



DISTRICT  
DEPARTMENT OF

TRANSPORTATION

# ENVIRONMENTAL MANUAL

2ND EDITION





DISTRICT DEPARTMENT OF TRANSPORTATION  
**Environmental Manual**

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June 20, 2012

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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
DEPARTMENT OF TRANSPORTATION



Office of the Director

June 11, 2012

It gives me great pleasure to announce the completion of the revised District Department of Transportation (DDOT) Environmental Manual. By revising and updating this manual, DDOT has proven its commitment to continuously improve its environmental processes and procedures. This manual will greatly facilitate DDOT in meeting our mission to “develop and maintain a cohesive sustainable transportation system that delivers safe, affordable, and convenient ways to move people and goods—while protecting and enhancing the natural, environmental and cultural resources of the District.”

In our first decade as an independent agency, we have made tremendous strides toward improving the way we deliver everything from major infrastructure projects to routine services. It is my vision that we streamline our internal procedures and deliver services faster; we must be progressive and cutting edge; we must set high expectations for our employees and measure our performance to ensure we are meeting our goals. We have marked our presence as a progressive State DOT and as an active member of American Association of State and Highway Officials (AASHTO). We have proven our ability to follow and comply with Federal and Local Environmental laws and regulations.

Improving environmental quality and establishing sustainable practices at DDOT are key goals for me as the Director of the agency. Our mission statement clearly states our commitment to protect and enhance natural, environmental and cultural resources of the District. The processes and procedures described in this manual will help DDOT meet these commitments and goals. In the past, this manual has greatly helped DDOT in ensuring compliance with Federal and DC environmental laws and regulations, and I am sure it will continue to be so.

I am confident that the use of this manual will continue to help us achieve our commitments to environment and sustainability as we continue to develop a sustainable transportation system for the District.

A handwritten signature in blue ink that reads "Terry Bellamy".

Terry Bellamy  
Director



# FOREWORD

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It gives me great pleasure to complete the revision and update of the DDOT Environmental Manual. In this revision, we have decided to change the name of the manual to “DDOT Environmental Manual” from the “DDOT Environmental Policy and Process Manual.” When the DDOT Environmental Policy and Process Manual was originally completed, DDOT committed to regular updates of this document. The revision and update of this manual is a fulfillment of DDOT’s commitment.

We have updated the manual to comprehensively address environmental processes and procedures as they relate to DDOT projects, especially regarding the implementation of the federal aid highway program. The processes outlined in the manual, such as the National Environmental Policy Act (NEPA), DC Environmental Policy Act (DCEPA), and Context Sensitive Solutions (CSS), will continue to facilitate the project development process to ensure that all DDOT projects are not only environmentally sustainable but also protect the environment. This manual provides information on the DDOT Project Development Process, NEPA, DCEPA, and other local and federal environmental laws and regulations. Specific regulations and processes are described in individual chapters in the manual. The appendices provided at the end of the document have also been updated with various reference documents, including local and federal regulations and environmental documents. The updates included in this version of the manual include an updated Chapter 1: DDOT Environmental Policy; updated Chapter 2: FAQs (previously called Environmental Basics); updated Chapter 3: Project Development Process (previously called Project Planning and Coordination with Transportation Planning, Design, & Construction); updated Chapter 5: Determining Environmental Action Types; updated Chapter 10: Categorical Exclusions; updated Chapter 14: Air Quality; updated Chapter 15: Highway Noise Policy; updated Chapter 17: Water Quality; updated Chapter 19: Wetlands and Waters of the U.S; updated Chapter 24: Environmental Justice; and revised appendices that include revised DDOT Environmental forms, Environmental Document Review Checklist, CEQ 40 FAQ, and DDOT Noise Policy.

In the end, I would like to recognize the numerous individuals from FHWA, DDOT, and its consultant team who worked very hard to complete this document.

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20 June 2012





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# ACRONYMS AND ABBREVIATIONS



# ACRONYMS AND ABBREVIATIONS

AADT	annual average daily traffic
ACHP	Advisory Council on Historic Preservation
ADT	average daily traffic
ANC	Advisory Neighborhood Commissions
APE	Area of Potential Effects
AST	aboveground storage tank
ASTM	American Society for Testing and Materials
BOD	biological oxygen demand
Btu	British thermal unit
CAA	Clean Air Act
CE	Categorical Exclusion or Cat Ex
CEQ	Council on Environmental Quality
CFA	U.S. Commission of Fine Arts
CFC	chlorofluorocarbon
CFR	Code of Federal Regulations
CH <sub>4</sub>	methane
CLRP	Constrained Long Range Plan
CO	carbon monoxide
CO <sub>2</sub>	carbon dioxide
CWA	Clean Water Act
dB	decibels
dba	A-weighted decibels
DCEPA	District of Columbia Environmental Policy Act
DCHA	District of Columbia Housing Authority
DCHPO	District of Columbia Historic Preservation Office
DCOP	District of Columbia Office of Planning
DCWPCA	District of Columbia Water Pollution Control Act of 1984
DDOE	District of Columbia Department of the Environment
DDOT	District Department of Transportation
DOI	U.S. Department of the Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
EISF	Environmental Impact Screening Form
EO	Executive Order
FEMA	Federal Emergency Management Agency

FHWA	Federal Highway Administration
FONSI	Finding of NO Significant Impact
GHG	greenhouse gas
gpm	gallons per minute
HABS	Historic American Buildings Survey
HAER	Historic American Engineering Record
HALS	Historic American Landscape Survey
HCFC	hydro-chlorofluorocarbon
HOT	high-occupancy toll (lane)
HOV	high-occupancy vehicle
IPMA	Infrastructure Project Management Administration
$L_{eq}$	Equivalent Continuous Noise Level low-impact development limits of disturbance level of service
LUST	leaking underground storage tank
MOA	Memorandum of Agreement
MOE	measure of effectiveness
MOU	Memorandum of Understanding
Mph	miles per hour
MS4	Municipal Separate Storm Sewer System
MSAT	Mobile Source Air Toxics
msl	mean sea level
MWCOG	Metropolitan Washington Council of Governments
NAAQS	National Ambient Air Quality Standards
NAC	Noise Abatement Criteria
NCPC	National Capital Planning Commission
NEPA	National Environmental Policy Act
NHL	National Historic Landmark
NHPA	National Historic Preservation Act
NO <sub>2</sub>	nitrogen dioxide
NOA	Notice of Availability
NOI	Notice of Intent
NO <sub>x</sub>	nitrogen oxides
NPDES	National Pollutant Discharge Elimination System
NPS	National Park Service
NRCS	Natural Resources Conservation Service
NRHP	National Register of Historic Places
NWI	National Wetlands Inventory
O <sub>3</sub>	ozone



## Acronyms and Abbreviations

PA	programmatic agreement
Pb	lead
PBS	Public Buildings Service
PCB	polychlorinated biphenyl
PDE	Project Development & Environment Division
PM <sub>10</sub>	particulate matter equal to or less than 10 microns in diameter
PM <sub>2.5</sub>	particulate matter equal to or less than 2.5 microns in diameter
ppb	parts per billion
ppm	parts per million
PPSA	Planning, Policy & Sustainability Administration
RCRA	Resource Conservation and Recovery Act
ROD	Record of Decision
ROW	right-of-way
SHPO	State Historic Preservation Office
SIP	State Implementation Plan
SO <sub>2</sub>	sulfur dioxide
SOL	Statute of Limitation
SOV	single-occupancy vehicle
SWMP	Storm Water Management Program
SWPPP	Storm Water Pollution Prevention Plan
TDM	Transportation Demand Management
TIP	Transportation Implementation Program
TNM	Traffic Noise Model
TOA	Traffic Operations Administration
TPB	Transportation Planning Board
UFA	Urban Forestry Administration
USACE	U.S. Army Corps of Engineers
USCG	U.S. Coast Guard
USCGS	U.S. Coastal and Geodetic Survey
USDA	U.S. Department of Agriculture
USEPA	U.S. Environmental Protection Agency
USFWS	U.S. Fish and Wildlife Service
UST	underground storage tank
VMT	vehicle miles traveled
VOC	volatile organic compound



## DDOT ENVIRONMENTAL POLICY, NEPA, AND DCEPA

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- I.2 DDOT Environmental Program
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- I.4 Organization of the Environmental Manual
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# DDOT ENVIRONMENTAL POLICY, NEPA, AND DCEPA

Welcome to the District of Columbia Department of Transportation (DDOT) *Environmental Manual*. This manual has been prepared for use by DDOT staff and their consultants in developing projects to be consistent with local and federal environmental requirements and DDOT Environmental Policy. This document will assist DDOT staff and consultants by providing them with the knowledge and references necessary to:

- Understand and follow the DDOT Project Development Process
- Understand how to prepare DDOT environmental documents that meet the provisions of the National Environmental Policy Act of 1969 (NEPA)
- Understand how to comply with District of Columbia Environmental Policy Act (DCEPA)
- Identify the potential for impacts to resources at a time during project studies when measures to avoid and minimize impacts are feasible

- Avoid delays in schedule and the need to revisit prior work
- Engage stakeholders in a meaningful manner
- Deliver quality studies and projects that benefit DDOT's customers

DDOT's primary focus as an agency is the provision of a safe and efficient transportation system for residents and visitors in the District of Columbia. DDOT also recognizes the importance of being a good steward of the environment and incorporating environmental stewardship into all its operations. To align its program to this objective and integrate the principles of stewardship into its processes, DDOT has adopted an environmental policy with specific goals.

## 1.1 DDOT Environmental Policy

The District Department of Transportation is committed to practicing environmental excellence as it fulfills its mission to develop and maintain a cohesive sustainable transportation system that delivers safe, affordable, and convenient ways to

move people and goods—while protecting and enhancing the natural, environmental, and cultural resources of the District.

DDOT recognizes its role as a steward of the environment and is committed to the prevention of pollution. DDOT recognizes that its activities have the potential to impact the environment and as such is committed to incorporating environmental considerations into its activities by following these objectives:

1. Using resources efficiently
2. Developing transportation projects and conducting operations in an environmentally sustainable manner

DDOT is committed to continual improvement of its environmental processes and is committed to compliance with all applicable Federal and local environmental laws, regulations, and other requirements. DDOT is actively pursuing the development and implementation of an Environmental Management System (EMS). This EMS structure is described in the DDOT EMS Manual, which includes a framework to develop DDOT environmental objectives and targets.

## 1.2 DDOT Environmental Program

The DDOT environmental program is managed by the Project Development & Environment (PDE) Division. The PDE Division provides oversight for all environmental processes, project development process, and sustainability initiatives. This division also ensures compliance of all DDOT projects with federal and local environmental laws and regulations. The DDOT environmental program also includes a Sustainability Plan and an Environmental Management System.

The PDE division provides technical oversight and assistance to DDOT staff with project delivery, from project planning to construction and maintenance/operations. It also provides

guidance and assistance to DDOT staff in making DDOT projects and operations (including office operations) environmentally sustainable. This division develops and maintains DDOT environmental policy and the DDOT Sustainability Plan, in addition to providing environment- and sustainability-related training and guidance. This manual is part of the effort by the PDE Division to provide tools and guidance to DDOT staff to manage environmental work. This manual is developed and maintained by the PDE Division. Today, DDOT has various environmental documents to focus attention on various environmental initiatives. These documents include the DDOT Environmental Manual, the DDOT EMS Manual, and the DDOT Sustainability Plan. However, it is envisioned that in later years all of these documents will be combined in the DDOT Environmental Manual.

### 1.2.1 Sustainability

Sustainability means meeting the needs of the present without compromising the ability of future generations to meet their own needs. It consists of three elements: Environment, Social Structure, and Economy. Collectively, these elements provide the foundation for quality of life. DDOT recognizes the relationship between transportation and sustainability. A key priority for DDOT is providing a sustainable transportation system that allows various mode choices in a balanced manner without compromising safety, accessibility, and mobility, but still enhancing the economy, promoting livability, and protecting the environment. DDOT understands the influence of transportation facilities on the development of adjacent land and the ability of transportation infrastructure to affect the environment by changing stormwater flows, temperatures, natural habitat, and community cohesion.

The DDOT Sustainability Plan was developed to ensure that sustainable practices are incorporated in all DDOT activities such that the transportation system promotes

the three elements of sustainability: Environment, Social Structure, and Economy. This plan serves as guidance for decision making at DDOT so that the District of Columbia remains a safe, multimodal, and healthy city for generations to come. It serves as an important step in keeping DDOT’s commitment to using sustainable practices. This Sustainability Plan is based on the DC Green Agenda, DDOT’s mission, and the DDOT Action Agenda.

In order to incorporate the three elements of sustainability into DDOT activities, various priority areas are identified in the DDOT sustainability plan, which include: Promoting Transportation and Land Use Linkage; Improving Mode Choices, Accessibility and Mobility; Effective Cost Assessments in Decision Making; Supporting the Economy; Improving DDOT Operations and the Project Development Process; Protecting the Environment and Conserving Resources; Climate Change Adaptation; and Promoting Livability and Safety. The DDOT Sustainability Plan is available in a separate document.

### 1.2.2 Environmental Management System

An Environmental Management System (EMS) is a management system that focuses on incorporating environmental considerations into business practices. In simple terms, an EMS is a way of incorporating environmental thinking into an organization’s daily activities. The American Association of State Highway and Transportation Officials (AASHTO) defines EMS as “the organizational structure and the associated responsibilities and procedures to integrate environmental considerations and objectives into the ongoing management decision-making processes and operations of an organization.” There are different methods of developing an EMS. The most commonly used method is called the “Plan-Do-Check-Act” model. DDOT EMS was developed using this model.

Fostering a culture of developing transportation systems in an environmentally sustainable manner and using resources

efficiently is a top priority for DDOT. The EMS developed by DDOT ensures that environmental considerations are part of all DDOT activities. This EMS primarily focuses on (1) Project Development and Environmental Review; and (2) Office Operations. More details on the DDOT EMS are available in the DDOT EMS Manual.

### 1.3 Purpose of the Environmental Manual

The purpose of this manual is to define the environmental process for developing a DDOT project and to discuss the considerations that are included in that process. The process considers both federally and locally funded transportation projects and projects that require major federal approvals or permits. Projects with major federal actions are subject to the requirements of NEPA, as well as other federal and District environmental regulations. The District of Columbia enacted its own Environmental Policy Act in 1989. The DCEPA of 1989 complements the NEPA process. Projects without a major federal action are still subject to District of Columbia requirements.

Specifically, the DDOT Environmental Manual has been prepared to:

- Provide guidance on the performance of appropriate environmental resource studies and preparation of environmental documents required under NEPA and DCEPA
- Facilitate the early identification of environmental issues (scoping) and encourage the use of appropriate mitigation measures
- Serve as a resource for technical guidance on impact assessment
- Develop consistency and improve the quality of environmental analyses and documents through standardization
- Assist DDOT project managers and environmental staff in their review of environmental documents

- Facilitate sustainability planning through improved communication among agency engineers, planners, resource scientists, and public involvement specialists

The Environmental Manual is not intended to be the sole source of information for NEPA and other environmental (laws) processes or conducting technical resource studies. The scope and scale of these studies are project specific. This manual strives to provide an overview of the process, delineating the structure of project development and decision making, but stops short of discussing detailed methodologies for individual engineering or environmental analyses.

This manual also operates as a companion to the DDOT Design and Engineering Manual. Chapter 4 of the Design and Engineering Manual discusses environmental topics. Should any conflicts arise between the Environmental Manual and the Design and Engineering Manual with respect to the environmental process, the Environmental Manual will govern.

#### 1.4 Organization of the Environmental Manual

The organization of the Environmental Manual is intended to mirror the project development process. The flow of chapters and topics is generally indicative of the sequence of actions and studies that may be required for a DDOT project. Recognizing that not all projects involve the same concerns and steps, the reader may reference a specific chapter without reading the entire manual. Each chapter is also intended to stand on its own, with references to other chapters, as needed, to eliminate redundancy. The Environmental Manual is divided into chapters that contain technical guidance and background information on federal and local environmental regulations, Federal Highway Administration (FHWA) guidance and policies, interagency agreements, and DDOT policies.

Because the purpose of this manual is to provide an overview of the DDOT process and outline the considerations that are part of the process, the discussions in this manual are focused on a “big picture” understanding of the steps undertaken, rather than the details of study methodology. For example, for resources such as wetlands, the emphasis of this document is on identifying when wetland delineations should be undertaken, which laws and regulations govern them, and how the presence or absence of wetlands affects project development.

The manual also reflects an effort to not repeat information that is already documented in federal regulations and District of Columbia policies and procedures. For this reason, the References section of this manual, which contains many of these regulations, is as critical as the main body of text.

#### 1.5 National Environmental Policy Act Overview

Through the use of federal funding or the need for a federal approval or permit, many DDOT projects will be required to comply with NEPA. As users reference this manual during the development of a DDOT project, understanding NEPA and the role it plays in the DDOT process is critical.

NEPA (42 United States Code [USC] 4321, et seq.) was passed by Congress in 1969 in response to the increasing national concerns over the deterioration of the natural environment. These concerns led to the realization that the long-term quality of the environment is dependent on today’s actions and decisions. NEPA is the national charter for environmental planning that declares the nation’s policy to encourage harmony between human development and the environment. Most importantly, NEPA establishes a process for federal agency decision making. This process requires that, for federal actions having the potential to significantly impact the environment, agencies must:



- Identify and analyze environmental consequences of proposed federal actions in comparable detail to economic and operational analyses
- Assess reasonable alternatives to agency proposed actions
- Document the environmental analysis and findings
- Make environmental information available to public officials and citizens before agency decisions are made

First and foremost, NEPA is a tool used by decision makers to make informed decisions on proposed federal actions or federally funded DDOT actions. NEPA requires that the effects (impacts) of federal actions on the environment are considered equally with economic, technical, and other factors associated with the proposed action (project).

Administratively, NEPA also establishes the Council of Environmental Quality (CEQ), which is responsible for overseeing NEPA and for reporting to the President and Congress on the status, condition, and management of the Nation's environment. CEQ is also responsible for developing the "Regulations for Implementing the Procedural Provisions of NEPA" (40 Code of Federal Regulations [CFR] 1500-1508). The CEQ regulations require agencies to categorize each of their actions as normally requiring one of the following levels of environmental analysis and documentation:

- Categorical Exclusion (CE): FHWA has previously studied many types of highway projects and found that certain ones routinely do not create a significant effect on the human environment, individually or cumulatively. In such cases, the project type is categorized as a CE and is excluded from higher level studies. Examples of project types considered CEs include landscaping, minor safety improvements, the installation of noise barriers, or construction of bicycle and pedestrian lanes.<sup>1</sup> Most

<sup>1</sup>The FHWA's list of CE-eligible actions is included in 23 CFR 771.117, along with a discussion of potential unusual circumstances in which further environmental studies will be necessary to determine the appropriateness of a CE classification. For more

DDOT highway projects are documented in CEs, and such projects, by definition, often lack the complexity or controversy requiring comprehensive or special environmental studies. See Chapter 10, The Categorical Exclusion, for details.

- Environmental Assessment (EA): An EA is completed for a project when there are impacts that could be significant, but the potential for a Finding of No Significant Impact (FONSI) exists. If there are known or expected significant impacts, an EA is inappropriate, and the completion of an EIS is required. See Chapter 9, The Environmental Assessment and Finding of No Significant Impacts, for details.
- Environmental Impact Statement (EIS): An EIS is the appropriate NEPA document to address actions with significant potential impacts on the human or natural environment. The EIS is the most detailed level of environmental analysis when compared to CE and EA projects. See Chapter 8, The Environmental Impact Statement and Record of Decision, for details.

In general, all NEPA documents should address the following:

- Purpose of and Need for Action: All NEPA documents should include a concise statement of general project goals (the purpose), as well as additional data and discussion of the underlying details that make the project necessary (the need).
- Alternatives: A NEPA document should address a wide range of potential alternatives, of which a "reasonable few" are generally identified as practicable and economically and technically feasible, thus warranting detailed analysis. For complex projects, it is critical to have a credible process to identify a full range of alternatives early and to provide documented

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information, see also Chapter 4 of this manual, which addresses specific policies and legislation that govern during the project development process.

justifications for eliminating some. Therefore, the analysis of alternatives—more than any other part of project development—requires the integrated work of both corridor development and NEPA practitioners.

- **Affected Environment:** The current conditions in the general project area, with emphasis on the most relevant resources, must be discussed. The level of detail and bulk of such information should correspond to the magnitude of the proposed action and the impacts that might result. In general, very basic background information is needed for a CE, and more comprehensive information may be needed for an EIS.
- **Environmental Consequences and Mitigation:** The NEPA document will also include impacts to the affected environmental resources and possible mitigation measures.
- **Comments, Coordination, Preparers, and Distribution:** Additional sections of NEPA documents identify persons involved in the document’s development and preparation.

Please note that the above-listed contents simply provide an overview of the information addressed in NEPA documents. FHWA Technical Advisory (TA) T6640.8A provides greater detail concerning the proper organization of CEs, EAs, and EISs.

## 1.6 District of Columbia Environmental Policy Act Overview

DCEPA applies to all DDOT projects. However, DCEPA provides an exemption when projects follow the NEPA process, and no separate action under DCEPA has to be

taken. For projects that only use local funding and do not need any federal action, DCEPA must be complied with. As users refer to this manual during the development of a DDOT project, understanding the DCEPA process in DDOT projects is very important.

DCEPA was enacted in 1989. In 1997, the final implementing regulations, “Rules to Implement The District of Columbia Environmental Policy Act (DCEPA) of 1989,” were published.

DCEPA applies to all DDOT projects. Most DDOT projects use federal funds and have to comply with NEPA. As stated earlier, DCEPA provides an exemption for projects that comply with NEPA and considers NEPA action to be equivalent to preparing a DCEPA action. Therefore, DDOT projects that comply with NEPA (CE, EA, or EIS) requirements only need to submit the Environmental Intake Form and claim an exemption, because the project has completed a NEPA action. No further documentation is needed under DCEPA for such actions.

For DDOT projects that use local funds and do not require any federal agency action, the detailed DCEPA process must be followed. After DDOT determines the appropriate action type for its proposed project, the development of the subsequent environmental document— Exemption, Environmental Impact Screening Form (EISF), or EIS— follows a review and approval process prescribed by the District of Columbia environmental regulations. The process for the Exemption, EISF, and EIS action types is explained in Chapter 6, The DCEPA Process.

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# FREQUENTLY ASKED QUESTIONS

## 2.1 Do All DDOT Projects Have to Comply with Environmental Laws?

Yes, all District of Columbia Department of Transportation (DDOT) projects have to comply with federal and local environmental laws.

## 2.2 Which Federal Environmental Laws Apply to DDOT Projects?

There are many federal environmental laws that apply to DDOT projects, depending upon the type of project and its complexity. Some of the major federal environmental laws are:

- National Environmental Policy Act (NEPA)
- National Historic Preservation Act (NHPA)- Section 106
- Clean Water Act (CWA) – Sections 404, 402, and 401
- Clean Air Act (CAA)
- Department of Transportation Act of 1966, Section 4(f)
- Endangered Species Act (ESA)

- Executive Order (EO) 12898: Environmental Justice
- Resource Conservation and Recovery Act (RCRA)

## 2.3 Which District of Columbia Environmental Laws Apply to DDOT Projects?

Many District of Columbia environmental laws apply to DDOT projects, depending on the type of project and its complexity. Some of the major District environmental laws are:

- District of Columbia Environmental Policy Act (DCEPA)
- District of Columbia Hazardous Waste Management Act of 1977
- Water Pollution Control Act
- Air Pollution Control Act

## 2.4 What Is NEPA?

NEPA is the National Environmental Policy Act of 1969. NEPA is a federal law requiring the federal government to

consider the effects of its actions upon the environment. NEPA established a framework within which these considerations are coordinated, documented, and communicated to the public and agencies with jurisdiction. Depending on the type of the project, NEPA action can be a Categorical Exclusion (CE), an Environmental Assessment (EA), or an Environmental Impact Statement (EIS).

## 2.5 Does NEPA Apply to All DDOT Projects?

NEPA applies to all DDOT projects that use federal funding or require a federal action (permit or approval). DDOT projects that require National Park Service (NPS) or any other federal agency approvals or permits also have to follow NEPA, even though the project is using only local funds.

## 2.6 What Is a NEPA Action Type?

NEPA action type means the class of action taken by the federal agency in approving a project to comply with NEPA. There are three NEPA classes (types) of action:

- Categorical Exclusion (Cat Ex, also called CE)
- Environmental Assessment (EA)
- Environmental Impact Statement (EIS)

## 2.7 What Is a Cat Ex?

Cat Ex means “Categorical Exclusion” under NEPA. It is sometimes also referred to as a “CE.” CEs are those types of actions or projects that do not cause significant impacts to the environment. Some CEs do not require documentation. 23 CFR 771.117 provides a list of projects for the Federal Highway Administration (FHWA) that qualify for a CE. See Chapter 10, The Categorical Exclusion, for details.

Typical DDOT projects within DDOT right-of-way, such as reconstruction, repaving, bridge rehab projects, and signal

installation projects, qualify for a CE. However, if another federal agency (such as NPS) is involved, then a CE may not be used.

## 2.8 What Is an Environmental Assessment?

To comply with NEPA, an EA is prepared when it is not clear whether a project (or action) has significant impacts or not. Typically, an EA is prepared when a project does not qualify for a CE, and it is not clear what types of impacts it might have on the environment.

An EA is a document that includes the proposed action and an analysis of the impacts of this action on the environment. If the EA concludes that the project will not have any significant impacts, then a Finding of No Significant Impact (FONSI) is prepared and approved by the lead federal agency. However, if the EA concludes that there are significant impacts, then an EIS has to be started. See Chapter 9, The Environmental Assessment and Finding of No Significant Impact, for details.

## 2.9 What Is a FONSI?

FONSI stands for “Finding of No Significant Impact.” A FONSI is prepared when an EA concludes that the project will not have any significant impacts on the environment. FONSI approval is the final step in the preparation of an EA.

## 2.10 What Is an Environmental Impact Statement?

An EIS is an environmental document prepared to comply with NEPA when a project is likely to have significant impacts to the environment. An EIS is a full-disclosure document describing the potential effects of a project on the environment. An EIS includes the impacts of a proposed project on land, water, air, structures, living organisms, and

environmental values at the site, as well as social, cultural, and economic aspects. An EIS describes impacts, as well as ways to mitigate (lessen, remove, and similar measures) these impacts. An EIS is released to the public for review and comments as a Draft EIS and as a Final EIS.

An EIS is the most thorough and comprehensive level of NEPA documentation. Projects such as new bridge construction projects and new highway projects may require an EIS. The final step in the preparation of an EIS is the Record of Decision (ROD), which documents the alternative selected for the project. See Chapter 8, The Environmental Impact Statement and Record of Decision, for details.

### **2.11 What Is a ROD?**

ROD stands for “Record of Decision.” The ROD is the final step in the preparation of an EIS. It documents the alternative selected for the project. See Chapter 8, The Environmental Impact Statement and Record of Decision, for details.

### **2.12 What Is DCEPA?**

DCEPA is an acronym for the District of Columbia Environmental Policy Act (DCEPA) of 1989. DCEPA applies to all DDOT projects. DCEPA is the District of Columbia law that requires the District government to consider the effects of its actions upon the environment. See Chapter 6, The DCEPA Process, for details.

### **2.13 Does DCEPA Apply to All DDOT Projects?**

Yes, DCEPA applies to all DDOT projects, even if they use federal funds. However, most DDOT projects use federal funds and have to comply with NEPA. DCEPA provides an exemption for projects that comply with NEPA and considers NEPA action to be equivalent to preparing a

DCEPA action. Therefore DDOT projects that comply with NEPA (CE, EA, or EIS) do not need to take any additional action to comply with DCEPA. However, an Environmental Intake Form (EIF) should be completed for construction projects.

DDOT projects that use local funds and do not require any federal agency action must comply with DCEPA. After DDOT determines the appropriate action type for its proposed project, the development of the subsequent environmental document— Exemption, Environmental Impact Screening Form (EISF), or EIS takes place.

### **2.14 What Are Different DCEPA Action Types?**

There are three DCEPA action types:

- Exemption
- Environmental Impact Screening Form
- Environmental Impact Statement

### **2.15 What Is an Exemption?**

In the DCEPA process, an Exemption means the types of actions that do not require any further documentation for DCEPA compliance (that is, do not require the preparation of an EISF or EIS). See Chapter 6, The DCEPA Process, for details.

### **2.16 What Is an EISF?**

Under DCEPA, an EISF means “Environmental Impact Screening Form.” An EISF is prepared for projects that are not covered by the exemption of DCEPA. This form is completed to determine whether an EIS is required or not. The EISF form is available in Appendix C. The EISF form has to be completed by the applicant and submitted to the

Department of Consumer and Regulatory Affairs (DCRA) for approval. See Chapter 6, The DCEPA Process, for details.

### **2.17 What Is an EIS in DCEPA?**

In DCEPA, an EIS means “Environmental Impact Statement.” The EIS for DCEPA compliance is similar to a NEPA EIS document. An EIS is prepared for projects that are not covered in the exemptions or are not covered in the EISF or for projects where the lead agency has made a determination that an EIS is required. See Chapter 6, The DCEPA Process, for details.

### **2.18 Who at DDOT Determines What Type of an Environmental Action/Document Is Needed?**

The PDE Division (or designee) determines the type of environmental action/document required for a proposed project, based on the information provided by the project manager.

### **2.19 Who at DDOT Approves Environmental Actions/Documents?**

The PDE Division approves all environmental actions/documents, based on the information provided by the project manager.

### **2.20 What Is Section 106?**

The term Section 106 usually refers to Section 106 of the National Historic Preservation Act. Section 106 protects historic or cultural resources (such as historic properties, historic sites, historic districts, and archeological sites) by providing the ground rules and processes that must be followed before an eligible resource can be affected by federal agency action. See Chapter 21, Archaeological, Historical, and Paleontological Resources, for details.

### **2.21 Does Section 106 Apply to All DDOT Projects?**

Section 106 applies only to those DDOT projects that use federal funds or require a federal agency action and are near a historic resource (historic properties, historic sites, historic districts, and archeological sites). For projects using only local funds, the District of Columbia Historic Preservation Act must be followed.

### **2.22 What Is SHPO?**

SHPO stands for State Historic Preservation Office(r). SHPO is the agency responsible for the preservation of historic resources in a state. In the District of Columbia, the SHPO function is part of the District of Columbia Office of Planning and is called the District of Columbia Historic Preservation Office (DCHPO). For DDOT projects, SHPO is also referred to as DCHPO.

### **2.23 What Is Section 4(f)?**

The term Section 4(f) usually refers to Section 4(f) of the United States Department of Transportation (USDOT) Act of 1966. This law protects the following property types from being converted to transportation use.

- Publicly owned parks and recreation areas
- Historic sites (regardless of ownership) of national, state, or local significance
- Wildlife or waterfowl refuges

See Chapter 22, Section 4(f) – Parks, Recreation Areas, Historic Sites, Wildlife and Waterfowl Refuges, for details.

### **2.24 Does Section 4(f) Apply to All DDOT Projects?**

Section 4(f) applies only to those DDOT projects that use USDOT (FHWA, Federal Transit Administration [FTA] )



funds. Section 4(f) applies when a project using such funds will impact a historic site, a public park, a recreational area, or a wildlife refuge. Section 4(f) does not apply on projects using only District funds.

### **2.25 Which Agencies Are Usually Involved in the Section 4(f) Process?**

Section 4(f) is a part of a law governing USDOT activity; therefore, a USDOT agency (such as FHWA or FTA) is the lead agency in the Section 4(f) process, responsible for Section 4(f) approval. Depending on the project, different agencies may have to be involved in the Section 4(f) process. In DDOT projects, typically, if parks owned by NPS are involved, then NPS has to be involved. If historic properties are involved, then DCHPO has to be involved. If District-owned parks are involved, then the District of Columbia Department of Parks and Recreation (DPR) has to be involved.

### **2.26 What Is Section 404?**

The term Section 404 usually refers to Section 404 of the Clean Water Act (CWA). Section 404 describes a permit that is required whenever debris or fill materials are discharged into the waters of the United States. For DDOT, it means that any time a DDOT project needs construction inside the Anacostia or Potomac River (or any of the creeks that feed into these rivers) or any wetlands, then DDOT needs to obtain a Section 404 permit. The United States Army Corps of Engineers (USACE) is the granting authority for Section 404 permits. There are two major types of Section 404 permits.

- Nationwide permits
- Individual permits

See Chapter 19, Wetlands and Waters of the United States, for details.

### **2.27 What Is Section 402?**

The term Section 402 usually refers to Section 402 of the CWA. Section 402 of the CWA provides for the National Pollutant Discharge Elimination System (NPDES) permit. Under NPDES, all facilities that discharge pollutants from any point source into waters of the United States are required to obtain a permit. The permitting authority for the District of Columbia is the United States Environmental Protection Agency (USEPA) Region 3 Office Water Protection Division.

There are two basic types of NPDES permits.

- Individual Permits
- General Permits

See Chapter 17, Water Quality Policy and Regulations, for details.

### **2.28 What Is the District of Columbia Department of Environment Role in Section 404 and 402 Permits?**

Section 401 of the CWA requires all Section 404 and 402 permits to be certified (approved) by the State Department of Environment (which is also called Water Quality Certification, or WQC). In the District, the District of Columbia Department of Environment (DDOE) is the state department of environment, hence is required to certify these permits before they can become effective.

### **2.29 What Is FHWA's Role in the Environmental Process?**

FHWA is the lead agency for DDOT projects that use Federal Aid Highway funds, which means that FHWA is

responsible for compliance with all federal environmental laws for DDOT projects. FHWA has to approve all NEPA actions for DDOT (such as CE, EA before it is released, FONSI, Draft EIS before release, Final EIS before release, and ROD). FHWA makes Section 4(f) determinations and approves Section 4(f) documents. Section 106 determinations are also made by FHWA before DCHPO Concurrence.

### **2.30 What Is DDOT’s Role in the Environmental Process?**

DDOT is responsible for preparing all the documents and collecting all necessary information for environmental compliance. For NEPA projects, DDOT manages and prepares the NEPA documents (CE, EA, EIS) and submits them to FHWA for approval. DDOT also prepares all the documents and information needed for the Section 106 and Section 4(f) processes and assists FHWA in its consultation process with DCHPO, Advisory Council on Historic Preservation (ACHP), NPS, and other agencies.

### **2.31 What Is the DDOT Environmental Process?**

The environmental process at DDOT begins when a project is included in the Transportation Improvement Plan (TIP). The necessary level of NEPA approval is identified at this stage. When the project is included in the yearly budget, the project manager submits the project information to the PDE staff. Based on the information from the project manager, PDE staff identify whether the project will need to comply with NEPA, DCEPA, or any other environmental laws. If the project manager submits the necessary information to the PDE staff, the project is approved by the PDE staff (or designee) as a CE. If the project does not qualify for a CE, then the PDE staff informs the project manager that an EA or EIS is required. The PDE staff assists in preparing

these documents. If Section 106, Section 4(f), or any other environmental law also applies, then the documentation needed for compliance is also prepared along with the NEPA document (CE, EA, or EIS). Once the NEPA document is approved by FHWA, the project can proceed to final design. PDE staff monitors and assists this process. The PDE staff (or designee) approves all NEPA and other environmental documents before they are submitted to FHWA. PDE staff also monitor each project as it proceeds from NEPA approval to design and construction to ensure that environmental evaluations and commitments are carried out in all phases of the project.

### **2.32 What Is CSS?**

Context-Sensitive Solutions (CSS), also called Context-Sensitive Design (CSD), is a collaborative, interdisciplinary approach that involves all stakeholders in developing a transportation facility that fits its physical setting and preserves scenic, aesthetic, historic, and environmental resources, while maintaining safety and mobility. It is a process used by departments of transportation to ensure that transportation projects fit with the needs of the community and the surrounding environment. See Chapter 13, Context-Sensitive Solutions, for details.

### **2.33 Does DDOT Have an Environmental Policy?**

Yes, DDOT does have an environmental policy. DDOT’s environmental policy is:

*DDOT is committed to practicing environmental excellence as it fulfills its mission to enhance the quality of life for the District of Columbia residents, businesses, and visitors by ensuring that people and goods move efficiently and safely, with minimal adverse impacts on the environment.*

Chapter 1, DDOT Environmental Policy, NEPA, and DCEPA, includes the DDOT Environmental Policy in detail.

### **2.34 What is Sustainability?**

Sustainability means meeting the needs of the present without compromising the ability of future generations to meet their own needs. It consists of three elements: Environment, Social Structure, and Economy. DDOT recognizes the relationship between transportation and sustainability. A key priority for DDOT is providing a sustainable transportation system that allows various mode choices in a balanced manner without compromising safety, accessibility, and mobility, but still enhancing the economy, promoting livability, and protecting the environment.

DDOT has developed a Sustainability Plan to ensure that sustainable practices are incorporated in all DDOT activities. This plan identifies priority areas, which include: Promoting Transportation and Land Use Linkage; Improving Mode Choices, Accessibility, and Mobility; Effective Cost Assessments in Decision Making; Supporting Economy; Improving DDOT Operations and Project Development Process; Protecting the Environment and Conserving Resources; Climate Change Adaptation; and Promoting Livability and Safety. The DDOT Sustainability Plan is available in a separate document.

### **2.35 What is EMS?**

An Environmental Management System (EMS) is a management system that focuses on incorporating environmental considerations in business practices. In simple terms, an EMS is a way of incorporating environmental thinking into an organization's daily activities. The EMS developed by DDOT ensures that environmental considerations are part of all DDOT activities. This

EMS primarily focuses on (1) Project Development and Environmental Review and (2) Office Operations. More details on DDOT EMS are available in the DDOT EMS Manual.

### **2.36 What is Climate Change?**

The continuous human development and the use of natural resources are contributing towards increased impacts to the environment and are resulting in global warming. Global temperatures have already risen 1.4 degrees Fahrenheit since the start of the twentieth century and continue to increase. More recently, the term “climate change” is being used instead of “global warming” because it helps convey that there are changes in addition to rising temperatures (The National Academies, 2008).

Most scientists and researchers think that the recent increase in global warming has resulted mainly because of human activities that cause the emission of gases like carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxides (N<sub>2</sub>O), and hydrofluorocarbons (HFCs). These gases, collectively called greenhouse gases (GHG), are primarily emitted by combustion processes. The greenhouse effect is a function of the concentration of water vapor, CO<sub>2</sub>, and other trace gases in the atmosphere that absorb terrestrial radiation leaving the surface of the earth (Intergovernmental Panel on Climate Change, 2001). Changes in the atmospheric concentrations of these GHGs can alter the balance of energy transfers between the atmosphere, space, land, and the oceans.

DDOT has worked closely with the District Department of Environment in developing the DC Climate Change Action Plan, which covers all public and private operations and developments in the district. DDOT is currently working on developing a Climate Change Adaptation Plan just for DDOT and its activities.



CHAPTER 3

PROJECT DEVELOPMENT



- 3.1 Transportation Planning
- 3.2 Project Planning
- 3.3 Final Design
- 3.4 Construction

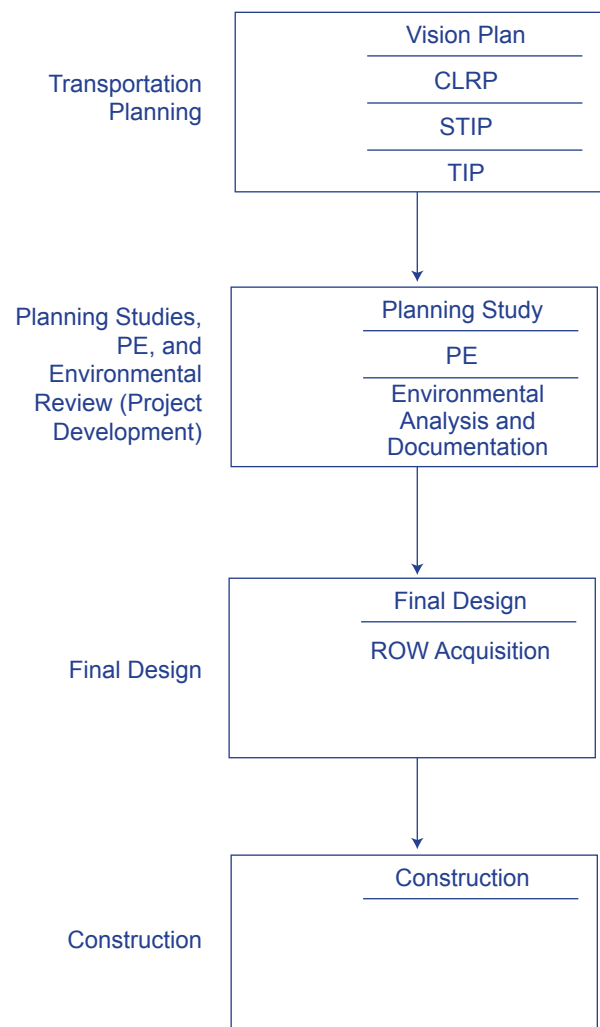


# PROJECT DEVELOPMENT PROCESS

This chapter describes the different phases of project development and its relationship with environmental review. Project development involves several distinct phases, with differing purposes and levels of detail. Various departments of transportation have their own terminology for how they describe these different phases. DDOT describes the project development process as four major phases:

1. Planning
2. Project Planning, Preliminary Engineering, and Environmental Review (Project Development)
3. Final Design
4. Construction

The first phase of project development is Transportation Planning. This phase involves a higher level of planning, which includes statewide planning (citywide planning for DDOT) as well as metropolitan and regional planning. During this phase, the Constrained Long Range Plan (CLRP), State Transportation Improvement Program



(STIP), and Transportation Improvement Program (TIP) are developed. During this phase the need for a project is determined. This determination may come as a result of several different types of input: engineering studies, infrastructure condition analyses, public input, or legislative input, among others.

The next phase of project development is the subject of this manual. This phase involves project planning studies, preliminary engineering, or conceptual design, as well as environmental review and documentation. This phase is sometimes also called the “Project Development” phase. The Project Development and Environment (PDE) Division is responsible for project development. During this phase, alternatives with the potential to solve the transportation problem are investigated, including their engineering requirements and environmental impacts. This phase typically involves public involvement, agency coordination, preliminary engineering plan development, and the preparation of environmental studies and documents.

The third phase of project development is final design. During this period, plan documents are developed, including engineering drawings and special provisions needed to guide construction.

The fourth phase is the construction phase. While the term “construction” may seem obvious, it is important to consider that this phase may require follow-through on commitments that have been made to agencies and the public during earlier phases of project development.

In examining how project development occurs, from planning through to the design phase and eventually to construction, one can see that more detail is added through each consecutive step and that the field of vision narrows until the focus is on a single element or improvement concept. The Transportation Planning process identifies that there is a need for an improvement. The Project Planning process

focuses upon identifying what it is that should be built (if planning studies end in a recommendation in favor of a build alternative). Design focuses on how something should be built. Construction, of course, builds the design, focusing on how the pieces fit together in the field.

The PDE Division is responsible for all Transportation Planning and Project Planning activities (except in special cases such as project planning for transit, which is performed by the Progressive Transportation Systems Administration (PTSA), previously known as Mass Transit Administration (MTA)).

The PDE Division is responsible for project development. The Infrastructure Project Management Administration (IPMA) is responsible for the design and construction of projects. The types of projects DDOT completes often involve more than straightforward rehabilitation and improvements within the existing right-of-way, including the following:

- Roadway widening
- Safety improvements
- Capacity improvements
- Intersection improvements
- Interchange studies
- Projects that could result in environmental impacts or changes in access and mobility
- Routes on new alignments
- Reconstruction requiring additional right-of-way and potential environmental impacts

This chapter will help to set the stage for the project planning process. The discussions contained here will provide background for what happens before the project planning begins, when a planning study is needed, provide the general context for a project planning process, and explain the relationship between the decisions made during the project planning process and the implementation of those decisions during design and construction.



### 3.1 Transportation Planning

The PDE Division within DDOT is responsible for the Transportation Planning process. It is during this phase that a project begins to take shape and is officially recognized as a transportation problem that needs to be addressed. In essence, the Transportation Planning process provides a guide for accomplishing a project's transportation goals and objectives in the context of the overall transportation system and program.

The key distinctions between Transportation Planning and Project Planning phases include the following.

- Transportation Planning is the precursor to project planning studies.
- During Transportation Planning, the proposed action is specified at a conceptual level, but does not specify the range of alternatives to be studied.
- Through the Transportation Planning process CLRP, TIP, STIP, and the Capital Improvement Plan (CIP) are developed and input are provided to the metropolitan planning organization (MPO). Through this process, the PDE Division identifies the system deficiencies and public and agency input that drive the creation of a project and defines the basic project needed to address the problem. Please note that the MPO for the Washington, D.C. region is Metropolitan Washington Council of Governments (Wash COG or MWCOG).
- The Transportation Planning process is much broader in scope than the planning process because it looks at the system as a whole, rather than a single link in the system.
- No engineering design is completed during Transportation Planning, nor does Transportation Planning establish the specific design requirements for an improvement, such as cross-section needs or

alignments. By comparison, preliminary design is an integral element of the project development process, because this information is required to define needed improvements and their footprint (impact on the ground) to support associated National Environmental Policy Act of 1969 (NEPA) analyses and secure Federal Highway Administration (FHWA) approval in cases where the project is using federal funds.

#### 3.1.1 The Relationship Between Transportation Planning and the Purpose and Need

Much of the work that goes into the Transportation Planning process to identify the need for an improvement on a system wide scale is the same information that forms the basis of the purpose and need for an individual project.

“Purpose and need” in this discussion is not meant simply to refer to the statement developed during the NEPA process. Indeed, even for projects where there is not a companion NEPA document or it is being processed under local guidelines, it is important to develop a purpose and need, or set of goals and criteria for the proposed action. This process will help establish the criteria by which alternatives are developed and evaluated.

Information generated during the Transportation Planning process should be augmented as appropriate and used to help define the purpose and need. Additional analyses that may be required to generate supporting information needed to better understand the transportation problem and establish the measures for alternatives evaluation include travel and traffic forecasting, studies of infrastructure deficiencies, sufficiency ratings for pavement and structures, public and agency input, and planning documents that would demonstrate consistency with regional transportation planning goals.

Projects are included in the Transportation Planning process because they have a demonstrated need, such as crash history

or capacity problems, while others may have been identified through legislative support, economic conditions, or a desire for consistency with land use planning goals.

### 3.2 Project Planning, Preliminary Engineering, and Environmental Review (Project Development)

As described earlier, this phase is also called the “Project Development” phase by many organizations. This phase of the process includes project planning, planning studies, preliminary engineering, preliminary design, alternatives analysis, and environmental review, documentation, and approval.

23 CFR 636.103 defines the term “Preliminary Design” as follows: “Preliminary design defines the general project location and design concepts. It includes, but is not limited to, preliminary engineering and other activities and analyses, such as environmental assessments, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for the final design. Prior to completion of the NEPA review process, any such preliminary engineering and other activities and analyses must not materially affect the objective consideration of alternatives in the NEPA review process.”

#### 3.2.1 Overview of the Project Planning Process

Chapter 1 of this manual provides a more detailed discussion of DDOT’s environmental policies and NEPA implementation. Later chapters in the manual explore individual resource studies and their methods and documentation in depth. Before considering the detail of a specific resource, it is helpful to understand the basic definition and purpose of the Project Planning process.

In many ways, Project Planning may be the most crucial phase of a project. This phase focuses on defining the problem as a means to identify a range of potential transportation solutions. This stage of the study process offers the greatest potential for avoiding environmental impacts and for controlling project construction costs.

The solutions developed during this phase must meet transportation engineering design principles, be economically feasible, and be publicly and politically acceptable. Specifically, the solutions must provide decisions about a type of improvement (such as access control, basic number of lanes, level of service, and design characteristics) and an approximation of where the project should be located.

The project planning process considers a broad range of alternatives and allows a serious examination of the means to address a transportation problem. The focus of a planning study is determining the best solution to a problem, whereas the focus of a design study involves determining the best way to implement that solution. A planning study asks, “What is the best solution to the problem?” A design study, on the other hand, asks a different question, “What is the best way to implement the solution?”

Not all projects are subject to planning studies. Certain improvements do not require detailed studies or investigation of alternatives. These improvements are defined adequately at the programming phase and generally do not require a planning study. They include the following.

- Resurfacing
- Reconstruction within the existing cross-section (with little or no new right-of-way)
- Bridge repair
- Signing

This list is not exclusive, and even projects falling into this list should be evaluated for their potential to require more detailed analyses. The projects that fall in the categories listed above typically go to IPMA directly for design and construction from the Transportation Planning phase after environmental review. Such projects do not require PDE to conduct planning studies.

Because each project will have its own set of goals that it must accomplish to result in successful completion, so must the planning process have its set of goals for the study to be successful and ready for design development.

Once there is a clear definition of the problem, the study should provide an examination of a range of alternatives. This examination should withstand the rigors of the NEPA process, if applicable, as well as the application of good engineering principles.

This examination of alternatives should involve applying a series of filters to proposed solutions (alternatives) to test and eliminate those that should not be carried forward for additional analysis. The categories that should be used for testing are listed and described below.

- **Technical:** The first test evaluates whether the proposed alternative meets technical (engineering) guidelines. Is it possible to accomplish the goal? Does the alternative meet safety demands? Does it create new or additional problems for adjacent areas (downstream congestion, for example)?
- **Environmental:** The potential alternatives that pass the first test are evaluated for their potential environmental impacts. The key to this analysis is the application of the sequencing process for the resources to which it applies. More generally, testing all resources for sequencing provides a good test. Does the alternative cause potentially significant impacts to such sensitive resources as wetlands, park and recreational lands, historic resources, or homes

and businesses? Do other alternatives exist that would accomplish the project goals with or without less impact?

- **Financial:** The third test is of fiscal reasonableness. Do the alternatives accomplish the goals and avoid or minimize impact to resources, but at an unreasonable financial cost? Are the alternatives well outside the programmed budget for implementation?
- **Public and Political:** A planning study should consider public and political input in the process. The input and preferences of public and elected officials are a useful tool in decision making, particularly when deciding among alternatives that are otherwise similar. As a public agency, careful consideration should be given before implementing alternatives that the majority of the public opposes.

In addition to the criteria noted above, the study should result in a legally defensible solution and should not require significant reexamination of the study during the subsequent design phase.

One of the threads running throughout this manual is the concept of a “proper level of detail.” Many of the actions DDOT undertakes are developed in stages rather than all at once. A planning study is an example of one of these stages. A planning study takes a conceptual system-level improvement and defines it as a project with logical termini, allowing for an intermediate stage of development involving the following:

- Allows work to be done at an appropriate level of detail for the decision at hand
- Minimizes the higher costs that design studies could require, such as a higher degree of geometric and data accuracy, although that accuracy does not necessarily translate to better decision making
- Allows the project to be viewed on a higher level as part of the whole transportation network

For Wash COG to complete its long-range planning and for DDOT to develop the TIP and CIP, both organizations use regional or citywide data and trends to identify locations where the investment of transportation funds is needed. When a project moves from the Transportation Planning phase to the Project Planning phase, the level of detail used in the analysis increases. The planning study results in the generation of sufficient engineering detail to facilitate the identification of the best performing alternative while balancing the engineering needs and their environmental impacts.

### 3.2.2 Responsibilities During the Project Planning Phase

The project manager is ultimately responsible for the development of the project. This includes ensuring that coordination with appropriate external agencies is completed, as well as coordination with other staff within DDOT. The project manager is responsible for obtaining any permits or approvals that are required during the project planning phase, whether issued by federal or District of Columbia agencies or DDOT itself. It must be noted that certain permits are not issued until the final design is completed; however, it is necessary to coordinate with the agencies that issue those permits during the project planning phase to ensure that the appropriate permit requirements are met and the relevant agency is aware of the projects and its scope.

The Project Development and Environment (PDE) Division is available to provide support for specific environmental studies and reviews. The project manager should actively engage staff from PDE Division early in project development. Regular coordination with PDE environmental staff throughout the project will help to avoid undesirable surprises that may arise later in project development. In particular, if changes in the proposed scope of a project arise, it is advisable to discuss the proposed changes with PDE staff to determine

if the changes affect the studies or approvals needed for the project.

All planning studies shall include the DDOT Environmental Form I, and upon its completion, Form II.

### 3.2.3 The Relationship Between Engineering and Environmental Studies

The relationship between engineering and environmental studies during project planning is dynamic and iterative. It is during the planning phase that environmental issues are identified, opportunities to avoid resource impacts are recognized, mitigation concepts are developed where avoidance is not possible, and necessary coordination with agencies with jurisdiction over resources is conducted. During this phase, engineering alternatives are identified and developed based on their potential to address project needs that evolve over the course of the study as decisions are made about the number of lanes, location of alignments, configuration of intersections, and similar issues.

Engineering and environmental studies are not related in a linear manner; given the specifics of a project, they are intertwined, depending on factors such as the following:

- The engineering complexity of the project or proposed action
- The presence of resources that may require sequencing (avoidance, minimization, and mitigation)
- The need for a “master plan,” from which smaller projects may be broken out for development (tiering, for example)
- The expected level of controversy that the project would generate and the need to be responsive to public and agency input
- Knowledge of whether the project would result in a potential for significant environmental impacts

The relationship between engineering and environmental studies should be explored through a tight, iterative process during project development. The purpose of the planning process is, in the most general terms, to develop a recommended solution for a transportation need. Knowing the environmental constraints and opportunities on a project aids in better decision making on a project in terms of the quality of the solution and in easier processing of the project in terms of practical ability to acquire the necessary approvals to execute the project. Learning about these constraints and opportunities requires coordination among the different DDOT administrations.

The environmental studies may be conducted under the auspices of NEPA, under District of Columbia Environmental Policy Act (DCEPA), or under more general practices of good planning. In some cases, where there is potential that federal funds may be requested in the future, the project should be developed giving consideration to how future application of NEPA would impact decision making.

### 3.2.4 Implementing the Planning Process

#### Project Initiation

This manual is structured around chapters that provide details for implementing the various elements of the planning process. These chapters cover elements ranging from the process for completing an Environmental Impact Statement (EIS) or Environmental Assessment (EA), the application of context-sensitive solutions to projects, and conducting public involvement to studying particular resources and applying all of the above requirements to proposed actions that fall into the major project category.

The process for all projects, however, begins with the steps shown in Figure 3-1, Project Initiation Process. Projects are first included in the DDOT program, and a project manager is identified for them. The process concludes with

the finalization of the Environmental Evaluation Form and obligating funding for the project.

#### *Step 1*

The need for the project is identified, and the project is included in the multiyear program. A project manager is assigned.

#### *Step 2*

DDOT administration and PDE staffs meet to review the project and potential requirements. The project manager has to be involved in this meeting.

#### *Step 3*

Based on input received during the project review meeting, the PDE staff recommends the level of environmental documentation and the resource studies that will be required for the project.

#### *Step 4*

The PDE staff provides recommendations on the Section 106 and Section 4(f) requirements for coordination with the District of Columbia Historic Preservation Officer (DCHPO) and/or the National Park Service (NPS), permits under the Clean Water Act (CWA), and any coordination specific to them.

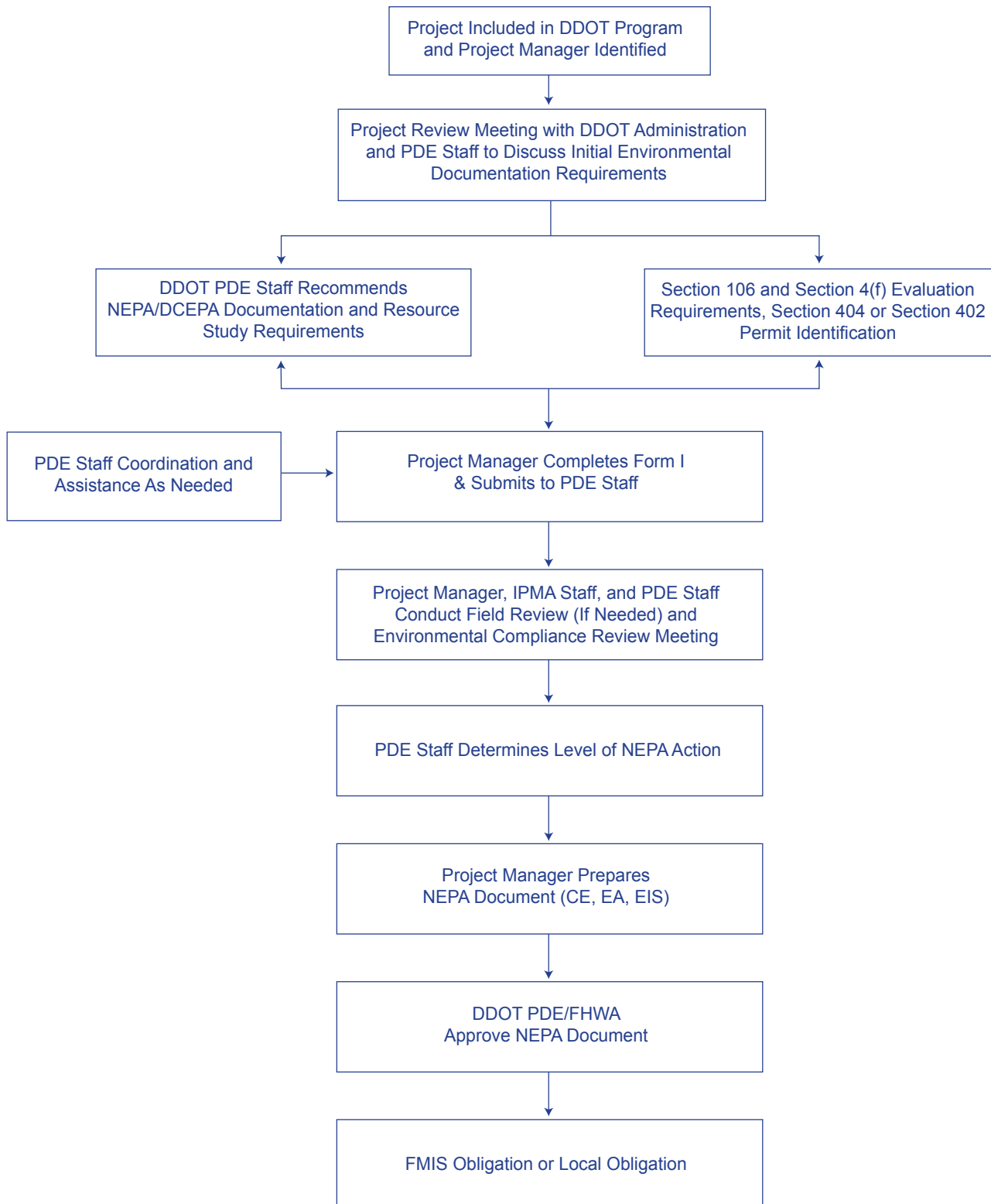
#### *Step 5*

At this point, the project manager is responsible for completing DDOT Environmental Form I (contained in Appendix A). The form should be submitted to the PDE staff for review. The PDE staff provides comments and guidance or assistance, as needed, on the next steps, based on the information provided in Form I.

#### *Step 6*

The project manager, IPMA/PPSA/TOA/PTSA staff, and PDE staff conduct a joint field review and hold an environmental compliance review meeting. If, based on the

**Figure 3-1 Project Initiation Process**



findings of the field review and the Form I review, there are no further changes to the scope of the project, the NEPA recommendations, or the coordination requirements of the project, the PDE staff completes Form II, approves the form, and returns it to the project manager. At this point, if the project is federally funded, funding is obligated in the Financial Management Information System (FMIS). If locally funded, the local project funding is approved. Whether federal or local, after the obligation of funding, the subsequent phases of project development can begin.

### **Project Development and Environmental Review**

Once federal or local funds have been allocated and the project is initiated, intensive field surveys and data collection may begin. This includes the development of functional-level engineering studies, study reports and documentation, and continuing public involvement. It is important to note that public involvement for a project begins during the development of the TIP and continues through construction. However, there are specific requirements for public involvement activities during planning. These requirements are covered in more detail in Chapter 11, Public Involvement.

Field studies for individual resources identified in the DDOT Environmental Forms will be completed during this phase of project development. Any such studies that have been identified should be conducted by qualified staff (a professional wetland scientist for wetland delineations, for example).

Subsequent chapters of this manual provide guidance on the procedures for identifying and studying resource concerns such as wetlands, threatened and endangered species, water resources and water quality, and hazardous waste. Based on the information provided in DDOT Environmental Form I, the PDE staff will complete DDOT Environmental Form II and inform the project manager regarding the necessary environmental documentation and approvals needed for

a project that includes NEPA action or DCEPA action, Section 106 evaluations, Section 4(f) evaluation, or other required documentation. If the project will be using federal funding, it will be processed as an EIS, EA, or Categorical Exclusion (CE). (DDOT Environmental Form II is contained in Appendix B.) The steps involved in these processes are depicted in Figure 3-2a-c, NEPA Process Summary. Note that these processes are interrelated, and if at any point it is concluded that a project may have the potential for greater impacts to resources than initially anticipated, the project may be reclassified and subjected to a higher level of study and public review. If the project is using local funds, then DCEPA will apply and the project will be processed as an exemption, EISE, or an EIS.

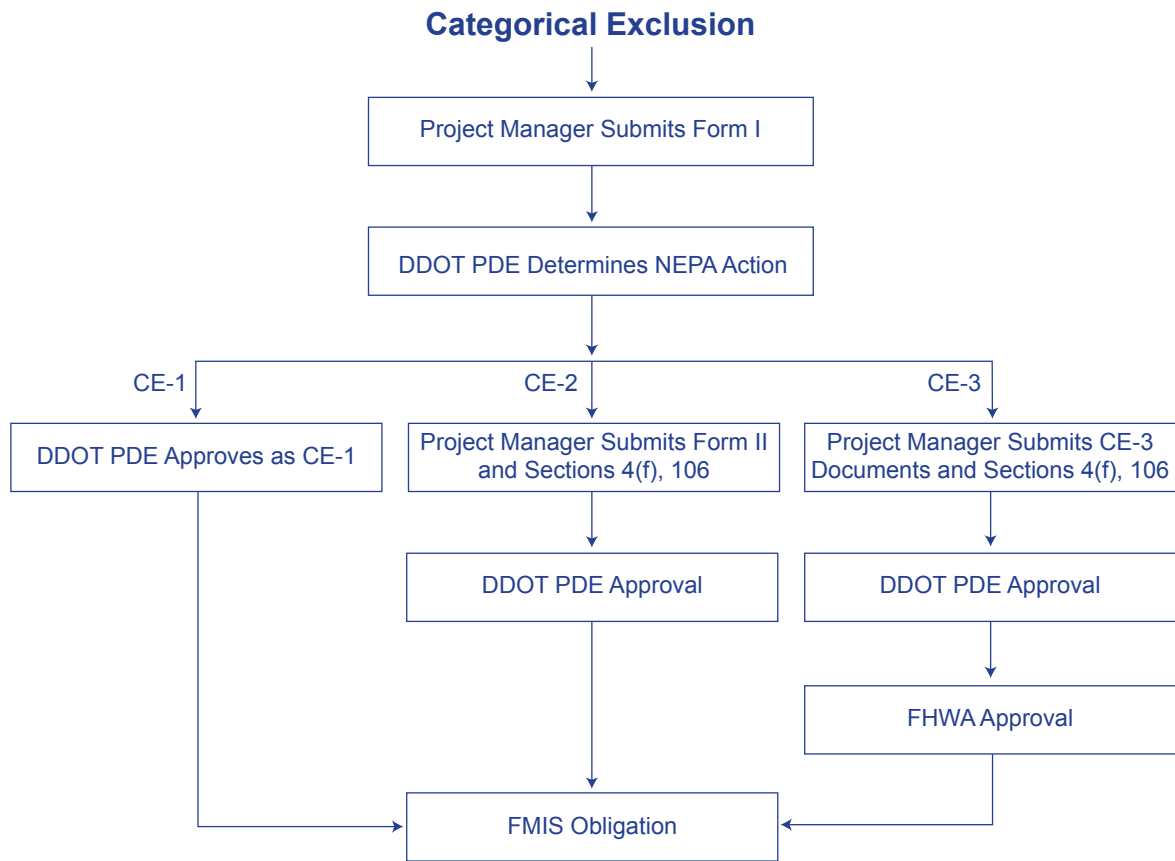
Additional details of this process are provided in the following chapters of this manual.

- Chapter 8, The Environmental Impact Statement and Record of Decision
- Chapter 9, The Environmental Assessment and Finding of No Significant Impact
- Chapter 10, The Categorical Exclusion

During the course of project development, it is natural for the scope of a project to change. When these changes are significant, a reevaluation of potential impacts to resources is usually required. More often, however, the changes to a project are minor in nature and may not immediately prompt a project manager to reconsider potential resource impacts.

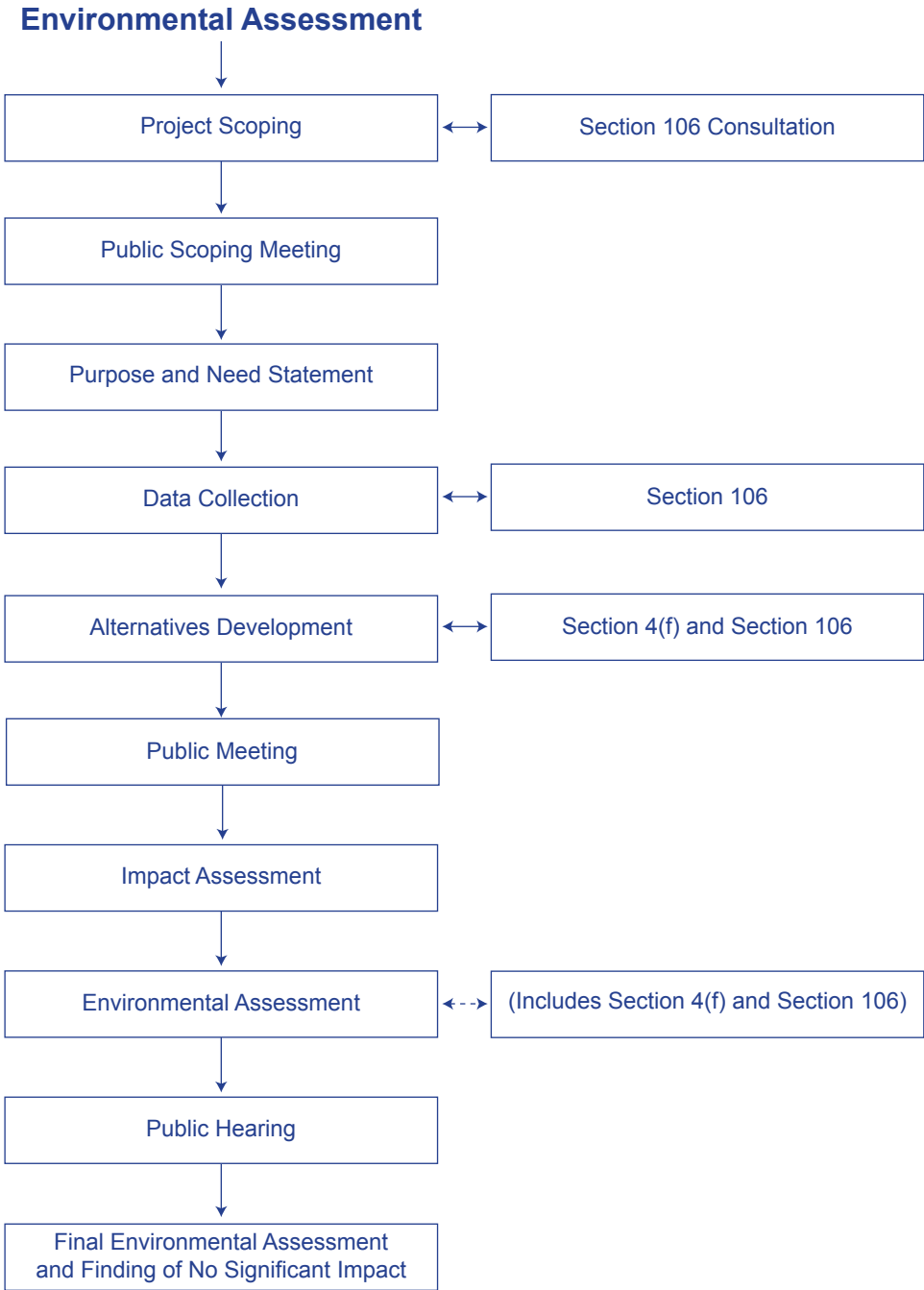
Form II should be reevaluated when a project reaches the 65-percent design stage. At this stage, most of the critical aspects of the design are known, and major engineering changes to the scope of the project have been identified. This provides an opportunity to discover issues that may require further study or documentation at a time when they can still

**Figure 3-2a NEPA Process Summary**

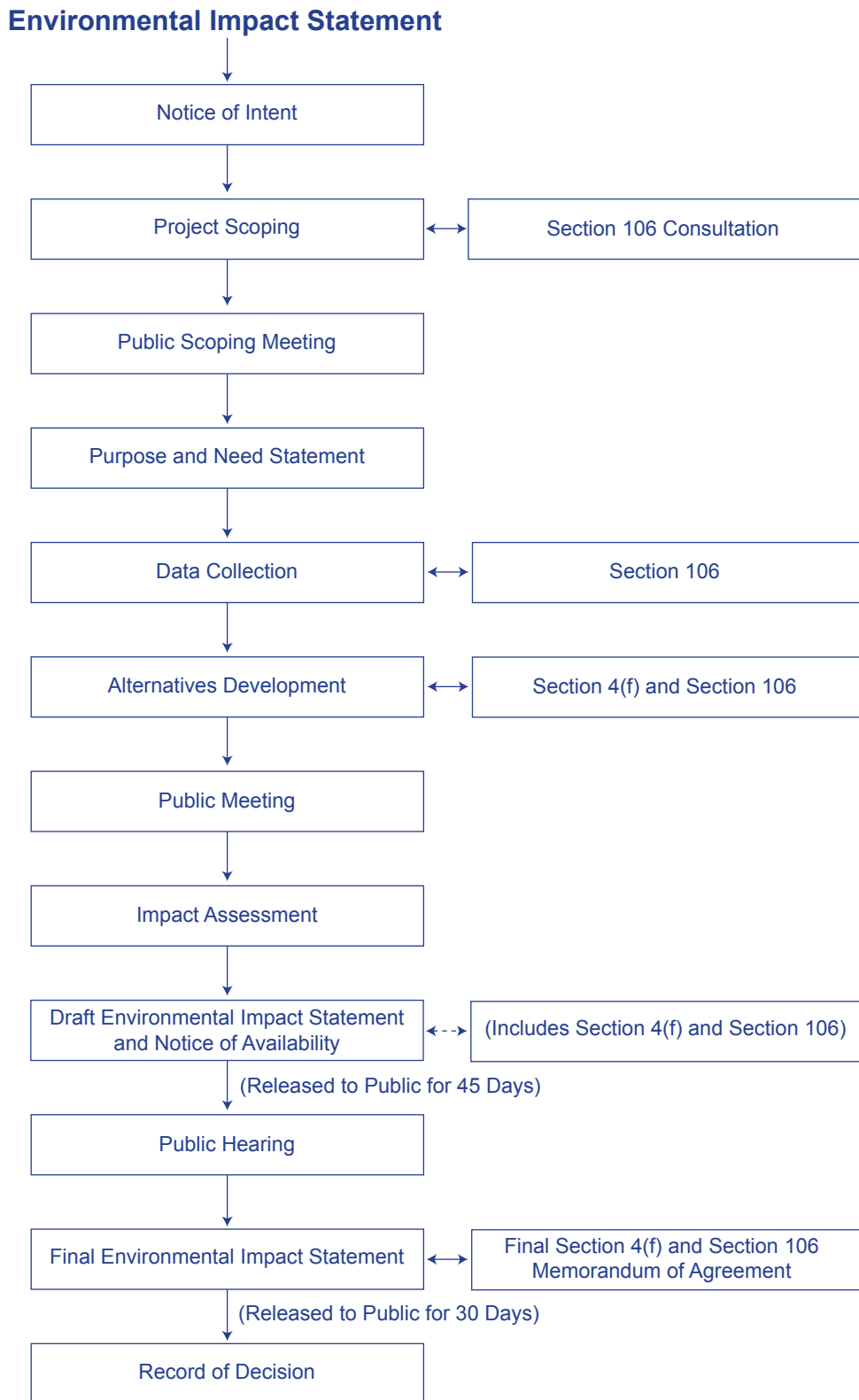




**Figure 3-2b NEPA Process Summary**



**Figure 3-2c NEPA Process Summary**



be addressed and before the project proceeds to final design and construction.

### 3.2.5 Project Scoping

Once the planning phase of a project is initiated, the project team should meet with stakeholders to develop a better understanding of the project context. (See Chapter 13, Context-Sensitive Solutions, for details.) Both the project scoping process and the public involvement process are important tools that should be used to obtain public and agency input.

Public involvement can be achieved through two types of public meetings. A smaller project would be expected to involve fewer people and receive less feedback. As such, it could be presented as an agenda item at an advisory neighborhood commission meeting. A more involved project that requires more explanation to the community and involves more people may require a DDOT public meeting held at a public venue, such as a library or school. Chapter 11, Public Involvement, provides additional information about the public involvement process and methods for conducting public meetings.

When possible, public meetings should be scheduled at times that accommodate key stakeholders. During the community meeting, residents and other stakeholders will have a chance to voice their concerns and offer opinions on the project scope of work. Prior to attending the first community meeting, DDOT representatives should recognize that the majority of the neighborhoods have similar concerns and needs that will have to be met in every project planning process.

The following questions represent some of the common concerns that should be explored during this stage of project studies, depending on the type of improvement proposed. Some of these questions may not be answered during this stage, but it would be beneficial to determine whether they

are issues that need to be considered as more detail about the study and its alternatives becomes available.

### Public Involvement

- Who will be responsible for communicating with the community during the project? What is their contact information, such as phone and email details?
- What updates will be provided?
- In what format will the updates be provided?
- With what frequency will the updates be provided?
- Will there be any required community involvement (such as passing on information in an effort to partner with the community)?
- Will periodic meetings take place?
- Will there be place to log complaints and receive responses to those complaints?
- Will there be a project website?

### Parking

- How much parking will be restricted during construction?
- Will alternative parking be provided?
- Will towing be enforced for violators?
- What type of notifications will be posted?

### Traffic

- Will there be a required traffic detour?
- If a traffic detour is provided, will it be properly marked?
- Will there be pedestrian access?

### Staging

- Where will the contractors stage their equipment?
- Will space for contractor equipment take additional parking away from the community?
- Can we require that the equipment be stored offsite?

### Trash Pickup

- Will construction adversely affect trash pickup?
- Will Department of Public Works trucks be able to access dumpsters and garbage cans?

### Contact

- Who will be the main contact for onsite complaints and problems during construction?
- What days and hours will this person be available?
- Is there a number available to call after work hours?

### Duration

- What is the duration of the construction?

### Hours

- What are the hours of construction?

### Deliveries

- Will businesses and residents be able to receive deliveries during construction? Will a loading zone be available?

### Site Conditions

- Who will be responsible for maintaining the work zone?
- Are there any special needs for storing or maintaining equipment during nonworking hours?
- If the contractor labor is rude or makes or is heard to make inflammatory statements, who should the business or resident contact?

### Noise

- What noise should the community expect to hear during construction?
- Will there be any flexibility due to business or residential constraints?

### Vibration from Equipment

- Will there be a survey of property prior to construction?

- If there is perceived damage to the property, who should the business or resident contact?

Further clarification on specific needs unique to that community can be addressed during future public meetings and discussions. Additional information about this process can be found in Chapter 11, Public Involvement.

### 3.2.6 Commitments

A commitment is typically made in response to an undesired circumstance created by a proposed project. The commitment to mitigate a project impact may be agreed upon with a resource or regulatory agency or a specific property owner, which could include local government bodies with jurisdiction over impacted property. Simple compliance with DDOT standard specifications would not normally constitute a commitment, unless the application of the standard specification itself carries special requirements.

Commitments are typically framed through coordination with resource or regulatory agencies in response to impacts created by a proposed project. Because the work contained in a commitment is often an element of the permitting process for a resource, execution of commitments should be considered a binding agreement upon which the construction of the project itself is contingent.

Examples of commitments may include:

- Provisions for bicycle or pedestrian facilities
- Vibration monitoring of historic structures near the project area
- Aesthetic treatment or special plantings and landscaping
- Wetland mitigation, including type, location, size, timing of plantings and hydrological testing, and similar measures
- Construction of noise barriers, including type, height, location, and any special design characteristics (such as surface treatment or color)

Commitments may be made at any point during project development. Commitments that are made during project planning, especially those that are required as part of resource agency coordination to obtain a permit, will be recorded in the environmental document for the project.

As the project moves into the design and construction phases, the commitments made during the planning phase that require specific actions during construction should be noted in the project plan documents. Such actions may include the provision of fencing to protect sensitive areas near the project, restrictions on construction activities during certain hours, or related activities. Commitments may also be made during the design phase that are a result of public involvement during this phase or from coordination with stakeholders.

When the commitment is related to required mitigation, descriptions of commitments should include enough information for the reader to understand what is being mitigated, what the mitigation concept is, where and when the mitigation will occur, who is responsible for the mitigation (especially if the party is other than DDOT), and future maintenance requirements, if applicable.

### **Responsibilities**

During each phase of the project, the DDOT project manager or resident engineer is responsible for ensuring compliance with commitments made during earlier phases of project development.

As a project moves from one phase of development to the next, the first action of the new project manager should be to familiarize himself/herself with the commitments made in the prior phases of work.

### **Format for Recording Commitments**

Environmental Evaluation Forms and Environmental Commitments Forms, also called project “green sheets,” should

be used to record commitments. It is recommended that green sheets be filed in a discrete location in the project filing system (i.e., a “green sheets” folder).

### **3.3 Final Design**

The Design phase of a project typically means the Final Design Phase.

23 CFR 636.103, defines the term “Final Design” as: “Final Design means any design activities following preliminary design and expressly includes the preparation of final construction plans and detailed specifications for the performance of construction work.”

23 CFR 636.103 characterizes the term “Preliminary Design” as “Preliminary design defines the general project location and design concepts. It includes, but is not limited to, preliminary engineering and other activities and analyses, such as environmental assessments, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for the final design. Prior to completion of the NEPA review process, any such preliminary engineering and other activities and analyses must not materially affect the objective consideration of alternatives in the NEPA review process” During the design phase, the recommended alternative is subjected to further, more detailed study. The focus shifts from identifying what should be built to how it should be built. In other words, during this phase, specifics are studied with respect to materials, the order of construction, the details of traffic management during construction, the methods for erosion control, and other similar concerns. The work during this phase builds upon the preliminary engineering completed during project planning and incorporates the environmental commitments, including efforts to avoid and minimize impacts

to natural and socioeconomic resources. The final products of this phase are plan documents and specifications, which are used to secure bids from contractors and to guide the construction of the project.

### 3.3.1 Public Involvement

Public input should be solicited at least twice during the design of a transportation project. The initial contact should be near the start of the design phase. Stakeholders, including residents and business owners, should be allowed to provide opinions and feedback on the aesthetics of the project and express their concerns about the impact that construction of the project will have on the surrounding community. It is important during this phase to understand the impacts that road closures, lane closures, detour routes, construction noise, and vibration may have on the community. The preliminary design phase and the 65 percent design completion stage are two excellent points at which to involve stakeholders. Chapter 11, Public Involvement, provides additional information about public involvement during all phases of project development.

### 3.3.2 Commitments

As the project moves into the design phase, ensuring follow-through on prior project decisions, particularly those related to environmental permitting, is critical. The design team should familiarize itself with the commitments made during the planning phase of the project. The emphasis at this point is on carrying forward prior commitments such that those related to how the project is designed are reflected in the plan documents and those that will require continuing follow-through during construction are recorded accurately and in a location where they are easily noticeable. A determination should be made how to best document the commitment so that the intended audience is aware of the commitment, whether the audience is the designer, consultant, other divisions within DDOT, or individuals involved in subsequent

phases of the project, including the contractor, subcontractor, or resident engineer, who are interpreting the additional requirements.

## 3.4 Construction

Construction is in many ways the most “public” phase of a project. Despite the public and agency coordination undertaken in earlier phases of the project, the period during which earth is moved, ground is broken, and structures are erected is the most visible period of the project’s development. During this phase, particular care should be given to following the commitments and agreements made earlier in the project.

### 3.4.1 Public Involvement

Public involvement should be continued throughout the construction phase. The public involvement requirements during this phase may vary from project to project, but should include regular briefings of resident and business groups, press releases, or special signing to inform the public of upcoming construction activities and their duration. Chapter 11, Public Involvement, provides additional information about public involvement during all phases of project development.

### 3.4.2 Commitments

As the project moves into the construction phase, the emphasis shifts to the implementation of the commitment. At the outset of work during construction, all key staff members should be made aware of commitments and their requirements. Where applicable, individuals should be assigned responsibility for overseeing implementation.

Of note during this phase is that some commitments will have one-time applicability, while others may require years of ongoing action. For example, tree clearing may be prohibited during the first year of construction during the breeding season of a bird species, but monitoring of a wetland mitigation site may be required for years.

# CHAPTER 4

## ENVIRONMENTAL LAWS, REGULATIONS, AND GUIDANCE (FEDERAL AND LOCAL)



- 4.1 Federal Regulations and Guidance
- 4.2 Environmental Regulations of the District of Columbia
- 4.3 Air Quality
- 4.4 Noise
- 4.5 Water Quality
- 4.6 Wetlands
- 4.7 Water Body Modification and Wildlife
- 4.8 Floodplains
- 4.9 Parkland and Recreational Areas
- 4.10 Historic and Archaeological Preservation
- 4.11 Hazardous Materials
- 4.12 Fish and Wildlife
- 4.13 Additional Regulatory Considerations for Transportation Projects





# ENVIRONMENTAL LAWS, REGULATIONS, AND GUIDANCE (FEDERAL AND LOCAL)

A wide range of environmental legislation, regulations, and guidance documents (hereinafter referred to collectively as “guidance”) applies to transportation projects and provides direction about the types of studies that must be completed and documented for a project to progress. Understanding the basis for these studies is critical to ensuring that all pertinent issues are considered and documented. This understanding can be achieved only by referring to the original guidance hand in hand with the studies that are being performed to implement the guidance. All too often, examples from past projects are referenced without reviewing the guidance that drives them.

Because the District of Columbia Department of Transportation (DDOT) uses not only local but also federal funds for its projects, it has to comply with both federal and local laws. DDOT uses Federal Highway Administration (FHWA) funding on most of its projects, which makes the role of FHWA very important in DDOT projects and processes. FHWA is the lead federal agency for most DDOT projects. FHWA provides oversight and approvals of not only the funding and technical details but also for National Environmental Policy Act (NEPA) actions and other related environmental laws.

For DDOT projects, these laws and regulations fall generally into one of two categories, federal guidance and local (District of Columbia) guidance. This chapter highlights much of the guidance that DDOT and consultant staff working on a project should be aware of and provides a quick look into the range of issues that should be considered when a project is undertaken. This is not to say that all guidance applies in all cases; rather, understanding when guidance is triggered and when it is not is the exact reason for referring to the original materials instead of merely an example document. The implementation of this guidance is explained further in the other chapters of this manual, which cover specific topics (NEPA documents, resource studies, and other environmental requirements) in greater detail.

To be most effective as a quick reference, this chapter is organized around resource or document topics. The subsections refer to key guidance, particularly FHWA Technical Advisory T6640.8A, 23 Code of Federal Regulations (CFR) Part 771, 40 CFR Parts 1501–1508, and the Council on Environmental Quality’s (CEQ’s) Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (40 Questions). The backgrounds of these documents are discussed below. To assist the users of this manual in researching specific topics, specific subsections of these

regulations and guidance documents are referenced within the various topical chapters of the manual. Topics that are not applicable to DDOT and are not discussed in this manual include farmland impacts, wild and scenic rivers, coastal barriers, and coastal zone impacts.

## 4.1 Federal Regulations and Guidance

### 4.1.1 The National Environmental Policy Act

NEPA is a broad law requiring the federal government to consider the effects of its major actions on the environment. NEPA established a framework within which these considerations are coordinated, documented, and communicated to the public and agencies with jurisdiction. NEPA is sometimes considered to be an “umbrella” law because it requires that other federal environmental legislation be considered in the evaluation of a proposed action.

For transportation projects, the implementation of NEPA most obviously manifests itself in the preparation of impact studies and NEPA documents, which include Environmental Assessments (EAs) and Environmental Impact Statements (EISs). The goal of the NEPA process is to make better decisions about major federal actions. While important to the development of a project, studies and documents are merely the physical output of a philosophy for project development—namely, the consideration of the individual and cumulative impacts of the implementation of transportation projects and programs when the options to avoid and minimize those impacts are greatest.

The full text of the first section of NEPA is included on the following pages. Subsequent sections of this chapter focus on guidance developed by the FHWA and others to help implement NEPA.

#### **The National Environmental Policy Act of 1969, as amended**

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “National Environmental Policy Act of 1969.”

Purpose

Sec. 2 [42 USC § 4321].

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331].

(a) The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population

growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102 [42 USC § 4332].

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently

unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

- (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
- (ii) the responsible Federal official furnishes guidance and participates in such preparation,
- (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
- (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103 [42 USC § 4333].

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104 [42 USC § 4334].

Nothing in section 102 [42 USC § 4332] or 103 [42 USC § 4333] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105 [42 USC § 4335].

The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

### 4.1.2 Implementation of NEPA

NEPA requires each federal agency to develop means and methods for implementing its provisions. This section describes guidance documents that apply broadly to transportation studies. Although these documents may contain information about specific resource issues (such as land use), in the interest of brevity, they will not be repeated in the individual resource sections of this chapter. Included in this group is fundamental guidance such as the FHWA Technical Advisory that provides direction on the

preparation of NEPA and Section 4(f) documents and wide-reaching legislation such as NEPA itself.

#### **FHWA Technical Advisory T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents**

T6640.8A, issued October 30, 1987, contains a wealth of information about the content and format of environmental documentation for FHWA projects, including Section 4(f) Statements. T6640.8A is not a regulatory document, but

it is a critical guidance document for all projects developed under FHWA jurisdiction. It includes information on the applicability of Categorical Exclusions (CEs), EAs, and EISs. It also includes information on the formats and processing requirements for EAs, EISs, and Section 4(f) Evaluations.

T6640.8A also includes guidance on the information to be included in environmental documents for impacts to various resources and potential action (such as permits) required by those impacts. Although many of these resources are covered elsewhere in this chapter, see T6640.8A for further information on the following topics:

- Joint development
- Permits
- Energy
- Relationship of local short-term uses vs. long-term productivity
- Irreversible and irretrievable commitment of resources

#### **40 CFR Parts 1500–1508, Regulations for Implementing NEPA**

These regulations were reissued by the CEQ in 1978 and amended once in 1986. This section sets forth requirements for the implementation of NEPA, with the directive that individual federal agencies must develop regulations for implementing NEPA that are specific to the mission of the particular agency.

#### **23 CFR Part 771, FHWA Environmental Impact and Related Procedures**

As noted above, each federal agency is directed to develop regulations to implement NEPA within the context of the agency's mission. This section of Title 23 establishes the requirements for FHWA projects.

#### **CEQ's Forty Most Asked Questions Concerning CEQ's NEPA Regulations**

Forty Questions was issued by the CEQ as a means to address the most frequently asked questions regarding 40 CFR 1500–1508. Although 40 Questions does not have the same legal standing as CEQ's NEPA regulations, it is perhaps the next best source of information regarding NEPA implementation.

#### **4.1.3 Sections 4(f) and 6(f)**

##### **49 United States Code (USC) 303, 29 CFR Part 771, Section 4(f) of the Department of Transportation Act**

Section 4(f) of the United States Department of Transportation (USDOT) Act protects publicly owned parks, recreation areas, wildlife or waterfowl refuges, and historic sites.

##### **16 USC 460L-4 to 460L-11, Section 6(f) of the Land and Water Conservation Fund Act of 1965**

This legislation requires that property acquired with funds from this Act be replaced.

##### **FHWA TA T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents**

See description above.

##### **Section 4(f) Policy Paper (Revised March 2005), FHWA**

This document answers many frequently asked Section 4(f) questions.

**16 USC 1241–1249, 43 CFR 8350, National Trails Systems Act**

These codes provide for outdoor recreation needs and encourages outdoor recreation.

**4.2 Environmental Regulations of the District of Columbia**

**4.2.1 District of Columbia Environmental Policy Act of 1989**

The District of Columbia Environmental Policy Act (DCEPA) establishes guidance for the District to ensure that the environmental effects of District and privately initiated actions be considered prior to their being permitted and implemented. Part of the DCEPA is given below.

**4.2.2 Implementation of DCEPA**

All projects within the District of Columbia that involve its agencies must comply with DCEPA. The regulations to implement DCEPA are provided in Chapter 72, Environment, of the District of Columbia Municipal Regulations (DCMR).

**4.2.3 District of Columbia Department of Transportation**

All DDOT projects comply with NEPA, DCEPA, and other environmental laws and regulations. DDOT’s Project Development and Environment Branch (PDE) is responsible for implementing NEPA and DCEPA requirements within DDOT.

**District of Columbia Environmental Policy Act of 1989**

In the Council of the District of Columbia  
July 27, 1989

To require the Mayor or any District of Columbia board, commission, authority, or person to prepare an environmental impact statement if the Mayor, board, commission, authority, or person proposes or approves an action that, if implemented, is likely to have a significant effect on the quality of the environment; to ensure the residents of the District of Columbia safe, healthful, productive, and aesthetically pleasing surroundings; and to develop a policy to ensure that economic, technical, and population growth occurs in an environmentally sound manner.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this Act may be cited as the “District of Columbia Environmental Policy Act of 1989”.

Sec. 2. Purpose.

The purpose of this Act is to promote the health, safety and welfare of District of Columbia (“District”) residents, to afford the fullest possible preservation and protection of the environment through a requirement that the environmental impact of proposed District government and privately initiated actions be examined before implementation and to require the Mayor, board, commission, or authority to substitute or require an applicant to substitute an alternative action or mitigating measures for a proposed action, if the alternative action or mitigating measures will accomplish the same purposes as the proposed action with minimized or no adverse environmental effects.

#### 4.2.4 District of Columbia Department of Consumer and Regulatory Affairs

##### Environmental Impact Screening Form

The District of Columbia Department of Consumer and Regulatory Affairs (DCRA) designed the Environmental Impact Screening Form (EISF) to help evaluate the environmental effects of governmental or private major action. The form helps to determine if the proposed action would result in significant adverse environmental impacts during the project's construction or operation.

The resources that the EISF evaluates include:

- Land use
- Zoning
- Size of project area
- Dominant soil type
- Contaminated soils
- Federal Emergency Management Agency (FEMA) flood designation
- Slope percentages
- Properties on the National Register of Historic Places (NRHP)
- Depth of water table
- Threatened and endangered species
- Streams/water bodies
- Utilities
- Noise issues
- Regulated materials

A copy of the EISF is included in Appendix C.

#### 4.2.5 District of Columbia Department of Environment

The District of Columbia Department of Environment (DDOE) provides environmental and energy services. The programs under DDOE include:

- Air quality
- Fisheries and wildlife
- Watershed protection
- Water quality
- Stormwater management
- Toxic substances

#### 4.2.6 District of Columbia Code

##### Title 43, Cemeteries and Crematories

Chapter 1, Section 43-103, Burial Ground to Be Platted and Surveyed, includes information concerning working on the site of a burial ground.

##### Title 8, Environmental Control and Protection

Chapter 1, Environmental Controls:

- Subchapter I – Air Pollution Controls
- Subchapter II – Water Pollution Control
- Subchapter III – Wastewater Control
- Subchapter IV – Restrictions on Phosphate Cleaners
- Subchapter V – Environmental Impact Statements  
8-109.01

The purpose of this subchapter is to:

- Promote the health, safety, and welfare of District of Columbia residents
- Afford the fullest possible preservation and protection of the environment through a requirement that the environmental impact



of proposed District of Columbia and privately initiated actions be examined before implementation

- Require the mayor, board, commission, or authority to substitute or require an applicant to substitute an alternative action or mitigating measures for a proposed action if the alternative action or mitigating measures will accomplish the same purposes as the proposed action with minimized or no adverse environmental effects

This subchapter covers the following topics:

- EIS requirements
  - Adverse impact findings
  - Supplemental EIS
  - Exemptions
  - Lead agencies, files
  - Judicial review
  - Rules
  - Construction
  - Required EISs
- Subchapter VI – Asbestos Licensing and Control
  - Subchapter VII – Underground Storage Tank Management
  - Subchapter VIII – Lead-Based Paint Abatement and Control

### 4.3 Air Quality

#### **23 CFR 450, Planning Assistance and Standards (Metropolitan Planning)**

This regulation discusses conformity requirements in statewide and metropolitan transportation planning.

#### **40 CFR 61, Clean Air Act, National Emissions Standard for Hazardous Air Pollutants (Asbestos Abatement and Demolition Sites)**

This regulation provides standards for handling asbestos during demolition activities.

#### **40 CFR 93, Determining Conformity of Federal Actions to State or Federal Implementation Plans**

This regulation provides guidance on air quality conformity with state or federal implementation plans of transportation plans, programs, and projects developed, funded, or approved under Title 23 USC.

#### **40 CFR 70, Clean Air Act Amendments of 1990**

This regulation encourages the use of market-based principles and other approaches; provides a framework for using alternative clean fuels; promotes the use of clean, low-sulfur coal and natural gas and innovative technologies to clean high-sulfur coal through the acid rain program; reduces energy waste and creates a market for clean fuels; and promotes energy conservation. The permitting process requires a monitoring plan to be created and sets limits on the amounts and types of releases allowed. The permits are required as part of Title V in the 1990 Clean Air Act.

#### **23 USC 109 (j), 42 USC 7401 et seq., 23 CFR 770, 40 CFR 50-52, 49 CFR 623, Clean Air Act, as amended**

These regulations protect and enhance the quality of national air resources and establish air quality standards.

#### **District of Columbia Air Quality Regulations**

The Air Quality Division of DDOE manages air resources in accordance with Title 20 of the DCMR Air Pollution Control Act of 1984. The Air Quality Division has three

branches: Compliance and Enforcement, Engineering and Planning, and Technical Services.

#### 4.4 Noise

##### **23 CFR Part 772, Procedures for Abatement of Highway Traffic Noise and Construction Noise, July 8, 1982; August 5, 1982; and August 26, 1996**

This regulation contains FHWA procedures for analyzing traffic and construction-related noise. As mandated by 23 USC 109(i), all federal-aid highway projects are to be developed in conformance with this directive. It should be noted that, whereas FHWA has procedures for addressing highway-related noise, states are granted the ability to set standards in conformance with FHWA procedures.

FHWA noise procedures are the steps that must be taken in the preparation of traffic noise studies for highway construction projects. The guide defines when noise impacts occur and when noise abatement must be considered. It also requires that information be given to local officials for their land use planning. Noise projects are designated as either Type I or Type II, as defined in the guidance.

##### **USC 109 (i), Noise Control Act of 1972**

This Act establishes noise standards, procedures, and criteria.

##### **District of Columbia Municipal Regulations, Chapter 27, Noise Control**

This regulation declares that it is public policy of the District of Columbia to reduce the ambient noise level in the District to promote public health, safety, and welfare. This policy indicates maximum noise levels for commercial, industrial, and residential land uses. Title 20, Section 2803, of the policy covers noise as a result of construction in residential zones.

#### 4.5 Water Quality

##### **33 USC 1251 et seq., Clean Water Act (CWA) (Sites Potentially Affecting Surface Water Bodies)**

The objective of this statute is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

##### **Federal Water Pollution Act of 1972 as amended by the CWA (1977 and 1987), Sections 303(d), 305(b), 401, 402, and 404**

The purpose of CWA is not only to protect the existing quality of water bodies but also to prevent their degradation. A description of each of the applicable sections of the law follows.

- Section 303(d) provides for the establishment of water-quality standards and identification of waters that cannot meet these standards. States develop Total Maximum Daily Load standards to help such “impaired waters” attain water-quality standards.
- Section 305(b) delegates to the states the control over the determination of “designated uses” for water bodies within their boundaries.
- Section 401 addresses state water-quality certification and is an agreement that water-quality standards will be achieved by preventing, reducing, and eliminating pollution. Certification is required when impacts to waters of the United States cannot be avoided.
- Section 402, National Pollutant Discharge Elimination System (NPDES), is a pollution-prevention program that requires development projects to have plans that limit the amount of pollution that enters the existing water resources. Both point and nonpoint sources of pollution are regulated under this program, according to the size of the construction area and population within it.

