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TRANSPORTATION INFRASTRUCTURE

A Comparison of Federal and State Highway Laws

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The Honorable Quentin N. Burdick,
Chairman
The Honorable John H. Chafee,
Ranking Minority Member
Committee on Environment and Public Works
United States Senate

The Honorable Daniel P. Moynihan,
Chairman
The Honorable Steve Symms,
Ranking Minority Member
Subcommittee on Water Resources, Transportation,
and Infrastructure
Committee on Environment and Public Works
United States Senate

In the Surface Transportation and Relocation Assistance Act of 1987, Congress authorized the Combined Road Plan—a block grant demonstration project designed to test the feasibility of giving states more flexibility to administer highway funds. The demonstration not only gives states more latitude in making funding decisions, but allows states to perform certain administrative functions such as approving design exceptions and performing final project inspections. In the 1991 reauthorization of the Highway Act, it is possible that Congress may look for ways to provide states with even greater flexibility in administering federal highway funds.

In February 1989 the Senate Committee on Environment and Public Works requested that we compare federal and state prevailing wage, environmental protection, Disadvantaged Business Enterprise, and highway design laws to determine whether the protections afforded by state laws in these areas are equivalent to the protections afforded by federal laws. This information could assist the Congress in determining whether states could assume more responsibility for the federal highway program in these areas.

Traditionally, states must comply with these and other federal laws as a precondition for obtaining federal highway funds. If compliance with these requirements were to be waived, states might be permitted to administer federal highway funds according to whichever state laws or policies the individual states feel are appropriate.

The laws targeted for this review included Davis-Bacon prevailing wage laws, the National Environmental Policy Act (NEPA), Disadvantaged Business Enterprise laws, and highway design laws. Davis-Bacon ensures that laborers on public works projects are paid commensurately with prevailing wage rates in the same geographic area for similar work. NEPA requires that adverse environmental impacts of a project be assessed prior to the project's construction. Disadvantaged Business Enterprise laws require that qualifying disadvantaged business enterprises receive a certain percentage of all public works contracts, and highway design laws provide guidance for ensuring highway safety and durability. As requested, we reviewed the laws of the five states participating in the Combined Road Plan—California, Minnesota, New York, Rhode Island, and Texas.

Results in Brief

While the prevailing wage laws of the five states are generally comparable to the federal Davis-Bacon Act, the states' environmental, minority-contracting, and highway design statutes vary in their degree of comparability to their federal counterparts.[1] Although not identical in content to the federal Davis-Bacon Act, the state prevailing wage laws provide essentially similar protections to laborers on public works projects. While California, Minnesota, and New York have environmental protection laws that match or exceed the requirements contained in NEPA, neither Rhode Island nor Texas has statutes designed to afford similar protections. All of the states we reviewed have laws that, like their federal counterparts, establish disadvantaged business contracting programs, but the laws differ somewhat. For example, the federal law requires that 10 percent of all surface transportation contracts be awarded to disadvantaged business enterprises; states' goals range from less than 4 percent (Minnesota's) to 20 percent (California's). Both federal and state statutes regarding highway design are nonspecific and vary significantly in scope and content.

According to state and federal highway officials, differences between state and federal laws in some areas are mitigated by regulations, administrative policies, case law, and operating procedures that are comparable to the federal laws. For instance, although Texas statutes do not contain an environmental reporting process similar to that required under the federal NEPA, state transportation officials report that the

[1]For the purposes of this report, the term "law" refers to statutes that have been enacted through the federal or state legislative process. It does not encompass regulations, administrative policies, or case law, except as noted. Nor does this review assess compliance with these laws.

Texas Department of Highways and Public Transportation administers an environmental program comparable to NEPA. In the area of minority contracting, although neither New York nor Texas has established a participation goal at the statute level, officials in both states say that goals established in administrative guidance meet or exceed the federal statutory goal. Although highway design statutes at the federal and state levels are largely incomparable, both federal and state highway officials say that the administrative guidelines they use as their operative control over highway design are nearly identical.

Where states have afforded comparable protections to state laborers, minority contractors, the environment, and highway safety, an implication exists that federal and state governments attach similar values to these concerns. However, other indicators, including courts' interpretations of the laws, administrative guidance, and states' compliance with the statutes, must be considered in determining whether the protections afforded by the federal and state governments are equivalent. Additionally, the presence of state laws or administrative guidance similar to the federal requirements does not in itself guarantee that states would retain or enforce the laws if federal requirements were lifted.

State Laws on Prevailing Wages Compare Favorably With the Federal Davis-Bacon Act

The federal Davis-Bacon Act requires that employees on federal public works projects receive pay equal to the wages prevailing for similar classes of laborers in that geographic region. All five states have laws that parallel this act, with minor variations. The federal act and state laws differ slightly on their thresholds of applicability. The federal act applies to all contracts greater than $2,000. Rhode Island sets a floor of $1,000, and both New York and Texas establish no minimum contract value for when the laws apply. California's threshold depends on the type of project—maintenance or construction. Minnesota's threshold depends on the number of trades or occupations required to complete a project. According to state officials in New York and Texas, there is no substantive difference in the federal and state thresholds, because the value of most highway contracts—federal or state—significantly exceeds the minimum thresholds. A detailed comparison of other provisions of the Davis-Bacon Act with relevant state laws appears in appendix I.

Three of Five States Have Environmental Acts That Mirror the National Environmental Policy Act

NEPA requires that the environmental impacts of a public works project be assessed prior to its initiation. Since the enactment of NEPA in 1969, a number of states have adopted corresponding legislation to monitor and regulate potentially adverse environmental impacts of state projects. Three of the five states reviewed have enacted such legislation. The statutes in Minnesota and New York are slightly more extensive than the federal law and in California are significantly more so. Minnesota and New York laws, for example, surpass federal requirements by mandating that a report or worksheet be prepared as a decision tool for determining the need for a full environmental impact report. California statutes go further to provide specific criteria to be used in determining whether a project will have a significant effect on the environment. All three states report that in most areas where the state laws appear to exceed the requirements of NEPA, the state laws have incorporated the requirements established in federal regulations.

