



# Navigating Public Private Partnerships and Environmental Review Processes

WEBINAR SERIES: INNOVATION IN PRACTICE

May 1, 2019

# Webinar Logistics



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# Webinar Overview

**Effect of  
Changing  
Environmental  
Policy**

**Key Legal  
Issues**

**Central 70 and  
the NEPA  
Process**

# Effect of Changing Environmental Policy on Public-Private Partnerships (P3s)

Eric Beightel  
WSP USA

# Why is this topic so timely?

- P3s are becoming more common as a means to bridge funding gaps.
- Congress and recent presidential administrations have prioritized increasing efficiency of environmental approvals.
- The intersection of P3s and NEPA is an area that demands greater guidance and structure.
- What are the key issues that sponsors, practitioners, investors and regulators need to know?

# Recent Changes to Accelerate Environmental Reviews

- Combined FEIS/ROD
- Greater flexibility in using Categorical Exclusions
- Encouraging programmatic approaches
- Strengthened Planning and Environment Linkages
- Expanded NEPA Assignment program
- Requires project schedules with concurrence
- Emphasizes the need to rely on a single environmental document
- One Federal Decision
- Moved FRA under FHWA/FTA procedures

# Existing Guidance

- **FHWA Guidance**
  - Public Private Partnership Oversight
  - P3 Toolkit
- **National Academy of Sciences**
  - Effect of Public-Private Partnerships and Nontraditional Procurement Processes on Highway Planning, Environmental Review and Collaborative Decisionmaking
- **NCHRP Document 183**
  - Guidance for Managing NEPA-Related and other Risks in Project Delivery, Vol 1 and 2
- **NCHRP 25-25, Task 109 –**
  - Successful Practices for Environmental Commitments in Public/Private Partnerships and Design-Build Contracts



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ASSESSMENT OF CURRENT POLICY  
AND GUIDANCE DIRECTING  
ENVIRONMENTAL REVIEWS OF P3  
PROJECTS

WSP USA 1015 Half Street, Ste 650, Washington DC 20003



# Topics to Explore

- **What is the optimal time in project development to determine the project delivery approach relative to NEPA??**
- **Can sponsors use Planning and Environment Linkages to define financially viable alternatives for a project prior to NEPA?**
- **Are there any special considerations for a NEPA Assignment state in pursuing a P3?**
- **What are the risks and potential mitigation of those risks associated with initiating a procurement concurrent with the environmental study?**

