

NEPA ASSIGNMENT

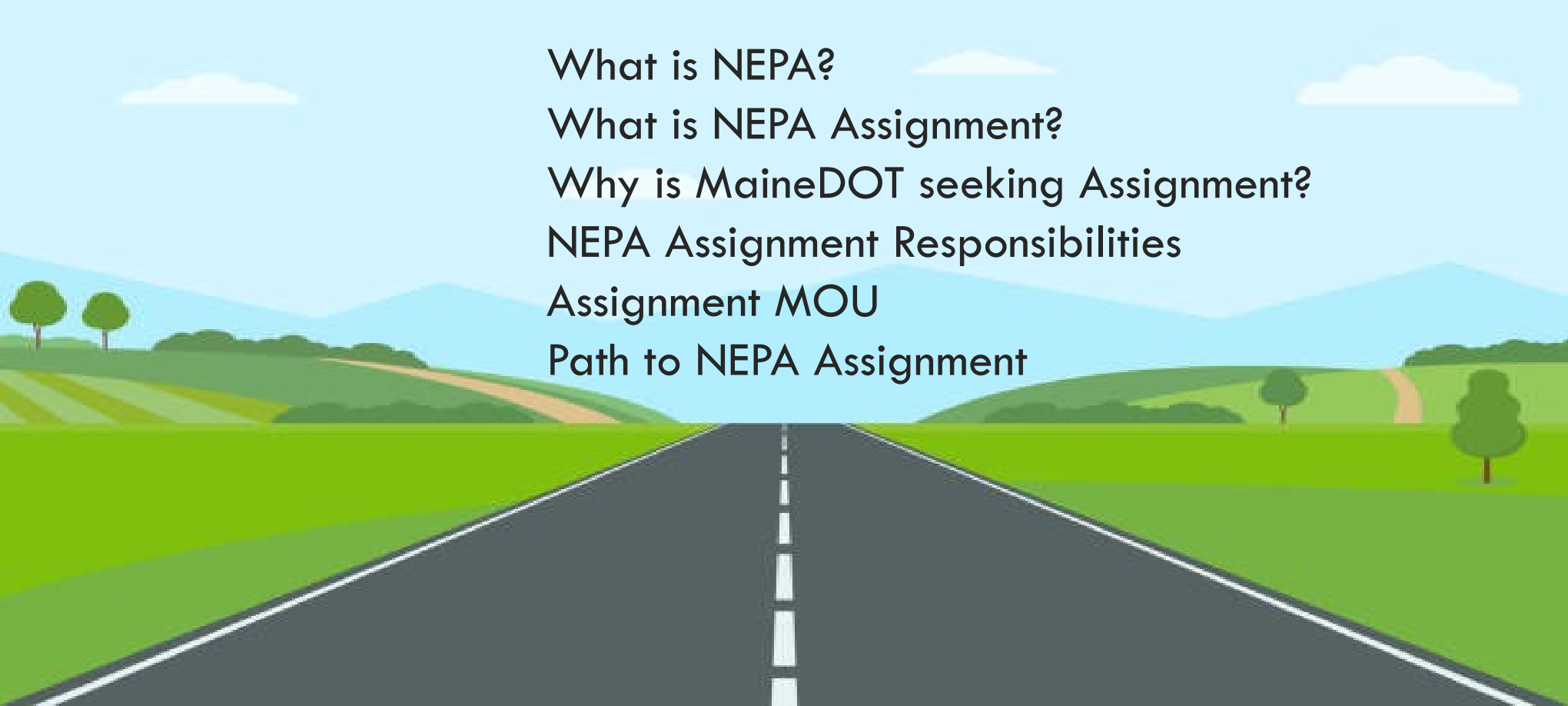
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NEPA ASSIGNMENT OVERVIEW



What is NEPA?
What is NEPA Assignment?
Why is MaineDOT seeking Assignment?
NEPA Assignment Responsibilities
Assignment MOU
Path to NEPA Assignment

WHAT IS NEPA?

- The National Environmental Policy Act (NEPA) is a Federal procedural law that establishes a national environmental policy.
- NEPA provides a framework for environmental planning and decision-making on projects that receive Federal funds or require Federal approvals.
- NEPA requires agencies, when planning projects or issuing permits, to evaluate **natural, cultural, social, and economic** effects of their actions and **provide opportunities for public input**.

