



Bob Ferguson

ATTORNEY GENERAL OF WASHINGTON

Transportation & Public Construction Division

PO Box 40113 • Olympia WA 98504-0113 • (360) 753-6126

September 19, 2013

F. J. Kenney
Rear Admiral, U.S. Coast Guard
Judge Advocate General & Chief Counsel
2100 Second Street S.W.
Washington, D.C. 20593-7121

RE: Bridge Permit Application Review of the Columbia River Crossing Project

Dear Rear Admiral Kenney:

Please accept this response to the Coast Guard's September 11, 2013, letter presenting questions regarding the bridge permit for the Columbia River Crossing Project (Project). As the Washington State Department of Transportation (WSDOT) indicated in a letter dated August 9, 2013, the project tasks leading to a bridge permit are to be handled by the Oregon Department of Transportation (ODOT). At the outset, it should be recognized that the states of Washington and Oregon have a great deal of experience working successfully together on the construction, operation, and maintenance of numerous bridges that span the state boundaries. This past relationship demonstrates a strong capability for cooperation and success between the states.

The Coast Guard's questions are focused on "the ability of ODOT to pursue a bridge project on shore-side and submerged lands in Washington State." As you noted, 33 C.F.R. § 115.30 reads: "An opinion of the attorney general of the State as to the sufficiency of State authority for the construction of a bridge is acceptable to the Coast Guard in doubtful cases." As more fully detailed below, the Executive Branch of the State of Washington has existing statutory authority to authorize ODOT's construction of a bridge over the Columbia River and on lands in the state of Washington.¹ The following responses are provided to the Coast Guard's questions in the order raised in the letter.

¹ The Washington statutes referenced in this letter are appended as Exhibits A-F.

ATTORNEY GENERAL OF WASHINGTON

Rear Admiral F.J. Kenney
September 19, 2013
Page 2

1. For Washington State, publically-held land shoreward of the river anticipated for use in constructing the approaches to the bridge, can the agency(ies) holding that land grant authority to Oregon to construct the bridge approaches on the Washington side?

RESPONSE:

RCW 47.01.260, RCW 47.04.080, and RCW 47.04.081 provide the general statutory authorities that allow WSDOT to authorize the State of Oregon to construct a bridge within the state of Washington.² WSDOT has the authority to “exercise all the powers and perform all the duties necessary, convenient, or incidental to the planning, locating, designing, constructing, improving, repairing, operating, and maintaining state highways, including bridges and other structures” See RCW 47.01.260. RCW 47.04.080 allows for agreements between WSDOT and ODOT to address the erecting and constructing of a bridge over water between the two states. We interpret this authority as including the steps necessary prior to construction, such as project development, permitting, and right-of-way acquisition. In addition to these two statutes, RCW 47.04.081 provides WSDOT the authority to join with other public agencies to plan, develop, and establish “urban public transportation systems” in conjunction with new or existing highways.

A. Would that grant of authority be a license, a grant of title, or something else?

RESPONSE:

Authority for ODOT to construct the bridge on land under WSDOT’s jurisdiction would be granted through one or more intergovernmental agreements. The agreements would reference one or more statutes, including RCW 47.01.260; RCW 47.04.080; RCW 47.04.081; and the Interlocal Cooperation Act, chapter 39.34 RCW.

B. Is this authority held solely within the Executive Branch, or is action of the Legislature required?

RESPONSE:

The authority is held with an Executive Branch agency, the Washington Department of Transportation, as reflected in RCW 47.01.260, RCW 47.04.080, and RCW 47.04.081. No approval authority or further action is required of the Washington State Legislature, as it has already delegated the authority to WSDOT.

² RCW 47.52.020 also provides that WSDOT may cooperate with ODOT to “plan, designate, establish, regulate, vacate, alter, improve, construct, maintain, and provide limited access facilities for public use wherever the authority or authorities are of the opinion that traffic conditions, present or future, will justify the special facilities.” Interstate 5 is a “limited access facility” within the state of Washington.

