

Chapter 410 Environmental Review Process Overview

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410.01 Introduction

Chapter 410 and **Chapter 411** describe the environmental review procedures that occur during the Design and Environmental Review phase of the WSDOT Transportation Decision-Making Process. Detailed guidance is given for the major steps in the environmental review process.

Chapter 410 focuses on understanding NEPA/SEPA legislative authority, agency roles and responsibilities, and public involvement. **Chapter 411** gives detailed guidance on the documents and procedures for each classification, and internal WSDOT procedures for environmental review.

Environmental analysis is conducted to some degree at each stage of the decision-making process. The first formal analysis occurs during project definition, with preparation of the Environmental Review Summary (**Section 310.05**). The most extensive analysis occurs during project design, when project teams prepare environmental review documents (e.g., environmental assessments/checklists and environmental impact statements) and permit applications. Federal and state environmental laws and regulations require analysis of elements of the environment that the proposed project may affect. **Chapters 420** through **Chapter 470** give specific guidance for analysis of each of the environmental elements. **Part 5** gives direction and guidance about project permitting.

(1) Abbreviations and Acronyms

Abbreviations and acronyms used in **Chapter 410** and **Chapter 411** are listed below. Others are found in **Appendix A**.

*Web sites and navigation referenced in this chapter are subject to change. For the most current links, please refer to the online version of the EPM, available through the WSDOT Environmental Services Office (ESO) home page: <http://www.wsdot.wa.gov/environment/>

AASHTO	American Association of State Highway and Transportation Officials
CE	Categorical Exclusion (NEPA) or Categorical Exemption (SEPA)
CEQ	Council on Environmental Quality (federal)
CFR	Code of Federal Regulations
DCE	Documented Categorical Exclusion (NEPA)
DEIS	Draft Environmental Impact Statement
DNS	Determination of Nonsignificance (SEPA)
DS	Determination of Significance (SEPA)
EA	Environmental Assessment
ECS	Environmental Classification Summary
EIS	Environmental Impact Statement
ERS	Environmental Review Summary
ESO	Environmental Services Office
FEIS	Final Environmental Impact Statement
FONSI	Finding of No Significant Impact (NEPA)
MDNS	Mitigated Determination of Nonsignificance (SEPA)
NAT	Notice of Action Taken (SEPA)
NEPA	National Environmental Policy Act
NOI	Notice of Intent (to prepare a NEPA EIS)
ROD	Record of Decision (NEPA)
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
SAGES	Statewide Advisory Group for Environmental Stewardship
SEPA	State Environmental Policy Act
USDOT	United States Department of Transportation

(2) Glossary of NEPA and SEPA Key Terms

Categorical Exclusion/Exemption – An action that does not individually or cumulatively have a significant environmental effect, as defined in NEPA/SEPA regulations, and is classified as excluded (NEPA) or exempt (SEPA) from requirements to prepare an Environmental Assessment/Checklist or Environmental Impact Statement.

Cumulative Impact/Effect – The impact on the environment that results from the incremental effect of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. [40 CFR 1508.7]

Direct Impact/Effect – A direct impact (or effect) is caused by the proposed action or alternative and occurs at the same time and place, most often during construction, but also including operational effects during the design life of the project. Effects may be ecological, aesthetic, historic, cultural, economic, social, or health-related. For example, a highway crossing a stream may directly affect its water quality, though such impacts can be mitigated. For NEPA, see 40 CFR 1508.8.

Discipline Report – A WSDOT report prepared by Regional Offices or Divisions to document environmental studies and investigations. Discipline reports are prepared for Environmental Impact Statements, Environmental Assessments, and in some cases, Documented Categorical Exclusions.

Environmental Checklist (SEPA) – A standard form used by all agencies to obtain information about a proposal and to assist them in making a threshold determination. It includes questions about the proposal, its location, possible future activities, and questions about potential impacts of the proposal on each element of the environment. The SEPA rules under WAC 197-11-960 list the information required in an environmental checklist.

Environmental Document – Includes Environmental Assessments (NEPA), SEPA Threshold Determinations (Determination of Significance or Determination of Nonsignificance) and associated Environmental SEPA Checklists, Draft and Final EISs, Section 4(f) Evaluations, Section 106 Reports, Environmental Justice Reports and other documents prepared in response to state or federal environmental requirements.

Environmental Review – Is the consideration of environmental factors required by NEPA and SEPA. The “environmental review process” is the procedure used by agencies and others to give appropriate consideration to the environment in decision making.

Feasible and Prudent Avoidance Alternative – A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property.

Federal Nexus – 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. 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. These include but are 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.

Indirect Impacts/Effects (NEPA) – Effects that are caused by the proposed action or alternative and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include effects related to changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems (40 CFR 1508.8).