NEPA CLASSES OF ACTION

Categorical Exclusion (CE)

- Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS.

Environmental Assessment (EA)

- Actions for which the Administration has not clearly established the significance of the environmental impact.

Environmental Impact Statement (EIS)

- Actions that significantly affect the environment require an EIS (40 CFR 1508.27).

Since 2001, MaineDOT has had responsibility for CE determinations via a Programmatic Agreement.

WHAT IS NEPA ASSIGNMENT?

- FHWA's environmental review responsibilities under NEPA are formally transferred to the State DOT.
 - All NEPA classes of action: CE's, EA's and EIS's (23 U.S. Code. 327) **MaineDOT**
 - or just CE's (23 U.S. Code 326).
 - Complete or partial transfer of FHWA's environmental review responsibilities (environmental laws, rules, and orders)
- The State, under this program, is deemed Lead Federal Agency for environmental review and consulting with agencies for Federal-aid highway projects
- No change to any existing environmental laws. Legal requirements remain the same

ASSIGNMENT BACKGROUND

Transportation Bills

- SAFETEA-LU (Safe, Accountable, Flexible, Efficient, Transportation Equity Act) signed into law in 2005
 - Section 6003 - Pilot program for full NEPA responsibility (Alaska, California, Ohio, Oklahoma, Texas)
 - Section 6004 - allowed States to assume responsibility for CEs (Alaska, Texas, Utah and California)
- MAP-21 (Moving ahead for Progress in the 21st Century Act) 2012
 - Section 1313 : Pilot program made permanent (NEPA Assignment Program)

Section 6005(a) of the SAFETEA-LU (and updated by MAP-21) established a Surface Transportation Project Delivery Program that allows the Secretary of the U.S. DOT to assign, and a State to assume, the USDOT Secretary's responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) and all or part of the USDOT Secretary's responsibilities for environmental review, consultation, or other action required under any Federal environmental law.



U.S. CODE

- **CE Assignment** - State Assumption of Responsibility for Categorical Exclusions [23 U.S. Code § 326].
 - Allows State DOTs to accept assignment via Memorandum of Understanding (MOU) to make determinations regarding mostly minor projects whose environmental review is limited to making categorical exclusion (CEs)(23 CFR 771.117) determinations.
- **NEPA Assignment** - Surface Transportation Project Delivery Program (all NEPA - CE/EA/EIS) [23 U.S. Code § 327].
 - Allows State DOTs to assume FHWA's NEPA responsibilities by preparing an application and then executing an MOU for a full program of environmental determinations, including Categorical Exclusion (CE), Environmental Assessments (EAs) and Environmental Impact Statements (EISs).

MaineDOT is applying for the Surface Transportation Project Delivery Program to assume all NEPA classes of action from FHWA and all environmental laws, regulations, EO under the NEPA umbrella.

LEGAL REQUIREMENTS

The State must ensure it meets the three main legal requirements in order to enter into CE or NEPA Assignment:

- Consent to accept the jurisdiction of the Federal courts - Limited waiver of sovereign immunity.
 - Language in 23 M.R.S. §4206 (P) satisfies this requirement.
- Authority to enter into a Memorandum of Understanding (MOU) for the 326 and/or 327 programs
 - Language in 23 M.R.S. §4206 (P) satisfies this requirement.
- Certify that Freedom of Information Act (FOIA) equivalents are in place
 - Maine Freedom of Access Act (M.R.S. Title 1 §400 to 521)

WHY IS MAINEDOT SEEKING ASSIGNMENT?

Deliver safety and highway improvement projects faster while preserving environmental quality

