

116TH CONGRESS
2D SESSION

S. 4312

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

IN THE SENATE OF THE UNITED STATES

JULY 23, 2020

Mr. LEE introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the National Environmental Policy Act of 1969 to provide for project delivery programs, 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 “NEPA State Assign-
5 ment Expansion Act of 2020”.

6 **SEC. 2. PROJECT DELIVERY PROGRAMS.**

7 (a) IN GENERAL.—Title I of the National Environ-
8 mental Policy Act of 1969 is amended—

9 (1) by redesignating section 105 (42 U.S.C.
10 4335) as section 106; and

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

3 **“SEC. 105. PROJECT DELIVERY PROGRAMS.**

4 “(a) DEFINITION OF AGENCY PROGRAM.—In this
5 section, the term ‘agency program’ means a project deliv-
6 ery program established by a Federal agency under sub-
7 section (b)(1).

8 “(b) ESTABLISHMENT.—

9 “(1) IN GENERAL.—The head of each Federal
10 agency, including the Secretary of Transportation,
11 shall carry out a project delivery program.

12 “(2) ASSUMPTION OF RESPONSIBILITY.—

13 “(A) IN GENERAL.—Subject to subpara-
14 graph (B), the head of each Federal agency
15 shall, on request of a State, enter into a written
16 agreement with the State, which may be in the
17 form of a memorandum of understanding, in
18 which the head of each Federal agency may as-
19 sign, and the State may assume, the respon-
20 sibilities of the head of the Federal agency
21 under this title with respect to 1 or more
22 projects within the State that are under the ju-
23 risdiction of the Federal agency.

24 “(B) EXCEPTION.—The head of a Federal
25 agency shall not enter into a written agreement

1 under subparagraph (A) if the head of the Fed-
2 eral agency determines that the State is not in
3 compliance with the requirements described in
4 subsection (c)(4).

5 “(C) ADDITIONAL RESPONSIBILITY.—If a
6 State assumes responsibility under subpara-
7 graph (A)—

8 “(i) the head of the Federal agency
9 may assign to the State, and the State
10 may assume, all or part of the responsibil-
11 ities of the head of the Federal agency for
12 environmental review, consultation, or
13 other action required under any Federal
14 environmental law pertaining to the review
15 or approval of a specific project;

16 “(ii) at the request of the State, the
17 head of the Federal agency may also as-
18 sign to the State, and the State may as-
19 sume, the responsibilities of the head of
20 the Federal agency under this title with re-
21 spect to 1 or more projects within the
22 State that are under the jurisdiction of the
23 Federal agency; but

24 “(iii) the head of the Federal agency
25 may not assign responsibility for any con-

1 formity determination required under sec-
2 tion 176 of the Clean Air Act (42 U.S.C.
3 7506).

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

10 “(E) FEDERAL RESPONSIBILITY.—Any re-
11 sponsibility of a Federal agency not explicitly
12 assumed by the State by written agreement
13 under subparagraph (A) shall remain the re-
14 sponsibility of the Federal agency.

15 “(F) NO EFFECT ON AUTHORITY.—Noth-
16 ing in this section preempts or interferes with
17 any power, jurisdiction, responsibility, or au-
18 thority of an agency, other than the Federal
19 agency for which the written agreement applies,
20 under applicable law (including regulations)
21 with respect to a project.

22 “(G) PRESERVATION OF FLEXIBILITY.—
23 The head of the Federal agency may not re-
24 quire a State, as a condition of participation in
25 the agency program of the Federal agency, to

forego project delivery methods that are otherwise 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 attorneys’ fees directly attributable to eligible activities associated with the project.

“(c) STATE PARTICIPATION.—

“(1) PARTICIPATING STATES.—Except as provided 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 application 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;

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

4 “(C) evidence of the notice and solicitation
5 of public comment by the State relating to par-
6 ticipation of the State in the agency program,
7 including copies of comments received from that
8 solicitation.

9 “(3) PUBLIC NOTICE.—

10 “(A) IN GENERAL.—Each State that sub-
11 mits an application under this subsection shall
12 give notice of the intent of the State to partici-
13 pate in an agency program not later than 30
14 days before the date of submission of the appli-
15 cation.

16 “(B) METHOD OF NOTICE AND SOLICITA-
17 TION.—The State shall provide notice and so-
18 licit public comment under this paragraph by
19 publishing the complete application of the State
20 in accordance with the appropriate public notice
21 law of the State.

22 “(4) SELECTION CRITERIA.—The head of a
23 Federal agency may approve the application of a
24 State under this section only if—

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

3 “(B) the head of the Federal agency deter-
4 mines that the State has the capability, includ-
5 ing financial and personnel, to assume the re-
6 sponsibility; and

7 “(C) the head of the State agency having
8 primary jurisdiction over the project enters into
9 a written agreement with the head of the Fed-
10 eral agency as described in subsection (d).

