

MEMORANDUM OF UNDERSTANDING

National Environmental Policy Act
and
Clean Water Act Section 404

Integration Process
for
Surface Transportation Projects
in
Arizona, California, and Nevada

I. APPLICABILITY

- A. This memorandum of understanding (MOU) applies to all projects needing both Federal Highway Administration (FHWA)/Federal Transit Administration (FTA) action under the National Environmental Policy Act (NEPA) and a U.S. Army Corps of Engineers (Corps) individual permit under section 404 of the Clean Water Act. This MOU is limited to issues pertaining to waters of the United States (waters of the U.S.) and associated sensitive species.
- B. Regulatory/resource agency participation in this process does not imply endorsement of all aspects of a transportation plan or project. Nothing in this MOU or its Appendices is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the agencies involved.

II. BACKGROUND

In a May 1, 1992 agreement, the U.S. Department of Transportation, the U.S. Department of Army-Civil Works, and the U.S. Environmental Protection Agency (EPA) adopted as agency policy (1) improved interagency coordination and (2) integration of NEPA and the Clean Water Act section 404 procedures. This MOU implements this policy.

III. NEPA-SECTION 404 INTEGRATION

The signatories to this MOU are committed to integrating NEPA and section 404 of the Clean Water Act in the transportation planning, programming, and implementation stages. We are committed to ensuring the earliest possible consideration of environmental concerns pertaining to waters of the U.S., including wetlands, at each

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of these three stages. We place a high priority on the avoidance of adverse impacts to waters of the U.S. and associated sensitive species, including threatened and endangered species.

Whenever avoidance of waters of the U.S. is not practicable, minimization of impacts will be achieved, and unavoidable impacts will be mitigated to the extent reasonable and practicable. We will improve interagency cooperation and consultation at all levels of government throughout the process. We will integrate compliance with the Section 404(b)(1) Guidelines with compliance with the National Environmental Policy Act.

IV. ANTICIPATED BENEFITS OF PROCESS

The process embodied in this MOU will:

1. Improve cooperation and efficiency of governmental operations at all levels, thereby better serving the public,
2. Expedite construction of necessary transportation projects, with benefits to mobility and the economy at large,
3. Enable more transportation projects to proceed on budget and on schedule, and
4. Protect and enhance the waters of the U.S., which will benefit the region's aquatic ecosystems and the public interest.

V. IMPLEMENTATION PROCEDURES

- A. Appendix A is a NEPA-404 Concurrent Process paper for the Project Development stage which is incorporated into this MOU.
- B. The signatory agencies agree to jointly develop guidance by March 1, 1994 and to use the guidance to facilitate the implementation of this MOU. These guidance papers include, but are not limited to, the following:
 1. Level of Data Needs / Threshold for Regulatory/Resource Agency Involvement
 2. Purpose and Need
 3. Alternatives Analysis and Avoidance
 4. Mitigation
 5. Tiered/Corridor EIS

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VI. CONCURRENCE/NONCONCURRENCE

- A. **Timeliness:** Regulatory/resource agencies will provide their comments in a timely manner, as defined for each stage (see Agency Commitments section below).
- B. **Concurrence:** written determination that:
1. The information to date is adequate for this stage, and
 2. The project may proceed to the next stage without modification.

Agencies agree not to revisit previous concurrences unless there is significant new information or significant changes to the project, the environment, or laws and regulations.

- C. **Nonconcurrence:** written determination that:

1. The information to date is not adequate for this stage, or
2. The potential adverse impacts of the project are severe.

Agencies agree to provide an explanation of the basis for nonconcurrence. All agencies (transportation and regulatory/resource) agree to attempt to resolve issues causing nonconcurrence, and to try to do so informally before entering formal dispute resolution.

VII. DISPUTE RESOLUTION

Initiated upon request of any signatory agency. Reasons may include:

1. Unresolved written nonconcurrence,
2. Lack of response within agreed-upon time limits, and
3. Substantive departure from the MOU process.

