



# BRENT SPENCE BRIDGE CORRIDOR

BRENT SPENCE BRIDGE PROJECT

# GOVERNANCE STRUCTURE REPORT

FEBRUARY 28, 2022



**HNTB**

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## 1. EXECUTIVE SUMMARY

For over a century states have come together to achieve shared goals to address specific policy issues or projects by creating and implementing interstate agreements. These agreements have been formed among neighboring states for issues ranging from water resources and flood control to transportation and infrastructure. In the case of an infrastructure project, the creation of an interstate agreement facilitates the completion of a project that touches multiple states or would be considered too large for individual states to accomplish on their own. The Brent Spence Bridge crossing the Ohio River between Kentucky and Ohio is the perfect example of a project that touches two states and is too large for either state to readily accomplish on its own.

The goal of this report is to benchmark key governance structures utilized for interstate projects such as the Brent Spence Bridge and recommend a governance structure that will enable an efficient and timely delivery of the project.

### 1.1 GOVERNANCE STRUCTURE BENCHMARKING

This Governance Structure Report describes common governance structures for interstate agreements and benchmarks how these agreements have been utilized for other interstate projects. To review and compare these agreements, the governance structures have been separated into three categories: (1) Interstate Agreement; (2) Interstate Compact Adopted by State Legislatures; and (3) Interstate Compact Adopted by Congress.

### 1.2 INSIGHTS FROM RESEARCH

The Council of State Governments describes bi-state agreements as “the most powerful, durable, and adaptive tools for ensuring cooperative action among the states.” Bi-state agreements provide states the ability to act jointly towards a common goal. In researching bi-state agreements, it is clear that no one governance structure fits every project or situation. To the contrary, each project has its own needs and goals, requiring an individual evaluation of which governance structure best suits that specific project.

No matter which governance structure is chosen there is a clear benefit to ensuring a comprehensive agreement specifying the scope, funding, procurement, construction and delivery method, operations and maintenance approach, and dispute resolution process for the project. If these details are not defined when the governance structure is created, then a multi-state council with the authority to address these issues, is often created in its stead.

Regardless of which governance structure is created, a successful project must have bi-state coordination with clear communication and a shared commitment to success.

### 1.3 RECOMMENDATIONS AND DETERMINATIONS

The states have agreed to the governance structure and several other recommendations associated with the project. The following recommendations and determinations assume the states will receive sufficient federal funding through the 2021 Infrastructure Investment and Jobs Act (IIJA) to build the project without toll financing. If the availability and accessibility of sufficient funds are not obtained by either state to build the project without toll financing, the recommendations will be re-evaluated. It is recommended that the project advance under the following structure:

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- a. Governance Structure: The project should be advanced under an Interstate Cooperative Agreement executed by both Governors. This recommendation is based on two primary considerations: the quickest time to enact the governance structure and allowing an existing agency to manage and lead the effort.
  - b. Lead Agency: The Ohio Department of Transportation (ODOT) will remain as the lead agency in delivering the project.
  - c. Project Limits: The limits of the project will be as described in the original National Environmental Policy Act (NEPA) decision or any future NEPA re-evaluation.
  - d. Project Financing Structure:
    - i. This project will be a completely public project and will not utilize a public-private-partnership as part of the delivery.
    - ii. All preliminary engineering, environmental re-evaluation, financial analysis, procurement support, and any other necessary activities required to get through project procurement shall be equally shared between Ohio and Kentucky.
    - iii. Each state shall be responsible for property acquisition and costs in their respective state.
    - iv. Each state shall be responsible for utility relocation costs in their respective state.
    - v. Each state will be responsible for all design, construction, construction engineering, construction inspection, and program management costs within their state except for the costs associated with the new companion main river crossing bridge, which will be shared equally between the states.

## 2. PROJECT BACKGROUND AND REPORT PURPOSE

On October 14, 2004, The Kentucky Transportation Cabinet (KYTC) and ODOT recognized the need to improve the Brent Spence Bridge (BSB) corridor and entered into an agreement to evaluate the replacement of the existing BSB over the Ohio River.