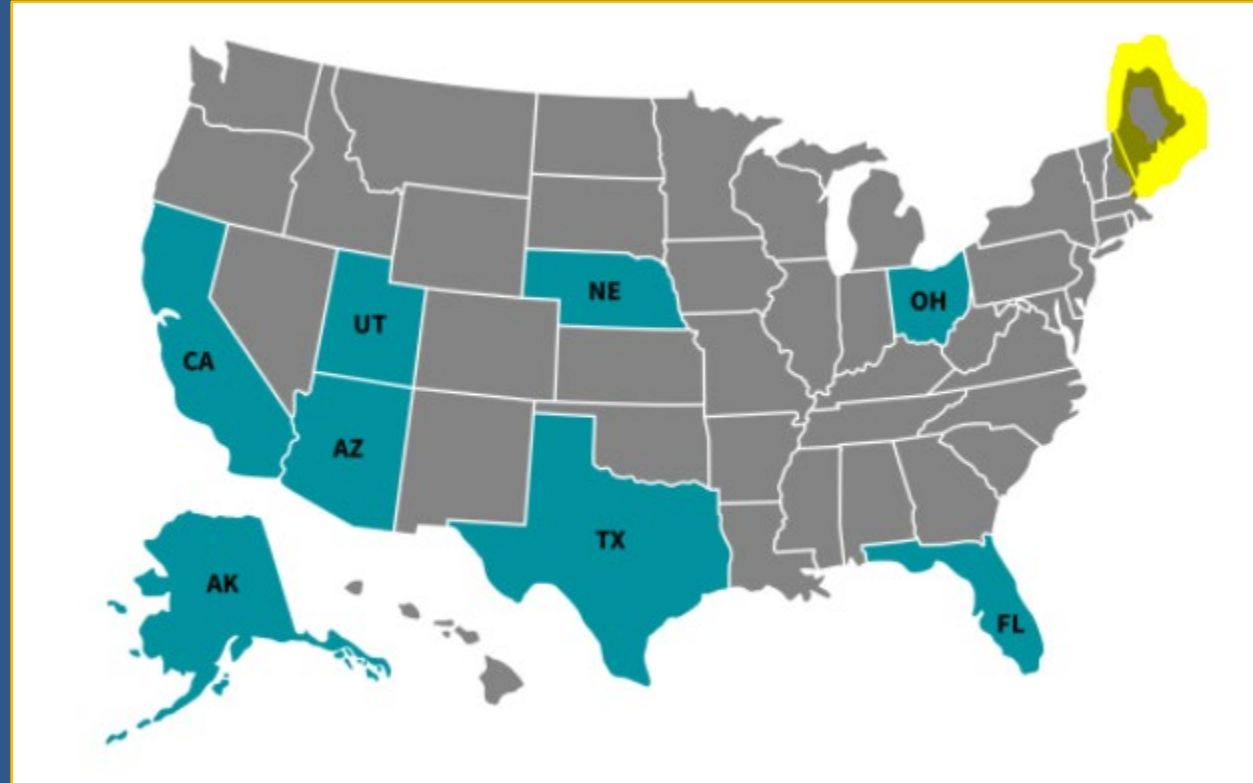
- Increases efficiency in meeting MaineDOT's capstone performance measures for work delivered on time and on budget.
- Multiple “decision-makers” can be inefficient.
- Provides time and cost savings by eliminating a layer of review
- Provides for direct consultation between MaineDOT and Others
- Streamlining of numerous project decisions



OTHER STATES AND NEPA ASSIGNMENT

326 (CE only) 327 (all NEPA)

- Alaska (327)
- Arizona (326 & 327)
- California (326 & 327)
- Florida (327)
- Nebraska (326)
- Ohio (327)
- Texas (327)
- Utah (326 & 327)
- **Maine is applying for full assumption under 327**



BENEFITS OF ASSIGNMENT

California, Texas, Ohio Report:

- Increased ownership of process and decisions
- More efficient environmental review process
 - Time and cost savings by eliminating a layer of review
 - Provides for more direct, efficient consultation between State and others
 - Streamline the Environmental Process-while still meeting environmental protection standards.
- State DOT is the “decision-maker”

BENEFITS OF ASSIGNMENT

- Deliver program quicker
 - Other States with NEPA assignment report 25% time savings
- Cost savings to the DOT
 - Ohio DOT saved over \$32 million dollars (12/28/2015 through 03/31/2019) in construction delays/inflation costs.
 - MaineDOT will not realize this amount of savings, but there will be a time and cost savings based on removing a layer of review and processing.

BENEFITS OF ASSIGNMENT

- MaineDOT has professional and experienced staff to carry out the required environmental analysis. A training plan for environment staff and MaineDOT will be maintained.
- MaineDOT is already performing the reviews today.
- MaineDOT/FHWA have one lawsuit under NEPA in the past 10 years (EA). MaineDOT does not expect Assignment will result in a higher degree of challenges.
- The risk to MaineDOT in losing a lawsuit is project stoppage, just as it would be with FHWA. In addition, cost to defend a lawsuit is federal reimbursable as a project cost.

