

## Section 417 - Re-Evaluations and Supplemental NEPA Documents

### Understanding NEPA Re-evaluations

A re-evaluation is a review conducted by ODOT and FHWA<sup>1</sup> to determine whether an approved NEPA document or decision remains valid for decision-making.

Although re-evaluations are not explicitly required under NEPA (42 USC 4321) or by the Council on Environmental Quality (CEQ) regulations ([40 CFR 1500-1508](#)), FHWA's NEPA implementing regulations set forth re-evaluation requirements, including requirements for written evaluations of Environmental Impact Statements (EISs) ([23 CFR 771.129 \[a-b\]](#)) and consultation procedures for other types of NEPA decisions, including Categorical Exclusions (CEs), Findings of No Significant Impacts (FONSI), and Records of Decision (ROD) ([23 CFR 771.129 \[c\]](#)).

#### § 771.129 Re-evaluations.

The Administration must determine, prior to granting any new approval related to an action or amending any previously approved aspect of an action, including mitigation commitments, whether an approved environmental document remains valid as described in this section.

- (a) The applicant must prepare a written evaluation of the draft EIS, in cooperation with the Administration, if an acceptable final EIS is not submitted to the Administration within three years from the date of the draft EIS circulation. The purpose of this evaluation is to determine whether or not a supplement to the draft EIS or a new draft EIS is needed.
- (b) The applicant must prepare a written evaluation of the final EIS before the Administration may grant further approvals if major steps to advance the action (e.g., authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications and estimates) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Administration approval or grant.
- (c) After the Administration issues a combined final EIS/ROD, ROD, FONSI, or CE designation, the applicant must consult with the Administration prior to requesting any major approvals or grants to establish whether or not the approved environmental document or CE designation remains valid for the requested Administration action. These consultations will be documented when determined necessary by the Administration.

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<sup>1</sup> A re-evaluation is conducted by the Lead Federal Agency (FHWA, FTA, FRA) or a State transportation agency with authority to conduct NEPA reviews or make CE determinations under 23 U.S.C. 327, 326 or 23 CFR 771.117. This document is applicable to ODOT projects that typically have a FHWA nexus and therefore refers only to FHWA and ODOT.

A re-evaluation is a continuation of the project development process that does not automatically re-open the NEPA decision but instead comprises ODOT and FHWA's review of any changes and new information regarding the project to determine whether the NEPA document or decision remains valid for Agency decision-making.

The determination of a re-evaluation is that the NEPA decision or document and project findings for related laws and authorities are still valid or that additional analysis is required. A re-evaluation provides evidence for the FHWA to determine whether the preparation of an additional or supplemental NEPA document is necessary to advance the project to the next stage but does not serve as a supplemental analysis and NEPA document required pursuant to [23 CFR 771.130](#).

## Re-evaluation Roles and Responsibilities

FHWA is responsible for determining whether the conditions for re-evaluation have been met or there is a need for new or supplemental documentation (23 CFR 771.129 and 23 CFR 771.130). FHWA also determines the information and level of documentation needed for the re-evaluation in coordination with ODOT. ODOT is responsible for providing FHWA with accurate and relevant information regarding project changes or new circumstances that could affect the validity of the NEPA document or decision.

Per the conditions of a Programmatic Categorical Exclusion (PCE) Agreement, ODOT processes PCE projects on behalf of FHWA. Therefore, ODOT approves re-evaluations of PCE Agreement projects, while FHWA OR Division approves all other re-evaluations.

## Re-evaluation Timing and Triggers

A re-evaluation can occur at any point after approval of a project's NEPA document (e.g., draft or final EIS) or decision ((e.g., ROD, combined final EIS/ROD, FONSI, or CE designation), but only to the extent there are remaining Federal approvals for the project.

There are four triggers resulting in the need to conduct a re-evaluation:

1. Three years or more have passed since circulation of a Draft EIS and a Final EIS has not been submitted to FHWA (23 CFR 771.129 [a]);
2. Three years or more have passed since approval of the Final EIS (or other major FHWA approval) and major steps to advance the action have not occurred (23 CFR 771.129 [b]);
3. Project is proceeding to the next major federal approval<sup>2</sup> (23 CFR 771.129 [c]); and

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<sup>2</sup> "Major federal approvals" include those associated with the release of federal funds for a specific phase of the project and/or FHWA approval of Contract Change Orders.

4. Project changes.

## ***Three-year timeline for an EIS***

In accordance with 23 CFR 771.129(a-b) and [FHWA Technical Advisory 6640.8A](#), a written evaluation of a draft EIS is required if the final EIS has not been submitted to FHWA within three years of the circulation of the draft EIS. A written evaluation of a final EIS is required when there is a request for further FHWA approvals and major steps to advance the project (e.g., authority to acquire a significant portion of right-of-way or to undertake final design) have not occurred within three years of the approval of the final EIS, final EIS supplement, or the last major FHWA approval.

