



# Technical Memorandum #10



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**Subject:** Permitting and Regulatory Compliance

**By:** Jeff Gray, PWS

**Date:** December 31, 2019

This design memorandum presents criteria, recommendations, and other relevant information for project consideration on the above referenced subject.

**Acknowledgement:**

|  |                           |                 |
|--|---------------------------|-----------------|
| Significant discussion and agency comments during review are incorporated and reflected by date-revision, when shown. Information presented herein represents final concurrence and direction on referenced subject. | <u>Otak</u>               | <i>initials</i> |
|  | Mark Cole, PE, Proj.Mgr.  |                 |
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|  | Kirk Harris, Commissioner |                 |

**Introduction**

The purpose of this technical memorandum is to present considerations and recommendations for the environmental permits and approvals required for proposed paved pedestrian trail in Fall City, Washington. Permit requirements are based on previous preliminary trail design work and supporting documentation prepared for this, and other similar projects.

**Relevant Previously-Prepared Documentation**

- Tech. Memorandum #1 - Environmental Site Review, by Otak dated May 12, 2017
- Tech. Memorandum #5 - Drainage Requirements & Preliminary Analysis, by Otak dated July 26, 2017
- Tech. Memorandum #6 - Cultural Resources Assessment, by Otak dated June 28, 2017
- Design Plans, West Side Trail (60% Complete), by Otak dated July 2017

**Project Location and Description**

Fall City Metropolitan Park District (Park District) proposes to create a pedestrian route along State Route (SR) 202 in Fall City, Washington. The project is located within unincorporated King County, Washington in Township 24 North, Range 7 East. The proposed project is the construction of a paved pedestrian trail 4,800 feet in length parallel and with within the southerly right of way of SR 202 from SE 42<sup>nd</sup> Street to SE 40<sup>th</sup> Street.

## Natural Resources in the Project Area

### ***Critical and Sensitive Areas***

No critical or sensitive areas were mapped within the project area as described in Technical Memorandum 1 completed for this project. Several grass-lined roadside ditches parallel SR 202 on both sides of the road and were determined to be not regulated due to the absence of wetland and stream characteristics. Outside of the project area, a large wetland complex exists in the Snoqualmie River oxbow on the north side of SR 202 between Chief Kanim Middle School and 332<sup>nd</sup> Ave NE. The wetland boundary is at the SR 202 road embankment toe of slope. The wetland is rated as a Category II with a total score of 69 points for functions and a score of 25 points for habitat functions per Washington State Wetland Rating System for Western Washington (Hruby 2004). Based on the wetland category, habitat score, and low impact land use, the wetland has a buffer of 112.5 feet per King County Code (KCC) Chapter 21A.24.325 (Wetland-buffers). However, this buffer is limited to the north side of SR 202 from approximately 328<sup>th</sup> Place SE to 332<sup>nd</sup> Avenue SE.

***Project Environmental Impacts/Mitigation:*** Vegetative clearing within the SR 202 and King County right-of-way for trail construction

Other potential temporary impacts during construction include erosion and sedimentation, and accidental spills of petroleum hydrocarbons and other contaminants from construction equipment. Standard erosion control best management practices (BMPs) will be followed to minimize erosion and sediment transport. All construction staging and storage areas shall take place within existing paved roads or developed areas to minimize impacts to vegetated areas. A spill prevention and control countermeasures plan will be implemented to avoid accidental spills of contaminants.

## Preliminary Regulatory and Permit Requirements

Based on existing conditions, proposed project, and current regulatory information preliminary requirements for applicable and non-applicable permitting/regulatory compliance are presented below.