Mitigation (NEPA) – With regard to environmental impacts, mitigation means sequentially (in the following order of decreasing preference): (1) Avoiding the impact altogether by not taking a certain action or parts of an action, (2) minimizing impacts by limiting the degree or magnitude of the impact of the action and its implementation, (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment, (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action, or (5) compensating for the impact by replacing or providing substitute resources or environments (40 CFR 1508.20).

Mitigation (SEPA) – With regard to environmental impacts, mitigation means sequentially (in the following order of decreasing preference): (1) avoiding the impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce impacts; (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; (5) compensating for the impact by replacing, enhancing, or providing substitute resources or environments; and/or (6) monitoring the impact and taking appropriate corrective measures (WAC 197-11-768).

Non-project Action – Governmental actions involving decisions on policies, plans, or programs that contain standards controlling the use or modification of the environment, or that will govern a series of connected actions (SEPA Handbook).

Project Description – A narrative written by the proponent to describe the project proposal. It may include explanations of the existing physical, environmental, social, and economic setting around the proposed project, a legal description of the location, and an explanation of the intended improvements.

Responsible Official – Official of the lead agency who has been delegated responsibility for complying with NEPA and SEPA procedures.

Scoping (public and agency scoping) – A formal process for engaging the public and agencies to identify the range of proposed actions, alternatives, environmental elements and impacts, and mitigation measures to be analyzed in an environmental impact statement (EIS) or environmental assessment (EA). It should not be confused with internal scoping to set a project's budget.

Significant Impact (NEPA) – According to the Council on Environmental Quality (CEQ) regulations (40 CFR §§ 1500-1508), the determination of a significant impact is a function of both context and intensity. To determine significance, the severity (intensity) of the impact must be examined in terms of the type, quality and sensitivity of the resource involved; the location of the proposed project; the duration of the effect (short- or long-term) and other consideration of context. Significance of the impact will vary with the setting of the proposed action and the surrounding area (including residential, industrial, commercial, and natural sites) For SEPA, WAC 197-11-330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact.

Threshold Determination (SEPA) – The threshold determination process is the process used to evaluate the environmental consequences of a proposal and determine whether the proposal is likely to have any “significant adverse environmental impact.” The SEPA lead agency makes this determination and documents it as either a determination of nonsignificance (DNS), or a determination of significance (DS). A determination of significance requires preparing an environmental impact statement (EIS). Agencies use the environmental checklist (see above) to help decide the threshold determination.

Tribal Consultation – As defined in WSDOT Executive Order 1025.01, tribal consultation means respectful, effective communication in a cooperative process that works towards a consensus, before a decision is made or action is taken...on actions that affect identified tribal rights and interests.

410.02 Applicable Statutes and Regulations

This section lists the primary statutes and regulations applicable to environmental review. See **Appendix D** for a list of statutes referenced in the EPM.

(1) **National Environmental Policy Act (NEPA)**

President Nixon signed the National Environmental Policy Act (NEPA) in January 1970 as the “national charter for protection of the environment” (PL 91-190, as amended). It ensures that information on the environmental impacts of any federal action is available to public officials and citizens before decisions are made and before actions are taken.

The intent of NEPA as stated in the Council on Environmental Quality NEPA Regulations (40 CFR 1500-1508): “Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.” (40 CFR 1500.1(c)).

Under NEPA, the Congress directs federal agencies to integrate in their planning and decision-making consideration of the natural and social sciences, environmental amenities and values, and design arts along with economic and technical concerns. NEPA is a broad-reaching mandate for federal agencies to work together with state, local, and tribal governments, public and private organizations, and the public, to achieve and balance national social, economic, and environmental goals while accomplishing their missions.

Federal agencies are required to integrate the NEPA process with other planning at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.

NEPA implementing regulations applicable to all federally aided projects were developed by the Council on Environmental Quality (CEQ) and are codified as 40 CFR 1500 – 1508, Regulations for Implementing the Procedural Provisions of NEPA. FHWA regulations applicable to federally aided highway projects are codified as 23 CFR 771, Environmental Impact and Related Procedures. In addition, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) transportation bill of 2005 revised the way FHWA implements NEPA. Section 6002 of the bill incorporates changes aimed at making environmental reviews more efficient and timely by clarifying agency roles and responsibilities, improving coordination, setting deadlines, and improving dispute resolution. It is codified in Section 139 of Title 23 of the U.S. Code (23 U.S.C. § 139)

Highlights of the environmental provisions under SAFETEA-LU are found on FHWA's Streamlining and Stewardship Web site:

☞ <http://environment.fhwa.dot.gov/strmlng/es2safetealu.asp>

WSDOT guidance regarding the new environmental review process can be found at:

