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#### **Authors**

Gundersen, Heather  
Heilman, Jeff

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## **REGULATORY COMPLIANCE ON MULTISTATE AND MULTIMODAL PROJECTS: BRIDGING THE GAPS BETWEEN STATES AND AMONG NEPA CO-LEADS**

**Heather Gundersen** (360-816-2199, gundersen@columbiarivercrossing.org), Environmental Project Manager, Columbia River Crossing Project, Oregon Department of Transportation, 700 Washington Street, Vancouver WA 98660, Fax: 360-737-0294 USA

**Jeff Heilman** (503-736-4806, jheilman@parametrix.com), Director of Environmental Planning, Parametrix, 700 NE Multnomah, Suite 1000, Portland, OR USA

**Abstract:** The I-5 Columbia River Crossing (CRC) project is a highway and transit project located on Interstate 5 (I-5) along a five mile corridor between Vancouver, Washington and Portland, Oregon. Spanning two states, cities and counties, the CRC project has many different jurisdictional boundaries that can include different ideologies, requirements, and established practices. Two Metropolitan Planning Organizations and transit organizations also play a primary role for the transit side. In total, the project has eight project sponsors, including the Oregon and Washington Departments of Transportation.

The project includes both major highway and major transit elements, and therefore two federal lead agencies – the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) – jointly oversee the National Environmental Policy Act (NEPA) process. The federal co-lead status for developing the Environmental Impact Statement (EIS) often presents challenges that will be discussed. On the regulatory side there are obvious complications from the bi-state nature of the project because each state has its own regulations and policies that can be inconsistent and sometimes contradictory to the other. The purpose of this paper is to explain the CRC approach to environmental streamlining for the NEPA process and the lessons learned that could apply to complex or even smaller transportation projects.

### **Project Challenges**

The complex structure of this project with two states, two United States Department of Transportation lead agencies and two major transportation modes, create some of the key regulatory and NEPA challenges for this project. It is further challenged by a high public profile and an ambitious schedule. These demands have led the project to develop innovative and efficient measures for combining and balancing disparate and sometimes conflicting requirements and objectives in the environmental process.

### **CO-NEPA Leads**

FTA and FHWA are co-lead agencies for the NEPA process of CRC. While a co-led project is not new, it is uncommon and introduces complexities as the project must follow the regulations and policies of both agencies and determine appropriate reconciliation for discrepancies or contradicting direction. For a large project such as CRC that already faces additional complexities, advanced consideration of potential differences, and predetermined approaches for dealing with these, were necessary to meet the project's ambitious schedule. The primary technique for determining and addressing potential differences in co-leads' expectations and policies were the development of Methods and Data Reports (MDRs) that specify how each Technical Report will be prepared. Letters of deferral have also been used to consolidate key interagency processes.

An MDR was recently drafted for each Technical Report discipline that will be prepared in support of the Draft EIS. Each MDR defines regulations and policies applicable to the respective discipline, and data sources and methodologies for identifying direct, indirect and cumulative effects within that discipline. Technical specialists and management staff from FTA and FHWA reviewed each MDR and provided feedback to the project team. The final drafts of these reports memorialize an approach for fully satisfying the policies and expectations of both agencies.

FTA and FHWA have different experience and approaches for complying with federal regulations such as the Clean Air Act (CAA) and the Endangered Species Act (ESA). Reconciling these differences was expedited by establishing which of the co-lead agencies would lead the process of determination of compliance with these regulations. Thus far, FTA has deferred the consultation process of Section 7 of the ESA, conducting conformity analysis under the CAA and 4(f) documentation. In each case, deferral simply determines the project's process of ensuring compliance and does not change or remove legal obligations of the co-lead agencies.

FHWA and FTA also differ in how they address project funding during the NEPA process. FTA administers the New Starts process (Section 5309) for funding major transit investments, and integrates a portion of the New Starts analysis and documentation with the NEPA process. FHWA's NEPA process does not integrate any such analysis. Travel demand, traffic analysis, and costs are extremely important in the New Starts evaluation criteria. Because the CRC project proposes major highway improvements, it complicates the analysis of how the transit proposal is evaluated. However, because the EIS evaluates both major highway and transit proposals, the New Starts analysis also combines these components.