NEPA ASSIGNMENT RESPONSIBILITIES

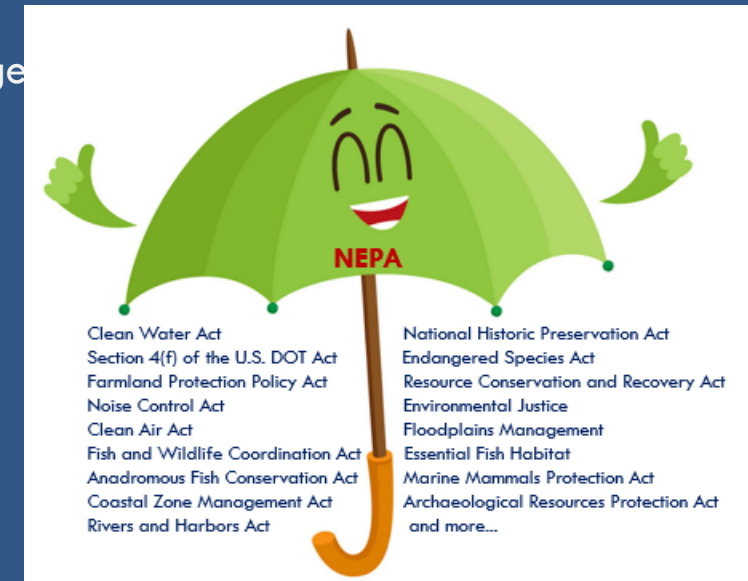
MaineDOT will assume

- Section 7 of the Endangered Species Act Consultation (direct consultation with USFWS and NOAA)
- Section 106 of the National Historic Preservation Act Consultation
- Section 4(f) of the U.S. DOT Act determinations (Parks, recreation lands, wildlife refuge and historic sites)
- Section 404 of the Clean Water Act
- CERCLA
- All other environmental regulations, Executive Orders, etc. covered under the NEPA Umbrella

MaineDOT acts as the lead agency for environmental review

- MaineDOT can not ask FHWA for project-specific assistance with NEPA
- MaineDOT leads interagency coordination without FHWA
- MaineDOT is the decision-maker

MaineDOT will be legally responsible and liable for all NEPA decisions. (This is not a universal waiver of all the state's immunity, it is limited to transportation projects in the NEPA Assignment program)



NEPA ASSIGNMENT RESPONSIBILITIES

MaineDOT must:

- Maintain appropriate technical and managerial expertise
- Maintain adequate financial and staff resources
- Demonstrate the capacity to perform the responsibilities
- Document all decisions and maintain records
 - Ensure actions are tracked and accounted for
- Train MaineDOT staff in all Bureaus
- Report CE determinations and NEPA decisions to FHWA
- Perform QA/QC and self-assessments
- Coordinate with FHWA monitoring and audits

NEPA ASSIGNMENT RESPONSIBILITIES

FHWA retains:

- Project level air quality conformity determinations (unlisted CE/EA/EIS).
- Government-to-Government Tribal consultation
- USDOT responsibilities for statewide and metropolitan planning (23 CFR 450)
- Projects that cross international or State lines
- Projects excluded from Assignment in the MOU
- Program Technical assistance and policy interpretation
- Auditing and monitoring role for Assignment program
 - Twice yearly for first 2 years, once a year after
 - Process and Program reviews

ASSIGNMENT MOU

- The MOU defines the range of project actions and environmental responsibilities the State assumes
- MaineDOT must comply with its MOU commitments in assuming FHWA's environmental responsibilities.

RESOURCE AGENCIES

- Resource agencies may not see much change
- MaineDOT already handles the program on a day-to-day basis
- MaineDOT will solely become responsible and legally liable for decisions.
- Processes and Agreements will be changed or addressed to reflect that MaineDOT has assumed FHWA's responsibilities.
- All requirements will be addressed just as they are today.

AASHTO CENTER FOR ENVIRONMENTAL EXCELLENCE

State DOTs Streamlining Project Delivery and Protecting the Environment ([click here to play](#))



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