

115TH CONGRESS
2D SESSION

S. 2588

To amend title 54, United States Code, to establish a program to allow States to assume certain Federal responsibilities under that title with respect to agency actions applicable to highway projects within the States, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 21, 2018

Mr. CORNYN (for himself, Mr. HATCH, and Mr. SULLIVAN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend title 54, United States Code, to establish a program to allow States to assume certain Federal responsibilities under that title with respect to agency actions applicable to highway projects within the States, 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. ASSUMPTION BY STATES OF CERTAIN HIS-**
4 **TORIC PRESERVATION RESPONSIBILITIES.**

5 (a) IN GENERAL.—Subchapter I of chapter 3061 of
6 title 54, United States Code, is amended by adding at the
7 end the following:

1 **“§ 306115. Assumption by States of certain respon-**
 2 **sibilities relating to highway projects**

3 “(a) ESTABLISHMENT.—

4 “(1) IN GENERAL.—The head of each agency
 5 (referred to in this section as the ‘agency head’)
 6 shall carry out an assignment program (referred to
 7 in this section as the ‘program’) to allow States that
 8 are eligible under subsection (b)(1) to assume cer-
 9 tain responsibilities of the agency under section
 10 306108 with respect to agency actions applicable to
 11 highway projects within the State.

12 “(2) ASSUMPTION OF RESPONSIBILITY.—

13 “(A) IN GENERAL.—Subject to the other
 14 requirements of this section, on written agree-
 15 ment of the agency head and a State (which
 16 may be in the form of a memorandum of under-
 17 standing), the agency head may assign, and the
 18 State may assume, the responsibilities of the
 19 agency head under section 306108 with respect
 20 to the undertakings of the agency described in
 21 that section that are applicable to 1 or more
 22 highway projects in the State.

23 “(B) ADDITIONAL RESPONSIBILITY.—

24 “(i) IN GENERAL.—If a State as-
 25 sumes responsibility under subparagraph
 26 (A), subject to clause (ii), on the request

of the State, the agency head may also assign to the State, and the State may assume, the responsibilities of the agency head described in that subparagraph for 1 or more railroad, public transportation, or multimodal projects within the State.

“(ii) EXCLUSION OF PROJECTS.—In any State that assumes a responsibility of the agency head under clause (i), a recipient of assistance under chapter 53 of title 49, may submit to the agency head a request that the agency head shall maintain the responsibility of the agency head with respect to 1 or more public transportation projects carried out by the recipient in the State.

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

“(D) FEDERAL RESPONSIBILITY.—Any responsibility of an agency head that is not explicitly assumed by a State by written agree-

1 ment under this section shall remain the re-
2 sponsibility of the agency head.

3 “(E) NO EFFECT ON AUTHORITY.—Noth-
4 ing in this section preempts or interferes with
5 any power, jurisdiction, responsibility, or au-
6 thority of the Secretary, the Council, or the ap-
7 plicable agency, except with respect to an au-
8 thority delegated by the agency head pursuant
9 to subparagraph (A) under applicable law re-
10 garding a project or agency action described in
11 subparagraph (A) or (B).

12 “(F) PRESERVATION OF FLEXIBILITY.—
13 The agency head may not require a State, as a
14 condition of participation in the program, to
15 forgo a project delivery method that is other-
16 wise permissible for a project described in sub-
17 paragraph (A) or (B).

18 “(G) LEGAL FEES.—A State that assumes
19 a responsibility of an agency head under this
20 section for a project described in subparagraph
21 (A) or (B) may use funds apportioned to the
22 State under section 104(b)(2) of title 23, as
23 necessary, for attorneys’ fees directly attrib-
24 utable to eligible activities associated with the
25 project.

1 “(b) STATE PARTICIPATION.—

2 “(1) PARTICIPATING STATES.—To be eligible to
3 participate in the program, a State shall—

4 “(A) be participating in the surface trans-
5 portation project delivery program under sec-
6 tion 327 of title 23; and

7 “(B) assume the responsibilities of the
8 Secretary of Transportation under the National
9 Environmental Policy Act of 1969 (42 U.S.C.
10 4321 et seq.) pursuant to that section.