Rhode Island and Texas have no environmental acts that parallel NEPA, although the Texas Department of Highways and Public Transportation has established administrative procedures for evaluating environmental impacts of state projects. According to Texas state officials, the procedures are identical to those legislatively required by NEPA. Rhode Island officials state that the small size of their state highway program does not justify the need for a state act. The officials add that because most projects funded solely by the state are small in magnitude—such as resurfacing roads—they would be unlikely to adversely affect the environment. Appendix II discusses further the similarities and differences between the federal and state environmental laws.

States' Minority Contracting Laws Vary in Their Comparability to Federal Disadvantaged Business Enterprise Laws

The Surface Transportation and Uniform Relocation Assistance Act of 1982 requires that not less than 10 percent of all surface transportation contracts be awarded to small businesses owned and operated by socially and economically disadvantaged individuals. All of the states reviewed have legislatively established disadvantaged business contracting programs intended to encourage disadvantaged business participation in public works contracts, but the programs differ somewhat in their content. The most significant differences are in the percentage goals set for minority business participation and the definitions of qualifying participants. Rhode Island's statutes establish a 10-percent contracting goal—identical to the federal law. Both New York's and Texas' laws do not establish goals in the statutes, deferring, rather, the responsibility for setting appropriate contracting goals to state agencies. California's laws establish separate goals for participation by women and

minorities while other states establish one goal that encompasses gender, race, and disability. Minnesota's contracting goal is lower than the federal goal. Table 1 illustrates the differences in the goals set by the federal government and the states for participation by disadvantaged businesses.

Table 1: State and Federal Disadvantaged Business Participation Goals

Government	Participation goal
Federal government	10.00%
California[a]	20.00%
Rhode Island	10.00%
Minnesota	3.75%
Texas[b]	10.00%
New York[b]	17.00%

[a]California laws establish separate goals for minorities and women: 15% for minorities, 5% for women.

[b]Goals administratively established by agency.

Unlike the federal law and those of the other four states, Minnesota's law limits participation to economically disadvantaged small businesses, eliminating all references to social disadvantage or gender. The law is in response to the 1989 Supreme Court decision in City of Richmond v. J. A. Croson,[2] in which the Court held that Richmond's minority-contracting program violated the Constitution because Richmond could not statistically demonstrate a history of racial discrimination to justify its program. This decision has affected the state program in Minnesota and may affect programs in the other states that lack this same type of statistical evidence. In 1989 Minnesota suspended its race- and gender-based program after its state program was challenged on the same grounds as in Croson, and instead adopted interim race- and gender-neutral legislation. Appendix III discusses these issues in greater detail.

States Say Federal and State Design Standards Are Nearly Identical

Neither federal nor state statutes contain substantive operative standards for highway design. Most design standards are contained, rather, in volumes of administrative policy promulgated by the American Association of State and Highway Transportation Officials (AASHTO). The design standards establish, for instance, how wide road lanes must be or where guardrails may be placed.

[2]488 U.S. 469 (1989)

Many states have adopted the AASHTO standards in their exact form for application on state roads; other states have promulgated standards of their own. In cases where the Federal Highway Administration (FHWA) has found the state standards to be reasonably similar to the federal standards, it has permitted the state to use these standards on projects receiving federal aid. If FHWA does not approve a state's standards, the state may apply the standards to state-funded projects but may not apply them to projects receiving federal-aid funds. New York, for example, reports that for economic reasons, it has modified the federal guidelines for roadside clearance for application on state-funded highways. Each of the five states we reviewed reports that the variation from federal standards is minimal, and four states—California, Minnesota, New York, and Texas—report that some of their state standards are more stringent than the federal standards. Safety and the potential risk of liability, according to one state's officials, are major considerations when deciding whether to deviate from the federally approved design standards.

Conclusions

While some state prevailing wage, environmental, disadvantaged business contracting, and highway design laws parallel the federal statutes, others vary considerably. State officials maintain that in several instances where the state laws are not similar, administrative guidelines have established processes equivalent to the federal laws.

Where state laws are equivalent to federal laws, the states may be maintaining values similar to those of the federal government. However, the presence of equivalent laws is not in itself a guarantee that the protections afforded by the states and the federal government are equivalent. For instance, compliance with the laws may vary considerably among states, and state and federal courts may interpret similar laws differently.

Where state officials maintain that regulations and administrative guidelines have established processes and standards equivalent to—or more stringent than—those in the federal statutes, this may also indicate that the states and federal government are maintaining similar values. Verification of the equivalency of these processes and standards, however, would require a review beyond the scope of this report. Here, too, the equivalency of protections afforded by the federal government and states would rely upon compliance with the regulations and procedures.

Additionally, the existence of the state laws and administrative guidance does not guarantee that states will continue enforcing the current laws or abiding by current policies should the states no longer be required to demonstrate compliance with the federal laws. Statutes may be rescinded or amended through a state's legislative process; administrative programs may be changed even more easily through an agency's internal procedures. A number of factors, however, suggest that some states would be likely to maintain state processes and statutes in the absence of federal requirements. In the area of highway design, for example, perceived liability may encourage states to maintain or bolster state standards.

Matters for Congressional Consideration

The Congress may choose from a number of options in determining the appropriate level of responsibility states should assume for the federal highway program. First, Congress could decide to maintain the status quo—not exempting states from any of the federal compliance requirements that are currently a precondition for obtaining federal funding. This option incurs the least risk of diluting efforts aimed toward upholding important national goals. Second, Congress could decide to excuse states completely from compliance requirements, entrusting each state with the freedom to administer the federal funds according to whatever rules and laws that state deems appropriate. This option incurs the greatest risk should states decide to rescind existing state laws or relax compliance with them. Third, Congress could decide to waive some or all of the requirements for compliance with the laws but require states to demonstrate that they are providing an acceptable level of protection to such concerns as labor, the environment, minority businesses, and highway safety. The third option would require that Congress determine what level of protection it is comfortable with and what safeguards would be necessary to ensure that states continue to enforce laws and programs that satisfy this standard.

