

Date: \_\_\_\_\_ April 18, 2008

Committee Meeting Date: \_\_\_\_\_ April 17, 2008

Board Meeting Date: \_\_\_\_\_ May 1, 2008

**BOARD MEMORANDUM**

ACTION ITEM

**TO:** Santa Clara Valley Transportation Authority  
Board of Directors

**THROUGH:** Michael T. Burns  
General Manager

**FROM:** Kurt Evans  
Government Affairs Manager

**SUBJECT:** Support Position for AB 2650 (Carter)

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**Policy-Related Action: Yes**

**Government Code Section 84308 Applies: No**

**RECOMMENDATION:**

Adopt a support position for AB 2650 (Carter), which permits Caltrans to continue to participate in a federal pilot program that allows certain states to assume the responsibilities of the Federal Highway Administration (FHWA) under the National Environmental Policy Act (NEPA) for a limited period of time to see if this approach would speed up the delivery of capital improvement projects on state highways without a lessening of environmental protection. Specifically, AB 2650 extends provisions in existing law that authorize Caltrans to consent to the jurisdiction of the federal courts with regard to the assumption of FHWA's responsibilities under NEPA and that waive the state's Eleventh Amendment protection against lawsuits brought in federal court for as long as Caltrans participates in the pilot program.

**BACKGROUND:**

Under federal law, transportation projects in California that: (a) use federal funds; (b) require a federal permit; (c) are proposed to be built on federal land; or (d) are jointly undertaken by a federal agency are subject to environmental review under NEPA. FHWA, on behalf of the U.S. Department of Transportation, is responsible for reviewing and approving NEPA documents prepared for federal-aid highway projects proposed for construction in California. The U.S. Department of Transportation assumes liability for the project in the event lawsuits are filed under NEPA.

Caltrans has been administratively delegated the authority for categorical exclusion decision-making under NEPA since 1990. Categorical exclusion decisions are determinations that a project falls within a particular category that has been pre-determined to be unlikely to cause negative environmental impacts and, thus, is exempt from federal environmental review. Examples of categories of projects that may be exempted from federal environmental review

include adding shoulders or guardrails to roadways, constructing pedestrian or bicycle facilities, and road resurfacing. It is the simplest environmental approval. Under this administrative delegation to Caltrans, FHWA retained the liability for legal challenges filed under NEPA.

If the project cannot be categorically excluded from review, then an Environmental Assessment is conducted to determine whether the project will have a significant environmental impact. If there is a Finding of No Significant Impact (FONSI), then there is no further environmental review required. If there is a finding of significant impact, then a more thorough Environmental Impact Statement must be developed.

Caltrans currently prepares documents for Environmental Assessments and Environmental Impact Statements under NEPA for federal-aid highway projects in California. After draft NEPA documents are completed by Caltrans, they are transmitted to FHWA for review and approval. FHWA is required to comment on the draft documents within 30 days of receiving them. If FHWA returns a document with comments, then Caltrans must respond to the comments and re-submit a final document, which FHWA has 30 days to approve.

The most recent federal surface transportation authorization act—the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)—established the Surface Transportation Project Delivery Pilot Program. Under this program, California is designated as one of five states that are eligible to apply to participate in a six-year pilot program that delegates to the state the responsibilities of FHWA under NEPA. The responsibilities delegated to the state would still be subject to the same procedural and substantive requirements as if they were carried out by FHWA. By accepting this authority, the state must also accept the financial costs associated with this authority, as well as full liability for lawsuits filed under NEPA in federal court.

To be selected to participate in the pilot program, a state must enter into a “written agreement” with the U.S. Department of Transportation. Under this agreement, the state must: (a) consent to accept the jurisdiction of the federal courts for the “compliance, discharge, and enforcement of any responsibility assumed by the state;” and (b) certify that state laws are in effect that authorize the state to meet this requirement. In 2006, AB 1039, authored by Assembly Speaker Fabian Nunez (D-Los Angeles), was enacted to make the necessary statutory changes, but only until January 1, 2009. Caltrans subsequently entered into the required written agreement with the U.S. Department of Transportation and began participating in the pilot program on July 1, 2007. However, without further legislation, Caltrans’ participation in the program would cease on January 1, 2009. AB 2650 would extend the statutory changes made pursuant to Speaker Nunez’s 2006 bill beyond the January 1, 2009, sunset date, thereby allowing Caltrans to continue to participate in the pilot program until it expires on August 10, 2011.

## **DISCUSSION:**

The Surface Transportation Project Delivery Pilot Program is intended to streamline the process for approving state highway projects by allowing certain state Departments of Transportation to assume FHWA’s responsibilities for approvals and consultations under NEPA and other federal laws, while maintaining all federal environmental protections. Under the pilot program, one

layer of bureaucracy (FHWA's review of environmental documents) is removed, thereby decreasing the time required for environmental approvals.

According to Caltrans, during the first six months of its participation in the pilot program, draft environmental documents for state highway projects have been approved in 72 percent less time (from six months prior to the pilot program to 1.7 months since the pilot program began.) In the case of final environmental documents, the time savings has been 67 percent (from two and a half months to 0.8 months).

It makes sense for California to continue to participate in the pilot program through its entire duration, particularly since the assumption of FHWA's responsibilities under NEPA by Caltrans so far has sped up the delivery of state highway projects without a lessening of environmental protection. Furthermore, there may be some future direct benefits to VTA in this regard, given that we oftentimes manage state highway capital improvement projects in Santa Clara County on behalf of Caltrans. Therefore, we recommend that the Board of Directors support AB 2650.

**ALTERNATIVES:**

The Board of Directors could decide to adopt a position for AB 2650 that is different from the one being recommended, or could opt to take no position on this bill at this time.

**FISCAL IMPACT:**

There is no immediate fiscal impact associated with this recommendation.

**STANDING COMMITTEE DISCUSSION/RECOMMENDATION:**

The Administration and Finance Committee considered this item on April 17, 2008, and unanimously supported the staff recommendation. Committee Chairperson Forrest Williams inquired as to whether Caltrans' participation in the pilot program has yielded the desired results so far. Staff responded that according to data provided by Caltrans, during the first six months of the department's participation in the pilot program, the length of time to review federal environmental documents for state highway projects has decreased significantly, while there was no evidence to suggest that environmental protection had suffered as a result.