See Appendix B, Dispute Resolution.

VIII. PARTICIPATION

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If Corps, EPA, Fish and Wildlife Service (FWS), and/or National Marine Fisheries Service (NMFS) choose not to participate in early planning, programming, or the pre-scoping phase of project development, they will notify the project sponsors, who may proceed to the next stage (or next phase of project development) without prejudice. There would be no formal concurrence or nonconcurrence. However, nonparticipation implies that, based upon information provided by the project sponsors, it appears that regulatory and resource issues are of a magnitude amenable to resolution at the next stage.

IX. MONITORING/EVALUATING IMPLEMENTATION OF MOU

The signatory agencies will monitor the success of the MOU process and modify it as necessary to improve it. Each signatory agency shall designate a representative to serve on a monitoring and evaluation team. See Appendix C, MOU Monitoring and Evaluation.

X. AGENCY COMMITMENTS

A. Pipeline Projects

Projects that were extant on the date this MOU is signed are "pipeline" projects. These projects will be made current by completing the analyses required by earlier stages prior to proceeding to the next concurrence point. The remaining MOU integration process will then be followed.

B. Non-Metropolitan Planning Organization (MPO) Projects

Non-MPO projects that have not gone through this MOU process in the transportation plan stage will adhere to the processes contained in the MOU for the programming and project development stages.

C. Continuity

FHWA and FTA will ensure that project sponsors provide copies of all relevant portions of correspondence from regulatory/resource agencies in documentation at subsequent stages.

D. Transportation Plan Stage

1. FHWA and FTA agree to:

- a. Issue regional guidance indicating that adherence to this MOU would satisfy the environmental planning provisions of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)

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- regarding waters of the U.S.
- b. Emphasize consideration of environmental impacts to waters, wetlands, and associated sensitive species in their federal planning priority statements.
 - c. Evaluate MPO inclusion of planning provisions of this MOU and federal planning priorities in the Overall Work Program review.
 - d. Evaluate the MPO's process for avoiding impacts to waters of the U.S. and associated sensitive species during the review and certification of MPO planning processes. Modifications consistent with this MOU integration process will be recommended as appropriate.
2. State Department of Transportation's (State DOT's) agree to:
- a. Encourage all MPO's to formally agree to follow the NEPA-404 integration process.
 - b. Provide technical assistance and/or existing biological data to MPO's for the development of inventories of waters of the U.S. and associated sensitive species.
 - c. Review and comment on the adequacy of information and avoidance of sensitive resources presented in the regional transportation plans (RTP's) and associated environmental analyses.
 - d. Request federal regulatory/resource agencies to review and comment on the RTP's and associated environmental analyses of MPO's that have formally agreed to follow the NEPA-404 integration process.
3. For those MPO's that have formally agreed to follow the NEPA-404 integration process, the Corps, EPA, FWS, and NMFS agree to:
- a. Provide input to draft RTP's (relating to waters of the U.S. and to associated sensitive species).
 - b. Review and comment on RTP's and associated environmental analyses within the public review period: purpose and need, alternative selection, mode, environmental impacts including

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cumulative impacts.

- c. Concur or not concur on the RTP by the end of the public review period for the RTP.

E. Project Programming Stage

1. FHWA and FTA agree to:

- a. Review project programming documents and identify those projects that have not followed the process described in this MOU or have not included practicable avoidance alternatives.
- b. Ensure that documents are supplemented by the project sponsor, if necessary for adherence to the MOU, before sending them for review to regulatory/resource agencies.

