



Geo-Environmental Section

Advisory

TOPIC

Environmental Documentation for State Funded Projects

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Topic

This advisory provides guidance to Region management, project leaders, and environmental staff regarding environmental analysis and the project development process for state funded projects.

An environmental scoping and analysis process which does not differentiate between state and federal funding (or other possible federal nexus) will provide a consistent and cost effective method to ensure appropriate environmental regulatory compliance for all projects

Advisory Information (use additional pages if needed)

Due to the high potential for a state-funded transportation project becoming "federalized" at any point in the project development or construction process, it is recommended that environmental scoping and analysis be conducted as if federal funds or other federal nexus are involved. Supporting information includes:

1. A federal nexus is a determination that at least one federal agency is involved as a proponent of a specified proposal and/or as an agency that needs to act on a federal permit, license, or other entitlement (such as a request to use federal funds or federal land) needed to implement the proposal. The existence of a federal nexus (even on an otherwise non-federal proposal) typically triggers the need for the federal agency or agencies to comply with various federal statutes including but not limited to NEPA, Section 106 of the Historic Preservation Act, Section 4(f) of the Department of Transportation Act, Section 6(f) of the Land and Water Conservation Fund Act, and Section 7 of the Endangered Species Act. (WSDOT Environmental Procedures Manual M 31-11, Section 300.6)
2. State projects may become federalized (federal nexus) during a project's life due to a variety of actions taken independently during the project development and

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implementation process. Normally the driver of federalization is the addition of federal funds. Some common circumstances may include overages from other federalized projects being transferred into the project; direct earmarking of federal dollars via ODOT administration; and congressional earmarks being made at the behest of local constituencies.

3. In addition to using federal funding, federalization can occur when the project impacts a resource which requires a federal permit, approval or clearance, or the project is within or requires the use of federal land.
4. Using federal standards to scope and conduct environmental analysis provides a level of flexibility which improves the chances that a project can continue uninterrupted when a state-funded project becomes federalized.
5. The scoping and reporting tools for state and federal projects are virtually the same (the Part 3, the checklist, the Closeout forms, and the Environmental Commitment Tracking Tool). The identical information, regardless of the project's status, is collected using the same tools. Creating a second set of tools for state only projects could be construed as being wasteful, duplicative, and confusing.

### **Background**

When does a project become federalized? According to the American Public Works Association there is no clear identification when a project becomes federalized and subject to federal laws and regulations. Different interpretations by the Federal Highway Administration (FHWA) and State Transportation personnel vary from "when federal funding is planned to be sought to when funding is accepted".

In a 2001 Tennessee Case (Southwest Williamson County Community Association v. Slater, et al ), the US Sixth Circuit Court of Appeals defined two alternative tests for determining whether a non-federal project might actually constitute a major federal action to the extent that NEPA requirements are applicable. The two tests included:

- a. When the non-federal project restricts or limits the statutorily prescribed federal decision-makers' choice of reasonable alternatives; or
- b. When the federal-decision makers have authority to exercise sufficient control over the non federal project so as to influence the project's outcome.

Unlike the Sixth District, the US Ninth Circuit Court of Appeals recognizes "no clear standards" to determine what transforms a non-federal project into a federal action. A review of case law by the Oregon Attorney General's office (Justice-#2931989-v1-NEPA\_Summary.DOC) notes that "Even if federal action impacts a non-federal project, the non-federal project may not constitute a federal action if:

1. The project can proceed regardless of a federal agency's decision to issue or deny a permit or funding;
2. The federal action only affects a limited and discrete aspect of the non federal

- project, it can still move forward on its own without NEPA clearance;
3. The non-federal project has already received approval from another federal agency and undergone NEPA review. Further NEPA review by a different Federal agency for the same project is not required;
  4. Federal funding of the project covers only a small portion of the anticipated expenditures for the non-federal project. Case law suggests that if the federal project contribution constitutes 10 % or less of the total project's costs a NEPA review may not be required; or
  5. Federal approval occurs on a non-discretionary basis because federal law or regulation requires the federal agency to intervene."

On the other hand there are situations where a non-federal project could become a federalized action if a federal agency :

1. Contributes substantial funding to the project.
2. Issues discretionary permits or opinions required for the project, or
3. Retrains authority to approve some or all of the non-federal action.

While no clear-cut rule exists a major federal action may arise where federal and non-federal cooperation transcends financial support and includes open and persistent collaboration. Such activities could suggest a major federal action.

### **Risk Assessment**

While Region Management and Project leaders can decide to develop state-funded projects to meet only state regulatory compliance requirements, it is important to consider the potential consequences of this decision.

### **Risks may include:**

Case law suggests that the use of a NEPA based analysis during project development for all state and federally funded projects may avert potential litigation under the National Environmental Policy Act.

Special circumstances that were cited under category b of *Southwest Williamson County Community Association v. Slater* could trigger a federal nexus including:

1. Impacts to National Register or eligible properties;
2. The use of lands from public parks, recreation areas, designated forests or wildlife management areas;
3. Work requiring a Coast Guard Permit or a US Army Corps of Engineer (USACE) 404 permit;
4. Construction in, across or adjacent to a National, Wild or Scenic River;
5. Work encroaching on a regulatory floodway or water course;
6. Work in wetlands;
7. Disposal of surplus right-of-way obtained with Federal Highway dollars;

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8. Change in access control;
9. Acquisition, disposal, or construction on known or potential hazardous material sites; and
10. A potential impact to federally listed endangered species.

- According to the Oregon Attorney General's Office, the Ninth Circuit considers the extent of federal funding for a non-federal project and the degree of control that the federal agency can exert over the project. Case law suggests the court considers "all facts and circumstances surrounding the relationship between federal and non-federal actors." Provided that a project meets these criteria the project may not fall under NEPA. However, these criteria are based on case law and maybe subject to continued judicial review and interpretation.
- Conducting environmental scoping and analysis to only a state standard could result in time lost due to the rework involved in additional scoping and analysis as required by NEPA. The fine line drawn by the Ninth Circuit could be crossed unintentionally through the project development process thus throwing the project into a federalized situation.
- The current NEPA based approach allows both state and federal agencies to freely engage and interact in ODOT's project development process by utilizing methods and procedures under NEPA. The federal process is in part built on encouraging a level of transparency and access to the environmental process.
- The use of a state based environmental process for local agency transportation agencies could jeopardize their access to federal dollars if they suddenly become available through a Federal earmark or Congressional intervention.

Utilizing a "state only system" could result in confusion and wasted effort with ODOT and its agency partners. It may also result in a reduced level of trust between state and federal partners. A state only process may ultimately cause state agencies to develop their own procedures, including their own administrative rule making, to ensure that they have a seat at the transportation table.

### *Target Audience*

Region Managers, Project Team Leaders, Environmental Staff

### *Contact Information*

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