Environmental Requirements for Encroachment Permits and Other Right-of-Way Use Agreements

Introduction

The purpose of this guidance is to assist Caltrans staff in understanding the environmental requirements for encroachment permits and other right-of-way use agreements.

Encroachment permits are issued when an outside agency or entity must encroach upon the State Highway System (SHS) right-of-way. The Caltrans Project Development Procedures Manual defines an encroachment as a "temporary use of State right of way for purposes other than transportation." The California Streets and Highways Code Section 660 states that an encroachment includes:

> …any tower, pole, pole line, pipe, pipe line, fence, billboard, stand or building, or any structure, object of any kind or character not particularly mentioned in this section, or special event, which is in, under, or over any portion of the highway. "Special event" means any street festival, sidewalk sale, community-sponsored activity, or community-approved activity.

Other examples of encroachment permits include work done by utility companies and/or telecommunications companies whose facilities may intersect with or be located within Caltrans right-of-way, improvements made to local roads with a connection to the SHS, and temporary traffic control.

Encroachment permits are normally issued for work of less than 30-days duration. For longer, or recurring, uses of the highway right-of-way, a right-of-way use agreement will likely be required (formerly referred to as an airspace lease).

California Environmental Quality Act Requirements

Is the Action a Project under CEQA?

Detailed information on California Environmental Quality Act (CEQA) compliance can be found on the Caltrans Standard Environmental Reference. CEQA applies to projects. A project under CEQA is defined as follows: "Project" means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

(a) An activity directly undertaken by any public agency.
(b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

Certain activities for which an encroachment permit is required may not qualify as a project under CEQA if there is **clearly no possibility** that there could be either a direct change in the physical environment, or a reasonably foreseeable indirect physical change in the environment. This determination must be made by the District Environmental Branch. Examples might include temporary traffic control for a marathon or bike race or other special event or an encroachment permit to enter onto the existing SHS to conduct maintenance of an existing traffic signal or other fixture.

Caltrans Responsibilities Under CEQA for "Projects" and as Owner/Operator of the State Highway System

As provided by California Streets and Highways Code Section 670, Caltrans has discretionary approval authority to approve actions that encroach within the State's highway right-of-way. This discretionary authority gives Caltrans a "responsible agency" status under CEQA for the part of a project (as defined under CEQA) that requires work within the State's highway right-of-way. For the purposes of CEQA, the term "responsible agency" includes all public agencies other than the lead agency which have discretionary approval power over the project.

Generally, it is the responsibility of the applicant to comply with CEQA for projects requiring an encroachment permit and the encroachment permit application will not be deemed complete until CEQA compliance has been demonstrated. As a responsible agency, Caltrans should actively participate in the lead agency's CEQA process and must consider the lead agency's environmental document prior to acting upon or approving the project (i.e., issuing the encroachment permit). Caltrans must certify that it has reviewed and considered the information contained in the Environmental Impact Report (EIR) or Negative Declaration/Mitigated Negative Declaration (ND/MND) on the project. In addition, Caltrans must file its own Notice and Determination and must prepare and issue its own findings regarding the project, if applicable. Note that as a responsible agency, Caltrans has discretionary approval only over the portion of the project within the State's right-of-way.

There is no process under CEQA for a responsible agency to utilize a categorical, statutory, or "common sense" CEQA Exemption (CE) prepared by a lead agency. The concept of a "responsible agency" under CEQA only applies when an environmental document (such as an Initial Study with ND/MND or an EIR) is prepared. For actions that were approved by the applicant or another public agency with a CEQA Exemption, the applicant must provide a copy of the Notice of Exemption (NOE) that was filed with the appropriate county clerk and the State Clearinghouse. It is not necessary for Caltrans staff to prepare a separate CE and/or NOE. However, if an NOE has not been filed by the lead agency, Caltrans should request that the applicant file an NOE with the State Clearinghouse pursuant to CEQA Guidelines 15062(c)(4). If the applicant is unwilling to file an NOE, Caltrans may file the NOE as responsible agency, however in these cases, Caltrans may request sufficient information from the applicant to determine that the action qualifies for an exemption under CEQA. This includes consideration of the "exceptions to the exemptions" discussed in Section 15300.2 of the CEQA Guidelines. Additionally, as owner-operator of the SHS, Caltrans can impose conditions

through the issuance of an encroachment permit independent of CEQA. Any such conditions must have a nexus and be proportional to the identified impacts to the SHS.