- The corridor consists of 7.8 total miles of I-71 and I-75 located within portions of Ohio and Kentucky.
- The BSB carries both I-71 and I-75 over the Ohio River.
- The BSB opened in 1963 and was originally designed to carry 80,000 vehicles per day (VPD) with current traffic volumes of 160,000 VPD.
- The corridor exhibits congestion and safety-related issues due to capacity constraints for current traffic demand, which is exacerbated by design deficiencies along the corridor.

The BSB project goals are to improve the operational characteristics in the BSB corridor for both local and through traffic by improving traffic flow and level of service, improving safety, correcting geometric deficiencies, and preserving and enhancing connections to key regional and national transportation corridors.

In August 2012, the Federal Highway Administration (FHWA) issued a Finding of No Significant Impact (FONSI) identifying the selected alternative for the BSB project, referred to as Alternative I. Since the approval of the FONSI, additional studies have been conducted by KYTC and ODOT to better understand financial and procurement options and any potential effects to the environmental impacts of the project. Additional analyses were conducted to update design standards, traffic counts, and traffic operations, with two new design concepts developed for the BSB in June 2020.

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The purpose of this report is to:

- Benchmark key governance structures utilized for projects such as the Brent Spence Bridge where the infrastructure crosses state lines, including where and how these governance structures have been implemented and the associated risks and opportunities of each structure type; and
- Recommend a governance structure that will enable the most efficient and timely delivery of the project, taking into account the scope of the project, the planning and administrative requirements, and any applicable state and/or federal constraints.

This Governance Structure Evaluation and Recommendation Report does not provide legal recommendations or advice. ODOT and KYTC acknowledge that no services performed by HNTB for this report or advice provided herein are intended to constitute the practice of law and that each will retain any legal professionals they deem necessary. This report is providing consulting services and recommendations based on HNTB's experience and knowledge of the engineering and construction industry.

### 3. GOVERNANCE STRUCTURE BENCHMARKING

Various interstate agreements have been used throughout the United States on large infrastructure projects. For the purposes of this report, the agreements have been grouped into one of three categories, an Interstate Cooperative Agreement, an Interstate Compact adopted by State Legislatures, or an Interstate Compact approved by Congress. The following subsections use a case study method to review structures used for several key projects, highlighting best practices, flagging potential pitfalls, and identifying potential solutions to drive success.

**Table 1. Governance Structure Comparison**

Structure	Authorization	Timeframe	Management	Enforceability & Dispute Resolution	Procurement Implications	Operations & Maintenance	Tolls	Amendments & Termination
<b>Interstate Cooperative Agreement</b>	State legislatures assign authority to states or state agencies to enter into the agreement.	Most efficient and able to be executed in a timely manner. Could be executed in three months to one year depending on the negotiation of terms between the states.	Oversight of the project and day to day management is defined by the terms of the agreement or compact. A third-party commission to oversee the project may be created by the agreement or compact. Project leadership may be assigned to one state or the other.	The terms for enforceability and dispute resolution are specified in the agreement.	Any changes to state law related to procurement provisions for the project must be addressed separately outside the terms of the agreement.	Operations and maintenance of the project is defined by the terms of the agreement or compact.	Tolling, if allowed by both states' laws, is identified in the agreement. Details regarding the implementation of the tolling program are generally created in a separate agreement.	The agreement may be amended or terminated when both state agencies choose to change or terminate the agreement.
<b>Interstate Compact Adopted by State Legislatures</b>	State legislatures assign authority to states or state agencies to enter the compact. The state legislatures adopt the agreement via legislation. The compact legislation is approved by the Governor of each state.	Terms of the agreement could be developed in three months to one year depending on the negotiation of terms between the states. Once the terms are agreed upon, additional time will be required to obtain approval and be adopted by both state legislatures.		The terms of the compact become state law.	Any changes to a state's procurement law could be addressed in the compact language. Thus, creating an opportunity to limit the scope for procurement and legislative changes to the identified project.		Tolling authority is created in the compact. Details of the tolling program may either be identified in the compact or created in a separate agreement.	The compact may be amended or terminated by an act of the state legislatures and approval of the Governors.
<b>Interstate Compact Approved by Congress</b>	State legislatures assign authority to states or state agencies to enter the compact. The state legislatures adopt the compact language via legislation. The compact legislation is approved by the Governor of each state, then is transmitted to Congress for approval.	Terms of the agreement could be developed in three months to one year depending on the negotiation of terms between the states. Once the terms are agreed upon, a significant amount of additional time will likely be required to obtain approval and be adopted by both state legislatures and then by Congress.		The terms of the compact become federal law.				The compact may only be amended or terminated by an act of Congress.

