

Question and Answers

NEPA-404 Integration Process

for

Surface Transportation Projects
in
Arizona, California, and Nevada

1. **Concurrent Process**

Question

What surface transportation projects in Arizona, California, and Nevada should follow the National Environmental Policy Act–Clean Water Act Section 404 (NEPA-404) MOU concurrent process? Paragraph I.A. of the MOU states the MOU “applies to all projects needing . . . a [Corps] individual permit under section 404 . . .,” while the first paragraphs of the NEPA-404 Permit Concurrent Process for both EIS’s and EA/CE’s (MOU Appendix A, pages 1 and 4) refer to “projects likely to require an individual permit, impact ‘special aquatic sites,’ or impact greater than five acres of other waters of the U.S.”

Answer

The MOU and its concurrent process were established for all Arizona, California, and Nevada projects needing both Federal Highway Administration (FHWA) and/or Federal Transit Administration (FTA) action and an **individual permit** from the Corps of Engineers under section 404 of the Clean Water Act. Projects that will be processed with a nationwide permit do not need to follow the concurrent process; however, such projects which affect “special aquatic sites” or impact greater than five acres of other waters of the U.S. need to be presented to the involved signatory agencies at the pre-scoping stage. At that time, each involved signatory agency will be given an opportunity to provide comments and/or objections to the Corps of Engineers regarding the use of a nationwide permit. If there is some question as to whether a project will require an individual or nationwide permit, it is recommended the project manager follow the concurrent process

until it is determined that the project will not require an individual permit.

2. Pipeline Projects

Question

What is a pipeline project? How does the NEPA-404 integration process affect pipeline projects?

Answer

Any project existing on the date the MOU was signed (March 3, 1994) is considered a pipeline project. In Section X.A., the MOU directs pipeline projects to be made current with the process by completing all analyses from earlier stages prior to proceeding to the next point of concurrence. Once a pipeline project has been brought up to date, agencies are instructed to follow the remainder of the concurrent process presented in Appendix A of the MOU. If a pipeline project was beyond the draft EIS circulation stage when the MOU was signed, the final EIS must reflect concurrence from all involved signatory agencies up to the current point of agreement. These letters of concurrence from the involved signatory agencies must address all points of concurrence for draft and final NEPA documents outlined in Appendix A of the MOU.

3. Purpose and Need

Question

How should the MOU signatory agencies approach the process of providing their agreement on project "purpose and need"? NEPA and its implementing regulations address "project purpose and need," while the Section 404(b)(1) Guidelines refer to "basic project purpose" and "overall project purpose." Attachment A of the NEPA-404 MOU lists the NEPA and the two section 404 "purpose and need" regulatory phrases as one of the draft/final EIS, draft/final EA, and CE development agreement points: "*NEPA purpose and need/404 basic and overall project purpose.*" Using all three phrases from the different "purpose and need" requirements causes confusion.

Answer

The NEPA-404 concurrent process (MOU Attachment A) was developed to address and incorporate the requirements of NEPA and section 404 into a single, integrated process at the project development stage. As such, the purpose and need concurrence point recognized all three regulatory phrases—NEPA purpose and need and the 404 basic project purpose and overall project purpose—to assure that the concurrence of each involved signatory agency was given in accord with each agency's regulatory responsibilities.

However, as the Purpose and Need Guidance Paper was being developed, it became clear for transportation projects/actions subject to NEPA approval by FHWA and/or FTA that both NEPA and section 404 "purpose and need" requirements could be satisfied by following the guidance. Hence, the Purpose and Need Guidance Paper does not

differentiate between the three regulatory phrases and collectively refers to them as “purpose and need.” Implementation of the MOU Attachment A concurrent process should also utilize the single “purpose and need” terminology and follow the Purpose and Need Guidance Paper.

4. Tiered NEPA Documents for Transportation Projects

Question

Some NEPA documents for transportation projects are tiered. How does the NEPA-404 MOU process apply to tiered NEPA documents for transportation projects?

Answer

The NEPA-404 MOU applies to all NEPA environmental documents for transportation projects funded or approved by FHWA and/or FTA. It does not differentiate between tiered and project-level documents prepared during the project development stage. Agency agreements at the points outlined in the MOU Attachment A concurrent process need to be obtained for both tiered and project-level environmental documents. As a minimum, written documentation needs to be received and included in the tier I final EIS indicating concurrence that the tier I preferred alternative is the appropriate location alternative/corridor to be addressed in the tier II document.

NEPA documents can be tiered in many ways (40 CFR §§ 1502.20 and 1508.28). For transportation projects, a tiered process is generally used for establishing the location of a future transportation facility. The tier I NEPA document needs to clearly state what action is being evaluated and approved (e.g., full right-of-way acquisition, preservation of a transportation corridor of specified width(s) using hardship and protective buying (23 CFR § 771.117(12)), and/or local agency-approved land use controls).

All reasonable measures need to be taken to avoid or minimize impacts of a transportation corridor on any sensitive resources. If avoidance is not possible after all reasonable measures have been taken to shift the alignment or otherwise minimize the impacts, the corridor width in the vicinity of the sensitive resource needs to be reduced to the minimum that will still accommodate the future project.

5. Agricultural Lands

Question

A January 6, 1994 memorandum of agreement (MOA) between the Corps of Engineers (Corps), Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS), and Soil Conservation Service (renamed the Natural Resources Conservation Service (NRCS)) established the NRCS as the lead Federal agency for delineating wetlands on agricultural lands. If a transportation project funded by FHWA and/or FTA is proposed that would cross agricultural and non-agricultural lands, should the project proponent go to the NRCS or the Corps for a wetland delineation?