In many instances, CEQA review will not be completed at the time of application. This often happens when the applicant is a private entity (only public agencies can serve as lead or responsible agencies under CEQA). In these cases, it should be determined whether or not another public agency will be granting a discretionary approval of the project, such as a city or county, or another state agency such as California Department of Fish and Wildlife or the California Coastal Commission. If another agency will be granting a discretionary approval, the determination of lead agency shall be governed by CEQA Guidelines Sections 15050 through 15053.

In situations where no other public agency will be granting a discretionary approval or where there is a preference for Caltrans to serve as lead agency, Caltrans *may* act as CEQA lead agency for an encroachment permit project. An example would be activities performed within Caltrans right-of-way by a private utility company. While in general, environmental reviews should include the "whole of the action" (including the reasonably foreseeable consequences of the encroachment) care should be taken when Caltrans only has discretionary approval over a very small area within a larger project. In most circumstances, the scope of Caltrans environmental review should be limited to the portion of the project over which Caltrans has discretionary authority (i.e., within the SHS right-of-way). In most cases, another public agency (such as a city or county) will be granting an encroachment permit as well and may more appropriately serve as the CEQA lead. When Caltrans does serve as CEQA lead for a private applicant, the applicant shall prepare, or cause to have prepared, the CEQA determination or documentation, including any required technical studies, for Caltrans approval. Depending upon the complexity of the project, the applicant may be required to enter into a "Complex Utilities Permit Agreement" (CUPA) with Caltrans to provide reimbursement for engineering and environmental work.

Regardless of whom prepares the CEQA document or when it is prepared, the encroachment permit application is not deemed complete until the CEQA review has been completed.

National Environmental Policy Act Requirements

The National Environmental Policy Act (NEPA) applies to encroachment permits when there is federal funding, or a federal approval is required. Examples of federal approvals include:

- Federal Highway Administration (FHWA) or Caltrans approval of a non-highway use on a federal-aid highway.
- A federal permit issued by another federal agency (e.g., United States Army Corps of Engineers (USACE), United States Fish and Wildlife Service (USFWS), etc.).
- The action is occurring on federal lands requiring the federal land-management agency to comply with NEPA.

FHWA or Caltrans Approval of a Non-Highway Use

FHWA approval of a non-highway use on a federal-aid highway is a federal action that requires compliance with NEPA, **even in those instances in which the approval of the non-highway use (i.e., the encroachment permit or other right-of-way agreement) is delegated to Caltrans through the FHWA/Caltrans Stewardship and Oversight Agreement**. A federal-aid highway is defined as any public highway eligible for Title 23 assistance (funding) except a highway functionally classified as a local road or rural minor collector. The "federal-aid system" is synonymous with the "National Highway System" which includes interstate routes.

A "highway" project is defined as "…any undertaking that is eligible for financial assistance under Title 23 United States Code (USC) and for which the Federal Highway Administration has primary responsibility. A highway project may include an undertaking that involves a series of contracts or phases, such as a corridor, and also may include anything that may be constructed in connection with a highway, bridge, or tunnel" (23 Code of Federal Regulations (CFR) 773.103). The NEPA determination or document for encroachment permits associated with highway projects may be approved by Caltrans through its NEPA Assignment Program under 23 USC 326 or 327. An example might include new, relocated, and existing public utility encroachments *associated with a highway improvement project (both capital and oversight)*. In these instances, the NEPA approval for the encroachment would be included in the NEPA determination or document for the highway improvement project.

While there is no definition provided for "non-highway projects," it can generally be viewed as anything not related to a highway purpose. Federal right-of-way regulations (23 CFR 710.403) state that a party that is the direct recipient of Title 23 funds (such as Caltrans) must:

> …ensure that all real property interests within the approved ROW [right-of-way] limits or other project limits of a facility that has been funded under title 23 are devoted exclusively to the purposes of that facility **and the facility is preserved free of all other public or private alternative uses**, unless such non-highway alternative uses are permitted by Federal law (including regulations) or the FHWA. An alternative use, whether temporary under §710.405 or permanent as provided in §710.409, must be in the public interest, consistent with the continued operation, maintenance, and safety of the facility, and such use must not impair the highway or interfere with the free and safe flow of traffic (see also 23 CFR 1.23).