11 “(2) APPLICATION.—Not later than 270 days
12 after the date of enactment of this section, the Sec-
13 retary shall amend, as appropriate, regulations that
14 establish requirements relating to information re-
15 quired in any application of a State to participate in
16 the program, including, at a minimum—

17 “(A) the projects or classes of projects for
18 which the State anticipates exercising the au-
19 thority that may be granted under the program;

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

23 “(C) evidence of the notice and solicitation
24 of public comment by the State relating to par-
25 ticipation of the State in the program, including

1 copies of comments received from that solicita-
2 tion.

3 “(3) PUBLIC NOTICE.—

4 “(A) IN GENERAL.—Each State that sub-
5 mits an application in accordance with the reg-
6 ulations described in paragraph (2) shall pro-
7 vide to the relevant agency head and publish
8 notice of the intent of the State to participate
9 in the program by not later than 30 days before
10 the date of submission of the application.

11 “(B) METHOD OF NOTICE AND SOLICITA-
12 TION.—The State shall provide notice and so-
13 licit public comment under this paragraph by
14 publishing the complete application of the State
15 in accordance with the appropriate public notice
16 requirements of the State.

17 “(4) SELECTION CRITERIA.—The agency head
18 may approve the application of a State under this
19 subsection only if—

20 “(A) any necessary changes to regulations
21 pursuant to paragraph (2) have been carried
22 out;

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

1 “(C) the head of the State agency with pri-
 2 mary jurisdiction over highway matters enters
 3 into a written agreement with the agency head,
 4 as described in subsection (c).

5 “(5) OTHER AGENCY VIEWS.—If a State applies
 6 to assume a responsibility of the agency head that
 7 would have required the agency head to consult with
 8 another agency, the agency head shall solicit the
 9 views of the other agency before approving the appli-
 10 cation of the State under this subsection.

11 “(c) WRITTEN AGREEMENT.—A written agreement
 12 under this section shall—

13 “(1) be executed by—

14 “(A) the Governor of the applicable State;
 15 or

16 “(B) the top-ranking transportation offi-
 17 cial in the State who is charged with responsi-
 18 bility for highway construction;

19 “(2) be in such form as the agency head may
 20 require;

21 “(3) provide that the State—

22 “(A) agrees to assume all or part of the re-
 23 sponsibilities of the agency head referred to in
 24 subsection (a);

1 “(B) expressly consents, on behalf of the
2 State, to accept the jurisdiction of the Federal
3 courts for the compliance, discharge, and en-
4 forcement of any responsibility of the agency
5 head assumed by the State;

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

8 “(i) authorize the State to take the
9 actions necessary to carry out the respon-
10 sibilities being assumed; and

11 “(ii) are comparable to section 552 of
12 title 5, including providing that any deci-
13 sion regarding the public availability of a
14 document under those State laws is review-
15 able by a court of competent jurisdiction;
16 and

17 “(D) agrees to maintain the financial re-
18 sources necessary to carry out the responsibil-
19 ities being assumed;

20 “(4) require the State to provide to the agency
21 head any information the agency head reasonably
22 considers necessary to ensure that the State is ade-
23 quately carrying out the responsibilities assigned to
24 the State;

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

1 “(6) be renewable.

2 “(d) JURISDICTION.—

3 “(1) IN GENERAL.—The United States district
4 courts shall have exclusive jurisdiction over any civil
5 action against a State for failure to carry out any
6 responsibility assumed by the State pursuant to this
7 section.

8 “(2) LEGAL STANDARDS AND REQUIRE-
9 MENTS.—A civil action under paragraph (1) shall be
10 governed by the legal standards and requirements
11 that would apply in such a civil action against the
12 applicable agency head had the agency head taken
13 the actions in question.

14 “(3) INTERVENTION.—The applicable agency
15 head shall have the right to intervene in any action
16 described in paragraph (1).

17 “(e) EFFECT OF ASSUMPTION OF RESPONSI-
18 BILITY.—A State that assumes responsibility under sub-
19 section (a)(2) shall be solely responsible and solely liable
20 for carrying out, in lieu of, and without further approval
21 of, the applicable agency head, those responsibilities, until
22 the date on which the program is terminated in accordance
23 with subsection (j).

24 “(f) LIMITATIONS ON AGREEMENTS.—Nothing in
25 this section permits a State to assume any rulemaking au-

1 thority of the Secretary or the applicable agency head
 2 under any Federal law.

