



Guidance

Primary Effects of Changes in Federal Funding Status on Environmental Reviews of Highway Projects

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Primary Effects of Changes in Federal Funding on Environmental Reviews of Highway Projects

Introduction

For most environmental reviews of highway projects, it is known at the outset whether the project will involve funding provided through the Federal Highway Administration (FHWA), and the use or non-use of federal funds for the project remains constant throughout. However, for some highway projects, there may be an unexpected change in whether the project will use federal funds, and that change may occur either before or after the environmental decision. The purpose of this guidance is to explain how environmental reviews of highway projects are primarily impacted when the status of federal funding changes, using the following four scenarios:

Scenario 1 – The project changes from having **no** federal funding to having **some** federal funding, **before** the environmental decision.

Scenario 2 – The project changes from having **no** federal funding to having **some** federal funding, **after** the environmental decision.

Scenario 3 – The project changes from having **some** federal funding to having **no** federal funding, **before** the environmental decision.

Scenario 4 – The project changes from having **some** federal funding to having **no** federal funding, **after** the environmental decision.

The effects of funding changes are summarized in a table on page 10 of this guidance ([Figure 1](#)), and explained in more detail below.

Because the scope of this document is limited to highway projects, throughout this guidance the phrase “federal funding” shall mean funding provided through the FHWA. While this guidance covers the most fundamental effects of funding changes on the environmental review process, there may be context-specific effects not covered herein. Project sponsors should seek additional guidance from TxDOT Environmental Affairs Division (ENV) if there is a question about the need for a federal oriented environmental review.

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Scenario 1 The project changes from having **no** federal funding to having **some** federal funding, **before** the environmental decision

In this scenario, up until the funding change, the environmental review process has presumably been conducted under Texas Department of Transportation's (TxDOT) requirements for state transportation projects, set forth in 43 Texas Administrative Code Chapter 2, without regard to any federal environmental review requirements. However, if the funding changes, then the project will be subject to a number of federal environmental requirements above and beyond those applicable to a state transportation project, including the following:

- National Environmental Policy Act (NEPA)
- FHWA's NEPA-implementing regulations
- Council on Environmental Quality's (CEQ) NEPA-implementing regulations
- Section 106 of the National Historic Preservation Act
- Section 4(f) of the U.S. Department of Transportation Act
- Section 7 of the Endangered Species Act

For a more inclusive list of federal environmental review requirements that may be triggered by the use of federal funds, see ENV's [FHWA and State EA Comparison Chart](#). Note that this list does not include the SAFETEA-LU requirements at [23 U.S.C. § 139](#), which only apply to EIS projects.

When federal funds are applied to a project, it is necessary to revisit all aspects of the environmental review process that have occurred to date, and to redo any analyses affected by the applicability of federal environmental review requirements. In other words, it is not sufficient to, after the funding change, simply take federal environmental review requirements into account on a going-forward basis.

The project sponsor must review any technical reports and drafts of the environmental review document prepared to-date, and revise accordingly to account for federal environmental review requirements. The project sponsor and department delegate (i.e., the core team) must revisit the project scoping and make any needed scope amendments to make sure that federal requirements are accounted for. Additionally, any consultation or coordination conducted with resource agencies, Indian tribes, or other consulting parties prior to the funding change must be redone, and any new consultation or coordination triggered by the change in funding (e.g., Section 7, Section 106) must be initiated.

It is also necessary to reissue any previously issued notice of availability, and redo any public hearing or opportunity for public hearing previously conducted. And for an EIS project, it is necessary to also reissue the notice of intent and restart the scoping process required by SAFETEA-LU. Any new public notices should specifically mention the funding change. Previously conducted public meetings and MAPOs, except for public meetings conducted to comply with SAFETEA-LU, need not be redone.

With regard to ENV's [Quality Assurance/Quality Control Procedures for Environmental Documents](#), it is not necessary to redo any QA/QC processes or milestones that occurred prior to the funding change, with the following exceptions: To the extent that any of the following QA/QC milestones occurred prior to the funding change, they must be redone after the funding change:

- Environmental Document Review Checklist
- Environmental Document Certification Form

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- Legal Sufficiency Review (EIS only)

Finally, the project sponsor should note the date and any relevant details regarding the funding change in the project file.

Absent any unusual circumstances, the department delegate may clear the project as an FHWA transportation project if the above requirements are satisfied.