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## 3.1 INTERSTATE COOPERATIVE AGREEMENT

### 3.1.1 STRUCTURE OVERVIEW

An interstate cooperative agreement is an agreement in which state legislatures empower administrative agencies within each state government to execute an agreement outlining the terms of cooperating with a neighbor state or its agencies for the development and delivery of a project. This type of agreement may come in the form of a memorandum of understanding or a more detailed agreement which addresses the authority for the design, construction, operations, and maintenance of a project. Specific terms, including funding, roles, and dispute resolution, may be negotiated and included in the cooperative agreement based on the project needs, capacity of each party, and the legislative landscape.

### 3.1.2 CASE STUDIES

#### 3.1.2.1 Ohio River Bridges Project on Interstate 65 (Kentucky/Indiana)

##### 3.1.2.1.1 Background

The approach to the Ohio River Bridges Project between Kentucky and Indiana was formalized with a Bi-State Development Agreement Concerning the Louisville Southern Indiana (LSI) Ohio River Bridges Project. This Agreement was created between the State of Indiana by and through the Indiana Department of Transportation, the Commonwealth of Kentucky, by and through KYTC, the Indiana Finance Authority, the Kentucky Public Transportation Infrastructure Authority, and the Louisville and Southern Indiana Bridges Authority.

Prior to the creation of this Agreement, the Louisville and Southern Indiana Bridges Authority was created. Kentucky's participation in the LSI Bridge's Authority was ratified by the Kentucky General Assembly. The State of Indiana's participation in the LSI Bridges Authority was authorized by the Governor of Indiana. The LSI Bridge's Authority was given the primary task of developing a new financial plan for the Project, which was submitted to the Kentucky Public Transportation Infrastructure Authority and Indiana Finance Authority for approval based on the authority vested in these agencies previously by their respective legislatures.

Through the establishment of this Agreement, a Joint Board and Tolling Body was created to facilitate and assist in the accomplishment of the Project. The Agreement also documents and defines the respective roles and responsibilities for the procurement, revenue-sharing, financing, designing, constructing, tolling, operation, and maintenance of the project.

In late 2011, Kentucky and Indiana, in consultation with the LSI Bridges Authority, determined the preferred approach for the delivery of the Project was for each state to take the lead in overseeing and financing construction of roughly one-half of the Project, with Kentucky responsible for financing and constructing the Downtown Crossing, and Indiana responsible for financing and constructing the East End Crossing.

A Bi-State Management Team composed of members from KYTC and the Indiana Department of Transportation, with representatives of the FHWA as non-voting, ex-officio members, has participated in the coordination of project-wide activities to date, created and continues to update the Project Management Plan, and provides oversight through monitoring and reporting on the Project's progress.

##### 3.1.2.1.2 Project Status

The Downtown Crossing project, which includes the new Abraham Lincoln Bridge, was procured using a design-build approach. The project was awarded in 2012 and completed in 2016.

The East End Crossing project, which includes the new Lewis and Clark Bridge, was procured using a design-build-finance-operate-maintain approach. The project was awarded in 2012 and completed in 2016.

### 3.1.2.2 Columbia River Crossing Interstate State Bridge on Interstate 5 (Washington/Oregon)

This Interstate Bridge is a pair of through-truss bridges over the Columbia River Crossing on I-5 between Portland, Oregon and Vancouver, Washington. A timeline of project developments is shown in **Figure 1**.