- Section 404 applies if a discharge of dredge and fill material into waters of the United States is anticipated. DDOE applies for a Section 404 permit if impacts to waters of the United States cannot be avoided and manages mitigation plans when mitigation is required.

### **Rivers and Harbors Act of 1899**

Section 10 of the Act prohibits work in navigable waters without a permit from the United States Army Corps of Engineers (USACE).

Section 9 specifically addresses the need for approval from the Coast Guard and USACE for construction of any bridge or causeway over navigable waters of the United States.

### **Safe Drinking Water Act, Section 1424(e)**

This section of the Act prohibits federally funded projects from adversely affecting principal or sole-source aquifers; 1986 amendments introduced wellhead protection areas and relegated their designation to the states.

### **Fish and Wildlife Coordination Act of 1958**

This Act ensures that agencies such as DDOE indicate the fish and wildlife impacts associated with a project that involves stream or water body modification, such as channel relocation, excavation, culvert installation or extension, bridge pier work, or any other activity changing the course, current, or cross-section of a stream or water body and not including centerline or ditch culverts primarily conveying stormwater within highway right-of-way. Although the Act is not binding, the Secretary of the Interior created it to ensure that fish and wildlife are given ample consideration in projects that affect water resources.

### **District of Columbia Water Quality Regulations**

DDOE has a Water Quality Division whose aim is to restore and protect surface waters in the District of Columbia. The Water Quality Division established a program, the District of Columbia Water Pollution Control Act. The Water Quality program has three principal components: Water Quality Control, Water Quality Monitoring, and Environmental Laboratory.

Regulations that apply to the Water Quality Division include:

- Water Pollution Control Act of 1984 (DC Law 5-188)
- Water Quality Standards for Surface Waters (21 DCMR Ch. 11)
- Ground Water Quality Standards (21 DCMR 1150-1158)
- Water Quality Research Grant Regulations (21 DCMR Ch. 13)
- Submerged Aquatic Vegetation Regulations (21 DCMR Ch. 14)
- Water Quality Monitoring Regulations (21 DCMR Ch. 19)

### **District of Columbia Stormwater Management Regulations**

The DDOE's Stormwater Management Division aims to reduce stormwater runoff pollution through the implementation of activities that go beyond those required under the NPDES Permit.

### **District of Columbia Watershed Protection Regulations**

DDOE's Watershed Protection Division's mission is to conserve soil and water resources in the District of Columbia and protect its watersheds from nonpoint source pollution.

## 4.6 Wetlands

### CWA, Section 401

This section of the CWA regulations generally requires review of all dredge and fill permits issued by USACE to provide reasonable assurance that water quality standards are not being violated as a result of an action.

### CWA, Section 404

This section of the CWA regulations authorizes USACE to regulate the discharge of dredged or fill materials into waters of the United States, including wetlands, and establishes the requirement for permit applicants to demonstrate and document proper sequencing of wetland impacts in the course of project development (such as wetland avoidance, wetland impact minimization, and wetland impact mitigation).

### Protection of Wetlands, Executive Order 11990

This order requires federal agencies to minimize detrimental actions affecting wetlands while preserving and enhancing the natural and beneficial values that wetlands provide.

### Solid Waste Agency of Northern Cook County Decision, 2001

This decision establishes that USACE does not have jurisdiction over isolated wetlands that have no surface water connections with other wetlands or waters of the United States.

### 33 CFR 328.3(b), Definition of Waters of the United States, 1986

This regulation defines wetlands to include the presence of hydrophytic vegetation, hydric soils, and wetland hydrology.

### 23 CFR 777, Mitigation of Impacts to Wetlands and Natural Habitat

This regulation provides policy and procedures for the evaluation and mitigation of adverse environmental effects to wetlands and natural habitat resulting from federal aid projects funded pursuant to provisions of 23 USC.

### Rapanos Decision

The Rapanos decision, handed down by the United States Supreme Court in 2006, is the latest word on the meaning of “waters of the United States.”<sup>1</sup> The case presented to the Court dealt with the question as to whether CWA covers wetlands that do not contain, and are not adjacent to, traditional navigable waters. Five justices agreed to overturn the lower court decisions (which had affirmed CWA jurisdiction over the wetlands) and send the cases back for further consideration, but they could not agree on the jurisdictional test that the lower courts would now have to apply.

## 4.7 Water Body Modification and Wildlife

### 16 USC 1531-1543, 50 CFR 402, Endangered Species Act of 1973, as amended

The purpose of the Endangered Species Act (ESA) is to conserve “the ecosystems on which threatened and endangered species depend” and to also conserve and recover listed species.

### 16 USC 661-667d, Fish and Wildlife Coordination Act

This Act provides for the protection of wildlife and habitat and requires coordination with United States Fish and Wildlife Service (USFWS) for stream modifications.

<sup>1</sup> Environmental Law Institute. 2007. *The Clean Water Act Jurisdictional Handbook*. Washington, D.C. 77 pp.

### **50 CFR 402.12(c), Interagency Cooperation (Biological Assessments, Endangered Species Act of 1973)**

This regulation requires concurrence with USFWS on presence or absence of federal threatened and endangered species in the project area. Under the law, species listed as either threatened or endangered are provided protection and are regulated by the USFWS.

### **16 USC 661–666, Fish and Wildlife Coordination Act**

The amendments enacted in 1946 require consultation with USFWS and the fish and wildlife agencies of states where the “waters of any stream or other body of water are proposed or authorized, permitted or licensed to be impounded, diverted...or otherwise controlled or modified” by any agency under a federal permit or license. Consultation is to be undertaken for the purpose of “preventing loss of and damage to wildlife resources.”

### **District of Columbia Wildlife and Habitat Regulations**

DDOE’s Fisheries and Wildlife Division has four major components: research and management, aquatic and wildlife education, licensing and regulations, and fishing. Activities regulated are mainly those with potential to harm species and habitat. The District’s Wildlife Action Plan covers threatened/ endangered species, common habitat, and where those species and habitats are commonly found in the District of Columbia.

## **4.8 Floodplains**

### **Executive Order 11988, Floodplain Management, 1977**

This regulation directs federal agencies to avoid conducting, allowing, or supporting actions in a floodplain.

### **USDOT Order 5650.2, Floodplain Management and Protection, 1979**

This regulation prescribes policies and procedures for ensuring that proper consideration is given to avoiding and mitigating adverse floodplain impacts in agency actions, planning programs, and budget requests.

### **44 CFR 59–62, 64–68, 70–71, 75–77, Flood Insurance Program**

This regulation enables property owners in participating communities to purchase insurance as protection against flood losses in exchange for state and community floodplain management regulations that reduce future flood damages.

### **23 CFR 650, Subpart A, National Flood Insurance Act**

This regulation prescribes policy and procedures for encroachment on floodplains.

## **4.9 Parkland and Recreational Areas**

### **49 USC 303, Department of Transportation Act of 1966, Section 4(f)**

This regulation states that “special effort [is] to be made to preserve the natural beauty of the countryside, and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” Public parks and recreational areas in the District of Columbia include all parks and recreational areas owned and operated by the National Park Service (NPS), District Department of Parks and Recreation (DPR), and some of the public recreational areas (such as boathouses). Proposed use of Section 4(f) property requires evaluation early in project development when alternatives to the proposed action are under study. NPS owns many small parks near or within DDOT roadways. Alterations and use

of these parks can be considered a Section 4(f) impact and must be evaluated.

#### **4.10 Historic and Archaeological Preservation**

##### **16 USC 470 et seq., as amended, National Historic Preservation Act of 1966**

The National Historic Preservation Act (NHPA) establishes a program for the preservation of additional historic properties throughout the nation.

##### **16 USC 470(aa)–(mm), Archaeological Resources Protection Act of 1979, as amended**

This regulation preserves and protects paleontological resources, historic monuments, memorials, and antiquities from loss or destruction.

##### **42 USC 1996 and 1996a, American Indian Religious Freedom Act of 1978**

This regulation protects places of religious importance to Native Americans, Eskimos, and Native Hawaiians.

##### **43 CFR 7, Protection of Archaeological Resources**

This regulation implements provisions of the Archaeological Resources Protection Act of 1979, as amended (16 USC 470[aa]–[mm]), by establishing uniform definitions, standards, and procedures to be followed by all federal land managers to protect archaeological resources on public and Indian lands.

##### **25 USC 3001-3013, Native American Graves Protection and Repatriation Act of 1990**

The Native American Graves Protection and Repatriation Act (NAGPRA) protects human remains and cultural material of Native Americans and Native Hawaiian groups. This legislation defines who may claim ownership of human remains, defines the intentional removal of Native American

human remains and cultural objects, defines the process for their inadvertent discovery, and defines the illegal trafficking in such items. The law also provides for the repatriation of Native American human remains and cultural objects in the possession of or controlled by federal agencies and museums.

##### **49 USC 303, Department of Transportation Act of 1966, Section 4(f)**

This regulation states that “special effort [is] to be made to preserve the natural beauty of the countryside, and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” Historic sites include historic or archaeological sites on, or eligible for inclusion on, the National Register of Historic Places. Proposed use of Section 4(f) property requires evaluation early in project development when alternatives to the proposed action are under study. The Section 106 process (see below) must be substantially completed prior to processing a Section 4(f) document on the adverse effects to a historic property.

##### **36 CFR 800, Section 106, Protection of Historic Properties, as revised and reissued effective January 11, 2001**

Section 106 requires federal agencies to take into account the effects of their projects on historic properties and affords the Advisory Council a reasonable opportunity to comment on such projects. The process defined in 36 CFR 800 describes how federal agencies are to meet these statutory responsibilities.

##### **36 CFR 60, National Register of Historic Places**

The NHPA, as amended, authorizes the Secretary of the Interior to expand and maintain a National Register of Historic Places that includes districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.

### **36 CFR 63, Determinations of Eligibility for Inclusion in the National Register of Historic Places**

This regulation describes the procedures for listing properties on the National Register of Historic Places.

### **16 USC 431-433, 36 CFR 251.50-64, 43 CFR 3, Act of Preservation of American Antiquities**

This regulation preserves and protects paleontological resources, historic monuments, and memorials from loss or destruction.

### **16 USC 469a, 26 CFR 1210, Archaeological and Historic Preservation Act of 1974**

This regulation preserves historical and archaeological data from loss or destruction.

### **National Park Service Bulletins**

NPS is part of the United States Department of the Interior and is the primary federal agency responsible for the conservation and protection of natural and cultural resources. Some relevant bulletins include:

- The Secretary of Interior's Standards for Guidance for Archaeology and Historic Preservation
- The Secretary of Interior's Proposed Historic Preservation Professional Qualification Standards
- The Secretary of Interior's Standards for Rehabilitation
- The Secretary of Interior's Standards for Architectural and Engineering Documentation
- The Secretary of Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings

### **4.11 Hazardous Materials**

#### **42 USC 9601-9657, 40 CFR 300, 43 CFR 11, Comprehensive Environmental Response, Compensation, and Liability Act of 1980**

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides for liability, compensation, cleanup, and emergency response related to hazardous substances.

#### **42 USC 103, CERCLA and Superfund Amendments and Reauthorization Act of 1986 (SARA, also known as the federal Superfund program) (Superfund sites)**

This legislation discusses comprehensive environmental response, compensation, and liability. Discussed are hazardous substances releases, liability, compensation, hazardous substance response revenue, and pollution insurance.

#### **40 CFR I, Resource Conservation and Recovery Act and Office of Solid Waste and Emergency Response Directive 9902.3-2A (May 31, 1994) (RCRA sites)**

This regulation provides guidance to United States Environmental Protection Agency (USEPA) regions and states on developing corrective action plans for Resource Conservation and Recovery Act (RCRA) sites.

#### **40 CFR 761, Toxic Substances Control Act, Polychlorinated Biphenyls Manufacturing, Processing**

This legislation addresses polychlorinated biphenyls (PCBs) and their manufacturing, processing, distribution in commerce, and use prohibitions.

**42 USC 6901 et seq., 23 CFR 751, 40 CFR 256-268, Solid Waste Disposal Act, as amended by the RCRA of 1976**

This regulation prescribes policies and procedures relating to solid wastes, the control of junkyards adjacent to highways, and the transportation of hazardous materials.

**District of Columbia Hazardous Waste Regulations**

The DDOE has a Toxic Substance Division that consists of two branches: the Hazardous Materials Branch and the Land Development and Remediation Branch. The mission of the Hazardous Waste Program is to enforce provisions of the District of Columbia Hazardous Waste Management Act of 1977. Congress enacted this law, which was based on RCRA. Chapter 42 of the District Hazardous Waste Management Regulations includes standards for the management of hazardous waste and used oil.

**4.12 Fish and Wildlife**

**16 USC 1531, Endangered Species Act of 1973**

The ESA was implemented to protect threatened and endangered fish and wildlife species. This law was developed to protect critically imperiled species from extinction as a consequence of economic growth and development untended by adequate concern and conservation.

**4.13 Additional Regulatory Considerations for Transportation Projects**

**4.13.1 Land Use**

**49 USC 303, 29 CFR 771, Section 4(f) of the Department of Transportation Act of 1966**

This regulation protects publicly owned parks, recreation areas, wildlife or waterfowl refuges, and land associated with historic sites.

**16 USC 460L-4 to 460L-11, Section 6(f) of the Land and Water Conservation Fund Act of 1965**

This regulation requires that property acquired with funds from this Act be replaced.

**4.13.2 Socioeconomic Resources**

**42 USC 4601 et seq., Uniform Relocation Assistance and Real Property Acquisition Act of 1970, Public Law 100-17, 101; 23 CFR 710, 49 CFR 24, Uniform Relocation Act Amendments**

This regulation provides for uniform and equitable treatment of displaced persons, businesses, and farms.

**42 USC 2000d-4; 23 USC 324 (sex), as amended; 42 USC 6101 (age); 29 USC 794 (handicap); 23 CFR 710, Subpart D; 49 CFR 21; Civil Rights Act of 1964**

These regulations prohibit discrimination based on race, color, national origin, sex, age, religion, and physical or mental handicap in any program receiving federal assistance.

**4.13.3 Environmental Justice**

**Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, February 11, 1994**

This Executive Order (EO) seeks to promote the fair treatment of people of all races, incomes, and cultures with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies and strives to ensure greater public participation among the targeted groups.

**Executive Order 12948, Amendment to Executive Order No. 12898, January 30, 1995**

This EO provides modifications and clarifications to EO 12948.



**USDOT Order 5610.2, Order to Address Environmental Justice in Minority Populations and Low-Income Populations, April 15, 1997**

This regulation provides that the Office of the Secretary and each Operating Administration within USDOT will develop specific procedures to incorporate the goals of the USDOT Order and EO 12898 with the programs, policies, and activities that they administer or implement.

**FHWA Order on Environmental Justice, FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations, December 2, 1998**

This order establishes policies and procedures for FHWA to use in complying with EO12898.

**Council on Environmental Quality, Environmental Justice: Guidance under the National Environmental Policy Act, December 10, 1997**

This report by CEQ discusses EO 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) and its relationship with NEPA to assist federal agencies with their NEPA procedures so that environmental justice concerns are effectively identified and addressed.

**42 USC 2000d-2000d-7, Title VI of the Civil Rights Act of 1964**

Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance.

**4.13.4 Residential and Business Displacements**

**42 USC 3601–3619, Title VIII of Civil Rights Act of 1968, Fair Housing Act, 42 USC 3601–3631, Fair Housing Act Amendments of 1988**

These regulations promulgate rules to implement the Uniform Relocation Assistance and Real Property

Acquisition Policies Act of 1970, as amended (42 USC 4601 et seq.).

**42 USC 4601, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), as amended; 23 CFR 710, 750 and 49 CFR 24, Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (amended in 1987); 49 CFR 24, Regulations Concerning the Uniform Act, as amended**

These regulations reestablish a uniform policy for fair and equitable treatment of individuals and businesses displaced as a direct result of programs or projects undertaken by a federal agency or with federal financial assistance. The primary purpose of this Act is to ensure that such persons do not suffer disproportionate injuries as a result of programs and projects that are designed for the benefit of the public as a whole and to minimize the hardship of displacement.

**4.13.5 Considerations Relating to Pedestrians and Bicyclists**

**FHWA Memorandum, ACTION: Transmittal of Guidance on Bicycle and Pedestrian Provisions of the Federal-aid Program February 24, 1999**

This memorandum explains the bicycle and pedestrian provisions of the federal-aid program in 23 USC.

**FHWA Guidance, Bicycle and Pedestrian Provisions of Federal Transportation Legislation, February 24, 1999**

This guidance explains the need to incorporate bicycling and walking into transportation planning, design, and operations. It provides policy statements, funding and eligibility requirements, and project selection and design information.

### **FHWA Guidance, Bicycle and Pedestrian Transportation Planning Guidance, November 28, 1994**

This guidance considers appropriate inclusion of bicycle and pedestrian elements in statewide and metropolitan planning organization, transportation plans, and transportation improvement programs.

#### **4.13.6 Visual Resources**

### **23 USC 138, Preservation of Parklands; 49 USC 303, Policy on Lands, Wildlife and Waterfowl Refuges, and Historic Sites**

These guidelines endeavor to preserve the natural beauty of the countryside and public parks and recreation lands, wildlife and waterfowl refuges, and historic sites.

### **23 USC 101(g), 133(b), and 133(g) Intermodal Surface Transportation Efficiency Act, 1991**

This Act establishes a Transportation Enhancement Program that offers broad opportunities and federal dollars for unique and creative actions to integrate transportation into our communities and the natural environment.

The International Surface Transportation Efficiency Act (ISTEA) mandated the creation of a Scenic Byways Program. FHWA has set criteria for designing scenic byways based on their scenic, historic, recreational, cultural, archaeological, or natural intrinsic qualities.

### **23 USC 101, Public Laws 109-59**

The Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) enables

funding for federally aided highways, highway safety, and transit programs. This program made it possible for the ISTEA to continue.

#### **4.13.7 Secondary and Cumulative Impacts**

### **FHWA Position Paper, Secondary [Indirect] and Cumulative Impact Assessment in the Highway Project Development Process, April 1992**

This document suggests methodologies for conducting secondary and cumulative impact analyses.

### **CEQ Handbook, Considering Cumulative Effects under the National Environmental Policy Act, January 1997**

This document provides background and guidance for the assessment of cumulative effects.

### **USEPA, Consideration of Cumulative Impacts in EPA Review of NEPA Documents (EPA 315-R-99-002), May 1999**

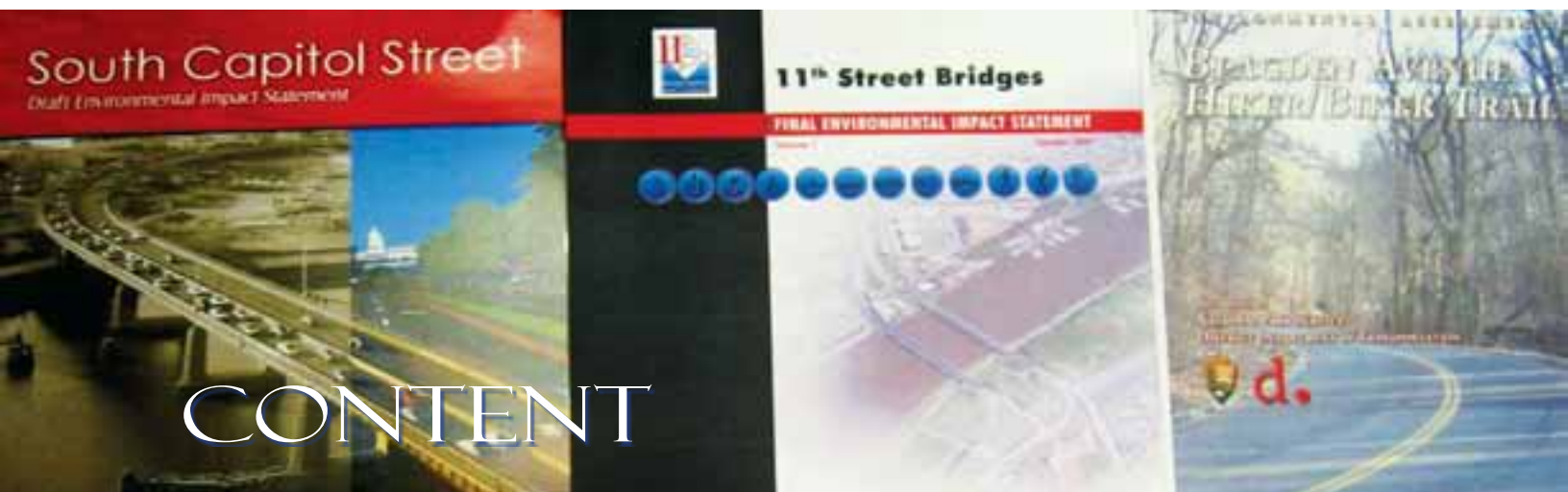
This document provides internal EPA guidance to assist in the review of cumulative impacts discussions in NEPA documents.

### **FHWA Memorandum, Interim Guidance: Questions and Answers Regarding Indirect and Cumulative Impact in the NEPA Process, January 31, 2003**

This 2003 guidance is structured around a “Q&A” format, with twelve questions providing the basis for a detailed discussion of the NEPA context for considering indirect and cumulative impacts, key concepts and definitions, case law, and links to more information.

# CHAPTER 5

## DETERMINING ENVIRONMENTAL ACTION TYPES



- 5.1 Determination of Environmental Action Types
- 5.2 NEPA Action Types
- 5.3 DCEPA Action Types
- 5.4 Additional Information



# DETERMINING ENVIRONMENTAL ACTION TYPES

One of the earliest decisions the District of Columbia Department of Transportation (DDOT) must make concerning a transportation project is the appropriate class of action the project represents. This decision is important because the class of action determines the appropriate level of documentation necessary to comply with the National Environmental Policy Act of 1969 (NEPA) and the District of Columbia Environmental Policy Act (DCEPA).

If the project is using federal funding or requires federal action (such as approvals or permits) then this project must comply with NEPA. Projects that comply with NEPA automatically comply with DCEPA, as an exemption is provided under District of Columbia Municipal Regulations (DCMR) Chapter 72, section 7202.1(b). If a project is only using local funding and no federal action is required, then the project has to comply with DCEPA only. It should be remembered that other environmental laws

in addition to NEPA and DCEPA may also have to be complied with.

For projects where NEPA applies, whether the project is a Categorical Exclusion (CE), an Environmental Assessment (EA), or an Environmental Impact Statement (EIS) action depends on the “significance” of the project’s potential adverse and beneficial impacts. The Council on Environmental Quality (CEQ) regulations (40 Code of Federal Regulations [CFR] 1508.27) state that two main points should be considered in determining significance—context and intensity.

For projects (using local funding) where DCEPA applies, whether the project is an exemption, or requires an Environmental Impact Screening Form (EISF), or requires an EIS depends upon the significance of the project impacts.

This section describes the different actions and document types within NEPA and DCEPA that DDOT will use to process its transportation projects. Because DDOT will normally select an action/document type before having a thorough understanding of a project's impacts, it is important to coordinate with the Federal Highway Administration (FHWA) or other lead federal agency to obtain concurrence on the document type at the start of the project. FHWA typically is not involved if a project is locally funded.

### 5.1 Determination of Environmental Action Types

For projects using federal funding or requiring a federal action, in accordance with CEQ regulations under NEPA, each federal agency must identify those typical classes of action that:

- Require an EIS – An EIS shall be prepared for any proposed major action significantly affecting the quality of the human environment.
- Require an EA, but not necessarily an EIS – These actions require that an EA be prepared to determine the significance of the impacts. If it is concluded from the EA that the project's impacts will be significant, an EIS is required; if not, a Finding of No Significant Impact (FONSI) is prepared.
- Require the preparation of a CE – Actions that are clearly Categorical Exclusions and do not normally affect activities or resources under the jurisdiction of other agencies. The need for an environmental document and agency coordination on CE projects depends on the level of impacts associated with the project.

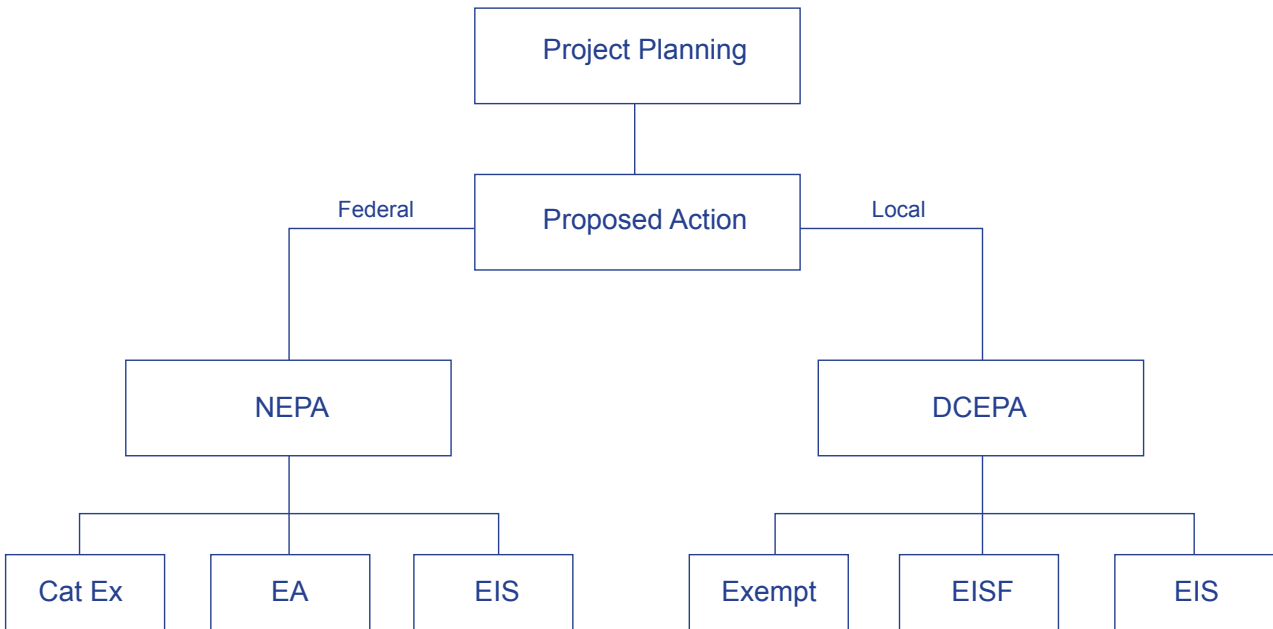
The FHWA environmental action list can be found in 23 CFR 771.115. Occasionally, a project is proposed that does not appear to fit any of the action categories. In that case, further consultation with FHWA is encouraged before an action decision is made.

For projects that only use local funding, in accordance with the District of Columbia regulations under DCEPA, DDOT has to identify whether a project will:

- Be an exemption provided in 72 DCMR 7202 – Actions for which no EISF or EIS is required. A list of actions is provided in 72 DCMR 7202 for the projects that do not require the preparation of an EISF or an EIS.
- Require the preparation of an EISF in 72 DCMR 7201 – Major actions for which EISF are required. A list of actions is provided in 72 DCMR 7201 for the projects that require the preparation of an EISF.
- Require the preparation of an EIS – Projects that do not qualify for an exemption or projects for which an EISF was submitted and the lead agency concluded that an EIS is required will have to prepare an EIS.

The scope of the improvement and the estimated significance of the impacts of DDOT's transportation projects determine the extent of the impact analysis, the type of document, and the level of public involvement. To determine the significance of an action, the entire human environment, the affected region, and the interests of the local area must be analyzed. Both short-term and long-term effects must be taken into account.

**Figure 5-1 Environmental Action Types**



**5.2 NEPA Action Types**

For projects using federal funding or requiring a federal action, in accordance with CEQ regulations under NEPA, each federal agency must identify those typical classes of action that:

- Require an EIS
- Require an EA
- Require the preparation of a CE

The FHWA environmental action list can be found in 23 CFR 771.115. Since the majority of DDOT projects require NEPA compliance, listed below is a description of the criteria used to determine the type of action DDOT is proposing and the appropriate document type for the proposed action under NEPA.

**5.2.1 Environmental Impact Statement Action**

A proposed action that is known to have significant environmental impacts will require the preparation of an EIS. This includes, but is not limited to, actions that are likely to:

- Have a significant impact on natural, ecological, or cultural resources or threatened and endangered species, wetlands, floodplains, groundwater, natural resources, or fish and wildlife resources
- Be highly controversial on environmental grounds (in other words, opposed or considered unacceptable on environmental or legal grounds by a federal or local agency or by the public)
- Have significant residential or commercial displacement impacts

- Cause substantial disruption to an established community, disrupt orderly, planned development, be inconsistent with plans or goals that have been adopted by affected communities, or adversely affect the economic vitality of an urban area
- Have a significant impact on noise levels in noise-sensitive areas
- Have a significant impact on air quality
- Have a significant impact on water quality or a surface or subsurface public water supply system

A decision to prepare an EIS for a proposed action may be made when that action clearly involves significant impacts on the human environment, when environmental studies and the results of early coordination indicate significant impacts, or when the review of an EA concludes that significant impacts would result from a proposed action. The following are examples of actions that normally require an EIS:

- A new controlled access freeway
- A highway project of four or more lanes on a new location
- New construction or extension of fixed rail transit facilities (such as rapid rail, light rail, commuter rail, or automated guideway transit)
- New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility

See Chapter 8, The Environmental Impact Statement and Record of Decision, for details on the format and content of EISs.

## 5.2.2 Environmental Assessment/Finding of No Significant Impact Action

An EA is a public document that provides sufficient evidence and environmental analysis to determine whether to prepare an EIS or to prepare a FONSI. An EA is prepared when the significance of the impacts cannot be clearly determined, if some but not all of the EIS criteria can be met, or if the project is a large one. All actions that do not readily fall into an EIS action or meet the qualifications of a CE are evaluated as an EA.

Based on the review and findings of an EA and any public comments, an EIS is prepared if FHWA (or another federal lead agency) determines that significant impacts would occur as a result of implementing DDOT's project. A FONSI is prepared when the study concludes that the proposed action will not cause significant impacts. The FONSI is a conclusion to the EA and highlights data supporting the finding that no significant impacts will occur as a result of the action.

See Chapter 9, The Environmental Assessment and Finding of No Significant Impact, for details on the format and content of EAs/FONSIs.

## 5.2.3 Categorical Exclusion Action

CEs are actions or activities that meet the definition in 23 CFR 771.117(a) and, based on FHWA experience, do not have significant environmental effects. CEs are divided into two groups that are based on the action's potential for impacts. The first group is a list of 20 categories of actions in 23 CFR 771.117(c) that never or almost never cause significant environmental impacts. These categories are nonconstruction actions (such as planning or grants for training and research



programs) or limited construction activities (such as pedestrian facilities, landscaping, or fencing). The actions associated with them are automatically classified as CEs except when unusual circumstances are brought to FHWA's attention.

The second group consists of actions with a higher potential for impacts than the first group but, because of minor environmental impacts, still meet the criteria for CEs. In 23 CFR 771.117(d), the regulation lists examples of 12 actions that experience has shown to be appropriate for CE classification. However, the second group is not limited to these 12 examples. Other actions with similar scopes of work may qualify as CEs. For actions in this group, site location is often a key factor. Some of these actions on certain sites may involve unusual circumstances or result in significant adverse environmental impacts.

Because of the potential for impacts, these actions require some information to be provided by DDOT so that the FHWA can determine if the CE classification is proper (23 CFR 771.117[d]). The level of information to be provided should be commensurate with the action's potential for adverse environmental impacts.

Where adverse environmental impacts are likely to occur, the level of analysis should be sufficient to define the extent of impacts, identify appropriate mitigation measures, and address known and foreseeable public and agency concerns. At a minimum, the information should include a description of the proposed action and, as appropriate, its immediate surrounding area, a discussion of any specific areas of environmental concern (such as Section 4(f), wetlands, or relocations), and a list of other federal actions required, if any, for the proposal.

The CE Programmatic Agreement between FHWA and DDOT requires a certain level of documentation and an approval process for CEs. This PA allows the DDOT Environmental Program to approve various CEs, while FHWA provides a yearly review/approval of the DDOT CE approval process. However, certain types of CEs may still require individual FHWA approval. The DDOT FHWA CE PA is provided in the reference section of this manual, and the CE forms are provided in the appendices.

See Chapter 10, The Categorical Exclusion, for details on the format and content of CEs.

### 5.3 DCEPA Action Types

For projects that only use local funding, in accordance with the District of Columbia regulations under DCEPA, DDOT has to identify whether a project will:

- Be an exemption
- Require the preparation of an EISF
- Require the preparation of an EIS

#### 5.3.1 Exemption

Exemptions belong to the class of actions that are exempt (do not require) preparation of an EISF or EIS. The 1997 rule making for DCEPA provides a list of actions that are exempt from preparing an EISF or EIS for DCEPA compliance.

Most of the DDOT reconstruction, replacements, and maintenance projects within the DDOT right-of-way are covered in covered in the exemptions.

See Chapter 6, The DCEPA Process, for details on DCEPA Exemptions.

### 5.3.2 EISF

An EISF is required for actions that are not covered in the exemption of the DCEPA. The EISF form is available in Appendix C. The EISF form has to be completed by the applicant and submitted to DCRA for approval.

See Chapter 6, The DCEPA Process, for details on DCEPA EISF.

### 5.3.3 EIS

An EIS for DCEPA is required for actions that are not covered in the exemption of the DCEPA, are not covered in the EISF section (20 DCMR 7201), or for which the lead agency has made a determination that an EIS is required.

See Chapter 6, The DCEPA Process, for details on DCEPA EIS.

## 5.4 Additional Information

Federal-Aid Policy Guide, October 14, 1997, Transmittal 18, Subchapter H (Right-of-Way and Environment), Part 771 – Environmental Impact and Related Procedures:

*<http://www.fhwa.dot.gov/legsregs/directives/fapglcfr0771.htm>*

FHWA TECHNICAL ADVISORY T 6640.8A, October 30, 1987. (I. Categorical Exclusion): *<http://www.environment.fhwa.dot.gov/projdev/impTA6640.asp#ce>*

# CHAPTER 6

## THE DCEPA PROCESS



- 6.1 District of Columbia Environmental Policy Act
- 6.2 DCEPA Action Types
- 6.3 Exemption: Actions for which No EISF or EIS Is Required
- 6.4 EISF: Actions for which an EISF Is Required
- 6.5 EIS: Actions for which an EIS Is Required
- 6.6 Determining DCEPA Action Type
- 6.7 Additional Information



## THE DCEPA PROCESS

The District of Columbia Environmental Policy Act (DCEPA) was enacted in 1989. In 1997, the “Rules to Implement the District of Columbia Environmental Policy Act of 1989” were published. These rules are included in Chapter 72, Environmental Policy Act Regulations, of Title 20, District of Columbia Municipal Regulations (DCMR), (Environment). The DCEPA and Rules to Implement DCEPA are given in the next sections of this chapter.

DCEPA applies to all District of Columbia Department of Transportation (DDOT) projects. Most of the DDOT projects use federal funds and have to comply with the National Environmental Policy Act (NEPA). DCEPA provides an exemption for projects that comply with NEPA and considers NEPA action to be equivalent to preparing a DCEPA action. Therefore, DDOT projects that comply with NEPA (Categorical Exclusion [CE], Environmental Assessment [EA], or Environmental

Impact Statement [EIS]) do not need to take any additional action to comply with DCEPA.

DDOT projects that use local funds and do not require any federal agency action have to follow the DCEPA. After the DDOT determines the appropriate action type for its proposed project, the development of the subsequent environmental document (Exemption, Environmental Impact Screening Form [EISF], or Environmental Impact Statement [EIS]) follows a review and approval process prescribed by the District of Columbia environmental regulations.

As with NEPA, the complexity of the process to gain approval for an Exemption action type is less than for an EIS action type. This section explains the individual steps in the DCEPA process.

## 6.1 District of Columbia Environmental Policy Act

The text of DCEPA is provided below for reference.

### D.C. LAW 8-36

#### “District of Columbia Environmental Policy Act of 1989”

July 27, 1989

*To require the Mayor or any District of Columbia board, commission, authority, or person to prepare an environmental impact statement if the Mayor, board, commission, authority, or person proposes or approves an action that, if implemented, is likely to have a significant effect on the quality of the environment; to ensure the residents of the District of Columbia safe, healthful, productive, and aesthetically pleasing surroundings; and to develop a policy to ensure that economic, technical, and population growth occurs in an environmentally sound manner.*

*BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the “District of Columbia Environmental Policy Act of 1989”.*

#### *Sec. 2. Purpose.*

*The purpose of this act is to promote the health, safety and welfare of District of Columbia (“District”) residents, to afford the fullest possible preservation and protection of the environment through a requirement that the environmental impact of proposed District government and privately initiated actions be examined before implementation and to require the Mayor, board, commission, or authority*

*to substitute or require an applicant to substitute an alternative action or mitigating measures for a proposed action, if the alternative action or mitigating measures will accomplish the same purposes as the proposed action with minimized or no adverse environmental effects.*

#### *Sec. 3. Definitions.*

*For the purposes of this act, the term:*

- (1) *“Action” means (i) a new project or activity directly undertaken by the Mayor or a board, Commission, or authority of the District government or (ii) a project or activity that involves the issuance of a lease, permit, license, certificate, other entitlement, or permission to act by an agency of the District government.*
- (2) *“Major action” means any action that costs over 1 million dollars and that may have a significant impact on the environment, except that, subject to the exemptions in section 7, the Mayor, pursuant to rules issued in accordance with section 10, shall classify any action that costs less than 1 million dollars as a major action, if the action imminently and substantially affects the public health, safety, or welfare. The cost level of 1 million dollars shall be based on 1989 dollars adjusted annually according to the Consumer Price Index.*
- (3) *“Environment” means the physical conditions that will be affected by a proposed action, including but not limited to, the land, air, water, minerals, flora and fauna.*
- (4) *“Hazardous substance” means any solid, liquid, gaseous, or semisolid form or combination that, because of its nature, concentration, physical, chemical,*

*or infectious characteristic, as established by the Mayor, may:*

*(A) Cause or significantly contribute to an increase in mortality or an increase in a serious, irreversible or incapacitating reversible illness; or (B) Pose a substantial hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed, including substances that are toxic, carcinogenic, flammable, irritants, strong sensitizers, or that generate pressure through decomposition, heat, or other means and containers and receptacles previously used in the transportation, storage, use, or application of hazardous substances.*

- (5) *“Lead agency” means the District agency designated by the Mayor to have primary responsibility for the preparation of an Environmental Impact Statement (EIS).*
- (6) *“Functional equivalent” means the full and adequate description and analysis of the environmental impact of a proposed action by an agency, board, commission, or authority of the District government that examines or imposes environmental controls under procedures that provide for notice, opportunity for public comment, and the creation of a reviewable record.*

## 6.2 DCEPA Action Types

There are three types of actions under DCEPA.

1. Exemption (provided in 20 DCMR 7202) – Actions for which no EISF or EIS is required. A list of actions is provided in 72 DCMR 7202 for the

projects that do not require the preparation of an EISF or an EIS.

2. Preparation of an EISF (in 20 DCMR 7201) – Major Actions for which EISF is required. A list of actions is provided in 20 DCMR 7201 for the projects that require the preparation of an EISF.
3. Preparation of an EIS – Projects that do not qualify for an exemption, or projects for which an EISF was submitted and the lead agency concluded that an EIS is required, will have to prepare an EIS.

## 6.3 Exemption: Actions for which No EISF or EIS Is Required

The 1997 rule making for DCEPA elaborated on the list of actions that were exempt from preparing an EISF or EIS for DCEPA compliance. This list of actions is provided in 20 DCMR Section 7202 as the “The Actions for which an EISF or EIS is Not required.” This list is included below.

- (a) *Any action that costs less than 1 million dollars (\$1,000,000) based on 1989 dollars adjusted annually according to the Consumer Price Index, unless that action meets the criteria of § 7201.3 and 7201.4 of these rules;*
- (b) *Any action for which an Environmental Impact statement (“EIS”) has been prepared in accordance with the National Environmental Policy Act of 1969, approved January 1, 1970 (83 Stat.852; 42 U.S.C. § 4321 et seq.) (NEPA) and its implementing regulations, or a determination has been made under NEPA and its implementing regulations that no impact statement is*

*required due to a finding of no significant impact or a finding that the proposed action is categorically excluded from consideration;*

- (c) Any action for which a request has been made for the authorization or allocation of funding that involves only a feasibility or a planning study for a possible future action that has not been approved, adopted or funded. The study, however, shall include consideration of environmental factors;*
- (d) Any action whose impact on the environment has been or is considered in the functional equivalent of an EIS, where equivalency is determined by the lead agency;*
- (e) Any action that reached a critical stage of completion prior to October 18, 1989, and the cost of altering or abandoning the action for environmental reasons outweighs the benefits derived from the action;*
- (f) Any action of an environmentally protective regulatory nature;*
- (g) Any action within the Central Employment Area as defined in the zoning Regulations of the District of Columbia; and*
- (h) Any action for which a lease, permit, certificate, or any other entitlement or permission to act by a District government agency has been approved before December 31, 1989.*

**7202.2** *In addition to the actions listed in § 7202.1, no agency shall require that an EISF or EIS be prepared for the following classes of actions:*

- (a) Class 1. Operation, repair, maintenance, or minor alteration of existing public structures, facilities, mechanical equipment, or topographical features, including replacement of roofs, HVAC, electrical, plumbing, elevator, sprinkler or other systems, plus interior work to common areas and individual units, involving negligible or no expansion of use beyond that previously existing;*
- (b) Class 2. Replacement, renovation, or reconstruction of existing structures and facilities, where the new or renovated structure meets the requirements of the Zoning Regulations, is located on the same site as the structure replaced, renovated, or reconstructed, will have substantially the same purpose and capacity as the structure replaced, renovated, or reconstructed, and will not exceed the density of that structure;*
- (c) Class 3. Construction and location of limited numbers of small facilities or structures; installation of new equipment in small structures, including replacement of HVAC, electrical, plumbing, elevator, sprinkler or other systems; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. This class includes, but is not limited to:
 
  - (1) Single family residences not in conjunction with the building of two or more such units;*
  - (2) Small commercial structures not involving the use of significant amounts of hazardous substances;*
  - (3) Water main, sewage, electrical, and other utility extensions of reasonable length to serve such construction; and*
  - (4) Accessory structures such as garages, patios, swimming pools, and fences;**



- (d) *Class 4. Minor public or private alterations in the condition of land, water, or vegetation which do not involve the removal of mature, healthy trees. This class includes, but is not limited to:*
- (1) *Grading on land with a slope of less than ten percent (10%), except in waterways, wetlands, or officially designated scenic areas;*
  - (2) *New gardening, landscaping or planting of trees or other vegetation;*
  - (3) *Temporary use of land having negligible permanent effects, such as carnivals, fairs, and sales of Christmas trees; and*
  - (4) *The creation of bicycle lanes on existing rights-of-way;*
- (e) *Class 5. Minor alterations in land use limitation in areas with an average slope of less than twenty percent (20%), which do not result in any changes in land use or density. This class includes, but is not limited to:*
- (1) *Minor lot line adjustments, side yard and set back variances; and*
  - (2) *Issuance of minor encroachment permits;*
- (f) *Class 6. Actions taken by District agencies as authorized by law or regulation to assure the maintenance, restoration, or enhancement of a natural resource or the environment, where the regulatory process involves procedures for protection of the environment. This includes basic data collection, research, experimental management and resource evaluation activities which do not result in a serious or major disturbance to the environment and activities limited entirely to*
- inspections to check for performance of an operation, or the quality, health or safety of a project;*
- (g) *Class 7. Construction or placement of minor structures accessory to existing commercial, industrial, or institutional facilities. This class includes, but is not limited to:*
- (1) *On-premise signs;*
  - (2) *Small parking lots (fewer than 50 vehicles); and;*
  - (3) *Placement of seasonal or temporary use items such as mobile food units, portable restrooms, or similar items in generally the same locations from time to time in publicly owned parks, stadiums, or other facilities designed for public use;*
- (h) *Class 8. Action in the nature of a response to an emergency as determined by the Mayor;*
- (i) *Class 9. Action in the nature of remedial actions related to leaking underground storage tanks, removal of PCB equipment, hazardous substances, or other environmental contaminants pursuant to all lawfully required and issued permits;*
- (j) *Class 10. Actions related to the removal of asbestos pursuant to all lawfully required and issued permits;*
- (k) *Class 11. Residential structure projects, or portions of projects, within the R-1 through R-5-A zoning districts, as defined under Chapters 2 and 3 of Title 11, DCMR (Zoning);*
- (l) *Class 12. Actions within Development Zones as defined pursuant to the District of Columbia Economic Development Zone Incentives Act of 1988 (D.C. Law 7-177).*

20 DCMR 7299 “Definitions” defines Public Structure as “any government-owned building, roadway, bridge, alley, sidewalk, curb, gutter, or utility, including structures and equipment related to the pumping or distribution of water, sanitary sewage, storm water, or combination of storm water and sanitary sewage.” This means that most of the DDOT projects and infrastructure is covered under the definition of Public Structures. Therefore DDOT projects can use the exemption for actions listed in the above mentioned section that deal with Public Structure. Hence, all DDOT projects (including reconstruction, maintenance, rehabilitation, and minor, limited construction), except new large construction projects, are provided an exemption under DCEPA regulations.

Project Development and Environment (PDE) Division staff (or designee) make the determination regarding whether a project qualifies as an exemption or not.

#### **6.4 EISF: Actions for which an EISF Is Required**

Actions that are not covered in the exemption listed in the above section (20 DCMR 7202) need to prepare an EISF to determine whether an EIS is required or not. The 1997 rule making for DCEPA elaborated the list of actions for which an EISF is required. This list is provided in 20 DCMR Section 7201. The EISF form is available in Appendix C. The EISF form has to be completed by the applicant and submitted to the Department of Consumer and Regulatory Affairs (DCRA) for approval. The EISF has to be reviewed and approved by PDE Division (or designee) before it is submitted to DCRA.

#### **6.5 EIS: Actions for which an EIS Is Required**

Actions that are not covered in the exemption listed in the above section (20 DCMR 7202), are not covered in the EISF section (20 DCMR 7201), or projects for which the lead agency has made a determination that an EIS is required shall prepare an EIS. The PDE staff (or designee) makes the determination regarding whether an EIS is required or not when an action does not qualify for an exemption or an EISF. However, if an EISF has been submitted to DCRA and DCRA determines that an EIS is needed, then an EIS has to be prepared by closely coordinating with the designated PDE Division staff (or designee). The EIS has to be reviewed and approved by the PDE Division (or designee) before it is submitted to DCRA.

##### **6.5.1 Content of an EIS**

The guidance for preparing an EIS is available in 20 DCMR 7206, 7208, 7209, and 7210. The EIS is required to include the following information, description, and analysis.

- (a) *The goals and nature of the proposed major action and its environment;*
- (b) *The relationship of the proposed major action to the goals of the adopted comprehensive Plan, requirements as promulgated by the Zoning Commission, and any District or federal environmental standards;*
- (c) *Any adverse environmental impact that cannot be avoided if the proposed major action is implemented;*

- (d) *Alternatives to the proposed major action, including alternative locations and the adverse and beneficial effects of the alternatives;*
- (e) *Any irreversible or irretrievable, commitment of resources involved in the implementation of the proposed major action;*
- (f) *Mitigation measures proposed to minimize any adverse environmental impact;*
- (g) *The impact of the proposed major action on the use of energy resources, if applicable and significant;*
- (h) *The cumulative impact of the major action when considered in conjunction with other proposed actions;*
- (i) *The environmental effect of future expansion or action, if expansion or action is a reasonably foreseeable consequence of the initial major action and the future expansion or action will likely change the scope or nature of the initial major action or its environmental effects;*
- (j) *Responses to comments on the EIS provided by the Council, any affected Advisory Neighborhood Commission, and interested members of the public; and*
- (k) *Any additional information that the Mayor or a board, commission, or authority determines to be helpful in assessing the environmental impact of any proposed major action and the suggested alternatives.*

## 6.5.2 Public and Agency Review

The EIS must be provided for agency and public comment. The lead agency is required to publish a notice of availability (NOA) for the EIS in the District

of Columbia Register. The public comment period has to be a minimum of 45 days. After the EIS is released, at least one public hearing is required within 45 calendar days of any request made during the public comment period by 25 registered voters in a single member district or if there is significant public interest in the action that is the subject of the EIS.

## 6.5.3 Findings of an EIS

The lead agency is responsible for developing the written findings of an EIS that takes into account written and oral public comments and the responses to those comments. An EIS will do one of the following.

- Identify no adverse effect
- Identify an adverse effect, but the public health, safety, or welfare is not imminently and substantially endangered
- Identify an adverse effect, and the public health, safety, or welfare is imminently and substantially endangered

These findings must be prepared within 30 working days after completion of a public hearing or the close of the public comment period. These findings must be published in the District of Columbia Register.

If the findings identify adverse affects and that the public health, safety, or welfare is imminently and substantially endangered, the lead agency shall disapprove the project unless the lead agency or applicant submits mitigating measures or substitutes a reasonable alternative to avoid the danger.

If the findings identify no adverse effect, or identify an adverse effect and the public health safety or welfare is not imminently and substantially endangered, the proposed action shall be approved with respect to the requirements of Law B-36.

## 6.6 Determining DCEPA Action Type

For locally funded projects where no federal action is required, the first step in order to identify the appropriate DCEPA action is to check whether that project qualifies as an exemption provided in 72 DCMR 7202, Actions for which No EISF or EIS is Required. The list of actions from 72 DCMR 7202 is provided in the “Exemption” section of this chapter. If the project qualifies for an exemption, then it should be documented in the DDOT Environmental Evaluation Form, and the DCEPA process is considered complete. At the time of construction, this exemption should be identified in the Environmental Intake Form (EIF) submitted to DCRA.

If the project does not qualify for an exemption, then an EISF should be prepared and submitted to DCRA. If DCRA accepts the EISF and approves the project based on the EISF, then the DCEPA process is considered complete.

If the project does not qualify for an exemption, is not covered in the EISF section (20 DCMR 7201), or the lead agency (or DCRA) has made a determination that an EIS is required, then an EIS must be prepared.

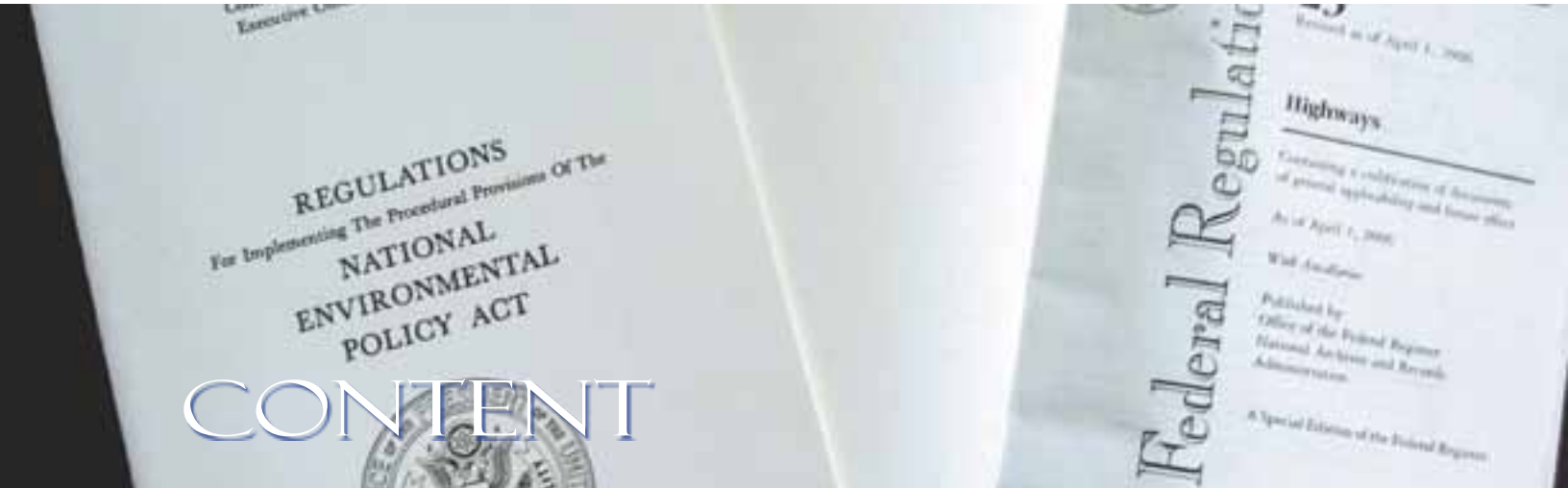
## 6.7 Additional Information

Code of Federal Regulations, Title 23, Volume 1, Part 771 Environmental Impact and Related Procedures  
[Revised as of April 1, 1999]

*[http://www.gpo.gov/nara/cfr/waisidx\\_99/23cfr771\\_99.html](http://www.gpo.gov/nara/cfr/waisidx_99/23cfr771_99.html)*

## THE NEPA PROCESS

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## THE NEPA PROCESS

**A**fter the District of Columbia Department of Transportation (DDOT) determines the appropriate action type for its proposed project, the development of the subsequent environmental document (Environmental Impact Statement [EIS], or Environmental Assessment [EA]) follows a review and approval process prescribed by federal environmental regulations. The process for the EIS, EA and Categorical Exclusion (CE) action types is shown in Figure 7-1 NEPA Documentation Process. The figure basically shows the National Environmental Policy Act (NEPA) process from project initiation through final approval.

This section explains the individual steps in the NEPA process. As might be expected, the complexity of the process to gain approval for a CE action type is less than for an EIS action type. Following the steps outlined in this section and maintaining regular contact with the Federal Highway Administration (FHWA) and the project's other key federal and local agencies will greatly reduce the likelihood of having to backtrack to complete a missed step.

Please note that most of the steps described below will not be required for CE action types. The focus of this section is the process that EA and EIS action types should follow. The format and content of those reports can be found in the following chapters.

- Chapter 8, The Environmental Impact Statement and Record of Decision
- Chapter 9, The Environmental Assessment and Finding of No Significant Impact
- Chapter 10, The Categorical Exclusion

### 7.1 Lead and Cooperating Agencies

At the federal level, the lead agency is usually the federal agency responsible for the preparation of the appropriate environmental document for a particular federal action, such as a federally funded highway project. FHWA would fill that role on DDOT's federally funded transportation projects, but depending on the circumstances surrounding DDOT's projects, the lead agency could be another federal agency such as the National Park Service (NPS). At the local level (District of Columbia) where no federal funds are involved,

DDOT would function as the lead agency responsible for the preparation of a project’s environmental document. In either case, other federal, state, or local agencies may, under the proper circumstances, act as joint lead agencies to prepare an environmental document.

A cooperating agency is any federal or local agency, other than a lead agency, that has special expertise or regulatory authority with respect to any environmental impact and which is requested by a lead agency to be a cooperating agency.

Any federal or state agency having or expected to have permit approval or concurrence authority on an action (DDOT project) should be requested to be a cooperating agency for an EIS or an EA. Agencies such as the United States Army Corps of Engineers (USACE), NPS, and the United States Fish and Wildlife Service (USFWS) could serve as cooperating agencies. More information about the roles and responsibilities of agencies in the NEPA process is found in Chapter 4, Environmental Laws, Regulations, and Guidance (Federal and Local).

## 7.2 Notice of Intent

As soon as practicable after the decision has been made to prepare a federally funded EIS, and prior to scoping, DDOT, in coordination with FHWA, should prepare a Notice of Intent (NOI) to prepare an EIS. The NOI, which is published in the Federal Register, initiates the EIS and the scoping process.

This notice shall briefly:

- Describe the proposed action and alternatives
- Describe the intent of Title VI of the Civil Rights Act and of Executive Order 12898, included below.

- Federal law prohibits discrimination on the basis of race, color, age, sex, or country of national origin in the implementation of this action. It is also Federal policy that no group of people bears the negative consequences of this action in a disproportionately high and adverse manner without adequate mitigation

- Describe the proposed scoping process, including, if known, any scheduled scoping or public information meetings
- State the name, address, and phone number of a contact person who can provide information about the project and document

FHWA is responsible for submitting the NOI to the Federal Register; however, as the applicant, DDOT personnel or a DDOT consultant will prepare the NOI for FHWA’s submittal. An NOI is also prepared and published in the Federal Register when a supplement to a Final EIS is initiated; however, it is not necessary when preparing a supplement to a Draft EIS.

Announcement of the intent to prepare an EIS at the local level is encouraged and can be accomplished by means of a notice in local newspapers.

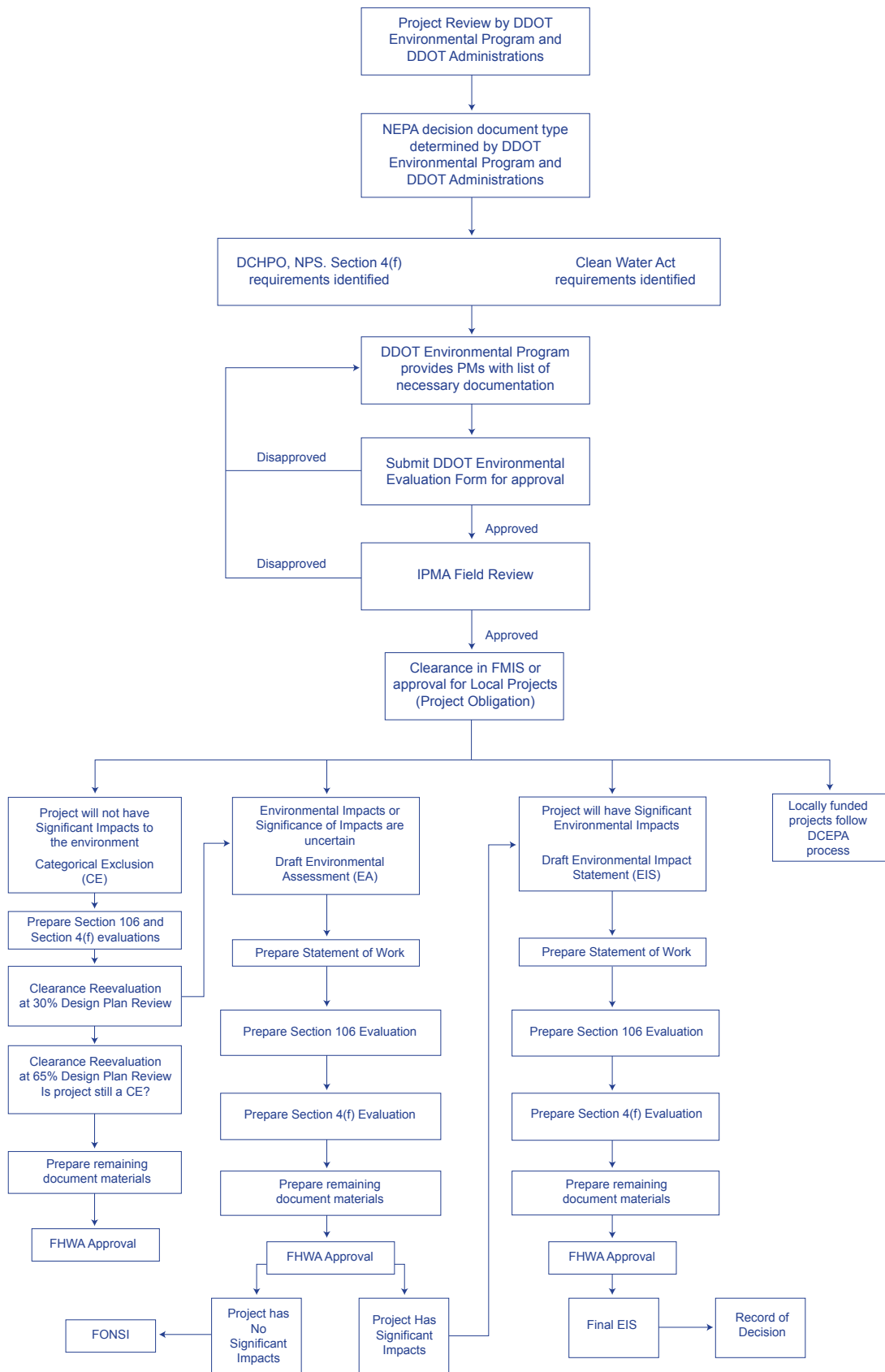
Appendix B of FHWA Technical Advisory T6640.8A discusses the format, content, and processing of an NOI in more detail. See Appendix D of this manual for an example of an NOI prepared for a DDOT project.

## 7.3 Scoping Process

Scoping is an early and open process of communication required by Council on Environmental Quality (CEQ) and FHWA regulations. The purpose of scoping is to identify significant issues and the range of alternatives to be addressed during environmental analyses very early in the process.



**FIGURE 7-1 NEPA Documentation Process**



Scoping is required for all actions for which a decision to prepare an EIS has been made. Because scoping is a good source of early information and is a useful coordination tool, it is also recommended for EAs and CEs that require documentation.

Scoping is accomplished largely through meetings, field interviews, telephone conversations, community outreach, and written communication. The innovative approach to scoping in the regulations is that the process is open to the public and state and local governments, as well as to affected federal agencies. This open process gives rise to important new opportunities for better and more efficient NEPA analyses and simultaneously places new responsibilities on the public and agency participants alike to express their concerns early. Scoping helps ensure that real problems are identified early and are properly studied, that issues that are of no concern do not consume time and effort, that the Draft EIS is balanced and thorough, and that the delays occasioned by redoing an inadequate Draft EIS are avoided. Scoping does not create problems that did not already exist; it ensures that problems that would have been raised anyway are identified early in the process.

During the scoping process, related environmental requirements, such as Section 404 permits, Section 10, Section 4(f) evaluations, Section 6(f) determinations, noise study reports, Section 106 Documentation for Consultation, and Section 7 Endangered Species Consultation requirements shall be identified so that required analyses and studies can be undertaken concurrently and integrated into the environmental document. Environmental justice concerns may also be identified during this process.

It is important to identify potential stakeholders when determining whom to invite to a scoping meeting. Examples of potential stakeholders include but are not limited to:

- Federal, state, and local agencies
- Other local interest groups
- Minority and low-income populations

Invite these groups to the scoping meeting when applicable. Notification by personal letter helps to assure maximum participation.

Scoping meetings may be conducted either alone or as part of early planning meetings to involve interested parties when determining the scope of a complex project involving several federal agencies. Scoping reports can also illustrate the decisions made on scoping-related issues as well as the opinions of participating agencies.

For many projects, a scoping meeting (which may be integrated with any other early planning meeting DDOT conducts) may be held early in the process to meet the requirements of 40 Code of Federal Regulations (CFR) Part 1501.7. Further, it may be appropriate for some projects to hold two scoping meetings, one with resource agencies and one with other interested parties. However, the scoping process does not have to include a meeting; it may be done via letters.

Correspondence between coordinating agencies pertaining to the scoping process should be well documented and included in the “Comments and Coordination” section of the EIS.

## 7.4 Review and Approval Process

### 7.4.1 Review Agencies

For all DDOT transportation facilities development projects involving federal funding or federal aid assistance, the appropriate federal agency (normally FHWA) will be a joint lead and approving agency. All cooperating agencies should also review and comment on the project’s environmental document. Federal and local agencies that are not

cooperating agencies, but that have jurisdiction over an area (or resource in the study area), or that have a responsibility to a particular interest or area of concern, may also be considered a review agency.

Public officials, private interest groups, and members of the public, including minority populations and low-income populations that are potentially affected by or express an interest in the DDOT project, should be given the opportunity to review EISs and EAs.

#### **7.4.2 Approval and Timing**

The timing of an environmental document's review process will vary with the complexity of the DDOT project, the controversy associated with the impacts, and the number of local and federal reviewers. It is recommended that DDOT submit a preliminary draft of the environmental document to FHWA (or another lead agency) for early review to avoid subsequent delays and to avoid changes in methods, format and content. Based on comments obtained from FHWA's preliminary review, DDOT (or its consultant) will complete the draft document and submit it to FHWA for final review and approval and for circulation to cooperating and affected agencies for concurrent review. The appropriate number of review copies needed will vary depending on agency interest and demand.

### **7.5 Notice of Availability and Notice of Public Hearing**

After the appropriate agencies have reviewed and approved the DDOT Draft and Final EISs, a Notice of Availability (NOA) is published in the Federal Register. It is not required to publish an NOA in the Federal Register for EAs.

Regardless of whether a public hearing is conducted, an NOA must be published in the area newspaper(s) for a Draft EIS, a Final EIS, an EA, or a Supplemental EIS. An

NOA is not required for a Finding of No Significant Impact (FONSI) or a CE. It is good NEPA practice to distribute the NOA to as many community outreach organizations (such as religious organizations, schools, public libraries, project-area residences, or minority business associations) as possible.

The NOA in the local newspapers and other appropriate media shall advise the public where the document is available for review, how copies may be obtained, and to whom comments should be sent. Appendix E contains an example of an NOA. The full participation of the public, including minority and low-income populations, should be encouraged to avoid any perception of discrimination in the decision-making process.

The public NOA shall establish a period for the return of comments of not less than 45 days for a Draft EIS or 30 days for an EA. When a public hearing is required, both a Draft EIS and an EA must be made available to the public a minimum of 15 days before the hearing and a minimum of 15 days after the hearing.

The comments received will be given consideration, and appropriate responses will be prepared for inclusion in DDOT's final document: FONSI, Final EIS, or Record of Decision (ROD).

Because a public hearing is required for a Draft EIS, the NOA and the Notice of Public Hearing may be combined for publication in the local newspapers. If DDOT decides to conduct a public hearing for an EA, the local publication of the NOA and Notice of Public Hearing would be treated like an EIS action. If DDOT has not committed to conduct a public hearing for an EA, it must offer the opportunity for a public hearing. In such a case, the NOA and the opportunity to request a public hearing are normally combined for publication in the local newspaper. More

information about the Notice of Public Hearing is found in Chapter 11, Public Involvement.

## 7.6 Public Hearing

A public hearing is required for a Draft EIS. A public hearing for an EA may not be needed if appropriate opportunities for the public to comment have been provided. The requirements for a public hearing on an EA may be satisfied by either conducting the hearing or publishing a notice of opportunity for a public hearing and holding one if substantial requests are received.

Refer to Chapter 11, Public Involvement, for more information on public hearings.

### 7.6.1 Public Comment Period

The public shall be provided a period of not less than 45 days in which to submit oral or written comments on the Draft EIS (or 30 days for an EA). The public will be informed in writing on the cover of the Draft EIS and by announcement at the hearing as to whom to send their comments and the deadline for submission of the comments.

Draft and Final EISs and EAs should be made available for public inspection at DDOT's offices and at public or community center locations. CEs and FONSI are public documents that may be inspected at DDOT's offices.

## 7.7 Record of Decision

No federal-aid DDOT project shall proceed until the following actions have been completed.

The FHWA has received and accepted the public hearing transcripts and certifications required by 23 USC 128 (applies to all environmental documents for which a hearing has been held).

Either the action has been classified as a CE, a FONSI has been adopted, or a Final EIS has been published and made available for the prescribed length of time, and a ROD for an EIS action has been signed by FHWA.

### 7.7.1 Timing

No formal decision on a proposed federal action requiring an EIS shall be made or recorded by a federal agency until the later of the following dates.

- 90 days after publication of the NOA of a Draft EIS (see Section 7.6)
- 30 days after publication of the NOA of a Final EIS

### 7.7.2 Record of Decision Document

A ROD is prepared by FHWA in conjunction with DDOT on federally funded EIS projects. The ROD should document any requirements, such as Section 4(f) and Section 106 (historic properties) approvals. The ROD is the final approval necessary before the proposed action can begin. However, administrative actions taken to secure further project funding and other actions can be initiated before the ROD is signed.

In cases where an EIS has been prepared, the ROD must identify all alternatives that were considered, “. . . specifying the alternative or alternatives which were considered to be environmentally preferable.” The environmentally preferable alternative is the alternative that will promote the national environmental policy as expressed in NEPA, Section 101. Ordinarily, this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.

If the FHWA subsequently wishes to take an action that was not identified as the proposed action in the Final EIS

or proposes to make substantial changes to the mitigation measures or findings discussed in the ROD, a revised ROD shall be processed. Information about the content of the ROD is found in Chapter 8, The Environmental Impact Statement and Record of Decision.

### 7.7.3 Mitigation and Monitoring

Federal agencies (such as FHWA) may provide for monitoring to assure that their decisions are carried out. Mitigation and other conditions established in DDOT EISs or EAs or during their review, and committed to as part of the decision, will be implemented by the lead agency or other appropriate consenting agency. The lead agency will:

- Include appropriate conditions, grants, permits, or other approvals
- Condition funding of actions on mitigation
- Inform cooperating or commenting agencies about the implementation of those mitigation measures they proposed and which were adopted by the agency making the decision
- Make the results of monitoring available to the public

## 7.8 Reevaluating Documents

For reevaluation of an EA, DEIS, FEIS, or similar document, the same format and table of contents should be used as was used in the original environmental documents. All sections in the environmental document should be included; however, details should be provided only in those sections where there are changes. Sections where there are no changes should be handled briefly with text such as “No changes in this section.”

### 7.8.1 Draft EIS Reevaluations

A written evaluation of the Draft EIS shall be prepared by DDOT in cooperation with FHWA if an acceptable Final EIS is not submitted to FHWA within 3 years from the date of the Draft EIS circulation. The purpose of this evaluation is to determine whether a supplement to the Draft EIS or a new Draft EIS is needed.

This evaluation (or reevaluation) must demonstrate that there have not been significant changes in the proposed action, the alternatives considered, the affected environment (including the human environment), the anticipated impacts, or the proposed mitigation measures. If there have been changes in these factors that would be considered significant, a supplement to the Draft EIS or a new Draft EIS should be prepared and circulated. See Section 7.9 for a discussion of Supplemental EISs.

### 7.8.2 Final EIS Reevaluations

A written evaluation of the Final EIS will be required before further approvals may be granted if major steps to advance the action (such as authority to undertake final design, authority to acquire a significant portion of the right-of-way, or approval of the plans, specifications, and estimates) have not occurred within 3 years of the approval of the Final EIS, Final EIS supplement, or the last major FHWA approval or grant.

If major steps to advance the action have not occurred within 5 years from the date the Final EIS or Final EIS supplement was approved, or within the time frame specified in the Final EIS, a written reevaluation will be prepared and forwarded for review and action to the same offices that approved the original Final EIS.

The following questions should be addressed during a reevaluation of an old federal document.

- Are there any changes in the proposed project from the action as proposed in the EIS?
- Are there any changes in the existing setting in the vicinity of the project from that described in the EIS (for example, has previously undeveloped land become developed and to what extent)?
- If there are changes, are these changes likely to result in different social, economic, and environmental effects from those described in the EIS?
- Have there been any changes in legislation since the EIS was prepared that will have an effect on the proposed project?
- Have there been any changes in federal or state policies, procedures, or regulations that warrant updating the EIS (for example, was EO12898 on Environmental Justice issued within the time frame for the reevaluation of the Final EIS)?
- Has the mitigation specified in the EIS been changed?

Note that new legislation, policies, procedures, or regulations would not necessarily require a new EIS for a particular project but should be an important part of a reevaluation of the EIS or, in special cases, a Supplemental EIS.

If any changes are made to the proposed action and if it is uncertain if a reevaluation of the EIS or a Supplemental EIS is required, appropriate environmental studies may be necessary. If necessary, an EA can be used as a reevaluation tool to assess whether the impacts of such changes are significant.

If it is determined that the changes result in significant environmental impacts that could not be identified from reviewing the initial EIS, a Supplemental EIS will be prepared. If no Supplemental EIS is required after the studies or the EA has been completed, the findings will be indicated in the project file. Close coordination between DDOT and FHWA is essential in expediting this determination.

### 7.8.3 EA Reevaluations

Reevaluation requirements shall apply to EAs that have not been approved or have not progressed to the EIS or FONSI stage. Reevaluation requirements should also apply to FONSI for which major activities have not commenced. It is recommended, but not required, that DDOT reevaluate a CE project before approval is sought for major actions.

## 7.9 Supplemental EIS

FHWA regulation 23 CFR 771.130 requires preparation of a Supplemental EIS if a substantial change in a proposed action that is relevant to environmental concerns has occurred or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. However, a Supplemental EIS will not be necessary if the project is an alternative adequately covered in the Final EIS, but not identified as the proposed action. The decision to prepare a supplement to the Final EIS shall not require withdrawal of the previous approvals for those aspects of the proposed action not directly affected by the changed condition or new information. A Supplemental EIS shall be prepared for either a Draft or a Final EIS if, at any time:

- There are substantial changes in the proposed action that are relevant to environmental concerns.
- There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

The supplement shall be developed using the same process and format, (that is, Draft EIS, Final EIS, and ROD) as an original EIS, with the exception that scoping is not required. A new or amended ROD will also be prepared. A Supplemental EIS shall not be necessary where:

- The changes to the proposed action, new information, or new circumstances result in a lessening of adverse environmental impacts evaluated in the EIS without causing other environmental impacts that are significant and were not evaluated in the EIS.
- The decision is made to approve an alternative fully evaluated in an approved EIS but not identified as the preferred alternative. In such a case, a revised ROD shall be prepared. See Chapter 8, The Environmental Impact Statement and Record of Decision, for more information about the content of a ROD.

### 7.10 The National Park Service Environmental Process

Although FHWA will be the lead federal agency on many, if not most, of DDOT's projects, other federal agencies have served as the lead agency on DDOT projects. As an example, NPS served as the lead federal agency on the Blagden Avenue Draft EA, which evaluated the potential impacts from the construction of a hiker/biker trail along Blagden Avenue within Rock Creek Park. Rock Creek Park is an administrative unit of NPS.

Although NPS also follows NEPA, it is beneficial for DDOT project managers to understand that NPS has an environmental manual titled The Director's Order 12 Handbook (also called DO 12). This handbook never conflicts with the CEQ regulations, although NPS has added some requirements that go beyond those imposed by CEQ. The handbook can be found at <http://www.nps.gov/policy/DOrders/RM12.pdf>.

Projects that require an NPS permit, approval, or action (land transfer, funding, and similar functions) are subject to NEPA even though they may be funded by DDOT local funds. For such projects, close coordination with NPS is needed. It should be remembered that the list of CEs under

23 CFR 771.117 are for FHWA/FTA only and may not be accepted by NPS. NPS has its own NEPA regulations which are described in the NPS NEPA Guidelines, DO 12. Please refer to DO 12 (in addition to FHWA guidelines) whenever a project involves NPS. DO 12 has a list of CEs and guidelines on preparing EAs and EISs. DDOT environmental staff and NPS staff should work together closely on such projects. Most of the time, projects involving NPS require Section 4(f) evaluations. For details on Section 4(f) evaluations, refer to Chapter 22, Section 4(f) – Parks, Recreation Areas, Historic Sites, and Wildlife and Waterfowl Refuges.

### 7.11 External Environmental Document Review Process

In addition to preparing environmental documents for its own actions, DDOT is also involved in reviewing and commenting on other agency environmental documents (EA, EIS, and others). In some cases, DDOT also accepts the role of a cooperating agency. To review an outside environmental document, the following process should be used.

- Upon receiving an Environmental document (EA, EIS, or similar submittal) from an external agency (local, state, or federal) the Project Development and Environment (PDE) Branch staff will coordinate with DDOT administrations for comments. These comments will be generated mainly by the Planning, Policy and Sustainability Administration (PPSA), Infrastructure Project Management Administration (IPMA), Mass Transit Administration (MTA), and Traffic Operations Administration (TOA).
- The PDE staff will inform the appropriate staff members at the relative administrations of the request for comments. The administration heads will also be copied on the correspondence.

- For IPMA, the correspondence for review will be sent to the team leaders, while for PPSA, the ward planner will be notified as well.
- All administrations will receive 2 weeks or less for comments.
- The comments will be collected by the PDE staff and combined into a response to the agency that submitted the environmental document.
- PDE staff will coordinate a meeting between the reviewers, if needed, before submitting official comments.
- The official comments will be submitted through the DDOT director.
- The PDE Staff will complete the DDOT External Environmental Document Review Form (provided in Appendix I) and keep it in files to document the review process for each document.

The DCEPA EISF for external agency projects will continue to go to the PDE branch for reviews unless the PDE branch is required to comment on environmental issues.

## 7.12 Additional Information

Code of Federal Regulations, Title 23, Volume 1, Part 771  
Environmental Impact and Related Procedures [Revised as of  
April 1, 1999]

*[http://www.gpo.gov/nara/cfr/waisidx\\_99/23cfr771\\_99.html](http://www.gpo.gov/nara/cfr/waisidx_99/23cfr771_99.html)*

FHWA Technical Advisory, T 6640.8A, October 30,  
1987(Sections I-IV and Sections XI and XII)

*<http://www.environment.fhwa.dot.gov/projdev/impTA6640.asp#ce>*

The Director's Order (DO) 12 Handbook.:

*<http://www.nps.gov/policy/DOrders/RM12.pdf>*



## THE ENVIRONMENTAL IMPACT STATEMENT AND RECORD OF DECISION

### CONTENT

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  - 8.4 EIS Distribution
  - 8.5 Preparing the Final EIS
  - 8.6 Preparing the Record of Decision
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  - 8.8 Tiering of Environmental Impact Statements



# THE ENVIRONMENTAL IMPACT STATEMENT AND RECORD OF DECISION

**W**hereas Chapter 7 described where the Environmental Impact Statement (EIS) fits into the overall National Environmental Policy Act (NEPA) process, this section describes the format and content of an EIS (Draft and Final) and the Record of Decision (ROD) that follows the Final EIS. Although less than 5 percent of all Federal Highway Administration (FHWA) projects involve EISs, these are the projects that require the most time and effort to complete. Because of the range and significance of resource topics covered in an EIS, the District of Columbia Department of Transportation (DDOT) project manager must coordinate with a wide range of specialists to properly describe existing conditions in the study area and the project's potential impacts (beneficial and adverse). The intent of this section is to assist the project manager in understanding not only the component pieces of an EIS, but also the general content of each section so that judgments can be made on the thoroughness of the document. Ensuring that technical specialists properly identify the natural and socioeconomic resources in the

project area and describe the project's resource impacts in a way that meets the regulatory agencies' needs is critical to developing a document that can be approved by FHWA and supported by local and federal agencies.

The following section begins with background information to familiarize the reader with the EIS and the key legislation and guidance for preparing an EIS. Following the background, the components of a Draft EIS and Final EIS and the contents of a ROD are described. The chapter ends with a brief discussion of the tiering process for EISs.

## 8.1 EIS Basics

### 8.1.1 What is an EIS?

An EIS is a full-disclosure document describing the potential effects of a project on the environment, as described in the regulations of the United States Council on Environmental Quality (CEQ) (40 Code of Federal Regulations [CFR] Parts 1500-1508). "Environment" is defined as the natural

and physical environment and the relationship of people with that environment. This means that the “environment” considered in an EIS includes land, water, air, structures, living organisms, environmental values at the site, and the social, cultural, and economic aspects. An “impact” is a change in consequence that results from an activity. Impacts can be positive or negative or both, and in EISs there are direct, indirect, and cumulative impacts. An EIS describes impacts, as well as ways to “mitigate” impacts. To “mitigate” means to lessen or remove negative impacts.

### 8.1.2 Why is an EIS Needed?

The ultimate purpose of the EIS is to assist in decision making, “to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment” (43 CFR 55990 Section 1500.1, CEQ Regulations).

### 8.1.3 When is an EIS Prepared?

An EIS, which is classified as a Class I action by FHWA, is the most thorough and comprehensive level of NEPA documentation. It is prepared when DDOT, in consultation with FHWA, determines that the action is likely to cause significant impacts on the environment. In determining the significance of an action, the entire human environment, the affected region, and the interests of the local area must be analyzed. Both short-term and long-term effects must be taken into account.

Significance, as used in NEPA, requires considerations of both context and intensity. Significance varies with the setting of the proposed action.

- Context: The significance of an action must be analyzed in several contexts such as society as a whole (human,

national), the affected region, affected interests, and the locality.

- Intensity: This refers to the severity of the impact—that is, the degree to which the action affects public health or safety or sensitive species (flora or fauna).

An EIS is prepared for projects that are defined under 23 CFR 771.115, or for which FHWA has determined individually that an EIS is required. Some examples of the types of projects normally requiring the preparation of an EIS include:

- Proposed construction of new access-controlled freeways
- A highway project of four or more lanes on a new location
- New construction or extension of fixed rail transit facilities
- New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility

### 8.1.4 What is included in an EIS?

An EIS discusses the physical, biological, and social elements in the project’s environment. The major sections of an EIS discuss the purpose and need for the proposed action; existing conditions; affected environment; alternatives considered to avoid and minimize impact, including the No Action Alternative and those considered and eliminated; the environmental effects (both adverse and beneficial) of the proposed action; and the results of coordination with federal, state, and local agencies and the public.

## 8.2 Summary of Key Legislation, Regulations, and Guidance

This chapter contains multiple references to several key regulations or guidance, particularly FHWA Technical Advisory (TA) T6640.8A, 23 CFR Part 771, 40 CFR Parts 1500–1508, and the CEQ’s 40 Questions. A brief description of key legislation and regulation is found below.

- 40 CFR Parts 1500–1508, Regulations for Implementing NEPA: The regulations in this section of the CFR were issued by CEQ in 1978 and were amended once in 1986. This section sets forth requirements for implementing NEPA, with the directive that individual federal agencies must develop regulations for implementing NEPA that are specific to the mission of the particular agency.
- 23 CFR Part 771, FHWA Environmental Impact and Related Procedures: As noted above, individual federal agencies were directed to develop regulations to implement NEPA within the context of the agency’s mission. This section of Title 23 establishes the requirements for FHWA projects.
- CEQ’s Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (40 Questions): While 40 Questions does not have the same legal standing as CEQ’s NEPA regulations, this document is perhaps the next best source of information regarding NEPA implementation. CEQ issued the 40 Questions to address the most frequently asked questions regarding 40 CFR Parts 1500–1508.
- FHWA TA T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents: FHWA TA T6640.8A and subsections within it are heavily referenced throughout the environmental portions of this manual. This document, issued October

30, 1987, contains a wealth of information about the content and format of environmental documentation on FHWA projects, including Section 4(f) Statements. While FHWA TA T6640.8A is not a regulatory document, it is a critical guidance document for all projects developed under FHWA jurisdiction.

## 8.3 Preparing the Draft EIS

The format and content requirements for an EIS are described in the CEQ regulations and FHWA regulations, 23 CFR 771.

The use of plain language and graphics in EISs is encouraged. Impact discussions should be concise and appropriate to the issues. Discussion of the affected environment and environmental consequences should be limited to those elements germane to the action being evaluated.

CEQ recommends that the text of Final EISs should be less than 150 pages. For those proposals of unusual scope or complexity, the text should be less than 300 pages.

The required elements of an EIS are listed below. They serve to introduce the reader to the project; to set forth the details of the proposed action, its impacts, and the mitigation of those impacts; to summarize coordination; and to distinguish changes between the draft and final statements.

- Title/Cover Sheet/Policy Statement
- Abstract
- Summary
- Table of Contents
- Purpose and Need

- Description of Alternatives, Including the Proposed Action
- Affected Environment
- Environmental Consequences
- Public Involvement
- Economic Advantages and Disadvantages
- Irreversible or Irrecoverable Commitments of Resources
- Short-Term Uses of Environment and Long-Term Productivity
- List of Preparers
- References
- Index
- Appendices
  - Agency Circulation List
  - Comments and Coordination (Results of the Scoping Process)
  - Responses to Comments on Draft EIS (in Final EIS Only)

The Draft EIS, Final EIS, and ROD should not be submitted to FHWA (or lead agency) before the designated environmental staff (Environmental Program Coordinator or designee) review and approve the document.

### 8.3.1 Title Sheet/Policy Statement

The title (or cover) sheet should include:

- The name of the lead agency and cooperating agencies
- The designation of Draft, Final, or Supplemental EIS and whether it includes Section 4(f), Section 6(f), or Section 106 evaluations
- The title of the proposed action
- The location of the action
- The federal project number
- Name(s), address(es), and telephone number(s) of information contact person(s)
- A date by which comments are due
- A designation of where comments should be sent

An EIS that contains a Section 4(f) evaluation shall include the reference to 49 United States Code (USC) 303. The reference shall be excluded if there is no Section 4(f) evaluation in the federal EIS.

A code, which will be provided by FHWA, will be included at the top left-hand corner designating the federal agency, state, type of document, year prepared, the number assigned to the statement, and whether the document is a Draft, Final, or Supplemental [for example, FHWA DC EIS 07 01 F].

The policy statement indicating that the EIS has been prepared in compliance with the NEPA process is required. The policy statement may be placed either on the back of the cover sheet or as the first page of the document.

A brief abstract of the statement will be printed on the cover.

An example title sheet is shown in Figure 8-1, Example Title Sheet. An example policy statement is shown in Figure 8-2, Example Policy Statement.

### 8.3.2 Summary

The summary should not exceed 15 pages. It is intended to assist reviewers by providing an easily accessible overview of the proposed action. The summary should be placed in the document in such a way that it can be reproduced separately

**Figure 8-1 Example Title Sheet**

FHWA-DC-EIS-07-01-F

**11th STREET BRIDGES**  
Anacostia Freeway (I-295/DC 295) to the Southeast/ Southwest Freeway (I-695),  
Washington, DC

**FINAL ENVIRONMENTAL IMPACT STATEMENT**

Submitted Pursuant to: 42 U.S.C. 4332 (2) (c) and 49 U.S.C 303

By:

U.S. Department of Transportation  
Federal Highway Administration  
and  
District of Columbia Department of Transportation

SEP 11, 07  
Date of Approval

  
Ardeshir Nafici  
Associate Director/Chief Engineer (Acting)  
District of Columbia Department of Transportation

9/25/07  
Date of Approval

  
Mark Kehring  
Division Administrator  
Federal Highway Administration

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The District Department of Transportation (DDOT) and the Federal Highway Administration (FHWA) have proposed improvements to the highway connection between the Southeast/ Southwest Freeway (I-695) and the Anacostia Freeway (I-295 and DC-295) in Southeast Washington, DC. The project would replace obsolete infrastructure, provide missing freeway connections to improve traffic flow to and from downtown Washington, DC, discourage cut-through traffic on neighborhood streets, improve local access, and better link land uses across the Anacostia River. A Preferred Alternative has been identified.

This final environmental impact statement analyzes four Build Alternatives, the Preferred Alternative, and a No-Build Alternative for their potential effects on the human and natural environment. The analysis considers construction and the cumulative effects of proposed improvements.

This final environmental impact statement will be available for public review until November 20, 2007.

## Figure 8-2 Example Policy Statement

### National Environmental Policy Act Statement

The National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4332) requires that all federal agencies prepare a detailed Environmental Impact Statement (EIS) for major federal actions that will significantly affect the quality of the human environment. The Federal Highway Administration (FHWA) is therefore required to prepare an EIS for proposals funded under its authority if such proposals are determined to be major actions significantly affecting the quality of the human environment.

The EIS process is carried out in two stages. The Draft EIS is circulated for review by federal, state, and local agencies with jurisdiction by law or special expertise, and made available to the public. The Draft EIS must be made available to the public at least 15 days before the public hearing, and no later than the first public hearing notice. A minimum 45-day comment period is provided from the date the Draft EIS availability notice is published in the Federal Register. WisDOT must receive agency and public comments on or before the date listed on the front cover of the Draft EIS unless a time extension is requested and granted by comment period has elapsed, work may begin on the Final EIS.

The Final EIS includes the following:

1. Identification of the recommended course of action (alternative), and the basis for its recommendation.
2. Basic content of the Draft EIS along with any changes, updated information, or additional information as a result of agency and public review.
3. Summary and disposition of substantive comments on social, economic, environmental, and engineering aspects resulting from the public hearing/public comment period and agency comments on the Draft EIS.
4. Resolution of environmental issues and documentation of compliance with applicable environmental laws and related requirements.

Final administrative action by FHWA (Record of Decision) cannot occur sooner than 90 days after filing the Draft EIS, or 30 days after filing the Final EIS with the U.S. Environmental Protection Agency. Both the Draft and Final EIS are full-disclosure documents that provide descriptions of the proposed action, the affected environment, alternatives considered, and an analysis of the expected beneficial or adverse environmental effects.

### General Reviewer Information

Major topics are divided into sections, each with a separate page-numbering sequence. Exhibits pertaining to each section are located at the end of the section to minimize disruption of the narrative discussions.

An overall project exhibit showing the Alternatives selected for detailed study is located at the end of the document, and is titled Aerial Photo Exhibit. This exhibit is referenced throughout the sections as "Aerial Photo."



for purposes of public involvement as may be required. The summary shall emphasize the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the alternatives).

The summary should include the following.

- A brief description of the proposed action indicating route, termini, type of improvement, number of lanes, length, county, city, state, functional classification, and similar items, as appropriate.
- A description of any significant actions proposed by other government agencies in the same geographic area as the proposed action.
- A summary of the reasonable alternatives considered and whether they meet the project's purpose and need. If they are not proposed for adoption, indicate why not. Identify which, if any, of the alternatives is the preferred alternative. The Final EIS should identify and justify the preferred alternative.
- A summary of significant environmental impacts.
- Highlights of the public involvement process.
- Any areas of controversy (including issues raised by agencies and the public).
- Any major issues to be resolved.
- A list of other federal or state actions required because of this proposed action (such as permit approvals).
- Proposed mitigation.
- A discussion of economic advantages and disadvantages.

- The summary should include a comparative table of impacts or a matrix providing the reader with a one-page tabular comparison, by alternative, of existing and anticipated traffic volumes (average daily traffic), costs, acquisition and relocation requirements, noise and air quality, and environmental and social impacts.

### 8.3.3 Table of Contents

A table of contents should be provided for all major sections and subsections within the EIS. It should also contain a list of tables and figures. The table of contents should reflect the following sections of the document, at a minimum.

- Summary
- Purpose of and Need for Action
- Alternatives
- Affected Environment
- Environmental Consequences
- List of Preparers
- List of Agencies, Organizations, and Persons to Whom Copies of the Statement are Sent
- Comments and Coordination
- Index
- Appendices (if any)

The Mapped Environmental Impact Statement Project Delivery Process in the District of Columbia is shown in Figure 8-3.

### 8.3.4 Purpose and Need

This section should identify the problem, describe the requested action, and present the time frame for the proposed action. This section should clearly identify the

purpose and need for the action and clearly demonstrate a need for the project. The following is a list of items that may assist in the explanation of the need for the proposed action. It is not all-inclusive or applicable to every project and is intended only as a guide.

- System Linkage – Is the proposed project a “connecting link?” How does it fit in the system? Is it an “essential gap” in the system?
- Transportation Demand – Including relationship to any statewide plan or adopted urban transportation plan.
- Capacity – Is the capacity of the present facility inadequate for the present traffic? Projected traffic? What capacity is needed? What is the level of service?
- Social Demands or Economic Development – New employment, schools, land use plans, recreation, etc. What projected economic development/land use changes indicate the need to improve or add to the highway capacity?
- Modal Interrelationships – How will the proposed facility interface with and serve to complement airports, rail and port facilities, mass transit services, and other similar entities?
- Condition of Existing Facility – Relate to standards and maintenance costs.
- Safety – Is the proposed project necessary to correct an existing or potential safety hazard? Is the existing accident rate excessively high? Why? How will the proposed facility improve it?
- Legislative Authority – federal, state, or local governmental authority (legislation) directing the action.

A solid purpose and need will establish why the expenditure of funding is necessary, justify why the environmental impacts of the project are necessary, and help to limit the range of alternatives by providing specific goals. With all of the focus placed on defining the goals of the proposed action, the purpose and need should also help demonstrate what will happen if the action is not taken.

By establishing why there is a proposed action (the need) and what that action is to accomplish (the purpose), the purpose and need lays the groundwork for defining the range of alternatives. Alternatives that do not have potential to meet the purpose and need are not required to be discussed in the course of the NEPA document, thus reducing the amount of study required.

Tables and graphics should be used to efficiently convey supporting information and data. The purpose and need will be reviewed and approved by FHWA prior to any publication, including concurrence point meetings.

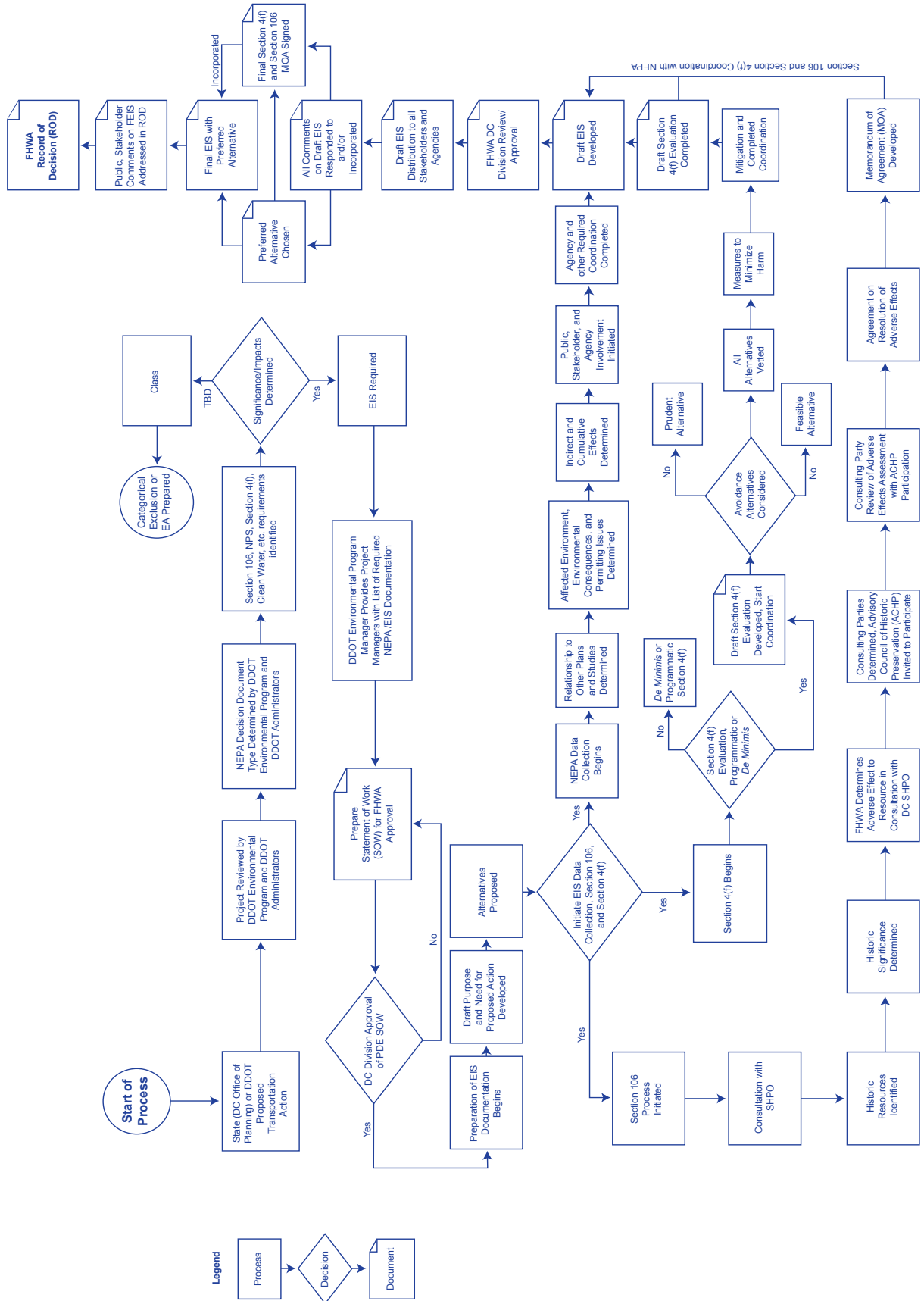
### 8.3.5 Alternatives

This section should rigorously explore and objectively evaluate all reasonable alternatives, including the proposed actions, and discuss why other alternatives were eliminated from further analysis. All viable alternatives must be given equal treatment during analysis. In many cases, analysis will conclude that there may be several suboptions to any or all of the alternatives. For every project, the No Action Alternative must be analyzed.

According to FHWA TA T6640.8A, the following alternatives should be discussed in this chapter.

- “No Action” Alternative: The No Action Alternative must be included in the EIS and is used as the basis of comparison to other alternatives. While the term “no

Figure 8-3 Mapped Environmental Impact Statement Project Delivery Process in the District of Columbia



action” would seem to imply that no work would occur under that alternative, no action may include routine maintenance and upkeep of the existing facility. These activities may have environmental impacts (such as water quality impacts from runoff or vegetative impacts from ditch cleaning) and transportation impacts resulting from the No Action Alternative’s ability (or lack thereof) to meet the project’s purpose and need.