Agency Comments

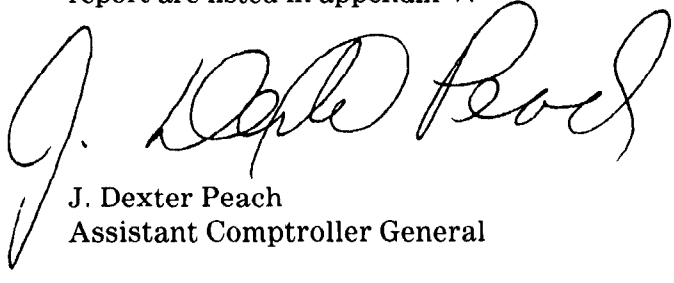
The five states whose laws we reviewed and FHWA generally agreed with the facts presented in this report. The states and FHWA provided some technical corrections and clarifications, which have been incorporated.

Additionally, FHWA expressed its concern that our review addresses only statutory law and does not assess compliance with these statutes or review significant case law interpretations of the statutes. In response, we acknowledged the limitations of using the results of this analysis for

future policy decisions and reviewed one Supreme Court case that FHWA identified as integral to our discussion of environmental law.

To complete this comparison of federal and state laws, GAO analyzed the federal Davis-Bacon, NEPA, Disadvantaged Business Enterprise, and highway design laws in their entirety and then searched state statutes for comparable provisions. Realizing that state regulations and policies might affect the way states administer these laws, GAO visited with state attorneys and transportation officials to discuss state operations. We did not, however, verify states' reports of administrative policies, of courts' interpretations of the statutes, or of regulatory guidance that states claimed mitigate differences between federal and state laws. We also did not review compliance with the federal or state statutes. While GAO recognizes the importance of addressing these issues in a complete assessment of the equivalency between state and federal activities in a given area, such an analysis is beyond the scope of this review. Views of federal officials from the Department of Transportation on our analysis and the comparability of state and federal laws are also represented in this report. Our work was performed between August 1989 and February 1990.

We are sending copies of this report to the Secretary of Transportation; the Administrator, FHWA; interested congressional committees; participating states; and other interested parties. This work was performed under the direction of Kenneth M. Mead, Director, Transportation Issues, who may be reached at (202) 275-1000. Major contributors to the report are listed in appendix V.



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Abbreviations

AASHTO	American Association of State Highway and Transportation Officials
DBE	Disadvantaged Business Enterprise
EIS	Environmental impact statement
FHWA	Federal Highway Administration
GAO	General Accounting Office
NEPA	National Environmental Policy Act

Davis-Bacon Prevailing Wage Laws

In 1931 Congress enacted the Davis-Bacon Act,[1] which requires contractors to pay laborers on federal public works projects those wages prevailing in that area for similar types of labor. Since its enactment, the five states that we reviewed have each adopted similar legislation for state-funded public works projects. Although some differences exist between the federal and state laws, the federal act and all five of the state laws provide generally equivalent protections to laborers on public works projects.

Union Agreements Often Supersede State Laws

According to two of the five states we reviewed, the primary means of establishing prevailing wage rates is through reference to union collective bargaining agreements. According to state officials in Rhode Island, union workers perform nearly all of the labor contracted for by the state transportation department. According to officials in California, New York, and Rhode Island, the union contracts often set rules for basic wages that exceed the requirements of the states' prevailing wage laws. New York officials state that in the areas of the state not highly unionized, the prevailing wage laws are an integral part of ensuring the payment of prevailing wages and supplements. State officials in Texas report that Texas has elected to use the same rates established by the Secretary of the United States Department of Labor as the prevailing wages for state-funded projects.

Variations in Contract Amount Floors Are Insignificant

One example of the generally minor variations between the federal and state prevailing wage laws is the variation in thresholds at which the wage laws apply. The federal Davis-Bacon Act applies to all contracts with dollar values in excess of $2,000. Rhode Island's law establishes a floor of $1,000, and both Texas' and New York's laws set no minimum amount, requiring that prevailing wage laws apply to all state contracts. California's and Minnesota's laws set dual limits—dependent upon the type and magnitude of the project. California requires that prevailing wage laws apply for construction projects in excess of $25,000, and for maintenance work costing more than $15,000. California officials explain that smaller contracts than these are usually home service projects—for instance, carpentry or electrical wiring—where the small number of employees would not justify the expense of monitoring payrolls and visiting sites to ensure compliance with the laws. Likewise, Minnesota sets the application floor at $2,500 for contracts involving only one trade or occupation, and $25,000 for those involving more than

[1] 40 U.S.C., sec. 276a-1 thru 276a-5

one trade or occupation. According to both officials in New York and Texas, the differences between federal and state contract floors are insignificant since nearly every highway contract—at both the state and federal levels—exceeds these minimum amounts.

Overtime Is More Strictly Defined at the State Level

Similarly, minor variations exist in how the states and federal government define the legal work day and work week, with the state laws slightly stricter than the federal law. The federal Fair Labor Standards Act defines the legal work week for laborers on federal public works projects as 40 hours per week. California, Minnesota, and New York establish the legal work week at 40 hours, but also define the legal work day as 8 hours. For example, under these state laws, a laborer working a 40-hour week, in increments of 4 10-hour days would receive overtime pay for 2 hours each day. Rhode Island requires that either 40 hours per week or 8 hours per day constitute the maximum work period, whichever is prevailing in the area. Texas laws are silent on the subject, although Texas state officials report that any work in excess of 8 hours per day is paid at the overtime rate.

Table I.1 illustrates the similarities and differences between significant provisions in the Davis-Bacon Act and in corresponding state laws.