## ***Project Proceeding to Next Federal Approval***

In accordance with 23 CFR 771.129(c), after a NEPA decision has been rendered (that is, a final EIS/ROD, ROD, FONSI or CE designation), ODOT must consult with FHWA prior to requesting any major approvals or grants to determine if the decision remains valid for the action. This type of re-evaluation is referred to as a re-evaluation consultation. This type of re-evaluation is referred to as a re-evaluation consultation and it is not required to be documented in writing unless directed to do so by FHWA.

## ***Project Changes***

Although project changes are not specifically listed in 23 CFR 771.129 (a-c), they are treated as a re-evaluation trigger because addressing project changes proactively can avoid project delivery delays. For the purposes of this guidance, the term “project change” includes, but is not limited to:

- Changes to the project’s design, scope, or area of potential impact (API);
- Changes to the affected environment, including land use changes or changes that have affected resource boundaries, delineations that are more than 5 years old, changes in listed species, or historic properties becoming eligible since the original evaluation;
- Changes to the analysis and/or methods used since the original NEPA document or decision;
- Changes to nature of severity of anticipated impacts;
- Changes in applicable environmental laws and regulations;
- New information relating to the NEPA document or decision;
- Modifications to construction methods; and/or
- Changes in mitigation or environmental commitments.

When a re-evaluation is being prepared after approval of a NEPA document to address project changes, the re-evaluation should ideally be timed to address all project changes ahead of the next federal decision to help reduce the number of re-evaluations. This may not be possible in every case and ODOT's Region environmental staff should coordinate with the ODOT NEPA Program to determine appropriate timing and approach based on project-specific circumstances.

## Re-evaluation Documentation

FHWA regulation and guidance regarding re-evaluations focuses on when and why re-evaluations should be considered and prepared, with limited detail about the content or format of the re-evaluation documentation. This allows for flexibility in the process to determine what should be considered and documented, while avoiding superfluous or extraneous details. Although the regulations address the need for written re-evaluation for EISs in specific instances, this does not mean that other re-evaluations should not be documented. The analysis and documentation in a re-evaluation should focus on and be commensurate with the situation resulting in the need for a re-evaluation. For example, if a re-evaluation is required and no substantial changes to the affected environment or anticipated impacts have occurred since approval of the NEPA document or decision, then the analysis and documentation should be minimal. For more complex changes or controversial projects, additional analysis may be warranted to determine if the original NEPA document or decision remains valid. Field reviews, additional environmental studies (as necessary), and coordination with other agencies should be undertaken as appropriate to analyze any new impacts or issues and to address outdated information. In these situations, the results could be included in a technical memorandum complete with attachments. In either situation, the re-evaluation should be concise and focused on determining and documenting whether the original NEPA document or decision remains valid.

ODOT's documentation for re-evaluations is based on the type of NEPA document or decision being re-evaluated:

- ***FHWA and Oregon DOT PCE / CE Re-evaluation Documentation form*** ("PCE/CE Re-evaluation Form", ODOT Form # XXX) is used to document re-evaluations of PCEs and CEs; and
- ***FHWA and Oregon DOT EA/FONSI or EIS/ROD Re-evaluation Documentation form*** ("EA/FONSI/EIS/ROD Re-evaluation Form", ODOT Form # XXX) is used to document re-evaluations of an Environmental Assessment (EA)/FONSI, EIS, or ROD.

These forms have been designed to clearly document the reason for the re-evaluation, any project changes and changes to environmental impacts or mitigation (as applicable), and the

conclusion, or determination, of the re-evaluation (i.e., whether the original NEPA document or decision remains valid). The appropriate form should be completed for each re-evaluation as discussed below.

## Re-evaluations of PCEs and CEs

ODOT documents re-evaluations of PCEs and CEs using the PCE/CE Re-evaluation Form. However, not every PCE and CE re-evaluation must complete the form. When ODOT approves PCEs and FHWA approves CEs very close in time to the project going to PS&E, there is a relatively short timeframe and few (if any) project changes between the approval of a PCE or CE and request for FHWA construction authorization. Therefore, completion of the PCE/CE Re-evaluation Form is only required when:

1. Substantive project changes require a re-evaluation; and/or
2. Project is proceeding to the next major federal approval and more than one year has passed since ODOT approval of the PCE or FHWA approval of the CE.

In the context of this guidance, “substantive project changes” include changes that could result in impacts not discussed in the original PCE or CE documentation or a change to findings for related laws and authorities. For example, changes to the project’s API, changes in listed species, or historic properties becoming eligible since the original evaluation would be considered substantive and require completion of the PCE/CE Re-evaluation Form.