☞ http://www.wsdot.wa.gov/Environment/Compliance/NEPA_SEPA.htm

The full text of NEPA (42 USC 4321 et seq.), CEQ implementing regulations (40 CFR 1500-1508), and other guidance is online at:

☞ <http://www.nepa.gov/nepa/nepanet.htm>

The American Association of State Highway and Transportation Officials (AASHTO) Center for Environmental excellence provides a very useful one-stop source of environmental information for transportation professionals. The direct link is:

☞ <http://environment.transportation.org/>

For FHWA legislation, regulations, and guidance:

☞ <http://www.fhwa.dot.gov/legsregs/legislat.html>

For FHWA resources and information about transportation and the environment see FHWA's Environmental Review Toolkit:

☞ <http://environment.fhwa.dot.gov/index.asp>

For WSDOT/FHWA guidance on how and when to consult with tribes on projects under NEPA review, see the model NEPA Tribal consultation process on WSDOT's Web site:

☞ <http://www.wsdot.wa.gov/Environment/Tribal/default.htm>

(2) Other Federal Environmental Statutes

In addition to NEPA, there are a number of other Federal Statutes such as the Clean Water Act and the Clean Air Act that govern federal-aid highway projects. Documentation of compliance with these requirements is generally incorporated into the NEPA process, but the statutes listed below have additional procedural requirements that go beyond agency coordination and permits.

(a) Endangered Species Act

Section 7 of the Endangered Species Act applies to transportation projects with federal funding, authorization, or permits. It requires that federal agencies confer with the U.S. Fish and Wildlife Service or National Marine Fisheries Service to ensure their actions do not jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify critical habitat. See **Chapter 436** for details.

(b) Section 106 – Historic and Cultural Resources

Section 106 of the National Historic Preservation Act applies to transportation projects affecting historic property listed on or eligible for listing on the National Register of Historic Places. See **Chapter 456** for details.

A project that affects historic property may also need a Section 4(f) evaluation if it is determined that the proposed project will use or otherwise have an adverse effect on the property, and there is no “feasible and prudent avoidance alternative” (as defined in the glossary in **Section 410.01**). See the following (and **Chapter 457**) for details on Section 4(f) evaluation.

(c) Section 4(f) Evaluation

Whenever a project requires funding or approval from a USDOT agency, Section 4(f) applies. Section 4(f) refers to the original section within the U.S. Department of Transportation Act of 1966 which established the requirement for consideration of park and recreational lands, wildlife and waterfowl refuges, and historic sites in transportation project development. The law, now codified in 49 U.S.C. § 303 and 23 U.S.C. § 138, is

implemented by the Federal Highway Administration (FHWA) through the regulation 23 CFR 774. For details on the requirements of Section 4(f), see **Chapter 450** and **Chapter 457**.

(d) Section 6(f) – Outdoor Recreation Resources

Whenever a project requires funding or approval from a federal agency, Section 6(f) of the Land and Water Conservation Fund Act (LWCFA) of 1966 prohibits the conversion of property acquired or developed with LWCFA grant funds to a non-recreational purpose without the approval of the Department of Interior's National Park Service (NPS). It also directs the NPS to assure that replacement lands of equal value, location and usefulness are provided as a condition of approval for land conversions. Therefore, when a Section 6(f) land conversion is proposed for a transportation project, replacement land will be necessary, and the NPS's position on the land transfer must be documented. See **Chapter 450** and **Chapter 457** for details.

(3) State Environmental Policy Act (SEPA)

Washington's State Environmental Policy Act (SEPA), adopted in 1971, directs state and local decision-makers to consider the environmental consequences of their actions. Implementing regulations, in the form of the SEPA Rules (WAC 197-11) establish uniform requirements for agencies to use in evaluating the possible adverse environmental impacts of a proposal. The process also allows review of possible project alternatives or mitigation measures that will reduce the environmental impact of a project. The *SEPA Handbook* gives specific guidance on the steps required for the SEPA environmental review process.

For WSDOT projects, the Transportation Commission and Transportation Department State Environmental Policy Act Rules (WAC 468-12) integrate the policies and procedures of SEPA into the programs, activities, and actions of the department.