**Figure 1. Columbia River Crossing Overview**



Source: Secretary of State, Oregon Audits Division, Advisory Report 2019-07

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The original northbound bridge opened in 1917 and an identical companion southbound bridge opened in 1958. In 1999, a Bi-State Transportation Committee was created to review transportation issues across the metropolitan area, with representatives from the Washington and Oregon DOTs, key local governments, and transit organizations. The committee recommended a new crossing over the Columbia River.

In 2002, a 26-member I-5 Transportation and Trade Partnership Task Force was created by the two state legislatures which recommended various infrastructure projects, all of which were completed by 2017, except for the Interstate Bridge Project. In 2005, a 39-member Columbia River Crossing Task Force was established to take action on the previous task force's recommendations, advise on the project development process as well as identify transportation problems, potential solutions, and the criteria for evaluating those solutions. This led to a joint freeway megaproject to widen and modernize I-5 where it crossed the Columbia River.

#### **3.1.2.2.1 Funding, Activities, and Project Failure**

In 2004, a Memorandum of Understanding (MOU) was signed by both states describing how the responsibility for the initial costs was to be divided between the states, with the Oregon DOT dedicating an initial \$3.9M and Washington DOT dedicating an initial \$3M, with future funding sources and commitments to be determined.

In 2006, An Interstate Funding Agreement was signed by both DOTs. Tolling revenues were expected to repay bonds and/or a low-interest federal Transportation Infrastructure Finance and Innovation Act loan in the amount of \$0.90B to \$1.57B.

In 2013, the Oregon Legislature passed House Bill 2800, authorizing \$450M for the project. Washington, however, failed to pass legislation in the senate that would fund its \$450M portion of the project, ending Washington's involvement with the project. At this point, although no bridge had been built, cumulative expenditures had already reached \$188M.

In March 2014, the project ended without a bridge being built and with total expenditures at \$200M. Of this \$200M, \$139M were federal funds used for project planning, which had to be repaid by each state in 2014 since the project was not completed. The states collaborated to receive a five-year repayment extension.

#### **3.1.2.2.2 Project Status**

In May 2017, the Washington legislature passed Senate Bill 5806, initiating preliminary work to develop a process for planning to build a new bridge and inviting the Oregon legislature to join in the effort.

In April 2020, the Washington State DOT and Oregon State DOT executed an Interstate Funding and Administration Agreement for Initial Project Management, Organization and Staffing, Environmental Analysis, and Preliminary Engineering. This Agreement required the selection of a Program Administrator who reports to the Washington DOT Secretary of Transportation or Washington DOT designee and the Director of the Oregon DOT or Oregon DOT designee. A leadership team was also established for day-to-day management of the project making joint decisions following federally accepted laws and procedures, and individual state laws for contracting. The leadership team consists of the Program Administrator, one designated employee from Washington DOT, and one designated employee from Oregon DOT.

The Agreement provides that the project will be funded equally by resources provided by both states, whether from state, local or federal funds, utilizing the funds as they become available from each source. This cost sharing applies to both contracts and contract amendments. In addition, the contracting process may be conducted by either state. The Agreement continues to identify the terms for modifications, audits and inspections, record retention, storage, maintenance and access, public record handling, termination,

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assignment, third party beneficiaries, unsolicited proposals, severability, dispute resolution, legal relations, indemnification, survival, notice and counterparts.

Interstate Bridge Replacement Program officials are currently engaged in community outreach and planning and working to develop a recommended configuration for the project in preparation for the NEPA process.

### 3.1.2.3 Lebanon-Hartford I-89 (New Hampshire/Vermont)

This project is for the rehabilitation and widening of the Interstate 89 bridge over the Connecticut River between the towns of Lebanon, New Hampshire and Hartford, Vermont. The Interstate Agreement was signed by the two states on May 23, 2014. This agreement establishes that the New Hampshire Department of Transportation will prepare and administer the design and construction of the project, the division of costs between the two states, the scheduling of progress payments, and the right to inspection for the Vermont Agency of Transportation. The project is currently under construction and expected to be completed in 2025.