An ODOT Qualified Preparer<sup>3</sup> meeting the minimum qualifications detailed in Section IV.A.8.a-c of the [PCE Agreement](#) should prepare the PCE/CE Re-evaluation Form. When the re-evaluation is required due to project changes, ODOT Region environmental staff should coordinate with the ODOT NEPA Program to determine information and level of analysis needed for the re-evaluation, including whether some form of public involvement is appropriate and/or additional consultation with Federal or state resource agencies is warranted. For re-evaluations of CEs, ODOT region and Program staff will coordinate with FHWA to discuss and confirm needed information and level of analysis. Evaluation of the effects of project changes should be conducted or approved by the appropriate ODOT resource/discipline specialist. The focus of the re-evaluation should be on confirming that the conditions for the CE or PCE are still met and that significant impacts and/or unusual circumstances still will not occur. Where there are changes in compliance status, the re-evaluation should also demonstrate compliance with applicable environmental laws and regulations.

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<sup>3</sup> Consultants and staff from local governments are not Qualified Preparers or Approvers; an ODOT Qualified Preparer is responsible for the content and for approving any draft PCE/CE Re-evaluation Form documents prepared by a consultant.

When complete, the PCE/CE Re-evaluation Form must be signed electronically (Adobe signature) by the Qualified Preparer, a Qualified Approver (an ODOT Region Environmental Manager (REM) or their designated staff such as the Environmental Lead, or other Qualified Preparer), and the FHWA OR Division Environmental Program Manager (for CEs only). Re-evaluations of PCEs are processed and approved by ODOT; no FHWA review or approval is required. Re-evaluations of CEs require review and approval by the FHWA OR Division Environmental Program Manager. Re-evaluations that require FHWA approval must be reviewed by ODOT NEPA Program staff prior to submittal to FHWA.

The PCE/CE Re-evaluation Form and all supporting documentation and attachments should be filed in the project's Environmental folder in ProjectWise. A copy of the PCE/CE Re-evaluation Form and any attachments should also be added to the project's existing PCE Project set in the CE\_PCE\_NGD\_Projects folder. See [Section 427 of the NEPA Manual](#) for more information about storing documents in ProjectWise.

## Re-evaluations of EA/FONSI and EIS/RODs

When the re-evaluation of an EA, FONSI, EIS, or ROD is triggered per the [Re-evaluation Timing and Triggers](#) section above, ODOT will document the re-evaluation using the EA/FONSI/EIS/ROD Re-evaluation Form. Where a "written re-evaluation" is required per 23 CFR 771.129 (a-b), the EA/FONSI/EIS/ROD Re-evaluation Form will serve as the written re-evaluation unless another format is agreed to by ODOT and FHWA OR Division.

Given the varying levels of potential complexity and controversy for projects with an EA, FONSI, EIS, or ROD, ODOT region environmental staff should coordinate with the ODOT NEPA Program and FHWA OR Division early in the re-evaluation process to discuss the approach to any additional analysis and the need for public involvement and consultation with Federal or state resource agencies. Evaluation of the effects of project changes should be conducted or approved by the appropriate ODOT resource/discipline specialist.

When complete, the EA/FONSI/EIS/ROD Re-evaluation Form must be signed electronically (Adobe signature) by the ODOT Preparer (typically an ODOT EPM), an ODOT Approver (an ODOT REM or their designated staff such as the Environmental Lead). Re-evaluations of EAs, FONSI, EISs, or RODs also require review by the FHWA OR Division Environmental Program Manager and approval by the FHWA OR Division Administrator. Prior to being signed by an ODOT Approver and submittal to FHWA, re-evaluations of EAs, FONSI, EISs, or RODs must be reviewed by ODOT NEPA Program staff.

The EA/FONSI/EIS/ROD Re-evaluation Form should be treated as part of the project file. Although it is not required that the re-evaluation be published, it may be made available



consistent with the Freedom of Information Act and/or Oregon public records law. In some cases, it may be appropriate to include the re-evaluation online on a project website or in another publicly available format. This decision will be made on a case-by-case basis in consultation with FHWA OR Division.

## Re-evaluation Determination and Need for Additional or Supplemental NEPA Documentation

The determination of a re-evaluation is that the NEPA decision or documentation is valid or that additional analysis is required. Examples of re-evaluation findings or determinations that indicate a previous NEPA decision or document is no longer valid include (but are not limited to):

- Identification of significant environmental impacts not previously evaluated;
- Identification of a substantive increase in previously identified adverse environmental impacts;
- The purpose or need for the project has changed;
- A shift to an alternative that was not fully evaluated in an approved final EIS;
- An environmental commitment necessary to mitigate a significant environmental impact cannot be implemented; and/or
- Conditions for a CE or PCE are no longer met.

A re-evaluation does not serve as additional or supplemental NEPA document per 23 CFR 771.130, but rather provides evidence for determining whether the preparation of new PCE or CE or supplemental EA or EIS is necessary.

When the re-evaluation is complete and ODOT and FHWA have determined that the NEPA document or decision is no longer valid, further coordination between the ODOT Region environmental staff, ODOT NEPA Program, and FHWA OR Division is required to determine the type of additional or supplemental NEPA document required. FHWA is the final authority for determining the need for supplemental documentation (23 CFR 771.129 and 771.130).