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PROJECT SUMMARY

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The Effect of Regulatory Requirements and Intervening Groups on Road Construction in South Carolina

This study was designed to evaluate delays occurring during the highway construction process, specifically delays resulting from the Clean Water Act (CWA) permitting process, and to evaluate how other state Departments of Transportation (DOT) in the Southeastern Association of State Highway and Transportation Officials (SASHTO) (with the exception of Puerto Rico) respond to these impacts. The study focused on construction project delays that were caused by potential impacts to wetlands and streams under the CWA, in as much as these are the issues, based on information provided by South Carolina DOT (SCDOT), that have historically received challenges. Furthermore, for challenges to state agency decisions, an appeal to the Administrative Law Court (ALC) provides for an automatic stay, which may result in a delay in the construction process. While National Environmental Policy Act (NEPA) challenges have also been brought, the primary intent of this study is to evaluate those issues that require US Army Corps of Engineers (USACE) permitting and SC Department of Health and Environmental Control (DHEC) water quality certification. Although the focus of this study is on the delay impact to SCDOT and other SASHTO state DOTs, other government agency construction

requests for CWA wetland permits were reviewed for delays and impacts related to the SC Administrative Law Court (ALC) actions.

The researchers developed a questionnaire to obtain uniform information for each highway project studied and to ensure that necessary dates, time frames, and delay issues were reviewed. Information to complete the questionnaires for SC projects was obtained by a review of the SCDOT files, the SCDOT website information, and from in-depth interviews with the appropriate project personnel. Information for projects in other states was obtained by interviews, electronic communication, DOT website reviews, and other publically available information (i.e., newspapers and non-governmental websites). Based on project information obtained from SCDOT and other information, five highway construction projects were reviewed in South Carolina; four of which experienced delays in their project timelines, and six projects were reviewed from other SASHTO states. The delays for all of the projects reviewed can be apportioned into four distinct categories: projects with no delays, projects with delays occurring at the stage of Section 401 Water Quality Certification (WQC), projects with delays occurring during the USACE section 404 permitting or permit modification process, and those delayed as a result of NEPA or other Federal statute challenges.

Summarizing the results of the five SC highway projects, the delays for four of the projects involved the ALC for an appeal of a DHEC decision of the WQC. Of the four projects, three were SCDOT projects: the I-85/I-385 Interchange, the Carolina Bays Parkway, and the 601 Bridge Replacement and the fourth was a county project: The International Drive project in Horry County. The fifth project, the ACE Basin, was delayed by USACE issues related to the CWA section 404 wetland permit. The 601 Bridge Replacement also was delayed by an appeal of USACE permit.

For those projects, which involved a delay related to the DHEC Section 401 WQC permit, the first project, the I-85/I385 Interchange, delay was due to a complaint filed by a landowner for a review of the DHEC Notice of Decision to issue the WQC permit. Although DHEC declined to review its initial decision and the landowner did not appeal the DHEC decision, the 30-day period available for a contested case to be filed with the ALC had been triggered. The process of awaiting decisions by DHEC, coupled with the plaintiff's time frame allowed for appeal, delayed the active project timeline by approximately 60 days. The second project, the Carolina Bays Parkway, involved a right-of-way disagreement with a developer. The case went to the ALC. According to available documents, the conflict was resolved via settlement approximately one month after the Section 401 WQC permit had been issued. The third project, the 601 Bridge Replacement, had delays related to the WQC issuance and appeal to the ACL as well as a third party appeal of the USACE finding in federal court. The combined appeals resulted in an approximately four-year delay (two years related to the ACL WQC appeal and four years related to the USACE permit appeal). The 601 Bridge Replacement project was

suggested for inclusion near the end of the grant and, while included, detailed interview materials are not as extensive. The fourth project delay, associated with the International Drive project, is approximately one year and includes the delay from the time that the initial notice that the Section 401 WQC permit would be issued on June 25, 2015 to the ALC court decision on July 7, 2016, which upheld the Section 401 WQC permit.