The SEPA (RCW 43.21C), SEPA Rules (WAC 197-11), *SEPA Handbook*, and forms, including the Environmental Checklist, are on Ecology's Web site:

☞ <http://www.ecy.wa.gov/programs/sea/sepa/e-review.html>

The WSDOT SEPA procedures (WAC 468-12, as amended) are located at the Office of the Code Reviser Web site at:

☞ <http://apps.leg.wa.gov/WAC/default.aspx?cite=468>

410.03 Process Overview for NEPA and SEPA

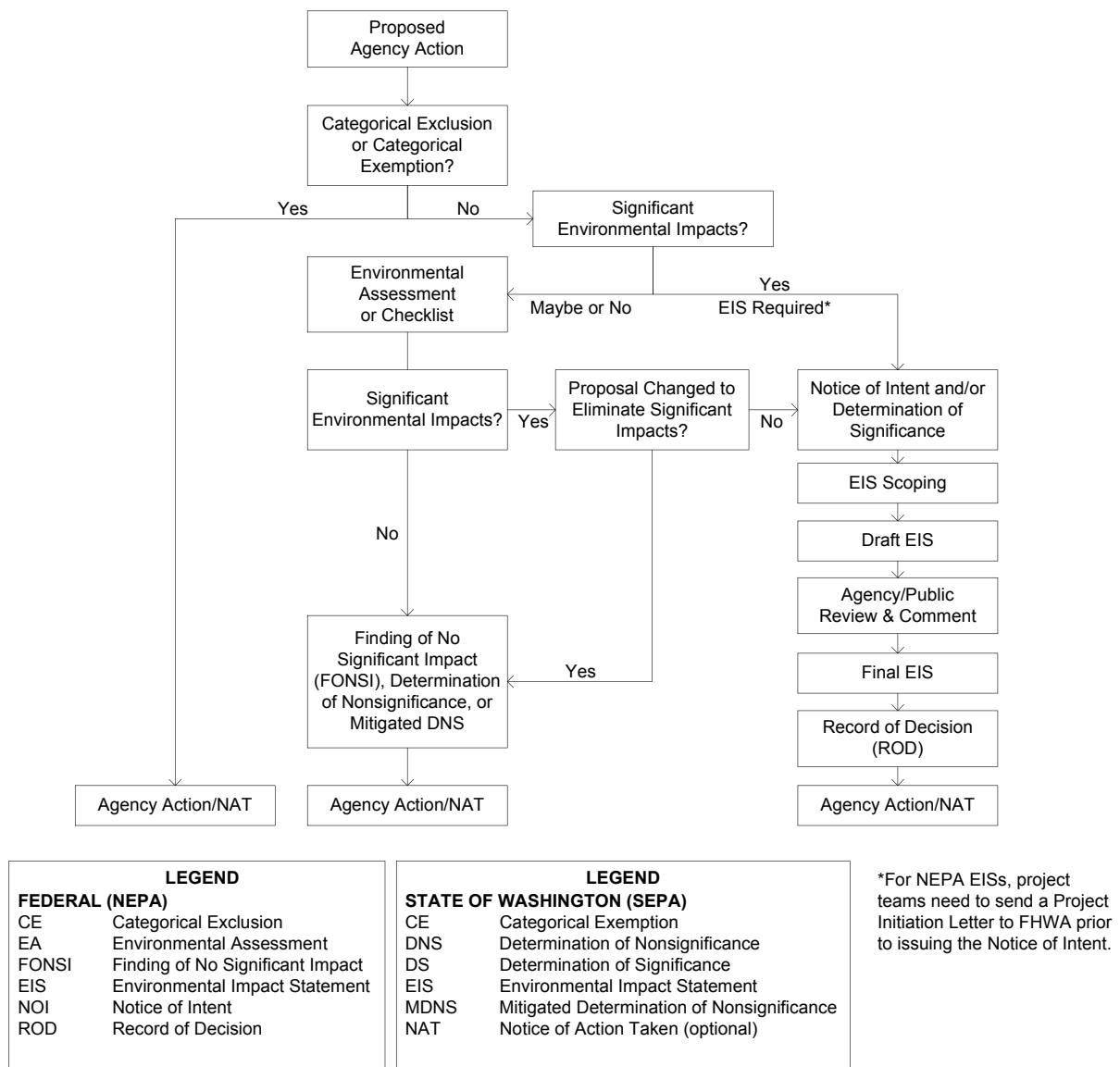
The most important elements that NEPA and SEPA require are (1) disclosure and (2) documentation. Neither law is intended to be a decision-making process in and of itself; it is intended to be integrated into the agency's decision-making process so that environmental impacts are included along

with other relevant factors in agency decision-making. Other statutes impose a substantive environmental obligation on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.

Figure 410-1 is a generalized flow chart illustrating the environmental review process, participants, and documentation. Critical path timelines for preliminary engineering of hypothetical Class I, II, and III projects are online via the ESO Web site:

<http://www.wsdot.wa.gov/Environment/Compliance/ComplianceGuidance.htm#path>

Figure 410-1: NEPA and SEPA Environmental Review Process Overview



Adapted from: *Background and Implementation of NEPA: Training Manual*, Chapter 1, Planning, Environmental, and Land Use Publications, Point Arena, CA. www.solano.com

NEPA applies to projects with a federal nexus (see definition in **Section 410.01**). Any federal project, or a private or state project funded by or requiring a permit from a federal agency, must meet NEPA requirements.