### **List of Required Regulatory Compliance and Applicable Permits**

1. ***National Environmental Policy Act (NEPA) \****
2. ***National Historic Preservation Act (NHPA) Section 106 Review \****
3. ***Federal Endangered Species Act (ESA) Section 7 Review \****
4. ***National Magnuson-Stevens Fishery Conservation and Management Act (MSA) \****
5. ***US Department of Transportation (US DOT) Act Section 4(f)/6(f) Evaluation \****
6. ***State Environmental Policy Act (SEPA)***
7. ***State Historic and Archaeological Resources***
8. ***National Pollutant Discharge Elimination System (NPDES) Construction Permit***
9. ***King County Critical Area Regulatory Compliance***
10. ***King County Permit*** (Clearing & Grading and/or Right of Way Use)

\* Required only if project utilizes Federal Funds

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

Major actions which have a federal nexus and may affect the environment must comply with the National Environmental Policy Act (NEPA). If compliance with NEPA is necessary (i.e. federal funding), an Environmental Classification Summary (ECS) will be prepared. Depending on the nature of the project, either a Categorical Exclusion (CE) or a Documented Categorical Exclusion (DCE) can be claimed. For larger proposals, an Environmental Assessment (EA) will need to be prepared. In rare cases of unavoidable significant impacts, this EA will trigger the preparation of an Environmental Impact Statement (EIS) (42 U.S.C §4331).

- Applicable NEPA elements:**
- NEPA not applicable
  - ECS/CE                       ECS/Documented CE
  - NEPA EA                       NEPA EIS
  - Corps has completed NEPA for Nationwide Permits

**Proposed Project:** If includes federal funds the project will require NEPA compliance and compliance with other relevant federal regulations. However, no significant environmental impacts are likely for this project and therefore it's anticipated qualifying for a CE or DCE. Based on the nature of the project and/or overall cost and amount of federal funding, it is anticipated that the project would be classified as a CE. The prepared preliminary NEPA documentation would need to be finalized and submitted for approval.

**Timeline: Varies.** Estimated 120 days for this project from submittal of complete NEPA documentation to Washington State Department of Transportation's (WSDOT)/Federal Highway Administration (FHWA) review and completion of the NEPA process.

## 2. National Historic Preservation Act (NHPA) - Section 106

Section 106 of the National Historic Preservation Act requires federal agencies to consider the effect of any proposed federal or federally assisted undertaking on any site that is included in or eligible for inclusion in the National Register of Historic Places (16 U.S.C §470 (f)).

**Proposed Project:** If includes federal funds compliance with Section 106 is required. The referenced Technical Memorandum #6 and Cultural Resources Assessment conducted on the project found the site to have undergone previous disturbances; an appearance of a low likelihood that significant (i.e. intact) cultural resource exists within the project location; and that no resources identified were eligible for listing in state or federal historical register.

**Timeline:** The referenced Cultural Resources Assessment was reviewed by the State Historical Preservation Office (SHPO) and received concurrence by State Department of Archaeology and Historic Preservation (DAHP) in a letter dated June 22, 2017.

## 3. Federal Endangered Species Act (ESA) - Section 7

Section 7 of the Federal Endangered Species Act (ESA) requires that each federal agency ensure that “any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of {listed species}” (16 U.S.C §1536 (a) (2)). This provision applies to local government activities where federal funding or authorization exists.

**Proposed Project:** If includes federal funds, a federal nexus exists for the project and compliance with Section 7 of the ESA will be required. Due to a lack of occurrence of ESA-listed species and designated critical habitat (DCH) within the project action area, a No Effects determination for all listed species and DCH is anticipated for the project. The preliminary “No Effects” letter would need to be finalized and included with the NEPA documentation to demonstrate compliance with the ESA.

**Timeline:** Concurrent with NEPA compliance timeline (approx. 120 days)

#### **4. National Magnuson-Stevens Fishery Conservation and Management Act (MSA)**

The Magnuson-Stevens Fisher Conservation and Management Act requires consultation for activities that are federally authorized, funded, or undertaken and may adversely affect “Essential Fish Habitat (EFH)”. EFH is generally defined as “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.” For the Pacific coast salmon fishery, EFH is further defined as streams, lakes, ponds, and other water bodies historically accessible to salmon.