- **Transportation System Management (TSM) Alternative:** The TSM alternative includes those activities which maximize the efficiency of the present system such as fringe parking, ridesharing, high-occupancy vehicle (HOV) lanes on existing roadways, and traffic signal timing optimization. This limited construction alternative is usually relevant only for major DDOT projects. For all major projects in the District of Columbia, HOV lanes should be considered.
- **Mass Transit:** This alternative includes those reasonable and feasible transit options (bus systems, rail, and other such services) even though they may not be within the existing FHWA funding authority. Where applicable, cost-effectiveness studies that have been performed should be summarized in the EIS.
- **Build Alternatives:** Both improvement of existing highway(s) and alternatives on new locations should be evaluated. A representative number of reasonable alternatives must be presented and evaluated in detail in the Draft EIS.

Each alternative should be briefly described using maps or other visual aids to help explain the various alternatives. The material should provide a clear understanding of each alternative’s termini, location, costs, and the project concept (number of lanes, right-of-way requirements, median

width, access control, and other pertinent information). To avoid duplication between the Alternatives section and the Environmental Consequences section of the document, the Alternatives section should be devoted to describing and comparing the alternatives.

### **Alternatives Development and Documentation**

Only a reasonable number of alternatives must be developed and evaluated for a proposed action. In determining the reasonable number of alternatives, consideration should be given to identifying alternatives that are “representative” of the range of potential alternatives and not just reasonable in number. For example, when screening potential alignments, care should be given to ensure that the alternatives to be evaluated are representative of the different locations in which an alignment could be drawn.

Documenting the process used to identify alternatives and the considerations given to resource issues is a critical element of identifying alternatives. As the project develops and the NEPA documentation is prepared, it is important to discuss the measures that were taken to avoid and minimize impacts to resources. Likewise, the methodology and sources of information used while developing the alternatives should be documented. In addition, a technical memorandum describing the alternatives development process is usually completed and summarized in the environmental document.

### **Alternatives Evaluation and Documentation**

All alternatives under consideration (including the No Action Alternative) should be developed to a comparable level of detail in the Draft EIS so that their comparative merits may be fairly evaluated. This comparable level of detail should be maintained until there is sufficient information to clearly dismiss an alternative from further

consideration based on impacts, transportation performance, and/or an inability to meet the purpose and need.

A careful screening process and diligent efforts to include resource information as early as possible in the process will lessen the potential that an alternative may be reconsidered. However, during the course of project development, additional information may become available that makes a previously dismissed alternative appear reasonable.

Development of more detailed design for some aspects (Section 4(f), United States Army Corps of Engineers [USACE] permits, noise, or wetlands, for example) of one or more alternatives may be necessary during the Draft EIS to evaluate impacts or to address issues raised by agencies or the public. However, care should be taken to avoid unnecessarily specifying features that preclude cost-effective final design options.

As with the process for identifying alternatives, the alternatives evaluation process should be documented and the contents summarized in the Draft EIS.

A table or matrix should be provided to compare the alternatives. The identification of a preferred alternative does not release DDOT from the requirement of preparing a document that is unbiased in its treatment of alternatives and their impacts. The range of alternatives will be reviewed and approved by FHWA prior to any publication, including concurrence point meetings.

### **Preferred Alternative**

The preferred alternative is referred to as the “agency’s preferred alternative” in CEQ regulations and CEQ’s 40 Questions. It is the alternative that DDOT and FHWA believe would best fulfill the purpose and need while

giving appropriate consideration to the environmental and socioeconomic effects of the alternatives considered.

In those situations where DDOT has officially identified a preferred alternative based on its early coordination and environmental studies, it will also be indicated in the Draft EIS. In these instances, the Draft EIS should include a statement indicating that the final selection of an alternative will not be made until the alternatives’ impacts and comments on the Draft EIS and from the public hearing (if held) have been fully evaluated.

Where a preferred alternative has not been identified, the Draft EIS should state that all reasonable alternatives are under consideration and that a decision will be made after the alternatives’ impacts and comments on the Draft EIS and from the public hearing have been fully evaluated.

For the Final EIS, the agency is required to specify the preferred alternative. The environmentally preferred alternative may also be identified in the Final EIS, and must be identified in the ROD. The environmentally preferred alternative is considered the one that would cause the least damage to the biological and physical environment. It means the alternative that best protects, preserves, and enhances historic, cultural and natural resources. It also means the alternative that best ensures a degree of balance in the distribution of adverse impacts such that no minority population or low-income population is disproportionately affected as a result of the proposed action and, should this be the case, identifies and clearly articulates adequate and appropriate measures to minimize and mitigate the negative impacts on the affected group.

The Final EIS must identify which recommendation was selected and why. The “why” should be explained in a

concise manner, using public hearing results and comments received on the Draft EIS to support the selection.

### 8.3.6 Affected Environment

FHWA TA T6640.8A suggests that the Affected Environment section of the EIS present information needed to understand the potential impacts of the alternatives to the proposed action. This section should provide a concise description of the existing social, economic, and environmental conditions for the area affected by all alternatives presented in the EIS. Where possible, the description should be a single description for the general project area rather than a separate one for each alternative.

The discussion should be limited to data, information, issues, and values that will have a bearing on possible impacts, mitigation measures, and on the selection of an alternative. Data and analyses should be commensurate with the importance of the impact, with the less important material summarized or referenced rather than being reproduced.

The Affected Environment discussion should provide information about the existing conditions for the resources listed in the bullets below that may be impacted by the project. Refer to Chapter 25, Socioeconomic Resources, for more information about the type of socioeconomic data to include in the Affected Environment section and Chapters 17 (Water Quality Policy and Regulations), 18 (Floodplain Policy and Regulations), 19 (Wetlands and Waters of the U.S.), and 20 (Biological Resources) for more information about the type of natural resource information to include in the Affected Environment discussion.

- Existing and planned land uses, zoning, and growth trends in the project area, including residential, commercial and industrial areas
- Wildlife and waterfowl refuges, wetlands, floodplains, parks, water resources, recreational facilities, threatened and endangered species, hazardous waste sites, and sites of historic, architectural or archaeological significance
- Community schools, religious institutions, health facilities, utility services, and adjacent political jurisdictions affected by the proposed development
- Features with visual and aesthetic values
- Populations (including an identification of minority populations and low-income populations), employment characteristics, economic trends, and community and neighborhood characteristics
- Other planned and developed activities in the affected area such as highways and other transportation projects, housing development, and relocations that are interrelated to the proposal and/or that would produce cumulative impacts
- Existing noise and air quality data

Photographs, illustrations, and other graphics should be used with the text to give a clear understanding of the area and the important issues. Federal activities that contribute to the significance of the proposed action's impacts should be described.

This section should also briefly describe the scope and status of the planning processes for the local jurisdictions and the project area. Maps of any adopted land use and transportation plans for these jurisdictions and the project area would be helpful in relating the proposed project to the planning processes.

### 8.3.7 Environmental Consequences

The purpose of this section is to discuss the project's potential direct, indirect, and cumulative environmental, social, and economic effects resulting from the alternatives, and to discuss measures that could be used to mitigate adverse impacts.

Direct effects are caused by the proposed action and occur during construction (at the same time and place).

Indirect effects are caused by the proposed action and occur later in time (later than construction) or farther removed in distance (from the proposed right-of-way) but are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate and related effects on air, water, and other natural systems.

Cumulative impacts result from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (federal or nonfederal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. The indirect effects and cumulative impacts can be discussed under each applicable resource topic or they can be separate subsections within the environmental consequences chapter. There is a wealth of guidance on indirect (secondary) and cumulative impacts. CEQ published a document titled *Considering Cumulative Effects Under the National Environmental Policy Act* (January 1997). FHWA developed a memorandum titled *Questions and Answers Regarding the Consideration of Indirect and Cumulative Impacts in the NEPA Process* that also contains a list of other indirect and cumulative impact

references. The memorandum can be found at <http://www.environment.fhwa.dot.gov/guidebook/qaimpact.asp>.

Section 101(b) of NEPA requires that federal agencies incorporate into project planning all practicable measures to mitigate adverse environmental impacts resulting from the proposed action. Mitigation concepts can be discussed as part of each applicable resource topic in this chapter or it can be discussed in a separate chapter. If mitigation is discussed in a separate section, it is normally titled "Measures to Minimize Harm or Measures to Minimize Adverse Effects," and it is placed after the Environmental Consequences chapter.

The information in the Environmental Consequences chapter should have sufficient scientific and analytical substance to provide a basis for evaluating the comparative merits of the alternatives. As stated in FHWA TA T6640.8A, "The discussion of the proposed project impacts should not use the term significant in describing the level of impacts. There is no benefit to be gained from its use."

There are two commonly used approaches to this section.

- List the alternatives and discuss the impacts and mitigation measures under each alternative
- List all the potential impacts and issues and discuss their effects under each alternative

Include the mitigation measures that would pertain to each impact.

When the Final EIS is prepared, the impacts and mitigation measures associated with the selected alternative may require more discussion than those in the Draft EIS. In discussing both beneficial and adverse impacts, the following

information should be included in both the Draft and Final EISs.

- A summary of studies undertaken and major assumptions made, with enough data or cross referencing to determine the validity of the methodology.
- Sufficient information to establish the reasonableness of the conclusions concerning impacts.
- A discussion of mitigation measures. Prior to completion of the Final EIS, these measures should be investigated in appropriate detail so that a commitment can be made to implement them.

Results of scoping meetings, public involvement and information meetings, interviews, and comments received will be used in analyzing potential impacts. It is important that the positive and negative effects of not building the project be included in this section.

Special instances may arise when a formal program for monitoring impacts or mitigation measures will be appropriate. In these instances, the Final EIS should describe the monitoring program. The EIS should include a discussion on the means to mitigate adverse environmental impacts.

The remainder of this subsection discusses some of the potentially significant impacts of highway projects. These factors should be discussed only to the extent applicable for each project. The list is not all inclusive, and, in some cases, there may be other impact categories that will require study. With respect to relocation, socioeconomic, and land use impacts, it should be noted that these impacts alone, if not also related to impacts on the natural and physical environment, would not necessarily require the preparation of an EIS.

## Land Use Impacts

This discussion should identify the current development trends in the project area and the District of Columbia Office of Planning plans and policies on land use and growth in the area that will be affected by the proposed project.

This subsection should indicate the total amount of new right-of-way required by the proposed project, and describe/quantify the amount of right-of-way being taken from each land use category. This discussion should deal with the land directly affected by the project (land converted from its existing use to transportation use), as well as land outside the immediate right-of-way that may be ultimately affected by the proposed improvements (by changing access or other means).

The land use discussion should assess the consistency of the alternatives with local plans such as the Washington, D.C. Comprehensive Plan, the Citywide Strategic Plan, the National Capital Planning Commission Legacy Plan, Neighborhood Action Plans (for the city's eight wards), and regional plans such as the Constrained Long-Range Transportation Plan (CLRP). The secondary social, economic, and environmental impacts of any substantial, foreseeable, induced development should be presented for each alternative, including potential adverse effects on existing communities. Where possible, the distinction between planned and unplanned growth should be identified.

## Social Impacts

In addition to relocation impacts (see next topic), the EIS will contain an estimate of expected changes in lifestyle for neighborhoods or various groups (such as minority and low-income groups) as a result of the proposed action. These changes might be either beneficial or adverse. Impacts might



include dividing the neighborhoods and changing area land use that may cause impacts to minority populations and low-income populations.

Discuss whether the proposal would change travel patterns, including vehicular, commuter, or pedestrian patterns. A subsection on traffic and access patterns should be contained in this chapter. The impacts of alternatives on highway and traffic safety, as well as on overall public safety, shall be discussed.

Include a discussion of impacts to public services and facilities, as well as economic impacts affecting employment, changes in property values and corresponding tax base changes, and changes in future growth. Any significant impacts on the economic viability of affected municipalities, including construction related impacts, should also be discussed together with a summary of any efforts taken and agreements reached for using the transportation investment to support both public and private development plans. Refer to Chapter 25, Socioeconomic Resources, for more information about socioeconomic issues that could be included in this section.

### **Relocation Impacts**

Relocation impacts should be summarized in sufficient detail to adequately explain the necessity for relocation, including anticipated problems and proposed solutions. Project relocation documents from which information is summarized should be referenced in the EIS. Secondary sources of information, such as census data, economic reports, and contact with community leaders supplemented by visual inspections (and, as appropriate, contact with local officials) may be used to obtain the data for this analysis.

If relocation of residences is involved, the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 must be met. If business relocation would cause appreciable economic hardship on the community or on groups within the community (such as minority groups or low-income groups), if significant changes in employment would result directly from the action, or if community disruption is considered substantial, then the EIS will include a detailed explanation of the effects and reasons why potentially significant impacts cannot be avoided.

- Provide an estimate of the number of households to be displaced and their characteristics, such as single family, multi-units, number bedrooms, and similar information.
- Describe the racial/ethnic composition and income levels of the affected households or businesses.
  - When more than one minority group is present within a given project area, it may be more appropriate to determine, for each racial/ethnic category, the corresponding ratios of the affected households and businesses to the total number of households and businesses within that category. Where several minority groups are affected, distinctions among groups should always be made. For example, determine how many Hispanic households or businesses are affected out of the total number of Hispanic households and businesses. The impact on minority groups should be assessed separately because perceptions and values may differ among groups. Consequently, minority groups may not be summarily lumped together as a uniform group.

- Compare the ratios of the affected minority/ ethnic groupings and the ratio of the low-income group to the ratios of the affected nonminority or non low income populations to ensure that disproportionately high and adverse impacts are not incurred by a minority population or low-income population.
- Describe whether the proposed action will affect the community by dividing neighborhoods, isolating residences or services, or changing the values of the community.
- Describe, if possible, the housing and neighborhoods available to the relocated residents. Discuss whether secondary impacts will result in the neighborhoods with available housing as a result of new residents.
- Describe any special advisory services that will be necessary for unique relocation problems.
- Discuss the actions proposed to remedy insufficient relocation housing.
- Provide an estimate of the number, type, and size of businesses to be displaced.
- Discuss the results of early consultation with the local government(s), community-based organizations, and any early consultation with businesses potentially subject to displacement, including any discussions of potential sources of funding, financing, planning for incentive packaging (such as tax abatement, flexible zoning, or building requirements), and advisory assistance which has been or will be furnished along with other appropriate information.

The effects on each group should be described to the extent reasonably predictable. The analysis should discuss how the relocation caused by the proposed project will facilitate or inhibit access to jobs, schools, and other educational facilities, religious institutions, health and welfare services, parks and recreational facilities, theaters, neighborhood centers, or other social and cultural facilities, pedestrian facilities, shopping facilities, and public transit services.

The EIS must include statements that express the following assurances.

- The acquisition and relocation program will be conducted in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended.
- Relocation resources are available to all relocated residents and businesses, without discrimination.

### **Economic Impacts**

Where there are foreseeable economic impacts, the EIS should discuss the following for each alternative, commensurate with the level of impacts.

- The economic impacts on the regional and/or local economy such as the effects of the project on development, tax revenues and public expenditures, employment opportunities, accessibility, and retail sales. Where substantial impacts on the economic viability of affected wards, communities, or neighborhoods are likely to occur, they should also be discussed together with a summary of any efforts undertaken and agreements reached for using the transportation investment to support both public and private economic development plans. To the extent possible, this discussion should rely

upon results of coordination with and views of affected federal and District officials and upon studies performed.

- Impacts of the proposed action on established business districts and any opportunities to minimize or reduce such impacts by the public and/or private sectors. This concern is likely to occur on a project that might lead to or support new large commercial development that would adversely affect an existing business district.

### Environmental Justice

Presidential Executive Order on Environmental Justice 12898 requires all federal agencies to address the impacts of their programs with respect to environmental justice. The Executive Order states, that to the extent practical and permitted by law, neither minority nor low income populations may receive disproportionately high or adverse impacts as a result of a proposed project.

The effects of a project on the elderly, disabled, nondrivers, transit-dependent, and minority and ethnic groups are of particular concern and should be described to the extent these effects can be reasonably predicted. Where impacts on a minority or ethnic population are likely to be an important issue, the EIS should contain the following information broken down by race, color, and national origin.

- The population of the study area
- The number of displaced residents
- The type and number of displaced businesses
- An estimate of the number of displaced employees in each business sector

Changes in ethnic or minority employment opportunities should be discussed, and the relationship of the project to

other federal actions that may serve or adversely affect the ethnic or minority population should be identified.

The discussion should address whether any social group is disproportionately affected and identify possible mitigation measures to avoid or minimize any adverse impacts. If an environmental justice impact is identified, the environmental consequences discussion should include the public involvement process used to coordinate with the affected persons. This discussion should note what groups were involved, where and how frequently meetings were held, and the results of that coordination. Secondary sources of information, such as census data and personal contact with community leaders, supplemented by visual inspections, should be used to obtain the data for this analysis. However, for projects with major community impacts, a survey of the affected area may be needed to identify the extent and severity of impacts on these social groups.

### Air Quality Impacts

Under the authority of the Clean Air Act, the United States Environmental Protection Agency (USEPA) has established nationwide air quality standards to protect public health and welfare. These federal standards, known as the National Ambient Air Quality Standards (NAAQS), represent the maximum allowable atmospheric concentrations of pollutants and were developed for seven “criteria” pollutants.

- Ozone (O<sub>3</sub>)
- Nitrogen dioxide (NO<sub>2</sub>)
- Carbon monoxide (CO)
- Particulate matter equal to or less than 10 microns in equivalent diameter (PM<sub>10</sub>)
- Particulate matter equal to or less than 2.5 microns in equivalent diameter (PM<sub>2.5</sub>)

- Sulfur dioxide (SO<sub>2</sub>)
- Lead

One of the key concepts in understanding air quality issues related to transportation projects is “attainment.” Attainment refers to whether EPA has designated the study area as being in attainment of the NAAQS. If an area does not meet the standard, it is designated as a “nonattainment” area for that pollutant. Areas that were previously designated as nonattainment areas but have now met the standard (with EPA approval of a suitable air quality plan) are called maintenance areas. As of December 2007, the Washington, D.C. area has been designated as a nonattainment area for O<sub>3</sub> and PM<sub>2.5</sub> and a maintenance area for CO. In CO and PM<sub>10</sub> nonattainment and maintenance areas, projects cannot cause or contribute to any new, localized CO or PM<sub>10</sub> violations or increase the severity of existing violations. The Washington, D.C. area is in attainment for all other criteria pollutants.

Air quality impacts are analyzed at a regional or “mesoscale” level and at a localized or “microscale” level, depending upon the pollutant being evaluated. The regional or mesoscale analysis of a project determines its overall impact on regional air quality levels. In the Washington, D.C. region, transportation projects are analyzed as part of a regional transportation network developed by Metropolitan Washington Council of Governments. Projects included in this network are those identified in the CLRP and the Transportation Improvement Plan (TIP) for the region. The CLRP/TIP includes a regional analysis, the results of which are used to determine if an area is in conformity with regulations set forth in the Clean Air Act Amendments Final Conformity Rule.

Microscale air quality analysis of the Proposed Action is performed by using computer modeling software to predict CO and PM<sub>10</sub> concentrations in emissions from motor vehicles using roadways immediately adjacent to a specific location or intersection. Emissions are predicted for both existing conditions and future conditions that reflect both the No Action condition and the implementation of the Proposed Action. The future No Action condition is the baseline against which the Proposed Action is compared.

The focus of the EIS documentation should be to describe the ambient air quality conditions, the analyses required to prove that the project will not degrade existing air quality, and the results of the analyses. Refer to Chapter 14, Air Quality Policy Regulations, for information relating to the air quality analyses for an EIS.

### Noise Impacts

The EIS should summarize the key findings in the project’s noise analysis technical memorandum. The summary should include a brief description of the following.

- Background information on FHWA’s Noise Abatement Criteria (NAC) that establishes threshold levels of noise for various noise-sensitive areas (such as residences, businesses, hospitals, schools, or parks). The noise levels established in the NAC determine when noise impacts are considered to occur and when consideration must be given to noise abatement.
- A comparison of existing noise levels, future noise levels with the No Action Alternative, and future noise levels with the Build Alternative.
- A description of the number, type and location of receivers that would experience a noise impact as defined by FHWA.

- An evaluation of the potential abatement measures.

Refer to Chapter 15, Highway Noise Policy and Regulations, for more information about the steps in FHWA's highway traffic noise analysis that should be summarized in the EIS.

### **Water Quality Impacts**

The EIS should describe the ambient conditions of streams or water bodies that are likely to be affected and identify the potential impacts of each alternative. For most projects, published water quality data may be used to describe ambient conditions. The inclusion of water quality data spanning several years is encouraged to reflect trends. Obtaining water quality data from agencies such as the USACE, National Marine Fisheries Service (NMFS), United States Fish and Wildlife Service (USFWS), USEPA, and District Department of Health (Water Quality Division) is also recommended. Coordination with these agencies should be included in the EIS.

A discussion of any locations where roadway runoff may have potentially significant effects on water uses, including groundwater, is desired. The District of Columbia relies on the Potomac River for its public drinking water supply. This reliance has placed the focus for ambient water quality protection primarily on surface water. However, the District also seeks to protect ground water as a public and/or private raw drinking water source especially in the event of an emergency. Groundwater is also protected for other beneficial purposes such as irrigation, firefighting or geothermal heating/cooling. Further, as contaminants entrained in groundwater discharge to surface water bodies they may pollute the water column and impact the ecosystems. Because there are no sole-source aquifers in the District of Columbia, there is no need to discuss this issue under this subsection.

Impacts on rivers and streams should be discussed in terms of water quality changes resulting from the proposed action. The 1981 FHWA research report, Constituents of Highway Runoff; the 1985 report, Management Practices for Mitigation of Highway Stormwater Runoff Pollution; and the 1987 report, Effects of Highway Runoff on Receiving Waters, contain procedures for estimating pollutant loading from highway runoff and would be helpful in determining the level of potential impacts and appropriate mitigation measures.

If Section 402 or 404 permits (Clean Water Act) are required, these needs must be addressed in the EIS. A water quality certification (Section 401) is also required if these federal permits are needed.

Refer to Chapter 17, Water Quality Policy and Regulations, for more information relating to water quality.

### **Wetland Impacts**

All Draft EISs for projects involving new construction in wetlands should include sufficient information to:

- Identify the type of wetlands involved
- Describe the impacts on the wetlands
- Evaluate alternatives that would avoid the wetlands
- Identify practicable measures to minimize harm to the wetlands

Exhibits showing the wetlands in relation to the alternatives, including the alternatives to avoid construction in the wetlands, should be provided. Wetland mapping is available from the District Department of Health.

Executive Order 11990, Protection of Wetlands, requires federal agencies “. . . to avoid to the extent possible the long- and short-term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative. . . .”

In evaluating the impact of the proposed project on wetlands, the following items should be addressed: the importance of the affected wetland(s) and the severity of this impact. Merely listing the number of acres taken by the various alternatives of a highway proposal does not provide sufficient information upon which to assess the degree of impact on the wetland ecosystem. EIS documentation of the wetlands analysis should be sufficiently detailed to provide an understanding of these two elements.

In evaluating the importance of the wetlands, the analysis should consider such factors as:

- The primary functions of the wetlands (such as flood control, wildlife habitat, groundwater recharge)
- The relative importance of these functions to the total wetland resource of the area
- Other factors such as uniqueness that may contribute to the wetlands’ importance

In describing the wetland impact, the discussion should show the project’s effects on the stability and quality of the wetland(s). The EIS should note the short- and long-term effects on the wetlands and the importance of any loss such as:

- Flood control capacity
- Shoreline anchorage potential
- Water pollution abatement capacity

- Fish and wildlife habitat value

Knowing the importance of the wetlands involved and the degree of the impact, DDOT and FHWA will be in a better position to identify the mitigation efforts necessary to minimize harm to these wetlands. Mitigation measures that should be considered include preservation and improvement of existing wetlands and creation of new wetlands (consistent with 23 CFR 777).

The EIS shall identify any permits that are required. Permit requirements for proposals affecting wetlands may include the following:

- Section 402 of the Clean Water Act – This pertains to a discharge subject to a Pollutant Discharge Elimination System permit pursuant to the Clean Water Act when the surrounding environment is a wetland.
- Section 404 of the Clean Water Act – All wetlands draining into a navigable water are included as navigable waters for the purpose of this act.
- Section 10 of the Rivers and Harbors Act of 1899 – Under this Act, wetlands may also fall under the permit requirements of USACE due to obstruction or alteration of navigable waters of the United States.

If the preferred alternative is located in wetlands, the Final EIS needs to document, as required by Executive Order 11990, that there are no practicable alternatives to construction in wetlands. Where this finding is included, approval of the EIS will document compliance with the Executive Order 11990 requirements (23 CFR 771.125(a)(1)). The finding should be presented in a separate subsection entitled “Only Practicable Alternative Finding” and should be supported by the following information:

- A reference to Executive Order 11990
- An explanation why there are no practicable alternatives to the proposed action
- An explanation why the proposed action includes all practicable measures to minimize harm to wetlands
- A concluding statement:  
Based upon the above considerations, it is concluded that there is no practicable alternative to the proposed construction in wetlands and that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.

Coordination with the District Department of Environment, USFWS, and USACE is required when wetlands are affected. Refer to Chapter 19, Wetlands and Waters of the United States, for more information relating to wetlands analysis.

### **Water Body Modification and Wildlife Impacts**

Note: It is acceptable to separate this impact into separate categories if appropriate—Water Body Modification Impacts and Wildlife Impacts.

For each alternative under detailed study, the EIS should discuss the type and extent of water body modifications (such as impoundment, relocation, channel deepening, or filling). The use of the stream or body of water for recreation, water supply, or other purposes should also be identified. Potential impacts to fish and wildlife resulting from the loss, degradation, or modification of aquatic habitat should also be discussed.

The description of terrestrial impacts should include the type of habitat(s) affected (paved areas, woodlands, mowed lawn) and the loss of that habitat on wildlife (lost nesting and loafing habitat).

The results of coordination with appropriate federal and District agencies should be documented in the EIS (coordination with USFWS under the Fish and Wildlife Coordination Act of 1958, for example). Refer to Chapter 20, Biological Resources, for more information.

### **Floodplain Impacts**

Floodplains are defined in Executive Order 11988, Floodplain Management, as “the lowland and relatively flat areas adjoining inland and coastal waters including flood-prone areas of offshore islands, including at a minimum, that area subject to a one percent or greater chance of flooding in any given year” (that is, the area that would be inundated by a 100-year flood). The Executive Order directs federal agencies to reduce the risk of flood loss, to minimize the impact of floods, and to restore and preserve the values served by floodplains.

If the proposed alternatives are not within the limits of a floodplain, no further analysis is necessary. If the preferred alternative includes a substantial floodplain encroachment, the EIS must state that it is the only practicable alternative, as required by 23 CFR 650, Subpart A. The finding should refer to Executive Order 11988 and 23 CFR 650, Subpart A. It should be included in a separate subsection entitled “Only Practicable Alternative Finding” and must be supported by the following information.

- The reasons why the proposed action must be located in the floodplain

- The alternatives considered and why they were not practicable
- A statement indicating whether the action conforms to applicable local floodplain protection standards

Refer to Chapter 18, Floodplain Policy and Regulations, for additional information in addressing impacts within the limits of a floodplain.

### Threatened or Endangered Species

Federally listed endangered or threatened species are designated and protected under the Endangered Species Act, administered jointly by NMFS (for tidal waters) and USFWS (for terrestrial areas and nontidal waters).

DDOT should submit a request for data on the known occurrence of federally listed threatened or endangered species, or known supporting critical habitat, from NMFS and USFWS to meet the requirements of the Endangered Species Act of 1973 and the Fish and Wildlife Coordination Act. Coordination with the District of Columbia Fisheries and Wildlife Division is also recommended.

If USFWS or NMFS advises that federally listed threatened or endangered species are in the project area, an evaluation should be conducted to identify whether any such species or critical habitat are likely to be adversely affected by the project. Informal consultation with USFWS and/or NMFS should be undertaken during this evaluation. If the evaluation determines that the proposed action would affect the species, a biological assessment must be prepared, pursuant to Section 7 of the Endangered Species Act. This biological assessment should include:

- An onsite inspection of the area affected by the proposed project

- Interviews with recognized experts on the species at issue
- A literature review to determine the species distribution, habitat needs, and other biological requirements
- An analysis of possible impacts on the species
- An analysis of measures to minimize impacts forwarded to USFWS or NMFS for a biological opinion

Upon completing their review of the biological assessment, USFWS or NMFS may request additional information and/or a meeting to discuss the project or issue a biological opinion stating that the project:

1. Is not likely to jeopardize the threatened or endangered species
2. Will promote the conservation of the threatened or endangered species
3. Is likely to jeopardize the threatened or endangered species

In selecting a preferred alternative, jeopardy of an endangered or threatened species must be avoided. If either a finding of (1) or (2) is given, the requirements of the Endangered Species Act are met. If a detrimental finding is presented, the proposed action may be modified so that the species is no longer jeopardized. In unique circumstances, an exemption may be requested. If an exemption is denied, the action must be halted or modified. The Final EIS should document the results of the coordination of the biological assessment with USFWS or NMFS.

Refer to Chapter 20, Biological Resources, for additional information on assessing impacts to threatened and endangered species.



### **Historic and Archaeological Preservation**

The EIS should contain a discussion demonstrating that historic and archaeological resources have been identified and evaluated in accordance with the requirements of 36 CFR 800.4, Protection of Historic Properties, for each reasonable alternative under consideration. The discussion should describe the resources and summarize the impacts that each alternative will have on these resources that might meet the criteria for inclusion on the National Register of Historic Places (NRHP). There should be a record of coordination with the District of Columbia Historic Preservation Office (DCHPO) concerning the significance of the identified resources, the likelihood of eligibility for the National Register, and an evaluation of the effect of the project on the resources. The transmittal memorandum to the Advisory Council on Historic Preservation (ACHP) should specifically request consultation.

The proposed use of land from a historic resource on or eligible for the NRHP will normally require an evaluation and approval under Section 4(f). See Chapter 22, Section 4(f) – Parks, Recreation Areas, Historic Sites, and Wildlife and Waterfowl Refuges, for more information on the Section 4(f) process.

The Final EIS should demonstrate that all the requirements of 36 CFR 800 have been met. The FHWA District of Columbia Division does not sign off on a Final EIS until the Section 106 process has been completed (that is, An “Adverse Effect” Letter, or a Memorandum of Agreement [MOA] or programmatic agreement [PA] has been signed off by all relevant parties).

Refer to Chapter 21, Archaeological, Historical, and Paleontological Resources, for additional information on

archaeological, historical, and paleontological evaluation procedures.

### **Recreational Resources/Public Use Land**

This subsection should describe the proposed action’s impacts on the range of recreational resources in the project area. Because not all recreational resources are Section 4(f) resources, this section does not serve the same purpose as the Section 4(f) Evaluation. This section should clarify which resources are Section 4(f) properties to be addressed in the Section 4(f) chapter and which resources will only be evaluated in this section.

### **Hazardous Waste Sites**

Hazardous waste sites are regulated by the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). During early planning, the location of permitted and nonregulated hazardous waste sites should be identified. Early coordination with the appropriate USEPA regional office and the appropriate District agency will aid in identifying known or potential hazardous waste sites. If known or potential waste sites are identified, the locations should be clearly marked on a map in the EIS, showing their relationship to the alternatives under consideration. If a known or potential hazardous waste site is affected by an alternative, the EIS should discuss information about the site; the potential involvement, impacts, and public health concerns of the affected alternative(s); and the proposed mitigation measures to eliminate or minimize impacts or public health concerns.

If the preferred alternative affects a known or potential hazardous waste site, the EIS should address and document the resolution of issues raised by the public and government agencies.

Refer to Chapter 16, Hazardous Materials, for additional information on hazardous waste assessments.

### Visual Impacts

The EIS should state whether the project alternatives have a potential for visual quality impacts. When this potential exists, the EIS should identify the impacts to the existing visual resource, the relationship of the impacts to potential viewers of and from the project, and measures to avoid, minimize, or reduce the adverse impacts. Visual and aesthetics impacts should also be assessed from an environmental justice perspective. The EIS also should explain the consideration given to design quality, art, and architecture in the project planning. These values may be particularly important for facilities located in visually sensitive urban or rural settings.

When a proposed project will include features associated with design quality, art, or architecture, the EIS should be circulated to the Commission of Fine Arts, the National Capital Planning Commission, and, as appropriate, other organizations with an interest in design, art, and architecture. The EIS should identify any proposed mitigation for the preferred alternative.

### Energy

For most projects, the EIS should discuss in general terms the construction and operational energy requirements and conservation potential of various alternatives under consideration. The discussion should be reasonable and supportable. It might recognize that the energy requirements of various construction alternatives are similar and are generally greater than the energy requirements of the No Action Alternative. Additionally, the discussion could point out that the postconstruction, operational energy requirements of the facility should be less with the build

alternatives than with the No Action Alternative. In such a situation, one might conclude that the savings in operational energy requirements would more than offset construction energy requirements and thus, in the long term, result in a net savings in energy usage.

### Public Services and Utilities

The focus of the utilities discussion should be the project's potential impacts on major facilities such as transmission towers, substations, and major pipelines that would be difficult and costly to relocate. Evidence of coordination with the appropriate utilities should be included in the EIS.

Concerning public services, the EIS should discuss whether the proposed project would affect existing transit and/or school bus routes or affect emergency response times.

### Construction Impacts

The EIS should discuss the potential adverse impacts (particularly air, noise, water, traffic congestion, detours, safety, visual, and other affected portions of the environment) associated with construction of each alternative and identify appropriate mitigation measures. Also, where the impacts of obtaining borrow material or disposal of waste material are important issues, they should be discussed in the EIS along with any proposed measures to minimize these impacts. The EIS should identify any proposed mitigation for the preferred alternative.

### Permits

This section should list the permits (and agency consultation) that would be necessary before the start of construction. Examples of permits include:

- Section 7 Endangered Species Act Consultation – NMFS (or USFWS) has concluded that further (or no further)

consultation pursuant to Section 7 of the Endangered Species Act is required.

- Section 9 Rivers and Harbors Act – United States Coast Guard (USCG) requires a 401 permit and an approved environmental document among other requirements.
- Section 10 Rivers and Harbors Act – Permits are issued by USACE for any work in, over, or under navigable waters of the United States. USACE can authorize activities by a variety of permit types, and will make the determination on the type of permit needed following formal application.
- Section 404 of the Clean Water Act – Establishes a program to regulate the discharge of fill material into waters of the United States, including wetlands. USACE administers this section. The proposed project could be authorized under a Nationwide Permit or may require an Individual Department of the Army Permit depending on the selected alternative and impacts to project-area streams.

### **The Relationship between Local Short-Term Uses of the Environment and the Maintenance and Enhancement of Long-Term Productivity**

In this section, “short term” refers to the immediate effects occurring as a result of a project, and “long term” refers to those effects expected to last for many years. Both positive and negative effects should be addressed in this section.

The EIS should discuss in general terms the proposed action’s relationship between local short-term impacts and use of resources in the environment, and the maintenance and enhancement of long-term productivity. This general discussion might recognize that the build alternatives would have similar impacts. The discussion should point out that

transportation improvements are based on DDOT and/ or District of Columbia Office of Planning comprehensive planning, which considers the need for present and future traffic requirements within the context of present and future land use development. In such a discussion, it might then be concluded that the local short-term impacts and use of resources by the proposed action are consistent with the maintenance and enhancement of long-term productivity for the area under consideration.

### **Irreversible and Irretrievable Commitments of Resources Involved in the Proposed Action**

The primary purpose of this section is to identify those specific adverse impacts that are unavoidable and for which there is no mitigation that will prevent the loss of the resource.

The EIS should discuss in general terms the proposed action’s irreversible and irretrievable commitment of resources. This general discussion might recognize that the build alternatives would require a similar commitment of natural, physical, human, and fiscal resources. An example of such discussion would be as follows:

Implementation of the proposed action involves a commitment of a range of natural, physical, human, and fiscal resources. Land used in the construction of the proposed facility is considered an irreversible commitment during the time period that the land is used for a highway facility. However, if a greater need arises for use of the land or if the highway facility is no longer needed, the land can be converted to another use. At present, there is no reason to believe such a conversion will ever be necessary or desirable.

Considerable amounts of fossil fuels, labor, and highway construction materials such as cement, aggregate, and bituminous material are expended. Additionally, large

amounts of labor and natural resources are used in the fabrication and preparation of construction materials. These materials are generally not retrievable. However, they are not in short supply, and their use will not have an adverse effect upon continued availability of these resources. Any construction will also require a substantial one-time expenditure of both District of Columbia and federal funds that are not retrievable. The commitment of these resources is based on the concept that residents in the project area, the District of Columbia, and the region will benefit by the improved quality of the transportation system. These benefits will consist of improved accessibility and safety, savings in time, and greater availability of quality services, which are anticipated to outweigh the commitment of these resources.

### **Environmental Commitments**

This subsection would be found in the Final EIS. In the various sections of the Final EIS, DDOT and FHWA will make a number of environmental commitments. These commitments include measures to avoid potential impacts, measures to reduce impacts, measures to mitigate impacts, and measures to enhance an aspect of the project in order to produce an overall positive impact. The measures in other portions of the Final EIS should be summarized in this section by the resource category.

### **8.3.8 Section 4(f) Evaluation**

Section 4(f) of the Department of Transportation Act provides that the United States Secretary of Transportation shall not approve any program or project that involves the use of any publicly owned land from a public park, recreation area, historic site, or waterfowl or wildlife refuge of national, state, or local significance (as determined by the officials having jurisdiction) unless there is no feasible and prudent alternative to the use of such land and such

project includes all possible planning to minimize harm. Section 4(f) evaluations are required for all federally funded transportation-related actions.

Refer to Chapter 22, Section 4(f) – Parks, Recreation Areas, Historic Sites, and Wildlife and Waterfowl Refuges, for an overview of Section 4(f), including determining which properties fall within the purview of the Section 4(f) provisions and the format and content of a Section 4(f) evaluation.

### **8.3.9 Comments and Coordination**

The EIS should document the early and continuing coordination with various government agencies and the public during the NEPA phase. Public and agency involvement is required by a variety of regulations, including those of CEQ and FHWA, that implement NEPA and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). It is recommended that the section open with a statement that the public involvement process was open to all residents and population groups in the study area and did not exclude any people because of income, race, color, religion, national origin, sex, age, or handicap.

The public involvement text should summarize the highlights of public information meetings, technical committee meetings, interest group meetings, and other activities used to keep the public informed about the progress of the project.

The agency coordination text should indicate when the Notice of Intent to prepare the Draft EIS was published in the Federal Register. It should also summarize the agency scoping/coordination activities.

### 8.3.10 List of Preparers

A list of preparers should be included with the Draft EIS.

This section should include lists of:

- DDOT personnel, including consultants, who were primarily responsible for preparing the EIS or performing environmental studies, and a brief summary of their qualifications, including educational background and experience
- The FHWA personnel primarily responsible for preparation or review of the EIS and their qualifications
- The areas of EIS responsibility for each preparer

This information can be placed in an appendix.

### 8.3.11 List of Agencies, Organizations, and Persons to Whom Copies of the Statement Are Sent

For a Draft EIS, list all entities from which comments are being requested (federal and state agencies, elected officials, and local units of government/interest groups).

For a Final EIS, identify those entities that submitted comments on the Draft EIS and those receiving a copy of the Final EIS.

This information can be placed in an appendix.

### 8.3.12 Index

The index should include important subjects and areas of major impacts so that the reader can quickly find information on a specific subject or impact.

### 8.3.13 Appendices

One appendix should be reserved for agency correspondence.

The References section and an Acronyms and Abbreviations section may also be placed in an appendix. Other appendices should be used to present analytical information important to the document (such as a biological assessment for threatened or endangered species).

## 8.4 EIS Distribution

After review and approval by designated environmental staff (Environmental Program Coordinator or designee) the Draft EIS can be submitted to FHWA. After clearance by FHWA, copies of all Draft EISs must be made available to the public and circulated for comments by DDOT to all public officials, private interest groups, and members of the public known to have an interest in the proposed action or the Draft EIS; all federal and District of Columbia government agencies expected to have jurisdiction, responsibility, interest, or expertise in the proposed action; and states (Virginia or Maryland) and federal land management entities that may be affected by the proposed action or any of the alternatives (40 CFR 1502.19 and 1503.1). Distribution must be made no later than the time the document is filed with USEPA for Federal Register publication and must allow for a minimum 45-day review period (40 CFR 1506.9 and 1506.10). Internal FHWA distribution of Draft and Final EISs is subject to change and is noted in memorandums to the regional administrators as requirements change.

Copies of all approved Final EISs must be distributed to all federal, state, and local agencies, private organizations, and members of the public who provided substantive comments on the Draft EIS or who requested a copy (40 CFR 1502.19). Distribution must be made no later than the time the document is filed with EPA for Federal Register

publication and must allow for a minimum 30-day review period before the ROD is approved (40 CFR 1506.9 and 1506.10). Two copies of all approved EISs should be forwarded to the FHWA Washington Headquarters (HEV 11) for recordkeeping purposes.

Copies of all EISs should normally be distributed to USEPA and Department of Interior as follows, unless the agency has indicated to the FHWA offices the need for a different number of copies:

- The USEPA Headquarters: five copies of the Draft EIS and five copies of the Final EIS (the “filing requirement” in Section 1506.9 of the CEQ regulation) to the following address:

Environmental Protection Agency  
Office of Federal Activities (A-104)  
401 M Street SW  
Washington, DC 20460.

- The appropriate USEPA Regional Office responsible for USEPA’s review pursuant to Section 309 of the Clean Air Act: five copies of the Draft EIS and five copies of the Final EIS.

- The Department of Interior Headquarters to the following address:

U.S. Department of the Interior, Office of  
Environmental Project Review, Room 4239  
18th and C Streets NW  
Washington, DC 20240

## 8.5 Preparing the Final EIS

This section discusses the content, format, and processing requirements for Final EISs prepared for DDOT projects. The material in this section is based on FHWA TA

T6640.8A. CEQ regulations and FHWA guidance create three different options for the format of a Final EIS: the traditional approach, a condensed Final EIS, and an abbreviated version of the Final EIS. The criteria for applying these options and detail about their content can be found in FHWA TA T6640.8A.

The FHWA District of Columbia Division does not sign off on a Final EIS until the Section 106 process has been completed (that is, an “Adverse Effect” Letter, an MOA, or PA has been signed off by all relevant parties).

The Section 4(f) process has to be completed as well before FHWA will sign off on the Final EIS.

The Final EIS should not be submitted to FHWA (or lead agency) before the designated environmental staff (Environmental Program Coordinator or designee) review and approve the document.

### 8.5.1 Traditional Approach

In the traditional approach, changes and modifications are made to the Draft EIS based on public hearing input, comments on the Draft EIS, and/or changes in the project area. If this approach is used, a “mark revisions” function should be used to track the changes and make them apparent to the reader.

### 8.5.2 Condensed Final EIS Statement

The condensed Final EIS approach incorporates the Draft EIS by reference. Information in the Draft EIS that has not changed should be summarized but not detailed. The text in the Final EIS should reflect changes in the proposed action, impacts, mitigation, or project setting. The Final EIS must also identify a preferred alternative. The format of the

sections of a condensed Final EIS should mirror that of a Draft EIS.

### 8.5.3 Abbreviated Version of the Final EIS

This approach should only be used when the changes to the Draft EIS are minor, typically consisting of factual corrections and an explanation of why the comments received on the Draft EIS do not require additional responses. See Part VI, Paragraph C, of FHWA TA T6640.8A for information regarding the content of the abbreviated version of the Final EIS.

#### Content of Final EIS

Although it may be identified in the Draft EIS, for any approach used to prepare a Final EIS, a preferred alternative must be identified in the Final EIS, and the basis for its selection must be discussed. The information required for the ROD as discussed in Section VIII, Paragraph B, of FHWA TA T6640.8A should be included in this discussion. Any changes to the preferred alternative that have occurred following the circulation of the Draft EIS should be identified, as well as any changes in the impacts.

When preparing the Final EIS, the impacts and mitigation measures of the alternatives, particularly the preferred alternative, may need to be discussed in more detail to elaborate on information, firm-up commitments, or address issues raised following the Draft EIS. The Final EIS should also identify any new impacts (and their significance) resulting from modification of or identification of substantive new circumstances or information regarding the preferred alternative following the Draft EIS circulation. Note: Where new significant impacts are identified, a Supplemental Draft EIS will be required (40 CFR 1502.9(c)).

The Final EIS must identify agencies or individuals who submitted comments on the Draft EIS, list those agencies or individuals receiving copies of the Final EIS, and summarize comments submitted on the Draft EIS made at the public hearing or at other public involvement activities. Any MOAs required for the project should be finalized, signed, and also be included in the Final EIS. Finally, the Final EIS should document compliance with applicable environmental laws and Executive Orders. These include, but are not limited to, the Wetlands Finding, the Floodplains Finding, and Title VI of the Civil Rights Act.

The Final EIS should include a copy of comments from each cooperating agency and other commenters on the Draft EIS. Where the response is exceptionally voluminous, the comments may be summarized. An appropriate response should be provided to each substantive comment. When the Final EIS text is revised as a result of the comments received, a copy of the comments should contain marginal references indicating where revisions were made, or the response to the comments should contain such references. The response should adequately address the issue or concern raised by the commenter or, where substantive comments do not warrant further response, explain why they do not and provide sufficient information to support that position. FHWA and DDOT are not commenters within the meaning of NEPA, and their comments on the Draft EIS should not be included in the Final EIS. However, the document should include adequate information for FHWA and DDOT to ascertain the disposition of the comment(s).

To the extent possible, all environmental issues should be resolved prior to the submission of the Final EIS. When disagreement on project issues exists with another agency, coordination with the agency should be undertaken to resolve the issues. Where the issues cannot be resolved, the

Final EIS should identify any remaining unresolved issues, the steps taken to resolve the issues, and the positions of the respective parties. Where issues are resolved through this effort, the Final EIS should demonstrate resolution of the concerns.

## 8.6 Preparing the Record of Decision

A Draft ROD should be prepared by DDOT and submitted to FHWA no sooner than 30 days after the submission of the Final EIS (45 days if a Section 4(f) is included) to accommodate the comment period for the Final EIS. There should be a minimum of 90 days between the publication of the NOA for the Draft EIS and the issuance of the ROD. An electronic submittal of the draft ROD may be acceptable. Appendix F of this manual shows a sample ROD.

The ROD should not be submitted to FHWA (or lead agency) before the designated environmental staff (Environmental Program Coordinator or designee) review and approve the document.

The format of the ROD is described below.

### 8.6.1 A Statement of the Decision (Selected Alternative)

Following the circulation of the Final EIS, the alternative that is recommended for implementation will become known as the “selected alternative.” This alternative may be the same as the preferred alternative, if one was previously identified, or it may be another alternative, identified based on public and agency comment during the circulation of the environmental document. The selected alternative should be clearly identified in the ROD for the project.

### 8.6.2 Alternatives Considered

All the alternatives considered in the EIS must be summarized, and the reasons for not selecting the alternatives must be explained. The discussion must identify the environmentally preferred alternative(s) (that is, the alternative[s] that causes the least damage to the biological and physical environment). If the selected alternative is other than the environmentally preferable alternative, the ROD should clearly state the reasons for not selecting it. Similarly, if the lands protected by Section 4(f) were a factor in the selection of a preferred alternative, the ROD should clearly explain how it influenced the decision.

All the values (such as social, economic, environmental, cost-effectiveness, safety, traffic, service, and community planning) that were important factors in the decision making must be clearly identified. The ROD should reflect the manner in which these values were considered in arriving at the decision.

### 8.6.3 Section 4(f) Evaluation

Summarize the basis for any Section 4(f) approval when applicable. The discussion should include the information supporting such approval. Where appropriate, this information may be included in the alternatives discussion and referenced in this paragraph to reduce repetition.

### 8.6.4 Measures to Minimize Harm

CEQ guidance states that the discussion of mitigation and monitoring in an ROD must be more detailed than a general statement that mitigation is being required, but not so detailed as to duplicate discussion of mitigation in the EIS. The ROD should contain a concise summary of the mitigation measures that the agency has committed itself to adopt.



The ROD should mention whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not (40 CFR 1505.2(c)).

### 8.6.5 Monitoring or Enforcement Program

The ROD should include a section or matrix that summarizes all the environmental commitments made in the Final EIS. If the section is voluminous, it can be included in the ROD as an appendix. Sometimes the funding of the project may be contingent on mitigation measures employed. Any such measures that are adopted must be explained and committed in the ROD.

CEQ Guidance Section 1505.3 states that the lead agencies “shall include appropriate conditions [including mitigation measures and monitoring and enforcement programs] in grants, permits or other approvals” and shall “condition funding of actions on mitigation.”

The ROD must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they are adopted as part of the agency’s decision. If the proposal is to be carried out by the [46 CFR 18037] federal agency itself, the ROD should delineate the mitigation and monitoring measures in sufficient detail to constitute an enforceable commitment, or incorporate by reference the portions of the EIS that do so.

### 8.6.6 Comments on Final EIS

All substantive comments received on the Final EIS should be identified and given appropriate responses. Other comments should be summarized and responses provided where appropriate.

## 8.7 EIS Timeframe and Size

According to CEQ under NEPA regulations, even large complex projects should require only about 12 months for the completion of the entire EIS process. The DDOT EIS process should try to meet this timeframe. However, because of the complexity of DDOT projects and the coordination needed, some DDOT EISs may take a longer time. Even for complex EISs, DDOT should try to complete the EIS process (from NOI to ROD) in 2 calendar years.

According to CEQ NEPA regulations (40 CFR 1502.7), the EIS document should be less than 150 pages. FHWA TA T6640.8A also indicates a page limit of 150 pages. DDOT EISs should try to meet that page limit. However, for complex projects this page limit may be exceeded. This page limit can be met by keeping the technical details out of the body of the EIS and including them in technical appendices of the EIS document.

## 8.8 Tiering of Environmental Impact Statements

The concept of tiering was issued in the 1978 CEQ regulations, with the intent of encouraging agencies “to eliminate repetitive discussions and to focus on the actual issues ripe for decision at each level of environmental review.” Tiering of EISs refers to the process of addressing a broad, general program, policy, or proposal in an initial EIS and then analyzing a site-specific project element of the broader plan in a subsequent EIS, EA, or CE. Tiering is useful for projects where the geographic scope is large, and the study may result in the identification of several smaller projects, each with logical termini, but not needing to be implemented in the same timeframe. Examples could include subarea studies involving a multitude of access considerations or improvement studies of longer routes across a broader reach of the state. Tiering allows for the

preparation of new, more narrowly focused environmental documentation, without duplicating relevant parts of previously prepared, more general, or broader documents. The more narrowly focused environmental document refers to the general discussions and analysis contained in the broader document but concentrates its discussion in the issues and impacts of the project that were not specifically covered in the broader document.

### **8.8.1 Tiered EIS – Procedural and Documentation Guidance**

The general procedures for preparing tiered EISs are the same as those for a regular EIS. If an environmental document is a follow-on action to a previous EIS, material already covered in the previous EIS should not be repeated, but the environmental document should simply state that it is being “tiered” to the previous EIS. The new environmental document must identify the document to which it is tiered, and indicate where the earlier document is available. Both documents must be available for public review.

The new environmental document must also briefly summarize relevant portions of any document to which it is tiered to the extent necessary for understanding the relationship between the two documents. The level of detail involved in the alternatives development and the impact

analysis will, in many cases, be different for Tier I and Tier II documents. Generally, as the first tier will look at a larger area or more global issues (such as a program of improvements), the data and surveys may be less detailed than a traditional project-level EIS. Subsequent second tier documents may use more traditional study/impact assessment methodologies.

When a tiered process is applied, it is possible that the second tier document(s) may not be an EIS. In some cases, more than one second tier document may be generated (particularly where the first tier examined an improvement program), for each specific improvement element. Each of the proposed improvements should be evaluated to determine the appropriate document category, which may be an EIS, EA, or CE. Even where there is only one second tier document, a determination should be made, based on the findings of the first tier EIS, as to whether it is appropriate to continue with an EIS classification for the second tier. The standard for determining the need for a Supplemental EIS is not changed by the use of tiering, and although there will undoubtedly be occasions when a Supplemental EIS is needed, tiering is intended to reduce the number of these occasions. See Chapter 7, Section 7.9 for more information on Supplemental EISs.

## THE ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT



### CONTENT

- 9.1 EA Basics
- 9.2 Summary of Key Legislation, Regulations, and Guidance
- 9.3 Format and Contents of Documentation
- 9.4 EA Timeframe and Size
- 9.5 Additional Information



# THE ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT

**T**his section describes the format and content of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI).

In a number of respects, the EA and Environmental Impact Statement (EIS) share similar steps in proceeding through the National Environmental Policy Act of 1969 (NEPA) process, and, although generally less detailed than an EIS, the EA structure is similar to that of an EIS. While similarities exist, it is important for the District of Columbia Department of Transportation (DDOT) project manager to understand the differences between the two documents to ensure that study resources are focused only on the natural and socioeconomic resources that would be affected by the DDOT project.

Like the EIS chapter, this chapter describes the sequence and content of the EA sections. Where appropriate, references are made to the EIS chapter to avoid unnecessary repetition.

This section begins with background information on the EA to begin to draw distinctions between the EA and an EIS. The remainder of this chapter describes the components of an EA and the process of developing a FONSI.

## 9.1 EA Basics

According to the Federal Highway Administration (FHWA) Technical Advisory (TA), “The primary purpose of an EA is to help the FHWA decide whether or not an EIS is needed.” While the Council on Environmental Quality (CEQ) originally created the EA to be used primarily when there is not enough information to decide whether the proposal may have significant impacts, it is now common for the EA to be used to aid in an agency’s compliance with NEPA, particularly section 102(2)(E), when an EIS may not be necessary.

An EA should be prepared if:

- An action is not listed as a Categorical Exclusion (CE) or if the action is not listed as an action normally requiring an EIS and a decision to prepare an EIS has not been made
- Additional analysis and public input are needed to know whether the potential for significant impact exists
- Preliminary analysis indicates there is no scientific basis to believe significant impacts would occur, but some level of controversy over the use of one or more environmental resources exists

An EA, which is a Class III action type, must lead to a FONSI or a Notice of Intent (NOI) and an EIS. (See Appendix D for a sample NOI.) If during the course of preparing an EA it becomes apparent that the DDOT project has a potentially significant impact, FHWA should be contacted and a decision should be made whether an EIS should be prepared. Conversely, if the EA does not uncover a significant impact, the NEPA process should be concluded by preparing a FONSI.

The TA notes that the content of an EA should be directed toward only those resources or features that have the potential to be significantly impacted. The EA should be a concise document that does not provide lengthy descriptions of studies and analyses, but rather focuses upon clearly written summaries. Although the emphasis of the FHWA TA is on brevity, it should not be at the risk of omitting important information needed to determine whether the project may result in significant impacts. Although page limits have not been established by regulation, the CEQ suggests that EAs should not exceed 15 pages. However, EA documents usually do exceed the 15-page limit.

## 9.2 Summary of Key Legislation, Regulations, and Guidance

The key legislation, regulations, and guidance applicable to EAs are the same as those found in Chapter 8, The Environmental Impact Statement and Record of Decision. Internet links for online references to these regulations and guidance documents are located at the end of this chapter.

- 40 Code of Federal Regulations (CFR) Parts 1500 - 1508, Regulations for Implementing NEPA: The regulations in this section of the CFR were issued by CEQ in 1978 and were amended once in 1986. This section sets forth requirements for implementing NEPA, with the directive that individual federal agencies must develop regulations for implementing NEPA that are specific to the mission of the particular agency.
- 23 CFR Part 771, FHWA Environmental Impact and Related Procedures: As noted above, individual federal agencies were directed to develop regulations to implement NEPA within the context of the agency's mission. This section of Title 23 establishes the requirements for FHWA projects.
- CEQ's Forty Most Asked Questions Concerning CEQ's NEPA Regulations (40 Questions): While 40 Questions does not have the same legal standing as CEQ's NEPA regulations, this document is perhaps the next best source of information regarding NEPA implementation. CEQ issued 40 Questions to address the most frequently asked questions regarding 40 CFR Parts 1500–1508.
- FHWA TA T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents: FHWA TA T6640.8A and subsections within it are heavily referenced throughout the environmental portions of this manual. This document, issued October 30, 1987, contains a wealth of information about the

content and format of environmental documentation on FHWA projects, including Section 4(f) Statements. While FHWA TA T6640.8A is not a regulatory document, it is a critical guidance document for all projects developed under FHWA jurisdiction.

### 9.3 Format and Contents of Documentation

Although CEQ does not require a particular format for EAs, the format normally is similar to that of an EIS. There are format differences, however, between EAs and EISs. A summary, table of contents, and separate affected environment section are not required but should be used if it makes a more readable document. If a separate affected environment section is not included, the baseline information needed to compare impacts must appear somewhere in the EA.

To maintain consistency in the quality and appearance of DDOT's environmental documents, the following format will be the general standard for EAs. Other sections, topics, or items can be added as appropriate; however, an effort should be made to keep the document as efficient, concise, and informative as possible avoiding superfluous and redundant discussions.

#### 9.3.1 Cover Sheet

The EIS cover sheet format is recommended as a guide for the EA cover sheet. A document number is not necessary. The due date for comments should be omitted unless the EA is distributed for comments. Figure 9-1 is an example of an EA cover sheet.

#### 9.3.2 Table of Contents

Although not required, a table of contents is advisable for longer EAs. The table of contents may include the following sections.

- Cover Sheet
- Summary (for longer EAs)
- Table of Contents
- Purpose of and Need for Action
- Alternatives
- Affected Environment (not required)
- Environmental Consequences
- Comments and Coordination
- Section 4(f) Evaluation (if any)
- Agency Coordination and Public Involvement
- Appendices (if any)

#### 9.3.3 Purpose of and Need for Action

This section should describe the project location, length, termini, proposed improvements, and so forth. It should identify and describe the transportation or other needs that the proposed action is intended to satisfy (such as provide system continuity, alleviate traffic congestion, or correct safety or roadway deficiencies). In many cases, the project need can be adequately explained in one or two paragraphs. It is useful to document other studies and plans in the general study area and the potential effects of those studies on the proposed project.


A description of the project scoping activities and the resulting decisions about which resources will be considered in detail in the document can also be documented in this section.

**Figure 9-1 Example EA Cover Sheet**


**ENVIRONMENTAL ASSESSMENT**  
**for**  
**K STREET**  
**24<sup>th</sup> Street NW to 7<sup>th</sup> Street NW**  
**WASHINGTON, D.C.**

Prepared pursuant to 42 U.S.C. 4332(2)(c)  
by  
U.S. Department of Transportation  
Federal Highway Administration and  
District Department of Transportation

SEP 24 2009  
\_\_\_\_\_  
Date of Approval

  
\_\_\_\_\_  
Gabe Klein, Director  
District Department of Transportation

9/24/09  
\_\_\_\_\_  
Date of Approval

  
\_\_\_\_\_  
Mark Kehrl, Division Administrator  
Federal Highway Administration  
D.C. Division Office



For projects where a law, Executive Order (EO), or regulation (such as Section 4(f), EO 11990, or EO 11988) mandates an evaluation of avoidance alternatives, the explanation of the project need should be more specific so that avoidance alternatives that do not meet the stated project need can be readily dismissed.

### **9.3.4 Alternatives**

This section discusses alternatives to the proposed action, including the No Action (sometimes called a No Build) Alternative, under consideration. The EA may discuss the preferred alternative and identify any other alternatives previously considered. However, if DDOT has not yet identified a preferred alternative, the EA should review the range of alternatives still under consideration. This section may also describe alternatives eliminated from consideration.

### **9.3.5 Affected Environment**

This section should discuss which natural and socioeconomic resources will be evaluated in detail and the reasons the other resource topics do not require study. The EIS affected environment text provides guidance for how the applicable social, economic, and environmental resources should be described. In general, the EA descriptions would be more concise than similar discussions in the EIS affected environment chapter.

### **9.3.6 Environmental Consequences**

For each alternative being considered, this section should discuss the project's impacts on the social, economic, and environmental resources identified in the affected environment text. The level of analysis should be sufficient to adequately identify the impacts and appropriate

mitigation measures and address known and foreseeable public and agency concerns. This section also should state why these impacts are considered not significant. Identified impact areas that do not have a reasonable possibility for individual or cumulative significant environmental impacts need not be discussed.

The environmental consequences text in the EIS chapter serves as a guide for describing project impacts. As with the affected environment text, the EA environmental consequences text would be more concise than that found in an EIS.

### **9.3.7 Comments and Coordination**

The EA should describe the early and continuing coordination with various government agencies and the public, summarize the key issues and pertinent information received through these efforts, and list the agencies and, as appropriate, members of the public consulted. Public meetings/hearings should also be documented, as well as any substantive issues (and the responses) that were raised during the meetings/hearings.

### **9.3.8 Section 4(f) Evaluation**

If the EA includes a Section 4(f) evaluation, the EA/Section 4(f) evaluation or, if prepared separately, the Section 4(f) evaluation by itself must be circulated to the appropriate agencies for Section 4(f) coordination. See Chapter 22, Section 4(f) – Parks, Recreation Areas, Historic Sites, and Wildlife and Waterfowl Refuges, for information on how to prepare a Section 4(f) evaluation.

### **9.3.9 Other Sections**

Depending on the length of the EA, other sections may be included in the EA. Possible chapters include a List of

Preparers, References Cited, and a Glossary of Terms and Acronyms. See the Blagden Avenue Hiker/Biker Trail EA for more information.

### 9.3.10 Appendices

According to the TA, the appendices should include only analytical information that substantiates an analysis that is important to the document (such as a biological assessment for threatened or endangered species). Other information should be referenced only (such as identifying the material and briefly describing its contents). Appendices may be added for the scoping letters received and for public and agency comments on the EA.

### 9.3.11 EA Distribution

After clearance by the designated DDOT environmental staff (DDOT Environmental Program Coordinator or designee) and FHWA, EAs must be made available for public inspection at DDOT and FHWA Division offices (23 CFR 771.119(d)). Although only a Notice of Availability (NOA) of the EA is required, it is advisable to distribute a copy of the document with the notice to federal and District of Columbia government agencies likely to have an interest in the undertaking and to District intergovernmental review contacts. This document should be distributed to any federal or District of Columbia agency known to have interest or special expertise (such as USEPA or District of Columbia Department of the Environment [DDOE] for wetlands, water quality, air, and noise) in those areas addressed in the EA that have or may have potential for significant impact. The possible impacts and the agencies involved should be identified following the early coordination process (see Chapter 4,

Environmental Laws, Regulations, and Guidance [Federal and Local]).

Where an individual permit would be required from the United States Army Corps of Engineers (USACE) (such as Section 404 or Section 10), National Park Service (NPS), DDOE, or the United States Coast Guard (USCG) (as in Section 9), a copy of the EA should be distributed to the involved agency in accordance with the United States Department of Transportation (USDOT)/USACE memorandum of agreement (MOA) or the FHWA/USCG memorandum of understanding (MOU), respectively.

Any internal distribution will be determined by the FHWA Division Office on a case-by-case basis.

### 9.3.12 EA Revisions

Following the public availability period, the EA should be revised or an attachment provided, as appropriate, to reflect changes in the proposed action or mitigation measures resulting from comments received on the EA or at the public hearing (if one is held) and any impacts of the changes. Include any necessary findings, agreements, or determination (such as wetlands, Section 106, Section 4(f)) required for the proposal. Also include a copy of pertinent comments received on the EA and appropriate responses to the comments.

### 9.3.13 Finding of No Significant Impact

A FONSI is a brief document with a signature sheet and a discussion of the comments and coordination related to the EA, important events since the EA was made available, special conditions necessary for location approval, and any errata related to the EA.

If, through the project studies and comments on the EA, it is concluded that the project will not result in significant impacts, a FONSI will be prepared. FHWA regulations allow for the preparation of a revised EA to address comments or the preparation of an attachment to the EA. The FONSI should address any issues of interest, respond to comments, and include commitments to mitigation, as appropriate. If public/agency review results in changes to alternatives, the changes would be discussed in the FONSI. The following topics should be covered in the FONSI.

- Description of the Preferred Alternative
- Alternatives Considered but Rejected
- Analysis of Significant Impacts
- Mitigation Measures
- Agency Coordination
- Public Involvement
- Conclusion

An addendum/supplement typically would not be prepared unless there are major changes or important new information that the public has not seen.

A sample FONSI document is found in Appendix G.

FHWA District of Columbia Division normally requires the completion of Section 106 and the Section 4(f) process before approving a FONSI.

Before submitting the FONSI to FHWA, the final EA document along with a FONSI must be reviewed and approved by the designated environmental staff.

#### 9.3.14 FONSI Distribution

Formal distribution of a FONSI is not required. The DDOT must send a NOA of the FONSI to federal, state,

and local government agencies likely to have an interest in the undertaking and the state intergovernmental review contacts (23 CFR 771.121(b)). However, it is encouraged that agencies that commented on the EA (or requested to be informed) be advised of the project decision and the disposition of their comments and be provided a copy of the FONSI. This fosters good lines of communication and enhances interagency coordination.

#### 9.4 EA Timeframe and Size

According to CEQ for cases in which only an EA will be prepared, the NEPA process should take no more than 3 months. The DDOT EA process should also try to meet that timeframe. However, for complex projects, a longer timeframe can be used. Even for complex EAs, DDOT should try to complete the EA process (from start to signing FONSI) in one calendar year.

While there is no set page limit for EAs in federal regulations, CEQ has generally advised agencies to keep the length of EAs to not more than approximately 10 to 15 pages. The FHWA TA also indicates a page limit of 15 pages. DDOT EAs should try to meet that page limit. However, for complex projects, this page limit may be exceeded. Serious considerations should be made to keep EA documents as brief as possible (50 to 100 pages).

#### 9.5 Additional Information

Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR 1500–1508), CEQ, 1978. [http://ceq.eh.doe.gov/nepalregs/ceq/toc\\_ceq.htm](http://ceq.eh.doe.gov/nepalregs/ceq/toc_ceq.htm)

Environmental Impact and Related Procedures (23 CFR 771), FHWA. <http://www.environment.fhwa.dot.gov/projdev/index.asp>

FHWA Environmental Review Toolkit, NEPA Documentation. <http://www.environment.fhwa.dot.gov/projdev/docuce.asp>

Environmental Handbook, Volume I: Guidance for Compliance, Caltrans. <http://www.dot.ca.gov/ser/vol1/sec4/ch30ce/chap30ce.htm>

FHWA TA T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents

# CHAPTER 10

## THE CATEGORICAL EXCLUSION



### CONTENT

- 10.1 Summary of Key Legislation, Regulations, and Guidance
- 10.2 General Methodology Analysis or Evaluation
- 10.3 Format and Content of Documentation
- 10.4 CE Approval and Documentation
- 10.5 Additional Information



## THE CATEGORICAL EXCLUSION

This section describes the format and content of a Categorical Exclusion (CE, also known as a Cat Ex). CEs are Class II actions or activities that meet the definition in 23 Code of Federal Regulations (CFR) 771.117(a) and, based on the experience of the Federal Highway Administration (FHWA), do not have significant environmental effects. The CEs are divided into two groups, standard and documented, based on the action's potential for impacts. The level of documentation necessary for a particular CE depends on the group the action falls under. Because the level of CE documentation varies, it is important to understand the relationship between the various actions and the required documentation.

### 10.1 Summary of Key Legislation, Regulations, and Guidance

The key legislation, regulations, and guidance for CEs are the same as those presented for Environmental Assessments (EAs) and Environmental Impact Statements (EISs).

Internet links for online references to these regulations and guidance documents are located at the end of this chapter.

- 40 CFR Parts 1500–1508, Regulations for Implementing NEPA: The Council on Environmental Quality (CEQ) issued the regulations in this section of the CFR in 1978, and amended them once in 1986. This section sets forth requirements for the implementation of the National Environmental Policy Act of 1969 (NEPA), with the directive that individual federal agencies must develop regulations for implementing NEPA that are specific to the mission of the particular agency.
- 23 CFR Part 771, FHWA Environmental Impact and Related Procedures: As noted above, individual federal agencies were directed to develop regulations to implement NEPA within the context of the agency's mission. This section of Title 23 establishes the requirements for FHWA projects.

- CEQ’s Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (40 Questions): While 40 Questions does not have the same legal standing as CEQ’s NEPA regulations, this document is perhaps the next best source of information regarding NEPA implementation. The CEQ issued 40 Questions as a means to addressing the most frequently asked questions regarding 40 CFR 1500–1508.

## 10.2 General Methodology Analysis or Evaluation

CEs do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historical, or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; and do not otherwise, either individually or cumulatively, have any significant environmental impacts. Neither an EA nor an EIS is required for these types of projects. As noted, CEs are divided into two groups: standard and documented. Each type requires differing levels of documentation and is discussed below

The actions below meet the criteria for CEs in the CEQ regulation (Section 1508.4) and Section 771.117(a) of 23 CFR 771, and typically do not require any further NEPA documentation or approvals by FHWA. However, other environmental laws may still apply. For example, installation of traffic signals in a historic district may require compliance with Section 106, or a proposed noise barrier that would use land protected by Section 4(f) would require preparation of a Section 4(f) evaluation (23 CFR 771.135(i)). In most cases, information is available from planning and programming documents for the FHWA Division Office to determine the applicability

of other environmental laws. However, any necessary documentation should be discussed and developed cooperatively by the District of Columbia Department of Transportation (DDOT) and FHWA.

- Activities that do not involve or lead directly to construction, such as planning and technical studies; grants for training and research programs; research activities as defined in 23 USC 307; approval of a unified work program and any findings required in the planning process pursuant to 23 USC 134; approval of statewide programs under 23 CFR 630; approval of project concepts under 23 CFR 476; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and federal aid system revisions that establish classes of highways on the federal aid highway system
- Approval of utility installations along or across a transportation facility
- Construction of bicycle and pedestrian lanes, paths, and facilities
- Activities included in the State’s “highway safety plan” under 23 USC 402
- Transfer of federal lands pursuant to 23 USC 317 when the subsequent action is not an FHWA action
- The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction
- Landscaping
- Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur



- Emergency repairs under 23 USC 125
- Acquisition of scenic easements
- Determination of payback under 23 CFR 480 for property previously acquired with federal aid participation
- Improvements to existing rest areas and truck weigh stations
- Ridesharing activities
- Bus and rail car rehabilitation
- Alterations to facilities or vehicles to make them accessible for elderly and disabled persons
- Program administration, technical assistance activities, and operating assistance to transit authorities to continue existing service or increase service to meet routine changes in demand
- The purchase of vehicles by the applicant where the use of these vehicles can be accommodated by existing facilities or by new facilities which themselves are within a CE
- Track and railbed maintenance and improvements when carried out within the existing right-of-way
- Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site
- Promulgation of rules, regulations, and directives

Typically, resurfacing and street maintenance projects, sidewalk repair, traffic signal replacement, striping of pavements, tree planting and replacement, bridge deck replacements, and bridge painting-type projects qualify as CEs. However, if these projects are within historic districts,

the District of Columbia Historic Preservation Office (DCHPO) should review the plans.

Before placing these projects in the federal Financial Management Information System (FMIS) for FHWA approval, the environmental coordinator in the Project Development and Environment (PDE) Division must verify the Level I CE classification.

Additional actions that satisfy the criteria for a CE in the CEQ regulations (40 CFR 1508.4) may be designated as CEs only after Administration approval. The applicant shall submit documentation that demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

- Modernization of highways by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (such as parking, weaving, turning, and climbing).
- Highway safety or traffic operations improvement projects including the installation of ramp metering control devices and lighting.
- Bridge rehabilitation, reconstruction, or replacement, or the construction of grade separation to replace existing at-grade railroad crossings.
- Development of transportation corridor fringe parking facilities.
- Construction of new truck weigh stations or rest areas.

Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.

- Approvals for changes in access control.

- Construction of new bus storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and located on or near a street with adequate capacity to handle anticipated bus and support vehicle traffic.
- Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.
- Construction of bus transfer facilities (an open area consisting of passenger shelters, boarding areas, kiosks, and related street improvements) when located in a commercial area or other high activity center in which there is adequate street capacity for projected bus traffic.
- Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.
- Acquisition of land for hardship or protective purposes, and advance land acquisition loans under Section 3(b) of the Urban Mass Transportation (UMT) Act of 1964. Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety, or financial reasons that remaining in the property poses an undue hardship compared to others. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisitions qualify for a CE only where the acquisition

will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.

### 10.2.1 Consideration of Unusual Circumstances

Section 771.117(b) lists those unusual circumstances when further environmental studies will be necessary to determine the appropriateness of a CE classification. The unusual circumstances include:

- Significant environmental impacts
- Substantial controversy on environmental grounds
- Significant impact on properties protected by Section 4(f) of the United States Department of Transportation (USDOT) Act or Section 106 of the National Historic Preservation Act (NHPA)
- Inconsistencies with any federal, state, or local law, requirement, or administrative determination relating to the environmental aspects of the action

Unusual circumstances can arise on any project normally advanced with a CE; however, the type and depth of additional studies will vary with the type of CE and the facts and circumstances of each situation. For those actions on the fixed list (standard CE group) of CEs, unusual circumstances should rarely, if ever, occur due to the limited scope of work. Unless unusual circumstances come to the attention of DDOT or FHWA, they need not be given further consideration. For actions in the second group of CEs (documented CE group), unusual circumstances should be addressed in the information provided to the FHWA with the request for CE approval.

The level of consideration, analysis, and documentation should be commensurate with the action's potential for significant impacts, controversy, or inconsistency with other agencies' environmental requirements.

### 10.3 CE Approval Process and Documents

FHWA and DDOT have signed a Programmatic Agreement regarding the review and approval process of Categorical Exclusions (CE) in accordance with NEPA regarding the implementation of the federal aid highway program. The FHWA – DDOT CE Programmatic Agreement (CE PA) establishes the following process for approval and review of CEs.

- Project Development & Environmental Review Form (Form I) must be prepared and submitted to DDOT PDE Division for all projects and actions under the Federal Aid Program by the respective project managers. This includes actions taken when any project progresses from one phase to the next (e.g., from planning to design or from design to construction), as well as change orders.
- Based on the information submitted in Form I, the DDOT Environmental Division will determine which level of NEPA action the project qualifies for.
- All actions that qualify as CEs identified in 23 CFR 771.117(c) and which meet all the requirements listed in Section III.A of the CE PA will be classified as Level 1 CE (“CE-1”) Actions. For such actions, Project Development & Environment Form (Form I) will be only document needed. The DDOT Environmental Division will make this determination based on Form I. The final step in this level of CE will be the approval of the DDOT Environment Division Chief or his/her designee. Projects that do not meet the criteria of CE-1 Actions shall be processed at the next appropriate higher level.
- All actions that qualify as CEs identified in 23 CFR 771.117(c) and (d) and which meet all the requirements listed in Section III.B of the CE PA will be classified as Level 2 CE (“CE-2”) Actions. The DDOT Environmental Division will make this determination based on the Form I submitted. After the determination made by the DDOT Environmental Division that the project is CE-2, the project manager shall prepare and submit a CE-2 Form (Form II). The DDOT Environmental Division shall confirm that these actions meet the criteria of CE-2 projects and no significant impact exists. The final step in this level of CE will be the approval of the DDOT Environment Division Chief or his/her designee. Projects that do not meet the criteria of CE-2 Actions shall be processed at the next appropriate higher level.
- All actions that qualify as CEs identified in 23 CFR 771.117(c) & (d) which do not meet the requirements listed in Section III.A and III.B of the CE PA, will be classified as Level 3 CE (“CE-3”) Actions. The DDOT Environmental Division will make this determination based on the Form I submitted. After the determination made by the DDOT Environmental Division that the project is CE-3, the project manager shall prepare and submit the CE-3 document. The format of the CE-3 document is provided in the appendices of this manual. The DDOT Environmental Division shall confirm that these actions meet the criteria of CE-3 projects and no significant impact exists. The DDOT Environment Division Chief or his/her designee will approve this document as CE-3, and then this document will be submitted to FHWA for final approval. The final step for this level of CE will be the signature of the FHWA Division Administrator or his/her designee. Projects that do not meet the criteria

of any level of CE shall be processed as an EA or EIS pursuant to 40 CFR 1500 and 23 CFR 771.

- DDOT will prepare an annual report for submittal to FHWA that covers the current fiscal year. The report will include summary information on projects processed as CEs and will include all forms and documents prepared for all NEPA actions for the Federal Aid Program. The report will be provided to the FHWA annually. FHWA shall monitor activities to ensure compliance with its responsibilities under NEPA. FHWA will make periodic reviews of DDOT procedures and documentation to ensure that all potential environmental impacts are being considered and compliance with all applicable laws, regulations, executive orders, etc., is being properly documented.

CE-1 and CE-2 forms and CE-3 documents are provided in Appendices A, B, and C, respectively, of this manual. For CE projects/documents, public involvement is required even though a public meeting is not required. Public involvement may be carried out by various methods, such as ANC meetings, public notices, websites, DDOT website postings,

press releases, flyers, and handouts, depending upon the complexity of the project.

## 10.4 Additional Information

Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR 1500-1508), CEQ, 1978: [http://ceq.eh.doe.gov/nepa/regs/ceq/toc\\_ceq.htm](http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm)

Environmental Impact and Related Procedures (23 CFR 771), FHWA: <http://www.environment.fhwa.dot.gov/projdev/index.asp>

FHWA Environmental Review Toolkit, NEPA Documentation: <http://www.environment.fhwa.dot.gov/projdev/docuce.asp>

Environmental Handbook, Volume I: Guidance for Compliance, Caltrans: <http://www.dot.ca.gov/ser/vol1/sec4/ch30ce/chap30ce.htm>

## PUBLIC INVOLVEMENT



- 11.1 Summary of Key Legislation, Regulations, and Guidance
- 11.2 Requirements for Stakeholder Collaboration
- 11.3 Public Involvement Plans
- 11.4 Public Involvement Tools and Techniques
- 11.5 Public Meetings
- 11.6 Limited English Proficient Population
- 11.7 Documenting the Public Involvement Process
- 11.8 Additional information



## PUBLIC INVOLVEMENT

The Federal Highway Administration (FHWA) and the District of Columbia Department of Transportation (DDOT) support proactive public involvement at all stages of planning and project development. The performance standards for proactive public involvement processes include early and continuous involvement; reasonable public availability of technical and other information; collaborative input on alternatives, evaluation criteria, and mitigation needs; open public meetings where matters related to federal-aid highway programs are being considered; and open access to the decision-making process prior to closure.

The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 required states to involve the public in transportation decision making to a much greater extent than previously. ISTEA was replaced by the Transportation Equity Act for the 21st Century (TEA-21) in 1998. TEA 21 continued to place strong emphasis on public involvement. The emphasis on public involvement has continued with the passage in 2005 of the Safe, Accountable, Flexible, Efficient

Transportation Equity Act: A Legacy for Users (SAFETEA-LU).

SAFETEA-LU retains all of the public involvement language from the previous acts and adds new requirements, including early outreach to governmental agencies that might become participating agencies, the addition of bicycle and pedestrian facility users and the disabled as interested parties, public meetings held at convenient times and accessible locations, and the use of electronic methods and visualization techniques to provide information to the public.

There is no standardized approach to informing, educating, and involving the public. Every project is different and will require the use of different public involvement strategies. Each public involvement program will incorporate a variety of techniques, some more than others. But every project has one thing in common: there will be some level of public involvement.

The DDOT Policy, Planning, and Sustainability Administration (PPSA) is primarily responsible for identifying the level of public involvement necessary

for highway proposals, while the DDOT Infrastructure Project Management Administration (IPMA) is primarily responsible for supplying the technical information necessary to carry out the proposals. With the project manager, PDE and IPMA are responsible for implementing the public involvement process.

### 11.1 Summary of Key Legislation, Regulations, and Guidance

Regulations found in 23 Code of Federal Regulations (CFR), Part 450.210 and 450.316 are designed to guide the development of transportation plans and programs. These regulations include the following:

- Early and continuous public involvement opportunities throughout the planning and programming process
- Timely information to citizens, affected public agencies, representatives of transportation agencies, private sector transportation entities, and other interested parties, including segments of the community affected by transportation plans, programs, and projects
- Reasonable public access to information
- Adequate public notice of public involvement activities and ample time for public review and comment at key decision points
- Explicit consideration and response to public comment
- Consideration of the needs of the traditionally underserved, including low-income and minority citizens
- Periodic review of public involvement efforts by the Metropolitan Planning Organization (MPO) to ensure full and open access to all
- Review of public involvement procedures by the FHWA and Federal Transit Administration (FTA) when necessary
- Coordination of MPO public involvement processes with statewide efforts, whenever possible
- There is a substantial body of legislation, regulation, and guidance that governs the need and timing for public involvement on transportation projects. Some of the more prominent items are listed below.
- Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) – Continued and enhanced emphasis on strong planning processes and public involvement. [www.fhwa.dot.gov/hep/23cfr450.htm](http://www.fhwa.dot.gov/hep/23cfr450.htm)
- 23 CFR 450.210 and 450.316 – Guides the development of statewide transportation plans and programs; requires early and continuous public involvement. [www.access.gpo.gov](http://www.access.gpo.gov)
- FHWA/FTA Interim Policy on Public Involvement – Requires effective public involvement processes, custom tailored to local conditions. [www.fhwa.dot.gov/environment/pi\\_pol.htm](http://www.fhwa.dot.gov/environment/pi_pol.htm)
- 23 USC 128 – Requires public hearings or the opportunity for public hearings for plans for federal-aid highway projects. <http://www.fhwa.dot.gov/environment/128.htm>
- 40 CFR 1500-1508 National Environmental Policy Act of 1969 (NEPA) – Requires consideration of impacts on human environments. [www.fhwa.dot.gov/environment](http://www.fhwa.dot.gov/environment)
- Title VI of the Civil Rights Act of 1964 – Declares that no person shall be excluded from participating in any program receiving federal assistance on the basis of race, color, or national origin. [www.fhwa.dot.gov/environment/title\\_vi.htm](http://www.fhwa.dot.gov/environment/title_vi.htm)
- 28 CFR 36 Americans with Disabilities Act – Requires government programs to be accessible to people with disabilities. [www.usdoj.gov/crt/ada/adahom1.htm](http://www.usdoj.gov/crt/ada/adahom1.htm)



- 23 CFR 771 Environmental Impact and Related Procedures – Addresses early coordination, public involvement, and project development. *www.access.gpo.gov*
- Technical Advisory 6640.8A – FHWA guidance for preparing and processing Environmental and Section 4(f) documents. *www.environment.fhwa.dot.gov/projdev/impta6640.asp*
- Executive Order 12898 on Environmental Justice – Addresses avoidance of actions that can cause disproportionately high and adverse impacts on minority and low-income populations. *www.fhwa.dot.gov/environment/justice/facts/index.htm*
- 49 CFR 24 Uniform Relocation Assistance and Real Property Acquisition Policies Act – Ensures property owners and people displaced by federal-aid projects are treated fairly, consistently, and equitably. *www.access.gpo.gov*
- Executive Order 13166 on Limited English Proficiency – Improving access to services for people with limited English proficiency. *www.fhwa.dot.gov/hep/lowlim/index.htm*
- Context-Sensitive Solutions/Design Policy (Administrative Order 301.05) – Requires the use of context-sensitive design (CSD) in DDOT transportation planning, design, and construction projects. (See Chapter 5, Context-Sensitive Design Guidelines.)
- DDOT Design and Engineering Manual – Chapter 12 of the manual establishes DDOT’s public involvement policy and outlines the steps of developing and implementing a Public Involvement Plan (PIP).
- Project Development and Environment Division – The Public Involvement Manual includes project development and public involvement procedures.

### 11.1.1 Matching Public Involvement Effort to Project Needs

Three classes of action are defined by 23 CFR 771.115 for federally assisted projects. Each requires a specific level of NEPA documentation and public involvement:

- Environmental Impact Statement (EIS)
- Categorical Exclusion (CE)
- Environmental Assessment (EA)

An EIS typically involves larger, more complex projects with a range of impacts on a number of people and organizations. Public involvement typically includes scoping meetings, public hearings, stakeholder advisory groups, websites, newsletters, participating agencies, and formal decision-making models. A typical CE project has minimal or no impacts and is associated with less complex public involvement efforts, perhaps just informing affected property owners and other stakeholders of the project. An EA falls between these boundaries both in the range of impacts and the appropriate public involvement effort.

Projects that are not federally assisted are typically smaller projects such as local street and sidewalk improvements. They have minimal environmental impacts and are treated similarly to a CE. They require little, if any, environmental documentation and receive public involvement during the District of Columbia budget review phase of project development.

The District of Columbia Advisory Neighborhood Commission (ANC) notification policy, as well as the public involvement that is part of the District of Columbia CSD guidelines, is followed for all projects, whether or not they are federally assisted.

## 11.2 Requirements for Stakeholder Collaboration

SAFETEA-LU, Section 6002, covers collaboration—in particular, ensuring that the public and agencies have influence in transportation decision making. This collaboration needs to involve the public, local government agencies and jurisdictions, state resource agencies and departments of transportation, and federal resource agencies.

SAFETEA-LU establishes a new category of agency involvement, participating agencies. Any governmental agency (federal or state/District) with an interest in the project can become an active participant in the NEPA evaluation. DDOT and FHWA must invite agencies to join the project as participating agencies. Agencies that accept the invitation are afforded earlier and more frequent opportunities to be involved. Agencies that decline may still comment at the same time as the public, but their comments may not carry the same weight as participating agencies.

Public, stakeholder, and participating agency input is required at specific NEPA milestones, including:

- Scoping
- Determining impact assessment methodologies
- Screening conceptual alternatives and identifying detailed alternatives for evaluation in the EIS
- Identifying the preferred alternative

### 11.2.1 Scoping

The project team must offer the public, stakeholders, and participating agencies an opportunity to affect decisions on the identification of issues and concerns to be addressed in the EIS, the project's purpose and need, and the range of alternatives to be carried forward from earlier planning studies.

For the public and stakeholders, this requirement may be met by a public meeting where initial project materials are provided and input sought. A meeting should be complemented by a project website. Post all material available at the meeting and solicit additional comments. All comments and suggestions need to be considered and a written record maintained as to their disposition. Incorporating all input is not necessary, but consider it and keep a record of how it was handled.

Participating agencies receive more focused treatment. One or more small group meetings, or even separate meetings with each participating agency, are often useful. Specific response to the input from participating agencies, including written response, is appropriate. For many participating agencies, an impact methodology discussion could be included.

Collaboration on the range of alternatives to be considered and on the purpose and need may be either concurrent or sequential.

A public scoping meeting is not required for an EA, but some level of early public involvement is necessary. This could include holding an informational meeting with specific stakeholders, presenting the project at a regular ANC meeting or citizens' association meeting, mailing letters or flyers to residents in the affected area, making newsletters or handouts available in the affected area, or holding a public meeting or workshop. The key is to have a flexible approach and adapt to stakeholders' needs.

### 11.2.2 Impact Analysis Methodology

For each issue area that will be addressed in the environmental document, DDOT should propose an appropriate methodology and level of detail to be used. DDOT will then work with cooperating and participating

agencies to refine the methodology and determine the approaches to be used. Prepare a summary report, post it on the project website, and invite public comment. Consensus is not required, but the views of the public and other agencies must be considered. Well-documented, widely accepted methodologies (such as noise) typically require minimal collaboration.

Methodologies need to be consistent with statutes and regulations of federal agencies (such as the United States Environmental Protection Agency [USEPA] hot spot analysis under the Clean Air Act [CAA]).

### 11.2.3 Screening of Conceptual Alternatives

If the range of alternatives being considered or the purpose and need change substantially from the ones considered during the scoping phase, an additional opportunity for public, stakeholder, and participating agency comment may be appropriate, and additional comments may need to be considered. This does not necessarily mean a meeting is necessary.

### 11.2.4 Identification of Preferred Alternative

Input should be sought prior to the identification of a preferred alternative. If the preferred alternative is identified prior to the publication of the Draft EIS, this collaboration effort may involve meetings with the participating agencies, stakeholders, and the public. A portion of this obligation may be fulfilled using the project website, but the project team will need to ensure that the public is aware of any posting and is able to access the site. If selection of the preferred alternative is deferred until after publication of the Draft EIS, collaboration on a preferred alternative can be a portion of the public meeting on the Draft EIS.

### 11.2.5 Comment Periods

The comment period on a Draft EIS shall not exceed 60 days unless a different comment period is established by the lead agency, the project sponsor, and all participating agencies. For other milestones in the process, comment periods shall not exceed 30 days unless agencies mutually agree.

The lead agency can extend the comment period for good cause.

All comment periods should be specified in the PIP.

## 11.3 Public Involvement Plans

Public involvement is most effective when it is begun early in the project process and continued throughout project development, design, and construction. The best way to ensure this happens is to start with a solid PIP.

A PIP is a written document, developed by the project team, public involvement specialists, and preferably with assistance from some key local stakeholders. It is an action plan that describes how public involvement will advance the objectives of the project, the techniques designed to facilitate public involvement, and how those techniques will be used.

The scope of the PIP should be appropriate to the needs of the project and tailored to the needs of the local community. It should establish a rational public involvement process. The document itself should only be as detailed as necessary to set up an appropriate process and obtain buy-in from DDOT personnel and stakeholders.

Developing the PIP involves gathering information, researching the background and history of the project, identifying major issues and decisions, assessing the level of public interest, and identifying appropriate public involvement techniques. The DDOT Context-Sensitive

Guidelines include a detailed list of questions to be considered in developing the PIP.

When developing the PIP, contact the PDE ward planners and the ANC for the affected area to assess the level of community interest in the project and identify known project advocates and adversaries. The ANC will set the time and place for a meeting to discuss the proposed project and provide its input.

Review the legal requirements for public participation (such as NEPA, Section 106) and identify the potential environmental, social, and economic issues for the project and the stakeholders who need to be involved. Define the strategy for achieving the purpose and goals of the project and create an action plan, including public meetings, action items, assigned responsible parties, locations, and target dates.

The PIP should identify the council ward(s) and the ANC(s) where the project is located and identify the contact people for each (including postal and email addresses and telephone numbers). List any agency, person, or business that asks to be notified of the project status. Identify other agency coordination and consultation requirements to be satisfied. Inform individuals about actions that will directly affect them. Periodically review the PIP and update it as needed. Include a summary of any relevant meetings or correspondence.

More complex projects that require an EA or an EIS normally require a more comprehensive PIP. In these cases, the PIP is developed by the project manager, the environmental manager, and public involvement specialists, along with assistance from key local stakeholders. At a minimum, the PIP for an EIS needs to include participating agencies, scoping, alternatives development, public hearings, public comment periods, and public notices for each phase

of the project. Beyond the minimum, a public involvement program should be designed to inform and involve the public and agency stakeholders, using additional techniques appropriate to each project and affected community.

An annotated version of a typical outline for a PIP is provided below. This outline should be suitable for nearly all projects. Of course, project-specific conditions may lend themselves to other organizational strategies. Do not be constrained by the structure of this outline.

### 11.3.1 Project Scope

The project scope is an introduction to the project that will build on the data already developed and be updated as new data becomes available. It needs to address why DDOT is undertaking the project.

### 11.3.2 Stakeholders

Stakeholders are essential to an effective public involvement process. Throughout the public involvement process, stakeholders will be incorporated into all of the major phases of the project. They will influence decisions, but stakeholders are rarely the final decision makers.

In this section of the PIP, summarize the process followed to determine the stakeholder list for the project and name the stakeholders and organizations they represent. To identify stakeholders, create a list of issues that might occur as a result of the project. For each issue, identify groups (businesses, community organizations, residence and property owners, interest groups, government agencies, and other interested parties) that might be affected (positively or negatively) by the project.

### 11.3.3 Project Team

Identify the overall project roles and responsibilities of the project team. This includes the roles of the DDOT

project manager and environmental manager, consultants, the FHWA project manager, and any other entity whose involvement includes developing data or analysis for the project. An organization chart is helpful, and contact information is essential.

### 11.3.4 Decision-Making Structure

As clearly as possible, state how decisions will be made. Most major planning studies involve stakeholder committees. These are most often called, steering, scoping, advisory, or just plain stakeholder committees. While the name is not important, what is essential is the committee's role and those who are appointed to it. These committees provide a stable, continuously deliberative body that is willing to voluntarily stay with the project throughout the process and provide a public perspective on how it is advancing. This body can become an advocate for the decision-making process and the recommendations. It can help explain the history of the process and defend the decisions made. These committees must understand their role in the project.

Secondarily, it is important for these committees to have established membership criteria and represent the range of the project's stakeholders. Stakeholder committees should include people who support the project and people who are inclined to oppose the project, people who live near the project, people who work near the project, people who use the transportation facilities, and appointed and elected officials who represent the interests of those affected by the project. The committee's internal operating procedures should also be well established, understood, and followed. Typically, these committees are advisory and reach decisions through consensus, although concurrence is sometimes a more appropriate metric, and decision-making models are often appropriate.

If the project continues for any period of time, there will be turnover in the stakeholder committee. Include details on whether and how stakeholder committee members will be replaced.

### 11.3.5 Schedule

Provide a table that lists all public involvement activities and notes when each will occur. Be as detailed as possible and anticipate that the schedule will need to be revised as the project progresses. Include details, such as names and contact information for responsible staff members and how public involvement activities will be documented.

## 11.4 Public Involvement Tools and Techniques

Tailor activities to the stakeholders and to the project's public involvement goals. FHWA and FTA jointly maintain an excellent website for public involvement activities at [www.planning.dot.gov/PublicInvolvement/pi\\_documents/toc-foreword.asp](http://www.planning.dot.gov/PublicInvolvement/pi_documents/toc-foreword.asp). One feature of the site is the Planning Assistant tool. After you provide basic information about your project, the Planning Assistant will identify a range of different techniques that might be used in a public involvement effort. The Planning Assistant describes each technique, notes how and when to use it, and identifies its strengths. Even the most experienced public involvement practitioner will discover or remember useful techniques using this tool.

Use the Planning Assistant, or other relevant sources, to identify each technique or tool that will be used on your project. For each anticipated technique, provide:

- Information on how the technique will be implemented on the project
- Staff roles and responsibilities
- Schedule
- Locations or space requirements

- Goals and stakeholders targeted

While public notices, public meetings and hearings, and public comment periods are the basic requirements for soliciting residents' opinions, more and better input is likely to be gained through alternative means.

There are many challenges in gathering public input for transportation projects. Lack of trust in government agencies, differing levels of education, and language barriers are among the factors that limit people's ability to effectively participate in the public process. To engage a diverse and representative group of residents, DDOT must actively attempt to address these barriers throughout the public involvement process. Often, this requires the use of a combination of techniques.

Some commonly used public techniques and outreach tools are listed below.

- Attending Meetings
- Citizen Advisory Group
- Community Events
- Email
- Kiosks
- Media Advertising
- Media Releases
- Public Information Materials/Handouts
- School Events
- Site Visits
- Sponsoring Meetings
- Stakeholder Group
- Transit Advertising
- Visualization
- Websites
- Workshops/Seminars

For any public involvement activity, bear in mind a few basic principles.

- Involve PDE ward planners in all public involvement processes.
- Meeting places, announcements, and websites should always be Americans with Disabilities Act (ADA) compliant.
- Involve officials and advocates for other modes of travel (including bicycle, walking, transit, and special transportation services, such as the ADA paratransit program, MetroAccess) in the process.
- Consider the demographics of the affected area, especially underrepresented groups, when selecting public notice media (for example, newspaper, public transportation, and radio outlets) and meeting locations.
- Identify communities that are environmentally stressed and plan how to mitigate that stress through public involvement.
- Make use of new technology and techniques for communication.

## 11.5 Public Meetings

One or more public meetings will likely be required. A public hearing, or the opportunity for a public hearing, is required during the impact analysis phase of an EIS and sometimes for an EA.

A public hearing should never be the first or only opportunity for involving the community. The public hearing represents only the formal stage of the entire public involvement process. The most productive interaction with the public and other agencies takes place in informal meetings, nontraditional events, interagency conferences, and direct correspondence—not during public hearings.

The typical formats for a public meeting are a formal hearing, an informal open house, and a town hall session.

A formal hearing is led by a presiding officer. A formal presentation is made, and then the public is given the opportunity to address DDOT or FHWA with their comments. A court reporter records the proceedings and produces a verbatim transcript. Seating is provided facing the head table. Comments and testimony are taken from the floor in an orderly fashion. The order of taking comments and time limits should be announced during the formal presentation.

An informal open house offers a flexible agenda that allows people to come and go at their own convenience. There is generally no presentation and no open microphone. An open house may have a provision for recording formal comments/testimony, but this is not a requirement. Although the format of the open house is informal, formal public notice and collection of comments for the record are still necessary. Despite its advantages, the open house format can be seen as an attempt to prevent community members from hearing each others' comments; setting aside a time for questions and answers as a group can ease that concern.