### 3.1.2.4 Additional Case Studies

Additional case studies in which a similar structure was utilized where the states create an interstate agreement between designated agencies without the agreement becoming law include the following:

- Glenn Jackson Memorial Bridge on Interstate 205 between Washington and Oregon (*completed in 1982*);
- Umatilla Bridges on Interstate 82 between Washington and Oregon (*completed in 1955 and 1988*); and
- Mississippi River Bridge on Interstate 74 between Iowa and Illinois (*opened to traffic in December 2021*).

## 3.1.3 APPLYING INSIGHTS TO BSB

There are a number of benefits to using an interstate agreement structure between state agencies for the development of infrastructure projects:

- This approach gives the parties more flexibility to make necessary adjustments as the project develops. By allowing the state agencies to manage and be accountable for the agreement, amending the agreement to respond to changing conditions is much less bureaucratic and allows the agencies to be nimble and adjust to the needs of the project without delay.
- This approach allows for expedited and efficient delivery as the process for negotiating and agreeing upon the interstate agreement is streamlined because it does not require specific additional state legislative or federal congressional approval.

Another aspect of an interstate agreement structure is that agencies who are party to the agreement have more flexibility to withdraw than if the agreement was codified into state or federal law. While the agreement is stable and can be enduring, it is an arrangement that is not as binding and enforceable as the codified compacts and may create some uncertainty as to what recourse would be available if one of the states fails to perform.

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## 3.2 INTERSTATE COMPACT ADOPTED BY STATE LEGISLATURES

### 3.2.1 STRUCTURE OVERVIEW

In an interstate compact adopted by state legislatures, each state's legislature first adopts the compact through legislation and then that compact legislation is approved by the Governor of each state. The legislation for each state is identical except for changes that may be needed in sections of each state's code to effectuate the compact. Many details of the compact are open to negotiation and are tailored specifically to the project including:

- Jurisdiction
- Number, term, salary, and expenses of commissioners
- Commission powers
- Quorums
- Borrowing authority
- Power/Procedures for fixing/changing tolls
- Police powers
- Applicable laws (i.e., which state's laws apply and when)
- Additional procedures to effectuate compact
- Other items as identified

The most recent transportation infrastructure related interstate compact adopted by state legislatures was the Midwest Interstate Passenger Rail Compact between Illinois, Indiana, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio and Wisconsin. This compact was started in the year 2000 when Illinois, Indiana, Minnesota, and Missouri adopted the compact, and was finalized with Ohio's adoption of the interstate compact in 2002.

### 3.2.2 CASE STUDIES

#### 3.2.2.1 Arkansas-Mississippi Great River Bridge Construction Compact on Interstate 69

##### 3.2.2.1.1 Background

In 1985, the Arkansas-Mississippi Great River Bridge Construction Compact was developed between Arkansas and Mississippi. The compact calls for interstate cooperation to maintain and operate a bridge and the approaches to the bridge across the Mississippi River and to oversee all operations inherent to the operation of the bridge. To implement this cooperation, the compact created an Arkansas-Mississippi Bridge Commission.

The Arkansas-Mississippi Bridge Commission was assigned the authority to plan, construct, maintain and operate the bridge and approaches for the Arkansas-Mississippi Great River Bridge. This authority included the oversight of the ferry operations within twenty-five miles of the bridge, the ability to acquire, hold and dispose of real or personal property, issue bonds, establish toll charges and perform all other necessary and incidental functions for the bridge.

The Arkansas-Mississippi Great River Bridge Construction Compact is only three pages long. The compact language is broad in nature and is focused on creating the structure for the commission. The commission is then responsible for determining how to proceed with planning, constructing, maintaining, and operating the bridge.

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Article VII of the compact authorizes and directs the commission to proceed with the planning and construction of the bridge and approaches as rapidly as may be economically practicable and vested the commission with all necessary and appropriate powers to do so. In 1985, Arkansas and Mississippi proceeded with adopting the compact into their own state laws.

### **3.2.2.1.2 Project Status**

While certain aspects of the project have been advanced, such as environmental reviews, right of way acquisitions and permitting, construction of the project has not advanced, in large part due to a lack of funding. The bridge was approved for funding by Congress in 2009 but has not yet been funded. The design for the bridge was completed in 2010. At that time funding for constructing the bridge was not available and the project has been on hold since 2011.