The second significant source of extended delays was with regard to USACE approval of Section 404 permits or permit modifications, and with mitigation and permitted area compliance. The Carolina Bays Parkway project, which has a delay of approximately two years, was due to a USACE prompted re-evaluation of mitigation requirements and compliance. The fourth project reviewed, the ACE Basin project, experienced a delay of 118 days due to necessary communications with USACE regarding wetland mitigation. The 601 Bridge Replacement had a delay of approximately four years.

In response to the SCDOT's and our team's request for information from 12 of the SASHTO states' representatives, project information for review was received from three SASHTO states, Louisiana (LA), Tennessee (TN), and Texas (TX). Eight states indicated that they had no sites that were delayed based on an automatic stay or a CWA certification or permit, and three states did not respond. Of the states that provided sites for review, the projects from LA did not involve litigation, but delays were incurred related to USACE-issued permits. One LA project was delayed in the design/planning stage for approximately four years due to additional environmental review and a change in the alignment of the I-12/1088 Interchange. The second LA project, the LA- 3421 Highway, required a mitigation modification due to a deviation from the issued 404 permit; however, this modification was made in a three month (114 day) period and did not impact the overall project timeline. The projects from TN and TX involved delays with litigation at the federal level. The on-going status of the TX project presents a challenge, as future delays or continuations of current litigation are still possible. The lawsuit in TX for the TX-45-SW did not delay the selection of a contractor, which occurred while the case was being decided; however, the project is still in its early stages could be further delayed beyond the initial two-year delay.

Review of the Bonner Bridge Replacement Project in NC illustrated a similar use of the ALC by plaintiffs. While the main litigation regarding occurred in Federal court due to the challenge of NEPA regulations, the case also had a component in state court. When NC denied a request for a review of a state-issued bridge permit, it was taken to the Administrative Office of Hearings as a contested

case. This prevented approval of a bridge permit from the Coast Guard while the lawsuit was ongoing, as the Coast Guard will not issue permits to projects with active legal challenges.

In summary, the environmental related delays reviewed for highway construction projects for this report, include: 1) no delay, 2) delays from challenges of the state WQC and state court actions, 3) delays resulting from challenges to the USACE section 404 permits or modifications in federal court and 4) delays from challenges to NEPA or Endangered Species Act in Federal court. Based on the construction projects reviewed in South Carolina, the average length of delay was slightly longer for Federal Court challenges related to 404 permits (1.6 years) versus state court 401 WQC challenges (0.9 years). However, based in all SASHTO construction projects reviewed, the length of delay was similar between Federal Court challenges and state court challenges with each being approximately 1.5 years.

Frequent Focus Points for Legal Challenge; Potential Project Delays

Section 401 Water Quality Certification	Section 404 Permit Approval/ Modification	NEPA Grounds
<ul style="list-style-type: none"> • KY: Ohio River Bridges • NC: Bonner Bridge • SC: I-85/385 • SC: Horry County International Drive <ul style="list-style-type: none"> ○ KY- project finished ahead of schedule; no delay ○ NC- delay began before construction initiated; approx. 3 years behind planned timeline ○ SC- ongoing project, 60-day delay before contract initiated ○ SC- Ongoing project, delay occurred before construction initiated. 362 day delay. 	<ul style="list-style-type: none"> • LA: Hwy 3421 • LA: 1088 Interchange • SC: ACE Basin • SC: Carolina Bays Parkway <ul style="list-style-type: none"> ○ LA- Project ongoing. No construction delay; approximately 4-year delay in planning/design phase before permitting. ○ LA- Permit deviation issue resolved in 114-day period; no construction delays. ○ SC- Delay occurred while contract phase initiated. 118-day active construction delay. ○ SC- Near completion. 2-year delay occurred while between contract phases. 	<ul style="list-style-type: none"> • TN: SR-840 • TX: SH-45-SW <ul style="list-style-type: none"> ○ TN-Project complete; challenge occurred while contract ongoing. ○ TX- Project in initial stages; challenge occurred before construction initiated.

Figure 1. Frequent Focus Points for Legal Challenge; Potential Project Delays for SC projects (excluding the US 601 Bridge Replacement project) and SHASTO state projects (excluding Puerto Rico).

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