A town hall session is often the preferred format in the District. Typically, DDOT will make a presentation and schedule a question and answer session at a fixed time, or at intervals (for example, the last 15 minutes of each hour), with time limits on individual comments. Between the question and answer sessions, DDOT staff is available at the displays for one-on-one discussions with attendees. The question-and-answer and presentation portions of the town hall sessions would be recorded by the court reporter, and a transcript available afterwards. Staff notes from any one-on-one sessions supplement the transcript.

All formats share these features:

- Greeters are stationed near the door to sign people in, provide handouts, and explain the format of the meeting.

- Exhibits—such as posters, maps, videos, and handouts—provide information and illustrations.
- Handouts provide take-home summaries, including where people can find more information and how they can submit comments.
- Comment forms are provided for written comments, which can be turned in at the hearing or mailed back later.
- Knowledgeable DDOT representatives are stationed at each display or group of displays (stations) to answer questions and discuss ideas with people; others may roam the room to get a sense of the meeting or to relieve someone who is being monopolized.
- The physical layout should allow for easy flow; it can be open (square or U-shape) or directed (S-shape), such that people proceed in order from one station to the next.

A formal hearing and town hall format, unlike an open house, needs a stenographer or court reporter to record testimony and comments from the public, one at a time, to provide a verbatim transcript.

A live or prerecorded presentation that summarizes the information in exhibits and handouts can be helpful for audiences with varying educational or literacy levels, regardless of the format of the meeting. A presentation is not a requirement with any format, but it is often expected at both formal hearings and town hall sessions.

Formal hearings are usually held in the evening, for the convenience of working people who cannot attend daytime meetings during the week. A town hall or open house, however, can be scheduled from mid-afternoon through evening, or for a block of time in the afternoon and another in the evening. This may encourage more participation from people who work evenings, those who work in a project area

but do not live nearby, the elderly, and others who prefer not to attend at night.

Comments received in the public hearing become part of the project record. For a Draft EIS, responses to all substantive and relevant comments are provided in the Final EIS. For an EA, all substantive and relevant comments must be fully considered before proceeding with the project.

FHWA cannot sign either the Finding of No Significant Impact (FONSI) or Record of Decision (ROD) until after the comments received in the public hearing and by other means are fully considered, responses are prepared, and public input is incorporated, as appropriate, into the EA or EIS. A public hearing is an opportunity for the public to make formal statements of position immediately before project decision making and preparation of the final environmental document. A hearing is a specific, observable administrative benchmark for public involvement. Public meetings, as needed during the development of the NEPA document, are less formal opportunities for early and continuing public involvement.

DDOT may conduct one or more public hearings or provide the opportunity for a public hearing(s) at a convenient time and place for any project that meets one of the following criteria:

- The proposal requires more than 0.5 acre of permanent right-of-way.
- The proposal substantially changes the layout or function of connecting roadways or of the facility being improved.
- The proposal may have substantial adverse impact on abutting property.
- The proposal may have a significant social, economic, environmental, or other effect.
- The proposal is determined by FHWA, in consultation with DDOT, to warrant a public hearing in the public's interest.
- The proposal involves impacts to resources in or eligible for inclusion in the National Register of Historic Places (NRHP), wetland impacts, and/or significant floodplain encroachments.

As well, DDOT may conduct a public hearing on local projects that do not involve federal aid when a project meets one or more of these criteria.

Public hearings will be held for all transportation projects that involve the development of an EIS under the NEPA. The disposition of both oral and written comments will be included in the final approved NEPA document that constitutes FHWA approval.

### 11.5.1 Public Hearing Notification Procedures

In accordance with 23 CFR 771.111(h), a notice of public hearing is published in the District of Columbia Register and in at least one newspaper having general circulation in the District, beginning two weeks before the public hearing. The notice also should be published in local newspapers having substantial circulation in the affected area (including minority-focused newspapers and foreign language newspapers, as appropriate). Newspaper notices are placed as display advertisements, not as legal or classified advertisements.

The public notice is published 2 weeks before the hearing and announces the public comment period. The Draft EIS or EA must be placed in public locations beginning 2 weeks before the public hearing and for at least 2 weeks after the hearing. In all, the document must be available for review for no less than 30 days for an EA or 45 days for an EIS.



In addition to placing newspaper notices, mail copies of the public notice to the appropriate ANCs, District agencies, representatives of the United States Department of the Interior and the United States Department of Housing and Urban Development (where appropriate), other federal and quasi-federal agencies, and other groups or individuals who have an interest in the project. Copies of the notice should also be posted in public places in the affected area, such as libraries, community centers, churches, and stores, to maximize outreach to people who may not have been aware of previous public involvement activities.

The public notice includes:

- Date, time, and place of the hearing
- A brief description of the proposal
- A location where the public can find environmental documents, maps, drawings, and other relevant information before the hearing
- How and by what date people can submit written or oral comments
- A point of contact for questions about the hearing or to request any special services needed to participate, such as language or sign-language interpretation

A tentative schedule of right-of-way acquisition and construction should be provided in the notice, if applicable. When mailed or used as a handout, a map or other illustration of the proposal could be included to better promote public understanding of the project.

### 11.5.2 Conducting a Public Hearing

There are no regulations that dictate what kind of format to follow for public hearings. Although DDOT has flexibility in conducting public hearings, certain criteria must be met:

- The hearing is open to all members of the public.

- The hearing is held at a time and place convenient to most of the people affected by the project, including both the business community and private citizens.
- The building where the hearing is held is compliant with the accessibility requirements of the ADA.
- The hearing is advertised in advance.
- The Draft EIS, exhibits, and informational materials are available at the hearing.
- Comments are formally recorded: people have the choice of making oral comments during the hearing or filing written responses during and after the hearing.
- An official transcript of comments is prepared and made available to parties interested in it after the event.

Debriefing: Because most of an open house is conducted informally by DDOT staff members, they should meet soon afterward (preferably the next day) to identify issues and ideas that were discussed in informal conversations and that may not have been captured in the formal record.

Hearing record: After the hearing, a verbatim written record of the oral presentations and written comments at public hearings will be prepared. For federal-aid projects, a summary and analysis of comments received during the hearing process will be provided to FHWA and made available for public inspection. Copies of maps and exhibits and other material used at the hearing also can be made available upon request.

### 11.5.3 Notice of Opportunity for a Public Hearing

The public involvement requirements for either an EA or a CE project can be satisfied by either holding a public hearing or by DDOT publishing notices offering the opportunity for a public hearing.

A Notice of Opportunity may be used to satisfy the requirement for a public hearing on an EIS, if DDOT believes, based on earlier comments received and on contact with key stakeholders, that the project is not controversial and that hearing requests are unlikely. This option is not often used, because of the potential for delays if hearing requests are received. Contact the FHWA liaison engineer before proceeding to publish a Notice of Opportunity on an EIS. Usually a Notice of Availability (NOA) for a Draft EIS is published indicating the dates and locations of public hearings as well as other methods of providing comments.

If DDOT chooses the Notice of Opportunity option, publish notices in local media. Explain the procedure for requesting a public hearing in the notice. Publicize the availability of the appropriate environmental document and explain where project materials may be reviewed. Inform the public of significant floodplain encroachments and whether a practicable alternative exists for the use of impacted wetland and historic resources. Clearly state the deadline for submission of a request for a public hearing.

If no response is received by the stated deadline, DDOT will certify that the public involvement requirements have been satisfied and document the files accordingly. DDOT shall forward a copy of each certification to FHWA for information.

If a limited number of requests are received (usually less than four), appropriate DDOT representatives may meet with those individuals who responded to determine their involvement and concerns. Residents may request a public hearing be held when a substantial and significant social, economic, or environmental interest in the matter is perceived. If a resident identifies no significant interest, and DDOT determines that it is not in the public interest to hold such a meeting, DDOT will prepare a report to certify that the public involvement requirements have been satisfied.

A public notice must be published in local newspapers, and, by other means (such as an existing mailing list), DDOT must offer an opportunity for a public hearing. The notice must provide a 30 day comment period after the notice is published, to allow interested members of the public to request a hearing, and the notice should explain that a hearing will be scheduled if at least four written requests are received.

### **11.6 Limited English Proficient Population**

Areas where the population includes Limited English Proficient (LEP) population, then efforts must be made to allow the LEP population with appropriate resources to provide comments and to participate in the public involvement process.

Useful strategies to engage LEP populations include, but are not limited to:

- Translating vital documents, such as public meeting notices and posting in foreign language newspapers
- Using bilingual interpreters and/or hiring bilingual project staff
- Coordinating with community organizations targeting LEP populations
- Use of visual displays or symbols to notify and engage LEP populations in project activities

### **11.7 Documenting the Public Involvement Process**

Whenever a public involvement activity takes place, document the activity, participants, issues discussed, any agreements reached, and the results in writing as soon as possible after the activity takes place and maintain the documentation in the project file. This documentation is

critical as evidence that the letter and spirit of local and federal laws, regulations, and policies were followed.

To keep track of completed events, documentation can be attached as appendices to the PIP, as a series of internal memoranda, or other technique. For an EIS, this information will need to be compiled, summarized, and included in both the Draft and the Final EIS. Summarize the primary issues after each activity, especially for larger, more complex projects. Doing so consistently throughout a project, makes it much easier to provide FHWA with evidence of compliance of legal public involvement requirements, as well as to make use of lessons learned on the project for future NEPA documents.

Include the following items when documenting any public involvement activity:

- Participant sign-in sheets for meetings
- Copies of handouts
- Copies or descriptions of displays and presentations
- Documentation of discussions, questions, and oral or written responses (meeting notes or hearing record)
- Acknowledgement of all correspondence and maintenance of copies in a project file

Comments received in a public hearing become part of the project record. For a Draft EIS, responses to all substantive and relevant comments must be fully considered before decisions are made, and the comments and responses must be provided in the Final EIS. For an EA, all substantive and relevant comments must be fully considered before proceeding with the project.

FHWA cannot sign either the FONSI following an EA or the ROD following a Final EIS until after the comments received in the public hearing and by other means are fully

considered, responses are prepared, and public input is incorporated, as appropriate, into the EA or EIS.

## 11.8 Additional Information

Some useful reference documents are listed below.

### 11.8.1 Reference Documents

- An Overview of Transportation and Environmental Justice, USDOT FHWA/FTA, 2000  
*<http://www.fhwa.dot.gov/environment/ej2000.pdf>*
- Context Sensitive Guidelines, DDOT, 2005
- Going Public: Involving Communities in Transportation Decisions, Transportation Research Board, 2002
- Hear Every Voice, Minnesota DOT, 1999
- How to Engage Low-Literacy and Limited English Populations, FHWA, 2006
- Methods and Approaches to Enhance Involvement in Non-Traditional Transportation Stakeholder Communities and Neighborhoods, Minnesota DOT, 1997
- Practitioner's Handbook (05): Utilizing Community Advisory Committees for NEPA Studies, AASHTO, 2006
- Practitioner's Handbook (06): Consulting Under Section 106 Of The National Historic Preservation Act, AASHTO, 2007
- Project Development Procedures Manual: Chapter 11 – Public Hearings, and Chapter 22 – Community Involvement, CalTrans, 1999
- Public Involvement in Environmental Permits, A Reference Guide (EPA 500 R 00-007), U.S. EPA, 2000
- SAFETEA-LU Environmental Review Process – Final Guidance, FHWA, 2007

- Transportation and Environmental Justice, Effective Practices (FHWA-EP-02-016), USDOT FHWA/FTA, 2000

### 11.8.2 Useful Websites

- District of Columbia Advisory Neighborhood Commissions  
*<http://anc.dc.gov/anc/site/default.asp>*
- D.C. Citywide Calendar  
*<http://app.calendar.rrc.dc.gov/monthView.aspx?cdlCalendars=59&agencyUrl=http://ddot.dc.gov>*
- DDOT Newsroom  
*<http://newsroom.dc.gov/list.aspx/agency/ddot>*
- D.C. Office of Planning  
*<http://planning.dc.gov/planning/site/default.asp>*
- D.C. Library Locations  
*<http://www.dclibrary.org/dcpl/cwp/view.asp?a=1266&q=564161>*
- FHWA – NEPA Guidebook Site  
*<http://www.environment.fhwa.dot.gov/guidebook/index.asp>*
- FHWA Guidance Material on Public Hearings and Other Public Involvement  
*<http://www.environment.fhwa.dot.gov/guidebook/vol2/doc13b.pdf>*
- FHWA/FTA Interim Policy on Public Involvement  
*<http://www.environment.fhwa.dot.gov/guidebook/chapters/v2ch13.asp>*
- FHWA/FTA Questions and Answers on Public Involvement in Transportation Decision-making  
*[http://www.fhwa.dot.gov/environment/pub\\_inv/q\\_and\\_a.htm](http://www.fhwa.dot.gov/environment/pub_inv/q_and_a.htm)*
- FHWA/FTA Public Involvement Techniques For Transportation Decision-making  
*<http://www.fhwa.dot.gov/reports/pittd/contents.htm>*
- AASHTO – Environmental Justice Page  
*[http://environment.transportation.org/environmental\\_issues/environmental\\_justice/](http://environment.transportation.org/environmental_issues/environmental_justice/)*
- CalTrans – Environmental Manual: Federal Requirements  
*<http://www.dot.ca.gov/ser/vol1/vol1.htm>*
- Minnesota DOT’s Public Involvement Process  
*<http://www.dot.state.mn.us/planning/publicinvolvement/>*
- Washington Post Advertising  
*<http://www.washingtonpostads.com/>*
- Washington Times  
*<http://www.washingtontimes.com/>*
- Washington Informer Advertising  
*<http://www.washingtoninformer.com/advertising.html>*
- Washington City Paper  
*<http://www.washingtoncitypaper.com/>*
- Capitol Community News (Hill Rag, East of the River, D.C. North)  
*<http://www.capitolcommunitynews.com/index.cfm>*

# CHAPTER 12

## AGENCY COORDINATION PROCESS



- 12.1 Regulations and Guidance
- 12.2 Agency Responsibilities
- 12.3 Lead, Cooperating, and Participating Agencies
- 12.4 Opportunities for Agency Involvement
- 12.5 Additional Information



## AGENCY COORDINATION PROCESS

The recognition of the need for early coordination and cooperation with federal, state, and local agencies in the development of federal-aid highways predates the National Environmental Policy Act of 1969 (NEPA). As early as 1963, the Federal Highway Administration (FHWA) established a unit at its headquarters to improve interagency coordination and public involvement for highway projects. Following the passage of NEPA, some of the notable milestones in the evolution of agency coordination as part of the NEPA process include:

- The 1978 Council on Environmental Quality (CEQ) regulations introduced the concepts of “lead agency” and “cooperating agency.”
- In late 1987, FHWA prepared guidance on how to identify and work with cooperating agencies. That guidance was superseded by the 1992 FHWA memorandum “Guidance on Cooperating Agencies” that, among other issues, discussed lead agency and cooperating agency responsibilities, agency responsibilities with the Clean Water Act (CWA) Section 404 Permit,

and included a question-and-answer section regarding cooperating agencies.

- In March 1994, FHWA, the United States Environmental Protection Agency (USEPA), the United States Fish and Wildlife Service (USFWS), and the United States Army Corps of Engineers (USACE) developed the Concurrent NEPA/Section 404 Processes for Transportation Projects, which specifies three concurrence points in the NEPA process: purpose and need, alternatives to be carried forward for detailed study, and selection of a recommended alternative.
- Under the Safe Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) Section 6002 (23 United States Code [USC] Section 139), the United States Department of Transportation (USDOT) established a process for involving “participating” agencies. Participating agencies are more broadly defined than cooperating agencies; they are agencies with “an interest” in the project. The process requires inviting participating agencies and providing

them and the public with the opportunity to participate in defining the proposed project's purpose and need and determine the range of alternatives. The process also provides participating agencies the opportunity to work in collaboration with the lead agencies to determine the methodologies and level of detail to be used in analyzing the alternatives.

The unifying understanding among the above-mentioned documents/regulations is that effective agency coordination is not only an essential element of the transportation planning process, but also the project development process leading to construction. In the NEPA phase, the agencies' scientific and technical input results in more comprehensive resource discussions that address the regulatory issues in the manner that meet agencies' requirements. By participating in the development and approval of critical steps of the environmental document development (purpose and need, range of alternatives, and preferred alternative), the document is less likely to meet agency opposition during public/agency review periods and the likelihood for backtracking during the process to revisit past decisions is greatly reduced. Finally, effective agency involvement during the NEPA process yields the type of information required by agencies in permit applications, thereby minimizing the potential for construction delays.

## 12.1 Regulations and Guidance

This section provides the legislation, regulations, and guidance most likely to be applicable to and associated with typical agency coordination for transportation projects.

### Federal Legislation and Regulations

- 40 CFR 1500–1508, the Council of Environmental Quality (CEQ), Regulations for Implementing NEPA
- 23 CFR Highways Chapter 1, Federal Highway Administration, Department of Transportation, Subchapter H, Right of Way and Environment, Part 771, Environmental Impact and Related Procedures
- The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU Section 6002)

### Local Legislation and Regulations

- District Environmental Policy Act of 1989, Chapter 72, Section 7203 (Designation and Responsibilities of Lead Review Agencies)

## 12.2 Agency Responsibilities

Listed below are federal and local agencies that could be involved in DDOT projects. For a complete list of federal agencies with jurisdiction by law or special expertise, see Appendix II of the CEQ regulations (49 Code of Federal Regulations [CFR] 49750). The number of federal and local agencies that need to be involved in each project and the level of their involvement will vary by project. The most intensive agency involvement would likely occur on Environmental Impact Statement (EIS) projects because of the range and potential significance of project impacts. Section 12.3 includes information about the roles federal agencies (and other agencies) perform in DDOT transportation projects.

### 12.2.1 Federal Agencies

**Federal Highway Administration (FHWA)** – It is very important to understand the role of FHWA because FHWA is the lead federal agency for most DDOT projects. Most of the DDOT projects use FHWA funding. FHWA provides oversight and approvals for not only the funding and technical details but is also responsible for NEPA actions and



other related environmental laws. DDOT always prepares all the environmental documents for FHWA; however, these documents have to be approved by FHWA, and the official determination of NEPA action, Section 106 effects, Section 4(f) evaluation, and other environmental laws has to be made by FHWA. Details of environmental regulations for FHWA can be obtained from 23 CFR 771. Whenever a project is using FHWA funds, it is very important to work closely with FHWA to make sure all FHWA regulations and procedures are followed.

**Federal Transit Administration (FTA)** – DDOT also uses FTA funds in some of its projects. When FTA funds are used, FTA becomes the lead federal agency and is responsible for NEPA actions and other related environmental laws. Official determination of NEPA action, Section 106 effects, Section 4(f) evaluation, and other environmental laws has to be made by FTA.

**United States Army Corps of Engineers (USACE)** – USACE is the primary federal agency that regulates direct impacts to rivers, streams, and wetlands under Section 10 of the Rivers and Harbors Act and Section 404 of the CWA. Both Section 10 and Section 404 apply to all activities, public or private. Section 10 regulates activities in navigable waters, and Section 404 regulates the discharge of fill material into “waters of the United States,” including navigable waters but also extending along tributaries and adjacent wetlands. In general, USACE exercises its authority under both laws as a single permitting process.

The regulatory branch of the USACE Baltimore District leads project regulatory compliance in the District of Columbia.

**United States Environmental Protection Agency (USEPA)** – Under the Clean Air Act Section 309, USEPA has the authority to review and comment on the proposed actions

of other federal agencies under NEPA. This means that USEPA can review NEPA documents. USEPA, however, usually reviews other agency EISs and provides comments in addition to ranking the Draft EIS based on environmental issues. All Draft EISs must be submitted to USEPA for review. These copies should be submitted to the NEPA team at USEPA Region 3 office in Philadelphia. These copies are in addition to the copies submitted to USEPA for Federal Register Notice. USEPA generally does not review Environmental Assessments (EAs); however, for complex and controversial projects USEPA may want to be involved.

In addition, USEPA has broad authority over air, water, and land pollution. USEPA has oversight of USACE execution of Section 404. Generally, USEPA is invisible in the Section 404 permitting process; however, USEPA has approval authority for some USACE Jurisdictional Determinations.

In the District of Columbia, USEPA is also the permitting authority for Section 402, the National Pollutant Discharge Elimination System (NPDES) program. For highways, NPDES permitting relates to stormwater discharges.

USEPA Region 3 (Mid-Atlantic) office in Philadelphia and its field office in Annapolis are responsible for programs in the District of Columbia.

**Federal Emergency Management Agency (FEMA)** – As it relates to highway projects and natural resources, FEMA has primary responsibility for the protection of floodplains in accordance with Executive Order 11988, Floodplain Management. Generally, FEMA regulates projects within the limits of the 100-year floodplain, as shown on the Flood Insurance Rate Maps, which are issued by FEMA. Floodplain regulation has been delegated in the District of Columbia to the District Department of the Environment (DDOE) and Watershed Protection Division (discussed below).

**United States Fish and Wildlife Service (USFWS)** – (Department of the Interior and National Marine Fisheries Service (NMFS, National Oceanographic and Atmospheric Administration, Department of Commerce) – USFWS and NMFS share responsibilities regarding overall evaluation of a project on natural habitats, fish and wildlife, and threatened and endangered species. The Fish and Wildlife Coordination Act requires proponents to coordinate the impacts of federally funded projects with these agencies. These agencies maintain records of species that are protected under the Endangered Species Act and oversee compliance with the Act. Through a cooperative agreement with the Virginia Institute of Marine Sciences, NMFS also monitors the annual extent of submerged aquatic vegetation (SAV), a type of plant community that occurs in permanent waters and is an important habitat feature for fish and water quality. SAV beds are protected as a special aquatic habitat (as with wetlands) under Section 404, as well as under District regulations, as noted above (and in Chapter 14 of DCMR Title 21).

The Chesapeake Bay Field Office of USFWS in Annapolis and the northeast regional office of the NMFS in Gloucester, Massachusetts, oversee activities in the District of Columbia.

**National Park Service (NPS)** – NPS owns a number of parks as well parkways within the District of Columbia. NPS also owns the bottom of the Potomac River and Anacostia River within the District of Columbia. In addition, NPS National Capital Region Center for Urban ecology has particular interest in designated national parks but also maintains records and provides protection for federally listed and state-listed rare species.

**United States Coast Guard (USCG), Office of Bridge Administration** – USCG has authority to regulate projects in or over navigable waterways that may impede navigation under Section 9 of the Rivers and Harbors Act. While the

impact to natural resources and water quality is not its primary focus, the USCG also must ensure that projects under its purview are in compliance with environmental regulations that apply to federally funded projects or projects that require a federal license or permit.

The Fifth Coast Guard District, in Portsmouth, Virginia, has jurisdiction over projects in the District of Columbia.

**National Capital Planning Commission (NCPC)** – NCPC has review and approval authority over certain projects within the District of Columbia. NCPC authority is usually limited to federal interests (federal buildings, parks).

**United States Commission of Fine Arts (CFA)** – Established in 1910 by Act of Congress, CFA is a federal entity, charged with giving expert advice to the departments and agencies of the federal and District of Columbia governments on matters of design and aesthetics, as they affect the federal interest and preserve the dignity of the nation's capital.

**Other Federal Agencies** – There are several other federal agencies within the District of Columbia that may have to be coordinated depending upon the nature and location of a project. These agencies include Architect of the Capitol (AOC), Department of Defense (DoD), General Services Administration (GSA), and others.

### 12.2.2 Local Agencies

The District of Columbia Department of the Environment (DDOE) is the District government's equivalent of USEPA.

- Fisheries and Wildlife Division provides fish and wildlife research and management, aquatic education, and fishing license administration. The Fisheries and Wildlife Division conducts annual surveys, maintains a database of fish and ichthyoplankton populations in

the waters of the District of Columbia, and monitors and evaluates aquatic habitat. The Fisheries and Wildlife Division has also developed the District of Columbia Comprehensive Wildlife Conservation Strategy, a plan for conserving wildlife and their habitats, with particular emphasis on preserving wildlife and habitats in the urban environment. Coordination with the District of Columbia Fisheries and Wildlife Division could provide existing conditions information, rare species data, and impact assessment for projects.

- Water Quality Division is an important regulatory agency to contact for any impacts to waterways or wetlands. The Water Quality Division provides drinking water testing, source water assessment, and water quality certification under Section 401 of the CWA. The Water Quality Division monitors water quality and designates appropriate uses of the various water bodies.

As required under Section 401 of the CWA, the Water Quality Division provides Water Quality Certification (WQC) for draft NPDES permits (issued by USEPA) and Section 404 permits (issued by USACE). The 401 WQC process provides the District with the opportunity to review the federal permits for consistency with District water quality standards and SAV regulations. The limits of jurisdiction of the Water Quality Division may extend beyond the limits determined by USACE for waters of the United States; that is, the Water Quality Division may also regulate isolated waters.

In accordance with Section 303(d) of the CWA, the Water Quality Division also provides total maximum daily load (TMDL) assessment for each of the watersheds (Potomac, Anacostia, and Rock Creek) in the District.

- Watershed Protection Division, Sediment and Storm Water Technical Services Branch is responsible for

stormwater management, sediment and erosion control, and floodplain management for all land-disturbing activities. The Sediment and Storm Water Technical Services Branch is responsible for reviewing project plans for consistency in these areas with the District of Columbia Municipal Regulations (DCMR) zoning regulations.

- Air Quality Division develops and implements plans and programs to meet and maintain federal and District of Columbia air quality standards. The Air Quality Division protects and manages District air resources in accordance with 20 DCMR Air Pollution Control Act of 1984.
- Stormwater Management Division works on methods to reduce stormwater runoff pollution through the implementation of activities that go beyond the activities required in the District NPDES Permit. This division has been responsible for managing the District NPDES Permit (MS4 permit) since February 2007. This permit was previously managed by the District of Columbia Water and Sewer Authority (DCWASA).
- Toxic Substances Division includes Hazardous Material Branch, and Land Development and Remediation Branch.

District of Columbia Water and Sewer Authority (DCWASA) maintains records of water quality in the drinking and wastewater systems. This agency may be able to provide current surface water quality data in a project area where there is a combined sewer overflow or other wastewater outfall. The District Stormwater Administration, part of DCWASA, is the lead agency for controlling stormwater outfalls in the District.

District of Columbia Department of Parks and Recreation (DPR) is responsible for urban recreation and leisure

services to residents and visitors to the District of Columbia. DPR owns and maintains a number of parks, community facilities, and neighborhood recreation centers.

District of Columbia Office of Planning (DCOP) is the lead District agency for all land use, development, and neighborhood planning for the District. The State Historic Preservation Office (SHPO) for the District is called the District of Columbia Historic Preservation Office (DCHPO) and is a part of the DCOP.

Metropolitan Washington Council of Governments (MWCOG) maintains water quality and fisheries data on a regional basis. MWCOG also monitors fish habitat conditions and areas in need of restoration.

### 12.3 Lead, Cooperating, and Participating Agencies

The role of a local, state, or federal agency in the NEPA process depends on the agency's expertise and relationship to the proposed undertaking. The key to a successful NEPA project is to coordinate with all agencies that can provide data and information that will yield a more comprehensive environmental document. It is also good NEPA practice to coordinate with agencies who request information about the project, regardless of the information they can provide the project.

The number of agencies involved in a project and their levels of involvement will vary in response to the type and level of project impacts. While there are no firm rules on the agencies that will be involved in DDOT project, it is generally true that there will be a greater level of agency involvement in projects requiring an EIS (rather than an EA or Categorical Exclusion [CE]) simply because of the range and potential significance of project impacts.

To broaden the range of agencies that have the ability to influence the NEPA process, SAFETEA-LU created in August 2005 the designation of "participating" agencies to allow more state, local, and tribal agencies a formal role and rights in the environmental process. The category of participating agency joins the designations of lead agency and coordinating agency that have been a part of the environmental process since the inception of NEPA. Brief explanations of lead, cooperating, and participating agencies are found below. It is important to note that the agency coordination (and other) provisions of SAFETEA-LU must be implemented on highway, transit, and multimodal projects being processed with an EIS. For projects being processed as EAs or CEs, DDOT, in coordination with FHWA, will decide whether to apply SAFETEA-LU.

The lead agency, as defined in SAFETEA-LU, is the USDOT agency conducting the NEPA analysis. For DDOT projects, the lead agency would most often be FHWA, but it could also be the FTA, the Federal Railroad Administration (FRA), or other federal agencies. DDOT, as the project sponsor that is receiving SAFETEA-LU funds, would be the joint lead agency. The lead agencies must identify and involve participating agencies, develop coordination plans, provide opportunities for public and participating agency involvement in defining the purpose and need and determining the range of alternatives, and collaborate with participating agencies in determining methodologies and the level of detail for the analysis of alternatives. In addition, lead agencies must provide increased oversight in managing the process and resolving issues. In short, the lead and joint lead agencies manage the SAFETEA-LU 6002 process, oversee preparation of the EIS, and provide opportunities for public and cooperating/participating agency involvement.

Cooperating agencies are federal or local agencies other than the federal lead agency that have jurisdiction by

law over the property or area that will be affected by the transportation project or special expertise with respect to a particular environmental issue in the project area that could significantly affecting the quality of the human environment.

Participating agencies are federal, state, or local agencies that may have an interest in the project. The roles and responsibilities of participating agencies include, but are not limited to:

- Participating in the NEPA process starting at the earliest possible time, especially with regard to the development of the purpose and need statement, range of alternatives, methodologies, and the level of detail for the analysis of alternatives.
- Identifying, as early as practicable, any issues of concern regarding the project’s potential environmental or socioeconomic impacts. Participating agencies also may participate in the issue resolution process described later in this guidance.
- Providing meaningful and timely input on unresolved issues.
- Participating in the scoping process. The scoping process should be designed so that agencies whose interest in the project comes to light as a result of initial scoping activities are invited to participate and still have an opportunity for involvement.

SAFETEA-LU specifies that federal agencies that do not decline the invitation in writing are by default considered participating agencies. It also states that nonfederal agencies that do not provide written acceptance are not considered participating agencies.

As noted, the federal, state, and local agencies that could serve as cooperating or participating agencies will vary with

each DDOT project. A list of potential cooperating and participating agencies is found below. The list is not meant to be exhaustive or all inclusive.

### **Federal Agencies**

- Advisory Council on Historic Preservation
- Architect of the Capitol
- National Capital Planning Commission
- United States Commission of Fine Arts
- National Park Service (United States Department of the Interior)
- United States Army Corps of Engineers, Baltimore District
- United States Environmental Protection Agency
- United States Coast Guard, Fifth District
- United States Department of Housing and Urban Development
- United States Federal Railroad Administration
- United States Federal Transit Administration
- United States Fish and Wildlife Service
- National Marine Fisheries Service

### **State, Local, and Regional Agencies**

- District of Columbia Department of the Environment
- District of Columbia Department of Health
- District of Columbia Department of Parks and Recreation
- District of Columbia Housing and Community Development
- District of Columbia Water and Sanitary Sewer Authority
- Metropolitan Washington Council of Governments

- Washington Metropolitan Area Transit Authority
- Interstate Commission on the Potomac River Basin
- Maryland Department of Transportation
- Maryland Department of the Environment
- Montgomery County Department of Environmental Protection
- Prince George’s County Department of Environmental Resources

It is important to remember that the agencies listed above and many more in the Washington, D.C. metro area can play meaningful roles in DDOT projects without being identified as either cooperating or participating agencies.

## 12.4 Opportunities for Agency Involvement

Agency coordination should occur as early as possible in the NEPA process and continue through the approval of the final environmental document. Regardless of the type of environmental document being prepared, DDOT should begin working with the appropriate agencies as early in the project development stage as possible. This will allow agencies the chance to identify environmental impacts and responsibilities it considers most critical and work with DDOT to ensure the environmental document addresses them.

### 12.4.1 SAFETEA-LU

The passage of SAFETEA-LU (23 USC Section 139) in August 2005 changed the nature of agency involvement in EIS projects. The objective of SAFETEA-LU is to involve the public and appropriate federal, state, and local agencies in the environmental review process and to move the process along expeditiously. All EISs for which the Notice of Intent (NOI) was published in the Federal Register after August 10, 2005, must follow SAFETEA-LU requirements.

As noted in Section 12.4, SAFETEA-LU created a new category of involvement in the environmental review process termed “participating agency.” The intent of the new category is to encourage governmental agencies at any level with an interest in the proposed project to be active participants in the NEPA evaluation. Designation as a participating agency does not indicate project support but does give invited agencies new opportunities to provide input at key decision points in the process.

As a joint lead agency on its transportation projects, DDOT, in cooperation with FHWA, must identify and involve participating agencies, develop a coordination plan, and collaborate with participating agencies in determining methodologies and the level of detail for the analysis of alternatives. The purposes of the coordination plan are to facilitate and document the lead agencies’ structured interaction with the public and other agencies and to inform the public and other agencies of how the coordination plan will be accomplished. The coordination plan is meant to promote an efficient and streamlined process and good project management through coordination, scheduling, and early resolution of issues. The coordination plan should be developed early in the environmental review process after project initiation and should outline the points for review and comment by the participating and cooperating agencies, as well as by the public.

The purpose of the impact analysis methodology is to communicate and document the lead agency’s structured approach to analyzing impacts of the proposed transportation project and its alternatives. Collaboration on the impact analysis methodology is intended to promote an efficient and streamlined process and early resolution of concerns or issues. Consensus on the methodology is not required, but the lead agency must consider the views of the cooperating and participating agencies with relevant interests

before making a decision on a particular methodology. Well-documented, widely accepted methodologies, such as those for noise impact assessment and evaluation of impacts under Section 106 of the National Historic Preservation Act would require minimal collaboration. If a cooperating or participating agency criticizes the proposed methodology for a particular environmental factor, the agency should describe its preferred methodology and why it is recommended.

In addition to identifying participating agencies and developing coordination plans and impact analysis methodologies, DDOT is also required to provide enhanced opportunities for public and participating agency involvement in defining the purpose and need and determining the range of alternatives. DDOT will also be responsible for notifying cooperating and participating agencies of the availability of Draft and Final EIS documents and providing appropriate comment opportunities. Finally, DDOT will coordinate with agencies on completion of necessary permits following the Record of Decision (ROD).

There are numerous sources of information about SAFETEA-LU in general and its agency coordination provision. Two recommended sources are FHWA's SAFETEA-LU Environmental Review Process (Public Law 109-59), Final Guidance November 15, 2006, (<http://www.fhwa.dot.gov/hep/section6002/>) and American Association of State Highway and Transportation Officials (AASHTO) Practitioner's Handbook 09, Using the SAFETEA-LU Environmental Review Process (January 2008) ([http://environment.transportation.org/pdf/practitioners\\_handbook09.pdf](http://environment.transportation.org/pdf/practitioners_handbook09.pdf)).

While EA actions are not required to follow SAFETEA-LU provisions, there may be occasions when following the process would benefit a DDOT project. DDOT should coordinate with FHWA in deciding the applicability of SAFETEA-LU to EA actions. At this time, USDOT does

not intend to exercise the authority to apply the Section 6002 process to CEs.

### 12.4.2 Scoping

Scoping is an early opportunity for agency involvement in EIS and EA projects. Scoping is the process of determining what should be included in the environmental analysis and discussion for the EIS, both in terms of extent and level of detail. The scoping process greatly benefits an agency preparing an EIS/EA. For DDOT projects, the scoping process should particularly seek input from federal and local agencies with jurisdiction or special expertise. These agencies can provide valuable information about:

- Known resource issues of concern related to the project area
- Agency requirements for issuing permits or approvals, where it may have an action required to implement the proposed action
- Sources of information to be obtained and considered during studies
- The level and detail of analyses to be performed (including identifying what studies may not be necessary, thus saving time and effort for DDOT)
- Other projects being planned and/or studied
- Public involvement requirements

### 12.4.3 Agency Comments on Environmental Documents

In addition to commenting on purpose and need and project alternatives during the course of a NEPA project, agencies also have the ability to comment on the completed Draft EIS, EA, and Final EIS. Agency comments are included

in the appendices of those documents and would receive responses by DDOT.

## 12.5 Additional Information

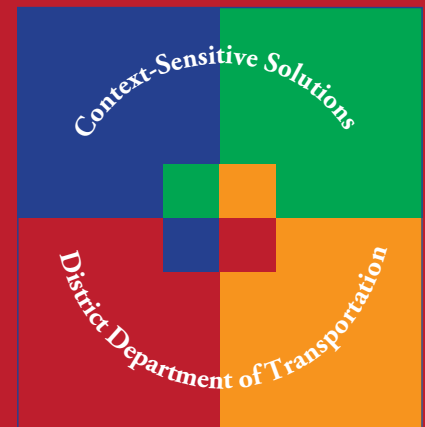
- CEQ Regulation Part 1501, NEPA and Agency Planning: <http://www.nepa.gov/nepa/regs/ceq/1501.htm>
- FHWA Environmental Guidebook, Interagency Coordination: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>
- FHWA Interagency Guidance: Transportation Funding for Federal Agency Coordination Associated with Environmental Streamlining Activities: <http://www.environment.fhwa.dot.gov/strmlng/igdocs/index.asp>
- 23 CFR Highways Chapter 1, Federal Highway Administration, Department of Transportation, Subchapter H, Right-of-Way and Environment, Part 771, Environmental Impact and Related Procedures: <http://www.fhwa.dot.gov/hep/23cfr771.htm>
- DC Environmental Policy Act of 1989, Chapter 72, Sec. 7203 (Designation and Responsibilities of Lead Review Agencies): <http://www.dcregs.dc.gov/Gateway/RuleHome.aspx?RuleNumber=20-7203>



# CHAPTER 13

## CONTEXT-SENSITIVE SOLUTIONS

### CONTENT

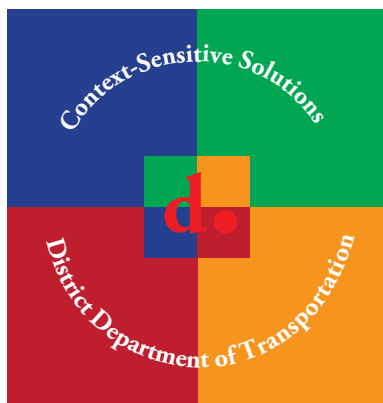


- 13.1 Summary of Key Legislation, Regulations, and Guidance
- 13.2 Agency Roles
- 13.3 General Analysis or Evaluation Methodology
- 13.4 Format and Contents of Documentation
- 13.5 Project Development Process
- 13.6 Continuation through Design and Construction
- 13.7 Additional Information



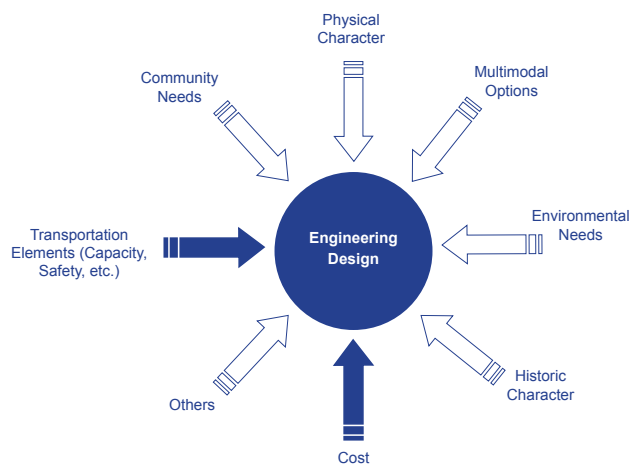
## CONTEXT-SENSITIVE SOLUTIONS

A Context-Sensitive Solution (CSS), also called Context-Sensitive Design (CSD), is a collaborative, interdisciplinary approach that involves all stakeholders in developing a transportation facility that fits its physical setting and preserves scenic, aesthetic, historic, and environmental resources while maintaining safety and mobility (Figure 13-1). CSS represents an approach that considers the total context within which a transportation improvement project will exist.



The District of Columbia Department of Transportation (DDOT) is committed to the advancement of CSS in all transportation projects. DDOT's objective is to improve the

environmental quality of transportation decision making by incorporating CSS principles in all aspects of planning and the project development process. CSS is an integral part of the DDOT project development process.



### 13.1 Summary of Key Legislation, Regulations, and Guidance

23 United States Code (USC) 109:

*A design for new construction, reconstruction, resurfacing... restoration, or rehabilitation of highways on the National Highway System (other than a highway also on the Interstate*

System) may take into account...[in addition to safety, durability, and economy of maintenance]...

- a. *The constructed and natural environment of the area*
  - b. *The environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity*
  - c. *Access for other modes of transportation*
- AASHTO National Highway System Design Standards Policy 1994

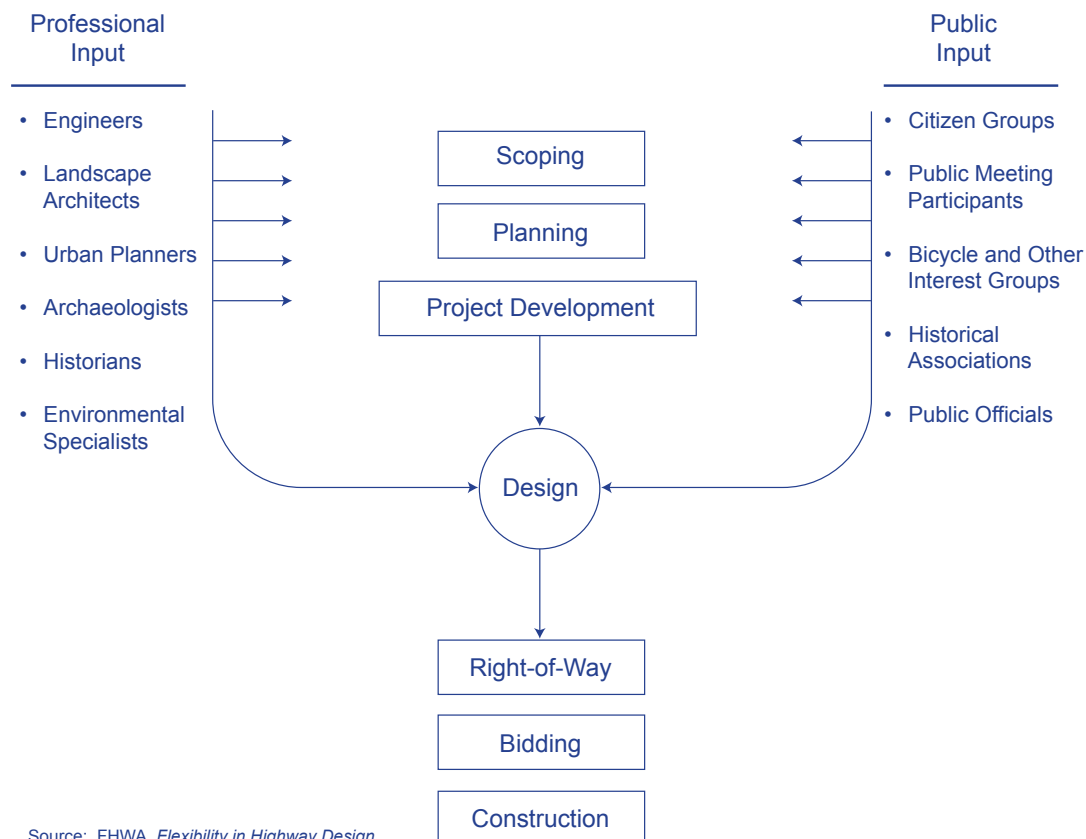
The American Association of State Highway Transportation Officials (AASHTO) adopted the National Highway System Design Standards policy on April 11, 1994. The relevant portion of this policy is:

*BE IT FURTHER RESOLVED that the Member Departments of AASHTO will work through AASHTO's*

*design standards committees with (the U.S. Department of Transportation) USDOT and with interested parties on design criteria and a design process for (National Highway System) NHS routes that integrate safety, environmental, scenic, historic, community, and preservation concerns, and on standards which also foster access for bicycles and pedestrian traffic along with other transportation modes.*

- 23 USC Section 109(c) (2) directs the Secretary of Transportation to consider three sources when developing criteria for the design for new construction, reconstruction, resurfacing (except for maintenance resurfacing), restoration, or rehabilitation of a highway on the National Highway System. These three sources are:

- The Policy on Geometric Design of Highways and Streets developed by AASHTO (The Green Book)



Source: FHWA, *Flexibility in Highway Design*

- The FHWA document Flexibility in Highway Design
- Eight Characteristics of Process to Yield Excellence and the Seven Qualities of Excellence in Transportation Design developed by CSS practitioners at the conference “Thinking Beyond the Pavement National Workshop on Integrating Highway Development with Communities and the Environment while Maintaining Safety and Performance.”

The seven qualities that characterize excellence in transportation design—the outcomes of the CSS process—are listed below.

- The project satisfies the purpose and needs as agreed to by a full range of stakeholders. This agreement is forged in the earliest phase of the project and is amended, as warranted, as the project develops.
- The project is a safe facility for both the user and the community.
- The project is in harmony with the community, and it preserves the environmental, scenic, aesthetic, historic, and natural resource values of the area.
- The project exceeds the expectations of both designers and stakeholders and achieves a level of excellence in the public’s mind.
- The project involves the efficient and effective use of resources (time, budget, community) of all involved parties.
- The project is designed and built with minimal disruption to the community.
- The project is seen as having added lasting value to the community.

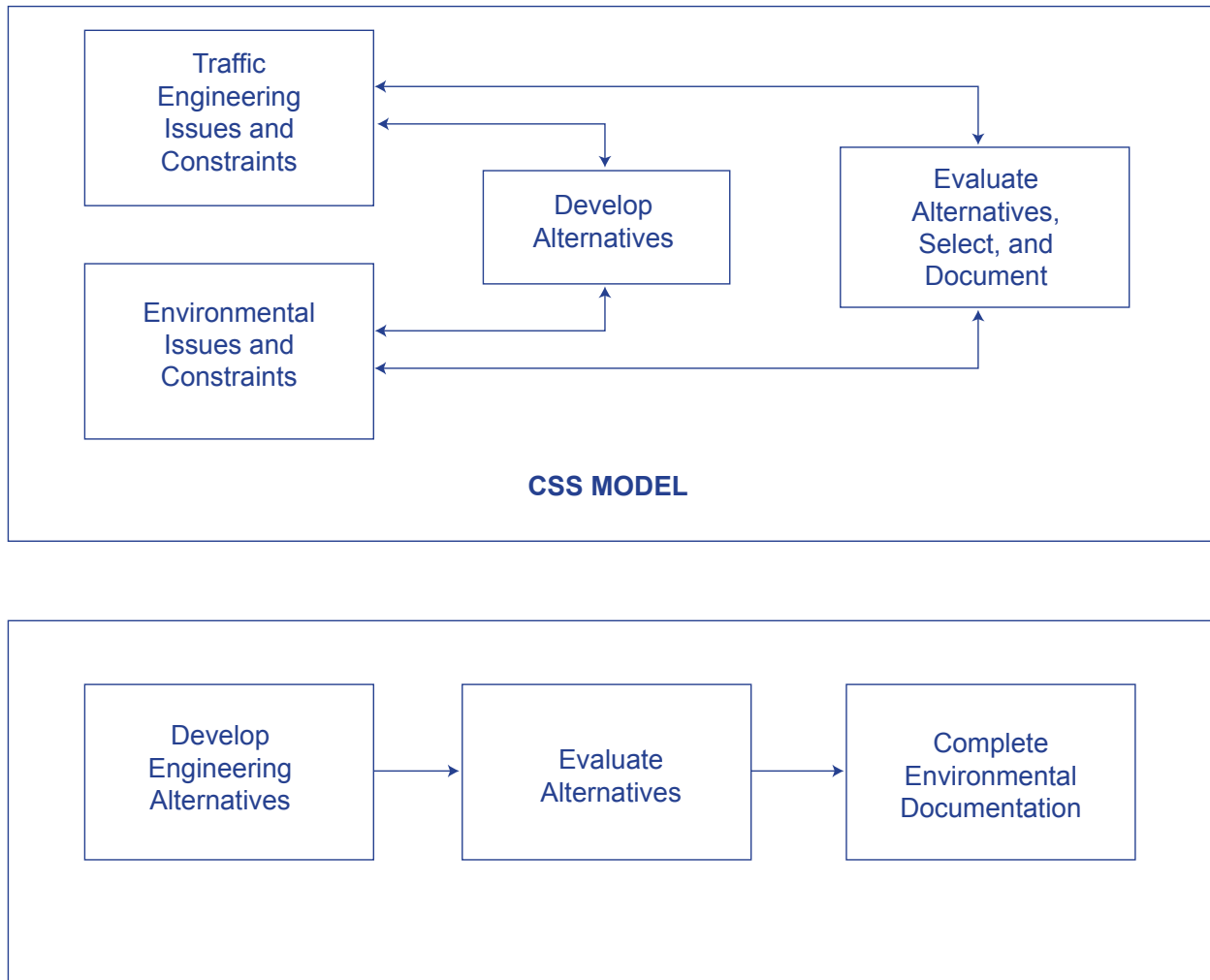
The eight characteristics of the process that will yield excellence in transportation design are listed below.

- Communication with all stakeholders is open, honest, early, and continuous.
- A multidisciplinary team is established early on, with disciplines based on the needs of the specific project, and with the inclusion of the public.
- A full range of stakeholders is involved with transportation officials in the scoping phase. The purposes of the project are clearly defined, and consensus on the scope is forged before proceeding.
- The highway development process is tailored to meet the circumstances. This process should examine multiple alternatives that would result in a consensus of approach methods.
- A commitment to the process from top agency officials and local leaders is secured.
- The public involvement process, which includes informal meetings, is tailored to the project.
- The landscape, the community, and valued resources are understood before engineering design is started.
- A full range of tools for communication about project alternatives is used, such as visualization.

### 13.2 Agency Roles

The key federal agencies with which to coordinate CSS will be Federal Highway Administration (FHWA), United States Commission of Fine Arts (CFA), National Capital Planning Commission (NCPC), National Park Service (NPS), United States Army Corps of Engineers (USACE) and United States Fish and Wildlife Service (USFWS).

**Figure 13-1 Context-Sensitive Solutions Approach—Integrating Concurrent Engineering and Environmental Analyses**



Source: FHWA, *Flexibility in Highway Design*

District of Columbia agencies involved are the District of Columbia Office of Planning (OP), District of Columbia Historic Preservation Office (DCHPO), and the District of Columbia Department of the Environment (DDOE).

### 13.3 General Analysis or Evaluation Methodology

DDOT has always used the principles of CSS in some form or another by involving the public, avoiding adverse impacts on the natural parklands, or enhancing multimodal transportation options in every transportation project. DDOT requires CSS to be an integral part of all

transportation design activities and requires the completion of a CSS worksheet.

CSS involves social, economic, and environmental considerations as meaningful parts of each alternative developed, not simply as add-ons or after-the-fact steps (see Figure 13-1). This integrated approach helps build consensus for the eventual decision and saves time and costs by incorporating such considerations from the beginning, when it is easier to accommodate change. There may be some confusion on how the National Environmental Policy Act of

1969 (NEPA) is related to CSS. In fact, the CSS process is like the NEPA process in that:

- Steps in the two processes are nearly identical and easily blend together.
- Both involve stakeholders in selecting the “best” alternative.
- Both are intended to provide adequate information for effective decision making.
- Both provide an interdisciplinary framework for considering the positive and negative impacts of agency actions.

The key elements of CSS for any project are described below.

### 13.3.1 Purpose and Need Statement

The Purpose and Need Statement under the CSS process does not necessarily focus only on transportation needs.

It may also focus on environmental and community values. It is the description of the transportation problem that provides the basis for the transportation project. The project purpose and need is a formal element of NEPA documentation. It is technically not required for non-NEPA projects, but it is recommended because it establishes the beginning framework for alternatives evaluation.

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) requires the purpose and need statement to clearly identify objectives that the proposed project is intended to achieve for improving transportation conditions. The objectives should be derived from needs and may include, but are not limited to, the following, as outlined in SAFETEA-LU.

- Achieving a transportation objective identified in an applicable statewide or metropolitan transportation plan

- Supporting land use, economic development, or growth objectives established in applicable federal, state, local, or tribal plans
- Serving national defense, national security, or other national objectives, as established in federal laws, plans, or policies

The purpose and need statement should be concise and understandable. Every effort should be made to develop a purpose and need statement that focuses on the primary challenges to be addressed.

Although the purpose and need statement serves as the cornerstone for the alternatives analysis, it should not discuss alternatives. Each potential alternative is analyzed to evaluate whether it meets the purpose and need for the project. Care should be taken that the purpose and need statement is not so narrowly drafted that it unreasonably points to a single solution.

### 13.3.2 Collaborative Stakeholder Involvement

Public and stakeholder involvement is an essential element of CSS. NCHRP 480: A Guide to Best Practices for Achieving Context Sensitive Solutions has excellent suggestions for identifying and motivating stakeholder involvement. Some of those suggestions are presented below. Some of these suggestions supplement or expand on the public involvement concepts presented in Chapter 11, Public Involvement.

For every design project, public involvement should be initiated in the earliest phase of the project and continued throughout its duration. CSS should be tailored to local needs and conditions and should be frequent, ongoing, innovative, and intended to affect the results of the planning process. Public involvement should play a meaningful role in

the project's evolution and the decision process. Developing a public involvement plan generally involves four steps.

1. Identifying stakeholders
2. Interviewing stakeholders
3. Selecting public involvement techniques
4. Planning for implementation

### Identifying Stakeholders

A stakeholder is anyone or any organization that may be affected by the ultimate project or the process to achieve the project. Stakeholders are the individuals or groups, private or public, who are potentially affected by the project either directly or indirectly and have a “stake” in the success or failure of the project. Stakeholders typically include owners or property adjacent to the project and their tenants, users of the facility, representatives of the political jurisdictions in which the project is located, transportation service providers in the area, and a wide range of interest groups who support and oppose the project.

Identifying stakeholders is sometimes difficult. It may be useful to solicit opinions and feedback from people within the sponsoring agency familiar with the project area and with the transportation needs. The first step to developing a public involvement plan is to identify the key groups to focus on, such as the city council, Advisory Neighborhood Commission (ANC), advocacy groups, media, and the public at large. These representatives can identify potential issues that could be raised by a project in the area, the groups likely to be affected by those issues, key people in each group, the type of impacts that might be expected, and the significance of those impacts on the group(s). Also, knowledge and understanding of the local community is a critical success factor in identifying stakeholders. The ANC may be helpful in making this assessment and also

in identifying the local groups that might be affected by a proposed project.

### Interviewing Stakeholders

After identifying the stakeholders, the next step is to conduct one-on-one interviews with a selected set of potential stakeholders, either by telephone or in person. The necessary number of interviews will vary for each project, and all the stakeholders identified need not be interviewed personally. Stakeholders can be narrowed down to represent the full range of those affected and should include likely opposition, supporters, and other facility users.

Interviews generally begin with a brief overview of the transportation need that is prompting the project development activity and proceed to questions concerning perceived issues and concerns, levels of interest, ways the individual or group want to be included in the process, appropriate techniques for information exchange and preferred methods of communication, key sources used for obtaining information about community activities, and other individuals or groups who may be interested in the project.

These interviews work well in the beginning of the project. However, time and resources are required for scheduling and later conducting interviews with each individual stakeholder and also because of the difficulty in making contact.

Stakeholder interviews improve the understanding of stakeholder issues and characteristics, provide ideas for appropriate public involvement techniques, and build agency credibility. People appreciate being listened to and express gratitude when DDOT representatives take the time and trouble to do so. The point of this process is to base public involvement planning on actual consultation with stakeholders rather than speculation about their views. Personal interviews also have the advantage of placing



staff members locally in the project area, giving them an opportunity to get a sense of place and how the community functions at the project outset.

### Selecting Public Involvement Techniques

The third step to developing a public involvement process is selecting tools and techniques to use at particular decision points to flesh out how information exchanges will be conducted.

No two projects are exactly alike, and public involvement tools and techniques should be tailored to reflect the particular character of each project—its group of stakeholders, its geographic location, the successes and failures of previous public outreach programs, the level of complexity and controversy, and so on. The key, of course, is to understand the local groups and differences and tailor an approach that works for the stakeholders while also meeting the needs of and resources available to DDOT.

Techniques are also likely to differ from one decision point to another within any project because the nature of the required information exchange is different. At the beginning of the process, for example, the agency usually seeks to discover community issues and validate its understanding of the project need but may have relatively little detailed or substantive information to share with the community. Later in the process, the agency is seeking feedback on particular alternatives and may need opportunities to present a large amount of detailed information.

The tendency in planning for public involvement is to schedule project-specific events and encourage stakeholders to participate in them.

It is important to recognize that no matter how thorough a stakeholder identification activity is conducted at the outset of the project, the list of stakeholders will change as the

project progresses. As more detailed information becomes available, members of the general public who were previously uninterested in the project may become stakeholders.

The earlier all of the interested parties can be identified, the better. For that reason, it is a good practice to include mechanisms for outreach to the general public, in addition to known stakeholders, as a continuing element of the overall public involvement plan.

Special outreach techniques may be necessary if certain stakeholder groups will be affected by the project but for one reason or another have not been active in the project to date. The team should seek out these groups and meet with them at their convenience to ensure that their input is taken into consideration.

### Planning for Implementation

Planning for implementation of a public involvement program involves integrating the selected public involvement activities into the overall project scope, schedule, and budget. Some agencies less experienced in employing CSS do not yet treat public involvement as a task that must be planned and budgeted. “You never know how many meetings you are going to have to hold” is a common refrain. Of course, one of the points of identifying stakeholders up front and planning rigorously is to find out what those needs are.

Finally, a public involvement plan is a useful tool, a key element of the project implementation strategy. But, it is only a road map and will likely require modifications as the project proceeds.

### 13.3.3 Structured Decision Making

All projects have a level of risk, and anything that can be done to reduce risk and uncertainty is an improvement. A structured process for making decisions helps uncover unknowns and highlight risks so they can be addressed as

needed, rather than discovered late in the process when they are more time-consuming and costly to address. A structured decision process specifies technical milestones and related opportunities for public involvement. It integrates public involvement with overall project management and identifies roles and responsibilities of stakeholders. Further, a structured process provides a level of transparency to decision making that is useful, and sometimes critical, when providing a meaningful role for nontraditional, and often skeptical, participants in the decision making process.

The particulars of the decision process should reflect the type of environmental review process required under NEPA for federally funded projects, and any other relevant state or local environmental regulatory processes. Specifics will differ in some respects for projects requiring an Environmental Impact Statement (EIS), an Environmental Assessment (EA), or a Categorical Exclusion (CE). The meshing of state or local environmental requirements with those at the federal level will require special attention in the design of a project's decision process.

Both large and small projects can have complicated problems. Projects can be difficult to implement if decisions are not well understood by stakeholders. Having a well-defined decision making process and being able to explain it clearly to stakeholders makes it easier to implement projects and increase the chances for success.

A structured process focuses attention on problems in order of priority, increasing the chances that a project will address the most challenging problems first. The traditional development process adds alternatives as the project evolves. The fewer problems that are identified early in the process, possibly because of insufficient time spent on an effort, the more the process will slow down as time goes on.

The level of detailed data is low when many alternatives exist, but as alternatives are screened out and pared down, more data are needed about each remaining alternative to be able to evaluate them.

Spending more time at the front end on defining the problem allows for a more straightforward alternative development and evaluation, ultimately saving implementation time and avoiding controversies later.

### **Roles and Responsibilities of the Decision Process**

At the beginning of the decision process, it is important to define the points at which decisions will be made. It is also necessary to define who the decision maker(s) will be and who else will be able to make recommendations or comments that are considered by the decision makers. Transmission of comments to decision makers is a process that also needs to be defined at the beginning. Letting everyone know where they fit in the process goes a long way toward setting stakeholder expectations. Figure 13-2 presents a typical decision-making flowchart.

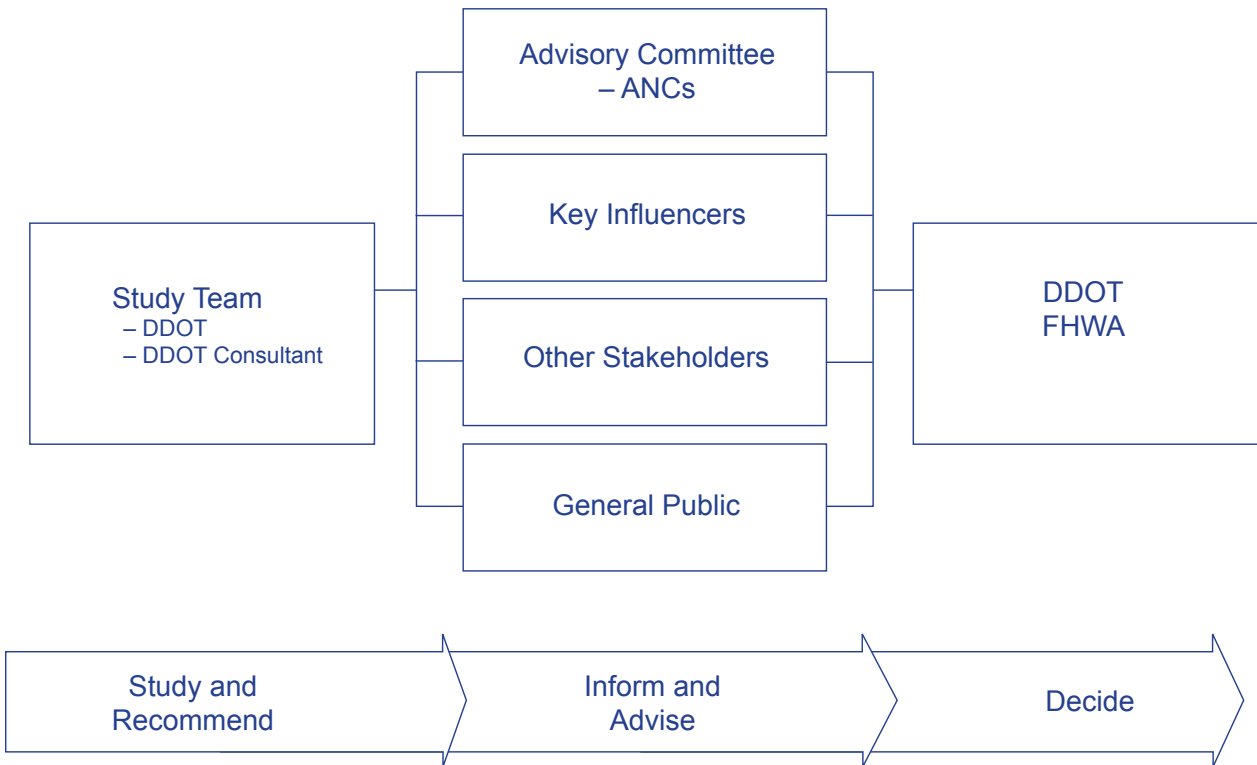
### **13.3.4 Evaluation of Alternatives**

By following a structured decision process, the alternative evaluation procedure operates more smoothly. The evaluation process should help identify and value the tradeoffs of diverse interests. The end result is that you need only evaluate those tradeoffs. All of the interests, problems, and concerns have an equal weight, so it is easier to eliminate modal bias and distinguish the relative impacts of alternatives.

Evaluation criteria should be established before developing alternatives. Evaluation criteria should be:

- Comprehensive, reflecting the full range of stakeholder values

**Figure 13-2 Decision-Making Flowchart**



- Fundamental, relating to topics that matter most
- Relevant, helping distinguish among alternatives
- Independent, not allowing double-counting of outcomes
- Measurable, allowing for clear comparisons between alternatives
- Well-defined, in having all parties share a mutual understanding of meaning

The focus of the evaluation criteria should be on distinguishing among the alternatives in an “apples-to-apples” comparison of impacts or outcomes of importance to the public and decision makers. Because all alternatives are evaluated against the same criteria, alternatives with significant differences can be compared to each other.

As a project moves forward, alternatives are refined and their impacts can be identified with greater precision. Early evaluations may include qualitative measures and later, more quantitative ones. The evaluation criteria and methodology should vary accordingly, with lesser degrees of specificity at the early stages.

Stakeholders generally demand high levels of detail for their areas of concern, regardless of the project development stage. Agencies can work collaboratively with key stakeholder groups to understand and accept the different levels of detail appropriate for the different stages of the project.

### 13.3.5 Alternative Development

The full range of stakeholder values must be reflected in the universe of alternative solutions considered at the outset. Alternatives are generally developed through iterative processes including public, agency, and project team input.

Screening processes for eliminating alternatives with “fatal flaws” are generally employed. The evaluation framework discussed earlier provides some guidance for developing screening criteria, but the goal is to eliminate infeasible concepts. Unless an alternative is financially infeasible, cost should not be used as a screening criterion. However, the purpose and need statement can be used to test whether each alternative is reasonable. Following are the key points to consider while developing each alternative.

- Ensure it is responsive to the problem statement.
- Use the purpose and need statement to test the alternative’s reasonableness.
- Involve stakeholders in identifying and screening each alternative.
- Consider all viable transportation modes and technologies. If a new technology is proposed, DDOT needs to spend time to describe it properly to stakeholders so that they make educated suggestions.
- Develop alternatives that consider physical solutions, such as adding highway lanes to increase capacity, as well as operational solutions, such as improving signal timing.
- Follow a logical evaluation screening process.
- Document all decisions for later reference.
- Consider the unique context of the project location and management requirements.
- Prior to developing alternatives:
  - Agree upon evaluation criteria.
  - Establish project-specific design criteria.
- Conduct sensitivity analyses for critical decisions (such as the level of service [LOS]).
- Portray alternatives in an understandable format to be conveyed to the stakeholders.
- Be creative in developing concepts within the design criteria.

### 13.3.6 Safety

Successful CSS implementation produces transportation solutions that are both safe and feasible. Balancing safety against other community values is part of the design process. There are ways to measure safety so that project teams can make objective decisions. The safety of each alternative may vary, even if several alternatives fall within similar criteria and standards. There are two ways to evaluate safety.

- Nominal safety refers to compliance with standards, warrants, guidelines, and sanctioned design procedures.
- Substantive safety refers to the expected crash frequency and severity for a highway or roadway.

One can readily measure the nominal safety of a road by comparing its design features—such as lane width, shoulder width, sight distance, curvature, grades, and roadside features—to prevailing design criteria. Similarly, one can measure or characterize an existing highway’s substantive safety by obtaining data about the frequency, type, severity, and other characteristics of crashes occurring on the highway, as well as other information (most importantly, its traffic volume).

Typical best practices include comparing the safety performance of a particular highway with a relevant statewide average or expected value for that facility type. For example, a meaningful review of a two-lane rural highway would involve comparing it to similar two-lane rural highways.

Another method for evaluating the substantive safety of a highway is to compare its performance with accepted crash prediction models.

Every highway segment or project can be categorized as being nominally safe or unsafe and substantively safe or unsafe. A two by two framework thus captures all possibilities. Highway or roadway projects that may be nominally unsafe but substantively safe may be candidates for resurfacing, restoration, and rehabilitation (known as 3R projects), which imply less-stringent design criteria. Or, for such projects, the designer may be more willing to accept a design exception if the context warrants one. A project that involves a road known to be substantively unsafe but nominally safe requires a targeted effort to deal with the safety problem. For highways or roads that are both nominally and substantively unsafe, reconstruction to full standards and a reluctance to accept a design exception may be appropriate.

Sometimes it is not possible to meet the design criteria. Establishing design criteria that cover every conceivable situation, each with a unique set of constraints and objectives, is not likely. In such cases, design exceptions may be inevitable. Such cases could include when impacts relate to the natural environment, social resources, or right-of-way impacts, or when there is a need to preserve historic or cultural resources or be particularly sensitive to context and community values. Having a design exception is not a substitute for an acceptable level of safety. Before committing to the design exception, the project team should thoroughly analyze the location for any potential impacts.

Design manuals and policies that provide further guidance are listed below.

- Design policies and practices in AASHTO's A Policy on Geometric Design of Highways and Streets (the Green Book)

- Design policies and practices in the DDOT Design Manual
- Design standards and specifications in the DDOT Standard Specifications for Highways and Structures
- Practices provided in National Cooperative Highway Research Program (NCHRP) Report 480, A Guide to Best Practices for Achieving Context Sensitive Solutions
- Guidance from FHWA's Flexibility in Highway Design
- Guidance from AASHTO's A Guide to Achieving Flexibility in Highway Design

### 13.4 Format and Contents of Documentation

The format and content of documentation depends on type of the project being proposed. At a minimum, the purpose and need statement for a transportation project should contain the following information:

- **Project Status:** Briefly describe the action's history, including measures taken to date, other agencies and governmental units involved, action on spending, schedules, and other pertinent information.
- **Capacity:** Discuss the capacity of the present facility and its ability to meet present and projected traffic demands. Discuss what capacity and LOS for existing and proposed facilities are needed.
- **System Linkage:** Discuss if the proposed action is a "connecting link" and how it fits into the transportation system.
- **Transportation Demand:** Discuss the action's relationship to any statewide plan or adopted urban transportation plan. In addition, explain any related traffic forecasts that

are substantially different from those estimates of the 23 USC 134 (Section 134) planning process.

- **Legislation:** Describe any federal, state, or local governmental mandate for the action.
- **Social Demands or Economic Development:** Describe how the action will foster new employment or benefit schools, land use plans, recreation facilities, and so forth. In addition, describe projected economic development/land use changes that indicate the need to improve or add to the highway capacity.
- **Modal Interrelationships:** Explain how the proposed action will interface with and complement airports, rail and port facilities, mass transit, and other public transportation services.
- **Safety:** Explain how the proposed action is necessary to correct an existing or potential safety hazard. In addition, if the existing accident rate is excessively high, explain why and how the proposed action will improve safety.
- **Roadway Deficiencies:** Explain why and how the proposed action is necessary to correct existing roadway deficiencies (such as substandard geometrics, load limits on structures, inadequate cross sections, or high maintenance costs). In addition, explain how the proposed action will correct these deficiencies.

### **Documenting the Alternatives' Evaluation and Selection**

Documentation is critical to establishing the credibility of the alternatives analysis process. Establishing naming conventions at the outset of the process assists in clear tracking of alternatives and their variations. Notes should be maintained for each meeting in which alternatives are discussed, as well as a record of specific reasons why each alternative was either retained for further evaluation

or rejected. For projects requiring NEPA compliance, this material is included in an EA or EIS to document alternatives reviewed but ultimately rejected. In these projects, the alternative evaluation and selection process ends with the selection of a preferred alternative, which is documented in a Finding of No Significant Impact (FONSI) for an EA, or a Record of Decision (ROD) for an EIS. Technical reports and the EA or EIS should provide detailed documentation of the evaluation process.

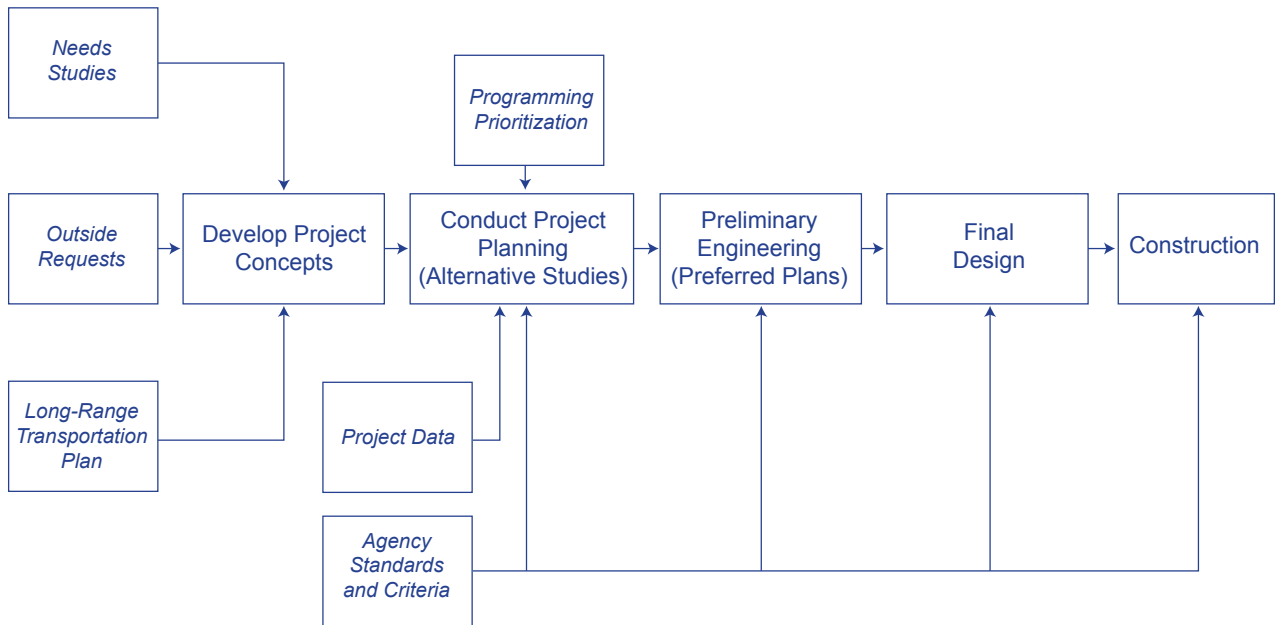
### **13.5 Project Development Process**

The project development process incorporates the steps listed below. Figure 13-3 graphically depicts the same process in more general terms.

The DDOT CSS Guidelines specify that the design process should include the following steps.

- Identify the project, including initial purpose and need.
- Develop a project team consisting of Infrastructure Project Management Administration, Planning, Policy and Sustainability Administration (PPSA), Transportation Security Administration (TSA), and the Urban Forestry Administration for project scoping.
- Develop a public participation plan.
- Refine the project's purpose and need, based on agency and public input.
- Develop project goals, objectives, and measures of performance.
- Identify design requirements.
- Involve other agencies, administrations, and the public in project scoping.

**Figure 13-3 Project Development Process**



- Identify design elements that are also transportation and contextual elements.
- Identify key agencies to coordinate project activities with, especially CFA, NCPC, NPS, USFWS, District of Columbia Office of Planning, USACE, DCHPO, and DDOE.
- Obtain compliance for environmental laws and regulations such as:
  - NEPA
  - District of Columbia Environmental Policy Act (DCEPA)
  - Section 404 clearance
  - Section 4(f) clearance
  - Section 106 clearance
- Consider the economic and budget constraints.
- Develop multiple conceptual designs in context with the design elements, based on stakeholder review and comments.
- Identify and address design deficiencies through stakeholder feedback.
- Screen the designs and select the one that most effectively fits the project purpose and need, taking into consideration environmental impacts, and community’s needs and wishes.
- Complete environmental compliance process.
- Develop mitigation measures, if required.
- Complete the final design.
- Notify the community and stakeholders about construction schedule.
- Begin construction.
- Include stakeholder reviews and incorporate their comments in every step of the process.
- Coordinate closely with the other administrations within DDOT.

### 13.6 Continuation through Design and Construction

Commitment to CSS and public participation should be carried out during the construction phase of the project. This is the time when the agencies have an opportunity to demonstrate that they are fulfilling the commitments they made to the public. Many public involvement processes conclude at the end of the alternative selection process, which in turn causes the agencies to lose sight of the continuing interest many stakeholders have in the ongoing details of final design and construction. It also ignores the importance of maintaining agency credibility for communicating any changes in the project that occurs during these postplanning activities. Poor accommodation of stakeholder issues at this stage can often break down much of the goodwill and trust that had been carefully built up to this point in the project process.

A more extensive outreach program during construction should be considered to provide travelers with information about revised routing and adjacent property owner/renters with information regarding planned construction activities. Changes to the project plan, schedule delays, changes to construction detours, and so on all present risks if they are not clearly communicated to stakeholders. Some options are to use existing newsletters and websites to update stakeholders and schedule occasional meetings with existing advisory groups and elected officials at key milestones.

The project team should fully communicate all key design decisions and stakeholder issues to construction staff and should be available to resolve construction issues and problems. This can be accomplished through a short conference call or a meeting that includes planners, designers, and construction staff. The public and stakeholders require continual updates and information on construction. The design staff must communicate any changes in the field that affect commitments to stakeholders. It is important to remain open and honest with stakeholders when field changes are necessary.

### 13.7 Additional Information

District Department of Transportation – Context Sensitive Solutions: <http://ddot.dc.gov/DC/DDOT/Projects+and+Planning/Standards+and+Guidelines/Context+Sensitive+Design+Guidelines>

FHWA and Context Sensitive Solutions: <http://www.fhwa.dot.gov/context/index.cfm>

Context Sensitive Solutions: <http://www.contextsensitivesolutions.org/>

Center for Environmental Excellence by AASHTO – Context Sensitive Solutions: [http://environment.transportation.org/environmental\\_issues/context\\_sens\\_sol/](http://environment.transportation.org/environmental_issues/context_sens_sol/)

A Guide to Best Practices for Achieving Context Sensitive Solutions – NCHRP 480: [http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp\\_rpt\\_480.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_480.pdf)



# CHAPTER 14

## AIR QUALITY POLICY AND REGULATIONS

### CONTENT

- 14.1 Summary of Key Legislation, Regulations, and Guidance
- 14.2 Agency Roles
- 14.3 Methodology for Conducting Air Quality Studies
- 14.4 Format and Contents of Documentation
- 14.5 Project Development Process Guidance
- 14.6 Continuation through Design and Construction
- 14.7 Additional Information



# AIR QUALITY POLICY AND REGULATIONS

**F**or air quality, transportation projects that are federally funded or require federal approval are subject to the transportation conformity requirements of the federal Clean Air Act (CAA) and to evaluation under the National Environmental Policy Act of 1969 (NEPA). Transportation conformity requires two conformity determinations: regional conformity determination and project-level conformity determination in nonattainment and maintenance areas for carbon monoxide (CO), fine particulate matter defined as particulate matter less than 2.5 microns in aerodynamic diameter ( $PM_{2.5}$ ), and respirable particulate matter defined as particulate matter less than 10 microns in aerodynamic diameter ( $PM_{10}$ ). Under NEPA, air quality is one of the elements to be considered in a project impact evaluation. This chapter summarizes relevant legislation and regulations, methodology to evaluate air quality impacts from transportation projects, contents of the environmental document, and project development.

## 14.1 Summary of Key Legislation, Regulations, and Guidance

The following rules, regulations, and guidance documents should be used when developing a methodology for analysis of air quality affects related to transportation projects. Not all will apply to every project, and the preparer should periodically check for updates and new guidance published by the agencies listed.

- Code of Federal Regulations (CFR) Title 40, Part 93, Determining Conformity of Federal Actions to State or Federal Implementation Plans (40 CFR 93)
- District of Columbia Municipal Regulations (DCMR), Title 20 (Air Pollution Control Act of 1984)
- United States Environmental Protection Agency (USEPA), Conformity Implementation in Multi-Jurisdictional Nonattainment and Maintenance Areas for Existing and New Air Quality Standards, July 2004

- USEPA, Guideline on Air Quality Models, 1986; revised, 1993
- USEPA, Guideline for Modeling Carbon Monoxide from Roadway Intersections, 1992
- USEPA, User’s Guide to CAL3QHC Version 2.0: A Modeling Methodology for Predicting Pollutant Concentrations near Roadway Intersections, 1995
- USEPA, User’s Guide for MOBILE6, 2001
- USEPA, Final Rule: PM<sub>2.5</sub> and PM<sub>10</sub> Hot Spot Analyses in Project-level Transportation Conformity Determinations for the PM<sub>2.5</sub> and PM<sub>10</sub> National Ambient Air Quality Standards, 2006 (71 CFR 12468)
- Federal Highway Administration (FHWA), Transportation Conformity Reference Guide, March, 2006
- FHWA, Guidance for Qualitative Project Level “Hot Spot” Analysis in PM-10 Nonattainment and Maintenance Areas, September, 2001
- FHWA, A Methodology for Evaluating Mobile Source Air Toxic Emissions Among Transportation Project Alternatives, 2006
- NEPA requirements for federally funded transportation projects (23 CFR 771) and the Transportation Conformity Regulations (40 CFR 93)

## 14.2 Agency Roles

**Table 14-1 – Resource/Regulatory Agency**

Agency	When Involved and Why
USEPA, Region 3	Provides concurrence of project-level hot spot air quality conformity during the review of an Environmental Impact Statement (EIS); may approve analysis methodology
Metropolitan Washington Council of Governments (MWCOG)	Resource agency for regional air quality and traffic data
FHWA	Provides guidance on transportation conformity and provides concurrence of project-level hot spot air quality conformity during the review of an EIS
District of Columbia Department of Environment (DDOE)	Regulates fugitive emissions during construction activities

## 14.3 Methodology for Conducting Air Quality Studies

### 14.3.1 Introduction

USEPA adopted the Clean Air Act (CAA) in 1970 and its amendments of 1977 and 1990. Pursuant to the 1990 CAA, the United States Department of Transportation (USDOT) cannot fund, authorize, or approve federal actions to programs or projects that do not conform to CAA requirements.

Under the authority of the CAA, USEPA has established nationwide air quality standards to protect public health and welfare with an adequate margin of safety. These federal standards, known as the National Ambient Air Quality Standards (NAAQS), represent the maximum

allowable atmospheric concentrations of pollutants and were developed for seven “criteria” pollutants:

- Ozone (O<sub>3</sub>)
- Nitrogen Dioxide (NO<sub>2</sub>)
- CO
- PM<sub>10</sub>
- PM<sub>2.5</sub>
- Sulfur Dioxide (SO<sub>2</sub>)
- Lead

One of the key concepts in understanding air quality issues related to transportation projects is “attainment.” Attainment, as discussed in this chapter, refers to whether USEPA has designated the study area as being in attainment of the NAAQS. If an area does not meet the standard, it is designated as a “nonattainment” area for that pollutant. Areas that were previously designated as nonattainment areas but have now met the standard—with USEPA approval of a suitable air quality plan—are called “maintenance” areas. Nonattainment areas are required to prepare implementation plans for attaining the standard for each pollutant for which there are violations of the NAAQS. As of December 2007, the Washington, D.C. area has been designated as a nonattainment area for O<sub>3</sub> and PM<sub>2.5</sub> and a maintenance area for CO. The Washington, D.C. area is in attainment for all other criteria pollutants.

In nonattainment or maintenance areas, “transportation conformity” applies if projects will be funded by FHWA, the Federal Transit Administration (FTA), or any agency that has been delegated project approval by these agencies. It also applies if projects are regionally significant, as defined at

40 CFR 93.101, and are approved by a regular recipient of federal highway or transit funds.

The basic demonstration of transportation conformity consists of showing that the project is listed in and consistent with a conforming regional transportation plan (RTP) and transportation improvement plan (TIP). In addition, a “hot spot” analysis is required if a project is located in a nonattainment or maintenance area for CO, PM<sub>2.5</sub>, and PM<sub>10</sub>. A hot spot is defined as a signalized intersection affected by the project.

In addition to the conformity requirements of criteria air pollutants, for which there are NAAQS, USEPA also regulates air toxics from mobile sources. Impacts of the six priority mobile source air toxics (MSATs)—which are benzene, formaldehyde, acetaldehyde, diesel particulate matter (DPM)/diesel exhaust organic gases, acrolein, and 1,3-butadiene—need to be evaluated.

Procedures for evaluating the air quality impacts of emissions associated with a transportation project, including emissions of criteria pollutants, MSATs, and greenhouse gases (GHGs) from project operation, are presented in the following sections. Procedures for evaluating project construction emissions are covered in a separate section and are not included here.

### 14.3.2 Categorical Exclusions and Exemptions

By their nature, air quality impacts are inherently negligible or nonexistent for projects processed as Categorical Exclusions (CEs). USEPA and USDOT have agreed that project-level analyses of local CO impacts may not be necessary for these projects, which are exempt from the requirement to determine air quality conformity. These

exempt projects may proceed toward implementation even in the absence of a conforming long-range transportation plan (LRTP) and TIP. However, if a metropolitan planning organization (MPO), in consultation with USEPA, FHWA, FTA, or other agencies, concludes that a project is nonexempt because it may have potentially adverse emission impacts for any reason, then an air quality analysis should be performed.

In addition to CEs, conformity regulations in 40 CFR 93.126 outline certain projects that are exempt from a conformity determination and all subsequent emission analyses. For these projects, regional and project-level conformity requirements do not apply.

### 14.3.3 Transportation Conformity

Because the Washington, D.C. area is a nonattainment/maintenance area for O<sub>3</sub>, PM<sub>2.5</sub>, and CO, projects in this area are subject to regional and project-level transportation conformity requirements, unless a project is exempt under CE or fits into one of the exempt categories listed in the transportation conformity rules.

Under these rules, all transportation plans, TIPs, and transportation projects are required to:

- Conform to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of such standards
- Ensure that these transportation activities will not:
  - Cause or contribute to any new violation of the NAAQS

- Increase the frequency or severity of any existing violation of the NAAQS
- Delay timely attainment of any standard or any required interim emissions reductions

40 CFR 450 requires that an MPO be designated for each urban area of more than 50,000 people by agreement between the governor and representatives of local jurisdictions (city or county). To be in compliance with the regional transportation conformity requirements, the local MPO prepares and periodically updates an LRTP and develops a TIP for this area. This work is done in cooperation with the MWCOG, DDOT, and the National Capital Region Transportation Planning Board. The MPO LRTP covers a minimum 20-year planning horizon. Federal law requires a minimum 4-year TIP.

Pursuant to the CAA Amendments of 1990, MPOs in areas designated by USEPA as nonattainment or maintenance of any of the NAAQS are required to demonstrate that LRTPs and TIPs conform to the state implementation plan (SIP). The MPO, FHWA, and FTA must make a finding of conformity for MPO LRTPs and TIPs in coordination with USEPA.

All projects subject to the transportation conformity rule must also have a project-level conformity determination unless they fit into one of the exempt categories listed in the conformity rule at 40 CFR 93.126 and 40 CFR 93.128. Procedures for the project level (hot spot) analysis are described in the following sections.

### 14.3.4 Procedures for Hot Spot Analysis

The following criteria are required to demonstrate project-level conformity:

- The project is listed in a conforming RTP and regional TIP.
- The design concept and scope that were in place at the time of the conformity finding are maintained through implementation.
- The project design concept and scope must be defined sufficiently to determine emissions at the time of the conformity determination.
- The project must not cause a new local violation of the federal standards for CO, PM<sub>10</sub>, or PM<sub>2.5</sub> or exacerbate an existing violation of the federal standards for CO, PM<sub>10</sub>, or PM<sub>2.5</sub>.
- Project-level conformity for the final criteria listed above is demonstrated by performing hot spot analyses in areas designated as nonattainment or maintenance areas for CO, PM<sub>10</sub>, and PM<sub>2.5</sub>.

As of 2008, hot spot analyses for CO and PM<sub>2.5</sub> are required for projects in the Washington, D.C. area. Currently, the area is in attainment for PM<sub>10</sub>, so a hot spot analysis of PM<sub>10</sub> is not required. The methodology for the CO and PM<sub>10</sub>/PM<sub>2.5</sub> air quality analysis for Environmental Assessments (EAs) and EISs should be confirmed, and if necessary, refined, in consultation with FHWA, MPO, and USEPA during the agency scoping and early coordination process.

Although the Washington, D.C. area is designated as nonattainment for O<sub>3</sub>, O<sub>3</sub> impacts are regional in nature and cannot be ascribed to any single project. Projects included in the LRTP and TIP have been included in a regional conformity analysis and require no further analysis at the project level.

### **PM<sub>10</sub> and PM<sub>2.5</sub> Hot Spot Analysis**

On March 10, 2006, USEPA issued amendments to the transportation conformity rule to address localized impacts of particulate matter emissions: PM<sub>2.5</sub> and PM<sub>10</sub> Hot Spot Analyses in Project-level Transportation Conformity Determinations for the New PM<sub>2.5</sub> and Existing PM<sub>10</sub> National Ambient Air Quality Standards (71 CFR 12468). This amendment requires the assessment of localized air quality impacts in PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment and maintenance areas for projects of air quality concern.

USEPA has specified in 40 CFR 93.123(b)(1) of the final rule that projects of air quality concern are certain highway and transit projects that involve significant levels of diesel-fueled vehicle traffic, or any other project that is identified in the PM<sub>2.5</sub> or PM<sub>10</sub> SIP as a localized air quality concern.

Because USEPA has not released modeling guidance on how to perform quantitative PM<sub>10</sub>/PM<sub>2.5</sub> hot spot analysis, such analysis is not currently required (40 CFR 93.123(b)(4)). Any future requirements for quantitative analysis will not take effect until USEPA releases modeling guidance and announces in the Federal Register that these requirements are in effect. Where quantitative analysis methods are not required, the demonstration may be based on a qualitative consideration of local factors, as described in 40 CFR 93.123(b)(2), and follow the latest USEPA guidance.

### **CO Hot Spot Analysis**

The analysis for project-level local CO impacts begins by implementing a screening analysis. If the project fails the screening analysis, then a full air quality modeling analysis is required. The procedures for the CO screening analysis and quantitative analysis are described in the following sections.

Screening Analysis 40 CFR 90.123 states that for projects whose traffic volumes are at level of service (LOS) D, E, or F or those that will change to these categories due to project-related traffic increases, the air quality screening analysis must be based on a quantitative approach and data. This is accomplished by using applicable air quality models, databases, and other requirements specified in 40 CFR 51, Appendix W (Guidelines on Air Quality Models).

To perform the screening analysis, the LOS using the appropriate traffic model (such as CORSIM) of all signalized intersections affected by the project will be calculated. All intersections that are found to be at LOS A, B, or C for the No Action Alternative and build alternatives are considered to be insignificant in terms of impact to air quality, and no further analysis is required. For those intersections found to be at LOS D, E, or F, further quantitative analysis is required. For projects with more than five or six intersections at LOS D or worse, three or four intersections that have the worst LOS and highest vehicle volumes are usually sufficient for the detailed hot spot modeling.

### Quantitative Analysis

The quantitative analysis requires the use of applicable air quality models. The model required to calculate vehicle emission factors is currently MOBILE 6.2. As with all modeling, the latest approved regulatory version should be verified. The model required to identify the impacts at the localized hot spot is CAL3QHC. Other information needed to provide the required input to CAL3QHC includes the traffic model output files. The steps to conduct the quantitative analysis are as follows:

1. Model the vehicle emission factors using the latest approved regulatory version of the MOBILE model (currently, MOBILE 6.2). Inputs should be consistent with those area-specific values used by the MPO for regional modeling.
2. Prepare the output of the appropriate traffic model (such as CORSIM) to be used as input to CAL3QHC.
3. Model the CO 1-hour concentrations at the affected signalized intersections.
4. Add the projected background CO concentrations to the modeled results from Step 3.
5. Compare the resultant 1-hour concentration with the NAAQS 1-hour standard of 35 parts per million (ppm).
6. Convert the resultant 1-hour concentration to an 8-hour concentration. The standard conversion factor is 0.7.
7. Compare the resultant 8-hour concentration with the NAAQS 8-hour standard of 9 ppm.
8. Compare the No Action Alternative concentrations with the build concentrations.

The intersections that do not exceed the NAAQS in the future year have demonstrated project-level conformity, and no further analysis is needed. Any intersection in the build alternative that exceeds the NAAQS for the future year should be compared with the No Action Alternative. If the build alternative does not create a new violation or increase the severity or number of violations predicted by the No Action Alternative, then project-level conformity has been demonstrated and no further analysis is required.

Mitigating measures must be applied to intersections that create a new violation or increase the severity or number of



existing ones. These measures may include reconfiguring the intersection, optimizing traffic signalization, or performing other engineering and operational measures.

With the mitigating measures in place, the quantitative analysis should be rerun to determine if project-level conformity requirements have been met. This process should be repeated until there are no new violations or increases in the severity or number of existing violations.

### 14.3.5 MSAT Analysis

The CAA identifies 188 air toxics, also known as hazardous air pollutants. USEPA has assessed this expansive list of toxics and identified a group of 21 as MSATs, which are set forth in an USEPA final rule, Control of Emissions of Hazardous Air Pollutants from Mobile Sources (66 CFR 17235). Of these, USEPA identified six as priority MSATs.

- Benzene
- Formaldehyde
- Acetaldehyde
- DPM/diesel exhaust organic gases
- Acrolein
- 1,3-butadiene

Currently, there are no established criteria for determining when MSAT emissions should be considered a significant issue in the NEPA context. For the purpose of the air quality evaluation under NEPA, FHWA has developed a tiered approach for analyzing MSATs. Depending on a project's specific circumstances and potential MSAT impacts, a project may be subject to one of the three levels of analysis.

- No analysis for projects with no potential for meaningful MSAT effects
- Qualitative analysis for projects with low-potential MSAT effects
- Quantitative analysis to differentiate alternatives for projects with higher potential MSAT effects

Discussions and evaluations of the MSAT impacts should follow the latest FHWA or USEPA guidance.

### 14.3.6 Greenhouse Gases

Greenhouse gases (GHGs) include carbon dioxide, methane, O<sub>3</sub>, water vapor, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. Carbon dioxide is the most abundant GHG. It is increasingly becoming accepted that increased concentrations of GHGs in the earth's atmosphere are linked to global climate change, such as rising surface temperatures, melting icebergs and snowpack, rising sea levels, and the increasing frequency and magnitude of severe weather conditions.

Federal legislation and action by USEPA is expected soon. In the case of *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438 (2007), the United States Supreme Court ruled that GHGs qualify as air pollutants under the CAA. The Supreme Court held that, unless the USEPA concludes that GHGs are not causing climate change, USEPA must regulate GHGs from automobiles. USEPA has not developed a mandatory regulatory program for GHGs, although it is actively engaged in a voluntary program.

Currently there is no approved policy or guidance to assist in evaluating the significance of a specific project at the project or cumulative level. To address the issue of GHG emissions

and their implications for global warming, a qualitative discussion of the GHG emissions associated with the project should be included in the air quality analysis. The qualitative discussion of GHG emissions should include both direct and indirect impacts and follow the USEPA guidance when it becomes available.

#### 14.4 Format and Contents of Documentation

The discussion of the affected environment in the environmental document should summarize the current air quality conditions and regulatory background. In particular, the section should describe:

**Current Air Quality Conditions.** Include a description of the existing climate and meteorological conditions of the project area, summarize pollutant monitoring data, and quantify the current air quality levels and attainment designation. Provide a regulatory background on the regional emission inventory, TIP/SIP, and transportation and general conformity.

The discussion of environmental consequences should summarize the air quality methodology, environmental impacts, and conformity determination. In particular, the section should describe:

**Analysis Methodology.** Include a summary of the methodology developed during the agency consultation, scoping, and early coordination meetings and used to evaluate air quality impacts and project-level conformity. The methodology discussion should encompass the screening analysis, air quality models, and construction emissions (if these are analyzed as part of the air quality analysis).

**Environmental Impacts.** Include a summary of the regional and localized impacts of the proposed project on air quality

as determined from the screening and modeling results. Describe significance (or nonsignificance) of the air quality impacts of the project with respect to regional air quality levels. For intersections that violate NAAQS under a build scenario and exceed the impacts of the No Action scenario, mitigation measures should be described and analyzed in the air quality models.