### **Regulatory Agencies**

For CRC, a major challenge with having two participating states is that each of the state and federal resource agencies bring its own mission, standards, permitting requirements, consultation procedures, documentation approaches, communication protocols, institutional histories and personalities to the table. This challenge is even present within

the same federal agency that has separate offices in each state, such as the Army Corps of Engineers. This can lead to contradictory and inconsistent direction from jurisdictions within each state, and inconsistent or compounding requirements from the co-lead agencies.

CRC will ultimately require a permit or approval from these state and federal agencies with jurisdiction over environmental regulations so it is a major benefit for the project to coordinate early and often with these agencies during the NEPA process. The project established the Interstate Collaborative Environmental Process (InterCEP) Agreement to coordinate an approach with state and federal regulatory agencies to streamline regulatory reviews and permitting functions by these agencies. The following agencies signed the InterCEP Agreement:

Federal High Administration	Federal Transit Administration
Oregon Department of Transportation	Washington Department of Transportation
National Marine Fisheries Service	Oregon Department of Land Conservation and Development
US Environmental Protection Agency	Oregon State Historic Preservation Office
US Fish and Wildlife Service	Oregon Department of State Lands
US Army Corps of Engineers	Washington Department of Archaeology and Historic Preservation
Oregon Department of Environmental Quality	Washington Department of Fish and Wildlife
Oregon Department of Fish and Wildlife	Washington Ecology

A primary function of the InterCEP Agreement is the establishment of key points during the project’s development where the signatory agencies are requested to provide concurrence on a proposed decision, such as the range of alternatives for evaluation in the DEIS. Concurrence points are important tools for the project team and the regulatory agencies. Receiving concurrence on a decision allows the project team to move forward confident that their current direction is aligned with state and federal regulations. Likewise, these opportunities for formal approval provide the regulatory agencies the ability to alert the project early of any problems that could later hinder the agencies’ issuance of necessary permits.

The concurrence and formal comment points for InterCEP are:

- Project Purpose and Need (Concurrence)
- Screening Criteria for Alternatives (Concurrence)
- Methods for analyzing impacts (Comment)
- Range of Alternatives to carry into the Draft Environmental Impact Statement (DEIS) (Concurrence)
- Preliminary DEIS (Comment)
- Final DEIS (Comment)

InterCEP served as a key advisory group in the development of the aforementioned MDRs. In addition to determining approaches amenable to both NEPA co-lead agencies, the project team sought to craft methodologies to assess environmental effects in a fashion that would satisfy each InterCEP agency. InterCEP provided detailed feedback, ranging from identifying appropriate laws, regulations and policies the team should consider, to refinements in how impacts should be assessed.

The approach toward expediting environmental permitting outlined in the InterCEP Agreement should not just speed the project’s development, but ultimately lead to a better product that meets or exceeds state and federal environmental expectations. Early and frequent coordination between the project team and representatives from InterCEP agencies has allowed these agencies to provide input during the development and evaluation of potential alternatives. For example, InterCEP agencies directly influenced the development of evaluation criteria for use in analyzing potential alternatives. Several agencies requested substantive changes to the wording of environmental criteria on the basis that these changes better reflect the goals of the regulations they enforce. Monthly meetings and even more frequent conversation and information exchange with these agencies has allowed the project team to continually monitor project development to ensure decisions are made that can be met with approval from InterCEP agencies.

**SAFETEA-LU**

The latest transportation reauthorization bill, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), amended how transportation projects seeking federal funding must engage tribal governments, regulatory agencies and other stakeholder groups. Many of these requirements are intended to ensure these projects genuinely and thoroughly engage all groups and individuals with potential interest in the projects’ outcomes.

One of the more significant changes included in SAFETEA-LU is the establishment of a Participating Agency group that is defined as federal, state, tribal, regional, and local government agencies that may have an interest in the project. For CRC, this requirement caused some initial confusion amongst the project team and these groups because it overlaps with other venues of involvement. For example, there are already state and federal requirements for robust coordination with tribal governments that provide tribes with more substantial opportunity to influence the project. Tribes were confused when the project team sent invitations to them for involvement as Participating Agencies, and asked how this related to the consultation they would already receive as a tribal government. However, the formation of a Participating

Agency group has involved several local agencies that would not have otherwise have been invited to regularly meet with the project team and provide input beyond avenues already open to the public.