SEPA is intended to ensure that environmental values are considered during decision-making by state and local agencies. The policies and goals of SEPA apply to all branches of government in Washington, including state agencies, counties, cities, districts, and public corporations. Any government action may be conditioned or denied pursuant to SEPA.

Most WSDOT projects must comply with both NEPA and SEPA. For example, because a highway project involving a bridge over a major river requires a permit from the U.S. Army Corps of Engineers, it would have to meet NEPA requirements. As an action of a state agency, the project would have to meet SEPA requirements.

Deciding upon the proper level of environmental documentation and preparing adequate documents are critical. Both NEPA and SEPA grant discretion to the Responsible Official to decide how detailed the studies should be and what issues to cover.

The SEPA Rules allow an agency to adopt environmental analysis, prepared under NEPA, to satisfy SEPA requirements (WAC 197-11-610). In general, a NEPA EA may be adopted to satisfy requirements for a SEPA Determination of Nonsignificance (DNS). A NEPA EIS may be adopted as a substitute for a SEPA EIS or WSDOT and the federal NEPA lead may decide to prepare a combined NEPA/SEPA EIS. Federal documents may also be incorporated by reference as support for issuance of a SEPA document (WAC 197-11-635).

410.04 Agency Roles and Responsibilities

(1) Lead Agencies

The Lead Agency is responsible for ensuring that NEPA and SEPA requirements are met. For state transportation projects, including ferry and rail projects, WSDOT is the lead agency for SEPA (WAC 197-11-926). State law gives WSDOT sole authority to site, design, construct and operate state transportation facilities. WSDOT typically prepares, approves and signs the SEPA or NEPA document.

Federal NEPA leads are determined by the federal approval or funding that is anticipated in the proposed action. In general, the federal NEPA lead does not prepare the NEPA document, instead the primary role of the federal NEPA lead is to provide guidance and independently evaluates the adequacy of the document (see 42 USC 4332(2)(D) and 23 CFR 771.123).

Federal Highway Administration (FHWA) is the most common NEPA lead agency because it is the federal agency responsible for funding and approving most highway projects. FHWA directs funding to many tribal or local government projects through WSDOT's Highways and Local Programs

Office. For local agency projects, WSDOT, FHWA, and the local agency share co-lead agency status under NEPA. Co-lead agencies together approve and sign the NEPA environmental document. The local agency is the lead and responsible entity for SEPA.

Other federal agencies may also assume lead or joint-lead agency status in certain situations where they have project funding or approval responsibilities. These include, but are not limited to, the following:

- U.S. Army Corps of Engineers (Corps)
- Federal Transit Administration (FTA)
- Federal Aviation Administration (FAA)
- United States Coast Guard (USCG)
- Federal Railroad Administration (FRA)
- Surface Transportation Board (STB)

These agencies have different regulations to implement NEPA. It is very important to clarify the requirements of the federal lead or joint lead. While FHWA is the most common federal lead, WSDOT staff is advised to contact any other federal leads to understand their NEPA requirements before settling on compliance strategies.

(2) Cooperating/Consulted Agencies

Under federal NEPA law, a cooperating agency has a vested interest (special expertise or jurisdiction by law) in a proposed project for which the environmental document will be prepared. Cooperating agencies may include federal and state resource agencies, local governments, tribal governments, and special districts. The agency might own affected property, issue required permits, or have special expertise in an impacted element of the environment. The level of involvement varies with the project. Cooperating agencies participate in “EIS or EA Scoping” to identify potential environmental impacts, alternatives and mitigating measures, and required permits. They review and comment formally and/or informally on environmental assessments and environmental impact statements. They may also prepare special studies or share in the cost of the environmental documentation. The terms and requirements of agency involvement under SEPA are similar to that of NEPA. For regulatory guidance, see CEQ 40 CFR 1501.6, FHWA 23 CFR 771.109 and 771.111, WAC 197-11-408(2)(d), WAC 197-11-410(1)(d), WAC 197-11-724, and WAC 197-11-920.

Under NEPA regulations, any federal agency with permitting authority must be asked to become a cooperating agency (23 CFR 771.109). By serving as a cooperating agency, the agency can ensure that the EIS will also satisfy its NEPA requirements for its particular jurisdictional responsibility. State resource agencies, tribes, and local agencies may be asked to be

cooperating agencies if the lead agency decides they have special expertise or legal jurisdiction.

The level of involvement by the cooperating agency varies. For some projects, it is merely a review function. In others, the cooperating agency may perform some of the specialty studies or help prepare documents. Normally, the lead agency funds the efforts to prepare studies and documentation by the cooperating agency.