**Conformity Determination.** Include a summary of transportation and general conformity, if applicable.

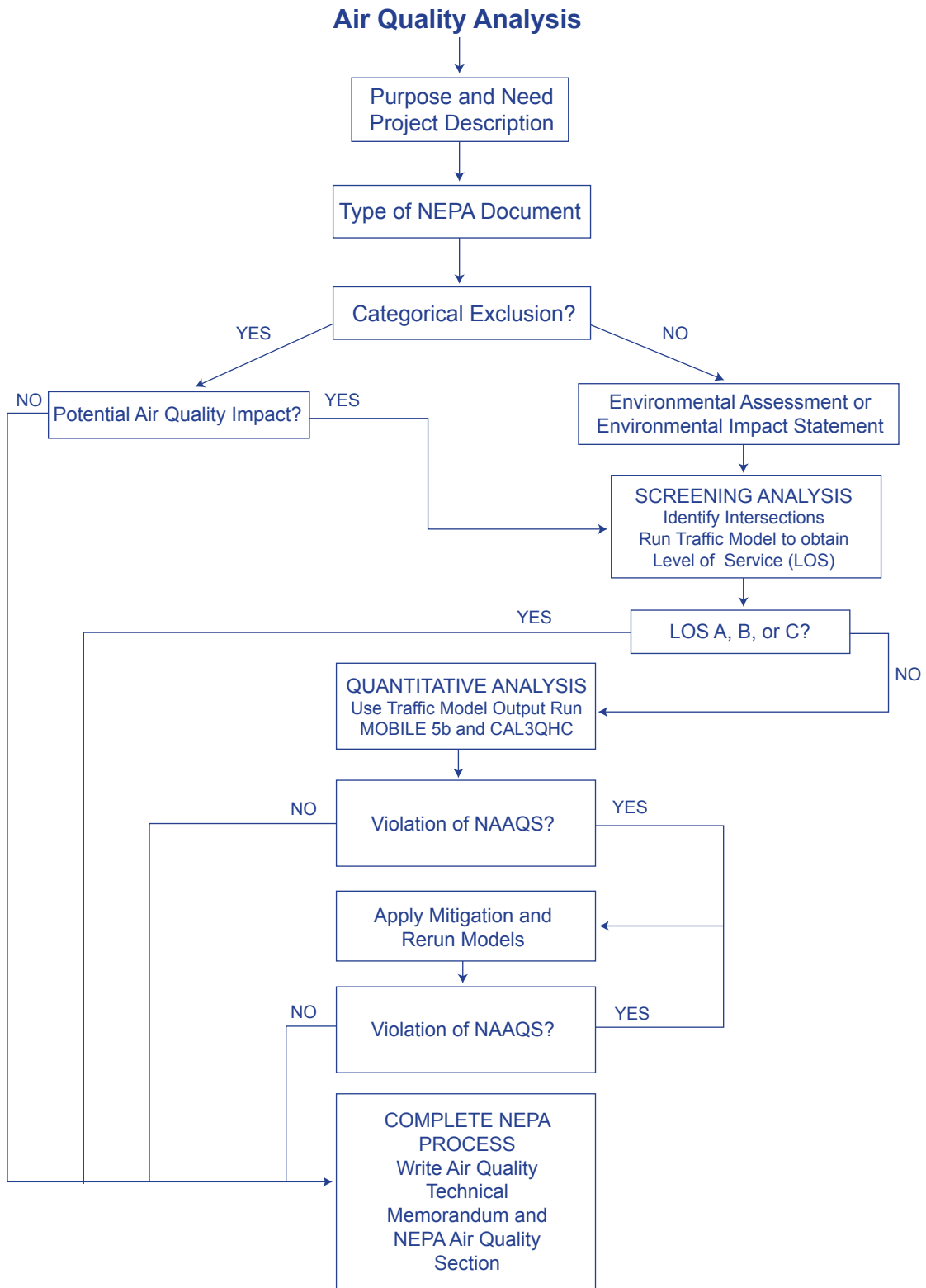
**Cumulative and Indirect Impacts.** Include a summary of the cumulative and indirect air quality impacts from other proposed or existing projects in the project area.

**Appendices.** Include any correspondence with regulatory agencies, including the results of the consultation process on the air quality analysis methodology, the assessment of current conditions, and projected pollutant background concentrations. Provide the MOBILE 6 modeling input and output data, summary of the LOS calculations, summary of the traffic modeling output data, and the CAL3QHC modeling input and output data.

#### 14.5 Project Development Process Guidance

The air quality analysis process is presented in Figure 14-1. The diagram presents the steps taken to evaluate the potential air quality impacts of a transportation project. The two most important pieces to begin the evaluation are the project description and type of NEPA document. However, regardless of the type of NEPA document being prepared, an air quality technical memorandum and air quality section for the NEPA document should be prepared. The air quality section should present the impact evaluation based on the conclusions drawn by following the steps in Figure 14-1.

**Figure 14-1 – Air Quality Analysis Process Diagram**



## 14.6 Continuation through Design and Construction

Construction-related emissions should be considered during the design and construction phases. Each site that is potentially affected by construction-related activities should be considered separately. If warranted, standard mitigation measures, such as fugitive dust suppression through watering, should be evaluated and implemented if necessary. If mitigation measures are committed to in the NEPA documentation, then plans for verifying and documenting their implementation need to be developed and executed.

## 14.7 Additional Information

Federal Highway Administration—Environmental Guidebook (Air Quality)

*<http://environment.fhwa.dot.gov/guidebook/results.asp?selSub=83>*

MWCOG, Air Quality Key Documents

<http://www.mwcog.org/environment/air/documents.asp>

National Capital Region Transportation Planning Board, Draft 2007 Financially Constrained Long-Range Transportation Plan (CLRP), 2007

*<http://www.mwcog.org/clrp/projects/tip/fy0813.asp>*

National Capital Region Transportation Planning Board, FY 2008-2013 Transportation Improvement Program, December 2007.

*<http://www.mwcog.org/clrp/projects/tip/fy0813.asp>*

# CHAPTER 15

## HIGHWAY NOISE POLICY AND REGULATIONS



### CONTENT

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## HIGHWAY NOISE POLICY AND REGULATIONS

**T**his chapter provides the procedural guidelines for assessing noise impacts associated with the construction and operation of highway improvements. These procedures are based on the Federal Highway Administration's (FHWA) noise policy at Part 772 of Title 23 of the Code of Federal Regulations (23 CFR 772) (see Appendix B of the DDOT Noise Policy in the References section of this manual). The procedures described in this document require compliance with the National Environmental Policy Act (NEPA) of 1969, FHWA environmental regulations as described in 23 CFR 771, sec 4f of the U.S DOT Act, Sec 106 of the National Historic Preservation Act, and other laws as applicable.

During the rapid expansion of the Interstate Highway System and other roadways in the 20th century, communities began to recognize that highway traffic noise and construction noise had become important environmental impacts. In the 1972 Federal-aid Highway Act, Congress required FHWA to develop a noise standard for new Federal-aid highway projects. While providing national criteria and requirements

for all highway agencies, the FHWA Noise Standard gives highway agencies flexibility that reflects state-specific attitudes and objectives in approaching the problem of highway traffic and construction noise. This chapter contains DDOT's policy on how highway traffic noise impacts are defined, how noise abatement is evaluated, and how noise abatement decisions are made.

In addition to defining traffic noise impacts, the FHWA Noise Standard requires that noise abatement measures be considered when traffic noise impacts are identified for Type I Federal projects. Noise abatement measures that are found to be feasible and reasonable must be constructed for such projects. Feasible and reasonable noise abatement measures are eligible for Federal-aid participation at the same ratio or percentage as other eligible project costs.

### 15.1 Purpose

This chapter describes the DDOT program to implement 23 CFR 772. Where FHWA has given DDOT the flexibility in implementing the standard, this chapter describes DDOT's

approach to implementation. Protection of the public health and welfare is an important responsibility that FHWA and DDOT help to accomplish during the planning and design of a highway project. In the 1970 Federal-Aid Highway Act, the U.S. Congress directed FHWA to develop noise standards. The District of Columbia Noise Control Act of 1977 (DC Law 2-53) as amended, by the DC Noise Control Act Amendment of 1996 (DC Law 11-161) and its implementing regulations declared it a policy of the District of Columbia (District) to reduce the ambient noise level in the District to promote public health, safety, welfare, and the peace and quiet of the inhabitants of the District, and to facilitate the enjoyment of the natural attraction of the District.

## 15.2 Definitions

**Abatement:** Any mitigation technique that results in lower noise levels.

**“Approach” NAC:** 1.0 dB(A) less than NAC.

**Barrier:** A natural or man-made object that interrupts the path of sound from the sound source to the sound receptor.

**Benefited Receptor:** The recipient of an abatement measure that receives a noise reduction at or above the minimum threshold of 5 dB(A), but not to exceed the highway agency’s reasonableness design goal. DDOT defines a benefited receptor as any receptor predicted to receive a 7 dB(A) reduction from the proposed noise abatement measure.

**Common Noise Environment:** A group of receptors within the same Activity Category in Table 1 that are exposed to similar noise sources and levels; traffic volumes, traffic mix, and speed; and topographic features. Generally, common noise environments occur between two secondary noise sources, such as interchanges, intersections, cross-roads.

**Date of Public Knowledge:** The date of approval of the Categorical Exclusion (CE), the Finding of No Significant Impact (FONSI), or the Record of Decision (ROD), as defined in 23 CFR 771.

**Descriptors, acoustical:** The following descriptors are often used:

- **dB(A):** A-weighted sound level measured in decibels
- **Leq:** The equivalent steady-state sound level which in a stated period of time contains the same acoustic energy as the time-varying sound level during the same time period, with  $Leq(h)$  being the hourly value of  $Leq$ .

**Design Year:** The future year used to estimate the probable traffic volume for which a highway is designed.

**Existing Noise Levels:** The worst noise hour resulting from the combination of natural and mechanical sources and human activity usually present in a particular area.

**Feasibility:** The combination of acoustical and engineering factors considered in the evaluation of a noise abatement measure.

**Impacted Receptor:** The recipient that has a traffic noise impact.

**Multifamily Dwelling:** A residential structure containing more than one residence. Each residence in a multifamily dwelling shall be counted as one receptor when determining impacted and benefited receptors.

**Noise Barrier:** A physical obstruction that is constructed between the highway noise source and the noise sensitive receptor(s) that lowers the noise level, including standalone noise walls, noise berms (earth or other material), and combination berm/wall systems.



**Noise Reduction Design Goal:** The optimum desired dB(A) noise reduction determined from calculating the difference between future build noise levels with abatement, to future build noise levels without abatement. The noise reduction design goal shall be at least 7 dB(A), but not more than 10 dB(A). The DDOT reasonable design goal is 7 dB(A).

**Permitted:** A definite commitment to develop land with an approved specific design of land use activities as evidenced by the issuance of a building permit.

**Property Owner:** An individual or group of individuals that holds a title, deed, or other legal documentation of ownership of a property or a residence.

**Reasonableness:** The combination of social, economic, and environmental factors considered in the evaluation of a noise abatement measure.

**Receptor:** A discrete or representative location of a noise sensitive area(s), for any of the land uses listed in Table 1.

**Residence:** A dwelling unit. Either a single family residence or each dwelling unit in a multifamily dwelling.

**Statement of Likelihood:** A statement provided in the environmental clearance document based on the feasibility and reasonableness analysis completed at the time the environmental document is being approved.

**Substantial Construction:** The granting of a building permit, prior to right-of-way acquisition or construction approval for the highway.

**Substantial noise increase:** One of two types of highway traffic noise impacts. For a Type I project, in DDOT an increase in noise levels of 10.0 dB(A) or more in the design year over the existing noise level.

**Traffic Noise Impacts:** Design year build condition noise levels that approach or exceed the NAC listed in Table 1 for the future build condition; or design year build condition noise levels that create a substantial noise increase over existing noise levels.

**Type I Project:** Following projects are considered Type I projects:

- The construction of a highway on new location
- The physical alteration of an existing highway where there is either:
  - *Substantial Horizontal Alteration.* A project that halves the distance between the traffic noise source and the closest receptor between the existing condition to the future build condition;
  - *Substantial Vertical Alteration.* A project that removes shielding therefore exposing the line of sight between the receptor and the traffic noise source. This is done by either altering the vertical alignment of the highway or by altering the topography between the highway traffic noise source and the receptor
- The addition of a through-traffic lane(s). This includes the addition of a through-traffic lane that functions as a HOV lane, High-Occupancy Toll (HOT) lane, bus lane, or truck climbing lane;
- The addition of an auxiliary lane, except for when the auxiliary lane is a turn lane;
- The addition or relocation of interchange lanes or ramps added to a quadrant to complete an existing partial interchange
- Restriping existing pavement for the purpose of adding a through-traffic lane or an auxiliary lane

- The addition of a new or substantial alteration of a weigh station, rest stop, ride-share lot or toll plaza
- If a project is determined to be a Type I project per § 772.5 then the entire project area as defined in the environmental document is a Type I project.
- The impacts associated with building a new roadway or improving an existing roadway (construction noise)

### 15.4.1 Highway Traffic Noise

**Type II Project:** A Federal or Federal-aid highway project for noise abatement on an existing highway. For a Type II project to be eligible for Federal-aid funding, the highway agency must develop and implement a Type II program in accordance with section 772.7(e). The Type II program is optional for participation by highway agencies. Currently, DDOT does not participate in Type II program.

**Type III Project:** A Federal or Federal-aid highway project that does not meet the classifications of a Type I or Type II project. Type III projects do not require a noise analysis

## 15.3 Applicability

This policy applies to all Federal highway projects in the District of Columbia; that is, any projects that receive Federal-aid highway funds or are otherwise subject to FHWA approval. These procedures are applicable to federally funded projects and are based on the Federal Highway Administration's (FHWA) noise policy at Part 772 of Title 23 of the Code of Federal Regulations (23 CFR 772) (see Appendix A of the DDOT Noise Policy in the References section of this manual) and are applicable to all Type I and Type II projects.

## 15.4 Summary of Key Legislation, Regulations, and Guidance

Relative to noise, two principal sources are considered:

- The impacts associated with vehicular traffic using a new or improved roadway (highway traffic noise)

As noted earlier, 23 CFR 772 contains the FHWA noise policy. This policy is further defined in Highway Traffic Noise: Analysis and Abatement Guidance (FHWA 2010). All federal-aid highway projects must be developed in conformance with these directives. The FHWA process for evaluating traffic-related noise impacts is often summarized by the following steps:

- Identify existing activities (sensitive receptors)
- Determine existing noise levels
- Predict future noise levels
- Identify potential impacts
- Evaluate abatement measures
- Include feasible and reasonable abatement measures in the project plans, specifications and estimates

These steps apply to only Type I projects (as defined in the definition section). Type II projects are noise abatement activities along existing federal-aid highways. Currently, DDOT does not have a Type II program.

### 15.4.2 Construction Noise

Construction noise analysis related to transportation projects is typically documented in conjunction with the project's highway traffic noise analysis. At each point in project development where highway traffic noise data are produced, a complementary construction noise subsection will be included in the documentation. Most projects will not require modeling of construction noise. In many cases, construction noise analyses may be adequately addressed

through the narrative discussion or an application of a simplified manual calculation technique. The use of sophisticated modeling techniques is typically only required for the most complex projects.

In the District of Columbia, construction noise is regulated by Title 20 of the District of Columbia Code of Municipal Regulations (DCMR). These regulations are the appropriate standards to use when assessing project-related impacts.

### 15.5 General Methodology of Evaluation

This section summarizes the general methodology associated with investigating highway traffic noise and construction noise. Section 15.5.1 explains the DDOT policy regarding noise impact and abatement measures, and relates the analysis of noise to the DDOT Project Development Process. The technical procedures for analyzing noise according to the FHWA methods are explained later in this chapter.

#### 15.5.1 DDOT Highway Traffic Noise Analysis and Policy

It is DDOT policy that noise mitigation should be considered whenever a project-related highway traffic noise impact is expected to occur. A highway traffic noise impact is deemed to occur when predicted (design-year) noise levels either approach or exceed the applicable NAC or substantially increase the existing noise levels. Generally, an effective noise abatement treatment is reasonable if its cost per benefited residential unit is no more than \$40,000 and it meets all of the other reasonableness criteria (see Section 15.8.3). Work related to the highway traffic noise analysis is conducted at three points within the DDOT Project Development process.

Preliminary investigations are conducted during the early planning steps, before the DDOT Environmental Compliance review meeting. Important background data are collected that will assist in the planning process. The key

**Table 15-1 – Noise Abatement Criteria (23 CFR 772)**

Activity Category	Activity Criteria Leq(h)	Evaluation Location	Description of Activity Category
A	57	Exterior	Lands on which serenity and quiet are of extraordinary significance and serve an important public need and where the preservation of those qualities is essential if the area is to continue to serve its intended purpose.
B	67	Exterior	Residential.
C	67	Exterior	Active sport areas, amphitheaters, auditoriums, campgrounds, cemeteries, day care centers, hospitals, libraries, medical facilities, parks, picnic areas, places of worship, playgrounds, public meeting rooms, public or nonprofit institutional structures, radio studios, recording studios, recreation areas, Section 4(f) sites, schools, television studios, trails, and trail crossings.
D	52	Interior	Auditoriums, day care centers, hospitals, libraries, medical facilities, places of worship, public meeting rooms, public or nonprofit institutional structures, radio studios, recording studios, schools, and television studios.
E	72	Exterior	Hotels, motels, offices, restaurants/bars, and other developed lands, properties or activities not included in A-D or F.
F	–	–	Agriculture, airports, bus yards, emergency services, industrial, logging, maintenance facilities, manufacturing, mining, rail yards, retail facilities, shipyards, utilities (water resources, water treatment, electrical), and warehousing.
G	–	–	Undeveloped lands that are not permitted.

question is: are there sensitive receptors in the project area? If there are, the distribution of the sensitive receptors within the project area will be valuable information for the planning study. If no sensitive receptors are present, no further noise analysis may be necessary. The data collected at this stage will be presented in a Sensitive Receptor Identification Technical Memorandum. The bulk of a project's highway traffic noise analysis will be conducted during the development of the NEPA document. Two deliverables are expected:

- The preliminary noise report documents the evaluation of the project's feasible alternatives. The key question will be to determine: is a highway traffic noise impact expected to occur? The answer will be obtained by determining existing noise levels, modeling to predict future noise levels, and evaluating the results against the appropriate standards. These data will be useful in evaluating the feasible alternatives and selecting a preferred alternative.
- The final noise report provides an update of the noise analysis for the preferred alternative. The important questions answered in this report are: has the preferred alternative been modified materially since the preliminary noise analysis? And, if a highway traffic noise impact is predicted, is mitigation feasible and reasonable? The answers to these questions will be essential to developing appropriate mitigation measures.

The final component of a highway traffic noise analysis will be conducted during project design. If mitigation is required, the analysis will be updated, as necessary, and the mitigation (typically noise barriers) will be designed and included in the construction plans.

## 15.5.2 FHWA Highway Traffic Noise Analysis

The steps involved in the FHWA process for evaluating traffic-related noise impacts are described below:

1. Identify Existing Activities
2. Measure Existing Noise Levels
3. Predict Future Noise Levels
4. Identify Potential Impacts
5. Evaluate Appropriate Abatement Measures

### Identify Existing Activities (Sensitive Receptors)

To inform the planning process and develop the information necessary for scoping future noise-related activities, the following data will be required:

- Assigning land use activities
- Identifying sensitive receptors
- Establishing representative monitoring locations and modeling sites

### Assign Land Use Activities

Because NACs are categorized by land use activity (see Table 15-1), the land uses within the project area must be identified. This can be accomplished through a review of existing materials. An inventory of existing/planned land uses and existing/planned zoning classifications are available through Title 10 and 11 of the DCMR. Where land adjacent to the project boundaries is undeveloped, the analysis shall consider whether there is a commitment to develop the property. A commitment is denoted by the issuance of a building permit, which serves to demonstrate a reasonable vested financial interest in developing the property.

### ***Identify Sensitive Receptors***

Based on the land use assignments, noise-sensitive land uses (sensitive receptors) can be established. A sensitive receptor is a noise-sensitive location registering measurable sound levels as described in 23 CFR 772 – typically a residence or other use that would be negatively affected by noise. In a noise model, a modeling site may represent one or more noise-sensitive locations/residences.

### ***Establish Representative Monitoring Locations and Modeling Sites***

Using the preceding information, representative locations for monitoring existing noise conditions can be established (monitoring locations). Monitoring locations should be representative of the land uses they are meant to represent. A photolog and project mapping should document the monitoring locations proposed. Because their primary use will be the calibration of the traffic noise model, the distribution and number of field monitoring locations should be adequate for that purpose.

Similarly, representative sites for noise prediction (modeling sites) can be established. It is not necessary to have modeling sites for each residence. However, sufficient noise modeling sites must be used to adequately represent the entire population of sensitive receptors. A photolog and project mapping should document the modeling sites proposed. Monitoring locations and modeling sites should be placed in areas of outdoor activity and at least 3 meters away from buildings. Also, it is often helpful for monitoring locations and modeling sites to be distributed such that front row and second row receptor evaluation is possible. Monitoring locations and modeling sites are typically limited to within 600 feet of the proposed improvements.

### **Measure Existing Noise Levels**

At the representative monitoring locations, existing noise levels will be measured using a noise meter during peak noise hour traffic conditions. The field measurements must be consistent with the guidelines contained in the FHWA *Highway Traffic Noise: Analysis and Abatement Guidance* (June 2010, Revised January 2011, *FHWA's Measurement of Highway Related Noise* (1996)) and DCMR Chapter 29, Noise Measuring Test Procedures.

The field measurements will be used to validate the traffic noise model. As the noise level is dependent on traffic volumes at the time of the measurement, traffic counts must also be taken during the measurement period to properly populate the validation run. If the difference between the field measurements and the validation run is less than 3 dBA, the model can be said to be properly validated. If the difference between field measurements and validation run is more than 3 dBA, then model should be calibrated (or re-run) accordingly until the difference is less than 3 dBA. In instances involving new roadways on new alignments, the measured noise levels will represent the existing noise levels. In all other cases, the validated model (using peak hour certified/project traffic volumes) will be used to produce the existing noise levels against which the future noise levels will be compared to determine impacts.

### **Predict Future Noise Levels**

The prediction of future noise levels relies on the certified/project traffic volumes for the peak noise hour in the design-year. The peak noise hour is often the peak truck hour. Future noise-level predictions are required for all build alternatives under consideration and for the no-build alternative. Noise prediction methodologies should be consistent with current FHWA approved methods. Currently, this involves the use of TNM version 2.5.

The construction of an adequate model requires three-dimensional coordinates for the existing conditions and for the proposed alternatives. The methods used to create the model require documentation, adequate to ensure that the stakeholders can assess its robustness. Typically, the engineering data available with which to construct noise models improves as the project advances through the project development process. The prediction of noise levels should use the posted speed limit or the highest overall speed that a driver can travel on a given road, under favorable conditions.

### Identify Potential Impacts

As noted earlier, a highway traffic noise impact is deemed to occur when predicted (design-year) noise levels either approach or exceed the applicable NAC listed in Table 15-1 or substantially increase over existing noise levels. If either of these conditions exists, a highway traffic noise impact occurs and noise abatement must be considered. Please see “definition” section of this document for definitions of “approach” and “substantial noise increase.”

### Evaluate Appropriate Abatement Measures

At a minimum, potential traffic noise abatement measures include the following:

- Constructing noise barriers within the proposed right-of-way
- Modifying the proposed horizontal and/or vertical alignment of the roadway
- Acquiring property to serve as a buffer zone
- Modifying speed limits
- Restricting truck traffic
- Providing noise insulation

Of these abatement measures, the noise barrier option is usually the most practical and effective choice, however, the District is a dense urban area. Most of the District has existing roadways with a narrow right of way. The District also has a historic character with view sheds of national importance. The addition of noise walls in such areas can cause severe impacts to the historic character of the area and to views to the national monuments. Nevertheless, for all possible abatement measures, a cost/benefit analysis is required. In most cases, this will focus on the practicality of the abatement method. In order for a noise abatement option to be selected, it must be both feasible and reasonable.

## 15.6 Traffic Noise Mitigation Feasibility and Reasonableness Criteria

### Feasibility

For a noise abatement technique to be considered feasible, all of the following must be true:

1. Achievement of at least a 5 dB(A) highway traffic noise reduction at impacted receptors. Per 23 CFR 772, FHWA requires the highway agency to determine the number of impacted receptors required to achieve at least 5 dB(A) of reduction. DDOT requires that fifty percent (50%) or more of the impacted receptors experience 5 dB(A) or more of insertion loss to be feasible; and
2. The determination that it is possible to design and construct the noise abatement measure. The factors related to the design and construction include: safety, barrier height, topography, drainage, utilities, geometry, structural integrity of the facilities, and maintenance of the abatement measure, maintenance access to adjacent properties, and general access to adjacent properties (i.e. arterial widening projects). Accepted engineering practices shall be exercised and AASHTO and DDOT

Standards shall be used when considering the factors associated with the design and construction of a noise abatement measure. All conflict(s) must be analyzed thoroughly and documented before a determination is made.

3. Placement of a barrier will not restrict pedestrian or vehicular access
4. Construction of a barrier will not cause safety or maintenance problems

### **Reasonableness**

For a noise abatement technique to be considered reasonable the factors given below must be considered. The parameters used during the NEPA process are also used during the Final Design Phase when making a determination of noise barrier reasonableness. When performing a reasonableness analysis for the NEPA document, some parameters (e.g., desires of the benefiting receptors) will not yet be quantifiable. Questions relating to these parameters will be answered in the Warranted, Feasible, and Reasonable Worksheets in order to determine the proposed noise barrier's reasonableness.

All of the reasonableness factors listed below must collectively be achieved in order for a noise abatement measure to be deemed reasonable.

### ***Viewpoints of the benefited receptors***

The FHWA highway traffic noise regulation requires DDOT to consider the viewpoints of the benefited receptors in determining the reasonableness of noise abatement. A final survey and determination shall occur after the approved final design noise analysis; however, comments will be considered throughout the entire design process. DDOT shall solicit the viewpoints of all benefited receptors through certified mailings and obtain enough responses to document a decision as to whether or not there is a desire for the

proposed noise abatement measure. Fifty percent (50%) or more of the respondents shall be required to favor the noise abatement measure in determining reasonableness.

### ***Cost Effectiveness***

Cost of an abatement measure is an important consideration but only one of a number of factors to consider. The FHWA allows DDOT to consider the actual construction cost of noise abatement. The construction of a noise barrier is not reasonable if the cost is more than \$40,000 per benefited receptor. The barrier cost will include the cost of construction (material and labor), the cost of additional right-of-way, the additional cost of relocating utilities and any other costs associated with the barrier. The estimated cost of construction (material and labor) will be \$25 per square foot. All receptors with noise reductions of 5 dBA or more will be counted. Each house will be counted as one receptor. The reasonableness calculations for Category C, D and E receptors are given in Appendix A of the DDOT Policy.

### ***Noise Reduction Design Goals***

The design goal is a reasonableness factor indicating a specific reduction in noise levels that DDOT uses to identify that a noise abatement measure effectively reduces noise. It is a comparison of the design year noise level with the abatement measure to the design year noise level without the abatement measure. The design goal establishes a criterion, selected by DDOT that noise abatement must achieve. The design goal is not the same as acoustic feasibility, which is the minimum level of effectiveness of a noise abatement measure. Acoustic feasibility indicates that the noise abatement measure can, at a minimum, achieve a discernible reduction in noise levels. As required by FHWA, DDOT shall define the design goal of at least 7 dB(A) but not more than 10 dB(A), and shall define the number of benefited receptors that must

achieve this design goal. DDOT’s design goal is 7 dB(A) of insertion loss for at least one benefited receptor.

## 15.7 Construction Noise Evaluation Methodology

There is nothing particularly unique about construction noise. It is produced by construction equipment or activities with sufficient magnitude (loudness) and within a certain frequency range (audible spectrum) such that human beings can hear it. While mostly annoying at night, construction noise can be equally unwelcome during the daytime. For instance, in commercial areas it can interfere with the ability to conduct business. Consequently, if not properly addressed, public concerns related to a project’s construction noise impacts can unnecessarily affect/delay project development. The general steps associated with a construction noise analysis are:

- Identifying activities that may be negatively affected by construction noise
- Identifying the measures needed to minimize adverse construction noise impacts
- Incorporating appropriate abatement measures into the project’s plans

Data regarding construction noise should be assessed in conjunction with the project’s highway traffic noise analysis.

### 15.7.1 Identifying Activities That May Be Negatively Affected by Construction Noise

The identification of activities that may be negatively affected by construction noise should mirror the process described in in Section 15.5.

### 15.7.2 Identifying the Measures Needed to Minimize Adverse Construction Noise Impacts

Most projects will not require modeling. In many cases, construction noise may be adequately evaluated through a narrative discussion or an application of a simplified manual calculation technique. The use of sophisticated modeling techniques is typically only required for the most complex projects. The state-of-the-art model is the FHWA Roadway Construction Noise Model (RCNM). The RCNM enables the prediction of construction noise levels for various construction operations based on a compilation of empirical data and the application of acoustical propagation formulas. If a construction noise impact is anticipated at a particular sensitive receptor, the use of the model contained in FHWA’s *Highway Construction Noise Measurement, Prediction and Mitigation* is generally acceptable. The scope of needed construction-related noise analysis should be delineated during the project’s planning steps.

In the District of Columbia, construction noise is regulated by Title 20 of the District of Columbia Municipal Regulations (DCMR). These regulations are the appropriate standards to use when assessing project-related impacts. The basic protocol under the DCMR is the establishment of maximum noise levels for the District’s various land uses. Chapter 27 of Title 20 addresses general provisions, exemptions, and other procedural issues. Chapter 28 establishes maximum noise levels. Chapter 29 establishes noise-measuring procedures. The DCMR provides construction-timing limitations as well as sound-level limitations. Both are typically distributed by land use type.

### 15.7.3 Incorporate Needed Abatement Measures into the Project’s Plans

Abatement measures to minimize construction noise impacts, in accordance with the DCMR, should be



incorporated into the project's environmental commitments. Typically, adherence with the DDOT construction and material specifications is adequate to comply with the DCMR limitations. A common sense approach to noise mitigation should be implemented. Low-cost and easy-to-implement measures are usually adequate. Environmental commitments should avoid unnecessarily constraining construction activities. Only in unusual circumstances should specific techniques be mandated.

### 15.8 Additional Information

DDOT. 2011. Noise Policy, April

DDOT. 2005. Design and Engineering Manual. November.

District of Columbia. District of Columbia Municipal Regulations.

FHWA. 2006. FHWA Roadway Construction Noise Model User's Guide. Report No. FHWA HEP-05-054. Washington DC. January.

FHWA. 1998. Traffic Noise Model (Look-Up Tables). Report No. FHWA-PD-98-047. Washington DC. July.

FHWA. 1998. Traffic Noise Model Technical Manual. Report No. FHWA-PD-96-010. Washington DC. February.

FHWA. 1998. Traffic Noise Model User's Guide. Report No. FHWA-PD-96-009. Washington DC. January.

FHWA. 1996. Measurement of Highway Related Noise. May.



# CHAPTER 16

## HAZARDOUS MATERIALS



### CONTENT

- 16.1 Definitions
- 16.2 Legislation, Regulations, and Guidance
- 16.3 Agency Roles
- 16.4 General Methodology Analysis or Evaluation
- 16.5 Format and Content of Documentation
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- 16.7 Continuation through Design and Construction
- 16.8 Additional Information



## HAZARDOUS MATERIALS

This chapter provides the procedural guidelines for assessing potential hazardous and toxic substances that may be encountered during the construction and operation of roadway projects. The primary reasons for identifying these sites is the risk to the health and safety of construction workers and the cost and schedule delays of remediating (control, clean-up, and disposal) hazardous wastes at contaminated sites during construction of the roadway.

The assessments begin with identifying properties that are, or may be, contaminated with hazardous materials within the project study area so that the presence of these properties may be factored into the selection of alternatives and design considerations. Additional assessments are usually conducted when a project's location indicates a likelihood that contaminated materials may be encountered. The assessment also evaluates potential exposure for worker health and safety, disposal options for contaminated materials, or remedial measures if necessary.

### 16.1 Definitions

**Hazardous substances** – Elements, compounds, mixtures, solutions, and substances that, when released into the environment, may present substantial danger to the public health or welfare or to the environment.

**Hazardous waste** – A solid waste, or combination of solid wastes that, because of quantity, concentration, or physical, chemical, or infectious characteristics, may 1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or 2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

**Hazardous waste/contaminated sites** – Sites on which the release of any hazardous substance, hazardous waste, or petroleum products has occurred, or is suspected to have occurred, and that release or suspected release has been reported to a government entity.

**Potentially Responsible Party (PRP)** – Any individual or entity including owners, operators, transporters, or generators who may be liable for the cleanup of contamination under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Section 107(a). The U.S. Environmental Protection Agency (USEPA) will usually ask PRPs to conduct the investigation and to perform the cleanup before using Superfund money.

## 16.2 Legislation, Regulations, and Guidance

This section provides the legislation, regulations, and guidance most likely to apply to and be associated with typical transportation projects with hazardous materials issues. This list is not all-inclusive, as site-specific conditions may be encountered where additional and unique regulations may apply. In these instances, District of Columbia Department of Transportation (DDOT) and its consultants must coordinate with appropriate regulatory agencies to ensure compliance with the applicable regulations. Key legislation, regulations, and guidance are provided in the following sections; the types of sites likely to be affected are identified following each item.

### 16.2.1 Federal Legislation and Regulations

- 42 United States Code (USC) 103, CERCLA and Superfund Amendments and Reauthorization Act of 1986 (SARA, also known as the federal Superfund program), Superfund sites.
- 40 Code of Federal Regulations (CFR) 61, Clean Air Act (CAA), National Emissions Standard for Hazardous Air Pollutants, asbestos abatement and demolition sites.
- 33 USC 1251 et seq., Clean Water Act (CWA), sites potentially affecting water bodies.

- 40 CFR I, Resource Conservation and Recovery Act of 1976 (RCRA), and Office of Solid Waste and Emergency Response Directive 9902.3 2A (May 31, 1994), RCRA sites.
- 42 USC 82, Solid Waste Disposal, solid waste management and disposal.
- 40 CFR 761 (15 USC), Toxic Substances Control Act of 1976 (TSCA), polychlorinated biphenyl (PCB) sites.

### 16.2.2 District of Columbia Legislation and Regulations

- District of Columbia Water Pollution Control Act of 1984, District of Columbia Code Annotated Sections 6-921 to 6-940, District of Columbia Municipal Regulations Title 21, Section 2200 et seq.
- 40 CFR Part 281, District of Columbia Underground Storage Tank Program
- District of Columbia Hazardous Waste Management Act of 1977, effective March 16, 1978, as amended, District of Columbia Law 2 64; District of Columbia Code Sections 8-1301 to 8-1322

### 16.2.3 Guidance Documents

- American Society of Testing and Materials (ASTM) E 1527. Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process
- ASTM E 1903, Standard Practice for Environmental Site Assessments: Phase II Environmental Site Assessment Process
- Federal Highway Administration (FHWA) Environmental Guidebook – Hazardous Waste and Brownfields

### 16.3 Agency Roles

DDOT and its consultants must work together to ensure that the appropriate regulatory agencies are involved as required. Agency coordination is described in more detail in Chapter 12, Agency Coordination Process. The primary agencies that will most likely be involved in reviewing the hazardous materials assessment include DDOT Environmental Division, District of Columbia Department of the Environment (DDOE) Hazardous Waste Division, USEPA, and FHWA.

- **DDOT Project Development & Environment Branch** – DDOT incorporates environmental management into its decision-making process to provide context-sensitive and environmentally sustainable solutions for the DDOT operations and District of Columbia transportation projects.
- **DDOE Hazardous Waste Division** – The Hazardous Waste Division enforces the provisions outlined in the District of Columbia Hazardous Waste Management Act of 1977. The Hazardous Waste Program regulates the waste generated by commercial, federal, state, and local government facilities from generation to disposal.
- **USEPA Region 3** – USEPA has approval authority for site investigation, corrective action work plans, final corrective action, and closures of RCRA, CERCLA, and Toxic Substances Control Act of 1976 (TSCA) sites. USEPA also regulates and approves permits for the operations at RCRA sites.
- **FHWA** – Environmentally, FHWA's role is to protect and enhance the natural environment and communities affected by highway transportation. FHWA reviews the potential environmental mitigation activities.

### 16.4 General Methodology Analysis or Evaluation

#### 16.4.1 Existing Conditions/Affected Environment

The first step of a typical hazardous waste assessment is referred to as a Phase I Environmental Site Assessment (ESA) and generally follows the most current version of ASTM E 1527. The Phase I ESA will identify hazardous wastes or contamination sites that may be encountered in a project study area and the PRP for the contamination. The Phase I ESA typically provides the information that is needed for the Existing Conditions/Affected Environment section of the NEPA document. It is important to note that the Phase I study area usually includes the area within a radius of 1 mile around the project area because contamination in adjacent areas, such as petroleum constituents or solvents in the subsurface or groundwater, can migrate into the project area.

#### *The Phase I ESA comprises two steps.*

**Database and Historical Reviews** – The Phase I assessment begins with a regulatory database review to determine if any areas of concern or contaminated sites are known to occur in the project area. The review identifies reported releases of hazardous or toxic materials to the environment as well as businesses and industries that use, generate, store, transport, and/or dispose of regulated hazardous materials. Usually, a private database search company is contracted to perform a computerized search of available environmental state and federal environmental databases. At a minimum, database searches should include sources identified in the ASTM standard. In addition, sites on the National Priorities List (NPL), Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) lists, leaking underground storage tank (LUST) sites, landfills, body shops, and maintenance yards must be identified. The result is a summary report that shows the

regulatory record of contaminated sites with site location maps.

Other searches that can be performed under Phase I may include the review of historic aerial photographs and maps, Sanborn fire insurance maps, old city directories, and title searches. The purpose of the historical records review is to identify previous uses of properties in the project area commonly associated with the generation, storage, and transportation of hazardous materials. The level of the additional records search will depend on the project.

**Field Corridor Review** – The investigator visits the project area to verify occupants, locations, addresses, and uses of properties identified in database searches and to search for visible evidence of hazardous materials releases at listed sites or other sites in the project study area. Observations should be documented in field notes and photographs. Detailed property inspections beyond those areas that can be viewed from public roadways are not expected. The investigator should interview regulatory agency staff and property owner/occupants, as necessary, to clarify any information obtained through the database search and field visit.

Screening each site helps determine which ones pose potential impact to the project area. The criteria for determining these sites to include in the assessment are as follows:

- Include sites where spills or releases required further remedial action
- Include sites with known and documented releases of contamination to the soil and/or groundwater that are within 400 feet of the project area
- Eliminate underground storage tank (UST) sites not associated with documented LUSTs
- Eliminate hazardous waste generators that do not have documented releases to the environment

Identified sites should be ranked as areas of “low risk” to “high risk” or “no concern” to “high concern.” Generally, higher rankings go to those sites located within the project area. The farther a site is from the project area, the lower the ranking.

- **High risk/high concern** – Any properties where there are known and documented releases of contamination to the soil and/or groundwater, with respect to their proximity and potential to impact the project area. These include CERCLA sites; RCRA corrective action sites; RCRA transportation, storage, or disposal sites; sites that DDOE has identified as hazardous waste sites; or any property where examiners during field corridor reviews or site visits observed the evidence of hazardous material release.
- **Moderate risk/potential concern** – Properties in proximity to the project area where examiners observed the potential for hazardous materials during a field corridor review or site visit and/or in which examiners observed sloppy housekeeping practices to the extent that the potential for environmental contamination is higher than it would have been had normal waste management practices been followed. These include sites where contamination has been documented, but there is no longer a high concern because of remedial action or site-cleanup activities.
- **Minimal risk/no concern** – Properties, such as vacant or commercial properties, where examiners observe low or no potential for hazardous materials during site visits.

For a NEPA document, it is the discretion of the project manager to have a standalone report summarizing the results



of the Phase I ESA, or to incorporate the results into the Affected Environment section of the document.

The locations of hazardous materials sites, particularly high- and moderate-risk sites, should be identified on drawings illustrating other environmental constraints for consideration during project siting and alternatives analysis. Sites that include asbestos, lead-based paint (LBP), polychlorinated biphenyls (PCBs), radon, USTs, LUSTs, and sites undergoing regulatory investigations or cleanup under RCRA or CERCLA should be specifically reported.

Figure 16-1, Hazardous Material Analysis Process, illustrates a flowchart of the hazardous waste assessment process.

### 16.4.2 Determination of Hazardous Material Impacts

Each alternative is evaluated for potential impacts using the mapping of the ranked sites. Contaminated properties that are located in or adjacent to an alternative can be considered to have a potential impact. Construction in a contaminated area, particularly with high and moderate risk, impacts the project by adding risk to the construction workers, as well as cost and potential construction schedule delays.

Typically, for sites in the project area, the project team would review the regulatory files (such as the District UST Program, CERCLA, and RCRA) to discern the current knowledge and status of the contamination at the site and to determine the potential impact to the project. From this information, the level of impact to the project from special construction techniques to manage or minimize exposure to the contamination can be estimated.

If the file does not contain adequate documentation of the site, then additional soil, surface water, or groundwater testing – known as Phase II ESA – may be necessary to determine the extent of the contamination and the risk that

the site poses for the project. Phase II ESAs are discussed further in the next section.

### 16.4.3 Identification of Appropriate Mitigation Measures

The owner or PRP, as identified by USEPA or DDOE, retains the responsibility for performing studies and remediation of a contaminated property. However, to protect construction workers and to ensure that the hazardous material is controlled during construction, DDOT may need to implement some mitigation measures during construction.

Mitigation will depend on the type and extent of contamination, the level of documentation that is available, and current or planned actions for site remediation already established. As mentioned above, the site may be fully documented in a regulatory record, and mitigation measures can be established from these records. If the site has not been well documented, additional Environmental Assessments (EAs), generally referred to as Phase II ESAs, may be necessary to verify the presence of hazardous materials in soil, groundwater, and other media (as appropriate) and to characterize the nature and extent of contamination at the targeted site or within the area targeted for acquisition. These assessments should be completed during the early design phase of the project.

The Phase II field investigation generally follows the most current version of ASTM E 1903. The project team will perform the following steps to complete the Phase II ESA.

1. Develop a proposed scope of work or Phase II investigation work plan
2. Identify media to be sampled, proposed sample locations, depths, analytical parameters, and basis for proposed samples

3. Perform field investigation
4. Characterize the nature and extent of contamination
5. Summarize findings in a Phase II technical report

Based on the results of the Phase II ESA, DDOT will coordinate with the appropriate federal and state agencies to identify the proper design and construction procedures. The design of the project must be coordinated with the agencies to ensure that it is compatible with the remediation plans for the site. For example, if long-term groundwater monitoring is required, the project design and monitoring network should be coordinated to minimize conflicts. In some cases, the roadway construction project may provide an opportunity to further site remediation. For example, a new roadway may be used as a maintained engineering barrier to eliminate a pathway to human exposure.

### Construction Mitigation Measures

Construction mitigation measures are site-specific, depending on the type and extent of the contamination. Typically, measures to minimize worker exposure and to control hazardous materials during construction are determined with the cooperation of the regulatory agencies during the detailed design of the highway.

The project team should adhere to the District of Columbia Hazardous Waste Management Plan for the use, storage, and disposal of all hazardous materials that it brings on to the project site during the construction phase.

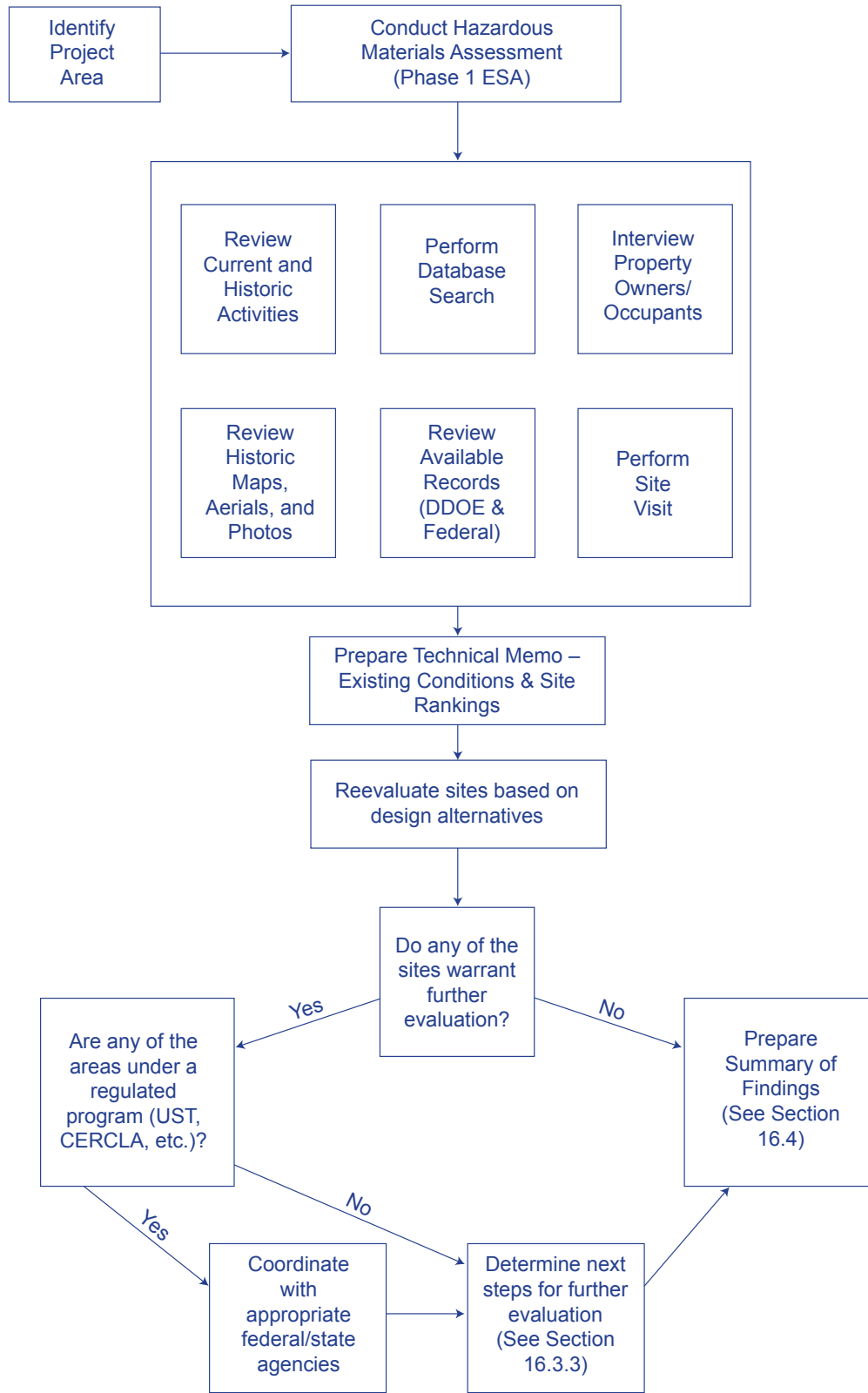
There may be occasions when the team may encounter regulated materials during construction. In these instances, construction must stop, and the regulatory agencies consulted for appropriate action.

## 16.5 Format and Content of Documentation

The summary of findings for the hazardous materials section of environmental documents should follow a consistent format, one that generally corresponds to the NEPA section on affected environments report (such as an EA or an Environmental Impact Statement [EIS]).

- **Affected Environment** – As noted above, it is at the project manager's discretion to require a standalone Phase I ESA report to be referenced in the NEPA document, or to create the hazardous materials sections of the NEPA document directly from the study results. In either case, the documentation of Affected Environment should include:
  - Methodology – A general description of the processes used to evaluate existing conditions or affected environment and determine any potential long-term and short-term impacts that may occur during construction or as a result of the project alternative designs.
  - Regulatory Records Database Review Summary – As summarized in Section 16.3.1
  - Historical Records Review Summary – As summarized in Section 16.3.1.
  - Site Screening Results – As summarized in Section 16.3.1.
  - Site Rankings and Descriptions of Areas of Concern – The list of rankings should include sites located within or near the project area and be based on the extent of known or potential contamination. Accompanying each ranking should be a brief description of the site and a description of known or potential contamination present.
  - Recommendations for Phase II studies, if needed.

**Figure 16-1 Hazardous Materials Analysis Process**



- **Review of Impacts and Environmental Consequences** – This section should provide a description of the potential impacts that could occur if any of the alternatives are implemented. It should also include a review of long- and short-term impacts along with any construction-related impacts that could occur.
- **Identification of Appropriate Mitigation Measures** – A list of mitigation measures should be identified based on the types of potential impacts expected with each alternative. Many of the mitigation measures for hazardous material issues typically encompass construction-related impacts, such as the handling, storage, and the use and disposal of hazardous materials during construction; the disposal of existing hazardous materials such as asbestos or LBP; and the mitigation of known contamination during construction.
- **Environmental Commitments** – The Environmental Commitments for hazardous materials may include commitments for additional site studies, coordination of final plans with DDOE, coordinate with DDOE /PRP to avoid conflicts with current remediation procedures and activities, site-specific restoration details, and construction materials storage and waste disposal.
- **Appendices** – The appendices typically include a copy of the database search used to help determine areas of concern and any additional EAs that were performed to characterize the nature and extent of contamination at specific sites.

## 16.6 Project Development Process Guidance

The early planning stages of the project provide the best opportunity to effectively address any known potential contamination problems that may be encountered during the project. These problems could then can be

avoided, eliminated by changing one or more aspects of the project design, or scheduled for remediation as part of the construction project. The initial hazardous materials assessment should be performed concurrently with the EA or EIS preparation, and in conjunction with other environmental investigations, such as threatened and endangered species studies or wetland surveys, so that contaminated sites can be considered with other environmental constraints in the analysis of alternatives.

## 16.7 Continuation through Design and Construction

The documentation process for developing the appropriate procedures for implementing ongoing investigation plans for contaminated sites, negotiating closure agreements with regulatory agencies, implementing site remediation and groundwater monitoring (when necessary), and reporting will be site specific and will follow the appropriate regulatory requirements and guidance accordingly for each site.

### 16.7.1 Final Design of Mitigation Measures

The project design team will need to establish plan notes and procedures for the final construction plans. Concepts for dealing with hazardous materials will be developed in the NEPA document, and included in the Environmental Commitments. Based on these commitments, the design team will develop the details of excavation, the handling, and disposal of contaminated earth or groundwater in cooperation with the regulatory agencies. Specifications for monitoring and reporting must also be incorporated into the final project plans.

Project plans should also adhere to the District of Columbia Hazardous Waste Management Plan for the use, storage, and disposal of all hazardous materials brought on to the project site during a project's construction phase.

## 16.7.2 Procedures for Addressing Regulated Materials Identified During Construction

In some instances, even when the full process is followed and the initial hazardous materials assessment and field investigations have been performed, field workers may encounter unknown hazardous materials during construction. When this occurs, the construction contractor must stop work immediately and notify DDOT. DDOE must be notified by DDOT, and DDOE will arrange for investigation of the suspect materials and, if necessary, management and removal of the materials.

The project team should assess the hazardous materials to determine if they must be removed immediately, managed, or disposed of, or to what degree characterizing the nature and extent of the waste materials is necessary before remedial activities can be performed. In most cases, waste characterization profiling (for disposal purposes) can be done in conjunction with a removal action.

If the contamination encountered is extensive or complex in nature, the project team should determine the scope and magnitude of a field investigation and arrange for an appropriate level of characterization. DDOT will notify USEPA or DDOE, as appropriate, and begin negotiations for site assessment, remediation, and closure so that the construction activities are minimally affected.

## 16.8 Additional Information

### Websites

- 42 USC 103, CERCLA and SARA of 1986: <http://www.epa.gov/superfund/policy/cercla.htm>
- 40 CFR 61, Clean Air Act, National Emissions Standard for Hazardous Air Pollutants: <http://www.epa.gov/air/caal>

- 40 CFR I, RCRA; and Office of Solid Waste and Emergency Response Directive 9902.3-2A: <http://www.epa.gov/rcraonline/>
- 42 USC 82, Solid Waste Disposal (solid waste management and disposal): <http://uscode.house.gov/download/pls/42C82.txt>
- 40 CFR 761 (15 USC), Toxic Substances Control Act of 1976 (TSCA), PCB sites: <http://www.epa.gov/lawsregs/laws/tsca.html>
- ASTM Standards, E1527, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process: <http://www.astm.org>
- ASTM Standards, E1903, Standard Guide for Environmental Site Assessments: Phase II Environmental Site Assessment Process: [www.astm.org](http://www.astm.org)
- FHWA Environmental Guidebook, “Hazardous Wastes and Brownfields,” <http://www.environment.fhwa.dot.gov/guidebook/index.asp>
- District of Columbia Lead-Based Paint Management Program: [http://www.ddoe.dc.gov/ddoe/cwp/view,a,1209,q,495190,ddoeNav\\_GID,1486,ddoeNav,31375/313771.asp](http://www.ddoe.dc.gov/ddoe/cwp/view,a,1209,q,495190,ddoeNav_GID,1486,ddoeNav,31375/313771.asp)
- District of Columbia Underground Storage Tank Program (DC UST Program): [http://www.ddoe.dc.gov/ddoe/cwp/view,a,1209,q,494854,ddoeNav\\_GID,1486,ddoeNav,31375/313771.asp](http://www.ddoe.dc.gov/ddoe/cwp/view,a,1209,q,494854,ddoeNav_GID,1486,ddoeNav,31375/313771.asp)

### General Information

- District of Columbia Hazardous Waste Management Act of 1977, effective March 16, 1978, as amended (District of Columbia Law 2 64; District of Columbia Code Sections 8-1301 to 8-1322)

- District of Columbia Hazardous Waste Management Regulations, Chapter 42 – Standards for the Management of Hazardous Waste and Used Oil
- District of Columbia Water Pollution Control Act of 1984, District of Columbia Code Annotated Sections 6-921 to 6-940, District of Columbia Municipal Regulations Title 21, Section 2200 et seq.
- District of Columbia Underground Storage Tank Regulations, Title 20 DCMR, Chapter 55

# CHAPTER 17

## WATER QUALITY POLICY AND REGULATIONS

### CONTENT

- 17.1 Summary of Key Legislation, Regulations, and Guidance
- 17.2 Agency Roles
- 17.3 General Methodology
- 17.4 Post-NEPA Commitments
- 17.5 Additional Information





## WATER QUALITY POLICY AND REGULATIONS

This chapter focuses on assessing impacts to surface water quality from stormwater runoff during and after construction. Maintaining the water quality in streams, rivers, wetlands, and other waters is important for human health and recreation, as well as for the natural aquatic environment.

The assessment and regulation of direct impacts to wetlands and stream habitats is discussed in Chapter 19, Wetlands and Waters of the United States. Chapter 20, Biological Resources, discusses impacts to biological resources in those waters.

### 17.1 Summary of Key Legislation, Regulations, and Guidance

#### Federal Laws and Regulations

- Clean Water Act (CWA), Section 402, National Pollutant Discharge Elimination System (NPDES)

- CWA, Section 401, Water Quality Certification (WQC)
- 40 Code of Federal Regulations (CFR), Part 122.26, Storm Water Discharges

#### District of Columbia Laws and Regulations

- Water Pollution Control Act of 1984 (DC Law 5-188)
- Storm Water Permit Compliance Amendment Act of 2000 (DC Law 13-311)
- District of Columbia Municipal Regulations (DCMR) Title 21, Chapter 11, Water Quality Standards
- DCMR Title 21, Chapter 19, Water Quality Monitoring Regulations

#### 17.1.1 Guidance Documents

- Guidance for Preparing and Processing Environmental and Section 4(f) Documents, Federal Highway

Administration (FHWA) Technical Advisory (TA)  
T6640.8A

## 17.2 Agency Roles

Federal and District of Columbia agencies share responsibilities for protecting water quality from point and nonpoint sources, including stormwater runoff. The following discussion focuses on the roles of these agencies in the review and regulation of highway projects.

### Federal Agency

- United States Environmental Protection Agency

In the District of Columbia, the United States Environmental Protection Agency (USEPA) is the permitting authority for Section 402, the NPDES program. For highways, NPDES permitting relates to stormwater discharges.

USEPA Region 3 (Mid-Atlantic) office in Philadelphia and its field office in Annapolis are responsible for programs in the District of Columbia.

### Local Agencies

District of Columbia Department of the Environment (DDOE) is the District government's equivalent of USEPA.

- Water Quality Division is an important regulatory agency to contact for any impacts to waterways or wetlands. The Water Quality Division provides drinking water testing, source water assessment, and water quality certification under Section 401 of the CWA. The Water Quality Division monitors water

quality and designates appropriate uses of the various water bodies.

As required under Section 401 of the CWA, the Water Quality Division provides WQC for draft NPDES permits (issued by USEPA). The 401 WQC process provides the District with the opportunity to review the federal permits for consistency with District of Columbia water quality standards.

In accordance with Section 303(d) of the CWA, the Water Quality Division also provides total maximum daily load (TMDL) assessment for each of the watersheds (Potomac, Anacostia, and Rock Creek) in the District of Columbia.

- Watershed Protection Division, Sediment and Storm Water Technical Services Branch is responsible for stormwater management, sediment and erosion control, and floodplain management for all land-disturbing activities. It is responsible for reviewing project plans for consistency in these areas with the DCMR zoning regulations.
- Water and Sewer Authority (DCWASA) maintains records of water quality in the drinking and wastewater systems. The District of Columbia Stormwater Administration, part of DCWASA, is the lead agency for controlling stormwater outfalls in the District.
- Metropolitan Washington Council of Governments (MWCOG) maintains water quality and fisheries data on a regional basis. MWCOG also monitors fish habitat conditions and areas in need of restoration.

## 17.3 General Methodology

### 17.3.1 Definitions

**Best Management Practices (BMPs):** Techniques found to be most effective and practical for reducing erosion and sedimentation into waterways.

**NPDES:** The NPDES program, established in Section 402 of the CWA, is the permitting program for discharges from point sources into waters of the United States.

**Wetlands:** Areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

**Total Maximum Daily Load:** A calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources. A TMDL is the sum of the allowable loads of a single pollutant from all contributing point and nonpoint sources.

### 17.3.2 Section 402 Permits

Section 402 of the CWA is also called the NPDES permit. Under NPDES, all facilities that discharge pollutants from any point source into waters of the United States are required to obtain a permit.

Many DDOT activities fall under the DC MS4 permit (which still requires NOI submission to EPA); however,

the following DDOT activities may require separate Section 402 permits:

- Construction dewatering operations associated with activities such as utility excavation, bridge pier installation, foundation or trench digging, or other subsurface activities.
- If discharge is expected to occur from a point source discharge from mechanical wastewater treatment plants, vehicle washing, or industrial discharges.

The permitting authority for the District of Columbia is the USEPA Region 3 Office Water Protection Division.

There are two basic types of NPDES permits:

- Individual Permits
- General Permits

Individual Permits are specifically tailored to an individual facility. An individual permit is issued to a facility based on the information provided in the permit application (such as type of activity, nature of discharge, receiving water quality). This permit is issued to the facility for a specific time period (not to exceed 5 years) with a requirement that the facility reapply prior to the expiration date. A water treatment plant, or an industrial facility are examples of types of facilities that may require an individual permit.

General Permits are issued for multiple facilities within a specific category. Categories for the general permit include:

- Stormwater point sources

- Facilities that involve the same or substantially similar types of operations
- Facilities that discharge the same types of wastes or engage in the same types of sludge use or disposal practices
- Facilities that require the same or similar monitoring

General permits, however, may only be issued to dischargers within a specific geographical area such as city, county, or state political boundaries; designated planning areas; sewer districts or sewer authorities; state highway systems; standard metropolitan statistical areas; or urbanized areas.

The Municipal Separate Storm Sewer System (MS4) permit is used for a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a state, city, town, borough, county, parish, district, association, or other public body (created to or pursuant to state law) including special districts under state law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the Clean Water Act that discharges into waters of the United States. (ii) Designed or used for collecting or conveying stormwater; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

Most DDOT work is covered under the MS4 permit. However, construction projects near the waters of the

United States that discharge directly into the water require a separate Section 402 permit. For such projects USEPA and DDOE should be contacted.

For most DDOT construction projects, a Construction General Permit (CGP) should be obtained by submitting the Notice of Intent (NOI) application available at the USEPA NPDES website.

### 17.3.3 Existing Conditions/Affected Environment

The primary waterways of the District are the Potomac River, the Anacostia River, and Rock Creek. Each of these has a number of tributaries.

Data collection should begin with identifying the watershed where the project is located, and all waters and wetlands that may receive stormwater runoff from the project area. A number of sources for this information are available, as outlined in Chapter 19, Wetlands and Waters of the United States. Whatever published data is referenced, the presence of waters or wetlands should be verified with a site visit. The site visit would also document the current physical conditions of the surface waters. This information may be provided in an ecological overview report or a wetlands and stream delineation report (see Chapter 19, Wetlands and Waters of the United States).

Current, baseline water quality information can be obtained from the resource agencies. Examples of these data sources are listed below:

- USEPA collects water quality and other data from a variety of sources and studies and provides a summary for many waterways in the District in its online

National Assessment Database. The summary includes the suitability of the waters for various uses and sources of impairment.

- United States Army Corps of Engineers (USACE) is responsible for the dredging of navigation channels in the Potomac and Anacostia Rivers. As part of that activity, USACE may be able to provide water quality information.
- DDOE Fisheries and Wildlife Division regularly surveys larger water bodies and maintains a database. A request for current data (biological and water quality) should be forwarded to the Fisheries and Wildlife Division for waters in the project area. The Fisheries and Wildlife Division is also responsible for establishing appropriate recreational uses, such as fishing, in the waters of the District.
- DDOE Water Quality Division provides TMDL and other water quality reports for various waters in the District. Waters that are identified as “impaired” on the 303(d) list have TMDL reports that identify the water quality problems in these waters. The TMDLs will also set limits for pollutant loads to impaired waters. These limits could be important considerations in developing stormwater and erosion control measures for compliance with water quality standards. The Water Quality Division may also provide other unpublished water quality data by request.
- DCWASA may be able to provide current surface water quality data in a project area where there is a combined sewer overflow or other wastewater outfall.

- Other nongovernmental agencies may also provide water quality information. For example, several groups are interested in and monitoring the restoration of the Anacostia River.

Also pertinent to assessing current water quality in receiving streams are the biological resources. In particular, any sensitive, threatened or endangered species that inhabit a particular waterway should be noted. The agencies who are primarily involved with monitoring these populations, such as the DDOE Fisheries and Wildlife Division (mentioned above), the United States Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS), would provide this information as part of the early project coordination (Chapter 12, Agency Coordination Process). The presence of these species provides both indications of the current conditions of the water body, as well as a standard for assessing impacts. These agencies may also provide additional water quality data as part of their rare species monitoring.

Depending on the data that are available from the resource agencies for water bodies in the project area, additional water quality measurements or laboratory analysis may be necessary. The need for additional data collection should be coordinated with the agencies early in the project development.

#### **17.3.4 Determination of Water Quality Impacts**

Stormwater runoff from roadways and urban environments can carry a number of pollutants, including suspended solids, volatile compounds, oil and grease, nutrients, and metals. Stormwater from road surfaces is

often collected into a storm sewer, and then discharged into a nearby waterway.

Impacts on the water quality of the receiving water should be discussed in terms of the expected amount of additional stormwater generated by the project and the amount of pollutants it will carry. The 1981 FHWA research report, *Constituents of Highway Runoff*; the 1985 report, *Management Practices for Mitigation of Highway Stormwater Runoff Pollution*; and the 1987 report, *Effects of Highway Runoff on Receiving Waters*, contain procedures for estimating pollutant loading from highway runoff.

These loadings can be compared to the existing water quality conditions, uses of the receiving waters, and the District water quality standards (21 DCMR Chapter 11) and TMDLs (if any) established for the receiving waters. Potential impacts to sensitive species in the receiving waters, if any, from water quality degradation should also be addressed. The discussion should also include all measures implemented to control the pollutant loads as required by water quality regulations (as discussed below).

### **17.3.5 Identification of Appropriate Mitigation Measures**

Some mitigation to reduce water pollutants is required by NPDES permits and District of Columbia water quality standards. An erosion and sediment control plan is required for 50 square feet of land disturbance. During construction, the control of erosion and sedimentation in nearby waters is standard practice. Section 107 of the DDOT Standard Specifications for Highways and Structures specifies the use of sediment and erosion control methods as described in DDOE 2003 Standards and

Specifications for Soil Erosion and Sediment Control and the District of Columbia Erosion and Sediment Control Handbook. These manuals contain standard details to develop a Stormwater Pollution Prevention Plan to meet the requirements of the NPDES construction permit. Such methods should be mentioned in the assessment of impacts and mitigation in the environmental document.

Also during construction, point discharges of stormwater may be created temporarily, such as dewatering or vehicle washing. The quality of these discharged waters must also be controlled. Frequently, that will involve removal of suspended solids.

Postconstruction, the use of BMPs to manage stormwater and reduce pollutant loads into waterways from nonpoint sources (such as roadways) or point sources (such as a roadside rest or other facility) must be considered in accordance with District water quality standards. A stormwater management plan is required for 5,000 square feet of land disturbance. DDOT has committed to implement BMPs to reduce stormwater runoff from roadways to the extent possible. The DDOT Standard Specifications for Highways and Structures adopts the methods as described in the District of Columbia Stormwater Management Guidebook to design and construct stormwater infiltration, detention, retention or attenuation structures, or other devices to abate pollution or control runoff. The use of low impact development (LID) techniques such as vegetated drainage swales, rain “gardens,” and/or treatment wetlands may also be considered. These techniques can reduce substantially the amount of metals, polycyclic aromatic hydrocarbons (PAHs), and other contaminants borne in roadway runoff.

The commitment to particular BMPs in the environmental document will depend on the size of the project, the sensitivity of the receiving waters, the available space, and adjacent land use.

#### 17.4 Post-NEPA Commitments

For water quality issues, permits are normally required from the DDOE. As mentioned in the previous section, the permits cover three types of water quality issues: sediment and erosion control during construction, point source discharges (such as dewatering or vehicle washing) during construction, and long-term stormwater management.

Typically, the project manager will be responsible to submit a permit application to the DDOE at 65-percent completion of design. Measures to control sediment and erosion, revegetation, and temporary and permanent stormwater management methods will be included in the plans with the application. The project manager must be sure to incorporate all comments and requirements before final review submission.

#### 17.5 Additional Information

- USEPA  
USEPA Region III (3WP41)  
Water Protection Division  
Philadelphia, PA 19103-5103
- Regulatory Branch  
USACE, Baltimore District  
10 South Howard Street  
8th Floor  
Baltimore, MD 21201  
<http://www.nab.usace.army.mil/Regulatory/>

- USFWS  
Chesapeake Bay Field Office  
177 Admiral Cochrane Drive  
Annapolis, MD 21401  
Tel: 410-573-4573  
<http://www.fws.gov/chesapeakebay/>
- NMFS  
Northeast Regional Office  
National Oceanic and Atmospheric Administration  
One Blackburn Drive  
Gloucester, MA 01930-2298  
<http://www.nero.noaa.gov/nero/>
- DDOE  
District Department of the Environment  
Division of Fisheries and Wildlife  
51 N Street, NE Suite 5002  
Washington, DC 20002  
Tel: 202-535-2266  
Fax: 202-535-1373  
[http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,492187,ddoeNav\\_GID,1486,ddoeNav,31375/31377/.asp](http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,492187,ddoeNav_GID,1486,ddoeNav,31375/31377/.asp)
- DDOE  
District Department of the Environment  
Water Quality Division  
51 N Street, NE, 5th Floor  
Washington, DC 20002  
Tel: 202-535-2190  
[http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,494812,ddoeNav\\_GID,1486,ddoeNav,31375/31377/.asp](http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,494812,ddoeNav_GID,1486,ddoeNav,31375/31377/.asp)

- DDOE Water Quality Division data:  
*[http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,494812,ddoeNav\\_GID,1486,ddoeNav,1313751313771.asp](http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,494812,ddoeNav_GID,1486,ddoeNav,1313751313771.asp)*
- DCMR Title 21, Chapter 11 Water Quality Standards:  
*<http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/wqd/WaterFinalRules06.pdf>*
- Federal Highway Administration. (undated). Stormwater Best Management Practices in an Ultra-Urban Setting: Selection and Monitoring:  
*[www.fhwa.dot.gov/environment/ultraurb/index.htm](http://www.fhwa.dot.gov/environment/ultraurb/index.htm)*
- Water quality criteria for discharges into Chesapeake Bay watershed:  
*<http://www.chesapeakebay.net/waterquality.aspx?menuitem=13945>*
- EPA Site for TMDLs in the District:  
*[http://iaspub.epa.gov/waters10/attains\\_index.control?p\\_area=DC](http://iaspub.epa.gov/waters10/attains_index.control?p_area=DC)*
- EPA National Assessment Database for D.C. Waterways:  
*[http://iaspub.epa.gov/waters10/w305b\\_report\\_control.get\\_report?p\\_state=DC](http://iaspub.epa.gov/waters10/w305b_report_control.get_report?p_state=DC)*
- District of Columbia Water and Sewer Authority (DCWASA): *<http://www.dcwasa.com/default.cfm>*



# CHAPTER 18

## FLOODPLAIN POLICY AND REGULATIONS



### CONTENT

- 18.1 Summary of Key Legislation, Regulations, and Guidance
- 18.2 Agency Roles
- 18.3 General Methodology
- 18.4 Post-NEPA Commitments
- 18.5 Additional Information



## FLOODPLAIN POLICY AND REGULATIONS

**T**his chapter focuses on the documentation and regulations that pertain to the protection of floodplains. In the District of Columbia, floodplains occur along the Potomac River, the Anacostia River, Rock Creek, and some of their tributaries. In the planning and design of highway projects, the District of Columbia Department of Transportation (DDOT) must consider potential impacts on floodplains and take action to minimize those impacts in order to reduce the risk of flood loss, to minimize the impact of floods on human safety, health, and welfare, and to restore and preserve the natural and beneficial values served by floodplains, which include habitat and water quality values.

If DDOT finds that the only practicable alternative requires siting in a floodplain, impacts must be minimized to the extent possible. A separate “Only Practicable Alternative Finding” statement must be placed in the final environmental document.

### 18.1 Summary of Key Legislation, Regulations, and Guidance

#### Federal Laws and Regulations

- Executive Order (EO) 11988, Floodplain Management, 1977
- United States Department of Transportation (USDOT) Order 5650.2, Floodplain Management and Protection, 1979
- 44 Code of Federal Regulations (CFR) 59–62, 64–68, 70–71, 75–77, National Flood Insurance Program (NFIP)

#### District of Columbia Laws and Regulations

- District of Columbia Municipal Regulations (DCMR) Title 20, Chapter 31, Flood Hazard Rule

#### Guidance Documents

- Federal Highway Administration (FHWA). 1987. Guidance for Preparing and Processing Environmental

and Section 4(f) Documents. Technical Advisory (TA) T6640.8A

## 18.2 Agency Roles

Federal and District of Columbia agencies share responsibilities for activities along streams or within floodplains. The following agencies may provide regulatory information or studies that can assist in the assessment of floodplain impacts.

- Federal Emergency Management Agency (FEMA) has primary responsibility for the protection of floodplains in accordance with EO 11988, Floodplain Management. Generally, FEMA regulates projects within the limits of the 100-year floodplain, as determined in the Flood Insurance Study issued by FEMA.
- United States Army Corps of Engineers (USACE) is responsible for dredging navigation channels. USACE may have additional flood data/studies for the Potomac and lower Anacostia Rivers to supplement FEMA studies.
- United States Coast Guard (USCG), Fifth District, Office of Bridge Administration has authority to regulate projects in or over navigable waterways that may impede navigation, under Section 9 of the Rivers and Harbors Act. While the impact to floodplains is not its primary focus, USCG may have hydraulic studies for any bridges that have been constructed or modified in the project area since the time of the FEMA Flood Insurance Study (FIS).

### Local Agencies

- District of Columbia Department of the Environment (DDOE), Watershed Protection Division, Sediment and Storm Water Technical Services Branch. At the

local level, FEMA has delegated floodplain regulation to the Department of Consumer and Regulatory Affairs (DCRA), although the DDOE Watershed Protection Division's Sediment and Storm Water Technical Services Branch has primary responsibility for technical review of impacts to the floodplain. Thus, the Technical Services Branch reviews projects to ensure compliance with both the National Flood Insurance Program (NFIP) requirements and DCMR floodplain regulations.

## 18.3 General Methodology

### 18.3.1 Definitions

**Base Flood:** Flood event having a 1 percent chance of being equaled or exceeded in a given year (also known as the 100-year flood).

**Base Flood Elevation (BFE):** Water surface elevation of the base floodplain.

**Flood Insurance Study (FIS):** Published by FEMA in 1985 pursuant to the National Flood Insurance Act, the study includes hydrologic and hydraulic analysis to develop flood risk data for areas around larger streams in the District of Columbia area.

**Floodplain:** The area of land adjacent to a stream or river that would be covered by waters during a 100-year flood event.

**Floodway:** The regulatory floodway is the channel of a stream plus any adjacent floodplain areas that must be kept free of encroachment so that the 100-year flood discharge can be conveyed without increasing the base flood elevation more than a specified amount.

**Floodway Fringe:** The area between the floodway and the 100-year floodplain boundaries. The floodway fringe encompasses the portion of the floodplain that could be

completely obstructed without increasing the water surface elevation of the 100-year flood by more than 1 foot at any point.

### **18.3.2 Existing Conditions/Affected Environment**

Most basic floodplain impact assessments can be made from the published FEMA maps. These maps, whether on geographic information system (GIS) layers or hard copy, will show the 100-year and 500-year floodplain areas. Generally, the focus of the assessment should be on the 100-year floodplain.

Floodplain boundaries were determined by FEMA in an FIS for the District of Columbia in May 1985. This is the official study cited in the DCMR Flood Hazard Rules. The floodplains are shown on two types of maps published by FEMA: Flood Boundary and Floodway Map (FBFM) and Flood Insurance Rate Map (FIRM). The use of these maps is mandatory in determining whether a highway location alternative will encroach on the base floodplain. These maps are available through the online FEMA Flood Map Store. The District GIS also includes a floodplain layer that was developed from the FEMA maps.

Flood boundaries that have been mapped based on detailed analysis of the watershed are designated Zones A2 through A22. In areas where the floodplain has been determined by approximate methods, the floodplain is simply designated Zone A. The area between the 100-year flood and the 500-year flood is shown as Zone B. Zone C designates areas outside the 500-year floodplain.

The FIS takes into account structures (such as bridges) that existed at the time of the study. A comparison of recent and historical mapping or aerial photos (from around 1985) may be used to determine whether substantial modifications have been made since the time of the FIS that may have

had an effect on the floodplain boundaries or the base flood elevation. If there have been substantial modifications or additional structures installed in the project area that are not represented in the FIS, an inquiry should be made to the DDOE Technical Services Branch and FEMA for any updates to the flood data in the project area.

The Affected Environment section of the National Environmental Policy Act of 1969 (NEPA) document should describe the references used (such as FIS, FIRM, and additional data from FEMA), floodplain characteristics (size and location of floodplain in the project area), the waterways with which it is associated, whether any parcels in the floodplain were purchased with FEMA funds, and land uses in the floodplain.

A description of the land uses (or cover types) in floodplains is important in understanding the degree to which a potentially affected floodplain maintains natural and beneficial floodplain values. A statement should be included in the Affected Environment text stating that floodplains in their natural or relatively undisturbed state serve water resource values (natural moderation of floods, water quality maintenance, and groundwater recharge); living resource values (fish, wildlife and plant resources); cultural resource values (open space, recreation); and cultivated resource values (agriculture, aquaculture and forestry). A description of land uses in the floodplain allows a comparison between the functions a natural or relatively undisturbed floodplain can serve and the functions actually being served. This information will help define the level of a project's impact in the Environmental Consequences text.

### **18.3.3 Determination of Floodplain Impacts**

The assessment of floodplain impacts is primarily a task of determining the area of the floodplain that would be affected, whether an increase in the BFE is expected between

postproject conditions and effective (preproject) conditions, and the effect on other natural benefits provided by the floodplain in the area.

The discussion of floodplain impacts should identify the acres of floodplain land uses (cover types) converted to transportation uses and the effects of those impacts on natural and beneficial floodplain values. Impacts to natural or relatively undisturbed floodplains would be expected to have a greater effect on water resource values, living resource values, cultural resource values, and cultivated resource values than impacts to a floodplain that was dominated by cropland or developed urban land.

FEMA regulations limit encroachments into the floodplain that would cause a rise in the BFE by more than 1 foot when no floodway is designated. Where there is a floodway, encroachments only into the flood fringe, by definition, should not cause a rise of greater than 1 foot. The regulations prohibit encroachments into floodways that cause any rise in the BFE.

Under the DCMR flood rules, it is specified that no encroachment, alteration or improvement of any kind shall be made to any watercourse that would reduce the flood-carrying capacity of the watercourse. There are no additional limitations to changes to the BFE than is specified in the FEMA rule.

Potential impacts to floodplains can be assessed when preliminary road designs (footprints) are available for the alternatives. By overlaying the design on the floodplain mapping, the area of the impacts to the 100-year floodplain can be determined. Impacts should be classified as transverse (that is, perpendicular to the stream, such as a bridge) or longitudinal (parallel to the stream). The environmental document should include exhibits that depict the

alternatives, the floodplains, and, where applicable, the regulatory floodways.

Longitudinal impacts are generally considered to have greater impact. The practicability of alternatives to any longitudinal encroachments must be discussed. The following items should be evaluated, commensurate with the significance of the risk or environmental impact, for all alternatives containing encroachments:

- The increased risks of flooding associated with implementation of the action
- The impacts on natural and beneficial floodplain values
- The support of probable incompatible floodplain development
- The measures to minimize floodplain impacts associated with the action
- The measures to restore and preserve the natural and beneficial floodplain values impacted by the action
- Permit conditions (if any)

If any alternative results in a floodplain encroachment or supports incompatible floodplain development having significant impacts, or requires a commitment to a particular structure size or type, the environmental document should include an evaluation and discussion of practicable alternatives to the structure or to the significant encroachment.

For each alternative encroaching on a designated floodway, engineering and environmental analyses should be undertaken commensurate with the level of encroachment, to identify impacts and to discuss the consistency of the action with the regulatory requirements. Hydraulic technical studies such as HEC-2 modeling and bridge scour

analysis may be useful if more detailed floodplain studies are considered necessary through agency coordination. Normally, hydraulic impact assessment requires a high level of engineering and it generally occurs after the NEPA process. A brief description of both studies is given below.

HEC-2 Modeling is a program from the USACE that was designed for its Water Surface Profiles Program. This model, and the subsequent version known as HEC-RAS, are the standard methods for FEMA floodplain and river channel evaluations during the preliminary design stage of project development. It is capable of modeling sideflow weirs, drop structures, and floodplain encroachments and can be used to evaluate floodway encroachments, identify flood hazard zones, manage floodplains, and design and evaluate channel improvements. HEC-2 modeling can be used to calculate the effect that an in-stream structure (such as bridge piers) would have on upstream water levels.

Bridge Scour Analysis. The format and content of a Bridge Scour Analysis are covered in the Guidelines for Preliminary Design of Bridges and Culverts Manual from the Office of Bridges and Structures. Appendix C of that manual describes methods to estimate scour for existing and proposed structures. Also in Appendix C are recommendations for reducing and preventing scour effects on existing and proposed bridges and worksheets for documenting the analysis.

Coordination with FEMA and the DDOE Technical Services Branch should be undertaken for each floodway encroachment. If a floodway revision is necessary, the Environmental Impact Statement (EIS) should include evidence from FEMA and the Technical Services Branch indicating that such revision would be acceptable.

### Only Practicable Alternative Finding

If the project includes unavoidable impacts to floodplains, then an “Only Practicable Alternative Finding” will need to be specifically included in the NEPA document in accordance with EO 11988.

A proposed action that includes a significant encroachment will not be approved unless FHWA finds that the proposed significant encroachment is the only practicable alternative. This finding shall be included in the Final EIS or in the Finding of No Significant Impact (FONSI) document and shall be supported by the following information.

- The reasons why the proposed action must be located in the floodplain
- The alternatives considered and why they were not practicable
- A statement indicating whether the action conforms to FEMA and DCMR flood hazard rules

### 18.4 Post-NEPA Commitments

FEMA requirements apply to permitting and design of structures and utilities in the floodplain. A submittal to FEMA for proposed projects in Zone A areas is not required by FEMA regulations, but the DCMR flood hazard rules require a permit for any actions in the floodplain.

The application for building permit in the floodplain is submitted through the Department of Consumer and Regulatory Affairs (DCRA), although the Technical Services Branch has primary responsibility for technical review of impacts to the floodplain. The general requirements for approval as specified in DCMR are to ensure that all proposed actions do not reduce the flood carrying capacity and are adequately constructed and protected to prevent flood damage.

With the application, an elevation determination must be submitted based on an appropriate hydrologic and hydraulic analysis. For the floodplain administrator to issue a floodplain development permit, they must receive a no rise certification that the proposed work would not increase the BFE. At this time, the HEC-2 or similar model and Bridge Scour Analysis (if necessary) will be mandatory.

The details of the permit application are outlined in DCMR Title 20 Chapter 31.

### 18.5 Additional Information

- U.S. Coast Guard, Fifth District, Portsmouth, Virginia:  
*<http://www.uscg.mil/d5/>*
- USACE, Baltimore District  
10 South Howard Street  
8th Floor  
Baltimore, MD 21201  
*<http://www.nab.usace.army.mil/>*
- DDOE  
District Department of the Environment  
Watershed Protection Division  
Sediment and Storm Water Technical Services Branch  
51 N Street, NE, 5th Floor  
Washington, DC 20002  
202-535-2240  
*[http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,492320,ddoeNav\\_GID,1486,ddoeNav,31375/313771.asp](http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,492320,ddoeNav_GID,1486,ddoeNav,31375/313771.asp)*  
*<http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,494833.asp>*
- Department of Consumer and Regulatory Affairs (DCRA): *<http://dcra.dc.gov/DC/DCRA>*
- District Geographic Information System (GIS). *<http://dcatlas.dcgis.dc.gov/catalog/>*
- Federal Emergency Management Agency. 1985. Flood Insurance Study, District of Columbia, Washington, DC., November 15, 1985. Community Number 110001.
- The Flood Insurance Study, Floodway and Flood Boundary Maps, and Flood Insurance Rate Maps, are available on the web at the FEMA “Product Catalog”:  
*<http://msc.fema.gov/webapp/wcs/stores/servlet/StoreCatalogDisplay?storeId=10001&catalogId=10001&langId=-1&userType=G>*



# CHAPTER 19

## WETLANDS AND WATERS OF THE UNITED STATES



# CONTENT

- 19.1 Summary of Key Legislation, Regulations, and Guidance
- 19.2 Agency Roles
- 19.3 General Methodology
- 19.4 Identification of Appropriate Mitigation Measures
- 19.5 Post-NEPA Commitments
- 19.6 Additional Information



## WETLANDS AND WATERS OF THE UNITED STATES

**T**his chapter discusses documentation of direct impacts to wetlands and other surface waters, including rivers, streams, ponds, and lakes.

Because of the stringent regulation of these resources, avoidance of impacts to wetlands, streams, or other waters is advisable whenever possible. If the waters cannot be avoided, then impacts should be minimized. Mitigation in the form of replacement is typically required for any unavoidable losses of these habitats. A separate “Only Practicable Alternative Finding” statement must be placed in the final environmental document for any unavoidable impacts.

From a regulatory viewpoint, direct impacts to waterways or wetlands and water quality impacts (as described in Chapter 18) are inseparable. However, this chapter specifically addresses the issues of identifying the limits of the wetlands and waters and assessing the impacts to those areas.

### 19.1 Summary of Key Legislation, Regulations, and Guidance

The preservation of aquatic habitats, wetlands, and water quality is the primary focus of many federal and District of Columbia regulations.

The following list of pertinent regulations is not all inclusive, but does include the primary regulations that are applicable to highway projects.

#### Federal Laws and Regulations

- Executive Order (EO) 11990, Protection of Wetlands
- Section 10 of the Rivers and Harbors Act (33 United States Code [USC] 403)
- Clean Water Act (CWA), Section 401
- CWA, Section 404 (33 USC 1344)
- 33 Code of Federal Regulations (CFR), Parts 320–330, Discharges of dredge and fill material into United States waterways
- 40 CFR, Part 6, Appendix A, Protection of Wetlands

- 40 CFR, Part 230, Protection of Wetlands
- 40 CFR, Parts 320-330, Protection of Wetlands
- Supreme Court Decision in the matter of Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (USACE), 531 U.S. 159 (2001) (“SWANCC Decision”)
- Supreme Court Decision in the matter of Rapanos v. United States, and Carabell v. United States, 126 S. Ct. 2208 (2006) (“Rapanos Decision”)

### District of Columbia Laws and Regulations

- Water Pollution Control Act of 1984 (District Law 5-188)
- District of Columbia Municipal Regulations (DCMR) Title 21, Chapter 11, Water Quality Standards
- DCMR Title 21, Chapter 14, Submerged Aquatic Vegetation (SAV) Regulations
- DCMR Title 21, Chapter 19, Water Quality Monitoring Regulations

Notably, the District of Columbia does not have coastal zone management regulations as do adjacent states.

### Guidance Documents

- USACE. 1987. Corps of Engineers Wetland Delineation Manual.
- USACE. 2007. U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook.
- USACE and United States Environmental Protection Agency (USEPA). Compensatory Mitigation for Losses of Aquatic Resources. Final Rule. Federal Register: April 10, 2008 (Volume 73, Number 70).

## 19.2 Agency Roles

The federal and District of Columbia agencies share responsibilities for protecting the natural environment. The following discussion focuses on the roles of these agencies in the review and regulation, if applicable, of highway projects.

### Federal Agencies

- USACE is the primary federal agency that regulates direct impacts to rivers, streams, and wetlands under Section 10 of the Rivers and Harbors Act and Section 404 of the CWA. Both Section 10 and Section 404 apply to all activities, public or private. Section 10 regulates activities in navigable waters, and Section 404 regulates the discharge of fill material into waters of the United States, including navigable waters but also extending along tributaries and adjacent wetlands. In general, USACE exercises its authority under both laws as a single permitting process.

USACE has the authority to determine the jurisdictional limits of waters of the United States, and to issue permits that involve placing any fill material, including earth embankments or bridge piers, into these waters.

- USEPA has broad authority over air, water, and land pollution. USEPA has oversight of USACE execution of Section 404. Generally, USEPA is invisible in the 404 permitting process; however, USEPA has review authority over USACE 404 permits and can veto USACE 404 permits. USEPA also has approval authority for some USACE jurisdictional determinations.

### Local Agencies

- District of Columbia Department of the Environment (DDOE), Water Quality Division is an important regulatory agency to contact for any impacts to

waterways or wetlands. As required under Section 401 of the CWA, the Water Quality Division provides Water Quality Certification (WQC) for draft NPDES permits (issued by USEPA) and Section 404 permits (issued by USACE). The 401 WQC process provides the District with the opportunity to review the federal permits for consistency with District water quality standards and SAV regulations. The limits of jurisdiction of the Water Quality Division may extend beyond the limits determined by USACE for waters of the United States; that is, the Water Quality Division may also regulate isolated waters. The 401 WQC from DDOE is required for all Section 404 permits including Nationwide Permits and Individual Permits.

## 19.3 General Methodology

### 19.3.1 Definitions

**Ephemeral:** Ephemeral streams have flowing water only during and for a short duration after precipitation events in a typical year. Runoff from rainfall is the primary source of water for stream flow. Groundwater is not a source for water for the stream.

**Intermittent:** An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

**Perennial:** A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow.

**Submerged Aquatic Vegetation:** SAV beds typically occur in depths of 3 to 6 feet along the larger waters of the District of Columbia, namely the Potomac and Anacostia Rivers, and

vary in extent from year to year. They comprise a particular collection of floating leaved or submerged plant species.

#### **Waters of the United States:**

- All waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide
- All interstate waters, including interstate wetlands
- All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds—the use, degradation, or destruction of which could affect interstate or foreign commerce, including any such waters:
  - That are or could be used by interstate or foreign travelers for recreational or other purposes
  - From which fish or shellfish are or could be taken and sold in interstate or foreign commerce
  - That are used or could be used for industrial purpose by industries in interstate commerce
- All impoundments of waters otherwise defined as waters of the United States under the definition
- Tributaries of waters identified above
- Wetlands adjacent to waters (other than waters that are themselves wetlands)

**Wetlands:** Areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in

saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

### 19.3.2 Existing Conditions/Affected Environment

While there are a number of published sources that show wetlands and waters in the District of Columbia, the jurisdictional boundaries must be determined in the field and confirmed by the USACE on a case-by-case basis. The confirmation process has been made especially important because of two recent Supreme Court decisions: the *Solid Waste Agency of Northern Cook County v. USACE* (2001) (known as SWANCC), and the consolidated cases *Rapanos v. United States*, and *Carabell v. United States* (2006) (known as *Rapanos*). These decisions excluded any isolated waters that have no “significant nexus” to navigable waters or their tributaries from regulation under the CWA. Streams that have relatively permanent flow, at least seasonally (generally 3 months or more), and wetlands adjacent to these streams are clearly regulated. Wetlands and waters that are clearly isolated, with no connections to other waters, are not regulated. For many waters, a significant nexus determination is needed.

- Tributaries that do not typically have continuous flow at least seasonally
- Wetlands that are adjacent to such tributaries
- Wetlands that are adjacent to but that do not directly abut a relatively permanent tributary

These determinations are often not straightforward. Therefore, it is prudent to confirm all jurisdictional determinations through the USACE.

Following is an approach to collecting pertinent information to identifying regulated waters and wetlands.

### Office Analysis

Various published and Internet resources are available that identify wetlands and other waters. It is recommended that data regarding resources within a 1-mile radius of the project area be collected. The collected data should be incorporated into the project base map. Examples of these available data sources are:

- District of Columbia Geographic Information System (GIS). The District of Columbia GIS contains mapping of streams and wetlands. A map of wetlands in the District of Columbia is also available as a download from the DDOE Water Quality Division website.
- District of Columbia Soil Survey. The soil survey, assembled by the Natural Resources Conservation Service, contains maps and descriptions of the soils throughout the District. The soil survey describes the soil characteristics, such as drainage and texture, which can determine plant community composition. In particular, the “hydric” soil units can show the location of historical wetlands and areas where wetlands may still occur.
- National Wetland Inventory (NWI). This inventory, developed by the United States Fish and Wildlife Service (USFWS), primarily from aerial photos, shows few wetlands in the District. However, it should be referenced for the project area.
- SAV beds are mapped annually by the Virginia Institute of Marine Sciences (VIMS), under contract with the National Marine Fisheries Service (NMFS). The annual maps of SAV beds in the Potomac and Anacostia rivers can be viewed online or downloaded from the VIMS website.

The amount of documentation needed depends on the project and nature of the environment in the project area.

A large portion of the District is densely developed, and, therefore, wetlands and streams are absent. For some projects in more developed areas, the secondary information gathered can be adequate to document the lack of wetlands or streams.

On the other hand, projects near Rock Creek, the Anacostia River, the Potomac River, any of their tributaries, parks or greenways may contain wetlands or streams that have not been previously identified or delineated. Therefore, field studies should be performed to confirm secondary data and to add detail to the inventory of wetlands and waters for any project that includes natural areas.

### Field Studies

On a project-by-project basis where wetlands and other waters are present, a qualified consultant should be employed to delineate the limits of regulated waters and wetlands according to the USACE guidance. These more accurate, updated boundaries should replace the secondary source information in the project base map for project planning and impact analysis. The field studies should also document the conditions of the waters. To adequately assess the biological characteristics, the field studies should be performed during the growing season (between the last freeze date in spring to the first freeze date in the fall), which in the District is generally between April 7 and October 29.

### Waterways Delineation

Rivers and streams are classified as tidal (the Potomac River upstream to Little Falls, the Anacostia River from its mouth to the confluence of the Northwest and Northeast Branches, and the lower 400 meters of Rock Creek) or nontidal (all others).

The regulatory boundary of a waterway is the “ordinary high water mark.” In tidal waters, the ordinary high water mark

corresponds to the Mean High Water (spring tide) elevation, which can be determined from tide tables available from the National Oceanographic and Atmospheric Administration (NOAA) and USACE.

For nontidal waters, the ordinary high water mark can usually be delineated and marked in the field using guidance from the USACE, and then located with global positioning or other survey methods.

Based on the field studies, nontidal streams should be additionally classified as perennial, intermittent, or ephemeral. The physical habitat of the stream should be described using an acceptable method, such as USEPA’s Rapid Bioassessment Protocols. Depending on the availability of recent data from the District Fisheries Division or Metropolitan Washington Council of Governments (MWCOG), the sensitivity of the habitat, or the potential level of impact, detailed studies of the fish and macroinvertebrates in project area streams also may be necessary. This is discussed in Chapter 20, Biological Resources.

The USACE generally will not assert jurisdiction over the following features.

- Swales or erosional features (such as gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

### Wetlands Delineation

The official methodology, developed by USACE, defines wetlands based on a combination of the dominant vegetation, soils characteristics, and positive indicators of at least seasonal soil saturation or inundation. Contrary

to some beliefs, all wetlands that meet the definition are regulated, regardless of their sizes. The Corps of Engineers Wetland Delineation Manual (1987) and other USACE guidance must be used to identify wetlands and their regulatory boundaries. The wetland delineation should be documented on wetland determination data forms acceptable to USACE. Wetland boundaries should be marked in the field and surveyed using global positioning or other survey methods.

Wetlands should be classified based on their vegetative and hydrologic characteristics. The Cowardin classification system (USFWS 1979) is typically used.

Functions and values of the wetlands must be assessed. Methods, such as the USACE Wetland Evaluation Technique or the USACE Hydrogeomorphic Model, can be used to qualitatively assess the functions that wetlands serve in the landscape, such as: floodflow alteration, groundwater discharge or recharge, bank stabilization, sediment and toxicant retention, and wildlife habitat. Methods developed by the Maryland Department of the Environment may also be applicable.

The wetland's size, classification, and functional assessment can be used to evaluate its uniqueness and relative importance compared to other wetlands in the watershed.

### **SAV Beds**

Field studies should delineate the extent of these beds, which may require a boat, and their species composition. While they are located below the ordinary high water mark of waterways and are regulated under the CWA, there are other special District of Columbia regulations that apply to them that require their separate delineation.

### **Isolated Waters**

Isolated wetlands and other waters (such as ponds) are not regulated under the CWA, but may be regulated by the District of Columbia Department of Health (DDOH). The same methodologies described above can be used to determine the boundaries of isolated wetlands or other waters.

### **Jurisdictional Determination**

A USACE Jurisdictional Determination Form should be completed for each wetland or water body. These forms should be used to document if a wetland or other water is connected to navigable waters or a tributary (therefore regulated under Section 404) or if it can be considered isolated.

Field studies should be summarized in a technical memorandum that includes:

- Study methods
- Dates of field surveys
- Background data (such as soil survey, NWI, District of Columbia GIS, and spring tide elevations)
- Number, sizes, types and functions of the wetlands and other waters in the project area
- Wetland delineation data forms
- Photos of the wetlands
- Maps of the wetlands and waters delineated

The technical memorandum should be submitted to the USACE with a request for a Jurisdictional Determination (JD). USACE typically makes a field visit to the site to confirm the boundaries and will issue an official JD letter.



## NEPA Document

The Affected Environment section of the NEPA document should provide a summary of the waters in the project area, as described in the technical memorandum, the date the fieldwork was completed, and the date confirmed by the USACE. Include tables with the following information.

- Unique identifier for each wetland or water in the project area
- If a wetland or pond, include the total approximate size
- If a stream, include the dimensions such as the length of the stream in the study area and average width
- Brief description of the wetland or water
- Brief description of habitat characteristics and classification of each wetland or water
- Functions and values of the wetland or waterway

### 19.3.3 Determination of Impacts

As both a regulatory and a practical matter, avoidance of impacts to wetlands, streams, SAV beds, or other waters is advisable whenever possible. Any impacts will require a justification and analysis of avoidance alternatives. Also, the CWA permitting process that will be required for any impacts to wetlands or other waters can have an effect on project budget and schedule.

The extent of the construction footprint over wetlands and waters is the first step to quantify the impacts. The area of wetlands or waters directly affected by the project footprint should be identified. Permanent and temporary impacts should be separately evaluated. Stream crossings that are made with culverts, which would permanently remove stream habitats, should be separately assessed from bridges, which generally have temporary impacts except in the areas of any piers that are placed in the waterway.

The stability and function of wetlands and waters that are only partly affected should be assessed. The NEPA document should examine potential peripheral impacts to hydrology or functions in the remaining portion of the wetland or stream beyond the project footprint.

If the project includes unavoidable impacts to wetlands, then an “Only Practicable Alternative Finding” will need to be specifically included in the NEPA document in accordance with EO 11990.

A proposed action that includes wetlands impacts will not be approved unless FHWA finds that the proposed significant encroachment is the only practicable alternative. This finding shall be included in the final environmental document (Final EIS or FONSI) and shall be supported by the following information.

- The reasons why the proposed action must be located in the wetland
- The alternatives considered and why they were not practicable
- A statement indicating whether the action conforms to federal and District regulations

### 19.3.4 Permitting Process

The placement of dredged and fill material into waters of the United States, including wetlands, is regulated under Section 404 of the CWA. A permit from the USACE is required for activities such as roadway embankments or utility lines. It is during the early detailed design process when the permits are obtained and the details of the mitigation are planned and designed. In general, Section 404 permits can be divided into two main categories.

- General Permits
- Individual Permits

## General Permits

General permits are issued for project that have minimal individual and cumulative impacts. General permits are of three types:

- Nationwide Permits (NWP)
- State and Regional Permits
- Programmatic Permits

Currently the District of Columbia is covered only under the NWP.