# NEPA for P3s: Key Legal Issues

Bill Malley  
Perkins Coie LLP

# Introduction

## What Makes P3s Different?

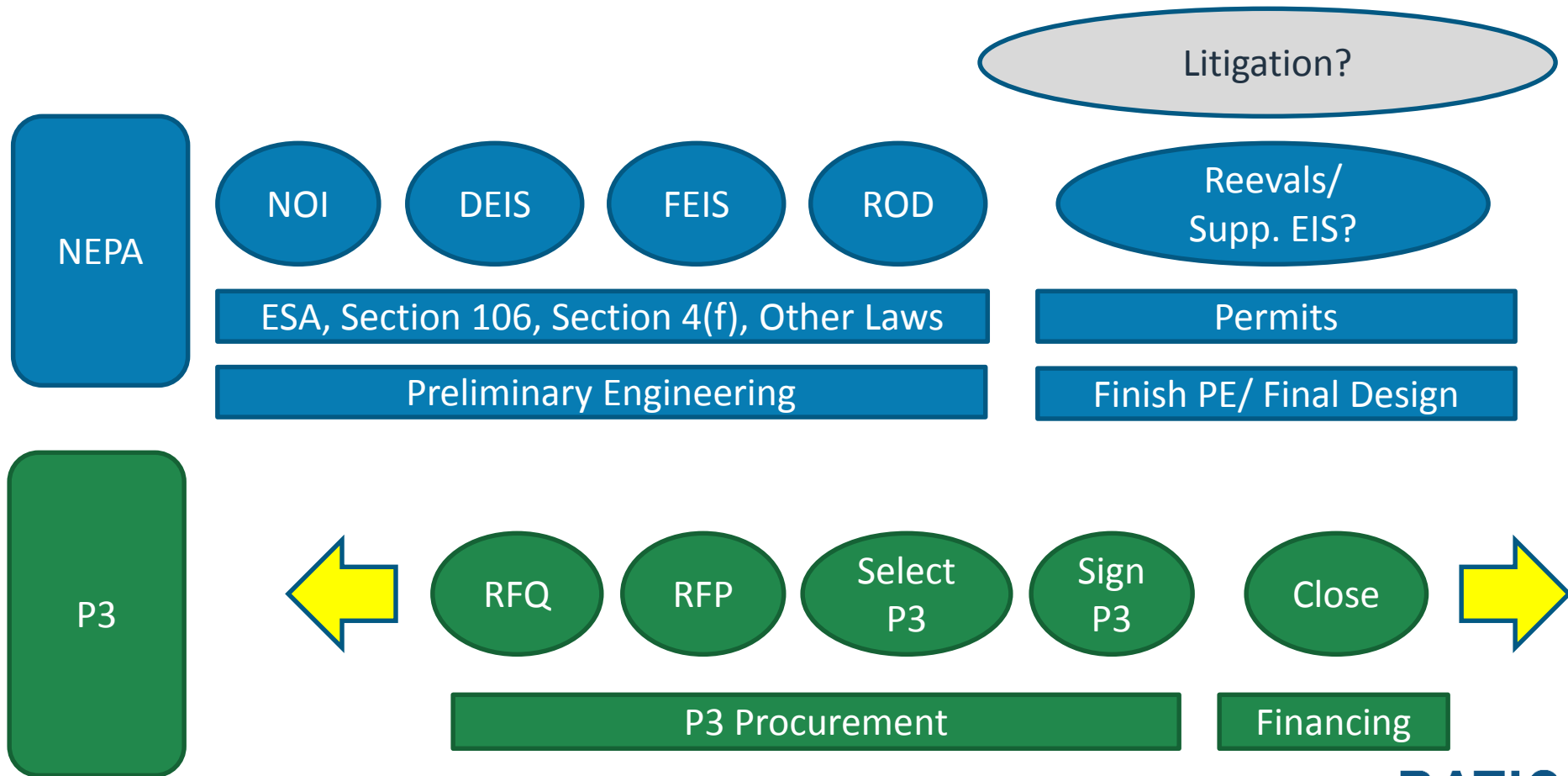
- Earlier initiation of procurement - often while NEPA is ongoing
- Desire for certainty as to NEPA completion date
- Desire to preserve flexibility for P3 partner to modify design
- Desire to shift permitting risk from State to P3 partner
- Greater focus on project economics – does it pencil out?



## Implications for NEPA:

- Heightened schedule pressure
- Need to coordinate NEPA process with P3 procurement
- Bias concerns re: P3 process and P3 partner involvement
- Concern about NEPA decisions tying the hands of P3 partner
- Concern about supplementation resulting from P3 partner's changes
- Permitting risks – who bears what?
- Litigation risks – who bears what?

# (Very) Illustrative NEPA and P3 Timeline



# Key Issues in NEPA for P3s

- **Coordinating Timing of NEPA Process with P3 Procurement**
- **Determining Role of P3 Partner in NEPA Process**
- **Considering Financial Viability in Alternatives Screening**
- **Managing Supplementation Risks**
- **Determining Role of P3 Partner in Permitting**
- **Managing Litigation Risks**

# Timing of NEPA vs. P3 Procurement

- **Legal Principles:**

- No final design, ROW acquisition (w/ some exceptions), or construction prior to NEPA completion
- More generally, avoid actions that would undermine NEPA by effectively rendering the decision a foregone conclusion ('fait accompli').

