall have the right to intervene in any action described in paragraph (1).

“(f) EFFECT OF ASSUMPTION OF RESPONSIBILITY.—A State that assumes responsibility under subsection (b)(2) shall be solely responsible and solely liable for carrying out, in lieu of and without further approval
of the head of the Federal agency, the responsibilities as-
sumed under subsection (b)(2), until the agency program
is terminated under subsection (k).

“(g) LIMITATIONS ON AGREEMENTS.—Nothing in
this section permits a State to assume any rulemaking au-
thority of the head of a Federal agency under any Federal
law.

“(h) AUDITS.—

“(1) IN GENERAL.—To ensure compliance by a
State with any agreement of the State under sub-
section (d) (including compliance by the State with
all Federal laws for which responsibility is assumed
under subsection (b)(2)), for each State partici-
pating in an agency program, the head of a Federal
agency shall—

“(A) not later than 180 days after the date
of execution of the agreement, meet with the
State to review implementation of the agree-
ment and discuss plans for the first annual
audit;

“(B) conduct annual audits during each of
the first 4 years of State participation; and

“(C) ensure that the time period for com-
pleting an annual audit, from initiation to com-
pletion (including public comment and re-
(2) Public Availability and Comment.—

(A) In general.—An audit conducted under paragraph (1) shall be provided to the public for comment.

(B) Response.—Not later than 60 days after the date on which the period for public comment ends, the head of the Federal agency shall respond to public comments received under subparagraph (A).

(3) Audit Team.—

(A) In general.—An audit conducted under paragraph (1) shall be carried out by an audit team determined by the head of the Federal agency, in consultation with the State, in accordance with subparagraph (B).

(B) Consultation.—Consultation with the State under subparagraph (A) shall include a reasonable opportunity for the State to review and provide comments on the proposed members of the audit team.

(i) Monitoring.—After the fourth year of the participation of a State in an agency program, the head of the Federal agency shall monitor compliance by the State
with the written agreement, including the provision by the
State of financial resources to carry out the written agree-
ment.

“(j) Report to Congress.—The head of each Fed-
eral agency shall submit to Congress an annual report that
describes the administration of the agency program.

“(k) Termination.—

“(1) Termination by Federal Agency.—The
head of a Federal agency may terminate the partici-
pation of a State in the agency program of the Fed-
eral agency if—

“(A) the head of the Federal agency deter-
mines that the State is not—

“(i) meeting time lines or other re-
quirements under Federal law that became
the responsibility of the State under the
agency program; or

“(ii) adequately carrying out other the
responsibilities assigned to the State under
the agency program;

“(B) the head of the Federal agency pro-
vides to the State—

“(i) a notification of the determina-
tion of noncompliance;
“(ii) a period of not less than 120 days to take such corrective action as the head of the Federal agency determines to be necessary to comply with the applicable agreement; and

“(iii) on request of the Governor of the State, a detailed description of each responsibility in need of corrective action regarding an inadequacy identified under subparagraph (A); and

“(C) the State, after the notification and period provided under subparagraph (B), fails to take satisfactory corrective action, as determined by the head of the Federal agency.

“(2) TERMINATION BY THE STATE.—A State may terminate the participation of the State in an agency program at any time by providing to the head of the applicable Federal agency a notice by not later than the date that is 90 days before the date of termination, and subject to such terms and conditions as the head of the Federal agency may provide.

“(l) CAPACITY BUILDING.—The head of a Federal agency, in cooperation with representatives of State offi-
cials, may carry out education, training, peer-exchange, and other initiatives as appropriate—

“(1) to assist States in developing the capacity to participate in the agency program of the Federal agency; and

“(2) to promote information sharing and collaboration among States that are participating in the agency program of the Federal agency.

“(m) RELATIONSHIP TO LOCALLY ADMINISTERED PROJECTS.—A State granted authority under an agency program may, as appropriate and at the request of a local government—

“(1) exercise that authority on behalf of the local government for a locally administered project; or

“(2) provide guidance and training on consolidating and minimizing the documentation and environmental analyses necessary for sponsors of a locally administered project to comply with this title and any comparable requirements under State law.”.

(b) CONFORMING AMENDMENT.—Section 327 of title 23, United States Code, is amended—

(1) in subsection (a)(1), by striking “The Secretary” and inserting “Subject to subsection (m), the Secretary”; and

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(2) by adding at the end the following:

“(m) SUNSET.—

“(1) IN GENERAL.—Except as provided under paragraph (2), the authority provided by this section terminates on the date of enactment of this subsection.

“(2) EXISTING AGREEMENTS.—Subject to the requirements of this section, the Secretary may continue to enforce any agreement entered into under this section before the date of enactment of this subsection.”.