Answer

As stated in Question/Answer 11 of the “Questions and Answers on the Agriculture

MOA”:

If a single linear project, such as a utility corridor or highway, is proposed that would cross both agricultural and non-agricultural lands, the Corps would have the lead for the wetland delineation for the project. The Corps would consult with [NRCS] and rely on previous wetland delineations made by [NRCS] in accordance with the MOA.

While the Corps may consult with the NRCS and rely on previous NRCS delineations, the Corps will remain the point-of-contact for delineations of waters of the U.S. associated with FHWA and/or FTA-funded projects.

6. Two NEPA-404 Approval Processes for FONSI and CE projects

Question

On page 5 of the original MOU Appendix A, two processes are outlined for coordinating individual 404 permits and FONSI (finding of no significant impact) or CE (categorical exclusion) transportation projects. What is contained in each process, and when should one process be used over the other?

Answer

Process <A> was developed as a “shortcut process” for FHWA/FTA FONSI and CE projects involving an individual Corps section 404 permit. It called for the Corps to complete the 404 process and issue a permit prior to NEPA approval by FHWA/FTA. Process was the same procedure as for EIS projects: (1) preliminary agreement of section 404(b)(1) compliance prior to FHWA/FTA NEPA approval, (2) FHWA/FTA NEPA approval, and (3) Corps section 404 permit decision.

Despite the good intentions of all participants to develop a flexible MOU, it was realized after MOU approval that a NEPA process would need to be completed prior to the Corps issuing a permit, as the permit decision is also a Federal action requiring NEPA compliance. Since the Corps can not issue a section 404 permit prior to NEPA approval, the FHWA/FTA NEPA approval will always occur prior to the Corps permit. Therefore, Process is the only process that can be followed; Process <A> is not an option.

To avoid confusion and future questions regarding this matter, pages 5 and 6 of NEPA-404 MOU Appendix A have been revised to eliminate Process <A> and have Process shown as the only process to be followed. A back-to-back copy of the revised pages is attached to replace the existing MOU Appendix A pages.

In any event, the development of FHWA/FTA FONSI and CE projects involving individual 404 permits need to be closely coordinated with the section 404 regulatory and resource agencies—hopefully in a manner that will allow the project NEPA and 404 permit processes to occur concurrently so that the Corps permit decision can be made shortly after the FHWA/FTA FONSI or CE approval.

7. 45-Day Review Period

Question

Can the 45-day time period for responding to a request for concurrence be amended?

Answer

Yes, under the following circumstances (where the "requesting party" is the one asking for NEPA-404 concurrence/nonconcurrence and the "responding party" is the one providing NEPA-404 concurrence/nonconcurrence):

- If both the requesting party(s) and responding party(s) agree to a new deadline.
- If the responding party(s) asks for and receives information (as specified under the MOU and/or guidance papers) that was not provided or available at the onset of the 45-day clock. In this instance, the clock should restart when the information is received by the responding party, unless the two parties mutually agree on another date. In many cases, it should be possible to reset the clock for a shorter period than the initial 45 days.

8. Nonconcurrence letters**Question (1)**

When should a nonconcurrence letter be sent?

Answer (1)

Formal nonconcurrence letters should be considered a "last resort" to notify the requesting party that there are serious issues that must be resolved if they wish to avoid entering dispute resolution. This could occur when the parties have reached the clock deadline with unresolved issues and they have not agreed to extend the clock. For example, nonconcurrence letters should not be used routinely to ask for additional information, stop the 45-day clock, or suggest minor changes in project alternatives, mitigation plans, etc. These requests should be handled informally through telephone conversations, meetings or informal letters. In this way, a long and potentially confusing paper trail of nonconcurrence letters can be avoided.

Question (2)

What should a nonconcurrence letter contain?

Answer (2)

It should fully discuss the responding party's concerns, and not refer to meetings or other documents for details unless these documents or meeting summaries are appended. This will increase its value as an official record of nonconcurrence.

9. Section 401 Certification or Waiver**Question**

How should the preliminary agreement for the 401 certification or waiver be achieved for final NEPA documents? Appendix A of the MOU indicates a section 401 certification or waiver must be obtained from the state water quality management agency prior to

approval of the NEPA document (MOU Appendix A, pages 2 and 6). However, state water quality management agencies will not usually issue a certification or waiver prior to receiving additional final project approval documents. In California, for example, the Regional Water Quality Control Boards cannot grant a 401 certification or waiver until CEQA compliance is achieved. (CEQA, the California Environmental Quality Act, is the California counterpart to NEPA, and for FHWA/Caltrans projects, CEQA and NEPA documents are processed jointly.)

Answer

State water quality management agencies did not participate in the development of the NEPA-404 MOU. As the MOU and Guidance Papers were being developed, it was assumed that the state water quality management agencies would respond to the section 404 permit process whether it occurred after NEPA approval (as was the case prior to the MOU) or during the development of the final NEPA document (as outlined in the MOU). During subsequent MOU implementation, it was realized that state water quality management agencies may need additional post-NEPA/CEQA documentation prior to granting a 401 certification or waiver, particularly in California.

If a section 401 certification or waiver can not be obtained from the state water quality management agency during the development of the final NEPA document as outlined in Appendix A of the MOU, then the final NEPA document will need to contain evidence of coordination (documented telephone call or copy of letter or other record of communication) with the state water quality management agency. Ideally, this coordination would address any anticipated conditions or concerns that might arise during the 401 certification or waiver process.