Table I.1: Federal and State Prevailing Wage Laws

	Contract floor	Type of worker and work	Definition of prevailing wage	Prevailing wage inclusions	Provisions in bids/ contracts
Davis-Bacon Act 40 U.S.C. sec. 276(a) 29 U.S.C. sec. 207 (a)(1)	$2,000	Laborers or mechanics employed in the construction, alteration, and/or repair—including painting and decorating —of public works	Wages required to be paid various classes of laborers and mechanics based upon the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the location in which the work is to be performed	Hourly rate of pay, benefit contributions, administration costs	Prevailing wages must be stipulated in ads for bids and contracts.
California Labor Code sec. 1771 sec. 1772 sec. 1773 sec. 1777 sec. 1815	$15,000 for maintenance contracts $25,000 for construction contracts	Workmen employed on public works projects paid for in whole or in part by state funds	The general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed	Per diem wages include employer payments for benefits, including welfare, pension, vacation, etc.	Prevailing wages must either be published in calls to bid, bid specifications, or referred to in a copy on file at awarding body's principal office.
Minnesota Statutes Annotated sec. 177.25 sec. 177.31 sec. 177.42 sec. 177.43 sec. 177.44	$2,500 for contracts requiring one trade or occupation to complete $25,000 for contracts requiring more than one trade or occupation	Laborers and mechanics employed on state-funded erections, construction, remodeling, or repair of a public work	The hourly basic rate of pay plus the contributions for health and welfare benefits, vacation, pension, etc. paid to the largest number of workers engaged in the same class of labor within the area	Hourly basic rate of pay and contributions to benefit plans	Contracts and proposals must state prevailing wage rates, hours of labor, and hourly basic rates of pay.
New York Labor Law Article 8 sec. 20	$0	Laborers, workmen, or mechanics employed on all contracts to which the state is a party	Rate of wage paid in the locality by virtue of collective bargaining agreements between labor organizations and employers performing public or private work	Supplements, e.g., health insurance, welfare, retirement, must be in accordance with prevailing practices in the locality.	All contracts and advertised specifications must stipulate the prevailing wages to be paid and supplemental payments to benefit plans.

Method of wage determination	Posting of wages	Work week and hours	Provision for overtime	Suspension for failure to pay prevailing wage
Secretary of Labor will determine prevailing wages.	Wage rates must be posted by contractor in a prominent and easily accesible place at the site of work.	40 hours/week	No less than 1.5 times the basic wage rate	3 years
Director of Industrial Relations sets wages, considering collective bargaining agreements, federally established rates, or further data from local labor and employers. Wages are set quarterly.	If filed copy is referred to, copies of rates must be posted at job site.	No more than 8 hours/day and 40 hours/week	1.5 times the basic rate of wages for all hours in excess of 8 per day	Not less than 1 year, not more than 3 years
At least once per year, the Department of Labor & Industry conducts investigations and holds public hearings necessary to define classes of laborers and mechanics and to determine prevailing hours of labor, wage rates, and basic rates of pay.	Hours, rates, and labor classifications must be posted on the project in at least one conspicuous place.	Prevailing hours not to exceed 8 hours/day or 40 hours/week	Not less than 1.5 times the basic hourly rate of pay	No provision
Department of jurisdiction ascertains from plans and specifications the classes of workmen to be employed. The fiscal officer of the locality then determines the appropriate wages to be earned by each.	Wages must be posted in a prominent and accessible place on the site of the work.	8 hours/day and 5 days/ week, except in emergency conditions	Premium wage prevailing in the area where work is performed	Two violations in 6 years result in a 5-year suspension.

(continued)

	Contract floor	Type of worker and work	Definition of prevailing wage	Prevailing wage inclusions	Provisions in bids/ contracts
Rhode Island General Laws sec. 37-13-1 thru sec. 37-13-16	$1,000	Mechanics, teamsters, laborers, workmen, or workers of any craft employed in the grading, cleaning, demolition, improvement, completion, repair, alteration, construction—including painting and decorating —of public works	Prevailing rates for the corresponding types of employees on projects of a character similar to the contract work in the city, town, village, or political subdivision of the state in which the work is to be performed	Hourly rate of pay, benefit contributions, administration costs	All contracts and calls to bid must contain provisions stating prevailing wages to be paid and frequency of payment.
Texas Labor Code, Annotated Title 83, Article 5159(a) secs. 1,2,3	$0	Laborers, workmen, and mechanics employed on all contracts to which the state is a party	Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed	No specific prevailing wage inclusions	Prevailing per diem, holiday, and overtime wages must be specified in call for bids and in contract.

Method of wage determination	Posting of wages	Work week and hours	Provision for overtime	Suspension for failure to pay prevailing wage
Director of Labor determines the prevailing wages and payments to benefit plans.	Prevailing wage rates and benefit contributions must be conspicuously displayed at project site.	Maximum of 40 hours/ week or 8 hours/day, whichever practice is prevailing	Prevailing rate of wages for overtime employment	18 months
Wages are determined by the public body awarding the contract or authorizing the work, whose decision in the matter shall be final.	No provision	8 hours/day	Not less than 1.5 times the required basic rate	No provision

National Environmental Policy Act

Since the National Environmental Policy Act's (NEPA) inception in 1969, a number of states have adopted "little NEPAs" modeled after the federal statute. Like NEPA, these acts require government agencies to prepare impact statements on actions affecting or potentially affecting the quality of the environment.

Three of Five States Have Environmental Acts Similar to NEPA

Of the five states reviewed for this analysis, three have adopted state legislation similar to NEPA. California, Minnesota, and New York have environmental protection acts that incorporate the major provisions of the federal statute and in some cases incorporate more stringent requirements than NEPA. The other two states, Texas and Rhode Island, do not have environmental laws comparable to NEPA. However, according to Texas officials, the state administrative policy for environmental impact assessment closely resembles NEPA. Rhode Island transportation officials note that the small number of state-funded projects do not merit a separate state environmental protection act. Additionally, according to these officials, the projects funded solely by the state are on such a small scale that the protections afforded the environment by such a law would rarely be necessary: Small projects, like resurfacing roads, generally do not threaten the environment.