ATTORNEY GENERAL OF WASHINGTON

Rear Admiral F.J. Kenney

September 19, 2013

Page 3

C. Are there additional Washington State environmental, permitting, or other processes, not already completed in connection with the CRC bridge, that would be required before such authorization could be sought? (For example, would Oregon acquiring land in Washington State require a separate State NEPA process?)

RESPONSE:

No additional environmental, permitting, or other processes beyond those already completed or currently underway would be required. The use of current Washington State right-of-way as well as the acquisition of land held by other public agencies has already been analyzed in the Final Environmental Impact Statement (FEIS) prepared pursuant to the National Environmental Policy Act (NEPA). In particular, impacts to park lands were analyzed in both the FEIS and in the section 4(f) statement. Under the State Environmental Policy Act (SEPA), if a NEPA EIS has been prepared for a project, there is no additional SEPA requirement. *See* RCW 43.21C.150. In addition, a change in the entity paying for the acquisition of the property would not result in a change in the environmental impacts.

D. What is the process for that action(s) and when will it be completed, or what is the anticipated timeline? What are the legal instruments that will be used to confirm and memorialize such land use/transfer arrangements?

RESPONSE:

After the State of Oregon gives ODOT and the Oregon Transportation Commission the authority to proceed with the Project, designated representatives from each state would begin to negotiate the terms of the intergovernmental agreements, covering such topics as construction, operations, maintenance, and right-of-way acquisition. Since the State of Oregon would be the lead on the Project, the State of Washington could commit to use its best efforts to meet the timelines identified by Oregon and other federal, state, and local project partners.

2. For Washington State, privately-held land shoreward of the river and anticipated for use in constructing the approaches to the bridge (if any), what are the mechanisms under which Oregon will be granted control or authorization to construct the approaches to the bridge on such land? What is the process for that action(s) and when will it be completed?

RESPONSE:

Privately-held land can be acquired by both WSDOT and ODOT for the Project. Once the land is acquired, WSDOT could authorize ODOT to construct the bridge through the intergovernmental agreement(s) referenced above.

WSDOT has the authority to acquire lands or interests in land "for a right-of-way for any state highway" and "for any other highway purpose." *See* RCW 47.12.010. The acquisition on behalf

ATTORNEY GENERAL OF WASHINGTON

Rear Admiral F.J. Kenney
September 19, 2013
Page 4

of the State of Washington may be by gift, purchase, or condemnation. Since Interstate 5 and State Route 14 are designated as Washington State highways, this acquisition authority is not diminished by the fact that Oregon will construct the portions of the bridge and bridge approaches in Washington. RCW 47.12.010 further authorizes WSDOT to acquire property for urban public transportation systems if the property to be acquired is adjacent to, under, upon, within, or above the right-of-way of any state highway.

ODOT has the statutory authority to acquire right-of-way for the Project in Washington. *See* O.R.S. § 381.005 § 4(2). Oregon, however, cannot exercise eminent domain authority to acquire privately-held property in Washington, and consequently must acquire land from a willing seller without threat of condemnation. Once acquired from a willing seller, title would be transferred to the State of Washington.

3. For Washington State, submerged lands in the Columbia River, what state agency(ies) have authority to grant authorization for Oregon to construct pilings, footings, etc., for the CRC bridge?

RESPONSE:

The Washington Department of Natural Resources (DNR) is the state agency responsible for the management of state-owned bedlands, including the submerged lands in the Columbia River that are within the state of Washington. *See* RCW 79.110.100-.140. In addition, both the Washington Department of Fish and Wildlife and the City of Vancouver have permitting authority over this work on submerged lands.

A. Is such authority held solely within the Executive Branch, or is action of the Washington Legislature required?

RESPONSE:

No action by the Washington State Legislature is required. DNR is headed by a separately elected official, the Commissioner of Public Lands, and not by a gubernatorial appointee. The Commissioner has authority to grant a right-of-way for public roads to any state agency under RCW 79.110.100 upon payment for the right-of-way and any damages to the affected aquatic lands. Also, the Commissioner has authority pursuant to RCW 47.12.026 to enter into an easement over bedlands and harbor areas³ with WSDOT for highway purposes, including bridges. There is no charge to WSDOT for an easement granted under RCW 47.12.026. It is likely that the easement would have to be obtained by WSDOT, with WSDOT's administrative costs for obtaining the easement being borne by Oregon.