Examples of non-highway uses within Caltrans right-of-way include renewable energy generation, electrical transmission and distribution projects, broadband projects, vegetation management NOT primarily directed at the maintenance of Caltrans right-of-way (such as vegetation management activities performed by utility companies), inductive charging in travel lanes, alternative fueling facilities, and other uses such as "safe parking" shelters. Remember that *utility projects associated with a highway improvement project* can be approved with the NEPA determination or document for the highway improvement project.

Non-highway uses that qualify for a categorical exclusion under NEPA can be approved by Caltrans under the 23 USC 326 CE Assignment MOU. Non-highway projects that do not qualify for a categorical exclusion under 23 USC 326 (i.e., an exclusion would be needed under 23 USC 327 or a higher-level document is required) will have to be submitted to FHWA for NEPA approval, assuming that the FHWA approval of the non-highway use is the only federal approval required for the project. If another federal approval is also required for the project, it will be up to FHWA and the other federal agency to determine which agency will act as lead agency under NEPA. When FHWA is serving as lead agency, it is anticipated that Caltrans or the applicant will prepare the environmental document for FHWA's review and approval.

For non-highway uses of interstate routes, FHWA must approve the non-highway use, regardless of whether Caltrans or FHWA serves as the NEPA lead agency. For non-interstate routes, Caltrans may approve the non-highway use, but NEPA compliance is still required. Caltrans will approve the non-highway use for non-interstate routes even when a NEPA environmental document is approved by FHWA. Right-of-way use agreements for non-highway uses may be approved under Appendix A of the 23 USC 326 MOU when a categorical exclusion is appropriate.

If a non-highway use (such as broadband installation) is being constructed as part of a larger highway project, the non-highway use should be included in the NEPA determination or document for the highway project and no longer requires an independent approval.

Table 1: Environmental Approval for Non-Highway Uses*

	Categorical Exclusion	Environmental Document
For Non-Interstate	• Caltrans or applicant prepares CE, Caltrans approves NEPA under 23 USC 326 MOU • Caltrans approves Non-Highway Use	• Caltrans or applicant prepares NEPA, FHWA approves NEPA • Caltrans approves Non-Highway Use
For Interstate	• Caltrans or applicant prepares CE, Caltrans approves NEPA under 23 USC 326 MOU • FHWA approves Non-Highway Use	• Caltrans or applicant prepares NEPA, FHWA approves NEPA • FHWA approves Non-Highway Use

*This table assumes that no other federal approvals are required.

Utility installations are a special type of non-highway use. The installation of utilities serving the public within Federal-aid highway right of way is governed by 23 CFR 645 Subpart B ("Accommodation of Utilities"). Unlike the regulations governing right-of-way use agreements, NEPA is not explicitly addressed by the requirements of 23 CFR 645. Rather, Subpart B states that it is in the public interest for utility facilities to be accommodated "when such use and occupancy of the highway right-of-way do not

adversely affect highway or traffic safety, or otherwise impair the highway or its aesthetic quality, and do not conflict with the provisions of Federal, State or local laws or regulations" (Section 645.205). Subpart B also makes explicit the need to protect productive agricultural lands; scenic areas (including public park and recreation lands, wildlife and waterfowl refuges, historic sites as described in 23 USC 138, scenic strips, overlooks, rest areas, and landscaped areas; and wetlands.

Rather than require project-by-project approvals of utilities by FHWA, each state, as directed by Subpart B, has a utility accommodation plan which has been approved by FHWA. These plans or policies allow state transportation departments to approve utility installations within Federal-aid highway right-of-way. For certain utility installations on interstate facilities, FHWA approval is still required. Caltrans' Utility Accommodation Policy can be found in Chapter 600 of the Encroachment Permits Manual.

Although NEPA is not explicitly mentioned in 23 CFR 645, the approval of utility installations and related activities within the Federal-Aid highway right of way constitute a federal approval, even when the approval is delegated to Caltrans through its Stewardship and Oversight Agreement with FHWA. For a complete listing of the types of right-of-way approvals needed for various activities, and when FHWA approval is still required, please see the FHWA/Caltrans Approval Matrix – Right of Way Use Agreement.

