

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: February 23, 2021
To: Transportation Committee
From: Sam Praver, Legislative Analyst

LD 128 – An Act To Authorize the Commissioner of Transportation To Enter into Agreements with the United States Department of Transportation

SUMMARY: This bill allows the Commissioner of Transportation to enter into agreements and cooperate with the United States Department of Transportation as provided in 23 United States Code, Sections 325 to 327 and as authorized under the federal Moving Ahead for Progress in the 21st Century Act, the federal Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users and the federal National Environmental Policy Act of 1969. It allows the commissioner to adopt rules to implement an agreement, carry out duties under an agreement and make expenditures in connection with an agreement. Consistent with 23 United States Code, Sections 326 and 327, it provides for a partial waiver of immunity from civil suit in federal court regarding the compliance, discharge or enforcement of a responsibility assumed by the Department of Transportation upon the department's entering an agreement.

TESTIMONY:

Proponents: *MaineDOT*

- Would allow MaineDOT to enter into agreements with the Federal Highway Administration (FHWA) within the United States Department of Transportation for Assignment under the National Environmental Policy Act.
- When planning projects, MaineDOT is required to conduct an environmental review to satisfy NEPA. This bill provides a framework for environmental planning and decision-making on MaineDOT projects that either receive federal funding or require federal approval.
- By pursuing NEPA Assignment, FHWA's environmental review responsibilities would be formally transferred to MaineDOT, and we would be deemed the lead federal agency for environmental review and consultation with other federal agencies.
- In order to accept NEPA Assignment, the State of Maine, under 23 U.S.C. 326 and 327 of the federal code, must meet three legal requirements: 1. Agree to accept the jurisdiction of the federal courts for the compliance, discharge, and enforcement of any responsibility of the Secretary of Transportation by waiving the state's immunity from civil liability on transportation projects within the NEPA Assignment program; 2. Acquire authority to enter into a memorandum of understanding (MOU) with FHWA to define the range of environmental responsibilities the state assumes; and 3. Provide certification that Freedom of Information Act (FOIA) equivalents are in place.
- There are currently eight other states that have successfully accepted Assignment under NEPA.
- Accepting NEPA Assignment will result in a more efficient and streamlined environmental review process by providing for a direct consultation between MaineDOT and federal regulatory agencies while still meeting environmental protection standards.

Opponents: *Ken Capron*

- Why would we want an already overburdened department to get involved in leading environmental policies. Legislation would be more appropriately tasked to other agencies.
- Imposes administration of "expenditures of money from any funds of the department that are available to the commissioner." And it eliminates sovereign immunity.

CURRENT STATUTE OR LAW:

State Sovereign Immunity – Maine Tort Claims Act ([14 MRS, Chapter 741](#))

LEGAL ISSUES:

This bill provides for a partial waiver of state immunity from civil suit in federal court for the purposes of compliance, discharge or enforcement of responsibility assumed by the Department of Transportation upon entering an agreement with the federal government to be the lead agency for the purposes of NEPA compliance.

FISCAL IMPACT:

Preliminary fiscal impact statement not yet issued.

**See information provided by AG's office.