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 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

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

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) 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 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:

   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 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.

Milton Hunter — 12/9/93
BG Milton Hunter, Division Engineer
U.S. Army Corps of Engineers, South Pacific Division
Date

Felicia Marcus — 12/9/93
Felicia Marcus, Regional Administrator
U.S. Environmental Protection Agency, Region IX
Date

Thomas J. Ptak — 12/13/93
Thomas J. Ptak, Regional Administrator
Federal Highway Administration, Region Nine
Date

12/14/93
Louis F. Mraz, Jr., Regional Administrator
Federal Transit Administration, Region 8
Date

Stewart F. Taylor — 12/3/93
Stewart F. Taylor, Regional Administrator
Federal Transit Administration, Region 9
Date

Marvin L. Plenert — 1/18/94
Marvin L. Plenert, Regional Director
U.S. Fish and Wildlife Service, Region 1
Date

John G. Rogers — 2/2/94
John G. Rogers, Regional Director
U.S. Fish and Wildlife Service, Region 2
Date

Anneka W. Bane — 3/3/94
Anneka W. Bane, Acting Regional Director
National Marine Fisheries Service, Southwest Region
Date

1/25/94
Larry Bonine, Director
Arizona Department of Transportation
Date

James W. van Loben Sels — 12/27/93
James W. van Loben Sels, Director
California Department of Transportation
Date

12/20/93
Garth F. Dull, Director
Nevada Department of Transportation
Date

NEPA EIS — 404 PERMIT CONCURRENT PROCESS [1]

PRE-SCOPING

For EIS projects likely to require an individual permit, impact "special aquatic sites," or impact greater than five acres of other waters of the U.S., State DOT invites Corps, EPA, FWS, and NMFS (when marine and anadromous fish resources are involved) to actively participate in the project development process.

- State DOT invitation letter will include pre-scoping information (e.g., "project assessment" in Arizona and Nevada; "project study report" in California) and a pre-assessment of waters of the U.S. (i.e., area of jurisdiction and aquatic resource impact).

The Corps, EPA, FWS, and NMFS will each choose to participate in the project development process at an appropriate level of involvement depending on the quality and quantity of resource involved (e.g., choose not to participate in some or all of the project meetings and/or in the first agreement point (marked ▸ below)); however, the remaining agreement points (marked ▸▸ below) will be executed prior to advancing to the next stage.

▸ *Reaffirm/refine/develop Corps, EPA, FWS, NMFS, State DOT, FHWA preliminary agreement on:*
- *NEPA purpose and need/404 basic and overall project purpose,*
- *Criteria for alternative selection,*
- *Project alternatives to be evaluated in draft EIS, and*
- *Level of agency involvement and cooperating agency role.*

SCOPING

- FHWA notice of intent.
- State DOT public information meetings.
- Corps pre-application meetings may be a forum to further address issues.
- FHWA invite Federal agencies to be cooperating agencies.

DRAFT EIS DEVELOPMENT

▸▸ *Final Corps, EPA, FWS, NMFS, State DOT, FHWA agreement on:*
- *NEPA purpose and need/404 basic and overall project purpose,*
- *Criteria for alternative selection,*
- *Project alternatives to be evaluated in draft EIS,*
- *Preliminary preferred alternative (if known), and*
- *Cooperating agencies (develop agreement/MOU for cooperating agency involvement).*

State DOT delineation of waters of the U.S.

▸▸ *Corps verification of jurisdictional determination.*

FHWA/State DOT environmental inventory/impact evaluation.
- State DOT requests threatened and endangered species list from FWS/NMFS, begins informal consultation, and prepares biological assessment for any identified species.
- Develop 404 resource/endangered species mitigation options.

[1] For transit projects, any references to FHWA and State DOT in this appendix can be replaced with FTA and FTA grantees, respectively.

Corps, EPA, FWS, NMFS participation in development of draft EIS. Such activities could include, as appropriate:

- Informal staff coordination,
- Interagency coordination meeting,
- Corps pre-application meeting,
- Draft biology and/or other technical report review, and/or
- Pre-draft EIS review.

State DOT submits application for Corps permit
(allowing enough time for Corps to prepare the public notice for a joint draft EIS/PN transmittal).

FHWA/State DOT draft EIS approval.

DRAFT EIS CIRCULATION / SECTION 404 PUBLIC NOTICE OF EIS DOCUMENT

Note: The draft EIS circulation and 404 public notice must be closely coordinated.

FHWA/State DOT NEPA public hearing (joint NEPA/Corps 404 hearing, if appropriate).

FINAL EIS DEVELOPMENT

FHWA/State DOT evaluate draft EIS comments received.
Corps evaluates comments received on public notice.

