Memorandum

TECHNICAL SERVICES
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TO: Scott Adams, Region 3 Local Government Liaison
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File Code:

FROM: John Raasch, Environmental Resources Unit Manager

SUBJECT: Environmental Permitting for Fund Exchange Projects

ODOT is transitioning into new approaches for delivery of Local Public Agency (LPA) transportation projects. One approach is the use of a fund exchange to provide LPA projects state dollars instead of FHWA dollars, removing ODOT and FHWA from the project delivery process for these projects. This memo provides information and considerations for environmental permitting; including factors to consider when determining which projects are good candidates for fund exchange.

Considerations:

1. Endangered Species Act (ESA): The take (harm, harass, injure, kill…) prohibitions in ESA apply to all citizens and organizations regardless of the presence or absence of a federal nexus (e.g. a federal permit, funding, or use of land).
2. National Environmental Policy Act (NEPA): Rules for NEPA project classification and process vary substantially between federal agencies. ODOT and FHWA have worked extensively to streamline NEPA compliance. If a project triggers a nexus with another federal agency and there is no FHWA involvement, the project will be subject to the NEPA rules and processes of the acting federal agency. This can add delay and increase costs.
3. Environmental Permitting: Generally speaking, if a LPA triggers a federal nexus through an agency other than FHWA or the U.S. Army Corps of Engineers (Corps), environmental permitting will be less efficient and more expensive.
4. Typical non-FHWA federal agencies creating a nexus on transportation projects include: National Marine Fisheries Service, Corps, Bureau of Land Management, U.S. Forest Service, U.S. Fish and Wildlife Service, Environmental Protection Agency, Federal Emergency Management Agency, Bureau of Indian Affairs, etc.

Fund Exchange Criteria:

From an environmental permitting perspective, LPA projects that are good candidates for delivery with state funds will be those that:

1. Have not received FHWA/ODOT regulatory permits (FAHP, Corps, Section 106) or are early in the PE design phase.
2. Have time to switch to a non-federal permitting process (replace FAHP with SLOPES, etc.).

3. Do not have in-water work or riparian vegetation impacts in streams with ESA listed fish, unless they will obtain a Section 404 fill permit from the Corps and use the SLOPES ESA (NMFS species) programmatic.
4. Do not trigger a federal nexus, except a Corps nexus for ESA permitting with NMFS.
5. Can treat stormwater to NMFS requirements. NMFS publically considers untreated stormwater to cause take.
6. Will not result in take of ESA listed aquatic or terrestrial wildlife species (except as mentioned above for use of the SLOPES ESA programmatic for NMFS species).
7. Do not significantly affect cultural or natural resources important to tribal governments.

Transition:

1. LPA projects without direct FHWA oversight for all design and construction phases are not eligible to use the FHWA/ODOT programmatic permits/agreements (PA). This includes the ESA and cultural resources programmatics.
2. ODOT/FHWA can withdraw applications/permits for projects that began development as federal aid projects and are now being switched to state funds only. This will be sensitive with our regulatory partners, so ODOT should strive to limit the number of projects taking this action and clearly communicate that this is an interim measure as we transition to the expanded fund exchange program. We don't want to be seen by regulatory agencies as trying to avoid environmental considerations on one class of projects.
3. Need to develop explicit and detailed environmental guidance to LPA's for fund exchange projects. Regulatory agencies see ODOT as one entity and a trusted partner. We will be asked to demonstrate how we are ensuring that LPA's understand the environmental requirements that apply to their projects.
4. ESA compliance will be challenging as the take prohibitions apply to all projects and we have listed species present on most project sites.
5. NMFS considers untreated stormwater to cause take. LPA projects will need to continue to meet NMFS criteria for stormwater treatment or consult under Section 7 (requires a federal nexus) and try to negotiate something different.
6. Need to communicate clearly with regulatory partners on the rational for and intent of the fund exchange program.

Recommendation:

As part of the decision making process for identifying fund exchange projects, consult with an experienced Region Environmental Coordinator regarding the project scope and anticipated environmental permitting requirements. Recommend that all projects be initially scoped as federalized projects.

Recommend that ODOT implement an audit process to periodically evaluate delivery processes and results on exchange projects. This would be intended as a continuous processes improvement and teaching tool.