**Proposed Project:** If includes federal funds, a federal nexus exists for the project and an EFH consultation will be required. Due to a lack of EFH and impacts to EFH associated with the project, a determination of no adverse effect is anticipated. The no adverse effect determination would be included in the preliminary “No Effects” letter and would need to be finalized and included with the NEPA documentation to demonstrate compliance with the MSA.

**Timeline:** Concurrent with NEPA compliance timeline (approx. 120 days)

#### **5. US Department of Transportation (US DOT) Act - Section 4(f)/6(f) Evaluation**

Section 4(f) and 6(f) of the Department of Transportation Act of 1966 (23 U.S.C §138) requires a review of projects funded by Federal Highway Administration (FHWA). This review analyzes the potential impacts of a proposal on nearby recreational resources.

**Proposed Project:** If includes federal funding from FHWA, Section 4(f) and 6(f) compliance will be required for the project. The trail is anticipated to occur entirely within WSDOT and King County ROW. Due to an apparent lack of (f) or 6(f) properties (e.g., parklands and recreational resources) in the project area, no impacts to these types of properties are anticipated.

**Timeline:** Concurrent with NEPA compliance timeline (approx. 120 days)

## 6. State Environmental Policy Act (SEPA)

The Washington State Environmental Policy Act (SEPA) requires all governmental agencies to consider the environmental impacts of a proposal before making decisions (RCW 43.21.C). An Environmental Checklist (EC) and Threshold Determination (TD) are the minimum requirements to satisfy SEPA. For projects with no impacts or impacts that can be mitigated, the TD will be a Determination of Non-Significance (DNS). In cases of larger projects with unavoidable impacts, a Determination of Significance (DS) will be issued. As a result of a DS, an Environmental Impact Statement (EIS) must be prepared. The SEPA EIS is similar to the NEPA EIS, and in some cases may be combined when both are required.

***Applicable SEPA elements:***

- SEPA not applicable
- SEPA EIS
- Consistent with Programmatic EC/DNS
- SEPA Exempt per WAC 197011-800
- Environmental Checklist/DNS (*preliminary assessment*)

***Proposed Project:*** Involves the construction of a 4,800-foot long paved pedestrian trail within the south right of way of SR 202. The magnitude of the proposed project and related impacts are unlikely to become significant, and a mitigated DNS is therefore anticipated for the project. The preliminary SEPA Environmental Checklist will need to be finalized and submitted to the King County Department of Permitting and Environmental Review.

***Timeline: Varies.*** Estimated 120 days for this project from submittal of complete SEPA checklist to King County to completion of the SEPA process. Issuance of a TD by the County will entail a subsequent public comment period. The period of time to address comments (if any) is included in total 120 day estimated timeline.

## 7. State Historic and Archaeological Resources

Archaeological sites and Native American graves are protected from knowing disturbance on all lands in Washington State. Federal law applies to all federal and Indian lands. Washington State law applies to all other lands and includes Indian Graves and Records (RCW 27.44), Archaeological Sites and Resources (RCW 27.53), and Executive Order 05-05. Compliance with Executive Order 05-05 is required for any project that is funded by state capital construction funds. An Archaeological Excavation and Removal Permit is required when site disturbance occurs on archaeological sites.

***Proposed Project:*** The previous referenced Technical Memorandum #6 and Cultural Resources Assessment conducted on the project found the site to have undergone previous disturbances; an appearance of a low likelihood that significant (i.e. intact) cultural resource exists within the project location; and that no resources identified were eligible for listing in state or federal historical register.

***Timeline:*** The referenced Cultural Resources Assessment was reviewed by SHPO and received concurrence by DAHP in a letter dated June 22, 2017.