## **3.2.2.2 Wilson Bridge and Tunnel Compact for Interstate 495 and Interstate 95 (Virginia/Maryland/District of Columbia)**

### **3.2.2.2.1 Background**

The Woodrow Wilson Bridge and Tunnel Compact is between the Commonwealth of Virginia, the State of Maryland and the District of Columbia (DC). This compact was adopted in 1995 and established the National Capital Region Woodrow Wilson Bridge and Tunnel Authority (NCRWWBT Authority) to establish, finance, construct, maintain, repair, and operate the Woodrow Wilson Bridge and Tunnel project as set forth in the compact.

The NCRWWBT Authority is managed by a board of 13 members, four of whom are appointed by the Governor of Virginia, four of whom are appointed by the Governor of Maryland with the advice and consent of the Senate of Maryland, and four of whom are appointed by the Mayor of DC with the advice and consent of the Council of DC. The remaining member is appointed by the US Secretary of Transportation. One member from each party is an incumbent elected official. However, no other member can hold elective or appointive public office.

The NCRWWBT Authority established an office to conduct its affairs and publish rules and regulations governing the conduct of its operations. These rules and regulations must not be in conflict with applicable federal law on matters such as administrative procedures, open meetings, and public information.

The compact also identifies the financial authority to set up and operate tolling for the use of the project, for repayment of bonds and interest on bonds, and for reserves for such expenses. Any signatory may withdraw from the Compact with one year's written notice, which triggers termination of the Compact.

### **3.2.2.2.2 Project Status**

The Woodrow Wilson Bridge and Tunnel Compact focused on the construction of a new crossing of the Potomac River along I-495. An alternative to build a new 12-lane bridge crossing the Potomac River and widened the approach roadway to a 12-lane dual-divided beltway was ultimately selected and advanced by the parties to the compact. Construction began in October 2000, and the bridges were opened to traffic by 2008. Additional related interchange work was completed in 2014.

## **3.2.3 APPLYING INSIGHTS TO BSB**

There are a number of considerations to using an interstate compact structure adopted by state legislatures for the development of infrastructure projects:

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- Difficult for a state that is a party to the compact to withdraw from or terminate the arrangement since the compact is codified in law.
  - Provides a means to address any existing state laws that limit the procurement options for a large infrastructure project. If a state has adopted any laws that limit certain procurement options such as alternative delivery, design build, P3s or other procurement opportunities, or laws limiting funding options such as tolling limitations, an interstate compact could provide the tools necessary for each state to address the regulatory limitations while limiting those changes to the project identified in the compact.
  - Provides for limited flexibility to amend the compact to make necessary adjustments as the project develops because it is adopted as state law. Depending on the terms of the compact, there may be flexibility in the day-to-day management, however, to change or amend the compact framework itself is more difficult.
  - Potentially requires significant effort and time to develop and to codify into law, as it requires formal approval by multiple state legislatures. The process to implement such a compact is often more complex, and takes longer, than the process to agree and execute an interstate agreement.

### **3.3 INTERSTATE COMPACT APPROVED BY CONGRESS**

#### **3.3.1 STRUCTURE OVERVIEW**

In an interstate compact approved by Congress, each state's legislature adopts the compact through legislation. The legislation is identical for each state except for changes needed in sections of each State's code to effectuate the compact. The Compact legislation is approved by the Governor of each state, then is reviewed for congressional approval. Typically, an interstate compact sets forth specific procedures to effectuate the compact, which must be followed to make the compact binding, even if approved by Congress. Congressional consent of the compact may transform the interstate compact into federal law if the states complete the necessary action to effectuate the compact.