Scenario 2 The project changes from having **no** federal funding to having **some** federal funding, **after** the environmental decision

Sometimes, the decision to use federal funds on a project is not made until after the environmental decision, or even after letting. A reevaluation cannot be used for a change from no federal funding to some federal funding. Therefore, in this scenario, an entirely new federal the environmental decision must be issued. This means that, procedurally, the environmental review process must essentially start over from the beginning. However, many of the analyses and written products developed during the previous review may be updated, as applicable, and so the process should theoretically be shorter than it may first appear. Pursuant to 23 C.F.R. §771.113(a), no final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction may proceed until the new federal the environmental decision is issued.

Scenario 3 The project changes from having **some** federal funding to having **no** federal funding, **before** the environmental decision

Because TxDOT's environmental review process must comply with both state rules and any applicable federal environmental review requirements, the removal of federal funding from a project will generally not require project sponsors to redo any analyses or other aspects of the review process to comply with state requirements. However, there are exceptions, most notably the following:

- The (c)(23) CE for "federally-funded projects" found at [23 C.F.R. §771.117\(c\)\(23\)](#) cannot be used for a project with no federal funding. Therefore, if the project started out as a (c)(23) CE, it will have to be changed by documenting use of a different CE in the project file prior to clearance.
- TxDOT cannot rely on USFWS Section 7 consultation for ESA compliance if there's no federal funding. Effects on federally listed species must instead be evaluated under a "take"/"no take" standard. This will normally consist of a technical report containing a "take"/"no take" analysis, which, depending on the outcome, may result in the need to acquire a permit under Section 10 of the ESA prior to project implementation.
- It may be necessary to re-do any alternatives analysis that was influenced by U.S. DOT Section 4(f) constraints, as the outcome may be different if Section 4(f) does not apply (this is most likely to arise when the Section 4(f) analysis involved a privately owned historic site, as other types of Section 4(f) properties are usually covered by a comparable state law, Chapter 26 of the Texas Parks and Wildlife Code).
- The project sponsor should contact ENV-CRM staff to determine whether any additional consultation for cultural resources is needed. The consultation obligations under Section 106 and Antiquities Code of Texas are different, and it may be appropriate under certain circumstances to notify consulting

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parties of the change in funding. This determination should be made not by the project sponsor but by ENV-CRM staff.

When federal funding is removed from a project before the environmental decision, there are two basic approaches available, depending on the circumstances:

Approach #1 - Clear the project as a federal project

If the project sponsor has already developed technical reports and/or a draft environmental review document based on the assumption that that project will be federally funded, then, in most cases, the project sponsor should complete the remainder of the environmental review in accordance with all federal environmental review requirements, and clear the project as a federal project. This approach has the benefit of preserving the possibility of federal funding for the project, should there be another unexpected change in funding.

When using the approach described above, the environmental review document must clearly indicate (a) that the project was originally envisioned as being federally funded, (b) that the project is now envisioned as not being federally funded, and (c) the environmental review has, nevertheless, been conducted in accordance with federal requirements, in order to preserve the possibility of federal funding.

Also, while it is generally okay to assume that federal environmental review requirements apply even when the project is envisioned as being not federally funded, as this will generally only result in a more conservative review, TxDOT cannot rely on Section 7 consultation for ESA compliance if the project is not actually federally funded. Therefore, if the project will not use federal funds, but would require Section 7 consultation if federal funding were involved, then the project sponsor should not follow the approach described above, but instead should clear the project as a state project, and include an evaluation of effects on federally listed species under a “take”/“no take” standard. This will normally consist of a technical report containing a “take”/“no take” analysis, which, depending on the outcome, may result in the need to acquire a permit under Section 10 of the ESA prior to project implementation..

Approach #2 - Clear the project as a state project

If the removal of federal funding from the project occurs at a relatively early stage of environmental review, or if the decision to not use federal funds was made for reasons other than a lack of availability, then the project sponsor may clear the project as a state project. However, if any public involvement, agency coordination or other aspect of the environmental review process was conducted under the assumption that the project would be federally funded, then the environmental review document must identify the aspects of review that were done under federal requirements, and explain that TxDOT is not going to re-do such aspects because compliance with the Federal requirements also satisfied applicable state requirements.

Regardless of how the project is cleared, the project sponsor should note the date and any relevant details regarding the funding change in the project file.

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Scenario 4 The project changes from having **some** federal funding to having **no** federal funding, after the environmental decision

In this scenario, the federal clearance satisfies TxDOT's environmental review rules, and no further environmental review requirements are triggered by the change in funding.