The lead and the cooperating agencies should define and agree on roles and expectations at the beginning of the project, for example specific schedules for coordinating the review of preliminary documents. For NEPA EISs, project teams will define the roles and expectations in the EIS Coordination Plan (Section 411.08).

Table 410-1 lists examples of agencies with jurisdiction or special expertise that may be asked to be cooperating agencies.

(a) Requesting Cooperation

WSDOT should request the involvement of each cooperating agency as early as possible, typically before the beginning of formal EA or EIS Scoping.

According to CEQ regulations, federal agencies with jurisdiction must accept cooperating agency status. The federal NEPA lead can accept an agency's decision to decline cooperating agency status if the agency's written response to the request states that its NEPA regulations do not require an EIS in response to the proposed action.

The federal NEPA lead (typically FHWA) sends a written request to federal agencies, asking them to become a cooperating agency. WSDOT (the project team) is responsible for inviting state, regional, and local agencies. The agency responds in writing, either accepting or declining the opportunity. All correspondence becomes part of the project file. For EIS projects, specific template letters are available to assist project teams when inviting federal agencies to be a cooperating agency. Information regarding the template letters is available on the WSDOT Environmental Web site at:

 http://www.wsdot.wa.gov/Environment/Compliance/NEPA_SEPA.htm#wsdot

(b) When can WSDOT be a Cooperating Agency?

For actions where WSDOT is not the lead agency, other agencies may ask WSDOT to become a cooperating agency. This could occur on projects when a landholding agency, such as the U.S. Forest Service, Bureau of Land Management, Bureau of Indian Affairs, or a tribal government, proposes a project that could impact WSDOT facilities. County and municipal transportation projects could also involve WSDOT as a cooperating agency.

Table 410-1: Potential Cooperating Agencies

Agency	Jurisdiction
U.S. Army Corps of Engineers	Section 10 and Section 404 Permits, Wetlands
U.S. Coast Guard	Bridge Permits.
Environmental Protection Agency (USEPA)	Sole Source Aquifers, Hazardous Waste Site, water supply, air quality
National Park Service	Properties funded under Land and Water Conservation Fund Act 6(f).
U.S. Fish & Wildlife Service (USFWS)	Areas funded under various fish and wildlife related grant programs or projects affecting endangered species (ESA)
Federal Transit Administration (FTA)	Transit and rail funding
Federal Highway Administration (FHWA)	Interstate airspace lease, Interstate disposal, Interstate access approval (for state funded projects)
Federal Aviation Administration (FAA)	Airspace, hazardous wildlife, airport facilities, and other air transportation activities
Rural Electrification Administration (REA)	Relocation of utilities constructed or assisted with REA loans.
Federal Agency Land Manager: National Park Service USFWS Bureau of Land Management U.S. Forest Service Department of Defense General Services Administration	Land transfer from: National Park System National Wildlife Refuge Public Lands National Forest System Military Facilities Federal Buildings
NOAA Fisheries	ESA, Fish and wildlife natural habitat, wetlands, stream relocations, estuaries
Federal Emergency Management Agency	Regulatory floodway
Tribal Governments	Agency with expertise or jurisdiction
Washington State Agencies Office of Archaeology & Historic Preservation Washington Dept. of Ecology Washington Dept. of Fish and Wildlife Washington Dept. of Natural Resources	Agency with expertise or jurisdiction, Historic, cultural, and archaeological sites, Fish and wildlife natural habitat, wetlands, stream relocations, estuaries, Use of state owned aquatic lands
City/County Governments	Shorelines, Floodplains, Critical Area, Ordinances, Growth Management Act issues

(3) Participating Agencies

In 2005 Federal transportation law, SAFETEA-LU Section 6002, created a new category of involvement in the environmental review process termed “participating agency.” This term is unique to USDOT’s compliance with NEPA. The intent of the new category is to encourage governmental agencies at any level with an interest in the proposed project to be active participants

in the NEPA EIS evaluation. Designation as a participating agency does not indicate project support, but it does give invited agencies new opportunities to provide input at key decision points in the process.

Any Federal, State, tribal, regional, and local governmental agencies that may have an interest in the project should be invited to serve as participating agencies. Nongovernmental organizations and private entities cannot serve as participating agencies.

Care should be taken when evaluating your list of potential participating agencies. It is not necessary to invite agencies that have only a tangential, speculative, or remote interest in the project. The same agencies listed in **Table 410-1** may be asked to be participating agencies.

The roles and responsibilities of participating agencies include but are not limited to:

- Identifying, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts that could substantially delay or prevent an agency from granting a permit or other approval that is needed for the project.
- Participating in the NEPA process starting at the earliest possible time, especially with regard to the development of the purpose and need statement, range of alternatives, methodologies, and the level of detail for the analysis of alternatives.
- Providing meaningful and timely input on unresolved issues.