³ The Board of Natural Resources, a multimember governing body composed of members described in RCW 43.30.205, must first designate the encumbered area as a "public place." RCW 47.12.026 (2); *see* RCW 43.30.215 (4) (designating the Board of Natural Resources as the Commission on Harbor Lines).

ATTORNEY GENERAL OF WASHINGTON

Rear Admiral F.J. Kenney
September 19, 2013
Page 5

In addition, the Project would likely need a Hydraulic Project Approval from the Washington Department of Fish and Wildlife (RCW 77.55.021), and a shoreline substantial development permit from the City of Vancouver (RCW 90.58.140). These permits are noted in the FEIS; no change in these permit processes results from Oregon taking the lead on this Project.

B. Are there additional Washington environmental, permitting, or other processes not already completed in connection with the CRC bridge, that would/will be required before such authority could be granted? (For example, would gaining use of submerged land in Washington State require a separate State NEPA process?)

RESPONSE:

No. The acquisition of an aquatic lands easement for the Project and the permits were anticipated and noted in the FEIS. No additional SEPA process is required.

C. When will the processes authorizing Oregon to use or control land in Washington State be completed, or what is the anticipated timeline?

RESPONSE:

The process for authorizing Oregon to use or control the aquatic lands easement area would likely be on the same timeline as the authorizations to use WSDOT right-of-way. While WSDOT does not have an anticipated timeline, it would be negotiated with ODOT and completed in time for the start of construction or such other time as Oregon or its contractors required access to the property.

D. What are the legal instruments that will be used to confirm and memorialize such land use/transfer arrangements?

RESPONSE:

WSDOT may acquire an aquatic lands easement from DNR for highway purposes, such as a bridge. WSDOT's intergovernmental agreement with Oregon would authorize ODOT to use WSDOT right-of-way, including the DNR easement area. DNR is also authorized to grant a right-of-way for public roads to state agencies.

4. If Oregon is also to be solely responsible for the operation and maintenance of the proposed CRC bridge, what is the legal mechanism or mechanisms by which Washington will give sole operational control and maintenance responsibility to Oregon?

RESPONSE:

RCW 47.01.260, RCW 47.04.080, RCW 47.04.081, RCW 47.52.020, and the Interlocal Cooperation Act provide WSDOT the authority to contract with Oregon regarding the operation

ATTORNEY GENERAL OF WASHINGTON

Rear Admiral F.J. Kenney
September 19, 2013
Page 6

and maintenance of the Interstate 5 bridge. The existing bridge is subject to a Maintenance Agreement, dated October 25, 1966, which describes the operation and maintenance responsibilities between the two states. WSDOT and ODOT would need to amend the 1966 agreement or execute a new agreement that identifies the respective obligations of the two states. The operation and maintenance of the light rail system within Washington State right-of-way would be subject to an airspace lease under RCW 47.12.120 and in accordance with 23 C.F.R. § 710.

A. Is the authority to implement such mechanism(s) under the sole control of the Executive Branch, or is action by the Washington Legislature required?

RESPONSE:

No action by the Washington State Legislature is required, as WSDOT has already received the delegated authority regarding operations and maintenance of the state highway system.

B. What is the process for that action(s) and when will it be completed, or what is the anticipated timeline?

RESPONSE:

After the State of Oregon gives ODOT and the Oregon Transportation Commission the authority to proceed with the Project, designated representatives from each state would begin to negotiate the terms of the various agreements, including an operations and maintenance agreement.

Please do not hesitate to contact me if you have any questions.

Sincerely,



BRYCE E. BROWN
Senior Assistant Attorney General
(360) 753-4962

Enclosures