## Nationwide Permits

The NWP represents authorizations that have been issued for specific activities nationwide. If certain conditions are met, the specified activities can take place with little or no individual review. Nationwide permits apply to projects that entail minimal impacts to the aquatic environment. Projects must involve less than 0.5 acre of cumulative wetland impacts to be eligible for a nationwide permit and must be completed within 2 years from the date of issuance. Nationwide permits allow the USACE to streamline the permitting of activities with minimal adverse environmental impacts. The USACE issues the NWP for 5 years. The current NWP has 45 categories including NWP 3 Maintenance, NWP 6 Survey Activities, NWP 14 Linear Transportation Projects, and NWP 15 USCG Approved Bridges that typically apply to DDOT projects. Most of the work performed by DDOT is generally covered under one or more categories of the NWP. The NWP has certain requirements that must be met before the NWP can be used. Refer to the NWP issuance notice from the USACE for the requirements and general conditions. A copy of the NWP issued in March 2007 is included in the References section.

NWP usually has some additional regional requirements that can be obtained from the USACE District office. The

USACE Baltimore District Permitting Office should be contacted any time a Section 404 permit is required. This NWP has to be certified by DDOE for Section 401 WQC.

## Individual Permits

Individual permits are needed when the impacts are greater than the limits set by USACE. Individual permits apply to projects involving more than 0.5 acre of wetland impacts and to those projects impacting high-quality aquatic resources. These permits require a public notice and interagency review. For individual permits, CWA Section 404 (b) guidelines must be followed. When an individual permit is required, close coordination with USACE and DDOE is needed.

## Section 401 Permit Certification

The Section 401 WQC process provides District of Columbia with the opportunity to review the federal permits for consistency with District water quality standards and SAV regulations. The limits of jurisdiction of the Water Quality Division may extend beyond the limits determined by USACE for waters of the United States; that is, the Water Quality Division may also regulate isolated waters. In the District of Columbia, the DDOE provides the Section 401 WQC.

## 19.4 Identification of Appropriate Mitigation Measures

As a rule, any loss of wetlands, streams, SAV, or other waters that are regulated by the CWA or District of Columbia regulations must be mitigated within the District to meet both the USACE and the DDOE permitting requirements. Federal rules for mitigation have been published (Federal Register, April 10, 2008). The DDOE has not yet published mitigation guidelines or rules. Case-by-case coordination with the USACE and the DDOE is necessary to define mitigation requirements.

Initiating the planning for mitigation is advisable as soon as the need is identified during the NEPA/project planning process, because of the limited mitigation opportunities in the District. Generally, the use of mitigation banks is preferable, but at this time there are no mitigation banks in the District of Columbia. Restoration of degraded habitats should first be considered for mitigation, followed by enhancement of existing wetlands, creation of replacement wetlands, and lastly preservation of wetlands. The right mitigation could be a combination of these methods. The goal is usually at least an in-kind replacement of wetlands or waters that are permanently disturbed by the project for “no net loss” of the wetlands. Depending on the importance of the affected wetland or water, the regulatory agencies may require mitigation at a ratio of 1.5 times the area of impact or more.

The NEPA document should discuss the mitigation goals for the project, as determined in coordination with the regulators, and conceptual mitigation strategies. The NEPA document may identify several alternatives for mitigation, with a commitment to developing the final mitigation plan during detailed design and the permitting process.

The project manager should note that wetlands created for the management and treatment of stormwater (see Chapter 17, Water Quality Policy and Regulations) are typically not acceptable as mitigation for wetland impacts.

### 19.5 Post-NEPA Commitments

Impacts to wetlands or other waters of the United States will require a Section 404 Permit from the USACE, and a Section 401 WQC from the DDOE. It is during the early detailed design process when the permits are obtained and the details of the mitigation are planned and designed.

### 19.5.1 Mitigation Detailed Design

Both Section 404 and Section 401 permits will require mitigation of impacts, as discussed in the previous section. Typically, the same mitigation plan can be used to satisfy the mitigation requirements for both permits.

All mitigation plans will require approval from the regulatory agencies during the permitting process. The negotiation of final, acceptable mitigation can be time consuming, and the project team should plan accordingly. Preferred sites should be selected as early in detailed design process as possible.

Once they are implemented, mitigation sites typically require monitoring for 5 years to fulfill permitting obligations. Mitigation monitoring includes qualitative and quantitative data collection for soils, hydrology, and vegetation. The level of monitoring may vary from site to site and should be negotiated and established at the permit stage and identified in the permit conditions. Typically, annual monitoring reports are submitted to the agencies.

### 19.6 Additional Information

- Regulatory Branch  
USACE, Baltimore District  
10 South Howard Street  
8th Floor  
Baltimore, MD 21201  
*<http://www.nab.usace.army.mil/Regulatory/>*
- National Marine and Fisheries Service (NMFS)  
Northeast Regional Office  
National Oceanic and Atmospheric Administration  
One Blackburn Drive  
Gloucester, MA 01930-2298  
*<http://www.nero.noaa.gov/nero/>*

- DDOE  
District Department of the Environment  
Water Quality Division  
51 N Street, NE, 5th Floor  
Washington, DC 20002  
202-535-2190  
[http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,494812,ddoeNav\\_GID,1486,ddoeNav,31375/313771.asp](http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,494812,ddoeNav_GID,1486,ddoeNav,31375/313771.asp)
- Division of Fisheries and Wildlife  
District of Columbia  
51 N Street, NE, Suite 5002  
Washington, DC 20002  
Phone: 202-535-2266  
Fax: 202-535-1373  
[http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,492187,ddoeNav\\_GID,1486,ddoeNav,31375/313771.asp](http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,492187,ddoeNav_GID,1486,ddoeNav,31375/313771.asp)
- District Geographic Information System: <http://dcatlas.dcgis.dc.gov/catalog/>
- Virginia Institute of Marine Science (VIMS), annual maps of SAV beds in the Potomac and Anacostia Rivers: <http://www.vims.edu/bio/sav/maps.html>
- USEPA's Rapid Bioassessment Protocols: <http://www.epa.gov/bioindicators/html/rbbs.html>
- DC Water Quality standards: <http://ddoe.dc.gov/ddoe/frames.asp?doc=/ddoe/lib/ddoe/wqd/WaterFinalRules06.pdf>
- Maryland Department of the Environment, Summary of Wetland Functional Indicators: [http://www.mde.state.md.us/Programs/WaterPrograms/Wetlands\\_Waterways/about\\_wetlands/description.aspx](http://www.mde.state.md.us/Programs/WaterPrograms/Wetlands_Waterways/about_wetlands/description.aspx)
- National Academies Press. Compensating for Wetland Losses under the Clean Water Act: [http://www.nap.edu/openbook.php?record\\_id=10134&page=285](http://www.nap.edu/openbook.php?record_id=10134&page=285)
- Cowardin, L., V. Carter, F. Golet and E. Laroe. 1979. Classification of Wetlands and Deepwater Habitats of the United States. U.S. Department of the Interior, Fish and Wildlife Service, Office of Biological Services, Washington, D.C. 20240. [http://el.erdc.usace.army.mil/emrrp/emris/emrshelp2/cowardin\\_report.htm](http://el.erdc.usace.army.mil/emrrp/emris/emrshelp2/cowardin_report.htm)
- USACE and USEPA. 2008. Compensatory Mitigation for Losses of Aquatic Resources. Final Rule. Federal Register: April 10, 2008 (Volume 73, Number 70). <http://www.epa.gov/fedrgstr/EPA-WATER/2008/April/Day-10/w6918a.htm>
- USACE. 2005. Anacostia River and Tributaries, Maryland and the District of Columbia, Comprehensive Watershed Plan, Section 905(b) (WRDA 86) Analysis. U.S. Army Corps of Engineers, Baltimore District, July 2005.
- USACE, Waterways Experiment Station. 1987. Wetland Evaluation Technique (WET) Volume II: Methodology. Army Corps of Engineers, Vicksburg, Mississippi.
- USACE, Guide to Clean Water Act Jurisdiction in light of the SWANCC and Rapanos Decisions [http://www.usace.army.mil/CECW/Pages/cwa\\_guide.aspx](http://www.usace.army.mil/CECW/Pages/cwa_guide.aspx)
- District of Columbia. 1997. District of Columbia Wetland Conservation Plan.

# CHAPTER 20

## BIOLOGICAL RESOURCES



### CONTENT

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- 20.2 Agency Roles
- 20.3 General Methodology
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## BIOLOGICAL RESOURCES

**T**his chapter focuses on the inventory and assessment of impacts to fish and wildlife. This assessment extends the studies of wetlands and streams (see Chapter 19, Wetlands and Waters of the United States) to terrestrial habitats, such as woodlands. This chapter also discusses impacts to threatened and endangered species.

As a largely developed area, all natural habitats in the District of Columbia are important to maintaining the diversity of wildlife. Therefore, impacts to natural areas should be avoided and minimized to the extent possible.

### **20.1 Summary of Key Legislation, Regulations, and Guidance**

Fish, wildlife, and threatened and endangered species in the District of Columbia are primarily protected under federal laws and regulations. The preservation of trees is addressed by District of Columbia law.

#### **Federal Laws and Regulations**

- Fish and Wildlife Coordination Act (16 United States Code [USC] 661–667d)
- Migratory Bird Treaty Act of 1976 (16 USC 703 and 50 Code of Federal Regulations [CFR] Part 21)
- Endangered Species Act of 1973 (ESA), 16 USC Section 1531 et seq.
- 50 CFR, Part 200, Wildlife and Fisheries
- 50 CFR, Part 402, ESA

#### **District of Columbia Laws and Regulations**

- District of Columbia Urban Forest Preservation Act (District of Columbia Register, Volume 50, Page 888)

## Guidance Documents

- United States Fish and Wildlife Service (USFWS). Section 7, Endangered Species Coordination Handbook.
- Federal Highway Administration (FHWA). 2006. Eco-Logical: An Ecosystem Approach to Developing Infrastructure Projects.
- FHWA. 1987. Guidance for Preparing and Processing Environmental and Section 4(f) Documents. Technical Advisory (TA) T6640.8A

## 20.2 Agency Roles

The federal and District of Columbia agencies share responsibilities for protecting the natural environment. The following discussion focuses on the roles of these agencies in the review and regulation, if applicable, of highway projects.

### Federal Agencies

- USFWS, United States Department of the Interior (USDOI), and National Marine Fisheries Service (NMFS, National Oceanographic and Atmospheric Administration, Department of Commerce) share responsibilities regarding overall evaluation of a project on natural habitats, fish and wildlife, and threatened and endangered species. The Fish and Wildlife Coordination Act requires proponents to coordinate the impacts of federally funded projects with these agencies. These agencies maintain records of species that are protected under the ESA and oversee compliance with the Act. Through a cooperative agreement with the Virginia Institute of Marine Sciences, NMFS also monitors the annual extent of submerged aquatic vegetation (SAV), a type of plant

community that occurs in permanent waters and is an important habitat feature for fish and water quality. SAV beds are protected as a special aquatic habitat (like wetlands) under Section 404, as well as under District of Columbia regulations, as noted above (District of Columbia Municipal Regulations [DCMR] Title 21, Chapter 14).

The Chesapeake Bay Field Office of USFWS in Annapolis and the northeast regional office of the NMFS in Gloucester, Massachusetts, oversee activities in the District of Columbia.

- National Park Service (NPS), National Capital Region Center for Urban Ecology, has particular interest in designated national parks, but also maintains records and provides protection for federally listed and state-listed rare species.

### Local Agencies

- District of Columbia Department of the Environment, Fisheries and Wildlife Division (DDOE) provides fish and wildlife research and management, aquatic education, and fishing license administration. The Fisheries and Wildlife Division conducts annual surveys and maintains a database of fish and other aquatic populations in the waters of the District of Columbia and provides aquatic habitat monitoring and evaluation. The Fisheries and Wildlife Division has also developed the District of Columbia Comprehensive Wildlife Conservation Strategy, a plan for conserving wildlife and their habitats, with particular emphasis on preserving wildlife and habitats in the urban environment. Coordination with the Fisheries and Wildlife Division could provide existing conditions information, rare species data, and impact assessment for projects.



- Metropolitan Washington Council of Governments (MWCOG) maintains water quality and fisheries data on a regional basis. MWCOG also monitors fish habitat conditions and areas in need of restoration.

## 20.3 General Methodology

### 20.3.1 Definitions

**Endangered species:** An animal or plant species in danger of extinction throughout all or a significant portion of its range.

**Threatened species:** An animal or plant species likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

### 20.3.2 ESA Section 7 Process

In the event that there is a potential of an endangered species in the project area, Endangered Species Act (ESA) Section 7 consultation is required. This consultation may lead to the determination by the lead federal agency that there are no endangered species present in the area or some kind of assessment (including a formal biological assessment [BA]) is required. Any project requiring work in Potomac or Anacostia River has to undergo this process due to the short nose sturgeon, which is a listed endangered species. National Marine Fisheries (NMF) or U.S. Fish and Wildlife Service (USFWS) should be consulted to determine which species (including short nose sturgeon) is listed or not as the endangered species list is updated routinely.

For a project that requires construction in Potomac River, Anacostia River, any tributaries to these waters, or any work in Anacostia Park, Rock Creek Park, or other parks where there is a potential of fish and wildlife, coordination

should be conducted with NMF, USFWS, and DDOE to ensure no threatened or endangered species exist in the area. If the coordination indicates there is an endangered species in the project area, then the Section 7 consultation shall be formally initiated by either a letter from FHWA (or the lead federal agency) to NMF or USFWS requesting the formal initiation of consultation; or by a letter from FHWA (or the lead federal agency) delegating DDOE as the “Non Federal Representative” for the consultation. Please see “14th Street Bridges Rehab Sec 7 BA” in the appendices for reference. After this letter is sent, formal consultation is started, which may include meetings (in-person or by phone) and written correspondence. NMF or USFWS may require a simple assessment or a BA for this project. This assessment should include a determination of “effects’ on the endangered species due to this project. After this assessment is submitted, NMF or USFWS may issue a concurrence with the determination of effects finding or may require more information. A written determination of effects (or concurrence with the federal agency determination) by NMF or USFWS is required to complete the Section 7 consultation process. In case of multiple federal agency actions (e.g., when FHWA is the lead agency, and the project requires a Section 404 permit needed from the U.S. Army Corps of Engineers and a permit from NPS as well), then joint agency consultation should be used rather than individual consultation.

### 20.3.3 Existing Conditions/Affected Environment

An inventory of the biological resources in the project area begins with the identification of natural and manmade environments. Developed areas, parks, greenways, stream corridors, brushy areas, woodlands and other natural or seminatural areas should be identified.

## Office Analysis

Various published and Internet resources are available for identifying potential natural habitats in the project area.

Examples of these data sources are listed below:

District of Columbia Geographic Information System (GIS). The District of Columbia GIS is a good starting point for the natural resources inventory search. It contains information such as wetlands, streams, and topography. A map of wetlands in the District of Columbia is available as a download from the DDOE Water Quality Division website.

- Aerial Photography. Several online sources for aerial photography exist, although the photos may not be recent. Some areas may be blacked out if they are too close to the Capitol or other government buildings. The aerials can show vegetated areas and land use that may not be available from other sources.
- District of Columbia Soil Survey. The soil survey, assembled by the Natural Resources Conservation Service, contains maps and descriptions of the soils throughout the District of Columbia. The soil survey describes the soil characteristics, such as drainage and texture, which can determine plant community composition.
- Casey Trees Endowment – Street Trees. Street trees may be the only natural resource in the project area. Casey Tree Endowment has inventoried many street trees throughout the District of Columbia, recording species, sizes, and condition. The Endowment maintains an online GIS of the trees that have been inventoried.

The inventory of habitats should also include wetlands and streams (see Chapter 19, Wetlands and Waters of the United States).

## Agency Coordination

To satisfy the requirement of the Fish and Wildlife Coordination Act and Section 7 of the ESA, early coordination letters should be forwarded to each of the resource agencies with a map of the project area, requesting information regarding fish and wildlife species known in the project area, specifically records of rare species or potential habitats and other issues that the agency may consider important.

### Federal Threatened and Endangered Species Known to Occur in the District of Columbia

Common Name	Scientific Name	Federal Status	Potential Habitat
Shortnose Sturgeon	<i>Acipenser brevirostrum</i>	Endangered	Potomac River and tributaries
Hay's Spring Amphipod	<i>Stygobromus hayi</i>	Endangered	Rock Creek

This information should be requested from:

- USFWS
- NMFS
- NPS
- DDOE Fisheries and Wildlife Division
- MWCOG

See additional information regarding agency coordination in Chapter 12, Agency Coordination Process.

## Field Studies

Field studies must be performed to confirm secondary data and to add detail to the biological resource inventory.

Granted, a large portion of the District of Columbia is densely developed, and, therefore, natural resources may be limited. On the other hand, projects near Rock Creek, the Anacostia River, the Potomac River, any of their tributaries, parks, or greenways may contain appreciable natural areas.

The project manager should coordinate with the resource agencies to establish the appropriate level of detail for the field studies. In most cases, a field biologist familiar with the local vegetation and wildlife should perform the survey. In addition, an aquatic biologist may be needed if any streams will be affected. Occasionally, a specialist, such as an expert on a particular rare species, may also be needed. Field studies should encompass the following areas of investigation:

- Terrestrial habitat characterization. Any areas supporting natural vegetation should be described. The type and relative amounts of plant community types (such as woodland or open field) should be described, including the plant species and wildlife observed in each community type. If woodlands are in the project area, the general sizes (diameter) and species of trees present should be described.
- Potential habitats for threatened and endangered species. Based on the records of species in the project vicinity supplied by the resource agencies during early coordination, the habitats that would be potentially affected should be compared to the habitat requirements of the rare species.

Field studies should be summarized in a technical memorandum that includes:

- Study methods
- Dates of field surveys

- Background data (such as soil survey, District of Columbia GIS, or aerial photos)
- Number, sizes, and types of habitats in the project area
- Wildlife encountered
- Special rare species studies (if any)
- Maps of the habitats
- Representative photos of the habitats
- Copies of agency coordination letters

The Affected Environment section of the National Environmental Policy Act (NEPA) document should include a map and discussion of the habitats in the project area. It should also include discussion of coordination efforts with state and federal agencies concerning potential presence of listed species, the habitat requirements of listed species and the presence or absence of such habitat within the project area. Much of these data can be summarized in tabular form.

#### **20.3.4 Determination of Impacts**

The alternatives should be evaluated for their impacts to any natural resources identified. Impacts should be quantified whenever possible. For many terrestrial habitat impacts, the area of each habitat within each alternative footprint should be quantified (such as woodland, mowed lawn, or brushy areas). This information can typically be summarized for all alternatives in a table.

An assessment of the impact to wildlife from the direct loss of habitats and indirect impacts to remaining habitats should also be made.

As discussed in Chapter 19, Wetlands and Waters of the United States, potential impacts to aquatic species or

wetland dependent species adjacent to the project should be examined because of the potential for peripheral impacts to these habitats beyond the project footprint. Further, potential impacts to aquatic species from water quality impacts should be examined (see also Chapter 17, Water Quality Policy and Regulations).

**Threatened and Endangered Species.** Special attention should be paid to impacts to known or potential habitats of threatened, endangered, or special interest species. If no listed species are known from the area, and the habitat is unsuitable, then a statement to that effect is sufficient.

If a protected species is potentially present in the project area, additional detailed correspondence with the USFWS or the NMFS may be needed in accordance with Section 7 of the ESA. Whenever possible, this coordination should begin as an “informal” coordination because that allows for a more casual conversation among DDOT, FHWA, and the resource agency regarding the details of the project and potential impacts.

Additional information regarding the habitat conditions at the site are submitted as a Biological Evaluation (BE). This document summarizes the habitat conditions from field studies and other documentation, the habitat requirements of the listed species, and detailed information on potential impacts to the listed species. Most often, an agreement can be reached during informal consultation that includes design modifications and mitigation measures to minimize impacts to the species, and the USFWS or NMFS can complete the Section 7 coordination process with a biological opinion that the project is “not likely to adversely affect” the species.

If a known habitat cannot be avoided, sufficient mitigation measures cannot be found to minimize potential impacts,

and the agency concludes that the project may adversely affect the species, then the coordination process may be formalized to review in detail and justify the project and its impacts. A formal Biological Assessment (BA) is prepared that includes all of the information from the BE, plus interviews with recognized experts. Additional detailed studies of the species and its habitat may be required for the BA. Once the USFWS or NMFS accepts the BA as complete, they prepare a biological opinion on whether the proposed activity will jeopardize the continued existence of a listed species. If it is determined that species will not be jeopardized, the project may proceed, but likely with conditions. If individuals of the listed species could be unavoidably lost, the agency may issue a “take” permit. If it is determined that the species will be jeopardized, the project cannot proceed.

The draft NEPA document should make reference to the Section 7 consultation. The biological opinion should be obtained before the NEPA document can be signed.

## **20.4 Identification of Appropriate Mitigation Measures**

Mitigation for the loss of natural habitats will vary by project. Revegetation of temporarily disturbed areas is standard practice in accordance with the DDOT Design Manual. Attempts to restore comparable vegetation should be considered to minimize project impacts.

- The District of Columbia Urban Forest Preservation Act requires a Special Tree Removal Permit for a person or nongovernmental agency that removes trees with a circumference of 55 inches (17.5 inches in diameter) or more. While the Urban Forest Preservation Act may not be applicable to DDOT projects, landscaping and replacement of trees is included in the DDOT Design and Engineering Manual.

Specific mitigation measures may also be dictated by regulatory agencies to satisfy regulatory requirements, such as wetlands and streams (Chapter 19, Wetlands and Waters of the United States) and floodplains (Chapter 18, Floodplains Policy and Regulations).

Very specific mitigation measures may be required in order to avoid or minimize impacts to threatened or endangered species. These measures would be identified in the Section 7 coordination with the USFWS and NMFS.

### 20.5 Post-NEPA Commitments

Any commitments to the restoration of habitats, such as from temporary disturbance, which are made in the NEPA document must be incorporated into the design documents. Particular design features to minimize peripheral impacts, such as wildlife or fish migration, must also be incorporated as agreed upon with the resource agencies.

Of particular importance is the incorporation of specific design or construction methods to avoid or minimize impacts to threatened or endangered species. If a “take” permit is issued, construction site monitoring and reporting may be required.

### 20.6 Additional Information

- USFWS  
Chesapeake Bay Field Office  
177 Admiral Cochrane Drive  
Annapolis, MD 21401  
410-573-4573  
<http://www.fws.gov/chesapeakebay/>
- National Marine Fisheries Service (NMFS)  
Northeast Regional Office  
National Oceanic and Atmospheric Administration  
One Blackburn Drive  
Gloucester, MA 01930-2298  
<http://www.nero.noaa.gov/nero/>
- National Park Service (NPS), National Capital Region  
Center for Urban Ecology  
District of Columbia Natural Heritage Program  
4598 MacArthur Boulevard NW  
Washington, DC 20007  
202-342-1443, x209  
<http://www.nps.gov/cue/tesm.htm>
- National Capital Parks East  
1900 Anacostia Drive SE  
Washington, DC 20020  
202-690-5160  
<http://www.nps.gov/nacel/>
- Division of Fisheries and Wildlife  
District of Columbia  
51 N Street NE, Suite 5002  
Washington, DC 20002  
Phone: 202-535-2266  
Fax: 202-535-1373  
[http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,492187,ddoeNav\\_GID,1486,ddoeNav,/31375/313771.asp](http://ddoe.dc.gov/ddoe/cwp/view,a,1209,q,492187,ddoeNav_GID,1486,ddoeNav,/31375/313771.asp)
- District of Columbia Urban Forest Preservation Act:  
[http://app.ddot.dc.gov/ufal/information/preservation\\_act.shtm](http://app.ddot.dc.gov/ufal/information/preservation_act.shtm)

- USFWS. 1998. Endangered Species Act Consultation Handbook; Procedures for Conducting Section 7 Consultations and Conferences: *[www.fws.gov/caribbean/es/PDF/Sec%207%20Handbook.pdf](http://www.fws.gov/caribbean/es/PDF/Sec%207%20Handbook.pdf)*
- FHWA. 2006. Eco-Logical: An Ecosystem Approach to Developing Infrastructure Projects: *[http://www.environment.fhwa.dot.gov/ecological/eco\\_toc.asp](http://www.environment.fhwa.dot.gov/ecological/eco_toc.asp)*

## ARCHAEOLOGICAL, HISTORICAL, AND PALEONTOLOGICAL RESOURCES



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# ARCHAEOLOGICAL, HISTORICAL, AND PALEONTOLOGICAL RESOURCES

Cultural resources are resources that are typically at least 50 years old and include (but are not limited to) everything that is man made. The vast range of resources considered “historic” includes everything from historic bridges to ancient tribal burial grounds, to an old barn, a Quonset hut, or even a trailer park. The most common resources that could be affected by transportation projects are bridges, buildings, landscapes, and archaeological sites. Federal laws have been enacted to require federal agencies to identify and protect cultural resources and to determine whether a proposed federal action, if it is defined as an “undertaking,” has the potential to cause “effects” upon historic properties. An agency will evaluate the undertaking and determine if the project would have “no adverse effect” or an “adverse effect” on cultural resources.

## 21.1 Section 106 at DDOT

In the District of Columbia, the process begins with the identification of the type of project. The District of Columbia Department of Transportation (DDOT) has set up a citywide

Section 106 Programmatic Agreement (PA) with the Federal Highway Administration (FHWA), District of Columbia Historic Preservation Office (DCHPO), and Advisory Council on Historic Preservation (ACHP). This PA has a list of activities/projects that do not require further review by DCHPO. The projects included in the PA are:

- Roadway surface replacement, reconstruction, overlays, shoulder treatments, pavement repair, seal coating, pavement grinding, and pavement marking where there will be no expansion, provided these activities occur within curb to curb with no change in materials or the character/design of the cross-section.
- Bridge reconstruction and rehabilitation, which does not include roadway widening or modification of existing piers and abutments, but which may include bridge repairs, deck replacement or repair, railing repair, painting and other maintenance work, excluding historic bridges or bridges more than 40 years old.

- Replacement or extension of culverts and other drainage structures with waterway openings of 100 square feet (9.3 square meters) or less and that do not extend beyond previous construction limits.
- Installation of new lighting, signals, and other traffic control devices, and replacement or repair of lighting, signals, and traffic control devices where the existing units were installed less than 50 years ago.
- Installation of new lighting, signals, and other traffic control devices, and replacement or repair of lighting, signals, and traffic control devices in historic districts where DDOT historic district street light policy is used.
- Installation, replacement, or repair of safety appurtenances such as guardrails, barriers, glare screens, and energy attenuators, except on National Register listed or previously determined eligible bridges, properties, or districts.
- Temporary construction fencing, including salvage yards, provided no grading or other landscaping is involved.
- Replacement in kind of landscaping within the DDOT Right-of-Way and on fillslopes and backslopes only.
- Repair or replacement in kind of curbs, gutters, and catch basins.
- Repair or replacement in kind of sidewalks and access ramps.
- Signs, signal installation, or modification and surface improvements to existing railway/transit crossings.
- Emergency structural repairs to maintain the structural integrity of a bridge, unless the bridge is listed on or determined eligible for listing on the National Register.
- Placement of fill material on the side of slopes of intersection crossroads and accesses for purposes of flattening these slopes to meet safety criteria, provided that no topsoil is removed beyond the area of previous horizontal and vertical disturbance.
- Hazardous waste removal and disposal from within an area previously disturbed by vertical and horizontal construction activities that constitute a public hazard and require immediate removal.
- Placement of riprap materials within an area previously disturbed by vertical and horizontal construction activities to prevent erosion of waterways and bridge piers excluding historic bridges.
- Routine roadway, roadside, and drainage system maintenance activities necessary to preserve existing infrastructure and maintain roadway safety, drainage conveyance, and stormwater treatment in previously disturbed areas.

If a project meets the criteria of any of the above-listed activities from PA, then that project does not need any further consultation with DCHPO. Such projects are approved by the Project Development and Environment (PDE) Division environmental program staff (or designee) for Section 106 compliance and the Section 106 process is considered completed. PDE environmental staff determine if a DDOT project qualifies for approval under the PA. All projects approved (processed) under this PA have to be included in the annual Section 106 PA report submitted to DCHPO, ACHP, and FHWA. This report is submitted by the PDE environmental program staff. DCHPO may determine a project not eligible for approval under the Citywide PA.

If a project does not qualify for approval under the citywide PA, then the next step is the identification of cultural resources listed or eligible for the National Register for Historic Places (NRHP) within a proposed transportation project area (referred to as an Area of Potential Effect [APE], as defined later in this chapter). The DCHPO, also called State Historic Preservation Office (SHPO), publishes a historic sites map called “The District of Columbia Inventory of Historic Sites.” This map is an excellent resource for identifying listed historic/cultural resources. The DCHPO staff is also consulted for additional resources identification.

Depending upon the size and scale of a project, additional investigations may be needed, such as field investigations, to determine the resources that may not be listed but may be eligible for nomination in the NRHP.

Once the resources are identified, then the potential effects of the proposed project on cultural resources are evaluated. DCHPO staff is consulted in this process. DDOT also uses consultants for this process.

If it is determined that the project will not have any effect on the cultural resources (listed and eligible) or that the project will have no adverse effects on the resources, then the DCHPO staff is consulted. If the DCHPO staff concurs with the “no effect” or “no adverse effect” finding, then the Section 106 process is completed by submitting a Section 106 No Adverse Effect Letter from FHWA to DCHPO. Once DCHPO signs off on the concurrence letter, the Section 106 process is completed.

If the project is determined to have adverse effects, then the potential mitigations have to be determined and agreed. An adverse impact finding requires a series of steps that are explained in 36 Code of Federal Regulations (CFR) 800. The process outlined in the 36 CFR 800 has to be used.

A Memorandum of Agreement (MOA) or a PA completes the process in this case. Coordination with the DCHPO, FHWA, the ACHP, consulting parties (the National Park Service [NPS], the U.S. National Capital Planning Commission [NCPC], the U.S. Commission of Fine Arts [CFA], and the Architect of the Capitol [AOC]), and the general public may also be needed. Such agency and public involvement occurs, as warranted, during the identification of resources and during the planning process to minimize and mitigate adverse effects. DDOT staff or consultants prepare and distribute reports as required by law and regulations.

## 21.2 Applicable Regulations

Many federal laws exist to protect cultural resources. Following is a brief description of the federal laws and regulations that are pertinent to cultural resources in the District of Columbia. The list is not comprehensive; rather, it focuses on the laws that DDOT staff would most likely consider for transportation projects.

### 21.2.1 Federal Legislation and Regulations

- **16 USC 470(aa)–(mm), Archaeological Resources Protection Act of 1979 (ARPA), as amended.** This regulation preserves and protects paleontological resources, historic monuments, memorials, and antiquities from loss or destruction.
- **16 USC 470 et seq., National Historic Preservation Act of 1966 (NHPA), as amended.** This Act establishes a program for the preservation of additional historic properties nationwide.
- **42 USC 1996 and 1996a, American Indian Religious Freedom Act of 1978 (AIRPA).** The AIRPA protects places of religious importance to Native Americans, Eskimos, and Native Hawaiians.

- **25 USC 3001-3013, Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).** This Act protects human remains and cultural material of Native Americans and Native Hawaiian groups.
- **36 CFR 800, Protection of Historic Properties as revised and reissued with an effective date of January 11, 2001.** Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties and affords the ACHP a reasonable opportunity to comment on such undertakings.
- **43 CFR 7, Protection of Archeological Properties.** This regulation implements provisions of the Archaeological Resources Protection Act of 1979, as amended (16 USC 470aa–mm).
- **36 CFR 60, National Register of Historic Places.** This regulation authorizes the Secretary of the Interior to expand and maintain an NRHP that includes districts, sites, buildings, structures, and objects that are significant in American history, architecture, archaeology, engineering, and culture.
- **36 CFR 63, Determinations of Eligibility for Inclusion in the National Register of Historic Places.** This code describes the process for listing properties on the NRHP.

### 21.2.2 District of Columbia Legislation and Regulations

In addition to federal laws and regulations, laws and regulations exist that are specific to the District of Columbia.

- **Historic Landmark and Historic District Protection Act of 1978, DC Law 2-144, as amended.** This Act protects historic landmarks and historic districts in the District of Columbia.

- **Historic Preservation Regulations (10DCMR Title 10A).** This regulation combines all historic preservation regulations into a new subtitle DCMR 10A.

The full text of the Act and regulations can be found at the DCHPO website: <http://planning.dc.gov/planning/site/default.asp> by clicking on the Historic Preservation link, then following it to Laws and Regulations.

### 21.2.3 Guidance Documents

The NPS, United States Department of the Interior, is the primary federal agency responsible for the conservation and protection of natural and cultural resources. NPS has issued numerous bulletins that provide standards and guidance to identify, evaluate, document, rehabilitate, preserve, and restore historic buildings, sites and structures, and archaeological resources.

- **The Secretary of the Interior Standards and Guidance for Archeology and Historic Preservation.** These standards have three purposes: to organize the information gathered about preservation activities; to describe the results to be achieved by federal agencies, states, and others when planning for the identification, evaluation, registration, and treatment of historic properties; and to integrate the diverse efforts of many entities performing historic preservation into a systematic effort to preserve the nation's cultural heritage.
- **62 CFR 33708, The Secretary of the Interior Proposed Historic Preservation Professional Qualification Standards, June 20, 1997.** These standards are designed as a tool to help recognize the minimum expertise generally necessary for performing professionally credible historic preservation work.

- **36 CFR 67, The Secretary of the Interior Standards for Rehabilitation.** These standards apply to historic buildings of all periods, styles, types, materials, and sizes.
- **The Secretary of the Interior Standards for Architectural and Engineering Documentation.** This bulletin describes the standards and guidelines for developing acceptable documentation on historic buildings, sites, structures, and objects, for inclusion in the Historic American Buildings Survey (HABS) and the Historic American Engineering Record (HAER) collections.
- **The Secretary of the Interior Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings.** These standards are intended to promote responsible preservation practices to help protect irreplaceable cultural resources.

#### 21.2.4 Interagency Programmatic Agreements

DDOT has recently signed a PA with FHWA, DCHPO, and ACHP to address Section 106 compliance for the implementation of a federal highway program in the District of Columbia. The PA addresses reconstruction and other activities with regard to existing bridges and interchanges, the replacement of curbs, and signage and other related work, as well as DDOT Section 106 responsibilities. The actions covered in the PA are discussed in the earlier section of this chapter. A copy of the PA is included in the References section.

#### 21.2.5 Related Regulations

In addition to Section 106 of the NHPA, DDOT also must consider the impacts of a project according to the law and regulations of Section 4(f) as described below.

49 USC 303, Department of Transportation Act of 1966, Section 4(f). This legislation states that “special effort [is] to be made to preserve the natural beauty of the countryside, and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” Historic sites include historic or archaeological sites on or eligible for inclusion on the NRHP. The proposed use of Section 4(f) property requires the agency to evaluate potential impacts early in the project development when alternatives to the proposed action are under study. Section 106 compliance must be substantially completed before processing a Section 4(f) evaluation. Chapter 10, The Categorical Exclusion, includes a full review of Section 4(f). FHWA Technical Advisory T 6640.8A, Section V also includes more details on Section 4(f).

#### 21.2.6 Primary Legislation

The two primary laws that apply to transportation projects and their impacts to cultural resources are:

- Section 106 of the National Historic Preservation Act (NHPA)
- Section 4(f) of the Department of Transportation Act

Cultural resource investigations are conducted for compliance with Section 106 of NHPA, as amended (codified as 36 CFR 800), with Section 4(f) of the Department of Transportation Act of 1966 (codified as 23 United States Code [USC] 771), and with the National Environmental Policy Act (NEPA). This chapter focuses on the NHPA: Section 4(f) is described in Chapter 22, Section 4(f) – Recreation Areas, Historic Sites, Wildlife and Waterfowl Refuges.

Cultural resources include prehistoric and historic archaeological sites and historic bridges, buildings, sites, objects, and districts. The purpose of cultural resource investigations is to consider the impact of federally funded

undertakings on properties, sites, buildings, structures, and objects that are listed in or eligible for inclusion in the NRHP. The criteria of adverse effect, the standard by which effects to historic properties are measured, are included in 36 CFR 800.

A historic property, as defined in regulation 36 CFR Section 800.16(l)(1), is any cultural resource included in or eligible for inclusion in the NRHP. A cultural resource is eligible for listing in the NRHP if it meets one or more of the four NRHP criteria and retains sufficient integrity to convey historic significance. The NRHP criteria state that the quality of significance is present in cultural resources when resources:

- Are associated with events that have made a significant contribution to the broad patterns of our history
- Are associated with the lives of persons significant in our past
- Embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction
- Have yielded or may be likely to yield information important in prehistory or history

In addition to significance, a property must also have integrity of location, design, setting, materials, workmanship, and feeling to be eligible for inclusion in the NRHP. This means that not only must a resource be old, but it also must retain many of its original features and be significant under one or more of the four criteria listed above. Ordinarily, the following types of cultural resources are not eligible for listing in the NRHP—religious properties, moved properties, birthplaces or graves, cemeteries, reconstructed

properties, commemorative properties, and properties that have achieved significance within the last 50 years. Such resources, however, may be eligible for inclusion in the NRHP, for example, if they are an integral part of an eligible district or for other reasons that are outlined in the NRHP regulations (36 CFR 60).

Two types of cultural resources need to be identified to satisfy the requirements of Section 106 of the National Historic Preservation Act of 1966: architectural/historical resources (buildings and structures) and archaeological resources (buried artifacts and remains of aboveground structures). For its projects, DDOT conducts the Section 106-required studies for FHWA.

The oversight of the archaeological and architectural/historical studies needed to satisfy Section 106 belongs to the environmental staff in DDOT. Typically, the environmental staff will work with the project manager to contract the work to a consultant whose staff meet the professional qualification requirements of the Secretary of the Interior.

The purpose of the studies is to identify architectural/historical resources or archaeological sites that are listed in or eligible for listing in the NRHP and to assess the effects of a project on such resources. The first step in this process is to define the Area of Potential Effect (APE). The APE of a project is defined in 36 CFR 800.16 (d) as “the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” The APE for architectural/historical resources will differ from the APE for archaeological resources. For example, the architectural/historical resource APE for a highway improvement project may encompass areas that:

- Could be affected by noise
- Could be affected by traffic increases
- May have changes in access
- Are within the viewshed of the proposed improvements
- Would be physically affected by the project

Only areas of direct physical impact would be considered as the APE for an archaeological survey. However, the archaeological APE could include areas of construction staging, borrow, or cut and fill. In addition, construction staging areas and borrow areas could be considered to be within the APE for historic resources.

Within the framework of the Section 106 process, the impact analysis is referred to as the “determination of effect.” Functional or conceptual plans, or other more detailed plans, are needed to undertake the effects assessment.

Effects determinations are made by applying the Criteria of Adverse Effects, as defined in 36 CFR 800.5, to each identified NRHP-listed or -eligible resource. This involves the consideration of several factors, including whether the project will alter the characteristics that qualify the historic property for inclusion in the NRHP. In accordance with Section 106, a project can result in No Historic Properties Affected, No Adverse Effect, or an Adverse Effect. No Historic Properties Affected indicates that a project will not affect the characteristics or qualities of an NRHP-listed or -eligible resource. No Adverse Effect indicates that a project has an effect on a historic resource, but that this effect does not affect the historic characteristics or qualities of the resource. Adverse Effect indicates that a project has a negative effect on a resource.

If resources are potentially adversely affected, DDOT must seek ways to avoid, minimize, or mitigate impacts through the consultation process, which is described below.

Any NRHP-listed or -eligible architectural/historical resources or archaeological site is also a Section 4(f) site and must be included in any Section 4(f) analysis that is developed (see Chapter 22).

### 21.3 Agency Coordination and Public Involvement

The NHPA requires the FHWA or its designee (in this case DDOT) to identify the appropriate parties that need to be involved in the process of identifying effects of a proposed project to historical resources and working through the process with such parties. This “involvement” is referred to as “consultation.”

Generally, the first outreach effort to the DCHPO, local government agencies, and known parties with historic preservation interests occurs in the NEPA initial coordination stage. Native American tribes would be included at this time, but no tribes are recognized within the District of Columbia.

The project manager will prepare or will assist the environmental coordinator or consultant in preparing a Section 106 initial coordination mailout. The mailout package includes:

- A cover letter requesting the recipient to provide comments on the project and its potential impacts to architectural/historical and archaeological resources
- A project description, including route name and number, termini, length of proposed improvements, and alternatives to be studied
- The project purpose including discussion of deficiencies such as safety and level of service
- A description of study area, including identification of neighborhoods, wards, and Advisory Neighborhood Commission (ANC) where the project is proposed

- A general description of the build alternative(s), including typical cross-sections, function classification of existing and future roadway, and modal connections
- A vicinity and a project location map

Consultation is required with the DCHPO. In addition, the ACHP must be afforded a reasonable opportunity to comment on the undertaking. The Section 106 regulations also require the federal agency or its designee to consult with certain other entities and involve the public in the process of assessing the effects of a project to historical resources.

As a result of DDOT's NEPA initial coordination mailout to historical groups known to have an interest in the area or through other correspondence or meetings, additional parties may be identified and invited by the agency to serve as consulting parties. The decision regarding the designation of additional consulting parties ultimately lies with FHWA.

The second phase of outreach occurs after technical studies have been completed. (In both the historic and archaeological areas, studies are or can be phased. If that is the case, outreach should occur after each phase.) As applicable, the completed technical study will be sent by the environmental coordinator to the DCHPO for review and comment. A copy of the cultural resource study, the management summary, or a pertinent study excerpt will be sent to all Section 106 Consulting Parties, and to the ACHP if adverse effects are identified under 36 CFR 800. If adverse effects are found, DDOT must work with the DCHPO, the ACHP if it chooses to participate, and Section 106 Consulting Parties to look at ways to avoid, minimize, or mitigate project effects. The measures agreed upon are included in an MOA, which is a legally binding document and is signed, at a minimum, by the FHWA, DCHPO, and any cooperating federal agencies, and concurred with by DDOT. FHWA may also invite other parties to sign the

MOA as concurring parties. The implementation of the measures included in an MOA is discussed in Section 21.7.

#### **21.4 Study Process for Architectural/Historical Resources**

The architectural/historic study can begin as early as the environmental screening phase. The goal of the study is to identify resources that are listed in or eligible for listing in the NRHP and identify effects to such resources, pursuant to 36 CFR 800. The study is typically undertaken by consultants. Early identification of significant cultural resources can assist in the selection of project alternatives by screening out alternatives that could adversely impact cultural resources.

A records search is required to identify previously surveyed historic properties in the proposed project corridor, to identify NRHP-listed or previously determined eligible historic resources, and to identify whether any properties in the project corridor are currently under consideration for nomination to the NRHP. This research can help in establishing the alignment and serves as the basis for fieldwork to be conducted in the project corridor. A literature review and research are also conducted to provide historic background, or context, of the project area. The historic context provides a basis against which cultural resources may be evaluated using the NRHP Criteria of Evaluation.

At the completion of the records review, a field survey is undertaken. The purpose of the architectural survey is to identify properties in the project vicinity that are either listed in, or eligible for listing in, the NRHP. The architectural historian will survey an area large enough to encompass all historic properties within the APE associated with the project.



While it is not necessary to inventory every structure that is at least 50 years old in the APE, the architectural historian should inventory any potentially historic properties in the APE. If there are properties either listed in or potentially eligible for listing in the NRHP (even if they are not being affected) in the immediate vicinity of the project impact area, these should be inventoried. Two primary reasons for this are to fulfill FHWA responsibilities under NEPA and NHPA by illustrating to the public and agencies that DDOT has an awareness of the existence of the property in proximity to the project and to assist in developing project modifications and alignment shifts needed to avoid other sensitive areas (including historic, ecology, or hazardous materials concerns).

The survey report should provide an architectural description of each inventoried property, general historical information about it, and a brief discussion of each support building (historic and modern). For each property, the report author must provide an opinion regarding its NRHP eligibility. For all listed or eligible resources, the existing or potential NRHP boundaries must be illustrated on a map. The historical/architectural survey must be coordinated with the DCHPO.

Following the survey, the findings regarding NRHP eligibility will be compiled in a report that is submitted to the DCHPO for review and concurrence. Sometimes the survey data are presented in a standalone report, which is submitted to the DCHPO for concurrence with the NRHP eligibility findings and boundaries. At other times, the survey report is combined with the assessment of effects report; the latter can also be submitted as a standalone report. In any case, the DCHPO must comment on the findings of effect, and the comment letter must be included in an appendix of the NEPA document. Typically, both architectural and

archaeological resource reports are combined into one report for review.

The Section 106 regulations allow 30 days for the report review to occur; however, the DCHPO can respond within that 30-day period and request additional information or disagree with the report findings. This can substantially increase the review time.

For each project alternative, an evaluation of potential impacts to architectural resources within the APE is made. Depending on the severity of the impacts and the significance of the resource, this evaluation could be a factor in determining the selection of a preferred alternative. If adverse effects are found with the preferred alternative, the environmental coordinator will work with the project manager to coordinate the effort to examine ways to avoid, minimize, or mitigate project effects with the DCHPO, the ACHP, if it is participating, and the Section 106 Consulting Parties. All measures agreed upon are included in an MOA, a legally binding agreement prepared pursuant to Section 106 if properties will be adversely affected by a project. A copy of the fully executed MOA must be included in an appendix of the final NEPA document.

Section 6007 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) includes a provision that exempts the bulk of the Interstate System from consideration as historic property under Section 106 and Section 4(f), provided the portion of the system plays an integral component of the entire system. This is important given that the Interstate System is over 50 years old and could be eligible for historic designation. However, under Section 106, certain elements of the interstate system, such as bridges, tunnels and rest stops can be excluded from the above-discussed exemption if designated by FHWA as “exceptionally significant features (ESF)” from a historic perspective. In December 2006, the

FHWA published the list of ESF in the Federal Register. The list can be found at [http://www.environment.fhwa.dot.gov/histpres/highways\\_list.asp](http://www.environment.fhwa.dot.gov/histpres/highways_list.asp). There are no designated ESF in the District of Columbia that need to be treated as historic properties.

## 21.5 Study Process for Archaeological Resources

The process for the identification and evaluation of archaeological resources is similar to that of architectural resources. Typically, these activities are conducted concurrently. The archaeology study can begin in the environmental screening phase for a corridor study or whenever functional or more detailed conceptual plans are available. The goal of the study is to identify resources that are listed in, or eligible for listing in, the NRHP and identify effects to such resources, pursuant to 36 CFR 800.

The first step in the survey process entails examination of historical and archaeological records and literature with the intent to identify previously recorded resources and develop cultural/historical contexts that may be important to understanding the resources of the area. The records check includes examination of the site survey forms at the DCHPO.

The second step involves fieldwork, which is almost always undertaken by a consultant. Prior to commencing work, the consultant is required to contact landowners for access to their property prior to the survey. This survey will involve a visual inspection, a systematic pedestrian examination of exposed ground surfaces, and shovel testing of land having poor surface visibility. Limited deep soil sampling to ascertain whether buried archaeological deposits are present is also required. The completion of site survey forms is required for all identified archaeological sites.

The data collected will be analyzed and then the findings of the literature search, fieldwork, and analysis are presented in a written report. The report must present sufficient information to allow evaluation of whether additional investigation is warranted to determine NRHP eligibility. This report will be reviewed by the project manager or the environmental coordinator and then, through the FHWA, sent to the Consulting Parties for a 30-day review period as provided in the regulations. Typically, the report includes results of the surveys, evaluation of historic significance for the resources identified, and determination of impacts for both architectural and archaeological resources. After questions and comments about the report are addressed, a final report is prepared and distributed to the consulting parties.

The Phase I Archaeological Survey (consisting of the two steps described above) not only identifies archaeological resources listed or eligible for inclusion in the NRHP, but also identifies archaeological resources requiring additional testing to evaluate their NRHP eligibility.

Between the Environmental Assessment (EA)/Draft Environmental Impact Statement (EIS) and Finding of No Significant Impact (FONSI)/Final EIS/Record of Decision (ROD), if it is determined that a site or sites on the selected alignment require additional testing, it is DDOT policy to attempt first to avoid the sites. The environmental coordinator works with the project manager to determine whether the subject site or sites can be avoided. If it is not feasible to avoid the sites, Phase II testing of the sites identified in Phase I will occur within the proposed right-of-way limits. The Phase II work, which must be completed prior to the approval of the FONSI or Final EIS/ROD, is almost always undertaken by a consultant. Phase II typically focuses on excavation of 15 to 20 percent of the site area within the right-of-way, often employing the use of heavy

equipment to determine whether undisturbed archaeological deposits are present that would meet the NRHP eligibility criteria. Right-of-way will not yet have been purchased. If an amicable arrangement cannot be made with the landowner to conduct the archaeological work on the site, the process will be carried forward by the DDOT legal office.

The fieldwork could include clearing, plowing and disking the direct impact zone to enhance surface visibility and then conducting controlled surface collection and subsurface excavation. The artifacts collected are then analyzed in the laboratory. The Phase II findings are presented in a report, which evaluates the NRHP eligibility of the site and provides recommendations for future work. If the site cannot be avoided, justification must be presented for suggested mitigation measures. If a site is considered NRHP eligible and recovery of significant data is recommended, a preliminary research design and data recovery plan must be included in the report. The Phase II testing report is distributed by FHWA to the consulting parties for a 30-day review in accordance with the Section 106 regulations.

As with architectural resources, the process includes identification and evaluation of potential effects of the project alternatives. If, with the selection of a preferred alternative, NRHP resources are adversely affected, FHWA, DDOT, DCHPO, and consulting parties must examine ways to avoid those effects. If avoidance is not feasible, then DDOT or the consultant must develop a plan for minimization and mitigation of adverse effects. Typically, archaeological mitigation involves excavation for the recovery of significant information. All of the measures to be taken to minimize and mitigate the adverse effects of a project are stipulated in an MOA. An MOA is typically prepared for the agreed mitigation measures for both architectural and archaeological resources; only one document is needed.

Once approved by the FHWA and the DCHPO, DDOT implements the agreed-upon measures.

Any mitigation agreed upon will be described in an MOA, which must be included in an appendix to the NEPA document. Archaeological mitigation measures may involve archaeological data recovery, which is referred to as Phase III, or Recovery of Significant Information (RSI). Phase III is most often undertaken after land has been acquired. All mitigation work must be completed before FHWA will authorize construction. The DCHPO must also be notified when the fieldwork has been completed and offered the opportunity to conduct an inspection.

Precise archaeological location data (written descriptions and maps) are not made available to the public to eliminate the distribution of this information to potential “treasure hunters” and to diminish the potential of looting of archaeological sites.

## 21.6 Paleontological Resources

Paleontological resources are not technically cultural resources; however, for NEPA purposes, they are included as part of the cultural resources sections. DDOT construction projects and maintenance activities must be evaluated to determine if paleontological resources will be impacted. The project manager, in conjunction with the environmental coordinator, is responsible for initiating a literature review, determining the potential presence of paleontological resources within the project area, developing reports, and coordinating with the FHWA and the DCHPO. DDOT may request technical assistance from the DCHPO. The project manager, in conjunction with the environmental coordinator, usually supported by a consultant, coordinates these items for review and for final clearances before the project is awarded.

The environmental coordinator is responsible for the following documentation:

- Preparation of paleontological resource assessment report
- Preparation of the mitigation plan in cooperation with the project manager and the environmental coordinator (may not be required for all projects)
- The following procedure is used to conduct a paleontological resource evaluation:
  - Perform literature search
  - Determine the potential for the presence or absence of paleontological resources
  - Conduct analysis to determine the scientific significance (research and/or educational value) of the resource
  - Determine if there is any potential for additional resources
  - Prepare a paleontological assessment report
  - Develop mitigation plan in cooperation with the project manager (if required)
  - Coordinate with FHWA and the DCHPO (if required)
- Include a discussion in the EA or EIS for the potential of finding paleontological resources and potential impacts associated with each of the project alternatives

### 21.7 Implementing Commitments

In the area of cultural resources (historic/architectural resources and archaeological resources), commitments may be made when it is found that a resource listed in or eligible for the NRHP will be affected by a proposed project. Federal laws, such as Section 106 of the NHPA and Section 4(f)

of the Department of Transportation Act, require agencies that are proposing federally funded or permitted projects to explore alternatives to avoid or reduce harm to historic properties.

Once an adverse effect has been identified, DDOT will work with the DCHPO, the FHWA, the ACHP (if it chooses to participate), and the public (including Section 106 Consulting Parties) to develop methods to avoid, minimize or mitigate impacts. Agreed-upon minimization and/or mitigation measures will be funded through the project and are often included in a legally binding MOA. This agreement is signed by FHWA and DDOT and is concurred with by DCHPO. On occasion, other parties that have obligations under the MOA also will sign the agreement. DDOT and FHWA will ensure that all commitments made in the MOA or in the Section 106 Effects Assessment are carried out.

Examples of such commitments include:

- Preparing documentation for the Historic American Building Survey (HABS) or Historic American Engineering Record (HAER)
- Relocating a historic structure such as a building or bridge
- Landscaping to serve as a visual screen
- Special surface treatment on retaining walls
- Recovery of Significant Information (RSI/Phase III archaeology)

FHWA will not authorize right-of-way funding until the final NEPA document is approved and the necessary MOA is fully executed.

### **21.7.1 Implementing Architectural/ Historical Commitments**

Once commitments have been made either in an MOA or in a Section 106 Effects Assessment, the environmental coordinator leads the effort for carrying forward the commitments. When an MOA is fully executed, the environmental coordinator sends a copy of the agreement to the project manager accompanied by a letter that outlines the actions that must be taken. When there is no MOA, any commitments made are outlined in a letter.

The preparation of HABS/HAER documentation is led by the environmental coordinator and is usually completed by a contractor. The level of the HABS/HAER documentation required is typically agreed upon in the MOA with DCHPO concurrence. The environmental coordinator ensures that the documentation is completed prior to contract letting and provided to appropriate repositories (DCHPO, National Archives, and/or public libraries).

The environmental staff should be on the distribution list for right-of-way plans. Once received, the plans are reviewed to ensure that the design measures included in the MOA are included on the plans and plan specifications. The environmental coordinator then sends a letter to the project manager commenting on the plans and reiterating design commitments. This letter will often request that notes be added to plans delineating historic properties and requesting that such areas not be used for construction staging or right-of-way easements. Normally, the construction plans are not reviewed; however, if there are items of concern that the environmental staff wants to track, a request will be made that the environmental coordinator be sent construction plans and be notified of the preconstruction meeting.

### **21.7.2 Implementing Archaeological Commitments**

All Phase I and Phase II archaeological work is undertaken during the NEPA process and is completed by the time the final NEPA document is approved. During this process, DDOT attempts to avoid impacts to archaeological sites. When avoidance is not feasible, DDOT will implement design modifications to minimize project effects and may enter into an MOA that will include a commitment to conduct RSI/Phase III Data Recovery. If there are mitigation commitments for architectural/historical resources, the archaeological commitments are included in the same MOA. If there are no architectural mitigation measures required, an MOA will be executed just for the archaeological work.

If an MOA that stipulates RSI, the fieldwork generally begins as soon as possible following approval of the final NEPA document and acquisition of the property. If a landowner is cooperative, fieldwork sometimes begins before property acquisition. Generally, DDOT contracts the RSI work to the archaeological contractor that completed the Phase I and II tasks. Once the fieldwork for the data recovery task is completed, DDOT notifies the DCHPO and provides it with an opportunity to inspect the site. Artifacts collected will be stored in a facility identified and agreed upon in the MOA. The environmental coordinator notifies the project manager when the RSI work has been completed.

## **21.8 Additional Information**

### **Websites**

Many useful Internet links exist that can assist DDOT staff and consultants. The following links provide detailed information, such as specific legislation language, the text for NPS technical bulletins, and so on. This list includes the most significant links for cultural resources related to the District of Columbia.

- Advisory Council on Historic Preservation,  
*<http://www.achp.gov/>*  
This site provides links to find specific legislation, regulations, and standards, as well as to other SHPOs, PAs, the Nationwide PA on Transportation Enhancements, and other pertinent information.
- American Cultural Resource Association (ACRA),  
*<http://www.acra-crm.org/>*  
This website for cultural resource professionals provides information on consultants, their specialties, and geographic locations. It also provides links to all SHPOs.
- DCHPO, *<http://planning.dc.gov/planning/cwp/view,a,1284,q,570741,planningnav,33515/,asp>*  
This website offers information on specific laws and regulations related to historic resources in the District of Columbia. In addition, it details information on historic districts, Section 106 procedures, and an index of historic sites and maps in the District of Columbia.
- Federal Highway Administration,  
*<http://www.fhwa.dot.gov>*  
This site provides information on cultural resources, significant guidelines and standards, and an FHWA environmental handbook that includes a section on cultural resources. The PA on Transportation Enhancement also links to this site. Find the FHWA NEPA Guidance for Preparing Documents at: *<http://environment.fhwa.dot.gov/projdev/index.asp>*
- National Park Service (NPS) has numerous links that provide a wealth of information on cultural resources:
  - Laws, Regulations and Standards:  
*<http://www.nps.gov/legacy/legalstuff.html>*
  - National Register for Historic Places information:  
*<http://www.cr.nps.gov/nr/index.htm>*
  - NPS Technical Assistance:  
*[http://www.nps.gov/ncrc/programs/rtca/contactus/cu\\_apply.html](http://www.nps.gov/ncrc/programs/rtca/contactus/cu_apply.html)*
  - NPS Publications:  
*<http://www.nps.gov/aboutus/publications.htm>*

SECTION 4(F) – PARKS,  
RECREATION AREAS, HISTORIC SITES,  
WILDLIFE AND WATERFOWL REFUGES



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## SECTION 4(F) – PARKS, RECREATION AREAS, HISTORIC SITES, WILDLIFE AND WATERFOWL REFUGES

This chapter focuses on documentation and regulations that are required by Section 4(f) of the United States Department of Transportation Act. Section 4(f) provides protection for the following types of properties from conversion to a transportation use:

- Publicly owned parks and recreation areas
- Historic sites (regardless of ownership) of national, state, or local significance
- Wildlife or waterfowl refuges

The word “use” has a particular meaning in Section 4(f) in that it includes the direct acquisition of a property or impairment of the vital functions of a 4(f) site because of the proximity of a transportation project.

Public parks and recreational areas in the District of Columbia include all parks and recreational areas owned and operated by National Park Service (NPS), District of Columbia Department of Parks and Recreation (DPR), and some of the public recreational areas (e.g., bathhouses).

Proposed use of Section 4(f) property requires evaluation early in project development when alternatives to the proposed action are under study. NPS and DPR own many small parks near or within District of Columbia Department of Transportation (DDOT) roadways. Alterations and use of these parks can be considered Section 4(f) impacts that have to be evaluated. In addition, a number of parkways within the District of Columbia are historic. Some of these parkways are owned and maintained by NPS while some are maintained by DDOT. Impacts to these historic parkways may also be considered a Section 4(f) use.

Although the legislation has been re-codified for some time, practitioners still commonly refer to these regulations as “Section 4(f)” requirements. Additional regulations and information that relate to some of these resources are provided in Chapter 21, Archaeological, Historical and Paleontological Resources, and Chapter 23, Section 6(f) – Land and Water Conservation Fund Areas.

## 22.1 Summary of Key Legislation, Regulations, and Guidance

### 22.1.1 Federal Regulations and Guidance

- Department of Transportation Act of 1966, Section 4(f), (49 United States Code [USC] 303, 23 USC 138, and 23 Code of Federal Regulations [CFR] 771.135). The regulation of impacts to publicly owned recreational areas, historic sites, and wildlife and waterfowl refuges under Section 4(f) is exclusive to transportation projects that are federally funded or require an action (such as an approval) by the United States Department of Transportation (USDOT), including the Federal Highway Administration (FHWA). Projects that are completely locally funded and do not require FHWA or other USDOT approval are exempt from Section 4(f). However, some of these areas may be protected under other regulations, which are not limited to transportation projects (see Section 22.1.2 on related regulations below.)
- Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005 (SAFETEA-LU). Section 6009(a) of this act amended the Section 4(f) legislation (23 USC 138) to simplify the processing and approval of projects that have de minimis (minimal) impacts on Section 4(f) properties.
- FHWA Technical Advisory (TA) T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents issued October 30, 1987, contains a wealth of information about the content and format of environmental documentation on FHWA projects, including Section 4(f) Statements. While FHWA TA T6640.8A is not a regulatory document, it is a critical guidance document for all projects developed under FHWA jurisdiction.

- Department of Interior (DOI) Handbook on Departmental Review of Section 4(f) Evaluations was developed by DOI without coordination with USDOT. It should not be considered the policy of USDOT or FHWA on Section 4(f) issues, but it provides valuable insights into DOI processes and priorities.
- Guidance for Determining De Minimis Impacts to Section 4(f) Resources (December 13, 2005)
- FHWA Section 4(f) Policy Paper (March 1, 2005)

### 22.1.2 Related Regulations

Other regulations apply to historic and some recreational properties that are protected under Section 4(f). Compliance with the requirements of Section 4(f), primarily in terms of alternatives analysis and providing appropriate mitigation, is often interrelated to compliance with these other regulations.

#### Federal Regulations

- Section 106 of the Historic Preservation Act (historic/ archaeological properties) (see Chapter 21)
- Section 6(f) of the Land and Water Conservation Fund Act (some recreational properties) (see Chapter 23)

#### District of Columbia Regulations

- District of Columbia Historic Landmark and Historic Protection Act of 1978 (DC Law 2-144, as amended)
- District of Columbia Historic Preservation Regulations (10 District of Columbia Municipal Regulations [DCMR] Title 10A)

## 22.2 Agency Roles

### FHWA

The FHWA Division Office determines if Section 4(f) applies to a property and approves all Section 4(f) evaluations. While several agencies are potentially consulted in Section 4(f) determinations, FHWA bears responsibility for final, formal Section 4(f) decisions and determinations.

### Consulting Agencies

Additional local and federal agencies have interest in Section 4(f) properties as the “officials having jurisdiction,” that is, as owners, managers, or regulators. These agencies often will be consulted regarding the primary uses of the properties, the impacts of the proposed project, and adequate mitigation. Other groups may be consulted for information regarding uses and significance of the properties.

- District of Columbia Historic Preservation Office (DCHPO), Office of Planning. The DCHPO (also called State Historical Preservation Office [SHPO]) is the authority on historic and archaeological sites in the District of Columbia and determines their significance and eligibility for listing on the National Register of Historic Places (NRHP). The DCHPO maintains the official list of historic properties protected by the District of Columbia Historic Preservation Law, known as the Inventory of Historic Sites Index.
- Advisory Council on Historic Preservation (ACHP). The ACHP has oversight authority over the DCHPO regarding the eligibility of historic properties for listing on the NRHP.
- National Park Service. Most NPS properties in the District of Columbia are Section 4(f) lands by virtue of being publicly owned parks and recreation areas or by their position as historic sites. A few others, such as Anacostia Park and Rock Creek Park, contain areas that are considered significant as wildlife refuges. A project manager should consider all portions of NPS properties to be Section 4(f) properties unless FHWA determines otherwise.
- District of Columbia Department of Parks and Recreation (DPR). DPR oversees all of the parks in the District of Columbia that are not managed by NPS. These include large parks, triangle parks, and unstaffed parks, as designated by DPR. A project manager should consider all portions of DPR properties to be Section 4(f) properties unless FHWA determines otherwise.
- Local historic preservation or recreational groups. These groups have no regulatory authority but may be able to provide information regarding the sensitivity of a resource to a proposed project, maps of existing or proposed recreational trails and sites, or the amount of use an area receives. Input from these groups should be sought in the National Environmental Policy Act of 1969 (NEPA) public involvement process.
- United States Department of Agriculture (USDA) and United States Department of Housing and Urban Development (HUD). Coordination with these agencies is required by Section 4(f) whenever a project uses land administered or funded by one of these agencies. Because it may be difficult to determine if USDA- and HUD-funded lands are subject to Section 4(f), coordination with FHWA should occur whenever a project uses land owned or financed by USDA or HUD to determine the applicability of Section 4(f).
- United States Department of Interior . Coordination with DOI is required by Section 4(f) whenever a Section 4(f) resource under the DOI jurisdiction is affected

(including NPS properties). Preliminary coordination prior to the circulation of the draft Section 4(f) evaluation should be accomplished with the official(s) of the DOI.

## 22.3 General Methodology of Evaluation

### 22.3.1 Determination of Applicability

FHWA determines whether Section 4(f) applies to a property and whether the project constitutes a “use” of that property. The project manager should provide as much information as can be gathered regarding the use of the property and submit it to FHWA for its determination. If FHWA determines that both conditions exist, a Section 4(f) document must be prepared for FHWA approval. If FHWA determines that one or the other conditions are not met for a property, obtain a “determination of no use” document from FHWA for reference in the NEPA document.

#### Does Section 4(f) apply?

The first question to answer is whether Section 4(f) applies or not. It should be noted that Section 4(f) is a USDOT law. Therefore, for DDOT projects, Section 4(f) will apply only when USDOT (FHWA or Federal Transit Administration [FTA]) funds are being used or when an action is required by USDOT. DDOT uses FHWA and FTA funds on a number of projects. Section 4(f) will apply any time FHWA/FTA funds are used; however, it will not apply when local funds are being used without FHWA involvement.

#### Does Section 4(f) apply to the property?

Determination of the applicability to Section 4(f) can be unclear. The following provides some guidance for determining if Section 4(f) applies to a property. For this initial determination, consider all uses of the property and assume the boundaries of the property to be as shown on

the most recent property maps. The actual limits of area protected under Section 4(f) may vary, but that will be determined by FHWA after all agencies and officials are contacted.

#### *Historical/Architectural or Archaeological Sites*

Historic buildings, districts, objects (such as monuments), historic bridges, and sites with significant buried historic/prehistoric artifacts are considered Section 4(f) resources, regardless of ownership. Generally, historical properties must be on or eligible for listing on the NRHP, as determined by the DCHPO and ACHP under the provisions of Section 106 of the Historic Preservation Act. There can be exceptions, where a locally significant site can be considered a Section 4(f) property even if it is not on the NRHP. Section 4(f) does not apply to archaeological sites where FHWA, after consultation with the DCHPO and the ACHP, determines that the archaeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place.

#### *Public Waterfowl and Wildlife Refuges*

Publicly owned land is considered to be a wildlife or waterfowl refuge when the land has been officially designated as such or when federal or District of Columbia officials who have jurisdiction over the land determine that one of its major purposes or functions is for refuge purposes. An example would be Kenilworth Marsh, which is a portion of the NPS Anacostia Park.

#### *Public Parks and Recreation Areas*

Publicly owned land is considered to be a park or recreation area when the land has been officially designated as such, or when federal or District of Columbia officials who have jurisdiction over the land determine that one of its major purposes or functions is for park or recreation purposes. Only those portions of multiple use public lands that are

designated by statutes or identified in the management plans of the administering agency as being for park, recreation, or wildlife or waterfowl refuge purposes and that are determined to be significant for those purposes are subject to the requirements of Section 4(f). Incidental, secondary, occasional, or dispersed recreational activities do not constitute a major purpose. For example, a public school playground or playfield may be considered a Section 4(f) property if the area is open at times for public use and provides a significant recreational resource, but the remainder of the school property would not be subject to Section 4(f) requirements. A privately owned golf course, whether or not it is open to the public, is not a Section 4(f) property.

Designated recreational trails are Section 4(f) properties, provided they are located on public lands or reside on lands with an easement that allows access to the general public. Trails that follow existing roadway right-of-way are generally not Section 4(f) properties unless they designated recreational (and not primarily for transportation) and have a specifically designated area within the right-of-way.

Paleontology sites are sites dedicated to studies of the fossil record. These sites are not protected under Section 4(f).

**Do the impacts of the project qualify as a “use” of any portion of the property?**

The next question to answer is whether the impacts of the project qualify as a “use” of Section 4(f) resource. If the project does not qualify for a use, then the Section 4(f) process can be completed. FHWA/FTA determines whether a “use” has occurred or not.

There are different levels of impact or “use,” as defined by the regulations. Examples of each type follow:

- Permanent Use
  - A permanent incorporation of right-of-way from a Section 4(f) resource into the transportation project
  - A permanent easement is acquired, such as for drainage or bridge maintenance
- Constructive Use
  - The proximity of the roadway project impairs the resource, such as impacts caused by noise, vibration, ecological intrusion, or access restriction
- Temporary Use
  - The project temporarily affects the property during construction, such as minor temporary construction impacts (that can be restored) or temporary access restriction during construction
- De Minimis Use
  - The project incorporates a small portion of a Section 4(f) property but does not affect the uses of the property

Once it is determined that the project will result in a “use” of a Section 4(f) resource then the impacts have to be evaluated, as described in Section 22.3.2.

**Does the project qualify for a programmatic evaluation or an individual evaluation?**

The next step is to determine whether the project qualifies for a programmatic evaluation (PE) or not. FHWA has developed five nationwide programmatic evaluations for projects that have minor or beneficial impacts to section 4(f) resources. These PEs are:

- Independent Walkway and Bikeways Construction Projects
- Historic Bridges

- Minor Involvement with Historic Sites
- Minor Involvement with Parks, Recreation Areas, and Waterfowl and Wildlife Refuges
- Net Benefits to a Section 4(f) Property

The details on how to use these PEs are given in Section 22.3.3.

However, if the project does not qualify for a PE then an individual Section 4(f) evaluation has to be completed. Details on how to prepare an individual Section 4(f) evaluation are given in Section 22.4.1.

### 22.3.2 Evaluation of Impacts

Once FHWA has determined that Section 4(f) is applicable, the following steps must be taken to show that impacts are unavoidable and that all measures have been taken to minimize impacts to the Section 4(f) property before FHWA can approve the project.

#### Coordination

Once it is determined that Section 4(f) applies, the officials having jurisdiction over the Section 4(f) property must be contacted. This contact will elaborate the purpose and significance of the property, the limits of the Section 4(f) site, and possible measures to minimize harm.

#### Alternatives Analysis

Section 4(f) requires consideration of avoidance alternatives to show that there are no “feasible and prudent alternatives” that would avoid use of the Section 4(f) property. A feasible alternative is one that is possible to engineer, design, and build. An alternative (that avoids a Section 4(f) resource) is not “prudent” if the cost; social, economic, and

environmental impacts; and/or community disruption are extraordinary.

The alternatives may include a No Action (“do nothing”) Alternative, a modification of the proposed project to avoid the Section 4(f) property, or placing the project at a new location that avoids the Section 4(f) property. Identifying feasible and prudent alternatives will depend on the project and other issues in the project area. If the project qualifies for a PE, the alternatives to be considered are specified (see Section 22.3.3 for more details).

#### Measures to Minimize Harm

Measures to be included in the project to reduce the impact of the use of the Section 4(f) property must be developed in cooperation with the officials having jurisdiction. These measures can take many forms, depending on the type of the property (such as recreational or historical), the type of “use” by the project, and project area conditions.

### 22.3.3 Programmatic Evaluations

FHWA has developed five nationwide PEs for projects that have minor or beneficial impacts to Section 4(f) properties. Many DDOT projects can qualify for one of these PEs. The benefit of qualifying for one of these PEs is that they streamline the documentation and approval process, as well as the amount of interagency coordination that is required. They do not require draft and final evaluations to be prepared or an FHWA legal sufficiency review. Unlike an individual PE, which FHWA ultimately approves, the qualification of the project under any of these PEs requires only the concurrence of the officials having jurisdiction over the affected Section 4(f) property.

### **Independent Walkway and Bikeway Construction Projects**

This PE is applicable to independent bikeway or walkway construction projects that require the use of recreation and park areas that are established and maintained primarily for active recreation, open space, and similar purposes, and are consistent with the designated use of the property.

### **Historic Bridges**

This PE applies to the rehabilitation of bridges that are on or eligible for inclusion on the NHRP and are an integral part of a modern transportation system. For the purpose of this programmatic Section 4(f) evaluation, a proposed action will “use” a bridge that is on or eligible for inclusion on the NRHP when the action will impair the historic integrity of the bridge either by rehabilitation or demolition. Rehabilitation that does not impair the historic integrity of the bridge as determined by procedures implementing the National Historic Preservation Act of 1966, as amended (NHPA), is not subject to Section 4(f).

This programmatic Section 4(f) evaluation may be applied by the FHWA to projects that meet the following criteria:

- The bridge is to be replaced or rehabilitated with federal funds.
- The project will require the use of a historic bridge structure that is on or is eligible for listing on the NRHP.
- The bridge is not a National Historic Landmark.
- The FHWA Division Administrator determines that the facts of the project match those set forth in the sections of the PE labeled Alternatives, Findings, and Mitigation.
- Agreement among the FHWA, the SHPO, and the ACHP has been reached through procedures pursuant to Section 106 of the NHPA.

The following alternatives avoid any use of the historic bridge:

- No action (do nothing).
- Build a new structure at a different location without affecting the historic integrity of the old bridge, as determined by procedures implementing the NHPA.
- Rehabilitate the historic bridge without affecting the historic integrity of the structure, as determined by procedures implementing the NHPA.

This list is intended to be all inclusive.

This programmatic Section 4(f) evaluation applies only when the FHWA Division Administrator:

- Determines that the project meets the applicability criteria set forth above
- Determines that all of the alternatives set forth in the Findings section of the evaluation have been fully considered
- Determines that use of the findings in the PE that there are no feasible and prudent alternatives to the use of the historic bridge is clearly applicable
- Determines that the project complies with the Measures to Minimize Harm section of the PE
- Assures that implementation of the measures to minimize harm is completed
- Documents the project file that the programmatic Section 4(f) evaluation applies to the project for which it is to be used.

### Minor Involvements with Historic Sites

This type of PE applies to projects that improve existing highways and use minor amounts of land from historic sites that are adjacent to existing highways.

### Minor Involvements with Parks, Recreation Areas, and Waterfowl and Wildlife Refuges

Under this PE, applicable projects would improve existing highways and use minor amounts of publicly owned public parks, recreation lands, or wildlife and waterfowl refuges that are adjacent to existing highways.

### Net Benefits

Designation under this PE would apply to transportation improvement projects on existing or new alignments that will use a portion of a Section 4(f) property and result in a net benefit to the Section 4(f) property, such as improved access to it.

#### 22.3.4 De Minimis Evaluations

In determining that a project will have a de minimis (minimal) impact, FHWA considers the proposed action, the nature of the property affected, and all measures proposed to minimize harm. Under the de minimis provisions, an analysis of avoidance alternatives is not required. However, the FHWA must obtain concurrence from the officials having jurisdiction that the project will have minimal impact.

If the Section 4(f) property is a recreational area, wildlife refuge, or waterfowl refuge, a public notice of the proposed action and opportunity for public review and comment is also required. This requirement can be satisfied through the publication of the NEPA document. If the NEPA document is not published (such as a categorical exclusion [CE]), a separate public notice may be required for the Section 4(f)

action. The format and method of the public notice should be coordinated with the FHWA District Office.

### 22.4 Format and Contents of Documentation

The Section 4(f) statute does not require the preparation of any written documents, public involvement, or coordination with any agencies other than DOI, HUD, or USDA. However, USDOT has established a procedure and documentation policy that creates an administrative record and ensures that the regulatory and statutory requirements have been met: there is no feasible and prudent alternative to the use of the Section 4(f) resource and all possible planning and measures to minimize harm have been considered.

For projects processed with an Environmental Impact Statement (EIS), Environmental Assessment (EA), or a Finding of No Significant Impact (FONSI), the individual Section 4(f) evaluation should be included as a separate section of the document, and for projects processed as CEs, as a separate Section 4(f) evaluation document. Pertinent information from various sections of the EIS or EA/FONSI may be referenced and summarized in the Section 4(f) evaluation to reduce repetition.

The use of Section 4(f) land may involve concurrent requirements of other regulations. Examples include compatibility determinations for the use of land in the NPS and approval of land conversions under Section 6(f) of the Land and Water Conservation Fund Act (Chapter 23). The mitigation plan developed for the project should include measures that would satisfy all of the requirements. For example, Section 6(f) requires that lands acquired for the project be replaced with lands of equal value, location, and usefulness. The Section 4(f) evaluation should discuss the coordination and resolution of the other applicable regulations as well.



### 22.4.1 Individual Evaluations

Individual Section 4(f) evaluations are prepared for any impacts that do not meet the criteria of one of the programmatic evaluations or the de minimis standard. This documentation involves a two-step process. A draft document is prepared following the preliminary coordination, analysis of alternatives, and development of measures to minimize harm. All Section 4(f) evaluations must undergo legal sufficiency review, and it is prudent for FHWA also to perform a legal sufficiency review at this time. The draft Section 4(f) evaluation is then circulated to the officials having jurisdiction, NPS, USDA, DCHPO, and HUD, as appropriate. The document is not specifically published for public review; public review occurs in conjunction with the NEPA document.

Following the circulation of the draft and receipt of review comments, a final document is developed that incorporates all of the draft document information, response to comments received, and a conclusion. If any issues are raised by the reviewing agencies, follow-up coordination must be undertaken to resolve the issues. If reasonable efforts to resolve the issues are not successful (such as, if one of these agencies is not satisfied with the way its concerns were addressed), but the issues are disclosed and receive good faith attention from the decision maker, then FHWA has satisfied the procedural obligation under Section 4(f) to consult with and obtain comments from the agency. Section 4(f) does not require concurrence, although that is the goal in most cases.

#### Draft Section 4(f) Evaluation

DDOT recommends the following format and content for the draft Section 4(f) evaluation. The listed information should be included in the evaluation, as applicable.

- Describe the proposed action.

Much of this section can be referenced and drawn from the NEPA document. At a minimum, include a summary. It is important to summarize the purpose and need for the project to establish the basis for analyzing feasible and prudent alternatives.

- Describe each Section 4(f) property that would be used by any alternative under consideration. Include the following information:
  - A detailed map or drawing of sufficient scale to identify the relationship of the alternatives to the Section 4(f) property
  - Size (acres or square feet) and location (maps or other exhibits such as photographs or sketches) of the affected Section 4(f) property
  - Ownership (such as city, county, or state) and type of Section 4(f) property (such as a park, recreational area, or historic site)
  - Function of or available activities on the property (such as ball playing, swimming, or golfing)
  - Description and location of all existing and planned facilities (ball diamonds or tennis courts, for example)
  - Access (pedestrian or vehicular) and usage (approximate number of users/visitors)
  - Relationship to other similarly used lands in the vicinity
  - Applicable clauses affecting ownership, such as lease, easement, covenants, restrictions, or conditions, including forfeiture
  - Unusual characteristics of the Section 4(f) property (such as flooding problems, terrain conditions, or

other features) that either reduce or enhance the value of all or part of the property

- Review impacts on Section 4(f) resources for each alternative, such as the amount of land to be used, facilities and functions affected, noise, air pollution, visual, and so on. When an alternative would use land from more than one Section 4(f) property, provide a summary table comparing the various impacts of the alternative(s). Quantify such impacts as facilities and functions affected, noise, and so on. Describe other impacts that cannot be quantified, such as visual intrusion, to the extent possible.
- Identify and evaluate alternatives that would avoid the Section 4(f) property. Avoidance alternatives must meet the “feasible and prudent” standard that is laid out in the regulations. Where an alternative would use land from more than one Section 4(f) property, the analysis needs to evaluate alternatives that avoid each and all properties. The design alternatives should be in the immediate area of the property and should consider minor alignment shifts, a reduced facility, retaining structures, and similar measures, either individually or in combination, as appropriate. The document need not repeat detailed discussions of alternatives in an EIS or EA in the Section 4(f) portion, but should reference and summarize them. When alternatives that would avoid the Section 4(f) properties have been eliminated from the detailed study in the NEPA document, the discussion in the Section 4(f) evaluation should explain whether these alternatives are feasible and prudent and, if not, the reasons why.
- Discuss all possible measures available to minimize the impacts of the proposed action on the Section 4(f) property(ies). Detailed discussions of mitigation

measures in the EIS or EA may be referenced and appropriately summarized rather than repeated.

- Discuss the results of preliminary coordination with the officials having jurisdiction over the Section 4(f) property, DCHPO, and with NPS, HUD, and the USDA, as appropriate. Generally, the coordination should include a discussion of significance and primary use of the property, discussion of avoidance alternatives, impacts to the property, and measures to minimize harm.

Note that the draft Section 4(f) evaluation normally does not include a statement concluding that there are no feasible and prudent alternatives. Such a conclusion is made only after the draft Section 4(f) evaluation has been circulated and coordinated, and any identified issues have been adequately evaluated.

### **Final Section 4(f) Evaluation**

The final Section 4(f) evaluation must contain:

- All the information from the draft evaluation.
- A discussion of the basis for concluding that there are no feasible and prudent alternatives for the use of the Section 4(f) land. The supporting information must demonstrate that “there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost; social, economic, and environmental impacts; or community disruption resulting from such alternatives reach extraordinary magnitudes” (23 CFR 771.135[a][2]). This language should appear in the document along with the supporting information.
- A discussion of the basis for concluding that the proposed action includes all possible planning to minimize harm to the Section 4(f) property. When there

are no feasible and prudent alternatives that avoid the use of Section 4(f) land, the final Section 4(f) evaluation must demonstrate that the preferred alternative is a feasible and prudent alternative with the least harm on the Section 4(f) resources after considering mitigation to the Section 4(f) resources.

- A summary of the appropriate formal coordination with DCHPO, DOI headquarters, NPS and/or other agency under DOI, and, as appropriate, the involved offices of USDA and HUD.
- Copies of all formal agency coordination comments received, a summary of other relevant Section 4(f) comments received (such as public review comments from the draft NEPA document), and an analysis and response to any questions raised. Where new alternatives or modifications to existing alternatives are identified and will not be given further consideration, the document should provide the basis for dismissing these alternatives, supported by factual information. Where Section 6(f) land is involved, the NPS position on the land transfer should be documented.
- Concluding statement as follows: “Based on the above considerations, there is no feasible and prudent alternative to the use of land from the [identify Section 4(f) property here] and the proposed action includes all possible planning to minimize harm to the [Section 4(f) property] resulting from such use.”

### 22.4.2 Programmatic Evaluations

The content of a programmatic evaluation document varies, depending on which program is applied, but it generally follows this outline:

- Description of the proposed project

- Description of the Section 4(f) property/ properties
- Applicability of the programmatic evaluation
- Avoidance alternatives description (specified for each programmatic evaluation)
- Findings (specific to each programmatic evaluation)
- Measures to minimize harm
- Coordination (documentation of concurrence from the official with jurisdiction)

The information provided in each section is similar to that described for individual evaluations. But for programmatic evaluations, draft and final evaluations do not need to be prepared, and an FHWA legal sufficiency review is not required. Interagency coordination is required only with the official(s) with jurisdiction, and not with DOI, USDA, or HUD—unless the federal agency has a specific action to take, such as an impact to an NPS property or DOI approval under Section 6(f). The applicable programmatic evaluation should be referred to for specific documentation requirements.

### 22.4.3 De Minimis Evaluations

The documentation necessary for de minimis determinations is not specified in detail. To properly document that the criteria for approval under the de minimis standard have been satisfied, the documentation should generally follow the individual evaluation guidance, but needs only include:

- Description of the proposed project
- Description of the Section 4(f) property/properties
- Measures to minimize harm

- Coordination (documentation of concurrence from the official with jurisdiction)
- Proof of publication of a public notice, if a recreational property, wildlife refuge, or waterfowl refuge is involved. This requirement can be satisfied as part of the NEPA public review requirements. In the case of a CE, a separate public notice may be required.
- There must be documented agreement of the appropriate federal, state, or local officials having jurisdiction over the resource regarding the above conditions.

In the situation where a project does not meet all of the above criteria, the temporary occupancy will be considered a use of the Section 4(f) resource and the appropriate Section 4(f) analysis will be required.

## 22.5 Temporary Use

In general, Section 4(f) does not apply to temporary occupancy, including those resulting from a right-of-entry, construction, other temporary easements or short-term arrangements, of a significant publicly owned public park, recreation area, or wildlife and waterfowl refuge, or any significant historic site where temporary occupancy of the land is so minimal that it does not constitute a use within the meaning of Section 4(f).

A temporary occupancy will not constitute a use of Section 4(f) resource when all of the conditions set forth in 23 CFR 771.135(p)(7) are met:

- The duration (of the occupancy) must be temporary (less than the time needed for construction of the project), and there should be no change in ownership of the land.
- The scope of work must be minor (both the nature and the magnitude of the changes to the Section 4(f) resource are to be minimal).
- No permanent adverse physical impacts are expected, nor will there be interference with the activities or purpose of the resource on either a temporary or permanent basis.
- The land being used must be fully restored (i.e., the resource must be returned to a condition that is at least as good as that which existed prior to the project).

## 22.6 Project Development Process Guidance

It is important to identify potential Section 4(f) issues early in the project development process, so that options to avoid impacts can be considered and, if impacts cannot be avoided, measures to minimize harm can be incorporated early into the design.

Potential Section 4(f) properties should be located early and incorporated into the project base mapping. These properties can be identified through a listing of publicly owned properties in the project area, review of the NRHP and District of Columbia Inventory of Historic Sites, and a tour of the project area to identify current uses of the properties. More-detailed evaluation of potential historic sites that may be eligible for the NRHP will be performed in cooperation with the DCHPO as part of the Section 106 clearance.

Once the properties are identified, potential uses by the proposed project can be identified. It is at this point that officials with jurisdiction (such as DPR, NPS, or DCHPO) should be contacted regarding the significance of the resource and its primary uses. Maps, master plans, and management plans of recreational areas should be obtained, if possible. At this time, measures to minimize harm should be discussed with the officials. All of this coordination should be fully documented for later use in the evaluation document.

If the property cannot be avoided, then the FHWA District Office should be contacted to determine if the project can be authorized under a programmatic evaluation or the de minimis standard. The path forward to approval will depend on this determination.

## 22.7 Continuation through Design and Construction

To avoid problems or delays, communication must continue throughout project design and construction.

Clearly, it is most important to incorporate all design modifications and measures to minimize harm, as approved by FHWA in the Section 4(f) document and the NEPA document, into the design plans and notes.

Where a land exchange is required (such as Section 6(f) property), then DDOT real estate staff must be informed. The specifics of the land purchase should be incorporated into the right-of-way plans as would any other right-of-way acquisition, including specifics for the final disposition of the title so that the transfer can be completed at the time of acquisition.

It is possible that for unforeseen reasons, changes could occur in the project after the Section 4(f) and NEPA document are complete, such as a change necessitated by conditions found during construction. The project team must continuously monitor impacts to the Section 4(f) properties, as design changes and/or onsite construction considerations may force modification of previously made commitments. The team should coordinate any changes with the FHWA immediately, because it may require revisiting the Section 4(f) process, including coordination with the official(s) having jurisdiction.

## 22.8 Additional Information

### 22.8.1 Guidance

- FHWA Section 4(f) regulations:  
*<http://environment.fhwa.dot.gov/projdev/4fregs.asp>*
- 23 CFR 771.135:  
*<http://www.fhwa.dot.gov/legregs/directives/fapp/cfr0771.htm>*
- FHWA Technical Advisory T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents:  
*<http://www.environment.fhwa.dot.gov/projdev/impTA6640.asp>*
- FHWA Section 4(f) Policy Paper (revised June 1989):  
*<http://www.environment.fhwa.dot.gov/projdev/4fpolicy.asp>*
- FHWA Section 4(f) Policy Paper (March 1, 2005):  
*<http://www.environment.fhwa.dot.gov/projdev/4fpolicy.asp>*
- FHWA Paper (November 15, 1989), Alternatives Selection Process for Projects Involving Section 4(f) of the DOT Act
- Guidance for Determining De Minimis Impacts to Section 4(f) Resources (December 13, 2005):  
*<http://www.fhwa.dot.gov/hep/guidedeminimis.htm>*
- SAFETEA-LU de Minimis Standard:  
*<http://www.environment.fhwa.dot.gov/projdev/PD5sec4f.asp>*
- Programmatic Evaluations:  
*<http://www.environment.fhwa.dot.gov/projdev/4fnspeval.asp>*
- NPS Section 4(f) Review Guidebook:  
*<http://www.doi.gov/oepl/handbook.html>*

### 22.8.2 Potential Section 4(f) Properties

- National Park Service, District of Columbia Park Guide:  
<http://home.nps.gov/applications/parksearch/state.cfm?st=dc>
- The District of Columbia Department of Parks and Recreation, list of parks:  
<http://app.dpr.dc.gov/dprmap/index.asp>
- District of Columbia Inventory of Historic Sites, Index and Maps:  
[http://planning.dc.gov/planning/cwp/view,a,1284,q,570748,planningNav\\_GID,1706,planningNav,%7C33515%7C.asp](http://planning.dc.gov/planning/cwp/view,a,1284,q,570748,planningNav_GID,1706,planningNav,%7C33515%7C.asp)
- District of Columbia Department of Parks and Recreation:  
<http://dpr.dc.gov/DC/DPR>
- District of Columbia Public Schools (playgrounds):  
<http://www.k12.dc.us/>
- The Capital Crescent Trail:  
<http://www.cctrail.org/map6.htm>
- Other recreational (hiking and biking) trails:  
<http://bikewashington.org/routes/index.htm>

CHAPTER  
23

SECTION 6(F) – LAND AND WATER  
CONSERVATION FUND AREAS



CONTENT

- 23.1 Summary of Key Legislation, Regulations, and Guidance
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- 23.3 General Methodology for Evaluation
- 23.4 Format and Contents of Documentation
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## SECTION 6(F) – LAND AND WATER CONSERVATION FUND AREAS

The federal government established the Land and Water Conservation Fund (LWCF) Program in 1965 to increase the net quantity of public, outdoor recreational space. Section 6(f) of this Act provides matching funds to states or municipalities for planning, improvements, or acquisition of outdoor recreational lands. Any property that was planned, purchased, or improved with LWCF money is considered a 6(f) property. Typically, Section 6(f) properties are recreational lands that are also regulated under Section 4(f) of the Department of Transportation Act, so the review and approval by federal and District of Columbia agencies under both regulations runs concurrently.

### 23.1 Summary of Key Legislation, Regulations, and Guidance

#### 23.1.1 Federal Legislations and Regulations

Land and Water Conservation Fund Act (Section 6[f]) at 16 United States Code (USC) 460-4 to 460-11 (P.L. 88-578)

The LWCF Act applies to all relevant projects—public or private. Section 6(f)(3) of the Act states that no property acquired or developed with LWCF money shall be converted

to other than public outdoor recreation uses without the approval of the Secretary of the Interior. If approved, the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location is required.

#### 23.1.2 Guidance Documents

- Land and Water Conservation Fund Grants-in-Aid Manual. National Park Service, 1991. Guideline NPS-34, Release no. 151.
- Guidance for Preparing and Processing Environmental and Section 4(f) Documents. Federal Highway Administration (FHWA) Technical Advisory T 6640.8A, October 30, 1987. This document includes a review of Section 6(f) issues, as well as Section 4(f) and other environmental issues.

#### 23.1.3 Related Regulations

49 USC 303, Department of Transportation Act of 1966, Section 4(f).

## 23.2 Agency Roles

- National Park Service (NPS), a part of the Department of the Interior. NPS is the lead agency overseeing the administration of Section 6(f). NPS maintains a list of all properties in which Section 6(f) funds have been invested and has the authority to determine if Section 6(f) is involved.
- District of Columbia Department of Parks and Recreation (DPR). The District of Columbia DPR is the recipient of the funds in the Government of the District of Columbia, and the state liaison for Section 6(f) lands as specified in the regulations.
- FHWA. FHWA also oversees the Section 6(f) process to ensure compliance. Typically, the Section 4(f) process includes this review.

## 23.3 General Methodology for Evaluation

More often than not, Section 6(f) properties also fall under Section 4(f). Therefore, if both regulations are applicable, their evaluations would typically run concurrently, and the Section 4(f) evaluation can incorporate the Section 6(f) documentation as well.

Depending on how LWCF funds are invested in a property, not all of the property may be considered Section 6(f). If the Section 6(f) grant was invested in a particular feature or section of a larger recreational property, it is possible that only a portion of the property is considered Section 6(f) property. On the other hand, if Section 6(f) funds are used for overarching planning or improvements, Section 6(f) may apply to the entire property.

Therefore, the location of Section 6(f) properties may be unclear; their boundaries cannot necessarily be determined simply from property maps. Instead, these boundaries must

be determined through early coordination efforts. As a starting point, NPS lists Section 6(f) investments by county on its website. However, this source simply provides a list. The project team should contact DPR and NPS if any local recreational areas may be affected by the project to determine if Section 6(f) applies to the area in question.

Like Section 4(f), the project team must evaluate and document all practical alternatives to the proposed conversion of Section 6(f) land for transportation use before the acquisition can be approved. This analysis would be similar to that in Section 4(f) and typically is documented in the Section 4(f) evaluation.

It is possible that the project could temporarily affect Section 6(f) lands. Provided the impact to the land and facilities can be restored as approved by DPR and NPS, then the intent of the statute can be met by onsite mitigation. The project team should document the details of the coordination and concurrence of DPR, NPS, and District of Columbia Department of Transportation (DDOT) on mitigation strategies for reference in the National Environmental Policy Act of 1969 (NEPA) document.

If acquisition of a Section 6(f) property is unavoidable, DDOT is required to replace the property. The regulations at 36 Code of Federal Regulations (CFR) 59.3 provide details of the selection of the appropriate replacement property. In summary:

- The replacement property is of at least equal fair market value.
- The replacement property is of reasonably equivalent usefulness and location.
- The replacement property must meet comparable recreation needs to the converted site.

- The replacement property need not necessarily be adjacent to or close to the converted site.
- The acquisition of one parcel of land may be used in satisfaction of several approved conversions.
- The replacement property meets the eligibility requirements for LWCF-assisted acquisition and must constitute or be part of a viable recreation area.
- If land currently in public ownership, including land owned by another public agency, is to be used as replacement land, each of the following conditions must be met:
  - The land must not have been acquired by the sponsor or selling agency for recreation.
  - The land has not been dedicated or managed for recreational purposes while in public ownership.
  - No federal assistance was provided in the original acquisition unless the assistance was provided under a program expressly authorized to match or supplement Section 6(f) funds assistance.
  - Where the project sponsor acquires the land from another public agency, the selling agency must be required by law to receive payment for the land.
- In the case where only a part of a Section 6(f) property is converted, the evaluation must consider the impact of the conversion on the remainder of the Section 6(f) property. The unconverted area must remain recreationally viable, or it must also be replaced.

If requesting permission to convert Section 6(f) properties in whole or in part, DDOT must submit the request to DPR, which in turn submits the request to the NPS regional director in writing. This could be accomplished using the Section 4(f) document, if applicable.

## 23.4 Format and Contents of Documentation

Although Section 6(f) is a separate process from Section 4(f), Section IX of FHWA Technical Advisory T 6640.8A allows the project team to combine the two processes into a single document. This approach reduces duplication and ideally provides a consolidated mitigation to comply with the requirements of both regulations.

A project team may also prepare a separate Section 6(f) evaluation memorandum to document the Section 6(f) investigations and study efforts. Typically, this process would only be necessary in particularly complex situations with extensive documentation. If prepared, the material contained in this memorandum could be referenced in the Section 4(f) evaluation and in the NEPA document.

The NEPA document should discuss the presence or absence of Section 6(f) land. This means, at minimum, any nearby eligible Section 6(f) land—such as a public park in which LWCF funds were used—should be described briefly in the section on affected environment. If all reasonable alternatives avoid the potential for Section 6(f) conversion, then typically it is sufficient to declare this finding in the NEPA document within the section on environmental consequences.

If the potential for Section 6(f) conversion exists, the section on environmental consequences should document measures to avoid, minimize, and mitigate impacts to Section 6(f) properties. The section also should document the results of agency correspondence between DDOT, DPR, and NPS concerning location, potential conversion of Section 6(f) lands, and proposed mitigation.

## 23.5 Project Development Process Guidance

It is important to pursue potential Section 6(f) issues early in the project development process, so that the project team

can consider options to avoid impacts; if impacts cannot be avoided, the team can incorporate measures to minimize harm early in the design. The project team also should identify potential Section 6(f) properties through early coordination with the DPR and NPS and incorporate these properties into the project base mapping.

At this time, the project team should consider avoidance alternatives and review possible mitigation measures for temporary impacts with DPR and NPS to avoid the need for land acquisition from Section 6(f) properties.

If acquisition cannot be avoided, the team must consider options for replacement land. DPR may be able to identify properties that it would prefer to acquire. Coordination with other offices in the District of Columbia Office of Planning may also help to identify suitable parcels. As the options are developed, DPR and NPS should be consulted on the acceptability of the options to comply with the statute requirements. Reasonable options should be defined for inclusion in the NEPA and (if applicable) Section 4(f) documents.

DPR and NPS must approve in writing the replacement land that is ultimately selected. It is often appropriate to develop a Memorandum of Agreement (MOA) to be signed by DDOT, DPR, and NPS that specifies the land replacement agreement. Include any MOA in the NEPA document.