NEPA requires an environmental impact statement (EIS) for all major federal actions significantly affecting the quality of the human environment. The EIS, as one court has stated,

> permits the court to ascertain whether the agency has made a good faith effort to take into account the values NEPA seeks to safeguard. . . . [I]t serves as an environmental full disclosure law, providing information which Congress thought the public should have concerning the particular environmental costs involved in a project.[1]

California's, Minnesota's, and New York's environmental laws have incorporated essentially the same specifications as defined by NEPA for the content of an EIS.

Both Federal and State Laws Apply to Private Development

One similarity between federal and state environmental acts is their application to private construction projects. California's, Minnesota's, and New York's acts apply not only to actions proposed by the state, but also to any projects state and local agencies "approve" that may have a significant effect on the environment. This requirement renders the

[1] Silva v. Lynn (II), 482 F2d 1282,1284 (1st Cir. 1973)

funding source irrelevant; projects receiving no public funds are still subject to the requirements of the environmental acts if they require a permit from or approval by a public agency. According to Federal Highway Administration (FHWA) officials, NEPA also applies to any project that requires a federal permit, even if no federal funding or sponsorship of the project is involved.

Thresholds for Preparing Impact Statements Vary Slightly at the Federal and State Levels

A slight difference between NEPA and the state environmental acts is the point where a decision is made whether an EIS is necessary. This threshold, above which the statement is determined necessary, varies slightly between the federal law and state laws. NEPA requires an EIS for "major federal actions significantly affecting the quality of the human environment." Minnesota requires a statement where there is the "potential" for such effects. California and New York both require statements for projects that "may have a significant effect" and eliminate the federal reference to "major" projects. According to officials in all three states, in actual practice, the threshold for preparing an environmental impact report is essentially the same under the federal and state programs.

State Laws Often Incorporate Federal Regulations and Case Law Decisions

In addition to having core elements similar to those of NEPA, California's, Minnesota's, and New York's laws incorporate additional safeguards or directions augmenting the environmental impact assessment process. All three states have expanded on the environmental decision-making responsibilities contained in NEPA, in some cases, quite extensively. In many cases, these elaborations reflect federal regulatory provisions or significant case law decisions, which states have elected to codify within their statutes. For instance, the California act includes an extensive list of the types of projects excluded from the environmental process, including emergency repairs necessary to maintain service and projects undertaken to repair disaster-stricken areas. According to state officials, these exclusions are derived nearly verbatim from the federal implementing regulations promulgated by the Council on Environmental Quality.[2]

[2]The Council on Environmental Quality is an agency established by Title II of NEPA in the Executive Office of the President. The Council has become the principal agency responsible for the administration of NEPA, primarily through the adoption of interpretive regulations. NEPA conferred to the Council only advisory—in contrast to enforcement—duties that include environmental review, research, and reporting.

In addition, although there is no federal statutory provision for identifying actions to mitigate adverse environmental effects, the Supreme Court ruled in Robertson v. Methow Valley Citizens Council[3] that one of the most important ingredients in an EIS is a "discussion of steps that could be taken to mitigate adverse environmental consequences." A number of states' environmental acts contain a provision embodying the language of this court decision.

State Laws Provide for Judicial Review of State Environmental Acts

Judicial review, or the process for seeking remedies for alleged harm through the judicial system, is not specifically provided for in NEPA. State laws, however, include provisions that permit those asserting environmental injury to seek remedies in a court of law. While New York provides state courts with limited standing to review compliance with the State Environmental Quality Review Act, California establishes the specific procedure for judicial review of agency actions claimed not to be in compliance with the state act. The California act specifies time limits for the commencement of court action and extends judicial inquiry to whether there was a "prejudicial abuse of discretion," which is established "if the agency has not proceeded in a manner required by law or if its determination or decision is not supported by substantial evidence." FHWA officials report that although federal statutory provisions for judicial review are nonexistent, early court decisions established the precedent for claims of environmental injury to be heard in court.

Table II.1 compares the significant provisions of NEPA and of the state laws in California, Minnesota, and New York. Table II.2 compares the EIS content requirements for federal and state laws.

[3]109 S.Ct. 1835 (1989)

Table II.1: Federal and State Environmental Protection Laws

	Weight of environmental concerns in agency decision making	Avoidance of adverse effects, reliance on alternatives, and mitigating measures
Federal National Environmental Policy Act (NEPA) 42.U.S.C., sec. 4331 sec. 4332	Appropriate consideration along with economic and technical considerations	No provision in statute
California Environmental Quality Act (CEQA) Government Code sec. 21080.3 sec. 21001(3) sec. 21002 sec. 21092 sec. 21167,21168	Consideration of qualitative, economic, long- and short-term benefits and costs	Project should not be approved if feasible alternatives or mitigating measures are available to lessen environmental effects.
Minnesota Environmental Policy Act (MEPA) sec. 116D.03(b) sec. 116D.04 subd. 2, subd. 6, subd. 9, and subd. 10	At least equal consideration along with economical and technical considerations	Action is not allowed if a feasible and prudent alternative exists.
New York State Environmental Quality Review Act (SEQRA) New York Environmental Conservation Law sec. 8-0109	Appropriate weight with social and economic considerations in public policy	To the maximum extent practicable, adverse environmental effects should be avoided.