▸▸ *State DOT/Corps/FHWA identify final EIS NEPA preferred/section 404 least environmentally damaging practicable alternative alignment (w/ design concept) to achieve NEPA project purpose and need/404 basic project purpose.*

▸▸ *Preliminary agreement of preferred alternative compliance with the section 404(b)(1) guidelines. The following documents are to be obtained by FHWA/State DOT for inclusion in the final EIS as a preliminary agreement of section 404(b)(1) compliance:*

(1) Written FWS preliminary agreement in the project mitigation plan as a result of earlier Fish & Wildlife Coordination Act consultation.

(2) If FWS/NMFS threatened and endangered species list identifies listed species potentially in project area, written FWS/NMFS documentation: species not present, not likely to be affected, or non-jeopardy biological opinion.

(3) Section 401 certification or waiver from State Water Quality Management Agency.

(4) Written Corps and EPA preliminary agreement that:

- *the final EIS NEPA preferred/section 404 least environmentally damaging practicable alternative,*
- *project will not significantly degrade the aquatic environment, and*
- *the project mitigation plan and implementation schedule is adequate.*

Cooperating agency review/participation in development of final EIS
(e.g., cooperating agency review of draft EIS comments and responses).

FHWA/State DOT final EIS approval.

FINAL EIS CIRCULATION / SECTION 404 PUBLIC NOTICE OF PROPOSED PERMIT

DEVELOPMENT OF RECORD OF DECISION

FHWA/State DOT evaluate any final EIS comments received.
Corps evaluates comments received on public notice.

Opportunity for cooperating agency review of the draft record of decision for consistency with the above preliminary agreement of section 404(b)(1) compliance.
FHWA record of decision approval.

State DOT develops final project design, finalizes mitigation plan and implementation schedule, and initiates right-of-way acquisition.

CORPS PERMIT DECISION

- Corps determination of compliance with the section 404(b)(1) guidelines.
- Corps public interest review/determination.

FHWA/State DOT approval of project plans, specifications, & estimate (PS&E)[2]
(after all necessary permits/findings obtained).

State DOT advertise / award contract.
Commence construction.

Permit compliance / mitigation monitoring.

[2] This approval is not applicable for FTA transit projects.

NEPA EA/CE — 404 PERMIT CONCURRENT PROCESS [3]

PRE-ASSESSMENT

For EA or CE projects likely to require an individual permit, impact "special aquatic sites," or impact greater than five acres of other waters of the U.S., State DOT invites Corps, EPA, FWS, and NMFS (when marine and anadromous fish resources are involved) to actively participate in the project development process.

- State DOT invitation letter will include pre-scoping information (e.g., "project assessment" in Arizona and Nevada; "project study report" in California) and a pre-assessment of waters of the U.S. (i.e., area of jurisdiction and aquatic resource impact).

The Corps, EPA, FWS, and NMFS will each choose to participate in the project development process at an appropriate level of involvement depending on the quality and quantity of resource involved (e.g., choose not to participate in some or all of the project meetings); however, the agreement points marked ▸▸ below will be executed prior to advancing to the next stage.

▸▸ *Reaffirm/refine/develop Corps, EPA, FWS, NMFS, State DOT, FHWA agreement on:*

- *NEPA purpose and need/404 basic and overall project purpose,*
- *Criteria for alternative selection,*
- *Project alternatives to be evaluated in draft EA or CE,*
- *Preliminary preferred alternative (if known), and*
- *Level of agency involvement.*

DRAFT EA or CE DEVELOPMENT

State DOT delineation of waters of the U.S.

▸▸ *Corps verification of jurisdictional determination.*

FHWA/State DOT environmental inventory/impact evaluation.

- State DOT informal endangered species consultation with FWS/NMFS as appropriate.
- Develop 404 resource/endangered species mitigation options.

Corps, EPA, FWS, NMFS participation in development of draft EA or CE. Such activities could include, as appropriate:

- Informal staff coordination,
- Interagency coordination meeting,
- Corps pre-application meeting,
- Draft biology and/or other technical report review, and/or
- Pre-draft EA/CE review.

For EA projects, FHWA/State DOT draft EA approval.

State DOT submits application for Corps permit.
For EA projects, a copy of the approved draft EA will be included with application.

[3] For transit projects, any references to FHWA and State DOT in this appendix can be replaced with FTA and FTA grantees, respectively.

DRAFT EA CIRCULATION / SECTION 404 PUBLIC NOTICE

For EA projects, opportunity for FHWA/State DOT NEPA public hearing
(joint NEPA/Corps 404 hearing, if appropriate).

CE's are not circulated to the general public. Required project information will be included with the section 404 public notice. Corps 404 hearing held, if appropriate.