## **Lessons Learned**

The CRC project is rightfully subject to scrutiny and regulation from a variety of stakeholders, agencies, and jurisdictions. Determining the best solution for improving the traffic and transit connection along I-5 between Vancouver, Washington, and Portland, Oregon, is a major decision that should not just comply with, but exceed expectations and requirements. Furthermore, the need for a solution is pressing. Involving with a wide range of local, state and federal agencies, developing a unified approach amongst co-lead agencies, and early collaboration with regulators has allowed the project to progress rapidly toward its goals.

Frequent coordination with the federal leads is key for successful project implementation. The federal leads are required by federal statutes to, at a minimum, play an oversight role for transportation projects, but generally cannot actively participate in projects because they are constrained by limited staff expertise and funding. Consequently, deferral to the states is mutually beneficial for the project and federal agencies. Unfortunately, federal agencies cannot defer legal responsibility to the state; therefore, deferral can only work well if the state maintains constant communication with the federal leads. CRC meets bi-weekly with the federal leads to discuss large project issues, followed by a session to discuss NEPA related activities. It is helpful for the federal agencies to know they have a direct line to the project, and are offered a venue to openly discuss concerns.

In a co-lead project it is important to obtain approval to follow one federal agency's environmental process, but be specific about what 'deferral' actually means. For CRC, deferring environmental process to FHWA did not represent what was anticipated. FTA, though they deferred process, expected to be involved in every step for section 106 and ESA compliance. This was mainly problematic because FTA would be excluded from specific meetings with resource agencies and in turn be frustrated with the project because of it. Ultimately, it was clear that the states, FHWA and FTA each had differing expectations for deferral. The confusion would easily be avoided through explicitly outlining the deferral process.

Concurrence is over-rated; comment points are adequate and preferable for obtaining regulatory agency feedback for projects in the NEPA process. Concurrence gives resource agencies a sense of veto power over the project because if an agency submits a 'non-concur' at the specific concurrence point then the project is halted and the issue elevation process is initiated. The perceived veto power can be counter-productive to the spirit of early collaboration. The purpose of InterCEP is to provide a forum for early agency coordination and collaboration, but when the issue elevation process is initiated because an agency doesn't agree with project direction it can cause unnecessary distrust and adds strain to the collaborative environment. Comment points offer the same opportunity for agency input, but adds a layer of inherent trust between agencies.

Frequent communication and meetings with the state and federal resource agencies is critical to discuss progress on the project. As mentioned several times, CRC has a very aggressive schedule that tends to keep the project in a constant state of flux. The project direction can change quickly causing frustration for stakeholders who minimally participate, but need to maintain a heightened level of awareness because they are critical for moving through decision points. Many resource agencies have limited time for CRC because they are responsible for several different projects. Consequently, the onus for facilitating agency involvement is on the project staff. Regular monthly meetings, with the appropriate project staff, provide the agencies an opportunity to maintain an ongoing dialogue with the project prior to concurrence and comment points. The positive result of frequent meetings is evident in the limited number of agency comments submitted during formal comment and concurrence periods because the project was able to address the majority of comments or concerns prior to the agency's formal submittal.

SAFETEA-LU provides a useful framework for engaging agencies, tribes and other stakeholders. Though it is not explicit in SAFETEA-LU, many state transportation departments are interpreting the new provisions as a red light to dissolve or revisit 404 merger agreements that center on concurrence. SAFETEA-LU does not differentiate between permitting agencies or other local 'interested' stakeholders in requirements to engage these parties as 'participating agencies'. Currently, the CRC has several different stakeholder groups that meet on various occasions, and the project could benefit from a more streamlined approach that incorporates several stakeholders in one process.

Every transportation project will have unique characteristics and challenges. The CRC is a very complex project that requires innovative techniques in the environmental process that will not be directly applicable to other projects. However, the positive impacts of frequent communication and inclusive collaboration with stakeholders can be directly applied to any project, transportation or otherwise.