Environmental impact statement (EIS) requirements	Decision process for determining the need for an EIS	Coordination with other agencies	Public notification	Administrative and/or judicial review
For major federal actions significantly affecting the quality of the human environment	No provision in statute	Before preparation of an EIS, agency must coordinate with any federal agency with legal jurisdiction or expertise with regard to impacts.	Copies of EIS, comments, and views from appropriate agencies shall be made available to the public.	No provision in statute
For any project that may have a significant effect on the environment	No provision in statute	Before an Environmental Impact Report (EIR) decision (equivalent to an EIS), lead agency must coordinate with other responsibile agencies. Before completion of an EIR, agency shall coordinate with relevant agencies and persons with special expertise with respect to impacts.	Agency preparing an EIR must notify public through publication, posting, and/ or direct mail. Completed report must be available to state legislature and general public for cost of reproduction.	Judicial inquiry is limited to whether agency has proceeded in accordance with law or whether agency's decision is supported by substantial evidence.
For major governmental actions where there is the potential for significant environmental effects	To determine whether an EIS is necessary, an Environmental Assessment Worksheet is required when an action has been (1) categorically determined to require one, (2) when a petition is filed and approved requiring one, or (3) where an environmental reveiw has not been provided for specifically.	Before preparation of a final EIS, the responsible government unit must coordinate with every governmental office with legal jurisdiction or expertise with respect to effects.	Copies of EIS, comments, and views of the approporiate offices shall be made available to the public.	Board has authority to reverse or modify a proposal following notice to agency and hearings on decision. Aggrieved parties may seek judicial review. Decisions on the need for or adequacy of an EIS may be reviewed in the district court of the county where the action would be undertaken.
For any action that may have a significant effect on the environment	Agency may require applicant to submit environmental report to help agency determine if an EIS is necessary.	Draft EIS shall be filed with the department or other designated agencies and circulated for comment to federal, state, regional, and local agencies having an interest in the action.	Draft and final EIS must be made available to the public prior to project implementation. Notice of initial determination with supporting findings shall be available for public inspection. Agency determines whether or not to hold public hearings on a project.	State courts have limited standing to review compliance with SEQRA for those asserting environmental injury.

Note: Rhode Island and Texas are excluded from this comparison as they do not have comparable environmental protection laws.

Table II.2: Significant Environmental Impact Statement Provisions

EIS Content	Federal NEPA	Minnesota Act	New York Act	California Act
Analysis of action's environmental impact	Yes	Yes	Yes	Yes
Analysis of unavoidable adverse effects	Yes	Yes	Yes	Yes
Discussion of alternatives to proposed action	Yes	Yes	Yes	Yes
Analysis of relationship between short-term uses of environment and the maintenance and enhancement of long-term productivity	Yes	No	Yes	Yes
Exploration of methods to mitigate effects of environmental action	No	Yes	Yes	Yes
Analysis of any irreversible commitment of resources	Yes	No	Yes	Yes
Discussion of growth-inducing aspects of proposed action	No	No	Yes	Yes
Discussion of measures to conserve energy	No	No	Yes	Yes

Note: Rhode Island and Texas are excluded because laws in these states do not require the preparation of an EIS.

Disadvantaged Business Enterprise Laws

With the intent of encouraging participation by socially and economically disadvantaged individuals in public contracting, Congress included in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (P.L. 100-17) a provision establishing the Disadvantaged Business Enterprise (DBE) program. The legislation states that no less than 10 percent of the amounts authorized through the act should be contracted to small businesses owned and operated by socially and economically disadvantaged individuals. Such individuals are defined in section 8(d) of the Small Business Act (15 U.S.C. 637(d)), which names specific groups of individuals who qualify as disadvantaged for the program's purpose. The law also specifies that women shall be presumed to be socially and economically disadvantaged individuals for the purpose of the program.

States' Programs Encourage Disadvantaged Businesses to Participate in State Contracts

All five states we reviewed have enacted some form of legislation to encourage participation by disadvantaged businesses in public contracting. Three of the five states have established goals in the legislation itself. Minnesota set a disadvantaged business contracting goal of 3.75 percent, and Rhode Island legislators mirrored the federal law, establishing a goal of 10 percent. California, reasoning that a single goal could result in the underutilization of businesses owned by women, established a separate goal for minorities (15 percent) and for women (5 percent). The remaining states have administratively established programs to encourage minority participation. The Texas Commerce Department has set an agency goal of 10 percent for the Department of Transportation, and the New York Department of Transportation sets an annual goal for businesses owned by disadvantaged persons, members of minority groups, and women, which the department reports it has maintained at 17 percent for the past 2 years.

The federal law and the state programs vary somewhat in how they define eligibility for inclusion under their programs. The federal program provides for socially and economically disadvantaged businesses, members of which are specified legislatively. The Rhode Island law is identical to the federal law, applying to economically and socially disadvantaged groups, the members of which are spelled out in the legislation. New York, Texas, and California do not delineate between economic and social disadvantage, but, rather, identify the specific minority groups that qualify for contracts under the state programs. All four of these states classify women as an eligible disadvantaged group. Minnesota's program is race- and gender-neutral, based solely on the premise of economic disadvantage, defined by criteria such as the age of

the business and the owner's income relative to the median income in the state.

Supreme Court Has Challenged State Disadvantaged Business Contracting Programs

In the past year, several states' minority and disadvantaged business enterprise programs have become subjects for legal battle. Following a landmark Supreme Court decision that found a city ordinance unconstitutional in its establishment of racial preferences for minority businesses, a number of state programs were challenged on similar questions of constitutionality. To date, three of the states we reviewed have been affected by these suits. Rhode Island, whose statutes are currently being challenged, anticipates forthcoming legislative changes. New York, also, according to state officials, is currently defending four lawsuits involving the state's disadvantaged business contracting program. Minnesota, faced with a similar lawsuit, suspended its existing program, and enacted interim legislation until statistical support for a race- and gender-based program could be obtained.