Similar to the interstate agreement and the interstate compact adopted by state legislatures, many details of the compact are open to negotiation and tailored specifically to the project including:

- Jurisdiction
- Type of Commission
- Number, term, salary, and expenses of Commissioners
- Commission powers
- Method of appointment/election and dismissal of Commissioners
- Scope of Responsibility
- Quorums
- Voting Requirements
- Rule Making Authority
- Borrowing authority
- Power/Procedures for fixing/changing tolls
- Taxing Powers and Ability to be Taxed
- Administration of Funds
- Police Powers/Enforcement Procedures
- Applicable laws (i.e., which state's laws applies, when)

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- Relationship to DOTs
  - Procedures to effectuate compact
  - Relationship to Local and State Permitting Requirements
  - Other items as identified

An interstate compact approved by Congress is typically utilized for the development, construction, maintenance, and operation of multiple infrastructure projects in a region or area. Most interstate compacts approved by Congress also create a separate entity to oversee the work and to collect and utilize revenues on additional infrastructure projects or improvements in the area rather than having these projects developed, delivered, managed, and operated by existing state agencies such as the state DOTs. However, this is not required; an interstate compact approved by Congress can be utilized for any interstate infrastructure project.

### **3.3.2 CASE STUDIES**

#### **3.3.2.1 New York New Jersey Port Authority**

The New York New Jersey Port Authority (NYNJ Port Authority) was created to improve the coordination of transit between New Jersey and New York and received congressional approval in 1921. The NYNJ Port Authority works to achieve coordination with regional terminals and other transportation facilities and is its own transportation agency.

The compact created a Board of Commissioners to oversee the NYNJ Port Authority. This board consists of twelve commissioners, six resident voters from New York and six resident voters from New Jersey. In addition, because the Port Authority is structured as its own entity, the compact calls for the creation of officers and identifies the operations for each position and employee.

As an interstate agency, the Port Authority is a financially self-supporting entity for the past 100 years. It does not receive tax revenue from either New York or New Jersey but relies primarily on revenue generated from facility operations including tolls from its bridges and tunnels, user fees from the airports and bus terminals, fares on its rail transit system, and rent from facilities, consumer services, and retail stores. The NYNJ Port Authority is a truly independent, self-supporting agency focused on the planning and delivery of major infrastructure projects in the region. Typically, these projects are large enough that the individual states could not have developed them on their own. The NYNJ Port Authority has planned and executed numerous infrastructure and structures projects since its inception.

#### **3.3.2.2 Potomac Highlands Airport Authority Compact (Maryland/West Virginia)**

In 1976, the Potomac Highlands Authority was created to provide a structure for local governments in Maryland and West Virginia to coordinate air transportation facilities regionally. The compact remained dormant until 1990 when an Intergovernmental Agreement was signed by both governors to activate the compact. In 1998, Congress then adopted the Potomac Highlands Airport Authority Compact to transfer operations to the Authority, create a governing board, and define the amount of funding expected from each state.

The Potomac Highlands Airport Authority Compact was the most recent interstate compact approved by Congress focusing on transportation infrastructure. Additional interstate compacts approved by Congress have been adopted since 1998, however these compacts focused on interstate boundaries, fire protection, and river basins.

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### 3.3.2.3 Additional Case Studies

#### 3.3.2.3.1 Bi-State Development Compact (Illinois/Missouri)

In 1949, Illinois and Missouri created the Bi-State Development Compact to serve and enrich the region including planning interstate highways, operating a power plant, and reducing pollution in the Mississippi River. Today, the agency manages the regional public transportation system and local airports, constructed the tram system for the Gateway Arch, and converted the unused rails into a light-rail system.

#### 3.3.2.3.2 Delaware River Toll Bridge Compact (New Jersey/Pennsylvania)

The Delaware River Toll Bridge Compact was created in 1935 to establish a commission to oversee the construction, operation and management of both free and toll bridges over the Delaware River between New Jersey and Pennsylvania. The commission was established to create a single agency empowered to further the transportation interests of both states within a specific area of the Delaware River.