**8. National Pollutant Discharge Elimination System (NPDES) General Construction Permit**

The Washington Department of Ecology (DOE) requires a permit for all soil disturbing activities (including grading, stump removal, demolition) where 1 or more acres will be disturbed, and storm water will be discharged to a receiving water directly (e.g., wetlands, ditches, creeks, unnamed creeks, rivers, marine waters, estuaries), or to storm drains that discharge to a receiving water. If all storm water is retained on-site and cannot enter surface waters of the state under any condition, a permit is not required.

***Proposed Project:*** Consists of approximately 2.7 total acres of soil disturbing activities. The project site is also along a drainage ditch with two culverts that infrequently allow stormwater discharge into the wetland located on the north side of SR 202. The proposed project will require an NPDES general permit for construction stormwater.

***Timeline:*** Application for permits should be made at least 60 days prior to commencement of proposed project construction.

**9. King County Critical Areas Regulatory Compliance**

All land uses in King County are subject to compliance with the County's critical areas regulations (KCC 21A.24 – Critical Areas). The code regulates activities in sensitive areas such as geologically hazardous areas, wetlands, streams, channel migration zones, and wetland and stream buffers. Wetlands and streams are typed by King County according to various criteria, and wetland and stream buffers are established according to type. Allowable modifications to streams, wetlands, or their buffers per County Code must be accompanied by report documentation and plans that support compliance with stipulations and requirements of the Code.

***Proposed Project:*** Is subject to compliance with King County's critical area regulations due to the proposed land disturbing activity. As indicated in reference Technical Memorandum #1, there are no critical areas identified within the project limits.

***Timeline:*** Confirmation is concurrent with SEPA and King County clearing and grading and/or right of way permit approval.

**10. King County Permit (Clearing & Grading and/or Right of Way Use)**

All projects must be in compliance with King County permit requirements (KCC 16.82 - Clearing and Grading and KCC 14.28 - Right of Way). Permits are required for projects that create over 2,000 square feet of new and/or replaced impervious surface.

***Proposed Project:*** The construction of the paved pedestrian trail is anticipated to be greater than 2,000 square feet (within King County) and therefore will require obtaining a permit. The preliminary draft permit clearing and grading application would be finalized and submitted for approval.

***Timeline:*** Estimated 90-120 days from formal application submittal.

### **Other Regulatory Permits Anticipated as Not Required for Project**

- ***State Department of Fish and Wildlife (WDFW) Hydraulic Project Approval (HPA)***

A Hydraulic Project Approval (HPA) is required for any project that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh “waters of the state” (RCW 77.55.100). There is no water of the state within the proposed project corridor. The project will not use, divert, obstruct or change the natural flow or bed of any water of the state, therefore an HPA will not be required for this project.

- ***U.S. Army Corps of Engineers (US ACOE) Section 404 Permit***

Pursuant to the Federal Water Pollution Control Act (“Clean Water Act”), the U.S. Army Corps of Engineers (Corps) requires a Section 404 permit for any discharge of dredged or fill material waterward of the ordinary high water mark, or the mean higher high tide in tidal areas, in waters of the United States (33 U.S.C §1344), including wetlands. A Section 404 permit will not be required because no fill, excavation, or permanent alteration of waters of the U.S. will occur as a result of the project.

- ***State Department of Ecology (WDOE) Section 401 water quality certification***

The Federal Clean Water Act allows states to approve, condition, or deny projects proposed to be built in wetlands or in other waters of the United States. Projects that may result in a discharge to these waters must first receive a permit from one of several federal agencies. Section 401 of the Clean Water Act requires that applicants for those permits first receive certification from the state that the proposed project will meet state water quality standards and other aquatic protection regulations. Any conditions of the state’s certification become conditions of the federal permit. WDOE issues a 401-certification based on approval of a Section 404 permit from the U.S. Army Corps of Engineers. The proposed project will not require a Section 404 permit from the Corps, and therefore the 401 water quality certification is not required.