Most utility installations can be approved under NEPA using the categorical exemption found at 23 CFR 771.117(c)(2) "Approval of utility installations along or across a transportation facility." Utility projects that are being constructed as part of a larger highway project should be included in the NEPA determination or document for the highway project and would no longer require an independent approval.

Federal Permit Issued by Another Agency

In cases where there is no FHWA nexus (FHWA approval or funding) for an encroachment permit action, but another federal agency is issuing a permit or approval (for example, a 404 permit from the USACE, or Section 7 approval by the USFWS), that federal agency will generally serve as NEPA lead agency only for their regulatory action. Caltrans or the applicant (if a public agency) will prepare a CEQA-only determination or document for the encroachment permit.

Federal Lands

In some instances, an encroachment permit may involve work on lands owned by a federal land management agency such as the United States Forest Service or the Bureau of Land Management. In cases with no FHWA nexus (FHWA approval or funding), it will be up to the federal land manager to determine if NEPA is required and, if applicable, to serve as NEPA lead agency.

Please note that ***interstate routes are not considered "federal lands."*** States own and operate the interstate system, but FHWA retains ultimate approval authority for non-highway uses. This means that NEPA does not apply to a project simply because it

is located on an interstate. In the absence of an FHWA nexus (FHWA approval or funding), NEPA does not apply. For example, a locally-sponsored highway project located on an interstate, with no federal funding or federal approval (such as FHWA approval of an interstate access modification), does not require NEPA. In the event that another federal approval is required (for example, a 404 permit from the USACE, or Section 7 approval by the USFWS), that federal agency will generally serve as NEPA lead agency only for their regulatory action. Caltrans or the applicant will prepare a CEQA-only determination or document for the highway project.

Other Considerations

In addition to CEQA and NEPA, other state and federal laws are likely to apply to an encroachment permit project even if that project is otherwise exempted or excluded from the requirements of CEQA and/or NEPA. This can include laws that protect historical, cultural, or biological resources. For example, even for a project that is exempt from CEQA, Caltrans is still required to comply with California Public Resources Code Section 5024, which provides that no state agency shall alter, transfer, relocate, or demolish a state-owned historical resource without providing the State Historic Preservation Officer (SHPO) with a summary of the proposed action and the opportunity to review and comment on the proposed action. Another example would be the Federal Endangered Species Act which can apply even in the absence of any other federal nexus.

Section 106 Programmatic Agreement

Caltrans may perform its Section 106 responsibilities under the Section 106 Programmatic Agreement (PA) if either Caltrans or FHWA are acting as lead federal agency. If a portion of the project area is within tribal trust land, the Section 106 PA may not be used, and Caltrans must rely on standard Section 106 regulations. If another federal agency is NEPA lead, it is possible to use the Section 106 PA, as long as that federal agency agrees. If not, standard Section 106 regulations must be used.

Federal Endangered Species Act Section 7 Procedures when Caltrans is not the NEPA Lead Agency

If Caltrans is not the lead federal agency under NEPA, there may be cases where another federal agency would become the lead for Section 7. For example, if the project area has impacts to federally jurisdictional waters of the U.S., the USACE would be the lead for species directly associated with the waters of U.S. jurisdiction, such as fish, amphibians, and other aquatically dependent listed species. Where the project limits extend on to federally-controlled land, such as U.S. Forest Service or Bureau of Land Management, those agencies would become the federal lead and work with Caltrans to conduct the consultation under Section 7 of the Act.

When FHWA is serving as the NEPA lead agency, Section 7 compliance shall be conducted in accordance with the April 24, 2002 Memorandum "Conducting Endangered Species Act Consultations with the Services."

When Does Section 4(f) Apply?

Section 4(f) only applies to transportation projects (please see Section 1.3 of the FHWA Section 4(f) Policy Paper). If FHWA or Caltrans is approving a non-highway use as part of a larger transportation project, Section 4(f) may apply. If FHWA or Caltrans is approving a non-highway use as a "standalone" project (such as a utility installation), Section 4(f) will not apply.

Additional Resources

- Caltrans Encroachment Permits
- Caltrans Encroachment Permits Manual Chapter 4 (updates pending)
- Caltrans Standard Environmental Reference
- FHWA Memorandum: State DOTs Leveraging Alternative Uses of the Highway Right-of-Way Guidance
- Quick Guide: Federal Highway Administration (FHWA) Requirements for Renewable Energy Projects in Highway Right-of-Way (ROW).