### 3.3.3 APPLYING INSIGHTS TO BSB

There are several considerations to using an interstate compact structure approved by Congress for the development of infrastructure projects:

- Best ensures the compact cannot be unilaterally terminated by a state as the compact becomes federal law, superseding any inconsistent state law. It is also likely more enforceable than alternatives and allows for clearer recourse for dispute resolution and remedies.
- Provides a means to address any existing state laws that limit the procurement options for a large infrastructure project. If a state has adopted any laws that limit certain procurement options such as alternative delivery, design build, P3s or other procurement opportunities, or laws limiting funding options such as tolling limitations, an interstate compact approved by Congress could provide the tools necessary for each state to address the regulatory limitations while limiting those changes to the project identified in the compact.
- Typically creates a separate single entity with the unilateral authority to make and execute decisions necessary to develop and deliver the projects it has jurisdiction over, which allows for a certain amount of flexibility and autonomy to manage the project(s).
- Signals a special importance for a project that may help energize market interest and provide momentum for the delivery of the project.
- Requires significant effort and time to develop and to codify into law, as it requires formal approval by Congress. The process to implement such a compact is often more complex, and takes longer, than the process to agree and execute an interstate agreement or an interstate compact adopted by state legislatures.
- Potential to create a separation between the project organization and the state DOTs, which could limit the involvement of the state in the project and could make it more difficult to make any changes to the compact.

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## 4. RECOMMENDATIONS, DETERMINATIONS AND NEXT STEPS

### 4.1 RECOMMENDATIONS AND DETERMINATIONS

The states have agreed to the governance structure and several other recommendations associated with the project. The following recommendations and determinations assume the states will receive sufficient federal funding through the IIJA to build the project without toll financing. If the availability and accessibility of sufficient funds are not obtained by either state to build the project without toll financing, the recommendations will be re-evaluated. It is recommended that the project advance under the following structure:

- a. **Governance Structure:** The project should be advanced under an Interstate Cooperative Agreement executed by both Governors. This recommendation is based on two primary considerations: the quickest time to enact the governance structure and allowing an existing agency to manage and lead the effort.
- b. **Lead Agency:** The Ohio Department of Transportation will remain as the lead agency in delivering the project.
- c. **Project Limits:** The limits of the project will be as described in the original NEPA decision or any future re-evaluation.
- d. **Project Financing Structure:**
  - i. This project will be a completely public project and will not utilize a public-private-partnership as part of the delivery.
  - ii. All preliminary engineering, environmental re-evaluation, financial analysis, procurement support, and any other necessary activities required to get through project procurement shall be equally shared between Ohio and Kentucky.
  - iii. Each state shall be responsible for property acquisition and costs in their respective state.
  - iv. Each state shall be responsible for utility relocation costs in their respective state.
  - v. Each state will be responsible for all design, construction, construction engineering, construction inspection, and program management costs within their state except for the costs associated with the new companion main river crossing bridge, which will be shared equally between the states.

### 4.2 NEXT STEPS

To advance, finalize and formally adopt an Interstate Cooperative Agreement between Ohio and Kentucky for the Brent Spence Bridge project as recommended, the following immediate steps should be completed:

- Execute a Sixth Supplement of the Memorandum of Agreement for the project to direct the Bi-State Management Team (BSMT) to prepare and have executed the Interstate Cooperative Agreement and to obtain consultant support to assist the BSMT during procurement of a design-build contract for the project.
- Each state to engage legal counsel to develop the Interstate Cooperative Agreement.

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- Each state to engage one or more external counsel with strong knowledge of the laws of Ohio and Kentucky to ensure compliance with local law requirements and address local law issues, including to assist in structuring governance arrangements that are permissible under existing state law and to assist in obtaining any required authorizations.
  - Execute the Interstate Cooperative Agreement.

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## 5. ACRONYMS

Acronym	Definition
BSB	Brent Spence Bridge
BSMT	Bi-State Management Team
DC	District of Columbia
DOT	Department of Transportation
FHWA	Federal Highway Administration
FONSI	Finding of No Significant Impact
IJA	Infrastructure Investment and Jobs Act
KYTC	Kentucky Transportation Cabinet
LSI	Louisville Southern Indiana
MOU	Memorandum of Understanding
NCRWWBT Authority	National Capital Region Woodrow Wilson Bridge and Tunnel Authority
NEPA	National Environmental Policy Act
NYNJ Port Authority	New York New Jersey Port Authority
ODOT	Ohio Department of Transportation
VPD	Vehicles Per Day

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