Modification of the "National Environmental Policy Act/Clean Water Act
Section 404 Integration Process for Surface Transportation Projects
Memorandum of Understanding (NEPA/404 MOU)[1]"
for application to
the Placer Parkway Corridor Preservation Project
April 12, 2004

The NEPA/404 MOU integrates requirements of the Clean Water Act Section 404 permit process into the NEPA environmental review. This integration facilitates the preparation of the Section 404 permit application at the end of the NEPA process. While a Tier 1 evaluation will not result in a Section 404 permit application, the associated Tier 2 project will require a permit. Therefore, the NEPA/404 process is modified for Tier 1 to reflect decisions made at Tier 1, and to anticipate the permit application requirements at Tier 2. The NEPA/404 process for Tier 2 will follow the standard procedure outlined in Appendix A of the NEPA/404 MOU.

The goal of the modified NEPA/404 process for Tier 1 is to ensure that Tier 1 decisions reflect careful consideration of the 404(b)(1) Guidelines (40 CFR 230), which are binding, substantive regulations implementing the Clean Water Act. The Guidelines should be addressed as early as possible in the Tier 1 NEPA evaluation to eliminate the need to revisit decisions in Tier 2 that might otherwise conflict with 404 permit requirements.

The Tier 1 (modified) and Tier 2 (standard) NEPA/404 processes are similar in many respects. Both Tier 1 and Tier 2 NEPA/404 include five concurrence points[2]. The main difference between Tier 1 and Tier 2 NEPA/404 processes are the last two concurrence points. In Tier 2, the project proponent seeks agency concurrence on the "least environmentally damaging practicable alternative"(LEDPA) and the conceptual mitigation plan for the LEDPA. In Tier 1, however, the project proponent seeks agency concurrence on the alternative (corridor) *most likely to contain the* LEDPA, and on the *general framework* for mitigation. All other elements of the standard NEPA/404 process apply, unless otherwise indicated.

The Tier 1 modified NEPA/404 process includes five concurrence points:

1. Purpose and Need
2. Criteria for Selecting the Range of Alternatives
3. Range of Alternatives
4. Alternative(s) most likely to contain the LEDPA
5. Mitigation Framework

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[1]Signed by Federal Highway Administration, Federal Transit Administration, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Transportation, Arizona Department of Transportation, Nevada Department of Transportation (1993).

[2]Concurrence/Non-Concurrence is described in Section VI of the NEPA/404 MOU.

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These concurrence points are sequential, each one building upon and consistent with previous concurrences. Concurrence points #1 to #3 occur prior to completion of the Tier 1 Draft EIS. Concurrence points #4 and #5 occur prior to completion of the Tier 1 Final EIS. The NEPA/404 signatory agencies may agree to bundle concurrence points for purposes of review.

Concurrence Point #1: Purpose and Need

The Council on Environmental Quality regulations implementing NEPA call for a statement of purpose and need (40 CFR 1502.13). The Section 404(b)(1) Guidelines include a basic purpose (40 CFR 230.10(a)(3)) and an overall project purpose (40 CFR 230.10(a)(2)). For NEPA/404 integration, one statement of purpose and need should be developed to meet all requirements.

The NEPA purpose and need statement briefly specifies the underlying purpose and need of the proposed project. The NEPA document should explain the project need, and demonstrate the project's logical termini and independent utility.

The Section 404(b)(1) Guidelines basic purpose is a brief statement that assists regulators in determining whether a project is water-dependent. The overall project purpose is an elaboration of the basic purpose, and provides a more specific description of the purpose and need for the project.[3] The overall project purpose should be broad enough to allow for an appropriate range of alternatives that avoid special aquatic sites, as defined in the Section 404 (b)(1) Guidelines (40 CFR 230 Subpart E). "Avoidance alternatives" could include alternatives that do not require securing a new right-of-way, maximize use of existing infrastructure, implement congestion pricing, or adjust the project study area to include alignments that impact fewer aquatic resources.