- **So what can be done with P3 prior to NEPA completion?**

- Initiate P3 procurement process; select P3 partner; award P3 contract; and give NTP for preliminary engineering activities.

- **Issues/Risks:**

- Allegations that State's commitment to P3 biased the NEPA process
- Delays in NEPA process hamper procurement efforts
- Litigation results in delay damages after P3 agreement is in place

# P3 Partner Role in the NEPA Process

- **Legal Principles:**

- Public agencies must remain in control of the NEPA process
- Cannot “privatize” responsibility for preparing an EIS

- **So what can P3 partners do?**

- Provide technical input to the NEPA process, including engineering plans
- Provide environmental data and reports
- Pay for cost of NEPA (under third-party contractor MOU)

- **Issues/Risks**

- Allegations that P3 partner involvement biased the NEPA process
- Miscommunication/lack of communication limits benefits of having a P3

# Economic Factors in Alts Screening

## Legal Principles

- NEPA requires “all reasonable alternatives” to be studied in detail in EIS
- Financial viability *can* be considered in determining reasonableness
  - In P3 context, can consider ability to attract P3 investors
- If MPO plan assumes tolling as revenue source to meet fiscal constraint, the plan may provide a basis for eliminating non-tolled alts.
- But like all decisions in NEPA, decisions to eliminate alts based on financial viability or need for tolling must be supported by reasoning and facts.

## Issues/Risks

- NEPA screening occurs early, often before P3 procurement is far advanced; may be difficult to rely on P3 considerations to screen alternatives.



# Managing Supplementation Risk

- **Legal Principles:**

- Federal agencies have “continuing duty” to consider new information and changed circumstances after NEPA completion.
- “Significant” new information or changed circumstances require SEIS
- Decision *not* to prepare SEIS can be challenged, so agencies document the basis for deciding not to prepare an SEIS (e.g., in a ‘reevaluation’)

- **Issues/Risks:**

- When is a reevaluation is needed?
- What role can P3 play in preparing reevaluation documents?
- How to handle a large number of minor design changes – e.g., bundle?
- Potential for litigation challenges to decisions not to prepare SEIS

# P3 Partner Role in Permitting

## Legal Principles

- State need not be the permit applicant; P3 partner can do it.
- But a permit decision by federal agency is challengeable in court, just like FHWA's ROD.
- “One Federal Decision” = NEPA and 404 decisions to occur at same time.
- Challenges to NEPA and Section 404 permit are often brought together; even if not a single lawsuit, issues are often intertwined.

## Issues/Risks

- Is it viable/desirable to assign Section 404 permitting responsibility to P3 partner if 404 permit will be issued at same time as NEPA ROD?
- What is P3 partner's responsibility/risk if 404 permit is challenged?

# Managing Litigation Risks

## Legal Principles

- “Final actions” by federal agencies can be challenged in federal court.
- Challengeable actions include:
  - NEPA decision documents (RODs, etc.)
  - Decisions not to supplement (reevaluations, etc.)
  - Federal approvals/permits
- 150-day period to bring lawsuits runs from date of decision
  - Decisions at different times = different litigation ‘windows’

## Issues/Risks

- Difficulty achieving ‘closure’ on litigation risk; the NEPA ROD is just the first of potentially several decisions that are subject to challenge.

# Final Thoughts

- Every P3 is unique. Lessons from one may not apply to others.
- Simplest approach is purely sequential: finish NEPA and permitting, then start P3 procurement.
- But NEPA, permitting, and P3 procurement typically overlap.
- Crux of the challenge is to conduct NEPA , permitting, and P3 procurement in parallel, balancing risks and demands of each.
- Litigation challenging NEPA and permitting is an inherent risk and cannot be quickly extinguished; must be managed.