3 “(g) AUDITS.—

4 “(1) IN GENERAL.—To ensure compliance by a
 5 State with an agreement of the State under sub-
 6 section (c) (including compliance by the State with
 7 all Federal laws for which responsibility is assumed
 8 under subsection (a)(2)), for each State partici-
 9 pating in the program, the applicable agency head
 10 shall—

11 “(A) not later than 180 days after the date
 12 of execution of the applicable agreement, meet
 13 with the State—

14 “(i) to review the implementation of
 15 the agreement; and

16 “(ii) to discuss plans for the first an-
 17 nual audit;

18 “(B) conduct annual audits during each of
 19 the first 4 years of State participation in the
 20 program; and

21 “(C) ensure that the time period for com-
 22 pleting an annual audit, from initiation to com-
 23 pletion (including public comment and re-
 24 sponses to those comments), does not exceed
 25 180 days.

1 “(2) PUBLIC AVAILABILITY AND COMMENT.—

2 “(A) IN GENERAL.—An audit conducted
3 under paragraph (1) shall be provided to the
4 public for comment.

5 “(B) RESPONSE.—Not later than 60 days
6 after the date on which the period for public
7 comment ends, the applicable agency head shall
8 respond to public comments received under sub-
9 paragraph (A).

10 “(3) AUDIT TEAM.—

11 “(A) IN GENERAL.—An audit conducted
12 under paragraph (1) shall be carried out by an
13 audit team determined by the applicable agency
14 head, in consultation with the State, in accord-
15 ance with subparagraph (B).

16 “(B) CONSULTATION.—Consultation with
17 the State under subparagraph (A) shall include
18 a reasonable opportunity for the State to re-
19 view, and provide comments regarding, the pro-
20 posed members of the audit team.

21 “(h) MONITORING.—After the end of the fourth year
22 of the participation by a State in the program, the applica-
23 ble agency head shall monitor compliance by the State
24 with the written agreement under subsection (c), including

1 the provision by the State of financial resources to carry
2 out the written agreement.

3 “(i) REPORT TO CONGRESS.—The Secretary or the
4 Council shall submit to Congress an annual report that
5 describes the administration of the program during the
6 preceding calendar year.

7 “(j) TERMINATION.—

8 “(1) TERMINATION BY AGENCY.—The applica-
9 ble agency head may terminate the participation of
10 a State in the program if—

11 “(A) the agency head determines that the
12 State is not adequately carrying out the respon-
13 sibilities assigned to the State pursuant to this
14 section;

15 “(B) the agency head provides to the
16 State—

17 “(i) a notification of the determina-
18 tion of noncompliance;

19 “(ii) a period of not less than 120
20 days to take such corrective action as the
21 agency head determines to be necessary to
22 comply with the applicable agreement; and

23 “(iii) on request of the Governor of
24 the State, a detailed description of each re-
25 sponsibility in need of corrective action re-

1 garding an inadequacy identified under
2 subparagraph (A); and

3 “(C) the State, after the notification and
4 period for corrective action provided under sub-
5 paragraph (B), fails to take satisfactory correc-
6 tive action, as determined by the agency head.

7 “(2) TERMINATION BY STATE.—The State may
8 terminate the participation of the State in the pro-
9 gram at any time by providing to the applicable
10 agency head a notice, by not later than the date that
11 is 90 days before the date of termination, subject to
12 such terms and conditions as the agency head may
13 provide.

14 “(k) CAPACITY BUILDING.—The Council, in coopera-
15 tion with representatives of State officials, may carry out
16 education, training, peer-exchange, and other initiatives as
17 appropriate—

18 “(1) to assist States in developing the capacity
19 to participate in the program; and

20 “(2) to promote information sharing and col-
21 laboration among States that are participating in
22 the program.

23 “(l) RELATIONSHIP TO LOCALLY ADMINISTERED
24 PROJECTS.—A State granted authority under this section

1 may, as appropriate and on the request of a local govern-
 2 ment—

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

6 “(2) provide guidance and training regarding
 7 consolidating and minimizing the documentation and
 8 environmental analyses necessary for sponsors of a
 9 locally administered project to comply with—

10 “(A) section 306108; and

11 “(B) any comparable requirements under
 12 State law.”.

13 (b) TECHNICAL AMENDMENT.—The table of sections
 14 for chapter 3061 of title 54, United States Code, is
 15 amended by inserting after the item relating to section
 16 306114 the following:

“306115. Assumption by States of certain responsibilities relating to highway
 projects.”.

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