However, as stated above, if the project was cleared using the (c)(23) CE for "federally-funded projects" found at [23 C.F.R. §771.117\(c\)\(23\)](#), then it will have to be re-cleared by documenting use of a different CE in the project file. And again, TxDOT cannot rely on Section 7 consultation for ESA compliance if there's no federal funding. So, if TxDOT consulted with USFWS under Section 7, and then federal funding was removed after the environmental decision, then, depending on whether any incidental take was anticipated, a new ESA compliance analysis may be required prior to letting. This will normally consist of a technical report containing a "take"/"no take" analysis, which, depending on the outcome, may result in the need to acquire a permit under Section 10 of the ESA prior to project implementation.

The project sponsor should contact ENV-CRM staff to determine whether any additional consultation for cultural resources is needed. The consultation obligations under Section 106 and Antiquities Code of Texas are different, and it may be appropriate under certain circumstances to notify consulting parties of the change in funding.

This determination should be made not by the project sponsor but by ENV-CRM staff.

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Glossary

Environmental Review – This is the review process for all transportation projects, regardless of whether the environmental documents were prepared or proposed by the state, by local government, or by private entities.

Environmental Decision – This is either a categorical exclusion (CE) determination, a finding of no significant impact (FONSI), or a record of decision (ROD).

Project File – The project file is the compilation of correspondence, notices, background reports and environmental review documents that provide a record of the environmental review, public involvement and decision-making processes related to the project.

Project Scoping – The project sponsor, in collaboration with the department delegate, will prepare a detailed project scope that describes the preparation of the environmental review document and performance of related tasks. The project scope must be prepared using a standardized checklist.

Project Sponsor -- As defined by the [Texas Administrative Code](#), the project sponsor accepts the responsibility for preparing the environmental review document and performing any related tasks. A TxDOT district, division, office, or a municipality, county, group of adjoining counties, regional mobility authority, local government corporation, or transportation corporation may be a project sponsor. Private entities and other types of local government entities may not serve as project sponsors.

State Transportation Project – As defined by the Texas Administrative Code, a state transportation project is a project that is not subject to NEPA.

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Abbreviation and Acronyms

CE	Categorical Exclusion
EA	Environmental Assessment
EIS	Environmental Impact Statement
ENV-CRM	Environmental Affairs Division Cultural Resources Management Section
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
MAPO	Meeting with Affected Property Owner
QA/QC	Quality Assurance and Quality Control
ROD	Record of Decision
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
USFWS	United States Fish and Wildlife Service

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Figure 1

Primary Effects of Changes in Federal Funding Status on Environmental Reviews of Highway Projects						
Change in Funding	Primary Effects on Environmental Review					
ADDITION of Federal Funding						
Scenario 1 <i>Before the environmental decision</i>	Revise all technical reports and draft of environmental review document to account for federal requirements.	Re-do any consultation or coordination with resource agencies, Indian tribes or other consulting parties.	Re-issue notice of availability, and re-do any public hearing or opportunity for public hearing.	Re-issue notice of intent and re-start scoping process required by SAFETEA-LU (EIS projects only).	Revisit project scoping and make any needed scope amendments.	Re-do Environmental Document Review Checklist, Environmental Document Certification Form, and Legal Sufficiency Review, as applicable.
Scenario 2 <i>After the environmental decision</i>	Re-start entire environmental review process (certain analyses and written products or parts thereof may be reusable).					
REMOVAL of Federal Funding						
Scenario 3 <i>Before the environmental decision</i>	Clear the project as a federal project (unless Section 7 consultation would be required) or clear the project as a state project.	Cannot use (c)(23) CE.	Cannot rely on Section 7 consultation under the ESA.	Consider whether alternatives analysis previously influenced by Section 4(f) constraints should be re-done.	Contact ENV-CRM staff to determine whether additional consultation for cultural resources is needed.	
Scenario 4 <i>After the environmental decision</i>	No need for new environmental review document or CE documentation (unless (c)(23) CE was used).	If TxDOT consulted with USFWS under ESA Section 7, prepare new "take"/"no take" technical report and comply with ESA Section 10 permitting requirements, if applicable.	Contact ENV-CRM staff to determine whether additional consultation for cultural resources is needed.			

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Appendix A: Revision History

The following table shows the revision history for this guidance document.

Revision History	
Effective Date Month, Year	Reason for and Description of Change
January 2016	Version 1 was released.