### 23.6 Continuation through Design and Construction

To avoid problems or delays, communication must continue throughout project design and construction.

Clearly, it is important to incorporate all design modifications and measures to minimize harm to the

Section 6(f) property (for example, restoration of temporary impacts) into the design plans and notes as approved by FHWA in the Section 4(f) document and/or the NEPA document.

Where a land exchange is required, DDOT real estate staff must be informed. The specifics of the land purchase should be incorporated into the right-of-way plans as any other right-of-way acquisition, including specifics for the final disposition of the title, so that the transfer may be completed at the time of acquisition.

It is possible that, for unforeseen reasons, changes could occur in the project after the environmental documents are complete, such as changes necessitated by conditions found during construction. Therefore, the impacts to the Section 6(f) properties must be continuously monitored, because design changes and/or onsite construction considerations may force modifications of commitments made previously. Any changes should be coordinated immediately with FHWA, NPS, and DPR because those changes may require revisiting the Section 6(f) process.

### 23.7 Additional Information

- NPS Land and Water Conservation Fund Program: <http://www.nps.gov/ncrc/programs/lwcf/protect.html>
- Properties in the District of Columbia where LWCF funds have been used: <http://waso-lwcf.ncrc.nps.gov/public/index.cfm>
- Guidance for Preparing and Processing Environmental and Section 4(f) Documents, FHWA Technical Advisory T 6640.8A: <http://environment.fhwa.dot.gov/projdev/impTA6640.asp>

# CHAPTER 24

## ENVIRONMENTAL JUSTICE



- 24.1 Summary of Key Legislation
- 24.2 Integrating E in the NEPA Process
- 24.3 General Methodology
- 24.4 Public Involvement
- 24.5 Additional Information



ENVIRONMENTAL  
JUSTICE

**O**n February 11, 1994, President Clinton signed Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. The Executive Order (EO) requires federal agencies to achieve environmental justice (EJ) by identifying and addressing disproportionately high and adverse human health and environmental effects, including the interrelated social and economic effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EO 12898 and related United States Department of Transportation (USDOT) and Federal Highway Administration (FHWA) orders on EJ expound upon the principles of Title VI of the Civil Rights Act of 1964 (Title VI) and related statutes emphasizing nondiscrimination and equity considerations in the environmental and transportation decision-making processes. The nondiscrimination requirements of Title VI extend to all programs and activities of the District of Columbia Department of Transportation (DDOT) and its respective

subrecipients and contractors; therefore, EJ requirements apply to all DDOT projects, including those that do not involve federal-aid funds.

There are three fundamental environmental justice principles:

- To avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations
- To ensure the full and fair participation by all potentially affected communities in the transportation decision-making process
- To prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations

### 24.1 Summary of Key Legislation

- Executive Order 12898 “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” February 11, 1994

- Executive Order 12948, “Amendment to Executive Order No. 12898,” January 30, 1995
- FHWA Memorandum from Associate Administrator for Program Development, “Nondiscrimination, Environmental Justice, and Community Impact Assessment in Planning and Project Development,” July 27, 1995
- USDOT Order 5610.2, “Order to Address Environmental Justice in Minority Populations and Low-Income Populations.” April 15, 1997
- FHWA Order on Environmental Justice, “FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” December 2, 1998
- 42 USC 2000d-2000d-7, Title VI of the Civil Rights Act of 1964
- Ensuring that mitigation measures outlined or analyzed in an Environmental Assessment (EA), Environmental Impact Statement (EIS), and Record of Decision (ROD), whenever feasible, address disproportionately high and adverse environmental effects or proposed actions on minority populations and low-income populations
- Providing opportunities for community input in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving accessibility to public meetings, official documents, and notices to affected communities

It is critical to note that while EO 12898 on environmental justice specifically identifies minority populations and low-income populations as the focus of consideration, Title VI and related nondiscrimination statutes also prohibit discrimination on the basis of race, color, national origin (includes limited English proficiency), sex, disability, and age. Throughout the NEPA process, special efforts must be taken to ensure that project impacts do not adversely affect individuals and populations belonging to any of the aforementioned protected categories.

## 24.2 Integrating EJ in the NEPA Process

The identification and analysis of disproportionately high and adverse human health or environmental effects on minority populations and low-income populations should occur throughout the National Environmental Policy Act of 1969 (NEPA) process, from the initial phases of the screening analysis through the consideration and communication of all alternatives and associated mitigation measures. Potential impacts to the human environment should drive the processing option decision as much as potential impacts to the natural environment. Impacts to both the natural and human environment are to be given comparable consideration throughout transportation decision making.

Specific actions to integrate EJ considerations into the NEPA process include::

- Analyzing environmental effects, including human health, economic, and social effects on minority populations and low-income populations when such analysis is required by NEPA

## 24.3 General Methodology

The following section provides guidance for identifying and addressing EJ impacts throughout the NEPA process.

### 24.3.1 Incorporating Environmental Justice into the NEPA Scoping Process

The identification of EJ concerns and the incorporation of these concerns into the scoping analysis can help to ensure that the NEPA process is fully utilized to address concerns and enhance protection for EJ populations.

Scoping consists of identifying and defining the range of actions, alternatives, and impacts that will be considered in



an environmental impact statement. During the scoping phase of the EIS process, DDOT must consider connected, cumulative, and similar actions to the proposed action, identify alternatives to the proposed action that may mitigate or avoid potential environmental consequences, and assess potential impacts (direct, indirect, and cumulative.) A similar planning process is used for EAs.

### **Environmental Justice Screening Process**

The objective of an environmental justice analysis is to assess the extent to which the benefits and costs of a proposed transportation system change would be experienced differentially by protected populations and other member of society.

A two-step screening analysis is the first step in identifying environmental justice concerns by determining the existence of a low-income and/or minority population; this should occur as soon as the proposed action is well understood, around the time planning for scoping begins for EISs and planning begins for EAs. The first step in the analysis is to determine if the potentially affected community includes minority and/or low-income populations. The second step in the analysis is to determine if the human health and environmental impacts are likely to fall disproportionately on minority and low-income members of the community and/or tribal resources.

#### **24.3.2 Determine Characteristics of the General Population**

Using the most recent U.S. Census data, determine the demographic and income characteristics of the general population. For projects without a major impact on regional transportation (for example, bridge reconstruction), an acceptable “general population” could be defined by geopolitical boundaries such as a city or county. However, for major projects (those with a sizable influence on regional

transportation, such as a new corridor), it is best to define a project-specific general population—that is, the total population that would be affected, positively or negatively, by the project. For example, for commuter routes, one may use the project’s “travelshed,” the area in which the majority of the facility’s users reside, as the general population. Key data for this analysis include racial characteristics and median household income. These data are best presented in a table or other delineated format, or illustrated by a geographic information system (GIS) graphic.

#### **24.3.3 Determine the Project’s Area of Influence**

Impacts within the project’s area of influence can include human health impacts such as noise and air quality, environmental degradation, impacts on community cohesion, or displacement and relocation impacts. The impact area can be determined using the project area or “footprint” of the project (this will determine the displacements and right-of-way acquisition associated with the project). Other relevant areas of influence include the 67-decibel (dB) noise contour (noise impacts) or the project “viewshed” (the area visually impacted by the project). The area of influence is project-specific and based on that project’s associated impacts. For example, in the case of major roadway construction through a residential area, one of the major impacts of concern would likely be noise; thus, using defined noise contours to determine the population that would be subjected to noise levels above the 67-dB contour would be a reasonable “area of influence.”

In limited instances, particularly on large or urban projects, EJ impacts could affect an entire community rather than just the immediate project area. This would occur when the impacts to a low-income community or minority group adjacent to a project damage the area as a whole (e.g., removal of a large enough number of affordable housing units so that there is

no longer a sufficient amount of affordable, community-wide housing).

#### 24.3.4 Determine Characteristics of the Impacted Population

To determine the presence of an EJ population, first determine the impacted population's (i.e., population within the area of influence) characteristics. Using U.S. Census data available for block groups or other small geographic areas such as quarter-sections, determine the impacted population's racial/ethnic and income characteristics. Other social program participation, such as school lunch programs, can be helpful in determining income characteristics of a defined population. Determine if the incomes in the area fall below the poverty levels established by the U.S. Department of Health and Human Services (DHHS).

In addition to data derived from the U.S. Census and social program participation, also consider the use of local knowledge, public input, field surveys, and customer surveys in your analysis. These methods can assist in better defining small or emerging populations, as well as lend new perspectives on how impacts may be experienced by different segments of the population.

#### 24.3.5 Compare the Impacted Population to the General Population

Compare the characteristics of the general population to those of the affected population to determine whether there is a disproportionate impact. A table listing the two populations' appropriate demographic characteristics is the clearest way to compare the populations. A GIS graphic should also be considered to represent the comparison.

#### 24.3.6 Addressing and Mitigating Impacts to EJ populations

If the EJ screening analysis does not identify minority communities or low-income communities, and suggests

no disproportionately high and adverse effects on those communities, then the EA and FONSI should describe the analysis and note the conclusion.

If the initial screening identifies an affected community that is minority and/or low-income or identifies a disproportionately high and adverse effect upon a minority and/or low-income community, then a smaller scale scoping analysis (than that undertaken for an EIS) should be conducted, and some level of public participation should be designed and implemented to solicit community involvement and input, and to develop alternatives and mitigation methods. Mitigation measures should be developed and alternatives should be crafted so as to allow an evaluation of the relative disproportionality of impacts across reasonable alternatives. The EA should also include a comparative socioeconomic analysis that is scaled and tailored to evaluate the potential effects to the minority and/or low-income community (i.e., in the case of EJ concerns, the EA should include socioeconomic analyses scaled according to the severity of the impacts.)

All reasonably foreseeable adverse social, economic, and environmental effects on minority populations and low-income populations must be identified and addressed. As defined in DOT Order 5610.2 on EJ, adverse effects include, but are not limited to:

- Bodily impairment, infirmity, illness, or death
- Air, noise, and water pollution and soil contamination
- Destruction or disruption of man-made or natural resources
- Destruction or diminution of aesthetic values
- Destruction or disruption of community cohesion or a community's economic vitality
- Destruction or disruption of the availability of public and private facilities and services
- Vibration

- Adverse employment effects
- Displacement of persons, businesses, farms, or nonprofit organizations
- Increased traffic congestion, isolation, exclusion, or separation of minority or low-income individuals within a given community or from the broader community
- The denial of, reduction in, or significant delay in the receipt of benefits of DDOT programs, policies, or activities

If the environmental effects of a project are deemed significant, the scoping notices (including the notice of intent for an EIS) should include a description of the results of the EJ screening analysis. If the results of the screening analysis do not find a minority community or low-income community, and the effects are not likely to fall disproportionately on a minority community and/or low income community, then the scoping notice should state this finding and request additional information on whether there may be disproportionately high and adverse effects that were overlooked during the screening analysis.

If the EJ screening analysis concludes that there is a potential for disproportionately high and adverse effects, then DDOT staff should ensure that the EIS scoping process raises EJ concerns and that sufficient data and information are generated to evaluate the potential effects. Prior to the full-scale scoping process, public outreach strategies should be developed.

In the event that a disproportionately high and/or adverse effect has been identified, and impact-avoiding measures are not reasonable, consider mitigation measures. Working with community agencies and relevant not-for-profit groups can help determine appropriate mitigation strategies. Mitigation measures include enhancements or offsetting benefits and opportunities that are reasonable in cost and scope and help the project fit more harmoniously into the community.

(Examples may range from landscaping/green space, sidewalks, or other pedestrian accommodations, and lighting features to the creation of community programs or advisory groups.)

## 24.4 Public Involvement

A proactive and ongoing public involvement program should be implemented to provide meaningful opportunities for EJ populations to participate in the decision-making process. Special efforts may need to be made to ensure that minority and low-income populations are aware of the public involvement process and are able to participate.

Targeted public involvement strategies include, but are not limited to:

- Communicating and seeking the assistance with members of the community and community based organizations who are able to identify minority and/or low-income communities that are affected by the proposed action
- Forming community advisory task forces, and ensuring that representatives from minority, low-income, and limited-English proficient communities are included, as applicable
- Utilizing the Mayor's Offices on Latino Affairs, Asian and Pacific Islander Affairs, and African Affairs, and the DC Language Access Coalition to distribute information to limited-English proficient communities
- Using oral interpreters at public meetings and events, and translating project information into other languages
- Selecting meeting locations and times that are accessible for low-income groups
- Soliciting information from the local community on environmental issues through nontraditional methods (e.g., survey community hot spots where locals gather information, barbershops, and popular restaurants)

- Soliciting public comments on environmental issues through formal/informal public notice and comment procedures tailored to the community

If the proposed activity is deemed significant to warrant the development of an EIS, or if the community has raised significant concerns to be addressed in an EA, DDOT should establish a community advisory board to work with its staff in the development of its NEPA documents.

The public participation plan designed as part of a scoping effort for an EA or EIS should clearly describe any EJ concerns identified by DDOT, and should include opportunities for the public to suggest and comment on alternatives and mitigation measures aimed at reducing or avoiding disproportionately high and adverse effects on EJ populations.

For additional information regarding public involvement requirements and strategies, see Chapter 11.

#### 24.4.1 Limited English Proficient Populations

A limited-English proficient (LEP) person does not speak English as their primary language and has a limited ability to read, speak, write, or understand English. Executive Order 13166 requires recipients of federal assistance to ensure that LEP persons are provided an equal opportunity to benefit or have access to services that are normally provided in English. Discrimination against LEP persons qualifies as national origin discrimination, and is a violation of Title VI. As such, DDOT must provide LEP populations with a meaningful level of access to environmental decision-making processes. In deciding to what extent access must be provided, the following four factors should be considered: (1) the number and proportion of affected LEP persons; (2) the frequency with which LEP persons are affected by the program or activity; (3) the importance of the effect of the program on the LEP persons; and (4) available resources.

Useful strategies to engage LEP populations include, but are not limited to:

- Translating vital documents, such as public meeting notices and posting in foreign language newspapers
- Using oral interpreters and/or hiring bilingual project staff
- Coordinating with community organizations targeting LEP populations
- Use of visual displays or symbols to notify and engage LEP populations in project activities

For more information on translation and interpretation resources, please contact the DDOT Office of Civil Rights.

#### 24.5 Additional Information

- FHWA/Federal Transit Authority (FTA) Website on Environmental Justice: <http://www.fhwa.dot.gov/environment/ej2000.htm>
- Final Guidance for Incorporating Environmental Justice Concerns in the United States Environmental Protection Agency (USEPA) NEPA Compliance Analyses (1998): [http://www.epa.gov/region1/ej/pdfs/ej\\_guidance\\_nepa\\_epa0498.pdf](http://www.epa.gov/region1/ej/pdfs/ej_guidance_nepa_epa0498.pdf)
- National Cooperative Highway Research Program (NCHRP) Report 532: Effective Methods for Environmental Justice Assessment (2004): [http://onlinepubs.trb.org/Onlinepubs/nchrp/nchrp\\_rpt\\_532.pdf](http://onlinepubs.trb.org/Onlinepubs/nchrp/nchrp_rpt_532.pdf)
- USDOT/FHWA: How to Engage Low-Literacy and Limited-English-Proficiency Populations in Transportation Decisionmaking (2006): <http://www.fhwa.dot.gov/hepl/lowlim/index.htm>
- For key legislation and regulations, please also see Chapter 25, Socioeconomic Resources.

# CHAPTER 25

## SOCIOECONOMIC RESOURCES



25.1 Summary of Key Legislation

25.2 General Methodology

25.3 Post-NEPA Commitments

25.4 Additional Information



# SOCIOECONOMIC RESOURCES

Socioeconomic resources can generally be thought of as manmade resources that provide community services (such as governmental, religious, or educational), places to live, jobs, opportunities for shopping, and other infrastructure or features that make a community livable. This chapter provides information on how these resources should be considered during the course of project development. “Socioeconomic resources” is actually a broad category of topics, including:

- **Land Use Impacts** – Land use often determines the demand for transportation facilities and transportation projects augment land-use possibilities. Thus, land use decisions and transportation investments affect the level of mobility in the region, the viability of each transportation mode in the region, and the overall efficiency of the transportation facilities and services in the region.
- **Social/Community Impacts** – A social or community impact assessment considers the positive and negative

effects of a project, policy, or plan on the community.

Social/community impacts are influenced by the effect of a project on historic or cultural resources; the availability of open spaces, parks, and recreational facilities; the quality of environmental design; and the availability of affordable housing. A social/community impact analysis should compare changes in the level of community well-being before and after the new development.

- **Environmental Justice** – Environmental justice is concerned with a variety of public policy efforts to ensure that adverse human health or environmental effects of governmental activities such as transportation projects do not fall disproportionately upon minority and/or low-income populations.
- **Relocation Impacts** – A project can be said to have relocation impacts when housing or businesses must be relocated to accommodate it. Steps are taken to assess direct and indirect relocation impacts and to determine how these impacts can be best mitigated.

- **Economic Impacts** – Transportation projects can affect the economic conditions of a community by impacting the community’s development, tax revenues, public expenditures, employment, retail sales, and displacements of and accessibility to businesses.

This chapter summarizes the important key legislation for each topic, explains the methodology that should be used for analyzing these socioeconomic topics, describes the post-National Environmental Policy Act (NEPA) commitments involved, and offers additional resources that might be helpful. The District of Columbia Department of Transportation (DDOT) project manager is responsible for ensuring that these resources are given proper consideration during project development. The project manager is not necessarily required to be the individual conducting the analyses, but he or she should be involved in facilitating the collection of data from other governmental agencies and conducting any community and public outreach that may be required as part of the studies of these resources.

## 25.1 Summary of Key Legislation

Following are lists of key legislation or regulations that establish rules, procedures, or criteria for evaluating socioeconomic resources. The person(s) conducting the socioeconomic analyses for a project should familiarize themselves with these materials to ensure that the project is developed in a manner compliant with their requirements. See Chapter 4 of this manual for a brief summary of the legislation and other documents listed below.

### Land Use Impacts

- 16 United States Code (USC) 46OL-4 to 46OL-11, Section 6(f) of the Land and Water Conservation Fund Act of 1965
- 42 USC 4231, NEPA
- 49 USC 303, 29 CFR 771, Section 4(f) of the Department of Transportation Act
- 40 Code of Federal Regulation (CFR) 1502.16(c) (environmental consequences)
- 40 CFR 1508.8(b) (indirect effects)
- Social/Community Impacts
- 42 USC 4601, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 Public Law 100-17, 101; 23 CFR 710; 49 CFR 24
- Uniform Relocation Act Amendments
- 42 USC 2000d-4; 23 USC 324 (sex) as amended; 42 USC 6101 (age); 29 USC 794 (handicap); 23 CFR 710, Subpart D; 49 CFR 21 Civil Rights Act of 1964
- 40 CFR 1502.16 (environmental consequences)
- 40 CFR 1508.8 (effects)
- 40 CFR 1508.14 (human environment)

### Environmental Justice

Please see Chapter 24, Environmental Justice, for more details.

- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, February 11, 1994
- Executive Order 12948, Amendment to Executive Order No. 12898, January 30, 1995
- Federal Highway Administration (FHWA) Memorandum from Associate Administrator for Program Development, Nondiscrimination, Environmental



Justice, and Community Impact Assessment in Planning and Project Development, July 27, 1995

- United States Department of Transportation (USDOT) Order 5610.2, Order to Address Environmental Justice in Minority Populations and Low-Income Populations, April 15, 1997
- FHWA Order on Environmental Justice, FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, December 2, 1998
- 42 USC 2000d-2000d-7, Title VI of the Civil Rights Act of 1964

### Relocation Impacts

- 42 USC 4601, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), as amended
- 42 USC 3601–3619, Title VIII of Civil Rights Act of 1968, Fair Housing Act
- 42 USC 3601–3631, Fair Housing Act Amendments of 1988
- 49 CFR 24, Regulations concerning the Uniform Act, as amended
- 23 CFR 710, 750, Regulations regarding Federal Highway Administration (FHWA) right-of-way

### Economic Impacts

- 23 CFR 710, 750 and 49 CFR 24, Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (amended in 1987)

## 25.2 General Methodology

The following discussion provides guidance for conducting socioeconomic studies of land use, social/community impacts, environmental justice, relocations, and economic impacts. While each project is unique in its potential to cause impacts to these resources, it is important to understand the basic analytical approach to these studies. The individual conducting the studies should have sufficient experience to judge the appropriate level of detail required to accurately identify any socioeconomic impacts of the proposed project.

### 25.2.1 Land Use Impacts

Determining the land use impacts of a project is a process of identifying and categorizing current land uses, studying future land use goals established by the local planning agency, and considering how the proposed transportation project will affect the current and future land uses of the area. The proposed project may directly convert land from other uses to transportation use, or it may facilitate conversion of land to other uses by improving access to an area.

### Data Collection

Collect the following information, if available for the study area:

- Published documents, including comprehensive land use plans or development plans, as well as zoning map information prepared by each community, county, or economic development agency. Consider any historic context because that will help establish trends in the study area.

- Transportation plan documents prepared by the regional transportation agency, Regional Planning Affiliations (RPA), DDOT, and other local agencies (if available).
- Information from primary data sources, including field reviews and interviews with local government officials and relevant organizations (such as chambers of commerce).
- Interview government officials regarding development policies and plans and determine whether the proposed roadway project is consistent with local plans.
- Whether land use impacts would be limited to the land converted from its existing use to the transportation facility

Review these documents to determine whether and how the proposed roadway project is consistent (or inconsistent) with current and future land use plans. Consider these types of questions.

- Does the project traverse a predominantly urban or suburban area?
- What communities does the improvement travel through and what are their goals?
- What is the general land use of the area now and what is planned for the future?

### **Determine the Area of Influence for the Project**

After all available data have been collected and reviewed, the area of influence for the project should be identified. This effort includes assessing the following:

- Whether the improvements would cause significant and/or far-reaching changes in existing land use
- Whether the project would facilitate or impede potential growth throughout the travelshed

The area of influence will be heavily driven by the type of improvement proposed. As an example, new, high-type highways on new alignment often have greater potential to change land use in an area because they provide access that was previously available, opening areas to new development. In such cases, it is important to examine how the local planning agency has incorporated the transportation project into its land use plan and whether the project, as proposed, is consistent with that plan. On the other hand, widening of existing roadways within a densely developed area may require direct conversion of existing residential or business uses to transportation use, but may not otherwise affect land use.

### **Determine Land Use Types**

Determine the percentages of land use types that are within the area of influence and what percent would be converted to roadway use by the project. If available for the project, GIS sources should be incorporated and used for data analysis. The categories listed for any given project will depend on the length and type of corridor and on the scope of the improvement. The categories to be noted, if present, are listed below. Note that this list includes land use types, such as agricultural uses, that may be rare within the typical urban area of Washington, D.C.

#### ***Developed***

- Residential (single and multifamily uses )
- Commercial (business facilities, such as retail, wholesale, financial, real estate, restaurants, and other services)

- Industrial (such as manufacturing activities, or light industrial uses)
- Vegetated Open Land (Nonrecreational)
- Woodlands (such as mesic forest and floodplain forest)
- Grasslands
- Bodies of water

### ***Recreation***

- Private recreation uses
- Public recreation uses

### ***Agricultural***

- Cropland
- Pasture
- Harvestable timber
- Nursery stock
- Farm ponds and creeks with associated vegetation
- Farm buildings and farmsteads

### ***Other/Miscellaneous***

- Utilities
- Landfills

This list may be adapted to suit the context of the project. As an example, for a corridor that has significant development along the roadway, such as typically found along more urban projects, additional emphasis may be placed on the breakdown of the developed lands category, providing additional detail on housing characteristics and business types.

## **25.2.2 Social/Community Impacts**

### **Determine the Level of Information Needed**

The first step in assessing the social and community impacts is determining the scale or emphasis of the data to be collected. For a lengthy corridor, for example, information may need to be collected at the county level and then at the community/city level. For a shorter, urban corridor, information may need to be collected at the community/city level and then at census-block level.

As part of identifying and collecting needed information, if available for the project, data should be collected in a digital format and incorporated into a geographic information system (GIS) for analysis, if GIS is being used for the project.

### **Identify and Document Neighborhoods**

Using available information from the community, such as comprehensive plans or maps, by conducting a windshield survey or by interviewing key community leaders for information, identify and delineate neighborhoods and communities within the project area. This includes identifying community socioeconomic characteristics and physical features (such as housing types, boundaries of a neighborhood, or public and private facilities and services available) for use in assessing community cohesion and access to services. Consider the historical context because it can help aid in identifying trends.

### **Collect and Document Demographic Information**

From the United States Census and District of Columbia Profiles, collect the following demographics, as appropriate and depending upon the scope of the project:

- Population and household characteristics
- Median age

- Ethnic and racial distribution
- Median years of school completed
- Median household income

Collect demographic forecasts, if available. These may be prepared by regional agencies, counties, or even by communities. (The data are often detailed in Comprehensive Plans.)

Information regarding the elderly, minority groups, low-income populations, disabled persons, and transit-dependent populations may be collected from community leaders, church officials, transit providers, and local social support organizations.

### **Identify and Document Potentially Affected Facilities**

Identify community facilities within the project area of influence. This list may include schools, libraries, religious facilities, health care facilities (such as hospitals and nursing homes), police and fire facilities and associated service areas, and recreation areas. This information may be obtained through mapping, windshield surveys, and coordination with community leaders. Impacts to these facilities can be direct or indirect. Direct impacts to community facilities include displacement or relocation, temporary or permanent access changes, or the creation of a barrier due to the transportation facility. Indirect impacts include altered travel times, bisection of service areas, or other such events.

### **Collect and Document Information from Residents**

Collect information from residents in the project area regarding the proposed project and perceived impacts, as well as potential avoidance, minimization, or mitigation measures. This may be accomplished in various ways—such as by meeting with neighborhood or community groups or gathering input at public meetings for the project.

### **Analyze Potential Effects**

After all available data have been collected and reviewed, determine the project area of influence. Identifying the area of influence includes assessing whether the improvements would cause significant and/or far-reaching changes in existing community and social resources.

Analyze how the proposed project may impact communities and/or specific neighborhoods. Changes caused by the proposed project may be either beneficial or adverse. The analysis should include impacts on cohesion due directly to the proposed improvements (a new facility bisecting a neighborhood, for example). There should also be consideration of potential cohesion impacts as a result of changes in travel patterns and accessibility—for example, is additional traffic now directed through an area where there had previously been a low traffic volume? Consider also traffic safety and overall public safety related to the project.

In analyzing the potential effects, one should consider such questions as the following:

- Would the project alternatives split existing neighborhoods?
- Is there a potential to isolate a portion of a neighborhood or ethnic group?
- Could the project generate new development? What are the potential effects of this (positive and negative)?
- Is there a potential to cause a change in property values (increase or decrease)?
- Would any of the alternatives separate residents from community facilities?

- Does the project change access or travel patterns? If so, does it move traffic into or away from the community/neighborhood?
- Is new access provided where it did not previously exist?

Analyze the impact to groups that are especially benefited or harmed by the proposed projects (for example, effects to the elderly, disabled persons, pedestrians, public transit-dependent individuals, and ethnic groups). Impacts to ethnic groups and low-income persons will be further analyzed in the environmental justice section.

Finally, consider potential enhancements if adverse project impacts are expected to occur.

### 25.2.3 Environmental Justice

#### Determine Characteristics of the General Population

Using the most recent United States Census data, determine the demographic and income characteristics of the general population. For projects without a major impact on regional transportation (for example, bridge reconstruction), an acceptable “general population” could be defined by geopolitical boundaries such as a city or county. However, for major projects (those with a sizable influence on regional transportation, such as a new corridor), it is best to define a project-specific general population—that is, the total population that would be affected, positively or negatively, by the project. For example, for commuter routes, one may use the project “travelshed,” the area in which the majority of the facility’s users reside, as the general population. Key data for this analysis include racial characteristics and median household income. These data are best presented in a table or other delineated format, or illustrated by a geographic information system (GIS) graphic.

#### Determine the Area of Influence for the Project

Impacts within the area of influence for the project can include human health impacts such as noise and air quality, environmental degradation, impacts on community cohesion, or displacement and relocation impacts. The impact area can be determined using the project area or “footprint” of the project (this will determine the displacements and right-of-way acquisition associated with the project). Other relevant areas of influence include the 67-decibel (dB) noise contour (noise impacts) or the project “viewshed” (the area visually impacted by the project).

The area of influence is project specific and is based on the impacts associated with each project. For example, in the case of major roadway construction through a residential area, one of the major impacts of concern would likely be noise; thus, using defined noise contours to determine the population that would be subjected to noise levels above the 67-dB contour would be a reasonable “area of influence.”

In limited instances, particularly on large or urban projects, environmental justice (EJ) impacts could affect an entire community rather than just the immediate project area. This would occur when the impacts to a low-income community or minority group adjacent to a project damage the area as a whole (removal of a large enough number of affordable housing units so that there is no longer a sufficient amount of affordable, community-wide housing).

#### Determine the Characteristics of the Impacted Population

To determine the presence of an EJ population, first determine the characteristics of the impacted population (the population within the area of influence). Using United States Census data available for block groups or other small geographic areas such as quarter-sections, determine the racial/ethnic and income characteristics of the impacted population. Other social program participation, such as

school lunch programs, can be helpful in determining income characteristics of a defined population. Determine if the incomes in the area fall below the poverty levels established by the United States Department of Health and Human Services (DHHS).

### **Compare Impacted Population to General Population**

Compare the characteristics of the general population to those of the impacted population to determine whether there is a disproportionate impact. A table listing the appropriate demographic characteristics of the two populations is the clearest way to compare them. A GIS graphic should also be considered to represent the comparison.

### **Determine Whether There Is An EJ Impact**

An impact can be defined as EJ related if the affected population bears a disproportionate share of a project's negative environmental effects compared to that of the general population. Any disproportionate state will be discussed as part of the environmental consequences of the proposed action. The project team shall investigate and document whether it is reasonable to avoid or minimize the impacts to this population. Design modifications or selection of reasonable alternatives can sometimes minimize or eliminate impacts to an EJ group. A project alternative with an EJ impact would be carried forward only if the social, economic, or environmental effects of the impact-avoiding alternatives render them impractical. In addition, the environmental consequences discussion should include the public involvement process used to coordinate with the affected persons.

An analysis should be completed explaining why avoidance and minimization alternatives are unreasonable on the basis of social, economic (including cost), and environmental effects. Where impacts occur and avoidance

is not reasonable, the NEPA document should provide an examination of reasonable mitigation measures. Mitigation measures should include enhancements or offsetting benefits and opportunities that are reasonable in cost and scope to help the project fit more harmoniously into the community. Even if no EJ-impacted population is identified, a brief discussion of EJ should be included in the environmental document. The presence of any minority or low-income persons triggers the investigation, and then the impacts and their magnitude must be assessed.

### **Mitigate EJ Impacts**

Where impact-avoiding measures are not reasonable, consider mitigation measures. Working with community agencies and relevant not-for-profit groups can help determine appropriate mitigation strategies. Mitigation measures include enhancements or offsetting benefits and opportunities that are reasonable in cost and scope to help the project fit more harmoniously into the community. (Examples may range from landscaping/green space, sidewalks or other pedestrian accommodations, and lighting features to the creation of community programs or advisory groups.)

### **Ensure Public Participation**

Where EJ impacts occur, a proactive and ongoing public involvement program should be implemented to engage the affected public, seek input on potential impact issues, and provide information on project development issues. See Chapter 11 for discussion of appropriate public involvement strategies. Special efforts may need to be made to ensure that minority or low-income populations are aware of the public involvement process and are able to participate. The use of interpreters and bilingual meeting materials, as well as careful selection of meeting locations, may be appropriate, depending on the project conditions.

### 25.2.4 Relocation Impacts

The methodology discussed in this chapter applies to work to be done during project development for the preparation of project environmental documentation. However, it is also important to coordinate with the Office of Facilities Management, which is responsible for DDOT land acquisition, to seek guidance on the application of DDOT land acquisition policies.

To assess relocation impacts, follow these steps:

- Collect housing data from primary sources. Interview local officials and/or housing organizations. Conduct windshield surveys to generalize local housing stock, unique neighborhood characteristics, and housing availability within the project area.
- Determine the number of households displaced for each alternative under consideration. Do so by overlaying the project design files on county assessor property-line files or aerial photography.
- Determine the characteristics of the households displaced. The assessment of households should include the inhabitants' characteristics, including race, age, household/family size, income levels, house size (number of bedrooms), and owner-tenant status. These data are available from the United States Census, local economic reports, community resources, visual inspections, and county assessors' records.
- Determine the availability of comparable replacement housing. Using real estate listings and/or interviews with housing/real estate organizations, assess the amount and type of available replacement housing. The analysis should include price range, size (number of bedrooms), occupancy status (owner/tenant), and location of the replacement housing. This assessment must also consider any special relocation requirements/considerations (such as language barriers or handicap-accessible replacement housing) on the basis of visual assessment of neighborhood and interviews with local representatives and housing officials.
- Estimate the number and characteristics of businesses to be displaced. The assessment should identify available sites for relocations, the likelihood of such a relocation, and the potential impacts to the business or farm. If there are limited displacements, characteristics such as race and income level should not be included for privacy reasons. In addition, one should be careful to pay attention to special concerns and community/neighborhood impacts that require special considerations. Examples of this include racial, cultural, or religious communities.
- Determine the availability of comparable replacement housing for businesses. Conduct the same assessment for businesses as previously discussed for replacement housing when businesses would be displaced by a proposed project.
- Consider indirect impacts. For major projects, this discussion should include, in addition to the direct effects of relocation, any related indirect impacts to schools, taxing districts, or other public entity due to the elimination of households or businesses in one area and their subsequent move to another area. This can be done by calculating actual losses from the tax base (in terms of sales or property taxes) or by estimating the increases or decreases in school enrollment due to relocations to estimate impacts on the local school district.
- Address relocation issues and requirements. Coordinating with local officials, housing organizations, business groups, or other individuals may be helpful to determine the best measures for handling relocation impacts. Such

coordination is strongly encouraged for projects with substantial relocations. Interviews and coordination with the aforementioned groups and individuals should address measures to reduce impacts or to determine the availability of financial and incentive programs or opportunities available to those to be relocated beyond measures provided by the Uniform Act. The project public hearing is also a source of such information, and should always include representatives from the Office of Facilities Management, given their responsibilities in the property-acquisition process.

As noted earlier, the Office of Facilities Management is a potential source of information or guidance for this analysis.

### 25.2.5 Economic Impacts

Assessing the economic impact of proposed projects involves assessing both the physical impacts of the project on businesses, such as a displacement or parking impacts, as well as how the project may affect a business even when it is not physically impacted, such as through changes to access or the removal of drive-by business. In assessing these impacts, the following seven tasks should be considered:

- Characterize labor force variables, employment trends, and economic trends. Collect data on businesses, including the number of employees, type of business, size of business, clientele demographics, and employee demographics. If available, economic trends should be collected and analyzed, because these may help establish the history of the community. Determine the number of major employers within the project area for larger projects that may have regional economic implications. The level of detail available and appropriate for the analysis will vary depending on the magnitude and location of the project.
- If businesses are displaced, estimate the number of people employed at each establishment. In addition, while not required, the use of modeling may be appropriate in some complex projects. (Modeling, when used, would generally apply only to EIS projects.) The necessity for conducting any of these assessments should be determined by the nature of the project impact in the proposed areas. Information about labor force and employment can be obtained through census data or by interviewing state, county, and city officials, and the local community.
- Calculate tax losses/gains to each taxing authority as a result of the project. Determine the amount of land to be removed from the tax rolls for each taxing body and apply their tax rate to an estimated land value to determine an estimated annual loss. Consider the tax consequences of a proposed project, which include removal of lands from the tax rolls (and what that financial loss to specific taxing bodies would be), as well as discussion of impacts resulting from induced growth.
- Determine business impacts due to the proposed improvement. A business may be considered impacted if it is displaced. A business also may be impacted if it loses enough land to render its operation too small to stay in business based on the generated revenue loss (for example, a resulting farm parcel would be too small to cultivate or the loss of a parking area would disrupt operations). Businesses, such as gas stations or convenience stores, which are dependent on drive-by traffic, may also be impacted by the relocation of a roadway away from its location. When evaluating business impacts, consider the number of business displacements, decline in patronage, and lost jobs.
- Establish any indirect impacts to businesses. Indirect impacts include residual effects on businesses that remain



after other businesses have been displaced. Possible effects may include temporary or permanent changes in business access, changes in traffic patterns, changes in property value, and impacts on highway and user safety.

- Consider indirect business impacts if proposed improvement is a bypass (if applicable). If the proposed improvement is a bypass, highway-related businesses located within the project area may be adversely affected, particularly those along the old alignment. Highway-related businesses may include gas stations, motels, or restaurants. The impact may result in decreased revenue or tax base, or loss of jobs. Estimate the number of jobs lost and consider the effects on any existing businesses along a project corridor, or nearby, that are not relocated.
- Develop ways to minimize or reduce economic impacts. Mitigation measures should be developed by the DDOT (or consultant) in an attempt to reduce economic impacts and should address known and foreseeable public and agency concerns. These mitigation measures may be developed in conjunction with local government agencies, if appropriate. Possible mitigation measures may include proposing appropriate access control, developing a public information program, implementing design changes, providing new signage, or suggesting that local zoning be updated.

### 25.3 Post-NEPA Commitments

The DDOT project manager or resident engineer is responsible for complying with commitments made during this phase of project development. The commitments may vary, depending on the project, and cannot be defined in this document. A commitment is typically made in response to an undesired circumstance, and commitments made at this planning stage should be recorded in the environmental document. As the project moves into the

design and construction phases, the commitments should be reflected in the planning documents and should continue through construction. For example, an economic impact may result in a commitment to have parking relocation during construction. Additionally, a relocation impact could establish a commitment that would require right-of-way activities, such as appraisals or negotiations. The need and level of commitment is therefore dependant on the project.

## 25.4 Additional Information

### 25.4.1 Land Use Impacts

- FHWA Technical Advisory (TA) T6640.8A, Section V. This TA provides guidance for uniformity and consistency in format, content, and processing of environmental studies and documents pursuant to NEPA.
- Question 23 of Council of Environmental Quality (CEQ) Q&A Conflicts between Proposed Action and Land Use Plan. This question deals with conflicts between a proposal and the objectives of federal, state, or local land use plans.
- FHWA Community Impact Assessment—A Quick Reference for Transportation. This document explains the process for evaluating the effects of transportation on a community and its quality of life.

### 25.4.2 Social/Community Impacts

- FHWA Technical Advisory T6640.8A, Section V. This TA provides guidance for uniformity and consistency in format, content, and processing of environmental studies and documents pursuant to NEPA.
- FHWA Environmental Guidebook  
<http://www.environment.fhwa.dot.gov/guidebook/index.asp>

- FHWA-PD-96-036, “Community Impact Assessment,”  
*<http://www.ciatrans.net/>*
- United States Census Bureau  
*<http://www.census.gov>*
- 42 USC 3601-3619, Civil Rights Act of 1968, Title VIII  
*<http://www.justice.gov/crt/housing/title8.php>*
- FHWA, Title VI & Environmental Justice, Impacts of the Civil Rights Restoration Act of 1987 on FHWA Programs  
*<http://www.fhwa.dot.gov/legregs/directives/notices/n4720-6.htm>*

### 25.4.3 Environmental Justice

- Council on Environmental Quality, Environmental Justice: Guidance under the National Environmental Policy Act, December 10, 1997.
- United States Environmental Protection Agency (EPA), Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses, April 1998.
- 23 CFR 200, Title VI Program and Related Statutes—Implementation and Review Procedures  
*<http://www.fhwa.dot.gov/legregs/directives/fapgcfr0200.htm>*
- 23 CFR 200.7, FHWA Policy on Title VI  
*<http://www.fhwa.dot.gov/legregs/directives/fapgcfr0200.htm>*
- 23 CFR 771.105, Policy:  
*<http://www.fhwa.dot.gov/legregs/directives/fapgcfr0771.htm>*
- 42 USC 2000(d)-2000(d)(4), Civil Rights Act of 1964, Nondiscrimination in Federally Assisted Programs, Title VI  
*<http://www.justice.gov/crt/cor/coord/titlevistat.php>*

### 25.4.4 Relocation Impacts

- FHWA, Your Rights and Benefits as a Displaced Person under the Federal Relocation Assistance Program, June 2005.
- FHWA, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970  
*<http://www.fhwa.dot.gov/realestate/act.htm>*

### 25.4.5 Economic Impacts

- FHWA Technical Advisory T6640.8A, Section V. This TA Addresses social, economic, relocation, and joint development impacts.
- FHWA, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970  
*<http://www.fhwa.dot.gov/realestate/act.htm>*

# CHAPTER 26

## ENVIRONMENTAL MITIGATION BASICS



### CONTENT

- 26.1 Environmental Commitments
- 26.2 Carrying through on Environmental Commitments



## ENVIRONMENTAL MITIGATION BASICS

**D**uring the planning phases of a project, the project team makes commitments to the public, stakeholders, and federal, state, and local agencies. These commitments are developed by environmental technical specialists as part of the National Environmental Policy Act of 1969 (NEPA) process and are stated in the environmental document through project development, in response to public comments, or as part of a required permit or approval. These environmental commitments must be carried through in the design, construction, operations, and maintenance phases of the project.

The following text defines the general types of environmental commitments and a procedure for a project manager to implement within the project team to ensure compliance with the environmental commitments is met when preparations for final design and construction are being conducted.

### 26.1 Environmental Commitments

Environmental commitments are all of the mitigation actions undertaken to minimize impacts on natural and manmade resources. While each commitment is developed separately

for each issue of concern, commitments are coordinated on a project level to ensure that all are implemented.

In general, four broad categories of environmental commitments exist: avoidance, minimization, mitigation, and enhancements. The first aim is to avoid impacts entirely. When that is not possible, the second aim is to minimize impacts to the extent possible. Then, and only then, is mitigation considered. When practical or necessary, enhancements may be incorporated into the project as a method to offset the result of the impact.

These four categories are described in greater detail below.

#### 26.1.1 Avoidance

Whenever practical, the project team revises the design of the alternatives to avoid impacts. Avoidance can include alignment shifts or modifications to go around or otherwise avoid a sensitive area. The decision to implement avoidance measures is determined based on practical reasons. These reasons include the feasibility to implement design modification and the cost of avoidance related to the importance of the sensitive area. A costly realignment to avoid common plant varieties, for example, is seldom justified. The same realignment may be justified, however, to avoid a Section 4(f) resource or an endangered plant species.

When avoidance occurs, it is important to document each change so that team members working on the project later in time are aware of any such decisions. If not documented, a value engineering or field modification during construction could unknowingly produce the unwanted impact, negating the earlier action.

### 26.1.2 Minimization

Minimization involves measures to reduce impacts. Minimization efforts result when the design of the alternatives could not be revised to avoid impacts. Design changes that can assist in modifying impacts could include alignment shifts, off-season construction to avoid breeding seasons, use of structures instead of slopes, alternative construction methods, the incorporation of drainage structures to control releases into protected waters, and measures to minimize traffic or construction noise. If complete avoidance is not practical, then reducing the potential impact to the lowest practical level becomes the goal. As with avoidance, when minimization occurs, it is important to document the change so team members working on the project later in time are aware of these decisions.

### 26.1.3 Mitigation

A project team implements mitigation activities only if a residual impact cannot be avoided or minimized. The environmental document identifies mitigation measures for the range of impacts of the proposed actions, regardless of whether the resources impacted would be considered significant. The goal of mitigation is to reduce impacts to the lowest levels practical, although mitigation seldom results in the elimination of all impacts. The document should review measures, such as design alternatives, possible land use controls that could be enacted, and other possible efforts (Council on Environmental Quality, 40 Questions). Best practices are important mitigations that should be noted.

The document should also review mitigation measures that are outside the jurisdiction of the District of Columbia Department of Transportation (DDOT) to implement; however, this lack of jurisdiction should be noted in the discussion. The probability of implementation should be disclosed in the review, particularly when the mitigation falls outside DDOT control. If the mitigation measures have long-term implementation requirements and will not be ready in a timeframe commensurate with the occurrence of the impact, this fact should be noted also.

Mitigation measures generally fall into one of four action categories: repair or restore, reduce over time, replace, or compensate.

#### Repair or Restore

When a project team commits to repair or restore an area, the team is stating that it will restore an area impacted by the project to its preconstruction status, as feasible. Areas often considered for this activity are those that would be temporarily impacted or damaged by construction activities. This could include staging areas or temporary easements for construction access, or the removal of an existing feature to facilitate a required construction activity. Areas proposed for repair or restoration would not include areas considered permanently impacted by the project, such as permanent structures or roadbed features.

Most often, areas proposed for repair or restoration activities are those that have biological value. Restoration typically focuses on activities to reestablish the vegetation within the area. These activities should be conducted as soon as construction is completed in the impacted area. Details of these activities should focus on establishing a plant palette (list of plant species to use in revegetation efforts) to match (often referred to as “in kind”) or be compatible with the local environment, as well as considering irrigation needs.

Other types of repair or restoration activities can occur. These could repair any damage to nearby streets and other structures resulting from construction activities. When considering areas that have the potential for repair or restoration activities, first identify their existing use, then consider what would be constructed or conducted within that area, and finally, evaluate what damage might occur. It is important to note that the environmental document will provide commitments when repair or restoration activities are required for environmental reasons. However, some logistical repair work may not be specified. Because of this, contractors should be required to complete their work in the area by leaving it in as close to its original condition as possible. For example, a fence may need to be removed to allow vehicles to access a specific area. The contractor will want to ensure that the fence is replaced as soon as possible after construction has been completed in that area.

### **Reduce Over Time**

Some mitigations take effect almost immediately, while others may be started but their benefits might not be fully realized for many years. For example, a grassy cover may be reestablished in a single growing season; however, a stand of trees might be replaced immediately, but could take decades to achieve the density and biological value of the original stand.

### **Replace**

When a resource is impacted because the project needs to permanently occupy the space the resource initially occupied, replacement is often the only appropriate mitigation. If a roadside picnic area is impacted, a new roadside picnic area at a nearby location may be an appropriate mitigation by replacement. An in-kind replacement—wetland for wetland, picnic area for picnic area, tree for tree—is typically the preferred replacement, but in some cases, more creative replacements may be desirable, such as a ball field for a

picnic area or a stream restoration for a wetland. The project team should coordinate replacement mitigations carefully with the appropriate regulatory agencies.

### **Compensate**

Compensation is a type of mitigation to offset damages or displacements to land or facilities. It often occurs in the form of a cash payment or “in-lieu fee” from the agency leading the undertaking, disbursed to the party or parties impacted to make up for the loss. For example, when right-of-way requires the displacement of homes or businesses, a cash payment to the property owners is made for the property by the agency taking the action, and relocation assistance can be provided to offset other impacts.

#### **26.1.4 Enhancements**

An enhancement is a compensation that creates conditions better than those that existed before a project was constructed. An enhancement implies “doing a bit more to leave things better than they were before the project.” These are most often required as part of permits (Clean Water Act) or approvals (Section 4[f]) for a project. Incorporating enhancements into a project is an approach that builds credibility and trust between transportation and resource agency staff, and with the public.

Enhancements are often best developed by considering activities that are natural extensions of what is already being done on a project. When conducting repair or restoration activities in a public wetland or other type of native habitat, a trail with educational and interpretive signage could be added. When an impact to a public park occurs, public art, landscaping, a playground, or paved pedestrian path to an area could be added. These enhancements go farther than just equal compensation for a loss, and typically serve as key elements when developing a “net benefit” for a Section 4(f) impact.

## 26.2 Carrying through on Environmental Commitments

Several methods exist to carry environmental commitments forward into design, construction, operations, and maintenance. The Environmental Commitments Summary and the Environmental Plan Notes are two of the most useful methods.

DDOT may appoint an environmental commitments manager to coordinate environmental commitments throughout the duration of the project. The environmental commitments manager prepares the Environmental Commitments Summary; attends project meetings, including design meetings; ensures that environmental commitments are incorporated into designs; and reviews all project documents, including NEPA documents, permit applications, permits, memoranda of agreement or understanding, value-engineering recommendations, constructability reviews, right-of-way requirements, and other documents related to project design or construction.

### 26.2.1 What Is an Environmental Commitments Summary?

An Environmental Commitments Summary is a compendium of commitments the project team made in the NEPA document. The team uses this summary to ensure that all commitments are communicated to designers and implemented during the project.

The Environmental Commitments Summary begins with the environmental commitments contained within the NEPA document. The Environmental Commitments Manager will coordinate the updating and expansion of this list to make them useful to the design team. Copies of any potentially applicable documentation, contact information, or any useful explanatory mapping or text will be included. This summary should contain all the information required to complete the design, including the Environmental Plan

Notes, in accordance with the commitments made during the planning and NEPA process.

### 26.2.2 What Are Environmental Plan Notes?

Environmental Plan Notes are an important component of the Environmental Management System. The notes are how environmental commitments are communicated to the contractor and construction personnel. The engineering team writes the Environmental Plan Notes by using the data contained in the Environmental Commitments Summary and reviewed by the environmental commitments manager. The purpose of these notes is to inform the contractor and DDOT construction personnel of the environmental restrictions and mitigation commitments that they must incorporate into the project design and ultimately into the construction phase. The notes provide guidance throughout the construction process. Consequently, the notes must contain enough detail and relevant information to ensure that they can be implemented.

The Environmental Plan Notes are contract-specification and provision work items that each contractor must complete to fulfill its contract requirements. If an environmental commitment does not get incorporated into the plan and addressed in the construction contract by way of a specification or provision prior to being awarded, it is not binding on the contractor and may only be added through a contract change order.

Many Environmental Plan Notes are covered by standard specifications and best practices that are incorporated into most contracts. The environmental commitments manager will compare these requirements to project-specific commitments and ensure that project implementation efforts comply with environmental commitments. If not, the environmental commitments manager will develop nonstandard specifications to direct the contractor's work and incorporate these specifications into the Environmental Plan Notes.



# CHAPTER 27

## CONCURRENCE AND CONFLICT RESOLUTION



### CONTENT

27.1 Concurrence Meetings and Documentation

27.2 Conflict Resolution



# CONCURRENCE AND CONFLICT RESOLUTION

This chapter describes the concurrence and conflict resolution during the National Environmental Policy Act of 1969 (NEPA) process. The District of Columbia Department of Transportation (DDOT) and the lead federal agency, the Federal Highway Administration (FHWA), will seek concurrence from the cooperating and participating agencies at four points during the project development process. Upon review of the information, the agencies will provide concurrence that DDOT is properly considering and addressing any potential natural resource impacts related to the development of the project in balance with social and economic impacts. The goal is to identify and address agency concerns throughout the development process while precluding the routine revisiting of decisions that have been agreed to earlier in the process.

The four concurrence points are:

1. Purpose and need
2. Alternatives to be considered
3. Alternatives to be carried forward
4. Preferred alternative

## 27.1 Concurrence Meetings and Documentation

At appropriate points during the project development process, DDOT will schedule concurrence meetings with the cooperating and participating agencies. DDOT will notify cooperating and participating agencies of upcoming meetings at least one month ahead of the planned meeting date. DDOT staff members will be responsible for the logistical arrangements for the meeting and/or packet of meeting materials, unless assigned to a consultant.

Prior to each meeting, DDOT will provide the agencies with a packet containing the meeting materials necessary for the review and response to the appropriate concurrence point. This packet may contain some or all of the items listed below, depending on their availability and the stage of project development at the time of the meeting. For some projects, one meeting may be sufficient, and the initial packet will contain all of the following materials. For others, several meetings may be necessary, and the packets may contain a combination of these items.

- Transmittal/invitation letter
- Location map of the proposed project
- Information regarding the project development process
- Summary of the purpose and need for the project (only for the first concurrence point)
- Drawings and descriptions of the proposed alternatives
- Evaluation criteria for the alternatives
- Summaries of public involvement activities and materials
- Minutes of previous concurrence meetings on the project
- At least a summary of field data collected since the last meeting
- Staff recommendations (if any) for additional field studies

Minutes will be taken at the meeting to document coordination with agencies and concurrence.

## 27.2 Conflict Resolution

The assumption is that agreement at each of the four concurrence points will usually be achieved. However, the project development process may continue at the discretion of FHWA and DDOT, whether attempts to reach concurrence among the agencies are successful or not. The probability of nonconcurrence increases in more controversial projects. For such projects, dispute resolution will consist of informal efforts to reach a general consensus

among the participating agencies. Attempts will be made to resolve issues at the lowest possible level in each agency, with the involved agencies agreeing upon the direction for resolution.

However, if the dispute remains unresolved, any agency in nonconcurrence can elevate its concerns, as described below.

Conflicts arising between any parties shall be resolved as follows:

- The parties in conflict shall make a good-faith effort to resolve the issue between them.
- If the parties are not able to resolve the conflict between them within 5 working days of the concurrence meeting, they shall jointly prepare a written statement of the nature of the conflict. They will share the statement with DDOT, FHWA, and other agencies or consultants who are involved in the conflict. The statement will be presented within 10 working days of identification of the conflict at the concurrence meeting.
- The disagreeing parties will again consult in a good faith effort to resolve the conflict. Other parties who received the written statement shall be invited to join the discussion. This step will take no more than 5 working days from the availability of the written statement.
- If the conflicting parties are unable to resolve the conflict, the directors of the respective agencies or their designated representatives shall meet and resolve the differences.

# CHAPTER 28

## NEPA AND RIGHT-OF-WAY



28.1 Balancing Right-of-Way Detail in NEPA Documentation

28.2 Approaches to Right-of-Way Preservation and Advanced Acquisition



## NEPA AND RIGHT-OF-WAY

**T**his chapter provides information on the relationship of right-of-way and the National Environmental Policy Act of 1969 (NEPA) process. During the NEPA process, the establishment of project right-of-way needs, as well as staging or easement areas, provides the basis for identifying an impact footprint outside the existing right-of-way for the project. For NEPA analyses, a new right-of-way required for a project defines the conversion of an existing use to a transportation use. This conversion is what is evaluated in the NEPA document. It is for this reason that the right-of-way information is valuable for the NEPA process. The current stage of the project development process determines the level of certainty of the position of the right-of-way and, therefore, the specificity of the proposed impacts from the project. Advanced engineering design to refine right-of-way needs during the NEPA process is important to consider if the result could establish a design modification to avoid or minimize project impacts.

The potential for acquisition of new right-of-way for a project often generates interest and concern from adjacent residents and businesses during the NEPA process. These

types of impacts are often among the most sensitive to affected property owners and, therefore, must be addressed with care throughout the project development process. Communication of right-of-way needs to property owners is generally not conducted during the NEPA process. Some general coordination may occur and is typically limited to NEPA-required processes. Examples of these needs could include right-of-entry coordination to facilitate resource surveys, notification of the availability of the NEPA document for review and comment, or notification of or coordination at a public information meeting (scoping) or hearing regarding the NEPA process. More specific coordination would occur if additional information about the property were needed to complete the NEPA analysis. This could include information about property access requirements if alterations were expected from the project, history about the property to support the historic property survey, or hardship assessment related to the sale or proposed development of the property.

For any project with potential right-of-way acquisition needs, the District of Columbia Department of Transportation

(DDOT) will have professional real estate staff available to consult with property owners about right-of-way needs, proposed changes in property access, and relocations. Most importantly, all right-of-way acquisition and relocations must be planned to adhere to the Uniform Relocation and Real Property Acquisition Act of 1970 (the Act), as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 and 49 Code of Federal Regulations (CFR), part 24, effective April 1989. During the NEPA stages of project development, the need for specialized real estate professionals is typically least in the earliest stages (public meetings) and increases to a greater need when final project design decisions are being made—especially if relocations are involved and/or if funding and scheduling for real estate acquisition and project construction is near.

As the time for property acquisition approaches, those who are impacted by right-of-way needs and relocations are entitled to advisory services, appraisals, fair market value for property acquired, and the reimbursement of costs associated with relocation. These costs may include moving expenses, replacement housing costs, increased rental or mortgage payments, closing costs, and other valid relocation costs. In accordance with the Act, the replacement dwelling or business site for those who are relocated must be “decent, safe, and sanitary,” meaning that it must meet all of the minimum requirements established by federal regulations and conform to all housing and occupancy codes.

Ultimately, the DDOT right-of-way process is documented in detail in the DDOT Right-of-Way Manual as well as in Chapter 9 of the Design and Engineering Manual.

### **28.1 Balancing Right-of-Way Detail in NEPA Documentation**

The methodology used to address right-of-way needs in NEPA documentation must be structured to fit the

parameters of the project and the level of decision making currently at hand. Examples of the various levels of discussion are provided in Table 28-1. This general guidance addresses three levels of impact analysis for rights-of-way, based on the specifics of the project and the status of the project in the decision-making process. Table 28-1 is structured to address three levels of NEPA analysis: (1) pre-NEPA studies; (2) NEPA Draft Environmental Impact Statement/ Environmental Assessment (EIS/EA) documents with many alternatives; and (3) Advanced NEPA Draft EIS/EA with one preferred alternative or documentation for a Final EIS or Finding of No Significant Impact (FONSI).

Balancing the level of right-of-way detail is challenging throughout the NEPA process. A coordinated effort between engineering and NEPA planners is needed to establish an acceptable level of information. A certain amount of risk needs to be considered at each phase of project development. Directing this attention to the impact evaluation in the NEPA document is most important. Consideration of additional right-of-way detail should focus on (1) the potential risk that a significant impact would not properly be identified or evaluated in the NEPA document and (2) the potential to further evaluate a potential impact as a means to attempt to avoid or minimize the impact. The consequences of the first category could result in not identifying all permits or approvals required for the project or possibly requiring a second circulation of the environmental document. The second category could assist to reduce permitting or mitigation requirements, but careful review of advanced design work would be required to ensure additional effort was not being expended on an analysis that would not result in additional clarity of the impact. Because of the consequences of an inappropriate level of right-of-way detail in the NEPA document, the determination of an acceptable level of right-of-way detail for the project is critical for successful and timely delivery of the NEPA process.



## 28.2 Approaches to Right-of-Way Preservation and Advanced Acquisition

Typically, real estate acquisition must not occur until after the completion of the NEPA process, and even much later after significant detail is available to prepare a right-of-way plat during final design. However, there are techniques that can be used to preserve lands for future transportation improvements, particularly with cooperation from local units of government and property owners.

### 28.2.1 Corridor Preservation

Corridor preservation is an action to establish a commitment for a future transportation facility that is currently in the planning process. The level of detail about the facility could

be as basic as a general location and an objective for its designation and resulting cross-section. The establishment of this information in a publicly available document or approved transportation plan triggers the requirement for the local government to address the objectives of the transportation agency during the NEPA or local permitting process for the proposed development. The main objective of a corridor preservation strategy is to facilitate the review of proposed developments prior to their approval to ensure their implementation would not preclude a future transportation project. If a reasonable solution would not be attainable, the prior disclosure of the intent of the future transportation facility would provide the grounds for advanced legal action.

**Table 28-1 General Guidance and Examples for Addressing Right-of-Way in NEPA Documents**

Level of NEPA Analysis	Methodologies for Assessing Property Acquisition Impacts	Methodologies for Assessing Relocation and Access Adjustment Impacts
—Feasibility studies, scoping studies, and Tier 1 NEPA documents or overviews	Address needs and impacts broadly and estimate potential impacts either qualitatively or quantitatively. Emphasize broad comparisons of alternatives. Do not show specific right-of-way acquisition limits on maps; show the potential footprint if feasible and appropriate or only show roadway limits and point out areas, in general, where right-of-way will be needed.	Address qualitatively or quantitatively, depending on the level of detail, emphasizing broad comparisons of alternatives. Describe all impacts as “possible” or “potential,” not “proposed.” On mapping, show either general areas where potential impacts might occur or show specific buildings with concurrence from the client. Availability of replacement sites may or may not be discussed, depending on the potential importance of that topic.
—Projects with substantially differing alternative corridor locations or project configurations	Address impacts quantitatively to compare the amount of land acquisition for each alternative. On mapping, show the potential footprint for right-of-way acquisition and roadway limits. The level of detail must be sufficient to reflect, at minimum, conceptually engineered design and to provide a reasonable comparison of the alternatives. Typically, do not differentiate between potential fee acquisition and temporary/construction easements.	Address impacts quantitatively to compare the number of residential and business relocations for each alternative. If the level of detail is sufficient to determine setbacks, typically assume that nonconforming setbacks will result in relocation impacts. If relocation can be avoided with a change to property access, label the property accordingly and illustrate major access changes (for example, new frontage roads). Analyze and discuss the market availability of replacement housing and sites for business relocation. Use generalized and reasonable real estate and relocation cost estimates, with contingencies.
—Especially for projects with a final decision, in an advanced stage of development/funding, and with one preferred design	Address impacts quantitatively at a higher level of detail to more accurately determine land acquisition requirements—considering slopes, drainage, and reasonableness in working with property owners. On mapping, show potential construction limits and the preliminary plat for proposed right-of-way acquisition at a conceptual level. The level of detail should be set to more accurately support project cost estimates and to determine impacts and mitigations, including some differentiation between potential fee acquisition and temporary/construction easements.	Address impacts quantitatively to support near-final decisions with regard to which properties will be subject to relocation impacts or changes in access. If appropriate to do so, consult with individual property owners and address the potential for special cases, such as owners who might have the opportunity and desire to rebuild on a remaining portion of the same property. On mapping, show detailed concept plans for changes in property access. Analyze and discuss the market availability of replacement housing and sites for relocated businesses. If appropriate to support the planning process, refine the cost estimates to account for site-specific parcel values and relocation costs.

Methods to preserve future transportation corridors are noted by FHWA at: [http://www.fhwa.dot.gov/realestate/cp\\_bib.htm](http://www.fhwa.dot.gov/realestate/cp_bib.htm), an annotated bibliography on the topic. It provides information on publications that explore these and other tools and techniques, which fit the definition of corridor preservation herein:

- Corridor Maps/Planning and Regional Transportation Planning – These planning tools/techniques generally avoid transactions with land owners, but could impose zoning restrictions as an example of a corridor preservation. The objective with these tools is to clearly establish the project with the local agencies and to coordinate on proposed developments within and adjacent to the corridor as development applications are submitted and reviewed for approval. Developments should be reviewed in their potential to preclude the feasibility of the implementation of the transportation project.

Additional information on this topic is included in Transportation Corridor Preservation: A Survey of State Government Current Practices: May 2000 ([http://www.fhwa.dot.gov/realestate/cp\\_state.htm](http://www.fhwa.dot.gov/realestate/cp_state.htm)). That report indicates that DDOT does not currently have any particular corridor preservation programs in place (by exclusion). Therefore, the implementation of corridor preservation strategies for DDOT must be approached and developed very carefully, on a case-by-case basis, working with experienced DDOT right-of-way personnel.

- Exactions/Takings, Easements, Transferable Development Rights/Purchase of Development Rights – All of these

techniques are essentially partial acquisition approaches, wherein some value in the land is recognized and even “purchased,” although such transactions do not progress up to full fee acquisition of property.

NEPA practitioners should recognize that corridor preservation strategies often introduce legal precedents in addressing public agency objectives versus private property rights. Qualified right-of-way professionals are essential to aspects of this work.

### 28.2.2 Protective Buying and Hardship Acquisitions

Advanced purchase of right-of-way proposed for future projects, many years before construction, is a more certain and complete right-of-way preservation action. This approach would typically involve the full detailed process of corridor planning, engineering, and land acquisition based on eminent domain. The main difference between protective versus traditional purchasing is that the former is a slower pace of the land acquisition process. In the case of protective buying, the land acquisitions would typically be focused first on legitimate hardship cases, where the land owners have been disadvantaged by the planned project. Next, the priority would be on willing sellers, and so on. Incidentally, project teams should be prepared to work with hardship cases, sometimes even before a NEPA decision is finalized. A common example of a hardship case is a property owner who wishes to liquidate real estate assets in the interest of retirement or other financial need, who can legitimately claim that the transportation agency is the only reasonable buyer.

# CHAPTER 29

## LEGAL SUFFICIENCY AND OTHER LEGAL CONSIDERATIONS



# CONTENT

- 26.1 Legislation, Regulations, and Guidance
- 26.2 Legal Sufficiency
- 26.3 Administrative Record



# LEGAL SUFFICIENCY AND OTHER LEGAL CONSIDERATIONS

**T**ransportation projects attract attention and legal action from an assortment of stakeholders for a wide variety of reasons. Transportation agencies, including the District of Columbia Department of Transportation (DDOT) and the Federal Highway Administration (FHWA), have a variety of procedures to ensure that their environmental efforts comply with the law and to minimize the likelihood or cost of adverse legal action.

## 29.1 Legislation, Regulations, and Guidance

- National Environmental Policy Act of 1969 (NEPA) as amended
- Regulations of the Council on Environmental Quality (CEQ), 40 Code of Federal Regulations (CFR) parts 1500–1508 implementing NEPA
- Section 4(f) at 49 United States Code (USC) 303 and 23 USC 138

- Administrative Procedures Act, which governs the way federal independent agencies and executive department agencies propose and establish regulations
- 23 CFR 771.125(b), which requires a formal legal sufficiency review for any final Environmental Impact Statement (EIS) issued by FHWA
- 23 CFR 771.135(k), which requires a formal legal sufficiency review for any final Section 4(f) report issued by FHWA

## 29.2 Legal Sufficiency

The FHWA review for legal sufficiency is required by regulation for final EIS documents and is intended to assess and ensure the legal adequacy of the federal decision-making process. These reviews are a normal and necessary part of the project development process.

Legal sufficiency depends on the substantive content, procedural compliance, and the overall document quality and readability. These reviews assist FHWA and DDOT in understanding the litigation risks associated with a particular project, environmental documentation, and administrative record. A legally sufficient NEPA document does not eliminate the risk of legal challenge or guarantee success if a project is litigated.

The two key themes related to legal sufficiency of NEPA documents are:

- The legal sufficiency review
- The common trouble spots related to the legal sufficiency of NEPA documents

### 29.2.1 Legal Sufficiency Review

The legal sufficiency of NEPA documents is an important element of the overall NEPA project development process for federally funded transportation projects. It involves identifying and addressing potential legal risks of proposed projects. DDOT working through the division project engineer, seeking expert legal advice early and throughout the project and document development process is likely the best way to achieve the broader purposes of legal sufficiency.

Legal sufficiency reviews are normally performed concurrently with the FHWA Division Office routine review of the administrative draft of a Final EIS prior to its approval and formal circulation. However, depending on project complexity, controversy, and related issues, the review may be initiated at the Preliminary Draft EIS phase, the Draft EIS stage, or earlier. For DDOT projects, legal sufficiency review is provided by DDOT General Counsel

and FHWA General Counsel attorneys. These attorneys are familiar with the interpretations of NEPA law by the federal courts with jurisdiction over the states for which they are responsible.

Legal sufficiency reviews assess the document from the perspective of legal standards and litigation risk, rather than technical adequacy, which the attorney assumes to be correct and complete. The document is analyzed from the perspective of whether it was developed properly and answers the substantive questions that reasonably could be asked. The review focuses on the adequacy of the discussion of essential NEPA and project decision-making elements such as purpose and need, alternatives, scope of environmental resources and impact analysis, interagency coordination, public involvement, and responses to comments.

Legal sufficiency review comments generally focus on:

- Compliance with applicable laws, regulations, Executive Orders, or agency guidance. These are substantial comments, which require appropriate attention.
- Substantive questions or comments. These may include, for example, comments on the adequacy of supporting information related to the elimination of alternatives or analysis of Section 4(f) feasible and prudent alternatives.
- Consistency with FHWA policies. This may include, for example, comments related to mitigation measures or evidence of coordination with other agencies and/or the public.

- Editorial comments. Generally, comments in this category are opinions on ways in which the document can be improved.

### 29.2.2 Common Trouble Spots

The common issues of legal sufficiency and litigation risk are also those elements of the NEPA process that are essential to environmental compliance and project decision making. These generally include the following issues.

#### Purpose and Need

Project purpose and need is the linchpin of any NEPA study and is often a point of criticism and target in litigation. Common concerns include:

- The project purpose and need are defined too narrowly. This can lead to criticism that the range of reasonable alternatives was improperly narrowed.
- Project goals are established either vaguely or too broadly.
- Local agencies' policy and goals established in transportation, land use, and other relevant planning studies are not addressed in the purpose and need statement.

#### Alternatives Screening and Analysis

Related to purpose and need, the development and screening of alternatives is a frequent cause of criticism and target in litigation. The record must support the development and elimination of alternatives. Some common concerns include:

- Failing to explain the alternative development, screening, and evaluation process adequately so that it can be found rational, reasonable, and complete
- Eliminating alternatives without adequate or appropriate analysis to support the decisions
- Eliminating alternatives based on outdated information or older studies that may no longer be reliable
- Failing to reconsider alternative screening decisions later in the project development process when new information becomes available
- Over-reliance on weighting and scoring techniques. Such numerical rating systems can be useful for screening alternatives, particularly if numerous alternatives are being considered; however, the results of these techniques can be misleading if important information is not available or if too much or too little weight is given to certain factors. Scoring techniques should be used appropriately and with care.

#### Project Segmentations

The FHWA NEPA regulations require project alternatives to have logical termini, have independent utility, and not restrict consideration of alternatives for reasonably foreseeable future transportation improvements.

#### Study Area and Boundaries

Appropriate study area and environmental resource boundaries are critical to the NEPA process, yet are often described vaguely or without clear rationale. The study area is sometimes defined by limited boundaries, despite the fact that project impacts extend over a wide geographic area or

include different and overlapping environmental resource boundaries.

### **Indirect and Cumulative Effects Analysis**

The indirect and cumulative effects analysis required by CEQ regulations is often the target of criticism and litigation.

### **Compliance with Procedural Requirements**

The National Historic Preservation Act of 1966 (NHPA) Section 106, Employment Standards Administration (ESA) Section 7, and other procedural processes require the lead agencies to consult with resource and regulatory agencies concerning project impacts to specific resources. One way to address this concern is to include a summary in the relevant section of the NEPA document that highlights the consultation process, with key dates, participants, and reference to related documents in the record.

### **Compliance with Substantive Requirements**

Legal sufficiency reviews will look at the substantive requirements that will potentially influence the ultimate project decision. Two important requirements are Section 4(f) and Section 404, both of which require specific findings prior to approval of the project or permit.

### **Responses to Public Comments**

For some high-profile projects, public comments on the Draft EIS can be voluminous and substantive. Responding to these comments can be challenging and time consuming. In many cases, responses will be prepared by a team, which can make the process more efficient but also

may introduce inconsistency or result in responses that fail to address the substantive issue.

### **Responses to Resource Agency Concerns**

For large and complex projects, tension or disagreement can develop between the lead agency and resource agencies. It is important that relevant and reasonable resource agencies' concerns be considered and adequately addressed. Courts often look to resource agencies as subject-matter experts in the public sector, and failure on the part of the lead agency to adequately respond to their comments or address their concerns can present serious problems during litigation.

### **Accounting for New Information or Circumstances**

Essential information related to the project analysis and decision making must be kept current. Project studies should be continually updated, with new information incorporated into the document and administrative record as it becomes available.

## **29.3 Administrative Record**

The administrative record is the written record supporting the agency's decisions and decision making. An administrative record plays an important role if a project is litigated. The administrative record must show that:

- Agency decision makers understood the legal standard applying to the decision
- The standard was applied properly; that the agency considered the proper information, evaluated all of the factors requiring evaluation, and considered relevant



factors in terms of the legal requirements governing the action

- The action taken is reasonable

The Administrative Record should include all documents and material directly or indirectly considered by the agency decision maker in making the challenged decision. This includes documents and materials that:

- Cite whether they support or do not support the final decision of the agency
- Were available to the decision-making office at the time the decision was made
- Were considered by or relied upon by the agency
- Came before the agency at the time of the challenged decision, even if the documents and materials were not specifically considered by the final agency decision maker
- Provide both privileged and nonprivileged information

The administrative record can be organized in various ways—in chronological order, by issue, or by type of information. It should provide an index to allow readers easy access. After FHWA counsel reviews the administrative record, the FHWA must certify it. To have a complete and thorough administrative record, it should be created at the start of the project and continually updated. This will help ensure that no information is lost and will help enable organization of the information in a logical manner. While this is the preferred path, even if it is not followed, it is critical that all documents, correspondence, reference material, meeting summaries, guidance considered, studies,

notes, electronic files (including all e-mail), and any other information relied on be retained until all potential of litigation is past.

The administrative record needs to include privileged information as well as nonprivileged information. Once the record is compiled, privileged or protected documents and materials may be redacted or removed from the record. Ultimately, the administrative record should include all documents, including those from DDOT, from any consultants and subconsultants, from FHWA, and those provided to the project team by interest groups, the public, agencies, proponents, and opponents.

When compiling the administrative record, DDOT should:

- Search files
- Search e-mail and backup tapes
- Write facts and narrative
- Put items in chronological order
- Review court documents such as plaintiff's statement of facts
- Serve as a resource

At the outset of litigation, this entire file is submitted to the court, and the legal positions taken by the government are based on this written record. Therefore, a good administrative record should reflect what the agency did and why it acted. The record must reflect how the agency handled the information it received and developed. Because the record must reflect the way the agency handled negative information, include documents and

materials whether they support or do not support the final agency decision.

If the file is found to be inadequate after it is submitted to the court, the government may be allowed to complete the record, but this raises important questions about the completeness of the entire record. A court may allow extra-record discovery, including depositions of agency personnel, and may allow court testimony of agency personnel. The court may allow discovery if the court

determines that the incompleteness is based upon bad faith, that improprieties may have influenced the decision maker, or that the agency relied on substantial materials not included in the record.

The DDOT Environmental Document Review Form provided in Appendix I should be used to ensure that all documents needed for the administrative record are available.

# CHAPTER 30

## POST-NEPA CONSIDERATIONS





## POST-NEPA CONSIDERATIONS

**T**he overall National Environmental Policy Act of 1969 (NEPA) process really begins with the early stages of project planning and continues through construction and maintenance. For effective project development, environmental considerations must be given their due throughout all stages of project decision making. Because many people associate NEPA with the document itself, this chapter will focus on the considerations after approval of the final NEPA document, without regard to whether it is a Categorical Exclusion (CE), an Environmental Assessment (EA, followed by a Finding of No Significant Impact, or FONSI), or an Environmental Impact Statement (EIS, followed by a Record of Decision, or ROD).

During the preparation and ultimate approval of the NEPA document, the project manager must focus on identifying potential impacts, taking measures to avoid or minimize those impacts, and finally developing mitigation measures to offset any impacts that cannot be avoided or minimized. In addition, conditions necessary to fulfill all permit requirements will have been addressed. Extensive

coordination has been performed with the many agencies and the general public to arrive at these final measures. Besides the actual NEPA document, the recordation of the promises made to successfully get this far in the process may take other forms such as a memorandum of agreement concluding in Section 106. The project development stages that follow approval of the NEPA document, such as final design, right-of-way acquisition, and construction are required to fulfill the commitments that were made to allow the project to advance.

In an ideal world, there would be one project manager who would track the same project from inception through construction and maintenance. Because this may not always be feasible, there needs to be an effective tracking system that provides a method for ensuring that any and all commitments made during each of the project development phases are incorporated into the subsequent stages. For example, say that construction-related vibrations have been raised as a concern by a citizen commenting on a Draft EIS. One likely response might be to describe the estimated

vibrations based on the likely construction equipment to be used. However, because at this stage it is only a professional opinion as to the type of equipment that the contractor is likely to use, there may be a further commitment to field verify the actual vibrations at the time of construction. Or there may be an even further commitment to discontinue construction operations if the vibrations actually exceed a predetermined level.

Without a way to track these commitments through each project development stage, it is very easy to lose track of these items, particularly with the passage of time and with the inevitable changing of agency personnel. One thing not likely to change is the citizen who raised the concern from the beginning. It is easy to anticipate that the concerned citizen will be observing very closely to make sure that the vibration-related commitment will be satisfied. To maintain the integrity of the decision-making NEPA process and, more importantly, the trust and integrity of the District of Columbia Department of Transportation (DDOT) personnel, these promises must be tracked and kept.

Understanding permit requirements and associated mitigation measures and commitments is particularly important because agencies with permit authority can stop or delay the project from advancing. Project managers must track these items to ensure the schedule is maintained and permits will be able to be issued by the responsible agencies.

Many agencies and project managers have developed their own systems for tracking commitments through the successive stages of project development. These systems range from very simple manual methods to sophisticated automated methods. The manual methods usually involve some type of checklist that is filled out that details the commitments by resource area. This checklist can then be

passed along through the successive project development stages for incorporation into that stage.

During each stage, it is also important to monitor for changes to either the resources or the affected environment. These changes may have an impact on the ability to meet the commitments. Or because of changes, the commitments may need to be modified. It is important in these instances to follow up with both the public and the agencies that were consulted from the beginning.

Depending on the complexity of the project and the type and range of commitments made, it is also advisable to consider the incorporation of a position for an environmental monitor during construction, or at least during certain phases of construction. This individual has the responsibility to ensure that the contractor satisfies all permit and mitigation requirements that have been developed over the life of the project.

The DDOT Environmental Management System contains a series of checks and balances to ensure adherence to commitments and mitigation.

### **Construction: Work Zone Safety Audit Inspection**

Work zone safety audit inspections may be required during construction activities. The following procedures should be followed for the inspections.

1. Attend Preconstruction meeting to collect all approved plans and data analysis projects from Teams with Notice To Proceed Dates
2. Pre Audit Meeting – Conduct meeting with Program Manager, Project Engineer, Inspector, or Traffic Safety Officer three weeks prior to work zone installation

- Review the General Project Information
- Review of Traffic Management Plan
- Review of Agency Policies, Processes and Procedures (Optional)

3. Audit Meeting

- Presentation by the Project Owner's Project Management Team
- Presentation by the Project Design Team
- Presentation by the Traffic Control Team

4. Audit Inspection – Conduct Work Zone Audit

Inspection and prepare Field Inspection Report. The Field Inspection Report will provide the following:

- Experiencing the Driving in the Work Zone and the Surrounding Area
  - Peak Hours – Off Peak Hours
  - Measure Que lengths
  - Delay Times
  - Actual Travel Speeds
- Inspection of Construction Activity Area
  - Worker's Safety Apparel
  - Temporary Traffic Barriers
  - Speed Reduction Signs

- Inspection of Temporary Traffic Control Devices
  - Signs
  - Marking
  - Signals
  - Lighting
  - Delineation

5. Audit Analysis

Provides audit team an opportunity to collect information and determine potential risk and what practical mitigation measures are needed. An audit analyses can cover the following areas:

- Overall Work Zone Management and coordination
- Transportation Operations Management Plans
- Public Information Plans
- Temporary Traffic Control Plans
- Construction Worker Safety
- Monitoring Work Zone Safety and Mobility Impacts during Construction





# APPENDICES



APPENDIX

A

DDOT ENVIRONMENTAL FORM I

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District Department of Transportation							
Project Development & Environmental Evaluation Form (Form I)							
<b>New Form:</b>				<b>Revised Form:</b>			
<b>1. Project Name (&amp; Number):</b>							
<b>2. TIP ID Number &amp; Year:</b>							
<b>3. Previous Related Work (if any):</b>							
<b>Title of the Previous Planning Study/Work:</b>							
<b>Completion Year/time</b>				<b>Study Completed by (Name of Agency)</b>			
<b>4. Project Location (Please attach a map of the project area)</b>							
<b>Roadway/Street Name:</b>							
<b>Functional Classification (Place "X")</b>	<b>INTERSTATE</b>	<b>FREEWAY</b>	<b>PRINCIPAL ARTERIAL</b>	<b>MINOR ARTERIAL</b>	<b>COLLECTOR</b>	<b>LOCAL STREET</b>	<b>OTHER</b>
<b>5. Purpose of the Project:</b>							
<b>6. Need of the Project (Place "X" where applicable):</b>							
Safety	System Linkage	Pavement condition	Operational improvement	Community need	Congestion Relief	Bicycle /Pedestrian	Environmental
Utility Relocation	Roadway Deficiency	Structural condition	Transportation Demand	ADA	Geometric Conditions	Planning Needs	other
<b>7. Project Description:</b>							
<b>8. Funding Type (Place "X" where applies) :</b>							
<b>Federal</b>			<b>Local</b>			<b>Other</b>	
<b>9. Estimated Cost of the Project:</b>							
<b>TOTAL :</b>	<b>PLANNING:</b>	<b>PE:</b>	<b>NEPA:</b>	<b>FINAL DESIGN:</b>	<b>CONSTRUCTION:</b>		
\$	\$	\$	\$	\$	\$		
<b>10. Project Type/Phase (Place "X" where applicable):</b>							
Administrative	Planning	PE	Environment	Final Design	Construction	Maintenance	
<b>IF AN ADMINISTRATIVE PROJECT/ACTION, PLEASE SKIP SECTIONS 11-17.</b>							
(Administrative actions include training, staff charges, research that does not include construction, IT, Office supplies, etc)							
<b>11. Limits of Proposed Work (Street and/or Block number):</b>							
North		South		East		West	
<b>12. Schedule of the Project (Identify month &amp; year):</b>							
Planning/PE		Environment		Design		Construction	

13. Traffic Data (not required for administrative, resurfacing, or maintenance projects) :					
Traffic	Year	ADT	LOS & Delay	Operating Speed	Crashes
Existing					
Build Year (opening year)					
Design Year (20-25 years)					
14. Roadway Conditions :					
	Total	General Purpose	Parking	Bike Only	Bus/Transit Only
Existing Number of Lanes					
Proposed Number of Lanes					
Existing Pavement condition (PCI)					
15. Project Information:			Yes	No	Comment
A. Facility on new location or re-alignment					
B. Addition of Traffic Lanes					
C. Removal of Traffic Lanes					
D. Permanent change in traffic pattern or LOS					
E. Roadway construction or reconstruction					
F. Roadway resurfacing					
G. Bridge construction					
H. Bridge reconstruction or rehabilitation					
I. Removal of Parking					
J. Removal of vegetation or Trees					
K. Work outside the DDOT ROW (including air rights)					
L. ROW Acquisition (including easement, lease, air rights etc)					
M. Relocation of Businesses (temporary or permanent)					
N. Relocation of residences (temporary or permanent)					
O. Change in Access on Interstate/Freeway or changes to Ramps					
P. Work on, over, or under an Interstate or Freeway?					
Q. Work over or under CSX, Amtrak, NPS, or rail tracks (or air					
R. Map of the project area attached (required)					
16. Public and Agency Coordination			Yes	No	Comments
A. Was general public involved (please describe how)?					
B. Were other agencies (FHWA, SHPO, NPS etc) involved?					
17. Resources			Yes	No	Possible/ Comments
A. Does the project address intermodal transportation needs (bike/transit/pedestrians)?					
B. Does the project impact land use/planned growth?					
C. Sec 4f & sec 6f Impacts: Does the project require work in a Park, Recreation area, or wildlife area?					
D. Sec 4f & sec 106 impacts: Does the project require work in a historic/archeological site, district, area, or street?					
E. CWA Sec 404: Does the project require work within a water body (river, wetland, stream, etc)?					
F. CWA Sec 402: Does the project require discharge of water or material directly into a river, wetland, or stream, etc?					
G. Sec 10: Does the project over a navigation channel?					
H. Does the project require work in hazardous waste site?					
I. ESA Sec 7: Does the project impact habitat					
J. Have the Soil and Erosion plans been developed?					
K. Has Storm Water Management plan been developed?					

L. Does the project result in permanent noise level increase?			
M. Is there any known controversy about the project?			
N. Does the project permanently affect the travel pattern?			
O. Does the Project have any environmental features e.g. increased green space, recycled materials, etc (describe)?			
<b>18. Other Comments (use additional pages if needed):</b>			
<b>19. Prepared by (Project Manager):</b>		<b>Phone:</b>	<b>Date:</b>
NAME:			
ADMINISTRATION:			
<b>PLEASE DO NOT WRITE BELOW. TO BE COMPLETED BY DDOT PROJECT DEVELOPMENT &amp; ENVIRONMENT DIVISION</b>			
<b>20. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) APPROVAL/DOCUMENTATION:</b>			
	<b>Categorical Exclusion, Level 1</b> – The proposed action meets the criteria for CE-1 level, per FHWA-DDOT CE PA. No further environmental documentation required.		
	<b>Categorical Exclusion, Level 2</b> – The proposed action meets the criteria for CE-2 level, per FHWA-DDOT CE PA. Additional documentation needed. Form II to be prepared.		
	<b>Categorical Exclusion, Level 3</b> – The proposed action meets the criteria for CE-3 level per the FHWA-DDOT CE PA. Additional documentation needed. CE III document to be prepared.		
	<b>EA</b> – An Environmental Assessment is to be prepared.		
	<b>EIS</b> – An Environmental Impact Statement is to be prepared.		
<b>21. DC ENVIRONMENTAL POLICY ACT (DCEPA) APPROVAL/DOCUMENTATION:</b>			
	<b>EXEMPT:</b> a) A federal action where a NEPA Action (Cat Ex, EA, EIS) has been taken (Ref: DCMR 7202.1(b)) b) Planning or Feasibility Study or Preliminary Engineering (Ref: DCMR 7202.1(c)) c) Operation, repair, maintenance of existing public structures(Ref: DCMR 7202.2(a)) d) Replacement, renovation, or reconstruction of existing structures (Ref: DCMR 7202.2(b))		
	<b>EISF</b>		
	<b>EIS</b>		
<b>22: COMMENTS/ADDITIONAL REVIEWS:</b>			

**Recommended and Approved by DDOT Project Development & Environment Division:**

Recommended by: \_\_\_\_\_  
NAME
Date

Approved by: \_\_\_\_\_  
NAME & SIGNATURE
Date





APPENDIX  
B

DDOT ENVIRONMENTAL FORM II

---



District Department of Transportation

Project Development & Environmental Evaluation  
CATEGORICAL EXCLUSION CE-II FORM (Form II)

Part I – PROJECT DESCRIPTION & DESIGN INFORMATION

**A. PROJECT INFORMATION:**

Project Manager: \_\_\_\_\_ Administration: \_\_\_\_\_ Ward: \_\_\_\_\_

Federal Aid Project Number: \_\_\_\_\_ TIP ID: \_\_\_\_\_

Name of the Facility/Roadway: \_\_\_\_\_

Funding Source:  Federal  Local  Private  Other

Limits of Proposed work:

North:	South:	East:	West:
Total Length of the proposed work (feet):			

**B. PURPOSE AND NEED FOR THE PROJECT:**

Purpose:

Need:

**C. ALTERNATIVES:**

Describe Alternatives that were considered:

The No Build / Do Nothing Alternative Does not: (Mark "X" on all that apply):

Correct existing capacity deficiencies;	<input type="checkbox"/>
Correct existing safety hazards;	<input type="checkbox"/>
Correct the existing roadway geometric deficiencies;	<input type="checkbox"/>
Correct existing deteriorated conditions and maintenance problems, or	<input type="checkbox"/>
Result in serious impacts to the public and general welfare of the economy.	<input type="checkbox"/>

Describe any other reasons beyond the ones listed above that the No Build / Do Nothing Alternative does not address the purpose of the project (if any):

**D. PREFERRED ALTERNATIVE** (not required for Resurfacing or Basic Asset Management projects):

**1. Does the Preferred Alternative:**

- Add General Purpose Lanes?
- Remove General Purpose Lanes?
- Add Transit Only Lanes?
- Remove Transit Only Lanes?
- Add Street Car (Fixed guide rail system) to existing lanes as shared lane(s)?
- Add Parking (Rush hour only) Lanes?
- Remove Parking (Rush hour only) Lanes?
- Convert One-way operation to Two-Way Operation?
- Convert Two-way operation to One-Way Operation?
- Create a Circle or Oval or Roundabout or Square?
- Create Grade separation on an intersection or street?
- Remove Grade separation on an intersection or street?
- Create a new intersection?
- Remove an existing intersection?

Y	N
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

If the Answer to any of the above is Yes, then complete section D.2; otherwise skip to section D3.

**2. Analysis:**

- Was an existing conditions corridor traffic analysis performed?
- Was an opening year traffic analysis performed for the preferred alternative?
- Was a design year traffic analysis performed for the preferred alternative?
- Was an opening year traffic analysis performed for NO BUILD/NO ACTION alternative?
- Was a design year traffic analysis performed for NO BUILD/NO ACTION alternative?
- Was Synchro and/or VISSIM and or CORSIM/HCS traffic analysis performed for the above conditions?
- Was MWCOG or DDOT Travel Demand Model Used to forecast the traffic for opening and Design year?
- Was an intersection LOS analysis performed?
- Was a Corridor LOS analysis performed?
- Did the Analysis include at least one upstream and one downstream street (case by case basis)?
- Is the Traffic Analysis attached with this Form?
- Is the Typical Section drawing(s) of the Preferred alternative attached with this Form?
- Is the Plan View drawing(s) of the Preferred alternative attached with this Form?
- Were the lane changes (or street car tracks) submitted to TPB (MWCOG) part of CLRP/STIP/TIP submittal?
- Is the project and the proposed changes in the Approved/Conforming CLRP?
- Are the proposed lane changes (and/or street car) coded in the MWCOG model?  
(Design Year = 20 + year or MWCOG Horizon Year; NO ACTION=Do Nothing/ if this project does not occur)

Y	N
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
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<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

**3. Coordination:**

- Was the preferred alternative coordinated with all DDOT administrations?

Y	N
<input type="checkbox"/>	<input type="checkbox"/>



**E. DESIGN CRITERIA FOR BRIDGES/CULVERTS:**

If there is no bridge or culvert in the project, skip to section F.

Structure Number(s): \_\_\_\_\_ Sufficiency Rating: \_\_\_\_\_

Bridge/Culvert	Existing	Proposed
Bridge Type:		
Number of Spans:		
Weight Restrictions:		
Curb to Curb Width:		
Shoulder Width:		
Under Clearance:		

Will the structure be rehabilitated or replaced as part of the project? Y  N

**F. MAINTENANCE OF TRAFFIC DURING CONSTRUCTION:**

	Y	N
Is a temporary bridge proposed?	<input type="checkbox"/>	<input type="checkbox"/>
Is a temporary roadway proposed?	<input type="checkbox"/>	<input type="checkbox"/>
Will the project involve the use of a detour or require a ramp closure?	<input type="checkbox"/>	<input type="checkbox"/>
Will provisions be made for access by local traffic and so posted?	<input type="checkbox"/>	<input type="checkbox"/>
Will provisions be made for through-traffic dependent businesses?	<input type="checkbox"/>	<input type="checkbox"/>
Will provisions be made to accommodate any local special events or festivals?	<input type="checkbox"/>	<input type="checkbox"/>
Is an MOT plan prepared?	<input type="checkbox"/>	<input type="checkbox"/>
Will the proposed MOT substantially change the environmental consequences of the action?	<input type="checkbox"/>	<input type="checkbox"/>
Is there substantial controversy associated with the proposed method for MOT?	<input type="checkbox"/>	<input type="checkbox"/>

Remarks:

**G. ESTIMATED PROJECT COST AND SCHEDULE:**

Estimated Cost of the Project:					
TOTAL :	PLANNING:	PE:	NEPA:	FINAL DESIGN:	CONSTRUCTION:
\$	\$	\$	\$	\$	\$
Limits of Proposed Work: (Street and/or Block number)					
North		South		East	West
Schedule of the Project (identify month & year):					
Planning		PE		NEPA	
				Final Design	
					Construction

**H. RIGHT OF WAY AND UTILITIES:**

Number of parcels affected by temporary ROW (including Air Rights): \_\_\_\_\_  
 Number of parcels affected by permanent ROW (including Air Rights): \_\_\_\_\_  
 Approximate area of temporary ROW needed (including Air Rights): \_\_\_\_\_ **acre**  
 Approximate area of permanent ROW needed (including Air Rights): \_\_\_\_\_ **acre**

Appendix B – DDOT Environmental Form II

Is there work over or under NPS property, CSX, Amtrak, railroad tracks?  
Are there air rights issues?  
Have the permits for construction in air rights obtained?  
Has Utility Coordination been completed?  
Are large scale transmission facilities located within the project area?  
Are there any private utility easements within the project area?  
If YES, will it be impacted by the project?

<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input type="checkbox"/>
<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input type="checkbox"/>
<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input type="checkbox"/>
<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input type="checkbox"/>
<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input type="checkbox"/>
<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input type="checkbox"/>
<b>Yes</b>	<input type="checkbox"/>	<b>No</b>	<input type="checkbox"/>

**Remarks:**

## Part II – IDENTIFICATION & EVALUATION OF IMPACTS OF THE PROPOSED ACTION

### A – ECOLOGICAL RESOURCES

#### 1. Rivers, Streams and Wetlands

	<u>Presence</u>		<u>Impacts</u>	
	Y	N	Y	N
River				
Stream				
Creek				
Pond				
Other				

**Total Area impacted (square ft):** \_\_\_\_\_

If the resource is not present, the remainder of section A does not need to be completed

	<u>Coordination</u>		<u>Approval</u>	
	Y	N	Y	N
<b>Agency Coordination</b>				
National Marine Fisheries (NMF)				
United States Fish and Wildlife Service (USFWS)				
District Department of Environment (DDOE)				
United States Army Corps of Engineers (USACE)				
National Park Service (NPS)				

**Remarks:**

IF THERE ARE POTENTIAL WETLANDS IMPACTS, DO YOU NEED:	<u>Documentation</u>	
	Y	N
Wetland Determination		
Wetland Delineation Report		
Individual Wetland Finding		
Sec 404 Permit needed?		
Does the project qualify for a Sec 404 NWP?		
If YES, Please provide NWP number (e.g. NWP 3. Maintenance; or NWP 14. Linear Transportation)		
Sec 402 (NPDES) Permit needed?		
Does the project qualify for a Sec 402 General Permit?		

Avoiding the wetland resource in this action would result in (Mark all that apply and explain):	Yes
Substantial adverse impacts to adjacent homes, business or other improved properties;	
Substantial increase to the project costs;	
Unique engineering, traffic, maintenance, or safety problems;	
Substantial adverse social, economic, or environmental impacts, or	
The project will not meet the identified purpose / needs.	

**Remarks (if you answered Y to any of the above, please describe here):**



**2. Habitat (Fish, Wildlife, Endangered Species-ESA)**

**Threatened or Endangered Species**

Federal species found in project area?  
 State species found in project area?  
 If species is present, please provide the name.

Presence		Impacts	
Y	N	Y	N
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="text"/>			

**Agency Coordination**

National Marine Fisheries (NMF)  
 United States Fish and Wildlife Service (USFWS)  
 District Department of Environment (DDOE)  
 United States Army Corps of Engineers (USACE)  
 National Park Service (NPS)

Coordination		Approval	
Y	N	Y	N
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Remarks (if you answered Y to any of the above, please describe here):

**B - CULTURAL RESOURCES (Historic and Archeological-sec 106)**

	Presence		Impacts	
	Y	N	Y	N
Historic Area	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Historic District	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Historic Streets	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Historic Parks	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Historic Properties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Historic Bridge	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Archeological Site	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Does the Project qualify for the Citywide Sec 106 PA?

Y	N
<input type="checkbox"/>	<input type="checkbox"/>

If the Project qualifies for the City wide PA or if the resource is not present, remainder of Sec B does not need to be completed.

Documentation	Y	N	Date of approval and authorizing agency
NO EFFECT Concurrence Letter	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
NO ADVERSE EFFECT Concurrence Letter	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
MOA/PA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
Documentation of Consultation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
Phase I Cultural Resources Survey Report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
Phase I History/Architecture Survey Report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
Phase I Archaeology Survey Report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
Phase II Cultural Resources Survey Report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
Phase II History/Architecture Survey Report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
Phase II Archaeology Survey Report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>

Remarks:

**C – SECTION 4(F) RESOURCES**

Section 4(f) Resources	Presence		Impacts	
	Y	N	Y	N
Publicly owned park (including NPS, DPR)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Publicly owned recreation area	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Historic Sites/Resources	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sites eligible &/or listed for the NRHP	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wildlife Refuge	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If the resource is not present, the remainder of section C does not need to be completed

Is temporary occupation of any of the resources listed above needed (for construction staging, etc)  Y  N

Type of Approval Needed	Y	N	approval dates
Temporary Use Section 4(f)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
De minimus	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
Programmatic Section 4(f) Evaluation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
Individual Section 4(f)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>
Section 6(f)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>

**Remarks:**

**D - AIR QUALITY (CAA)**

1. Conformity Status of the Project	Y	N
Is this project in the most current MWCOG air quality conforming (approved) TIP?	<input type="checkbox"/>	<input type="checkbox"/>
Is this project in the conformed CLRP?	<input type="checkbox"/>	<input type="checkbox"/>
Is this project exempt from regional conformity analysis?	<input type="checkbox"/>	<input type="checkbox"/>
Has the project scope changed substantially since the conformity analysis?	<input type="checkbox"/>	<input type="checkbox"/>
If YES, will this change require a reevaluation of the TIP conformity?	<input type="checkbox"/>	<input type="checkbox"/>
<b>2. Project Level Description</b>	<input type="checkbox"/>	<input type="checkbox"/>
Will the project move the travel lanes closer to sensitive land uses?	<input type="checkbox"/>	<input type="checkbox"/>
Will the project add lanes?	<input type="checkbox"/>	<input type="checkbox"/>
Will the project remove lanes?	<input type="checkbox"/>	<input type="checkbox"/>
Does the project result in (or maintain) LOS "D" or worst in the Design year & beyond?	<input type="checkbox"/>	<input type="checkbox"/>

If the answer to any of the questions above is "Yes" then complete the following. Otherwise go to next section.