# Case Study: Central 70 and the NEPA Process

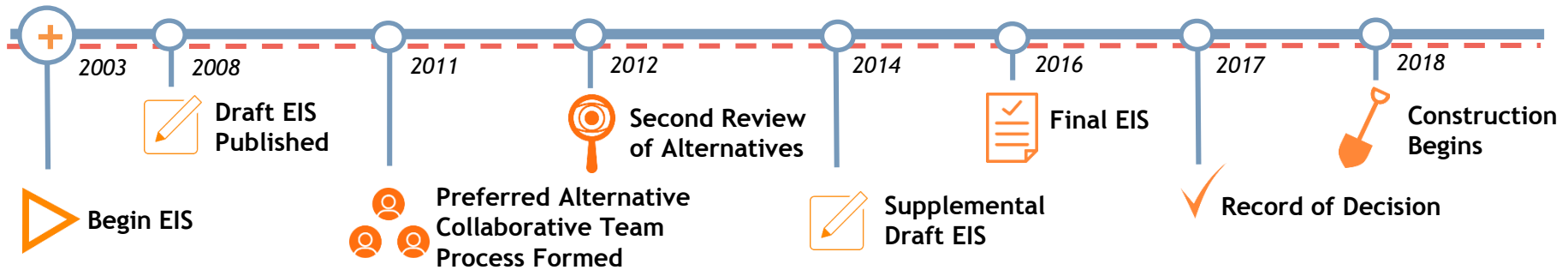
Keith Stefanik  
Colorado Department of Transportation

## Central 70 Case Study

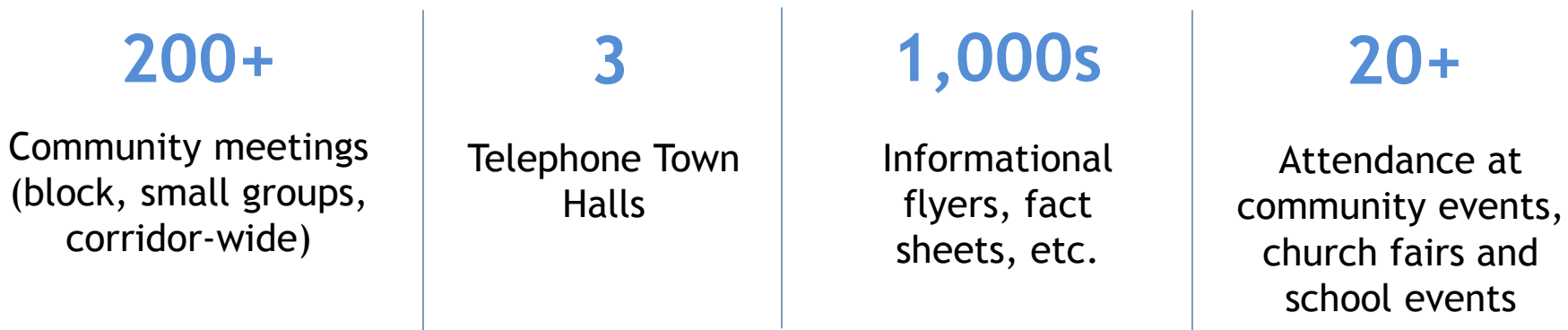
- I-70 between I-25 and Tower Road in Denver is one of the most heavily traveled and congested highway corridors in Colorado
- I-70 East Environmental Impact Statement (EIS) began in 2003
- Central 70 Record of Decision (ROD) signed in January 2017; 14-year duration
- Implement a transportation solution that improves safety, access, mobility and addresses congestion



## NEPA Timeline



### Public Involvement Throughout



## Procurement Analysis Timeline

### 2013:

- December: Procurement options analyzed in first Value for Money (VFM) analysis

### 2014:

- January: Project cost estimates, funding scenarios, Bridge Enterprise portfolio
- February: Risk transfer of Private Public Partnerships (P3)
- April: Anticipated sources of funding, outreach and communications efforts
- June: Phasing options, P3 vs. Design-Build, HPTE's 1<sup>st</sup> round of transparency
- July: Resolution directing HPTE to further pursue P3 opportunities
- November: Public outreach efforts, develop funding options, P3 delivery models
- December: Transportation Commission decision on project's preferred project scope