Concurrence Point #2: Criteria for Selecting the Range of Alternatives

The project sponsor develops criteria for selecting a reasonable range of alternatives. If the number of potential alternatives generated is very large, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS.[4] The criteria can be used to screen out or narrow the range of alternatives that will be carried forward for analysis in the Draft EIS. For NEPA/404 MOU projects, environmental criteria should be applied so that each alternative can be ranked based on its impact to the aquatic ecosystem.

Two types of screening criteria that can be effective for Tier 1 decision making are "project purpose" and "fatal flaw" analyses. Under the Clean Water Act Section 404 (b)(1) Guidelines, an alternative may be eliminated from consideration in the Draft EIS if it does not meet the project purpose. Fatal flaws are unavoidable or unmitigatable impacts associated with an alternative that are so great that the project could never go forward.

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[3]For a discussion of basic purpose and overall project purpose, see Yocom, T.G., R.A. Leidy, and C.A. Morris. 1989. "Wetlands Protection Through Impact Avoidance: A Discussion of the 404(b)(1) Alternatives Analysis." Wetlands. Vol 9, No. 2, pages 283-297.

[4]Council on Environmental Quality's Questions and Answers about the NEPA Regulations, Question 1.b. (1981)

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Concurrence Point #3: Range of Alternatives

The Range of Alternatives includes those alternatives that will be evaluated in the Draft EIS. For NEPA/404 projects, the range should include alternatives that avoid and minimize impacts to waters of the U.S. to the greatest extent possible. The range can include reasonable alternatives not within the jurisdiction of the lead agency, and a no-action alternative (40 CFR 1502.14 (c) and (d)).

— Tier 1 DEIS Circulation and Public Comment Period —

Concurrence Point #4: Alternative(s) most likely to contain the LEDPA

The U.S. Army Corps of Engineers cannot grant a CWA Section 404 permit to a Tier 2 preferred alternative that is not the LEDPA. Therefore, it is critical that any alternative likely to contain the LEDPA is not prematurely eliminated during the Tier 1 NEPA review. Although a Tier 1 landscape-level analysis may provide enough information to eliminate alternatives that would clearly have the *greatest* environmental impacts, the analysis may not be detailed enough to identify with certainty a *single* alternative that is likely to contain the LEDPA. If the Tier 1 analysis indicates that there are several alternatives likely to contain the LEDPA, and the lead agency does not want to prematurely eliminate any alternative likely to contain the LEDPA, then all of the alternatives likely to contain the LEDPA should be carried forward to Tier 2.

However, the lead agency can attempt to further narrow the range of alternatives likely to contain the LEDPA by performing additional analysis in Tier 1. Analytical tools could include:

- functional assessment of aquatic resources,
- photo-interpretation of aerial photos,
- spot surveys,
- delineations in selected areas of special significance,
- full delineation of waters of the U.S., or
- geo-referenced data points from delineations done for this or other projects.

If the lead agency chooses to eliminate in Tier 1 any alternative(s) likely to contain the LEDPA, there is a risk that the eliminated alternative(s) may need to be revisited in Tier 2.

Concurrence Point #5 – Mitigation Framework

The Tier 1 mitigation framework will describe in general terms the processes that the project sponsor will use to maximize opportunities for successful mitigation, including long-term mitigation and management of resources. The framework should identify:

1. Mitigation options available for creation, restoration, enhancement and preservation of aquatic resources (e.g., land dedication, acquisition of conservation easements, in lieu fees for acquisition, mitigation banks), and potential mitigation sites.

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2. Opportunities to build upon existing or planned conservation efforts of other agencies and non-governmental organizations for the purposes of protecting and restoring large, intact landscapes.

3. Institutions and instruments for long-term management of mitigation sites.

— Tier 1 FEIS Circulation. Agency Comment Period. Tier 1 Record of Decision. —

Note: It is presumed that the Tier 2 project will follow the standard NEPA/404 MOU process.

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