11 “(5) OTHER FEDERAL AGENCY VIEWS.—If a
12 State applies to assume a responsibility of the Fed-
13 eral agency that would have required the head of the
14 Federal agency to consult with the head of another
15 Federal agency, the head of the Federal agency shall
16 solicit the views of the head of the other Federal
17 agency before approving the application.

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

20 “(1) be executed by the Governor or the top-
21 ranking official in the State who is charged with re-
22 sponsibility for the project;

23 “(2) be in such form as the head of the Federal
24 agency may prescribe;

25 “(3) provide that the State—

1 “(A) agrees to assume all or part of the re-
2 sponsibilities of the Federal agency described in
3 subparagraphs (A) and (C) of subsection (b)(2);

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

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

11 “(i) authorize the State to take the
12 actions necessary to carry out the respon-
13 sibilities being assumed; and

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

20 “(D) agrees to maintain the financial re-
21 sources necessary to carry out the responsibil-
22 ities being assumed;

23 “(4) require the State to provide to the head of
24 the Federal agency any information the head of the
25 Federal agency reasonably considers necessary to en-

1 sure that the State is adequately carrying out the
2 responsibilities assigned to the State;

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

4 “(6) be renewable.

5 “(e) JURISDICTION.—

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

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

16 “(3) INTERVENTION.—The head of a Federal
17 agency shall have the right to intervene in any ac-
18 tion described in paragraph (1).

19 “(f) EFFECT OF ASSUMPTION OF RESPONSI-
20 BILITY.—A State that assumes responsibility under sub-
21 section (b)(2) shall be solely responsible and solely liable
22 for carrying out, in lieu of and without further approval
23 of the head of the Federal agency, the responsibilities as-
24 sumed under subsection (b)(2), until the agency program
25 is terminated under subsection (k).

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

5 “(h) AUDITS.—

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

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

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

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

25 “(2) PUBLIC AVAILABILITY AND COMMENT.—

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

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

9 “(3) AUDIT TEAM.—

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

15 “(B) CONSULTATION.—Consultation with
16 the State under subparagraph (A) shall include
17 a reasonable opportunity for the State to review
18 and provide comments on the proposed mem-
19 bers of the audit team.

20 “(i) MONITORING.—After the fourth year of the par-
21 ticipation of a State in an agency program, the head of
22 the Federal agency shall monitor compliance by the State
23 with the written agreement, including the provision by the
24 State of financial resources to carry out the written agree-
25 ment.

1 “(j) REPORT TO CONGRESS.—The head of each Fed-
 2 eral agency shall submit to Congress an annual report that
 3 describes the administration of the agency program.

4 “(k) TERMINATION.—

5 “(1) TERMINATION BY FEDERAL AGENCY.—The
 6 head of a Federal agency may terminate the partici-
 7 pation of any State in the agency program of the
 8 Federal agency if—

9 “(A) the head of the Federal agency deter-
 10 mines that the State is not adequately carrying
 11 out the responsibilities assigned to the State;

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

14 “(i) a notification of the determina-
 15 tion of noncompliance;

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

21 “(iii) on request of the Governor of
 22 the State, a detailed description of each re-
 23 sponsibility in need of corrective action re-
 24 garding an inadequacy identified under
 25 subparagraph (A); and

1 “(C) the State, after the notification and
2 period provided under subparagraph (B), fails
3 to take satisfactory corrective action, as deter-
4 mined by the head of the Federal agency.

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

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

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

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

23 “(m) RELATIONSHIP TO LOCALLY ADMINISTERED
24 PROJECTS.—A State granted authority under an agency

1 program may, as appropriate and at the request of a local
2 government—

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 on consoli-
7 dating and minimizing the documentation and envi-
8 ronmental analyses necessary for sponsors of a lo-
9 cally administered project to comply with this title
10 and any comparable requirements under State law.”.

11 (b) CONFORMING AMENDMENT.—Section 327 of title
12 23, United States Code, is amended—

13 (1) in subsection (a)(1), by striking “The Sec-
14 retary” and inserting “Subject to subsection (m),
15 the Secretary”; and

16 (2) by adding at the end the following:

17 “(m) SUNSET.—

18 “(1) IN GENERAL.—Except as provided under
19 paragraph (2), the authority provided by this section
20 terminates on the date of enactment of this sub-
21 section.

22 “(2) EXISTING AGREEMENTS.—Subject to the
23 requirements of this section, the Secretary may con-
24 tinue to enforce any agreement entered into under

- 1 this section before the date of enactment of this sub-
- 2 section.”.