- ***State Department of Ecology (WDOE) Coastal Zone Management (CZM) Consistency***

Activities and development affecting coastal resources which involve federal activities, federal licenses or permits, and federal assistance programs (funding) require written Coastal Zone Management (CZM) decision by the WDOE. CZM consistency for projects with a federal nexus is required within Washington State’s 15 coastal counties, including King County. Although the proposed project may receive federal funding, it will not require a Corps permit nor affect any land use, water use or natural resource of the coastal zone and therefore Federal CZM consistency review is not anticipated to be required.

- ***State Department of Natural Resources (DNR) Forest Practices Permit***

The Forest Practices Act (RCW 76.09) regulates activities related to growing, harvesting, or processing timber on forested lands. Tree removal will be minimal for the project, and no forest practices permit is anticipated.

- ***King County Shorelines Substantial Development Permit***

Pursuant to the Shoreline Management Act of 1971 (RCW 90.58), King County requires a shoreline management substantial development permit for all proposed uses and modifications within shorelines of the state (KCC Chapter 21A.25 – Shoreline). The project area does not lie within a designated shoreline environment and will not require a shoreline management substantial development permit.

## **Conclusions and Recommendations**

1. The project has not been federalized yet, i.e. current grant only has state funding. Until the project has federal funds there is no federal nexus and WSDOT won't begin NEPA or the process of the other identified compliance requirements dictated by use of Federal funds.
2. King County clearing/grading permit is good for one year from date of issuance. They can be extended 1 or 2 years depending on circumstances (generally, if construction has commenced). Because construction funding (and schedule) is not yet defined, it is recommended that Park District defer submitting application for permit until a construction schedule can be anticipated. In the meantime it is advised to meet with King County (Pre-application) to discuss/confirm permit requirements.



## **Pre-Application Meeting with King County**

A pre-application form/worksheet was prepared, along with the completed 60% design plans, and submitted to the Park District who then initiated a pre-application meeting with King County in September 2018. Significant highlights from that pre-application meeting, as summarized by the Park District, were as follows:

- The project would not require a Clearing and Grading permit however would require obtaining a King County Right of Way Use Permit.
- Confirmed that the project complies with King County Critical Areas regulations as the County concurred that no critical areas are within the project limits.
- Although majority of project is within WSDOT right-of-way the portions within KC-DOT right-of-way and associated new and/or replaced impervious areas must be separately identified to assess specific requirements. If the new and/or replaced impervious area of the project portion within King County is greater than 2,000 square feet (however indicated it may be possible to exempt even if the impervious area is as around 3,000 square feet) the project would require:
  - Preparation of a Technical Information Report (TIR), including indicating the number of drainage basins, and a full drainage review.
  - Evaluation to incorporate a Flow Control BMP - to infiltrate as much stormwater as possible. A feasibility of the possible options to incorporate into the project is to be included to indicate which measure make sense or not and why.

## **New and/or Replaced Project Impervious Areas (King County Right of Way)**

Based on the pre-application meeting, the amount of proposed new and/or replaced impervious areas portions of the project within King County right of way need to be determined to confirm permit submittal requirements. The total new and/or replaced impervious area for the project is approximately 66,500 square feet, including small portions within King County right-of-way at the intersections of 324<sup>th</sup> Ave SE; Chief Kanim MS entry road; 332<sup>nd</sup> Ave SE; and within the right-of-way of 334<sup>th</sup> Place SE (the east terminus). Otak's has calculated the portion of new and/or replaced impervious areas within King County right-of-way to be approximately 6,175 square feet (Note: this includes approximate 2,375 square foot of new concrete & paving treatment, as indicated on the plans, at the east terminus).

**Exhibit \_\_\_\_**

**Significant Discussion Topics during Agency (Client) Memorandum Review**

The below summary represents relevant discussion occurring during agency memorandum review in validating presented information and incorporating memorandum changes to reflect final agency direction.

*[To be completed at time of final concurrence]*