FINAL EA/CE DEVELOPMENT

For EA projects:

FHWA/State DOT evaluate draft EA comments received.
Corps evaluates comments received on public notice.

FHWA decision to prepare an EIS or to develop a FONSI.
If EIS, initiate EIS development process.

If FONSI or CE:

▸▸ *State DOT/Corps/FHWA identify final EA NEPA preferred/section 404 least environmentally damaging practicable alternative alignment (w/ design concept) to achieve NEPA project purpose and need/404 basic project purpose.*

▸▸ *Preliminary agreement of preferred alternative compliance with the section 404(b)(1) guidelines. The following documents are to be obtained by FHWA/State DOT for inclusion in the final EA as a preliminary agreement of section 404(b)(1) compliance:*

(1) Written FWS preliminary agreement in the project mitigation plan as a result of earlier Fish & Wildlife Coordination Act consultation.

(2) If FWS/NMFS threatened and endangered species list identifies listed species potentially in project area, written FWS/NMFS documentation: species not present, not likely to be affected, or non-jeopardy biological opinion.

(3) Section 401 certification or waiver from State Water Quality Management Agency.

(4) Written Corps and EPA preliminary agreement that:

- *the final EA NEPA preferred/section 404 least environmentally damaging practicable alternative,*
- *project will not significantly degrade the aquatic environment, and*
- *the project mitigation plan and implementation schedule is adequate.*

FHWA FONSI or CE approval.

State DOT begins final project design, finalizes mitigation plan and implementation schedule, and initiates right-of-way acquisition.

CORPS PERMIT DECISION

- Corps determination of compliance with the section 404(b)(1) guidelines.
- Corps public interest review/determination.

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FHWA/State DOT approval of project plans, specifications, & estimate (PS&E)[4]
(after all necessary permits/findings obtained).

State DOT advertise / award contract.
Commence construction.

Permit compliance / mitigation monitoring.

[4] This approval is not applicable for FTA transit projects.

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DISPUTE RESOLUTION

I. INTRODUCTION

The purpose of this dispute resolution procedure is to provide a process to resolve disagreements between signatory agencies or project sponsors. The intention is to expeditiously resolve disputes at the lowest level of the organizations through consensus. Alternative dispute resolution processes (e.g., facilitation or mediation) can be used.

II. LEVELS OF DISPUTE RESOLUTION

A. Informal dispute resolution

1. "Informal dispute resolution" is agency staff and mid-level management coordination between parties to resolve the issue.

2. Informal dispute resolution can be initiated by any signatory agency or a project sponsor who has formally agreed to follow the NEPA/404 process.

3. All normal and reasonable coordination options need to be exhausted before formal dispute resolution is initiated.

B. Formal dispute resolution

1. If the parties agree that the informal dispute resolution process has been exhausted, the second-level panel member of a signatory party can initiate the formal dispute resolution process.

2. The second-level panel member will invite all signatory agencies in writing to convene a meeting of the second-level panel within 45 days to resolve the issue.

3. The inviting party will include a statement of issue and any pertinent background material in the invitation.

4. The second-level panel may elect to raise the issue to the signatory level.

5. The written conclusion of the formal process will be distributed to all signatory parties.

MOU Signatory Level

- Corps Division Engineer
- FWS/NMFS Regional Directors
- EPA/FHWA/FTA Regional Administrators
- State DOT Directors

Second-Level Panel

- Corps District Engineer
- FWS Field Office Supervisor
- NMFS Field Office Supervisor
- EPA Division Director
- FHWA Division Administrator
- FTA Deputy Regional Administrator
- ADOT/NDOT State Engineer
- Caltrans District Director

MOU MONITORING AND EVALUATION

I. TEAM MEMBERSHIP

MOU monitoring and evaluation will be conducted by a team made up of one representative from each signatory agency. FHWA will chair the team and coordinate the meetings.

II. FREQUENCY AND SCOPE OF MEETINGS

This team shall hold quarterly meetings to consider and recommend:

1. Minor editorial corrections to the MOU,
2. More substantive proposals for improvement in the MOU process,
3. How to monitor and measure the success of the MOU process,
4. Changes to the MOU process to reflect monitoring results, and
5. Continuation of monitoring and evaluation.

III. PROCESS/MOU CHANGES

The monitoring and evaluation team will:

1. Present minor revisions to the MOU to their agencies for concurrence, or
2. For more substantive issues, recommend a process for obtaining the agreement of all signatories to amend the MOU. This may require reconvening the interagency body which developed the MOU, and/or initiating the dispute resolution process at the signatory level.

IV. REPORTING

A. Minutes of all quarterly meetings will be distributed to signatory agencies.

B. The team will report to the signatory agencies on implementation of this MOU one calendar year after the MOU is signed and as necessary thereafter.