On January 23, 1989, the Supreme Court ruled in City of Richmond v. J.A. Croson Co.[1] that a city ordinance requiring prime contractors to subcontract at least 30 percent of their city construction contracts to minority contractors violated the equal protection clause of the fourteenth amendment to the U.S. Constitution. In striking down the ordinance, the Court stated that in order for the program to be acceptable under the fourteenth amendment, it must 1) have a "compelling governmental interest" justifying the plan, and 2) be "narrowly tailored" to remedy past discrimination. The Court ruled that the city of Richmond had not demonstrated a "compelling governmental interest" because the city could not present any firm evidence of identified past discrimination in the city's construction industry. The Court also found that the city's plan was not "narrowly tailored" to remedy prior discrimination because the program allowed preferences for groups where no evidence of prior discrimination had been demonstrated. Additionally, the Court noted that the plan allowed preferences for individuals living outside the geographic area in which discrimination was alleged.

Minnesota Suspends DBE Program in the Wake of Croson

The impact of this and any subsequent Supreme Court decisions on state disadvantaged and minority business contracting programs has yet to be fully realized. In the wake of Croson and another Supreme Court decision, which found that to be constitutional, a gender-based program

[1] 488 U.S. 469 (1989)

must also be substantiated with firm evidence of discrimination,[2] Minnesota suspended its race- and gender-based program. In its place, Minnesota enacted an interim gender- and race-neutral program based solely on the economic status of the business. Meanwhile, efforts were undertaken to determine the need and justification for a race- and/or gender-based program. The Minnesota legislature established a commission to compile statistical information evidencing a history of discrimination against several racial groups and women. These findings, along with evidence demonstrating how race- and gender-based set-aside programs had helped ameliorate the underutilization of specific minority groups, underscored the need for a new, statistically substantiated race- and gender-based program. According to Minnesota Transportation officials, new legislation that would establish a race- and gender-based disadvantaged business contracting program has passed both branches of the legislature.

Table III.1 illustrates the similarities and differences between the major provisions of the federal and state disadvantaged business enterprise laws.

[2]Milliken v. Michigan Road Builders Association, 109 S. Ct. 1333 (1989)

Table III.1: Federal and State Disadvantaged Business Enterprise Laws

	Contract type	Application	Scope of coverage	Minimum DBE contract requirement	Contract amount limitations
Federal Disadvantaged Business Enterprise (DBE) P.L. 97-424 sec. 8(d) of 15 U S.C. 637(d)	All contracts pursuant to 1982 Surface Transportation Assistance Act	Small business concerns owned and controlled by socially and economically disadvantaged individuals	Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and other individuals found to be disadvantaged under this act	Not less than 10% of all surface transportation contracts	None specified
California Gov. Code sec. 14533.6	All contracts for construction, professional services, materials, supplies, equipment, alterations, repairs, and improvements	At least 51% of a business or its stock must be owned by one or more women or members of a minority group. Must be a domestic corporation with home office in the United States that is managed by and whose daily business operations are controlled by one or more members of a minority group or women.	Black, Hispanic, and Native Americans (descendants of American Indians, Eskimos, Aleuts, Native Hawaiians), Asian-Pacific Americans (descendants of peoples from Japan, China, Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan) or members of other groups identified by contracting agency	Statewide and agency goals for contracting with minority- and women-owned businesses should be 15% and 5% of contracts, respectively.	None specified
Minnesota Statutes Annotated sec. 161.321, subd. 1,3,and 4 sec. 645.445, subd. 5 sec. 16B.19, subd. 5	Contracts for construction of transportation improvements	Small businesses owned and operated by economically disadvantaged persons	Small businesses that are (1) located in an area where there is a surplus of labor, (2) located in a county where median income is less than 70% of statewide median income, (3) within the first 10 years of operation, or (4) otherwise economically disadvantaged	At least 5% of all state contracts must be set aside for award to small businesses; at least 75% of this must be awarded to small businesses certified as economically disadvantaged.	No individual contract may exceed $200,000, nor shall any one disadvantaged business, as defined, be awarded in aggregate more than $200,000 in 1 fiscal year.

(continued)

	Contract type	Application	Scope of coverage	Minimum DBE contract requirement	Contract amount limitations
New York Executive Law sec. 310, subd. 13	Agreements in excess of $25,000 for labor services, supplies, equipment, or materials Agreements in excess of $100,000 for the acquisition, construction, demolition, replacement, major repair, or renovation of real property and improvements thereon Subcontracts for all above activities along with planning or design of real property	Business enterprises at least 51% owned by minority group members or women, where ownership is real, substantial, and continuing. Such owners must control the day-to-day operations of the business.	Permanent resident alien or U.S. citizen of the following groups: women, blacks, Hispanics, Native Americans, Alaskans, Asians, and Pacific Islanders.	None specified	None specified
Rhode Island General Laws Vol. 6A, Chapter 14.1 sec. 37-14.1	State-funded and directed public construction programs and projects and state purchases of goods and services	Small business concerns owned by and whose daily operations are controlled by one or more minorities or women; at least 51% of business or public stock must be owned by such persons.	Citizen or lawful permanent resident of the United States who is female, black, Hispanic, Portuguese, Asian American, American Indian, Alaskan Native, or found to be economically and socially disadvantaged as described in sec. 8(a) of the Small Business Act (15 U.S.C.) (637(a)).	Minority enterprises shall be awarded a minimum of 10% of the dollar value of every procurement or project.	None specified
Texas Civil Practice & Remedies Code Annotated sec. 106.001(c)(2) sec. 106.001(c)(1)A sec. 106.001(c)(1)B	Public contract awards	Businesses at least 51% owned and whose management and daily operations are controlled by women or members of minority groups	Women, Black Americans, Hispanic Americans, Asian-Pacific Americans, and American Indians	Statute gives authority to Texas Department of Commerce to establish goals commensurate with availability of disadvantaged firms to perform certain services.	None specified

Highway Design Laws

The Federal-Aid Highway Act of 1958[1] requires that projects receiving federal-aid highway funds (1) meet existing and future traffic needs in a manner conducive to safety, durability, and economy of maintenance and (2) be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives. Most of these standards have been promulgated by the American Association of State Highway and Transportation Officials (AASHTO). AASHTO, representing state interests, publishes and periodically updates volumes of administrative policy for the purpose of establishing standards for highway design. FHWA has adopted these standards as the specific controls for the design of federal-aid highways.