Expectations and commitments about agency participation should be addressed in the EIS Coordination Plan described in **Section 411.08**.

It is appropriate to tailor an agency's participation to its area of interest or jurisdiction.

- The federal NEPA lead (FHWA or FTA) sends a written request to federal agencies, inviting them to become a cooperating/participating agency. WSDOT invites the non-federal governmental agencies that have been identified to have an interest in the project.
- The timing of sending invitations to potential participating agencies may vary. To the extent that WSDOT knows prior to EIS scoping that certain entities should be invited to serve, WSDOT and/or the Federal lead agency may send invitations at or after the time of the project notice of initiation (see **Section 411.06** for more information on the required project initiation letter).
- Federal agencies are designated as participating agencies, unless they decline based on the reasons listed in Section 139 of Title 23 of the U.S.C—specifically, the agency must state that (1) it has no jurisdiction or authority over the project; (2) it has no information or expertise regarding

the project; and (3) it has no intention of submitting comments on the project. The declining agency needs to respond by the deadline specified in the invitation letter.

- A State, regional, tribal, or local agency are designated as a participating agency only if they affirmatively accept the invitation within the deadline specified by the lead agencies.
- Further guidance and template letters are available on the WSDOT Environmental Web site at:

☞ http://www.wsdot.wa.gov/Environment/Compliance/NEPA_SEPA.htm

(4) **Tribal Participation**

Tribes can be involved in four capacities under NEPA: as a cooperating agency (with expertise and/or jurisdiction), as a participating agency on EIS projects as a consulting party, and/or as an affected community.

See **Section 410.06** for guidance on when and how to consult with tribes during the NEPA environmental review process on projects.

410.05 Public Involvement

Public involvement and a systematic interdisciplinary approach are essential parts of the transportation project development process (23 CFR § 771.105(c)). Public involvement helps ensure that project proponents consider their input in the decision process. Federal and state environmental policy acts provide policy direction and regulatory guidance, see 23 CFR 128, 23 CFR 771.111, 40 CFR 1500-1508 and WAC 197-11 Part 5. Transparency, open government and accountability directives are clear from The White House and from Governor's Office. More resources are on the Governor's "Plain Talk" Web site at:

☞ <http://www.accountability.wa.gov/plaintalk/default.asp>

WSDOT's agency guidance on public involvement during the transportation decision-making process is detailed in WSDOT's *Design Manual* (M 22-01), Chapter 210 Public Involvement and Hearings online at:

☞ <http://www.wsdot.wa.gov/publications/manuals/fulltext/M22-01/210.pdf>

For details on public notice/involvement requirements specific to NEPA and SEPA and Section 4(f) Evaluations, see **Section 411.04** through **Section 411.09** and **Section 411.12**. Other resources include:

FHWA guidance is online at:

☞ <http://www.fhwa.dot.gov/environment/pubinv2.htm>

Public Involvement Techniques for Transportation Decision-Making (September 1996), Publication No. FHWA-PD-96-031, is online at:

☞ <http://www.fhwa.dot.gov/reports/pittd/cover.htm>

FHWA's Public Involvement Techniques is a reference work that makes a wide variety of public involvement techniques available to transportation agencies. It includes the 14 techniques originally published in *Innovations in Public Involvement for Transportation Planning*. It is online at:

☞ http://www.planning.dot.gov/PublicInvolvement/pi_documents/toc.asp

Both NEPA and SEPA regulations cite agency and public involvement as essential parts of the project development process. Public involvement is best viewed as an opportunity to increase project awareness and provide opportunity for public input. Proper communication of the purpose and need for a project can often turn public apathy or opposition into support. Sometimes suggestions submitted by the public stimulate innovative problem solving. Public involvement can result in a better project. Local comments often offer perspectives that might not be considered otherwise.

Often the only way the public, interested organizations and agencies find out about a project is through a published notice. Lack of public notice can justify an appeal of the procedural aspects of NEPA or SEPA processes.

NEPA and SEPA processes require public notification and circulation of documents as methods for consulting with other agencies, tribes, and the public, identifying potential impacts, and offering opportunities to express concerns. See **Section 411.05(2)** and **Section 411.07(6)** for details on distribution of SEPA checklists, NEPA EAs and all EISs.