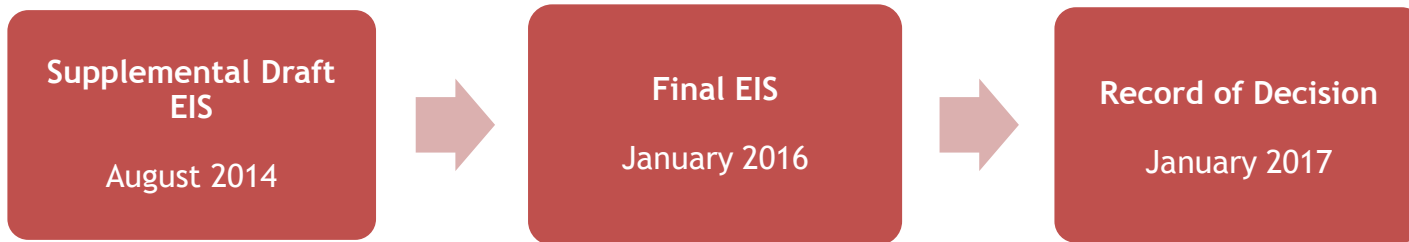
### 2015:

- January: Update on project funding, VFM detailed analysis
- **February: Resolution on P3 - DBFOM Model**



## Parallel Timeline Comparison

### NEPA Environmental Impact Statement (EIS) Timeline



### Project Delivery/Procurement Timeline



Public Outreach



## Public-Private Partnership for Central 70

- Financing a project through a public-private partnership (P3) can allow a project to be completed sooner or make it a possibility in the first place.
- The private partner participates in designing, completing, implementing and funding the project, while the public partner focuses on defining and monitoring compliance with the objectives.
- The Central 70 P3 is between CDOT's High Performance Transportation Enterprise (HPTE), CDOT's Colorado Bridge Enterprise (CBE) & Kiewit Meridiam Partners (KMP)
- Central 70 is a Design-Build-Finance-Operate and Maintain (DBFOM) delivery model, where the developer is:
  - Responsible for designing, building, financing, operating, maintaining and rehabilitating the roadway over a long period of time
  - Finances some or all of the capital cost of the project
- CDOT maintains ownership
- In exchange for the Developer constructing the project and then keeping the project in compliance with performance standards during the Operations Period, CDOT makes payments to Developer.



## Mitigation Commitments - Completed by CDOT

Mitigation	Dollar Amount
Swansea Elementary School Improvements	\$18.5M
Contribution to Affordable Housing	\$2.0M
Home Improvements	\$2.4M
Contribution to Fresh Food Access	\$100K
Transportation Demand Management (NETC)	\$2.5M
Training Center Building	\$100K
<b>TOTAL</b>	<b>\$25.6m</b>
<b>Leveraged Commitments</b>	
City of Denver—Home Improvements	\$1.4M
Piton Foundation—Workforce Training	\$1M distributed over annual basis
Regional Air Quality Council	\$1M for diesel retrofits
KMP Community Commitments	\$200k Construction Period \$800k Operating Period (25k/yr min)

## KMP Community Commitments



### \$200k

during construction

### Current Commitments/Outlook for Future Funding



**\$15,000** for Comal program through Focus Points in 2018



**\$50,000** for Denver Scholarship Fund in 2019



Committing scholarship funds to the Denver Foundation during the operating period (for students who attended Swansea Elementary School during construction)

### \$800k

during 30-year operating period

### Possible Ideas for Future Commitments



Partner with Denver and local nonprofits to bring in fresh foods



Art in community



Partner with CREA for mobility for aging community and healthcare visits



Find nonprofits to fund ongoing programs to benefit community

Let's hear from you



# Wrap-Up

## Thank you for attending today's webinar

The BATIC Institute will post responses to all questions received today on its website

The recorded webinar will also be available on the BATIC Institute website:

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