Many states have adopted these federal (AASHTO) standards in their exact form for application on state highways that are constructed without the use of federal-aid funds. Other states have promulgated standards of their own for application on state highways. These standards, when judged by FHWA to be in reasonable conformity with AASHTO standards, have been approved by the Federal Highway Administrator for use on federal-aid highway projects.

Design standards dictate specifications for construction, such as lane width, road curvature, and guardrail placement. These specifications depend on a number of factors, such as the projected daily volume and character of traffic.

Most of the operative guidance for highway design is in state design manuals rather than codified in statutes. Both the federal and state laws provide some general guidance on design, but, according to both state and federal officials, these requirements establish only the minimum standards. For instance, Minnesota's statutes require a vertical clearance of at least 14 feet under bridges in urban areas. Officials from this state report, however, that the state design policies require a clearance of 16 feet. California officials add that design standards are not codified because they change over time and thus should not be rigidly fixed in statute.

[1]P.L. 85-767, 23 U.S.C. 109

States Have Tailored Federal Standards to Meet Specific Needs

Although the federal and state statutes governing highway and bridge design are largely incomparable, states report that the standards they actually apply to state projects are equivalent—in many cases, identical—to those required for federal-aid projects. All five states report that they have adopted AASHTO standards as the states' principal guidance. In some instances, though, the states have tailored AASHTO standards to suit state needs. For instance, because of high land costs, New York standards for roadside clearance are lower for state projects than what would be required for a federal-aid project. New York officials say, however, that they consider the history of safety problems in an area before applying a standard lower than the corresponding AASHTO standard.

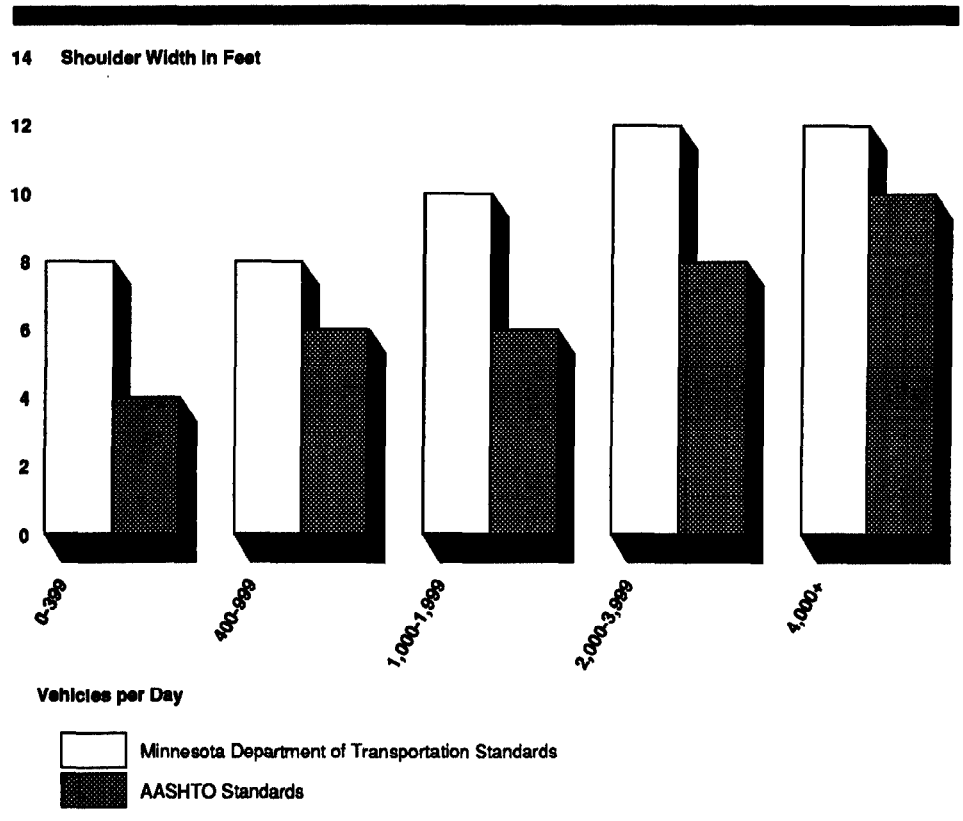
California, Minnesota, Texas, and New York all report that in certain areas, the state standards exceed the standards required for federal-aid projects. For instance, in California, officials report that the state standard for superelevation[2] on curves is higher than the corresponding AASHTO standard. New York has begun to require a concrete divider different from the AASHTO-approved "jersey shape barrier"[3] in order to reduce injury to passengers and damage to vehicles in the event of a collision. For high volume traffic areas—primarily urban areas—Texas officials report that they have begun to design pavement for a 30-year design life rather than the 20-year design life required by AASHTO. Minnesota's requirement for shoulder width on principal arterials[4] ranges from 8 to 12 feet while AASHTO's requirement ranges from 4 to 10 feet. (See fig. IV.1.)

[2]Superelevation refers to the vertical distance between the heights of inner and outer edges of highway pavement.

[3]Jersey shape barriers are the concrete median barriers lining highway traffic lanes. They are used primarily to reduce the severity of accidents and to prevent crossover accidents by separating opposing traffic.

[4]Arterials are routes that function primarily to move large numbers of persons and vehicles quickly from one place to another. They are characterized by long-distance travel, high volumes, and higher speeds, and generally are constructed to higher design standards than other routes.

Figure IV.1: Comparison of Minnesota's and AASHTO's Shoulder Width Standards



Source: Minnesota Department of Transportation.

If FHWA approves these higher state standards for use on federal-aid projects, then FHWA pays the cost associated with meeting the higher requirements. Texas state officials report that if the higher standard is not approved by FHWA, the state or locality requesting the design must make up the funding difference between the amount needed to meet the approved standard and the amount approved for the project.

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