410.06 Tribal Consultation

Throughout the environmental review stage of projects, WSDOT must comply with a number of federal and state laws, policies and executive orders requiring tribal consultation. Consultation with Indian Tribes on projects is mandated in the WSDOT Executive Order E1025.01 and *Centennial Accord Plan*. The lead federal agency for a project is responsible for tribal consultation and compliance with federal regulations. If FHWA is the lead federal agency, WSDOT has been delegated authority to initiate and manage the tribal consultation process in coordination with FHWA. When multiple agencies have a responsibility to consult, project teams should attempt to coordinate the consultation effort. The WSDOT *Model Comprehensive Tribal Consultation Process for the National Environmental Policy Act* describes the consultation requirements for numerous laws and policies during environmental review.

The NEPA Model is found at:

☞ <http://www.wsdot.wa.gov/environment/tribal>

The Executive Order is found at:

☞ <http://www.wsdot.wa.gov/Environment/Compliance/ExecutiveOrder.htm>

The *Centennial Accord Plan* is found at:

 http://www.wsdot.wa.gov/tribal/centennial_accord.htm

(1) Determine When to Consult With Tribes

It is important for project teams to provide early and ongoing consultation opportunities for affected or interested tribes. Consultation ideally begins in the transportation planning phase or the project scoping and programming phase and continues through design and environmental review and environmental permitting and PS&E, with project-specific meetings to address any issues. Continued consultation may occur via project monitoring by the tribes during the construction and maintenance phases.

The *WSDOT Model Comprehensive Tribal Consultation Process for the National Environmental Policy Act* should be followed when consulting with tribes during NEPA environmental review. This model also describes tribal consultation requirements for Section 106 of the National Historic Preservation Act.

(2) Determine Which Tribes to Consult With

Most consultation policies, including NEPA and Section 106 of the National Historic Preservation Act, require WSDOT to consult with interested or affected tribes. These statutes do not limit such consultation by any particular set of legal geographic boundaries. At WSDOT's request, tribes have specifically delineated a "consultation area" for WSDOT projects. These are neither legal nor firm boundaries, but an expressed area of interest. A tribe may refine its consultation area at any time. Consultation area maps are available on the GIS Environmental Workbench under Political and Administrative Boundaries. The sole purpose of these maps is to help project teams answer the question, "Which tribes do I need to consult with on my project."

"Usual and Accustomed (U&A) maps should not be used to determine which tribes to consult with. "Usual and Accustomed Areas" (U&A) is a legal term that comes from treaties between tribes and the federal government. Tribes reserved the right to fish in their "usual and accustomed grounds and stations." These U&A areas have been adjudicated by the federal courts. Appendix B of the *WSDOT Model Comprehensive Tribal Consultation Process for the National Environmental Policy Act* includes a description of U&A areas in Western Washington.

The HQ Tribal Liaison is available to assist you in determining which tribes should be invited to consult on a project.

(3) Determine Who to Consult With at the Tribe

Depending on the project's proximity to tribal lands, consultation can involve multiple tribal offices (planning, natural resources, cultural resources, and Tribal Employment Rights Ordinance (TERO)). At a minimum, project teams

need to invite the natural and cultural resource offices of affected or interested tribes to consult on projects located off reservation. Updated contacts for each tribe are available on the WSDOT Tribal Liaison Web site at:

☞ <http://www.wsdot.wa.gov/tribal/tribalcontacts>

410.07 WSDOT Internal Roles and Responsibilities

(1) Environmental Services Office (ESO)

The ESO supports the Regional Offices and Modes and develops policies, programs, and initiatives.

The Director of Environmental Services is the Responsible Official for all NEPA EIS/EAs and SEPA EISs in both draft and final format. For all other NEPA and SEPA documents, the Responsible Official is the Regional or Modal Environmental Manager. This applies to all projects where WSDOT is the lead agency, including ferry and rail projects. The Responsible Official is the signatory authority for the document.

ESO Compliance Program staff review all preliminary versions of the NEPA EIS, EA, Section 4(f), and SEPA EIS documents prepared by Regional Offices and Modes *before* they are submitted to the FHWA or other federal oversight agencies for their review. A final review of the document occurs before the Director of Environmental Services, FHWA, or other federal lead is requested to sign the document. ESO staff also review environmental documents prepared by local governments when WSDOT is the co-lead agency, following review by the WSDOT Highways and Local Programs Office.

To obtain signature approval (as appropriate), the ESO Compliance Program staff member (point of contact – POC) who is responsible for the region or mode needs to be contacted at least 45 days before the Signature Briefing with the Director of Environmental Services. The POC will provide all the necessary materials and guidance for readying the project to in obtaining final approval.

(2) Highways and Local Programs Office

The Highways and Local Programs Office oversees the distribution of federal funds from FHWA and other federal sources to cities and counties. Prior to ESO review, the office reviews NEPA environmental documents submitted by local governments for approval by FHWA. WSDOT's *Local Agency Guidelines* (M 36-63) provides more details on NEPA and SEPA procedures for WSDOT and local governments.

410.08 Exhibits

None.