2. State DOT's agree to:

- a. Screen documentation for significant section 404 issues and for their adherence to the MOU.
- b. Ensure that State DOT sponsored project documents are supplemented if necessary for adherence to the MOU, before sending them for review to regulatory/resource agencies.
- c. For State DOT sponsored projects, include the costs of avoiding, minimizing, and compensating impacts to waters of the U.S. and associated sensitive species in the project cost of the practicable alternatives evaluated.
- d. Encourage all other project sponsors to:
 - (1) supplement documents if necessary for adherence to the MOU, before sending them for review to regulatory/resource agencies,
 - (2) include the costs of avoiding, minimizing, and compensating impacts to waters of the U.S. and associated sensitive species in the project cost of the practicable alternatives evaluated, and
 - (3) provide the environmental information resulting from the programming process to the MPO's for inclusion in the cumulative impact assessment of the RTP.
- e. Recommend that projects which have not followed the NEPA-404 process outlined in this MOU not be programmed.
- f. For State DOT sponsored projects, provide the environmental

information resulting from the programming process to the MPO's for inclusion in the cumulative impact assessment of the RTP.

3. Corps, EPA, FWS, and NMFS agree to:
 - a. Review environmental elements of pre-programming documents as requested by FHWA/FTA and/or State DOT's.
 - b. Within 45 days of receipt, concur or nonconcur on refinements of purpose and need, project alternatives, impacts to waters of the U.S. and associated sensitive species (including cumulative impacts to these resources), and mitigation.

F. Project Development Stage

All signatory agencies agree to implement Appendix A, the NEPA EIS/EA/CE-404 Permit Concurrent Process for Project Development.

1. FHWA and FTA agree to:
 - a. Not approve a final EIS, categorical exclusion (CE), or, for an environmental assessment (EA), not issue a finding of no significant impact (FONSI) unless there is written preliminary agreement from the Corps, after consultation with EPA, that the project complies with the Section 404(b)(1) Guidelines.
2. State DOT's agree to:
 - a. Request regulatory/resource agency involvement early in the NEPA process.
 - b. Provide the information necessary to identify the least environmentally damaging practicable alternative and associated mitigation.
3. Corps, EPA, FWS, and NMFS agree to:
 - a. Participate in project development process when aquatic resource impacts are substantial.
 - b. Review and concur or nonconcur on NEPA purpose and need, section 404 basic and overall project purpose, criteria for alternative selection, project alternatives to be evaluated in the

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draft EIS, and the preferred alternative.

- c. Respond to requests for concurrence within 45 days.

XI. MODIFICATION/TERMINATION

This MOU may be modified upon approval of all signatories. Modification may be proposed by one or more signatories. Proposals for modification will be circulated to all signatories for a 30-day period of review. Approval of such proposals will be indicated by written acceptance. A signatory may terminate participation in this agreement upon written notice to all other signatories.

Robert F. Taylor, Regional Administrator
Federal Transit Administration, Region 9

Steven J. Thomas, Regional Director
U.S. Fish and Wildlife Service, Region 9

John G. Roberts, Regional Director
U.S. Fish and Wildlife Service, Region 9

Jennifer Williams, Acting Regional Director
National Marine Fisheries Service, Southwest Region

Kathy Sanders, Director
Arizona Department of Transportation

James W. van Leden, Sr., Director
California Department of Transportation

Gary J. Cook, Director
Nevada Department of Transportation

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BG Milton Hunter, Division Engineer U.S. Army Corps of Engineers, South Pacific Division	Date	-
Felicia Marcus, Regional Administrator U.S. Environmental Protection Agency, Region IX	Date	-
Thomas J. Ptak, Regional Administrator Federal Highway Administration, Region Nine	Date	-
Louis F. Mraz, Jr., Regional Administrator Federal Transit Administration, Region 8	Date	-
Stewart F. Taylor, Regional Administrator Federal Transit Administration, Region 9	Date	-
Marvin L. Plenert, Regional Director U.S. Fish and Wildlife Service, Region 1	Date	-
John G. Rogers, Regional Director U.S. Fish and Wildlife Service, Region 2	Date	-
Anneka W. Bane, Acting Regional Director National Marine Fisheries Service, Southwest Region	Date	-
Larry Bonine, Director Arizona Department of Transportation	Date	-
James W. van Loben Sels, Director California Department of Transportation	Date	-
Garth F. Dull, Director Nevada Department of Transportation	Date	-