3. Project-Level Analysis and Impacts	Y	N
Is this project exempt from project level conformity analysis?	<input type="checkbox"/>	<input type="checkbox"/>
Is a Hot Spot analysis required for this project?	<input type="checkbox"/>	<input type="checkbox"/>
Which pollutant(s): PM2.5____ PM10____ CO____ Ozone____	<input type="checkbox"/>	<input type="checkbox"/>
Is an air toxics (MSAT) analysis required for this project?	<input type="checkbox"/>	<input type="checkbox"/>
Type of Analysis: Qualitative____ Quantitative____	<input type="checkbox"/>	<input type="checkbox"/>

**Remarks:**

**E - NOISE:**

**1. Project Type Description**

- Does this project involve construction of a highway on a new alignment?
- Does this project result in a significant change in the horizontal alignment of an existing highway?
- Does this project result in a significant change in the vertical alignment of an existing highway?
- Does this project add new through lanes (GP, HOV, HOT, Transit) to an existing highway? (i.e. total number of lanes increases)
- Will the project move the travel lanes closer to sensitive land uses?
- Will the project result in increase of traffic?

Y	N
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

Complete section 2 & 3 only if the answer to any of the above is "Yes" otherwise go to section 4, Construction Noise.

2. Noise Level	Year	NAC Activity Category	NAC Activity Criteria (dBA)		Existing Noise Levels (dBA)		Future Noise Levels (dBA)		Receptor Type (e.g. school, hospital, etc)
			Leq (h)	L10 (h)	Leq (h)	L10 (h)	Leq (h)	L10 (h)	
Existing									
Build Year (opening year)									
Design Year (20-25 years)									

**3. Analysis & Abatement**

- Will the project result in increase in Noise Levels?
- Does the project "approach (i.e. 1 db(A) less than NAC)" the NAC Criteria?
- Will the project result in increase in Noise Levels higher than NAC Criteria?
- Will the project result in increase in "Substantial Noise Increase" (i.e. over 10 dBA)?
- If YES, have noise abatement measures been considered, consistent with FHWA policy?
- Is noise abatement found to be reasonable and feasible?

Y	N
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

If NO noise abatement is found to be reasonable and feasible, explain why?

Other Remarks:

**4. Construction Noise**

- Are construction noise abatement measures considered?

Y	N
<input type="checkbox"/>	<input type="checkbox"/>

Please explain, what types of construction noise abatement measures will be used in construction:

**F – COMMUNITY IMPACTS (Title VI & EJ)**

**Regional, Community & Neighborhood Factors**

- Does the project area contain concentrations of minority, low-income, limited-English populations or any other population protected by Title VI?
- Will the proposed action result in substantial impacts to community cohesion?
- Will the proposed action result in substantial impacts to local tax base or property values?
- Does the project have the potential to affect accessibility for people with disabilities?
- Does the project negatively impact minority-owned or small businesses?

Y	N
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

Will the proposed action result in reasonably foreseeable secondary or cumulative impacts to the community?

<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

Will the proposed action result in substantial impacts on health & educational facilities, public utilities, fire, police, emergency services, religious institutions, public transportation facilities?

**Remarks:**

**Environmental Justice** (Presidential Executive Order 12898)

During public involvement activities, were Environmental Justice issues raised?

<b>Y</b>	<b>N</b>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

Are any Environmental Justice populations located within the project area?

Will the project result in adversely high or disproportionate impacts to the population?

**Remarks:**

**Displacement of People or Businesses:**

Will the proposed action displace people or businesses?

<b>Y</b>	<b>N</b>
<input type="checkbox"/>	<input type="checkbox"/>

Number of displacements: Residences: \_\_\_\_\_ Businesses: \_\_\_\_\_ Institutions: \_\_\_\_\_ Others: \_\_\_\_\_

**Remarks:**

**G – PUBLIC INVOLVEMENT**

23 CFR 771.111 (h)(2)(i) and (ii) states that every Federal action requires some level of public involvement, providing for early and continuous opportunities throughout the project development process. The level of public involvement should be commensurate with the proposed action.

Was general public involved in the development of the project?

<b>Y</b>	<b>N</b>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

Were public meetings held for the project?

Were you inclusive of minority and low income people in public involvement activities?

**Please explain** how public was involved especially minority and low income community.

**Public Controversy on Environmental Grounds**

Will the project involve substantial controversy concerning community and/or natural resource impacts?

<b>Y</b>	<b>N</b>
<input type="checkbox"/>	<input type="checkbox"/>

**Remarks:**

**H – HAZARDOUS MATERIALS & REGULATED SUBSTANCES**

Are there any hazardous waste/sites present in the project area?  Y  N

**Documentation**

	Y	N	Approval Date
Phase I Environmental Site Assessment			
Phase II Environmental Site Assessment			
Design for Remediation			

**Remarks:**

Prepared by: \_\_\_\_\_ Name Date

\_\_\_\_\_ Organization/Administration

\_\_\_\_\_ Phone/Email

**PLEASE DO NOT WRITE IN THE NEXT SECTION. DDOT PROJECT DEVELOPMENT & ENVIRONMENT DIVISION WILL COMPLETE.**

**To be completed by Project Development & Environment Division**

Part III. DDOT PROJECT DEVELOPMENT & ENVIRONMENT DIVISION REVIEW

**A – PERMITS & APPROVALS CHECKLIST**

	<u>Required</u>	<u>Not Required</u>	<u>Complete</u>
<b>Sec 404/Section 10 Permit (Corps of Engineers)</b>			
Nationwide (NWP)			
Pre-Construction Notification (PCN)			
Individual Permit			
<b>Sec 402 NPDES Permit (EPA)</b>			
Construction General Permit (CGP)			
Individual Permit			
<b>Sec 401 Water Quality Certification (WQC)</b>			
<b>Section 9 Bridge Permit (US Coast Guard)</b>			
<b>Wetland and/or Stream Mitigation</b>			
<b>NPS Permit</b>			
<b>Value Engineering</b>			
<b>Interchange Justification Report (IJR/IMR)</b>			
<b>Major Project Plan</b>			
<b>Section 106</b>			
Citywide Programmatic Agreement			
No Adverse Effect Letter			
MOA			
Individual PA			
<b>Sec 4f</b>			
<b>Traffic Analysis</b>			
<b>Air Quality Analysis</b>			
Regional Conformity			
Project Level Conformity			
<b>Noise Analysis</b>			
<b>Sec 7 Consultation (ESA)</b>			
<b>Hazmat Assessment</b>			
<b>Title VI/EJ Assessment</b>			
<b>NCPC Approval</b>			
<b>NPS Approval</b>			
<b>ROW Acquisition Document (including Air Rights)</b>			
<b>Air Rights permits/approvals</b>			
<b>Other</b>			

Remarks (if you have completed the approval, please provide a copy as part of your application):

**B – ENVIRONMENTAL COMMITMENTS MADE & RESOURCES TO BE AVOIDED**

**C: The Project Does Not**

	Y	N
Have a significant impact on any natural, cultural, recreational, historic or other resources		
Involve significant air, noise, or water quality impacts		
Have significant impacts on travel patterns		
Either individually or cumulatively, have any significant environmental impacts.		
Induce significant impacts to planned growth or land use for the area		
Require the relocation of significant numbers of people		
Involve any right-of-way acquisition or disposal		
Involve Commercial or residential displacement		
Involve any use of properties protected by Section 4(f) except temporary use.		
Involve any use of properties protected by Section 6(f)		
Have a determination of adverse effect by the State Historic Preservation Office.		
Require any Sec 404 Individual Permits		
Require any Section 402 (NPDES) Individual Permits.		
Make any changes in access control on the freeway or the interstate system.		
Involve use of a temporary road, detour or ramp closure unless the use of such facilities satisfy the following conditions:		
1. Prohibit access by local traffic		
2. Adversely affect through-traffic dependent businesses.		
3. Require a temporary road, detour or ramp closure that substantially changes the environmental consequences of the action.		
4. Have any substantial controversy associated with the temporary road, detour, or ramp closure.		
Require any known hazardous materials sites or previous land uses with potential for hazardous materials remains within the right-of-way.		

**D – APPROVAL**

It is hereby determined that the subject project meets the criteria for CE in accordance with the Programmatic Categorical Exclusion Agreement between DDOT and FHWA. This action does not: induce significant impacts to planned growth or land use for the area; require relocation of significant numbers of people; have significant impact on any natural, cultural, recreational, historic, or other resource; involve significant air, noise, or water quality impacts; have significant impacts on travel patterns; or otherwise, either individually or cumulatively, have any significant impacts and do not require the preparation of an Environmental Assessment or an Environmental Impact Statement.

As supported by information contained in this Categorical Exclusion Document, this project qualifies for a CE Level \_\_\_\_, in accordance with the Programmatic Categorical Exclusion Agreement between DDOT and FHWA.

**Recommended By:**

DDOT Project Development & Environment Division (Name)	Date

**Approved By:**

DDOT Project Development & Environment Division Head (Name & Signature)	Date



APPENDIX  
C

DDOT CE 3 DOCUMENT OUTLINE

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District Department of Transportation
CATEGORICAL EXCLUSION DOCUMENT (CE 3)

Outline for CE 3 Documents is given below. It is recommended that the CE 3 documents do not exceed 30 pages. Detailed technical information should be added in appendices. All the sections given in the outline have to be addressed in the document. Detailed information should only be provided for the applicable issues listed under Section 7. The issues that are not applicable should be very briefly described as to why they are not applicable. The outline of a CE-3 document is given below:

1. Introduction
2. Table of Content
3. Proposed Action
4. Project Area Map
5. Purpose & Need
6. Alternatives
  - a. No Build
  - b. Build Alternative (s)
7. Affected Environment & Consequences
  - a. Land Use Impacts
  - b. Social Impacts
  - c. Relocation Impacts
  - d. Economic Impacts
  - e. Traffic & Transportation
  - f. Pedestrians and Bicyclists
  - g. Air Quality
  - h. Noise
  - i. Water Quality & Wetlands
  - j. Threatened or Endangered Species
  - k. Historic and Archeological Preservation
  - l. Hazardous Waste Sites
  - m. Visual impacts
  - n. Construction impacts
8. Public and Agency Involvement
9. Conclusions
10. Signature Page
11. Appendices

## SAMPLE SIGNATURE PAGE

It is hereby determined that the subject project meets the criteria for CE in accordance with 40 CFR 1508.4 and 23 CFR 771.117. This action does not: induce significant impacts to planned growth or land use for the area; require relocation of significant numbers of people; have a significant impact on any natural, cultural, recreational, historic, or other resource; involve significant air, noise, or water quality impacts; have significant impacts on travel patterns; or otherwise, either individually or cumulatively, have any significant impacts; and it does not require the preparation of an Environmental Assessment or an Environmental Impact Statement.

As supported by information contained in this Categorical Exclusion Document, this project qualifies for a CE Level 3, in accordance with the Programmatic Categorical Exclusion Agreement between DDOT and FHWA.

### DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION

\_\_\_\_\_  
ABCD  
Director  
District Department of Transportation

\_\_\_\_\_  
Date

### FEDERAL HIGHWAY ADMINISTRATION

\_\_\_\_\_  
XYZ  
DC Division Administrator  
Federal Highway Administration

\_\_\_\_\_  
Date

APPENDIX  
D

NOTICE OF INTENT EXAMPLE

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

ENVIRONMENTAL IMPACT STATEMENT; WASHINGTON, D.C

AGENCIES: U.S. Federal Highway Administration, District of Columbia Division; District of Columbia, Department of Transportation

ACTION: Notice of Intent to Prepare a Draft Environmental Impact Statement (DEIS).

SUMMARY: The U.S. Federal Highway Administration (FHWA) in coordination with the District of Columbia Department of Transportation (DDOT) in Washington, DC is issuing this notice to advise agencies and the public that a Draft Environmental Impact Statement (DEIS) will be prepared to assess the impacts of the proposed transportation improvements to the 11<sup>th</sup> Street Bridges.

FOR FURTHER INFORMATION CONTACT: Federal Highway Administration, District of Columbia Division: Mr. Michael Hicks, Environmental/Urban Engineer, 1900 K Street, Suite 510, Washington, DC 20006–1103, (202) 219–3513; or Mr. John Deatruck, Deputy Director/Chief Engineer, District of Columbia, Department of Transportation, 64 New York Avenue, N.E., Washington, DC 20005 (202) 671-2800.

SUPPLEMENTARY INFORMATION: The environmental review of transportation improvement alternatives for the 11<sup>th</sup> Street Bridges will be conducted in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4371, et seq.), Council on Environmental Quality (CEQ) regulations (40 CFR parts 1500–1508), FHWA Code of Federal Regulations (23 CFR 771.101–771.137, et seq.), and all applicable Federal, State, and local government laws, regulations, and policies.

PUBLIC SCOPING MEETINGS: DDOT will solicit public and agency comments through public scoping, including scoping meetings, on the proposed action. To ensure that the full range of issues is identified early in the process, comments are invited from all interested and/or potentially affected parties. The location and time for each meeting will be publicized in local

newspapers and elsewhere. Written comments will be accepted throughout this process and can be forwarded to John Deatrick at the address provided above.

Meeting dates, times, and locations will be announced on the project Website accessible at <http://www.11thStreetBridgesEIS.com> and in the following newspapers: The Washington Post, The Washington Times, The Hill Rag, and East of the River.

Scoping materials will be available at the meetings and may also be obtained in advance of the meetings by contacting Mr. John Deatrick. Scoping materials will be made available on the project website. Oral and written comments may be given at the scoping meetings. Comments may also be sent to the address above.

#### Description of Primary Study Area and Transportation Needs

The existing 11<sup>th</sup> Street Bridges cross the Anacostia River in the southeast quadrant of the District of Columbia. They connect the Southeast Freeway (I-395) and the Anacostia Freeway (I-295) and they connect to local streets on both sides of the river. Existing ramps provide only partial movement between the freeways. The project area includes both interchanges, both bridges, and the associated ramps.

The purpose of the 11<sup>th</sup> Street Bridges project is to improve connectivity across the Anacostia River to serve local traffic reaching residential, employment, and commercial centers on opposite sides of the river and to serve regional traffic moving between the major employment center of downtown Washington, D.C. and residential communities in Maryland and Virginia. The DDOT proposes to improve this traffic flow by replacing or reconstructing the pair of one-way bridges and completing the now missing traffic movements to the Anacostia Freeway and the 11<sup>th</sup> Street Bridges.

The 11<sup>th</sup> Street Bridges project, as defined in the Anacostia Waterfront Initiative (AWI) Framework Plan, is intended to provide better access to waterfront areas east and west of the river, including Anacostia Park, separate local traffic from regional commuter traffic, and better serve historic Anacostia, and near southeast neighborhoods. It will connect the Southeast Freeway with traffic to and from both directions of the Anacostia Freeway. The AWI seeks to restore the river's water quality, reclaim the waterfront as a magnet of activity, and stimulate sustainable development in



waterfront neighborhoods. The improvement of traffic flow across the 11<sup>th</sup> Street Bridges is a step in the reinvestment and reclamation process.

(Catalog of Federal Domestic Assistance Program Number 20.205 Highway Planning and Construction. The regulations and implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)  
Authority 23 U.S.C. 315; 49 CFR 1.48.

Issued on: September 8, 2005.

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Gary L. Henderson,  
Division Administrator, District of Columbia  
Division, Federal Highway Administration.



APPENDIX

E

NOTICE OF AVAILABILITY EXAMPLE

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NOTICE OF AVAILABILITY OF A  
(DRAFT OR FINAL ENVIRONMENTAL IMPACT STATEMENT,  
ENVIRONMENTAL ASSESSMENT,  
OR SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT)  
FOR (\_\_\_\_\_ PROJECT \_\_\_\_\_)

AGENCY: Federal Highway Administration

ACTION: Notice of Availability

-----

SUMMARY: Prepare a short summary of the document and announce its availability.

SUPPLEMENTARY INFORMATION:

1. Announce public availability of document.
2. State the location(s) where the document can be reviewed.
3. Announce (when applicable) date, time and place of public hearing on the document. If a public hearing is not scheduled, but is under consideration, the notice should invite the public to express their interest in having one.
4. For EA's, DEIS's and Supplemental EIS's, encourage comments from all members of the public, including minority populations and low-income populations. Provide the name and address where comments are to be sent, include deadline for receipt of comments.
5. Indicate FHWA and DDOT contact persons (and their telephone numbers) from whom further information may be obtained.



APPENDIX

F

SAMPLE RECORD OF DECISION

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# Record of Decision

## 11th Street Bridges

**Anacostia Freeway (I-295/DC 295) to Southeast/Southwest Freeway (I-695)**

**Washington, D.C.**

### Decision

The following sets forth the basis for the Selected Alternative for the 11<sup>th</sup> Street Bridges Project. The Selected Alternative is the Preferred Alternative from the Final Environmental Impact Statement (FEIS). It follows the existing alignment and provides a now missing linkage to DC 295 north of the 11<sup>th</sup> Street bridges across the Anacostia River. As documented in the FEIS, the Selected Alternative satisfies the Purpose and Need and is the environmentally preferable alternative as it does the least harm to the biological and physical environment. All practicable means to avoid and minimize environmental harm have been adopted. Refer to Attachment E. The estimated cost of the Selected Alternative is 465 million dollars, the lowest cost build alternative investigated in the FEIS.

In consideration of the 11<sup>th</sup> Street bridges undertaking, the FHWA in partnership with the District Department of Transportation (DDOT) and other Federal agencies have studied and evaluated a range of alternatives consistent with earlier planning efforts as required by the provisions of SAFETEA-LU. FHWA concurs in the alternative selected by DDOT.

This decision is based upon full consideration of information contained in the Draft Environmental Impact Statement (Draft EIS) and Draft Section 4(f) Evaluation approved June 16, 2006, the Public Hearings held July 26<sup>th</sup> and 27<sup>th</sup>, 2006, the Final EIS and Final Section 4(f) Evaluation approved September 25, 2007, public and agency comments, other alternatives considered, environmental consequences, and other issues related to the proposed action. This environmental review process is in full compliance with the National Environmental Policy Act, the Council on Environmental Quality Regulations, and all other applicable Federal regulations.

### Alternatives Considered

Alternatives are addressed in Chapter 5 of both the Draft EIS and the Final EIS.

#### No-Build Alternative

The No-Build Alternative would contain no new major construction resulting from a project action, although other planned and committed projects in the area would move forward. Improvements implemented under this alternative would be limited to short-term restoration and maintenance of the existing freeway and the river-crossing bridges. The inherent structural deficiencies of the bridges crossing the Anacostia River would not be corrected. The proposed ramps to and from Anacostia Freeway north of the 11<sup>th</sup> Street Bridges complex would not be connected to the 11<sup>th</sup> Street Bridge crossings, and existing

geometric and operational deficiencies would remain in place. These deficiencies are expected to result in increased travel on neighborhood streets, increased traffic congestion throughout the project area, and an increased number of traffic crashes.

The No Build Alternative does not reduce congestion, improve mobility, increase safety, or replace deficient infrastructure and roadway design, and thus does not meet the “Purpose and Need” as described in Chapter 4 of both the Draft EIS and the Final EIS.

### **Other Alternatives**

In addition to the four Build Alternatives in the Draft EIS, a Preferred Alternative was considered in preparation of the Final EIS. The Preferred Alternative was developed following the public comment period and takes advantage of desirable traffic and connectivity features of Draft EIS Build Alternative I west of the Anacostia River and Draft EIS Build Alternative II east of the river. The match line for combining these alternatives to develop the Preferred Alternative is generally the west bank of the Anacostia River. All of the build alternatives would meet the purpose and need.

### **Common Features of Alternatives**

All of the build alternatives, including the Preferred Alternative, have common features and elements that address the current transportation problems and reflect the project’s context and purpose and need. They are all designed to the same design criteria, which address current design deficiencies. They all provide the same basic traffic service by providing eight freeway traffic lanes and four local traffic lanes over the Anacostia River along the same basic alignment as the current crossings. The freeway lanes include three through lanes and one auxiliary lane in each direction. They all achieve separation of freeway traffic from local traffic, and they all provide a safe river crossing for pedestrians and bicyclists.

Every build alternative, including the Preferred Alternative, is designed to be compatible with the proposed conversion of a segment of the Southeast/Southwest Freeway to a surface arterial (referred to as Southeast Boulevard). This separate project includes the proposed removal of freeway ramps to/from Pennsylvania Avenue along the Southeast/Southwest Freeway west of the river at Barney Circle.

Every build alternative, including the Preferred Alternative, is designed to provide direct system ramp connections, which do not currently exist, to and from the Anacostia Freeway north of the 11<sup>th</sup> Street Bridge as well as maintaining the connections to the freeway south of the bridge.

### **Different or Unique Features of Alternatives**

The five build alternatives differ primarily with respect to designs for local access east of the river, the manner in which local and freeway traffic is separated, and how the local street system west of the river ties to I-295.

Build Alternatives I, II, III, and the Preferred Alternative would have one eight-lane, two-way freeway bridge and one four-lane, two-way local bridge. Build Alternative IV would have two six-lane, one-way bridges with local and freeway traffic separated by barriers.



Build Alternative I would not provide direct access from the historic Anacostia neighborhood to the Anacostia Freeway. Access from the neighborhood to the Anacostia Freeway would continue to be via the Howard Road interchange, Pennsylvania Avenue, or the Suitland Parkway. Build Alternatives II, III, IV, and the Preferred Alternative would provide a new service interchange between the Anacostia Freeway and an extension of 11<sup>th</sup> Street and Martin Luther King, Jr. Avenue. This new interchange would provide direct access to historic Anacostia via Martin Luther King, Jr. Avenue, and direct access to the local bridge.

In Build Alternative I and the Preferred Alternative, ramps from the Southeast/Southwest Freeway, the Southeast Boulevard, and 11<sup>th</sup> Street would connect through at-grade intersections on the local street grid. In Build Alternative II, these facilities would connect through a traffic circle. In Build Alternatives III and IV, the continuity of traffic from the Southeast/Southwest Freeway to Southeast Boulevard would be maintained and traffic would continue free-flow via a provided underpass.

Build Alternatives I, II, III, and the Preferred Alternative would extend two-way traffic on both 11<sup>th</sup> and 12<sup>th</sup> Streets from M Street to the river. Because of the river-crossing bridge configuration, Build Alternative IV requires that 11<sup>th</sup> Street (southbound) and 12<sup>th</sup> Street (northbound) operate as one-way roadways between approximately K Street and the Anacostia Freeway.

### **Description of Selected Alternative**

The Selected Alternative is the Preferred Alternative of the Final EIS. This is also the environmentally preferable alternative and incorporates all practicable means to avoid or minimize environmental harm. As noted, the Preferred Alternative was developed following the public comment period and takes advantage of desirable traffic and connectivity features of Draft EIS Build Alternative I west of the Anacostia River and Draft EIS Build Alternative II east of the river. The match line for combining these alternatives to develop the Preferred Alternative is generally the west bank of the Anacostia River.

The number of freeway lanes entering and leaving the project area (on the Southeast/Southwest Freeway, on I-295, and on the Anacostia Freeway) would remain unchanged with the Selected Alternative. Likewise, the number of freeway lanes crossing the river would remain constant at four in each direction. The freeway lanes include three through lanes and one auxiliary lane. The lane capacity of the freeway system serving this area of Washington, D.C. would not change.

A separate four-lane low speed bridge would provide new capacity for local traffic and transit buses to cross the river. This local bridge would include shared use sidewalks for pedestrians and bicycles. On the downstream side, this sidewalk would be 14 feet wide. The upstream sidewalk would be 6 feet wide. The local bridge design would accommodate a proposed streetcar system (not part of this project) that would not be practical on the shared local and freeway traffic lanes of the existing bridges.

West of the river, ramps from the Southeast/Southwest Freeway, the Southeast Boulevard, and 11<sup>th</sup> Street would connect through at-grade intersections on the local street grid. Continuity of traffic from the Southeast/Southwest Freeway would be eliminated and

traffic going from the Southeast/Southwest Freeway to the Southeast Boulevard would exit the freeway via a ramp and go through a traffic signal.

East of the River, the Selected Alternative would provide a service interchange between the Anacostia Freeway and an extension of 11<sup>th</sup> Street and Martin Luther King, Jr. Avenue. This interchange would provide direct access to historic Anacostia and the local bridge.

The local bridge would have two travel lanes in each direction and a 2-foot shoulder adjacent to each of the sidewalks. The freeway bridge would have a full barrier separating opposing lanes of traffic; a 12-foot shoulder adjacent to the right side lanes and a 2-foot shoulder adjacent to the left side lanes (see Final EIS Chapter 5 for a detailed description).

### **Changes to the Selected Alternative since Publication of the Final EIS**

In response to public comments, the Selected Alternative has been modified so that Good Hope Road under I-295 will be open to vehicles as well as pedestrians and bicyclists.

### **Summary of Features of the Selected Alternative:**

The Selected Alternative satisfies the purpose and need for the project. Direct ramp connections are provided to/from the Anacostia Freeway north of the 11th Street Bridge complex. Freeway traffic will then have the option of staying on the freeway. Access is provided to/from the Southeast/Southwest Freeway and the local street grid through at-grade intersections on the west side of the river. The Selected Alternative is the least costly of the reasonable alternatives considered. The cost estimate was confirmed in a Cost Review Meeting facilitated by the Federal Highway Administration (FHWA) on December 5 and 6, 2007. The objective of the review was to verify the accuracy and reasonableness of the cost estimate, and to develop a probability range to represent the current stage of design. The review indicated that the estimate was consistent with an 80<sup>th</sup> percentile probability that the year-of-expenditure project cost would not exceed 465 million dollars.

It is the environmentally preferred alternative. Only 1.5 acres of additional right-of-way is required, all from Anacostia Park. As a result of extensive coordination with National Park Service officials throughout the development of the project, a net benefit to the Park will be realized. No property from Virginia Avenue Park will be required. The existing structural, operational and design deficiencies will be corrected. There will be a safer river crossing for pedestrians and bicyclists. There will be a new service interchange between the Anacostia Freeway and an extension of 11<sup>th</sup> Street and Martin Luther King Jr., Avenue that responds to the community desires of additional access to Anacostia neighborhoods, businesses, and other local land uses. Access to the 11<sup>th</sup> Street Bridge will be removed from 13<sup>th</sup> Street on the east side of the river, and relocates it farther from residential communities, a strong desire expressed by the Fairlawn neighborhood.

## **Section 4(f) Considerations**

### **Section 4(f) Properties**

Section 4(f) properties in the project area include publicly owned land of a public park of national, State, or local significance, and land of an historic site on or eligible for listing on the National Register of Historic Places (NRHP).



### **Section 106 Properties**

The Selected Alternative will not use any property from the nearby historic districts listed on the NRHP. In the project area, NRHP listed properties include the Capital Hill Historic District, the U.S. Marine Corps Barracks, the Washington Navy Yard Historic District, and the Anacostia Historic District. The Selected Alternative will use 1.5 acres from Anacostia Park which is eligible for listing on the NRHP. A Phase I archaeological examination recognized the potential for the project to encounter prehistoric resources in several locations.

### **Parks and Recreation Areas**

Anacostia Park is a publicly owned park and recreation area that qualifies as a Section 4(f) property. The Selected Alternative will use 1.5 acres from Anacostia Park, and will require the temporary relocation of a recreation use, a boathouse, from the area on the west bank between the bridges. These properties are discussed in detail in the Draft EIS and Final EIS, Chapter 9.0, Section 4(f) Evaluation and Approval for Transportation Projects that have a Net Benefit to a Section 4(f) Property. Boathouse operations are detailed in Section 7.3, Relocation Impacts.

### **Section 4(f) Summary**

DDOT and FHWA have worked closely with NPS to create a win-win solution to the need for additional right of way from Anacostia Park by taking advantage of the relatively new “Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property.”

### **No Prudent and Feasible Alternatives**

All reasonable alternatives satisfying the project purpose and need require property from Anacostia Park. An avoidance build alternative that meets the project purpose and need was developed to investigate the consequences of avoiding all permanent right-of-way acquisition from the Section 4(f) resources within Anacostia Park on the east side of the river. This alternative would require the destruction of homes and businesses for the first two or three blocks of 13<sup>th</sup> Street, Good Hope Road, and Martin Luther King Jr., Avenue east of the Anacostia Freeway. Structures would be removed along Fairlawn Avenue, Ridge Place, S Street, T Street, 13<sup>th</sup> Street, Good Hope Road, Martin Luther King Jr., Avenue, U Street, V Street, Shannon Avenue, and Railroad Avenue. Residents in this area who would be directly impacted by this avoidance alternative are predominately low income and minority. Because the Anacostia neighborhood is a historic district listed on the National Register, avoiding impacts to one 4(f) property, Anacostia Park, would result in impacts to another 4(f) property, Historic Anacostia. The avoidance alternative is not a prudent alternative.

Similarly to the avoidance alternative, there is no alternative at another location that satisfies the project purpose and need and avoids an impact to Anacostia Park. Final EIS Section 4.2 explains in detail the deficiencies and operational problems associated with the existing location, primarily the result of the two missing freeway movements that cause freeway and local traffic to share facilities.

### Planning to Minimize Harm

Since there is no prudent and feasible alternative to using the existing alignment and taking adjacent property where additional right-of-way is necessary, the Selected Alternative includes all possible planning to minimize harm. Measures to minimize harm include keeping the roadway alignment within the existing right-of-way to the maximum extent possible and using retaining walls to reduce the amount of parkland needed for construction. Newly graded slopes will be landscaped. Elevated sections of the roadway will be as low as possible to minimize visual intrusions into the park. Stone veneer will be used in all places where walls, ramps, and bridge abutments face the park or are located along pedestrian access routes.

While it is possible to avoid removal of either of the buildings located between the western abutments of the existing bridges, temporary relocation of activities of the Anacostia Community Boathouse Association (ACBA) in those buildings is necessary for safety reasons due to proximity to planned construction activities. Extensive coordination has occurred between DDOT, ACBA, and NPS to identify acceptable temporary sites where ACBA operations could be maintained during construction. Both the NPS and the ACBA identified a preferred site, which is the former Washington Gas tanker site in the 1200 block of Water Street, SE.

All possible planning to minimize harm has been completed and the Selected Alternative is a feasible and prudent alternative with the least harm to the Section 4(f) resources after considering mitigations.

### Net Benefit

The Net Benefits 4(f) Programmatic Evaluation may be used if there is a finding that the No-Build and avoidance alternatives are not feasible and prudent. For the 11<sup>th</sup> Street Bridges project, the No-Build Alternative is the only alternative that avoids use of all Section 4(f) resources but it is not feasible and prudent because it would neither address nor correct the transportation needs cited in the project's purpose and need.

The avoidance alternative would impact an even larger area of a separate Section 4(f) property, the Anacostia Historic District, than the Selected Alternative. The avoidance alternative would also have substantial impacts on homes and businesses in a low-income, minority neighborhood. It is not considered prudent for these reasons.

In addition to the mitigation measures and incorporation of all possible planning to minimize harm, a series of enhancements will be implemented to create an overall net benefit to Anacostia Park. A budget of \$2 million, adjusted annually for inflation until construction begins has been established for this purpose. The budget will be used to:

- ◆ Compensate NPS for the full appraised value of \$980,000 for the 1.5 acres
- ◆ Add 12 inches of soil amended to facilitate turf growth to three ball fields
- ◆ Incorporate storm water management facilities at the base of retaining walls to protect the ball fields from storm water runoff
- ◆ Provide formal park entrance signs and entrance features at park entrances



- ◆ Apply soil amendments and provide plantings in select areas of the park
- ◆ Install new picnic shelters at select locations
- ◆ Design and install an exercise trail with exercise facilities

### **Formal Coordination**

Coordination between NPS and DDOT has been ongoing regarding the assessment of impacts, the proposed measures to minimize harm, the mitigation necessary to preserve the values of Section 4(f) resources, and enhancements appropriate to achieve a net benefit for the park. The culmination of this effort is Attachment A – Memorandum of Agreement between the DDOT and the NPS Relative to Section 4(f) Properties.

A Programmatic Agreement (PA) between the FHWA, DDOT, District of Columbia State Historic Preservation Office (SHPO), and NPS relative to Section 106 properties has been negotiated and signed to document the results of the coordination described in Section 9.5 of the Final EIS. The PA includes the measures that will be carried out to minimize the adverse effects to the historic properties that are included in the attached Environmental Commitments. Since the Section 106 PA applies to the same properties addressed by the Final Section 4(f) Evaluation, the measures to minimize adverse effects described in the PA will also apply to the Section 4(f) properties. A copy of the PA is included as Attachment B – Programmatic Agreement between the Federal Highway Administration, the District Department of Transportation, the District of Columbia State Historic Preservation Office, and the National Park Service Relative to Section 106 Properties on the 11<sup>th</sup> Street Bridges Project, District of Columbia.

The District has concurred with plans for the temporary relocation of operations of the ACBA. A copy of the letter from the Deputy Mayor of Planning and Economic Development specifying the District's commitment is included in Attachment C.

### **Section 4(f) Conclusion**

Based on the considerations in the Final EIS, there is no feasible and prudent alternative to the use of land from the Anacostia Park. The Selected Alternative includes all possible planning to minimize harm to the park. Additional measures negotiated by the DDOT and the NPS will result in a net benefit to the park from implementation of the Selected Alternative.

## **Measures to Mitigate Harm**

Chapter 7.0 of the Final EIS addresses mitigation measures for the selected alternative. Section 7.21 summarizes all the environmental commitments. Attachment D to this Record of Decision incorporates all of these final commitments.

## Comments on the Final Environmental Impact Statement

Comments on the Final EIS and responses to each are included in Attachment E to this Record of Decision.

## Statute of Limitations Notice

FHWA, in cooperation with DDOT, intends to issue a “statute of limitations” (SOL) notice in the Federal Register, pursuant to 23 U.S.C. Section 139(l), indicating that one or more Federal agencies have taken final action that grant permits, licenses, or approvals for this transportation project. This SOL notice establishes that claims seeking judicial review of those Federal agency actions will be barred unless such claims are filed on or before 180 days after publication of the notice in the Federal Register.

DDOT will also make the SOL notice available on the project website.

7/2/08

Date

  
For the Federal Highway Administration

7/2/08





APPENDIX  
G

SAMPLE FINDING OF NO SIGNIFICANT IMPACT

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**FINDING OF NO SIGNIFICANT IMPACT**  
**for**  
**K STREET**  
**24<sup>th</sup> Street NW to 7<sup>th</sup> Street NW**  
**WASHINGTON, D.C.**

**DDOT Project Number: 1102(027)/SR028A/DC-29**

The Federal Highway Administration (FHWA), in conjunction with the District Department of Transportation (DDOT), proposes modifications to K Street to create a transportation facility that enhances the mobility, throughput capacity, and economic vitality within the downtown Washington Central Business District. In accordance with the National Environmental Policy Act (NEPA), the FHWA and DDOT prepared an Environmental Assessment (EA) which was released for agency and public review on September 29, 2009. A public hearing was held on October 14, 2009. Subsequently, a Final EA has been prepared to fully address all agency and public comments received.

The proposed modifications to K Street are intended to accommodate multimodal traffic (bus, automobile, bicycle, and pedestrian) that currently uses the corridor. The proposed action would achieve the following objectives:

- Provide efficient travel along K Street for all transportation modes, including transit, pedestrians, bicycles, and automobiles;
- Eliminate roadway infrastructure deficiencies along K Street and improving mobility and safety for all K Street users; and
- Construct a “Green Street” using exceptional urban design principles and innovative and environmentally sustainable design methods.

**PREFERRED ALTERNATIVE**

Following the public comment period, DDOT identified Alternative 2, the Two-Lane Transitway, as the Preferred Alternative. Alternative 2 would provide an exclusive two-way, two-lane median transitway between 20<sup>th</sup> Street and 9<sup>th</sup> Street. Alternative 2 would also include two 10-foot general purpose travel lanes and one 12-foot travel/off-peak parking lane in each direction on K Street between 20<sup>th</sup> Street and 12<sup>th</sup> Street. Raised medians would separate the general purpose travel lanes from the transitway and provide width for passenger platforms and landscaping. The transitway would include one 12-foot lane in each direction. Passenger platforms would be located on the raised medians and would be typically 11 feet wide. The medians opposite the platforms would vary between five and 11 feet wide, except where they are constrained by reduced roadway widths at Farragut Square, McPherson Square, and Franklin Square parks. Between 12<sup>th</sup> Street and 9<sup>th</sup> Street, the existing roadway width reduces to

approximately 50 feet; therefore, the medians would be eliminated and the section would include one general purpose travel lane plus one exclusive bus lane in each direction.

Eight bus stops would be located in both the eastbound and westbound direction of the transitway. Bus stops would be curb-lane stops without provisions for passing of stopped buses. The bus stops would be approximately 140 feet long to accommodate multiple buses at one time. Left turns would be prohibited from the transitway, with the exception of left turns at 19<sup>th</sup> Street from the westbound direction. Left turns would be prohibited from the general purpose lanes at all but 14<sup>th</sup> Street in the eastbound direction and 11<sup>th</sup> and 10<sup>th</sup> Streets in the westbound direction during the peak periods.

A complete description of the Preferred Alternative is provided in *Section 2.2* of the Final EA.

### **ALTERNATIVES CONSIDERED BUT NOT SELECTED**

In addition to evaluating Alternative 2, the EA and Final EA considered the No-Build Alternative (Alternative 1) and the Two-lane Transitway with Passing Alternative (Alternative 3), as well as other alternatives that were considered but not retained for detailed analysis.

Under the No-Build Alternative, the existing roadway, median, service lanes, and sidewalks would remain as they are today, with no major modification to K Street within the study area. Currently programmed, committed, and/or funded roadway projects in the study area (with the exception of the K Street project) would be completed.

Alternative 3 would provide an exclusive two-way, two-lane median transitway between 20<sup>th</sup> Street and 9<sup>th</sup> Street plus provide opportunities for bus passing in blocks that could accommodate a third bus lane. Alternative 3 would include two 10-foot general purpose travel lanes and a five-foot bike lane in each direction. A raised median would separate the general purpose travel lanes from the transitway. The transitway would include one 12-foot lane in each direction, plus an 11-foot center passing lane adjacent to the bus stop area. Passing would be provided at eight locations where the roadway width permits. East of 12<sup>th</sup> Street, this alternative would be identical to Alternative 2 with one general purpose lane and one bus lane per direction. The typically 140-foot long bus platforms would be located approximately every block on the near side of the intersections. Seven platforms would be located in the eastbound direction and eight platforms would be located in the westbound direction.

Eight additional alternatives that were evaluated in the 2005 *K Street Transitway Report* were also considered during the scoping process conducted for the K Street EA. These alternatives were not carried forward for further study.

More detailed descriptions of the alternatives are provided in *Sections 2.2 and 2.3* of the Final EA.

## **ANALYSIS OF SIGNIFICANT IMPACT**

As stated in 40 CFR 1508.27(a), analysis of significance as used in NEPA requires considerations of both context and intensity:

(a) **Context.** This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) **Intensity.** This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

- Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- The degree to which the proposed action affects public health or safety.
- Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

- The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Based on the impact analysis presented in Section 3 of the Final EA, the project would not result in significant impacts. Given the project's urban environment, there would be no impacts to streams, wetlands, floodplains, coastal zones, wild and scenic rivers, farmland, forests, wildlife habitat, or habitat for threatened and endangered species. The project would improve water quality by incorporating Low Impact Development techniques such as rain garden cells, vegetative filter strips, and permeable pavers. Stormwater would be managed through the use of DCWASA water quality inlets to treat the pavement runoff. In addition, the project would:

- Not use any Section 4(f) properties;
- Not result in any increases in noise levels above existing levels;
- Not result in adverse effects to air quality. The National Capital Region Transportation Planning Board has approved the 2010 to 2015 Transportation Improvement Program (TIP), which includes the "K Street, NW Priority Busway" as a major project;
- Not result in any changes to land use or zoning;
- Not result in right-of-way acquisition or in any residential or business displacements; and
- Result in no adverse effect to historic properties, as concurred by the District of Columbia State Historic Preservation Officer on August 27, 2009.

The project would result in some adverse effects to the human and natural environment. A summary of these effects, and an evaluation of their significance per the CEQ guidance, is provided in the following paragraphs. A detailed analysis of these effects is provided in the Final EA.

***Social Characteristics – Neighborhoods and Community Cohesion:*** The K Street project area's neighborhood is defined as the business and residential community that exists on K Street and on the side streets immediately adjacent to K Street. Persons who spend non-work time in the corridor for other pursuits (recreation, school, shopping, dining, and professional appointments) are also part of the community. Social groups include employers and employees, residents, commuters, visitors/shoppers/diners, and through travelers.

Adverse effects to the community and businesses would occur as a result of changes in parking and delivery availability and in travel patterns. One hundred thirty of the approximately 330 curbside, two-hour parking spaces would be removed; and parking, curbside deliveries and valet parking would be restricted to off-peak hours. Approximately 200 curbside parking spaces would continue to be available during off-peak hours. There would be no change in availability

of the 409 parking spaces on the side streets within one block of K Street and the more than 8,000 garage parking spaces. Impacts caused by parking and delivery restrictions would include inconveniences to business patrons who normally park on K Street and adjustments in delivery times normally scheduled during peak hours. Deliveries during peak hours would be restricted to side streets or alley loading docks. Any potential for a reduction in business patronage attributable to reduced availability of parking would be offset by improved transit efficiency and reliability that would attract more business patrons who elect to use transit. Urban design improvements of the Preferred Alternative would include increased accessibility due to lowered congestion and higher efficiency of traffic movement along K Street that would attract more consumers to K Street, providing long-term benefits for the K Street business community.

Community cohesion refers to the interaction of the business owners and others who populate K Street as employees, customers, or visitors. None of the improvements would change this interactivity; rather, the urban design and streetscape improvements would enhance community cohesion through the creation of a strong sense of neighborhood character on K Street.

Based on the analysis summarized above, the direct effects to neighborhoods and community cohesion do not meet the criteria for either context or intensity per the CEQ definition. The improvements would not adversely affect public health or safety. Furthermore, those members of the public who commented on the K Street EA did not consider these effects to the human environment controversial (Final EA, Appendix F).

While the proposed action is a site specific action, the effects do not rise to a level of “significance” that would require a higher classification of NEPA documentation or study.

**Social Characteristics – Population and Employment:** The Preferred Alternative would not change the availability of housing; therefore, impacts to the residential population are not expected. The Preferred Alternative would attract employment and visitors by providing more efficient transportation that would facilitate faster, more reliable work trips and by creating a more inviting street subsequently creating a beneficial effect directly attributable to the proposed action. The effects of the proposed action on social characteristics were not considered controversial by commenters of the EA. The direct effects on population and employment do not rise to a level of “significance” as defined by the CEQ definition. .

**Social Characteristics – Environmental Justice:** There are minority and low-income populations located within the block groups that surround and abut K Street at either end of the project, however, the project improvements would occur away from predominantly low-income or minority populations. Only one block group with a high proportion of low income/minority population would be directly affected by the project’s improvements. The impacts to environmental justice populations would primarily occur as a result of the elimination of 130 on-street parking spaces, making low-cost parking less available. This would impact low-income persons more than others because a higher parking cost would represent a higher proportion of

their income. However, the preferred alternative would also provide transportation improvements that would result in improved travel times and more reliable and efficient transit which would benefit all populations. Therefore, the analysis concludes that the project’s impacts on minority and low-income populations are neither disproportionately high nor adverse. There would also be no adverse effect to public health or safety of minority and low-income populations. Overall, the effects do not meet the CEQ criteria for either context or intensity; therefore, the impacts of the action on social characteristics do not rise to a level of “significance” as defined by CEQ.

**Businesses and Economic Vitality:** Completion of the Preferred Alternative would provide a high quality design and streetscape that could attract businesses, consumers and visitors to this already successful street. Design and streetscape strategies would be developed to improve traffic conditions and provide faster, more reliable transit that would enhance and support the continuing economic vitality of K Street. Elimination of some parking and a prohibition on parking and deliveries during peak hours would impact businesses and visitors; however, (1) most on-street parking and loading would remain available during off-peak periods, and side street and garage parking would remain the same as existing conditions; (2) alley loading docks would remain open and available; and (3) the more efficient transit system would attract transit riders, decreasing the number of automobile drivers entering the area. These factors would serve to mitigate the impact on the human environment. Therefore, while there are some anticipated direct impacts to businesses and economic vitality caused by the Preferred Alternative, those impacts do not rise to a level of “significance” regarding their context or intensity as defined by the CEQ definition. .

**Community Facilities:** The Preferred Alternative would improve mobility and access to community facilities as a result of lowered congestion, faster travel times and more efficient, reliable transit. Emergency vehicles would use the transitway to avoid automobile traffic during emergencies, thus improving response times. The Preferred Alternative would directly impact community facilities through changes in the availability of on-street parking and deliveries. Therefore, similar to impacts to businesses, community facility parking and delivery restrictions would not result in severe impacts on community facilities. Based on the analysis provided in the EA, the direct effects of the proposed action to community facilities do not rise to a level “significance” as defined by CEQ.

**Traffic and Transportation:** With the Preferred Alternative, end-to-end travel times in the general purpose lanes would be up to four minutes faster than the No-Build Alternative. The K Street transitway would improve bus travel time and reliability, and encourage greater transit usage. End-to-end travel times for buses on the transitway would be up to six minutes faster than the No-Build Alternative in 2030. The proposed 140-foot long bus stops would accommodate more than one bus at a time. By placing buses (which carry more persons per vehicle than automobiles) in an exclusive transitway, thus allowing more buses to travel along K Street during a single hour period, the project would provide more person-carrying capacity. The



improvements in bus service would facilitate greater accessibility to employment and entertainment destinations.

Based on an analysis of the effect of the preferred alternative on vehicular traffic, there would be a benefit providing an increase in travel times through the corridor even with two intersections operating at a LOS F during the AM peak period and one intersection during the PM peak period. The impact of the preferred alternative regarding traffic within the corridor considering the “context” and “intensity” of the site specific action, inclusive of the effect on transit operations, would be beneficial overall and therefore not rise to a level of “significance” as defined by CEQ.

The Preferred Alternative would accommodate bicyclists in a 12-foot wide curbside general purpose shared lane with automobiles, during the peak periods. During off-peak hours, the curb lane would accommodate bicyclists and parking/loading. Cycle tracks or separated bicycle lanes could not be included with Alternative 2 because of the desire to maintain existing sidewalk widths. The District’s *Bicycle Master Plan* does not designate K Street as a bicycle corridor; rather, bicycle use is promoted on the adjacent parallel streets, L and M Streets. The wider curbside lane would provide approximately two to three feet of accommodation for bicyclists wishing to use K Street during the peak and slightly more space during the off-peak. Pedestrians would continue to be accommodated on wide sidewalks with marked crosswalks, timed crossing intervals, and wider median refuge widths. All pedestrian improvements would be in accordance with the District of Columbia *Pedestrian Master Plan* objectives and recommendations to correct pedestrian deficiencies and increase pedestrian safety. The effects of the project on pedestrians and bicycles / pedestrian mobility and safety are not significant either in context or intensity per the CEQ definitions.

As discussed previously, parking and loading would be impacted by the removal of approximately 130 of the existing 330 on-street parking spaces within the project area, and the restriction of the remaining approximately 200 spaces to off-peak use only. This would increase the demand for on-street parking on K Street and in the first blocks of the side streets. It is anticipated that this change is expected to cause inconveniences to those seeking to park on the street during peak hours and to those service providers delivering goods requiring loading and unloading on K Street during peak hours; however, parking impacts and restrictions to both the service providers and the general public do not rise to a level of “significance” as defined by the CEQ criteria.

***Terrestrial Habitat – Street Trees:*** The Preferred Alternative would require the removal of all of the street trees within the existing medians between 21<sup>st</sup> Street and 9<sup>th</sup> Street. Existing sidewalk vegetation would be removed as needed; however, existing, healthy mature trees would be preserved as much as possible. All tree removal would be in accordance with the DDOT Urban Forestry Administration guidelines. Replacement and additional trees would be planted in accordance with an urban streetscape design plan that includes green street technologies as

determined during final design. Given the provided mitigations, the effects on street trees and vegetation would not rise to a level of “significance” as defined by CEQ.

**Visual and Aesthetic Resources:** Under the Preferred Alternative, the aesthetic character of K Street would be slightly modified during and following construction. The project would continue to provide the four-row street tree configuration and would utilize DDOT’s standards for roadway and sidewalk paving, lighting and streetscape furnishings to provide a consistent and complementary aesthetic view within the corridor. The project goals for urban character would be manifested in landscaping and design that would include plantings, stormwater management LID, and street furnishings. The enhanced landscaping would maintain the historic views and vistas of the L’Enfant Plan of the City of Washington within the contemporary dense urban fabric. The effects on visual quality would therefore not be adverse and are not deemed “significant” either in context or intensity per the CEQ guidance.

**Indirect and Cumulative Impacts:** An indirect and cumulative impacts analysis was completed in accordance with CEQ, FHWA and EPA guidance. The project is not anticipated to cause any indirect impacts to land use in relation to what has been proposed in the comprehensive plans and approved development projects. Indirect impacts would be both adverse and beneficial, and include changes in travel patterns that would affect mobility on other streets; potential loss of customer base due to the inconvenience to customers attributable to on-street parking losses and restrictions; potential increases in delivery costs because of loss/restriction of loading times which would likely be passed on by businesses to consumers; increases in transit reliability and efficiency which could result in increases in transit ridership; and improved attractiveness of the area for new business.

Cumulative impacts would include the incremental changes that occur over time in conjunction with other surrounding development. Beneficial cumulative impacts to employment would include the increase in jobs created by the project and other projects as they are constructed (temporary) and completed (permanent employment opportunities); incremental increases to visual impacts that modify the views and vistas associated with the L’Enfant Plan; potential increases in traffic growth due to this and other development projects; and an incremental beneficial impact to water quality improvement within the Rock Creek watershed with the incorporation of green technologies for stormwater management. Regarding CEQ’s criteria for “context” and “intensity”, indirect and cumulative impacts associated with the proposed action do not rise to a level of “significance” requiring further NEPA study or documentation.

**Construction Impacts:** Business on K Street would be temporarily inconvenienced during construction. Construction would disrupt daily flow of business in the corridor. Landscaping, paving, street and/or sidewalk closures may cause some loss of business clientele as a result of this inconvenience. All utilities (electrical power, water and sewer, telephone and cable) are expected to be maintained throughout construction. Licensed street vendors may be temporarily relocated during construction. Construction noise and dust, although minimized, would

temporarily disrupt outdoor dining areas. DDOT would require their contractor to employ noise and dust suppression techniques to limit the impact on outdoor activities such as cafes.

A public information program would be used to inform businesses and residents of the duration of construction, phasing, construction methods, and possible effects. Access would be maintained to all businesses during construction, and pedestrian walkways would be protected from construction so that they could remain open to the extent practicable. DDOT would work with businesses, including street vendors, to develop ways to minimize construction impacts as much as possible. The construction-related effects on business activities would be temporary, and would be minimized through a concerted effort to communicate with, and be responsive to, business owners throughout the construction period. Given the temporary nature of impacts associated with construction activities coupled with the proposed DDOT commitments to mitigation during the period of construction activity, in addition to the support expressed by the business community, agency and public stakeholders for the proposed action; construction impacts, based on the analysis provided and with consideration of “context” and “intensity” do not rise to a level of “significance”, as defined by CEQ requiring a higher classification of NEPA documentation.

## **MITIGATION MEASURES**

The following mitigation measures would be implemented to mitigate or minimize adverse impacts of the Preferred Alternative:

- The DC SHPO will be consulted at 60% and 90% design on a landscaping plan, including way-finding signage, lighting, bus stops, pavement, sidewalks, and any proposed street furniture. The consultation with SHPO will also include NCPC and the Commission on Fine Arts.
- The proposed landscaping will respect and complement project area viewsheds, including historic vistas.
- Any trees removed from the corridor will be appropriately replaced through coordination with the DDOT Urban Forestry Administration.
- During final design, the provision of bus shelters will be coordinated with WMATA.
- Stormwater will be managed as much as practicable with Low Impact Development techniques such as rain garden cells, vegetative filter strips, and permeable pavers.
- A detailed maintenance of traffic plan will be developed during final design to ensure that through traffic is maintained to the extent practicable, pedestrians are provided safe passage through the work zone, businesses are accessible, and deliveries can be made.
- The contractor will be required to comply with the DC Code of Municipal Regulations with regard to construction noise. Noise levels would be minimized to the extent practicable.
- During final design, consideration will be given to signage, pavement markings, and other accommodations/amenities for bicyclists.

- During construction, DDOE regulations will be adhered to regarding protection of workers from exposure to petroleum-contaminated soils and treatment of contaminated soils prior to disposal when petroleum concentrations exceed regulatory thresholds.
- During construction, activities will comply with the District noise regulations.
- During construction, dust-suppression measures would be used to mitigate fugitive dust emissions.
- During construction, pro-active street-side signing would be provided regarding access to businesses and alternative parking locations.
- During construction, DDOT will work with street vendors to assist them in finding new locations along the corridor.
- During construction, a public information program will be used to inform the public concerning construction phases, work hours, access/parking changes, avenues for communication, and possible effects.

### **AGENCY CONSULTATION**

In accordance with Section 106 of the National Historic Preservation Act, the FHWA has determined that the proposed project would have no adverse effect on historic properties. In a letter dated August 27, 2009, the State Historic Preservation Officer (SHPO) concurred with the condition that detailed project plans are provided for the SHPO's review at 60% and 90% design.

A scoping meeting was conducted on July 1, 2009, followed by meetings with the interagency team on July 31, 2009 and October 14, 2009. The interagency team consisted of representatives from the National Capital Planning Commission, National Park Service, Commission on Fine Arts, Arlington County, Metropolitan Washington Council of Governments, DC Water and Sewer Authority, Washington Metropolitan Area Transit Administration, DC Office of Planning, and DC Department of the Environment. Individual meetings with each of the agencies were also conducted throughout July, 2009.

Agency letters and comments received in response to circulation of the EA are included in Appendix F of the Final EA, along with responses from DDOT.

### **PUBLIC INVOLVEMENT**

A public meeting was held on July 29, 2009, and attended by 47 citizens. Attendees were provided the opportunity to comment in writing or orally to a court reporter. The major themes of these comments were as follows:

- accommodate bicycle lanes,
- maintain on-street parking,
- provide loading zones with ample length and maneuvering room,
- provide separate transit lanes to more efficiently move transit along K Street, and

- be mindful of sidewalk width and landscaping.

Following circulation of the EA, a Public Hearing was conducted on October 14, 2009. The hearing was attended by 36 citizens. Eleven people provided public testimony and six people provided private testimony. Following the hearing, approximately 300 emails and letters were received. Copies of all comments received and responses to those comments are contained in Appendix F of the Final EA. The major themes and concerns were as follows:

- preference for a particular alternative
- desire for a dedicated bike facility, bicyclist safety, details on bike lanes, preference for bike lanes on L and I Streets
- impacts to businesses from loss of curbside parking, impact on valet parking, loss of sidewalk space, loss of loading zones, and effects during construction
- support for dedicated bus lanes to improve transit travel times, and other accommodations for transit users
- concerns with landscaping plans maintaining and complementing the historic viewsheds
- pedestrian safety, preservation of sidewalk widths
- concerns with left turn prohibitions
- accommodating emergency vehicles
- design suggestions
- automobile congestion and mobility, conflicts with buses/bicyclists, loss of parking
- construction impacts
- effects of changing traffic patterns on parallel streets
- effects to NPS properties

## CONCLUSION

The FHWA has determined that the Preferred Alternative/Alternative 2, will not have a significant impact on the natural, human or built environment. This Finding of No Significant Impact (FONSI) is based on the findings of the proposed project's Final Environmental Assessment (EA), and comments submitted during preparation of the EA. The Final EA has been evaluated by the FHWA and determined to adequately discuss the need, environmental issues, and impacts of the proposed project and appropriate mitigation measures. It provides sufficient evidence and analysis for determining that an environmental impact statement (EIS) is not required. The FHWA takes full responsibility for the accuracy, scope, and content of the attached EA.

Approved:



Division Administrator  
Federal Highway Administration

12/7/09

Date



APPENDIX  
H

EXAMPLE CATEGORICAL EXCLUSION

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**Categorical Exclusion Determination  
for Protective Buying  
for the South Capitol Street Project  
Washington, D.C.**

**February 12, 2007**

**Introduction**

The District of Columbia proposes the acquisition or partial acquisition of seven parcels near the approach of the Frederick Douglass Memorial (South Capitol Street) Bridge in southeast and southwest Washington, D.C. Because it uses federal funds, the proposed action constitutes a federal action subject to the National Environmental Policy Act (NEPA). The documentation presented below demonstrates that a categorical exclusion will satisfy NEPA requirements for the proposed action, consistent with 40 CFR 1508.4 (*Council on Environmental Quality – Terminology and Index – Categorical Exclusion*) and in accordance with 23 CFR 771.117(d) (*Federal Highway Administration – Environmental Impact and Related Procedures – Categorical Exclusions*), which states:

“Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to: [...]

(12) Acquisition of land for hardship or protective purposes; advance land acquisition loans under 49 U.S.C. 5309(b). Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed. [...]

Protective acquisition is done to prevent imminent development of a parcel which is needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.”

**1. Description of the Proposed Action: Parcels to be acquired**

The proposed action is the acquisition or partial acquisition of seven parcels located near the base of the Frederick Douglass Memorial (South Capitol Street) Bridge in southeast and southwest Washington, D.C. Below are descriptions of the seven parcels selected for protective buying, including the need for full or partial acquisition. This parcel information is based on survey data, public tax assessment records, and field investigations.

Parcel 037

Current Owner: Potomac Development Corporation  
 Street Address: 1509-1515 South Capitol St, SW  
 Tax ID: 0657 0802; 0657 0808; 0657 0810  
 Current Use: Industrial warehouse and auto repair shop  
 Size: 23,324 square feet (ft<sup>2</sup>)  
 Proposed acquisition: 23,324 square feet (ft<sup>2</sup>)

The South Capitol St. Project requires all of Parcel 037. The residual property becomes an uneconomic remnant, unless assembled to adjacent property.

Parcel 041

Current Owner: 1625 South Capitol St, NW, LLC  
 Street Address: 1625 South Capitol St, SW  
 Tax ID: 0660 0007  
 Current Use: Industrial warehouse  
 Size: 14,331 square feet (ft<sup>2</sup>)  
 Proposed acquisition: 14,331 square feet (ft<sup>2</sup>)

The South Capitol St. Project requires all of Parcel 041. The residual property becomes an uneconomic remnant, unless assembled to adjacent property.

Parcels 042

Current Owner: Steuart Investment Company  
 Street Address: 1601 South Capitol St, SW  
 Tax ID: 0660 0011; 0660 0012; 0660 0801; 0662 0801  
 Current Use: Garage and industrial raw material storage  
 Size: 51,640 square feet (ft<sup>2</sup>)  
 Proposed acquisition: 33,600 square feet (ft<sup>2</sup>)

The South Capitol St. Project requires a partial fee acquisition for Parcels 042 of 33,600 square feet (ft<sup>2</sup>).

Parcel 072

Current Owner: Florida Rock Properties, Inc.  
 Street Address: 25 Potomac Ave, SE  
 Tax ID: 0707 0800 through 0707 0802; 0708E 0807; 0708E 0808; 0708S 0806

Current Use: Industrial raw material storage  
Size: 253,291 square feet (ft<sup>2</sup>)  
Proposed acquisition: 12,750 square feet (ft<sup>2</sup>)

The South Capitol St. Project requires a partial fee acquisition for Parcel 072 of 12,750 square feet (ft<sup>2</sup>).

Parcel 074

Current Owner: Jemal’s Buzzard Point, LLC  
Street Address: 1620 South Capitol St, SE  
Tax ID: 0708E 0806; 0708S 0804; 0708S 0807  
Current Use: Vacant – improved and abandoned  
Size: 163,780 square feet (ft<sup>2</sup>)  
Proposed acquisition: 163,780 square feet (ft<sup>2</sup>)

The South Capitol St. Project requires all of Parcel 074.

Parcel 075

Current Owner: Steuart Investment Company  
Street Address: 1601 South Capitol St, SW  
Tax ID: 0660 0011; 0660 0012; 0660 0801; 0662 0801  
Current Use: Garage and industrial raw material storage  
Size: 129,902 square feet (ft<sup>2</sup>)  
Proposed acquisition: 10,550 square feet (ft<sup>2</sup>)

The South Capitol St. Project requires a partial fee acquisition for Parcels 075 of 10,550 square feet (ft<sup>2</sup>).

Parcel 077

Current Owner: Steuart Investment Company  
Street Address: 1724 South Capitol St, SW  
Tax ID: 0708S 0004  
Current Use: Commercial office and heliport  
Size: 41,965 square feet (ft<sup>2</sup>)  
Proposed acquisition: 34,010 square feet (ft<sup>2</sup>)

The South Capitol St. Project requires a partial fee acquisition for Parcel 077 of 34,010 square feet (ft<sup>2</sup>).

Figure 1 displays the project location.

Figure 2 displays the full and partial parcels identified for protective buying.



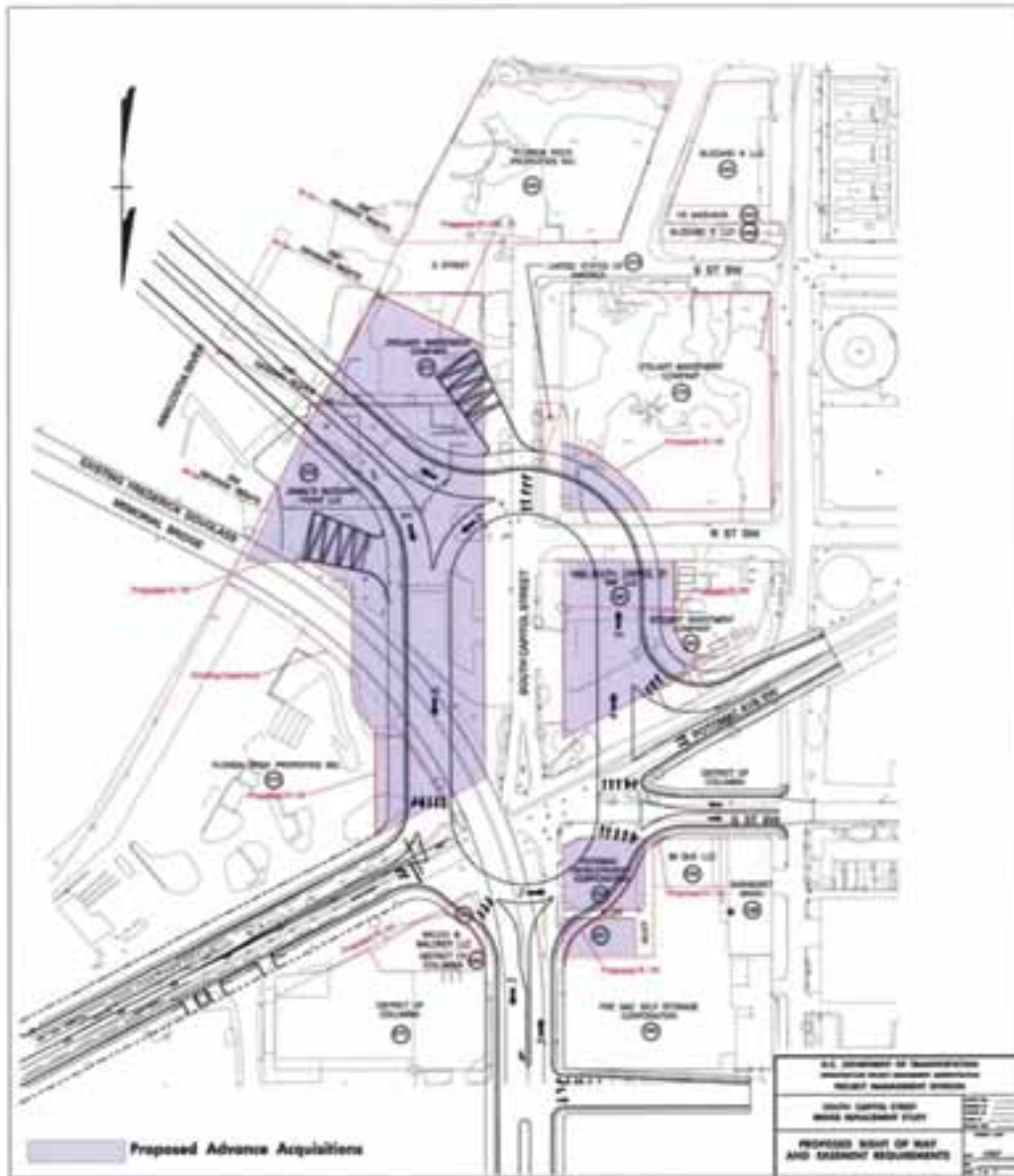


Figure 2: Parcels Identified for Protective Buying

## **2. Background: Coordination with South Capitol Street Environmental Impact Statement (EIS)**

Based on recommendations from the South Capitol Gateway and Corridor Improvement Study and the Anacostia Access Study, the District Department of Transportation (DDOT) is moving forward with plans to transform South Capitol Street into an urban boulevard and replace the Frederick Douglass Memorial Bridge. DDOT is establishing technical constraints and completing preliminary bridge engineering as part of the South Capitol Street Bridge Alignment Study. This study will be released in Spring 2007. The study includes a Protective Buying Report, outlining the right of way requirements for the new bridge alignment and the need for protective buying. Both the Bridge Alignment Study and Protective Buying Report will enhance the development and consideration of alternative alignments in the South Capitol Street Environmental Impact Statement (EIS), which is currently underway. DDOT plans to release the Draft Environmental Impact Statement (DEIS) by May 2007.

Although the selection process for a preferred alternative is not complete, the EIS process will evaluate two build alternatives and a no build alternative. Both build alternatives include replacement of the Frederick Douglass Memorial Bridge on a new southern alignment. Build Alternative 1 includes an at-grade intersection at South Capitol Street and Potomac Avenue. Build Alternative 2 includes a traffic oval connecting the approach of the new Frederick Douglass Memorial Bridge with the intersection of South Capitol Street and Potomac Avenue. The two build alternatives and the no build alternatives will continue to be evaluated through the South Capitol Street EIS and the evaluation will not be limited by the acquisition of the property. Additionally, the acquisition will not limit shifts in alignment that are still possible given the early phase of design. DDOT will not move forward with any project development activities until the South Capitol Street EIS is complete and a Record of Decision (ROD) is issued.

Replacement of the Frederick Douglass Memorial Bridge on a new southern alignment will require new connections to the planned and existing roadway network on both the east and west sides of the Anacostia River. In order to construct the new bridge approaches, DDOT must acquire additional right-of-way. The approach on the west side of the Anacostia River is of particular concern because development in the area is imminent. This development will limit future transportation choices significantly increase the cost of the South Capitol Street project. Therefore, DDOT is initiating protective buying in order to prevent development activities from eliminating project alternatives and increasing the project cost.

In the area of imminent development and specifically at the intersection of South Capitol Street and Potomac Avenue, there are different right-of-way requirements associated with Build Alternative 1, Build Alternative 2, and the four bridge types being analyzed.

- Build Alternative 1, which includes an at-grade intersection, requires the acquisition or partial acquisition of two parcels. Full acquisition of Parcel 074 and partial acquisition of Parcel 077 would be required to construct Build Alternative 1.

- Build Alternative 2, which includes a traffic oval, requires the acquisition or partial acquisition of seven parcels. Based on the bridge type, there are minor differences in right-of-way requirements. Full or partial acquisition of Parcels 037, 041, 042, 072, 074, 075, 077 is required for Build Alternative 2 for any bridge type.

DDOT is initiating protective buying for seven parcels to prevent imminent development and increased cost for both Alternative 1 and Alternative 2. The seven parcels required for Build Alternative 2 include the two parcels that are required for Build Alternative 1. Therefore, acquiring these seven parcels will protect development and increased cost for both build alternatives being analyzed in the EIS. Figure 2 displays the properties selected for protective buying with Build Alternative 2 and the alignment for the stayed bascule, arched bascule, or retractile bridge types. The seven parcels were selected to ensure that development does not occur and limit future transportation choices.

### **3. Purpose and Need: Justification for Protective Buying**

Protective buying of the seven selected parcels is justified for the South Capitol Street Project because:

- Development of the parcels is imminent
- Development will limit future transportation choices
- Development will significantly increase the cost of the transportation project

#### **3.1 Development of the parcels is imminent.**

In Spring 2005, the District of Columbia announced plans to build a new ballpark for the Washington Nationals, a Major League Baseball (MLB) team, adjacent to the existing approach to the Frederick Douglass Memorial Bridge. The ballpark site is located in the area bounded by N Street SE, Potomac Avenue SE, South Capitol Street, and 1<sup>st</sup> Street SE. Based on agreements between MLB and the District of Columbia, the ballpark will be open by April 2008.

The ballpark development has sparked real estate related activities in the area, including the amendments to the Capitol Gateway Overlay District by the DC Office of Zoning and the selection of Ballpark District Developers by the Anacostia Waterfront Corporation (AWC). Additionally, as stated in the Ballpark District Urban Development Strategy, “There is significant private investment in the area; properties are being assembled and prepared for development.”<sup>1</sup>

The sale of the former Hess Oil & Chemical Corporation site (Parcel 074) in July 2005 to Jemal’s Buzzard Point LLC is one example of development activity in the area. The new owner has completed a Phase I Environmental Site Assessment (ESA), which is the first

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<sup>1</sup> *Ballpark District Urban Development Strategy* by Prepared by ROMA Design Group in Association with 360 Architects and Chan Krieger & Associates for Anacostia Waterfront Corporation, September 2005, page 15. <http://www.anacostiawaterfront.net/pdfs/Summary%20Final.pdf>

step in preparing the site for development. Similarly, Florida Rock Properties, Inc. is moving forward with plans to develop their 5.8 acre site (Parcel 072). The first stage of Planned Unit Development (PUD) zoning approval is complete and a hearing for the second stage of PUD will be held in September 2006. The development plans include 3 buildings with office, retail, residential, and hotel components. In addition to the development activities occurring on the two waterfront properties, Steuart Investment Company has assembled three properties along South Capitol Street between Potomac Avenue and S Street SW (Parcels 042, 075, and 077) and has expressed interest in future development of the sites.

Although the ballpark has been the main driver of economic development, there are several other new developments in the area that are also catalysts for real estate development in the South Capitol Street Project area. A few of the significant projects that are in the design and construction phases are:

- U. S. Department of Transportation Headquarters
  - 1.3 million square feet office
  - Open 2006
- Southeast Federal Center
  - 1.8 million square feet office
  - 2,800 residential units
  - 160,000 to 350,000 square feet retail
  - 5.5 acre park
  - Initial phase open 2008
- Arthur Capper/Carrollburg Hope VI Redevelopment
  - 1,625 residential public housing, affordable, and market rate units

The new ballpark and other significant developments in the area has generated real estate activity in the South Capitol Street project area. Therefore, development of the seven parcels is imminent.

### **3.2 Development will limit future transportation choices.**

Currently, 4.62 acres of the parcels required for construction of the South Capitol Street Project are vacant, abandoned, or used for storage. Although these parcels may require demolition and environmental remediation prior to construction, the build alternative are feasible options. However, if the vacant and other properties are developed to the level permitted by zoning<sup>2</sup> prior to the construction of the proposed project, the new bridge alignment and oval alternative is no longer feasible. Therefore, development eliminates future transportation choices.

### **3.3 Development will significantly increase the cost of the project.**

The acquisition of properties for the ballpark site and several recent newspaper articles provide evidence of the rising property costs in the project area. As reported by the Washington Business Journal, “The stadium's early budget for land acquisition jumped from \$21 million to \$98 million to compensate for the neighborhood's increase in

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<sup>2</sup> In October 2002, The Zoning Commission established the Capitol Gateway (CG) Overlay District, intended to create an active mixed-use community in the Buzzard Point and South Capitol Street area. The CG Overlay permits medium to high density commercial, residential, and mixed use development.



property values.”<sup>3</sup> The city has offered \$98 million for the 20 acre ballpark site, which two years ago was assessed at \$32 million. One example of cost escalation for the ballpark site properties is city offering \$211 square foot for a single-family residential dwelling and vacant lot, which is a 75% increase over the assessed value. Since most of the 23 landowners have not agreed to sell, the city invoked eminent domain in October 2005 to take the properties.

Properties outside of the ballpark site are also increasing in value. As documented in the Washington Post, one property owner commented that the city offered her about \$188 per square foot while properties to the north are selling for \$350 to \$400 per square foot.<sup>4</sup> Additionally, the Washington Business Journal reported that a 41,000 square foot parcel on S. Capitol Street near O Street, SW, which was assessed at \$1.4 million could sell for as much as \$8 million.<sup>5</sup> It is apparent that the ballpark and other developments in the area sparked a great increase in property values and the market points to continued increases in value. This land value price escalation will greatly increase the cost of the South Capitol Street Project since right of way acquisition is necessarily to implement the proposed improvements.

#### **4. Coordination and Public Involvement**

Two early coordination/public information meetings were held regarding the need for protective buying for the South Capitol Street Project. The first meeting was held on July 6, 2005, at DDOT’s office and was attended by representatives of the three total-take properties (parcels 037, 041, 074). They were advised of the project requirements and how it affected their properties and given alternative alignments that were available at the time. The meeting agenda, outline, and attendance sheet are available in the Appendix A.

The second meeting was held on August 16, 2005, as a public forum. A notice was published in the Washington Post and other local newspapers of local interest, posted on the Frederick Douglass Memorial (South Capitol Street) Bridge Alignment Study website, and sent by letter to affected landowners. Thirty four people attended this public information meeting at the Frank D. Reeves Municipal Center. All of the landowner’s affected by the proposed advance right of way acquisition program had a representative in attendance. The PowerPoint presentation, notes from the meeting, and a list of attendees are available in Appendix A

Individual coordination meetings have been held with property owners, including:

- January 6, 2006: Meeting with Florida Rock Properties (FRP) Development Corporation, including Davis Buckley architects and District Department of Transportation (DDOT)

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<sup>3</sup> “Newsmaker of the Year: Washington NationalsWashington,” by Sean Madigan in the Washington Business Journal, December 23, 2005.

<sup>4</sup> “Battle Brewing for Stadium Tracts,” by David Nakamura in the Washington Post, September 25, 2005.

<sup>5</sup> “Ballpark-area property in SW pitched for \$8M mixed-use sale,” by Tim Mazzucca in the Washington Business Journal, September 16, 2005.

- April 20, 2006: Meeting with Florida Rock Properties (FRP) Development Corporation, including FRP president, Davis Buckley architects, District Department of Transportation (DDOT)
- October 12, 2006: Meeting with Florida Rock Properties (FRP) Development Corporation, including FRP president, Davis Buckley architects, District Department of Transportation (DDOT), Office of Planning, and Anacostia Waterfront Corporation
- January 3, 2007: Meeting with Heliport current users, District Department of Transportation (DDOT), Anacostia Waterfront Corporation (AWC), and other parties interested in heliport operations in the District. (See Appendix A for a list of meeting attendees and minutes.)

As a result of the meetings and coordination with Florida Rock Properties (FRP) Development Corporation, DDOT submitted a letter describing the coordination for FRP's Planned Unit Development (PUD) Zoning Application and Hearing. See Appendix A for a copy of the letter.

## **5. Environmental Effects**

### **5.1 Land Use**

Current land use for each parcel is included in the Description of the Proposed Action (Section 1). The current land uses on the parcels does not include a significant publicly owned public park, recreation area, wildlife or waterfowl refuge, or any significant historic site. Therefore, Section 4(f) consultation is not required. (See Section 5.11 for Historical and Archaeological Resources.)

The action will not necessarily change the current land use of the parcels. The action will not change the current zoning of the parcels. DDOT will not move forward with any project development activities until the South Capitol Street EIS is complete and a Record of Decision (ROD) is issued. In the interim, the parcels may be leased to the current owners or tenants or new tenants. The leasing of properties will follow all applicable District and federal policies, including the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and the DDOT Draft Right of Way Manual.

### **5.2 Displacements**

The action may displace existing tenants on the parcels. Relocation assistance will be provided to all tenants, following applicable District and federal policies, including the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and the DDOT Draft Right of Way Manual.

Based on current use, ownership, and property needs for the project, DDOT identified the following five potential commercial displacements:

#### Parcel 037

- Industrial warehouse
- Auto repair shop

Parcel 041

- Industrial warehouse

Parcel 077

- Commercial office
- Heliport

No residential displacements will be required. All displacees will be provided relocation assistance, following District and federal regulations.

DDOT has identified several areas for potential relocation of the businesses. The heliport has the most constraints in terms of available areas for relocation given the flight patterns, noise impacts, and accessibility requirements. DDOT is working with the Anacostia Waterfront Corporation (AWC) to identify a location for a new heliport to serve the demands of the current heliport on Buzzard Point and the needs of the National Park Service (NPS) police heliport in Anacostia Park. More specifically, AWC is developing a master plan for the redevelopment of Poplar Point and a plan for relocating the NPS facilities that are currently on site. DDOT and AWC are collaborating to identify a more specific location, most likely within the Poplar Point planned redevelopment area between the Frederick Douglass Memorial Bridge and the 11<sup>th</sup> St. Bridges. Co-locating the NPS police and the commercial heliport may provide advantages in terms of operations to support heliport use in the District. The current heliport on Buzzard Point will continue operations until a new location (either temporary or permanent) has been determined. Therefore, there will not be any major interruptions in heliport operations or revenue loss due to the inability to operate.

Aside from the heliport, the other businesses on the selected parcels are more flexible, mobile, and pose fewer relocation constraints. The relocations of the industrial warehouses, automotive repair shop, and the commercial office will most likely occur to other areas zoned Medium bulk commercial and light industrial (C-M-2). There might be locations available in the near vicinity of the current location at Buzzard Point. If a relocation cannot occur the near vicinity, DDOT will work with property owners and tenants to find comparable properties within the District. Preliminarily, DDOT identified some areas in the northeastern quadrant of the District that are currently zoned C-M-2 as potential areas for relocation. These areas includes the Bladensburg Road Corridor and the New York Avenue Corridor. Both corridors provide similar access to major freeways and interstates and have similar warehouse structures that can be used for warehousing or garages. The warehousing and automotive uses would match and compliment existing uses in those areas. The commercial office is likely the business that can most easily be relocated in the near vicinity of the existing site, particularly given the expansion of commercial office space as part of the development of the Ballpark District and Near Southeast.

### **5.3 Social and Economic**

The action will may have a negative economic impact on the property owners and tenants. Property owners will be compensated for their property, based on fair market value, following District and federal regulations. All tenants will be provided relocation assistance, following District and federal regulations. The current businesses have few employees that will be impacted by the relocation of their place of employment. Fifteen is a preliminary estimate of the number of employees, based on the land uses. If relocation occurs in the near vicinity, there will be no economic or social impact on the employees. If the businesses must be relocated to another area of the District, the areas will have similar access by various modes of transportation. The areas preliminarily identified in Section 5.2 are between two and four miles from the existing site and have similar vehicular and transit access. Employees will not experience a major hardship due to the relocation and no loss of employment is anticipated. Therefore, the economic impact to property owners, tenants, and employees will not be significant.

The future redevelopment of the area is anticipated to increase the housing supply, employment opportunities, and commercial markets. Although the planned development does not necessarily include the light industrial and warehouse uses that currently exist in the area, there will be more neighborhood serving retail. The automotive repair shop is the only service related commercial use on the parcels selected for protective buying. Given that patrons usually drive to the shop to drop off their vehicle, the relocation will not have a significant impact on current patrons or the community.

#### **5.4 Transportation**

The action will not impact transportation, including traffic operations for automobiles, transit, bicyclists, or pedestrians.

#### **5.5 Visual Quality**

The proposed action will not impact the visual quality of the area.

#### **5.6 Air Quality**

The action will not impact on air quality.

#### **5.7 Noise**

The action will not impact on noise levels.

#### **5.8 Energy**

The action will not impact energy consumption

#### **5.9 Floodplains, Wetlands, and Water Quality**

The action will have no impact on the 100-year floodplain, wetlands, or water quality. Two of the identified parcels are adjacent to the Anacostia River, a navigable water of the U.S. Additionally, portions of these two parcels are included in the 100-year floodplain. However, the action does not involve any work within the floodplain or the river. The action does not require permits under Section 404 of the Clean Water Act.

#### **5.10 Vegetation and Wildlife**

The action will not impact vegetation or wildlife.

### **5.11 Historical and Archaeological Resources**

The action will not impact historic resources that are listed in, or potentially eligible, for the National Register of Historic Places (NRHP). The identification of historic resources that are listed in, or potentially eligible, for the National Register of Historic Places (NRHP) took place in 2004 and 2005 as part of the South Capitol Street EIS. The findings were documented in the Technical Memorandum of Architectural/Historic Resources: Preliminary National Register Eligibility Assessment and the subsequent Identification of Historic Architectural Resources as Corrected by Errata, (February 13, 2006). Coordination has occurred with the State Historic Preservation Office (SHPO) for the District of Columbia for the South Capitol Street EIS. In a letter from SHPO dated July 21, 2006, SHPO concurred with conclusions reached in the Identification of Historic Architectural Resources. As documented in the findings, no eligible or listed resource will be affected by protective buying. Therefore, no further Section 106 or Section 4(f) coordination is required.

Protective buying will not disturb or impact any archaeological resources. The action will not impact archaeological resources. Archaeological resources were evaluated as part of the South Capitol Street EIS. No recorded archeological sites occur within the seven parcels or the South Capitol Street EIS study area. The potential for intact archeological deposits was determined to be fairly low. DDOT will not move forward with any project development activities until the South Capitol Street EIS is complete and a Record of Decision (ROD) is issued.

### **5.12 Hazardous Materials**

Given the presence of underground oil storage tanks and former and current industrial uses on the parcels, contaminants in the ground are likely. More information about the potential hazardous materials is available in the Phase 1 Environmental Site Assessment and Contaminated Materials Management Report for the South Capitol Street Bridge Alignment Study (2005) and the Preliminary Environmental Screening Assessment Report for the South Capitol Street Draft Environmental Impact Statement (2006). Below is a summary of the recognized environmental conditions for each parcel. Two of the parcels (074 and 075) have Risk Rating 1 (Highest Risk), meaning there is documented on-site soil or ground-water contamination with no or uncertain resolution. Four of the parcels (037, 041, 042, and 072) have Risk Rating 2, meaning there are potential environmental issues with insufficient information to establish if concern is recognized environmental condition (REC) related to on-site or off-site issues. One of the parcels is Risk Ranking 3, meaning there was known environmental contamination with documented closure.

#### Parcel 037: Risk Rating 2

- ERNS site with release of 100 gallons of unknown material, reported to be water.
- UST most likely present since vent and fill pipes were noted on the western façade of the subject building.

- Historic auto repair activities and laundry/dry cleaning with potential solvent use.
- Possible off-site impacts from adjacent upgradient GSA Central Field Support Office.

Parcel 041: Risk Rating 2

- Site listed on the UST database with a 1,000 gallon UST permanently out of use.
- Site listed on the ERNS database for a release of waster oil in 1994. Sorbents and booms to contain spill.
- RCRA-SQG listed on the site as Pak-America with compliance directive regarding poor handling of materials listed in 2001
- Suspected five historic tanks (4 fuel oil, 1 gasoline).
- ACM/LBP are suspected in existing building.

Parcel 042 : Risk Rating 2

- Three ASTS present on site during MACTEC's site reconnaissance.
- Seven USTS are listed on the UST database as out of use.
- Site listed on LUST database as Opportunity Concrete Corp., with a No Further Action Letter.
- RCRA generator record keeping violations at the site in 1994 under Opportunity Concrete Corp.
- ACM/LBP are suspected in existing building.

Parcel 072: Risk Rating 2

- Site listed as an active LUST case with monitoring wells present on site.
- Gas tank noted on Sanborn Maps dated 1959, 1977, 1984. May be in relation to the various gas tanks suggested in previous environmental investigations of larger site.
- Possible off-site impact from off-site LUST case.
- ACM/LBP are suspected in existing buildings/structures.

Parcel 074: Risk Rating 1

- Historical Petroleum Tank Farm and RCRA SQG, with large industrial ASTs/USTs located on the property.
- Documented free product (LPH) an elevated petroleum hydrocarbons in soil and ground-water.
- No formal Corrective Action Plan or remediation assessment has been completed.
- Missing DC EHA regulatory directories and files
- ACM/LBP are suspected in existing buildings.

Parcel 075 : Risk Rating 1

- Oil terminal once operated at the facility from approximately 1930-1989, including fuel oil and kerosene. Environmental investigations have been

taking place at the site since 1987 to present. In 1987, monitoring wells were installed and free product was recovered. Site is still considered an open LUST case. All USTs and association ASTs have apparently been removed in 1989.

- ACM/LBP are suspected in existing buildings.

Parcel 077: Risk Rating 3

- Hazardous materials and petroleum products may be present on site in relation to helicopter service/airport facility currently present on site.
- Historical LUST case at the site with soil contamination in relation to beoth USTs and ASTs on site.
- Remediation and removal of soil took place, and the LUST case was closed in 1999.
- ACM/LBP are suspected in existing buildings.

Refined cost estimates for environmental remediation will be assessed as part of the appraisal for each property and will be factored into the fair market value determination. The proposed action will not impact hazardous materials. Environmental remediation is part of the project development process for the South Capitol Street project.

**6. Conclusion**

It has been determined that the early acquisition of the referenced parcels for the purposes of protective buying in advance of construction activities for the South Capitol Street Bridge will have no significant impacts on urban or community resources or on the natural, human or physical (manmade) environment.

APPROVED BY \_\_\_\_\_ DATE \_\_\_\_\_

Mark R. Kehrli, Division Administrator  
District of Columbia Division, FHWA

APPROVED BY \_\_\_\_\_ DATE \_\_\_\_\_

John Deatrck, Chief Engineer  
District Department of Transportation





APPENDIX

I

DDOT ENVIRONMENTAL DOCUMENT REVIEW FORM





District Department of Transportation					
Environmental Document Review Form (Form IV)					
1. Project Name:					
2. DDOT Document	Yes	No	External Agency Document	Yes	No
3. Project Location:					
4. Project/Document Description:					
5. Document Type (please place "X" where applies):					
Environmental Assessment	Environmental Impact Statement		Categorical Exclusion		
Section 106 Assessment Report	Section 106 MOA/PA		Section 4(f)		
ESA Sec 7 BA	Air Quality Assessment		Sec 404 Permit		
Sec 402 Permit	Administrative Record		IJR/IMR		
EISF	Re-evaluation		Other		
6. Comments (use additional pages if needed):					
7. Prepared by:					
Name			Phone		Date
Please do not write below TO BE COMPLETED BY DDOT ENVIRONMENTAL OFFICE					
6. Environmental Document Checklist Attached:			Yes		No
Approved		Approved with Comments		Not Approved	
7. Comments:					
Recommended by:			Phone		Date
Name:					
DDOT Project Development & Environment					
Approved by:			Phone		Date
Name/Signature:					
DDOT Project Development & Environment Head					



APPENDIX

J

## DDOT ENVIRONMENTAL DOCUMENT CHECKLIST

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District Department of Transportation					
DDOT ENVIRONMENTAL DOCUMENTS CHECKLIST					
Date:					
Name of the Project:					
Location:					
Project Manager & Administration:					
Lead Federal Agency:					
Type of Document: (Place "X" where applicable)	DEIS	FEIS	ROD	EA	Final EA
	FONSI	Re-Evaluation	Administrative Record	Cat Ex	Other

Topic	Adequately covered (Yes/ No/ NA)	Comments
<b>a. EA/EIS CONTENT</b>		
1. Executive Summary		
2. Table of Content		
3. Cover Sheet (signed by DDOT Director & FHWA DA)		
4. Purpose & Need Statement		
5. Alternatives Chapter		
6. Assessment of Feasible Alternatives		
7. Affected Environment		
8. Environmental Consequences		
9. Public & Agency Involvement		
10. List of Preparers		
11. Record of Decision / FONSI		
12. Technical Study Reports( as appropriate)		
13. Notice of Intent (required for EIS)		
14. Notice of Availability (required for EIS)		
<b>b. PURPOSE AND NEED STATEMENT</b>		
1. Compliance with FHWA Technical Advisory TA 6640		
2. Purpose		

Topic	Adequately covered (Yes/ No/ NA)	Comments
3. Need (may be based on the following): <ul style="list-style-type: none"> <li>a. Project Status (project history, lead agency, other agencies involved, schedules, etc).</li> <li>b. System Linkage – (does the project provide a "connecting link?" How does it fit in the transportation system?)</li> <li>c. Capacity – (inadequate existing capacity, poor LOS, etc)</li> <li>d. Transportation Demand (relationship with STIP, TIP, CLRP, and other plans)</li> <li>e. Legislation – (Is there a Federal, State, or local governmental mandate for the action?)</li> <li>f. Social Demands or Economic Development – (New employment, schools, land use plans, recreation, etc that require the proposed action).</li> <li>g. Inter-Modal relationships – (relationship with other modes)</li> <li>h. Safety – (safety need, crash data, etc)</li> <li>i. Roadway Deficiencies – (substandard geometrics, load limits on structures, inadequate cross-section, or high maintenance costs)</li> </ul>		
4. Supporting Data		
5. Roadway Deficiencies Data (PCI, Structural rating, etc.)		
6. Economic Development Data		
7. List of Reference Materials		
8. Purpose and Need Statement		
9. Study Area Map		
<b>c. STUDY AREA DEFINITION</b>		
1. Study Area Description		
2. Study Area Map		
3. Logical Termini		
<b>d. ALTERNATIVES</b>		
1. No Action Alternative		
2. Reasonable Alternative		
3. Alternatives Considered But Eliminated from Further Review		
4. Build Alternatives		
5. TSM/HOV Alternative		
6. Bike/Pedestrian Considerations/Alternative		
7. Conceptual Plans		
8. Layout		
9. Typical Sections		
10. Right-of-Way Information		



Topic	Adequately covered (Yes/ No/ NA)	Comments
11. Utilities Identification		
12. Topo Data/Survey		
13. Environmental Resources Identification		
10. Cost Estimates		
14. Constructability		
15. Conceptual MOT		
<b>e. AFFECTED ENVIRONMENT</b>		
1. Land Use and Zoning		
2. Land Acquisition and Displacement		
3. Demographics		
4. Community Resources		
5. Economics and Development Issues		
6. Environmental Justice & Title VI		
7. Traffic & Transportation (including Transit, Pedestrian, Bike, Vehicles)		
8. Utilities		
9. Cultural / Historic Resources (Sec 106)		
10. Visual and Aesthetics		
11. Vibration		
12. Water Quality		
13. Navigable Waters		
14. Biotic Communities		
15. Endangered and Threatened Species		
16. Energy Conservation		
17. Construction Impacts		
18. Archaeological Investigation and Report (Sec 106)		
19. Paleontology Effects Determination		
20. Flood Plains Effects Determination		
21. Wetlands and Sec 404 Permit Requirements		
22. NPDES (section 402) Permit Requirements		
23. Fish and Wildlife Issues		
24. Hazardous Waste and Materials/Contaminated Soil Investigation		
25. Noise Analysis		
26. Air Quality		
27. Erosion and Sedimentation		
28. Indirect and Cumulative Impacts		
29. Section 4(f) Issues		
<b>d. ENVIRONMENTAL CONSEQUENCES</b>		
1. Land Use and Zoning		
2. Land Acquisition and Displacement		
3. Demographics		
4. Community Resources		
5. Economics and Development Issues		

Topic	Adequately covered (Yes/ No/ NA)	Comments
6. Environmental Justice & Title VI		
7. Traffic & Transportation (including Transit, Pedestrian, Bike, Vehicles)		
8. Utilities		
9. Cultural / Historic Resources (Sec 106)		
10. Visual and Aesthetics		
11. Vibration		
12. Water Quality		
13. Navigable Waters		
14. Biotic Communities		
15. Endangered and Threatened Species		
16. Energy Conservation		
17. Construction Impacts		
18. Archaeological Investigation and Report (Sec 106)		
19. Paleontology Effects Determination		
20. Flood Plains Effects Determination		
21. Wetlands and Sec 404 Permit Requirements		
22. NPDES (section 402) Permit Requirements		
23. Fish and Wildlife Issues		
24. Hazardous Waste and Materials/Contaminated Soil Investigation		
25. Noise Analysis		
26. Air Quality		
27. Erosion and Sedimentation		
28. Indirect and Cumulative Impacts		
29. Section 4(f) Issues		
<b>e. AGENCY COMMENTS &amp; COORDINATION</b>		
1. Cooperating Agency Letter		
2. Participating Agency Letter		
3. Agency Coordination/Scoping Letter		
4. Agency Meetings Minutes		
5. Agency Responses		
6. Informal Letters Received from Agencies		
7. Response to Agency Comments		
<b>f. PUBLIC COMMENTS &amp; INVOLVEMENT</b>		
1. Public Involvement Plan		
2. Public Scoping Meeting Minutes/Transcripts		
3. Public Alternatives Meeting Minutes/Transcripts		
4. Public Hearing (required only with EIS)		
5. Public Hearing Notice (the public meeting must be 14 days after the announcement/release of document)		
6. Public Hearing Meeting Minutes/Transcripts (Public hearing is required for EIS after the release of DEIS)		
7. Public Officials Meeting Reports and Handouts		



Topic	Adequately covered (Yes/ No/ NA)	Comments
<b>ANALYSIS/DATA/REPORTS</b>		
<b>i. TRANSPORTATION &amp; TRAFFIC ANALYSIS</b>		
1. Logical Termini & Traffic Analysis Area		
2. Existing Traffic Volume		
3. Existing Traffic (AADT) <ul style="list-style-type: none"> <li>▪ 48 hour ATR Counts</li> <li>▪ 13 hour Turning Movement Counts (13 hours is preferred; morning and evening peak hours are also acceptable)</li> </ul>		
4. Existing Bicycle Counts		
5. Existing Pedestrian Counts		
6. Existing Crash Data		
7. Existing Intersection Turning Movements (morning and afternoon peak hours and midday)		
8. Traffic Forecast and Level of Service Methodology		
9. Use of MWCOG Travel Demand Model for Forecast		
10. Forecast Year (20-25 years) Analysis		
11. Build/Opening Year Analysis		
12. Projected Average Annual Daily Traffic (AADT) Volumes		
13. Projected Intersection Turning Movements (morning and afternoon peak hours and midday)		
14. Levels of Service		
15. Signal Warrants Analysis		
16. Travel Pattern Analysis		
17. Levels of Service at all Major Intersections		
18. Delay at all Major Intersections		
19. Queuing at Major Intersections/Interchanges		
20. HCM Analysis		
21. CORSIM Analysis		
22. SYNCHRO or VISSIM Analysis		
23. SymTraffic or VISSIM Simulations		
24. Truck Percentages		
25. Origin – Destination Studies		
26. Study Detail (dates, times, locations, etc.)		
27. Survey Forms		
28. Trip Tables		
29. Travel Pattern Analysis		
30. Safety Data/Analysis		
31. Accident Data		
32. Statewide Accident Rates		

Topic	Adequately covered (Yes/ No/ NA)	Comments
33. Roadway Deficiencies		
34. Regional and Local Roadway Systems (including maps)		
35. Traffic Technical Report		
<b>j. ENGINEERING DATA</b>		
1. Functional Classification		
2. Design Criteria Described:		
3. Design Exceptions, if any (13 Controlling criteria given below): 1) Design Speed 2) lane width 3) shoulder width 4) bridge width 5) structural capacity 6) horizontal alignment 7) vertical alignment 8) grade 9) stopping sight distance 10) cross slope 11) super elevation 12) vertical clearance 13) horizontal clearance		
4. Constructability Review – Feasible Alternatives		
5. Preferred Alternative Verification Report		
6. Value Engineering Report – Preferred Alternative		
7. Constructability Review – Stage 2 Detailed Design Plans		
8. Preliminary Right-of-Way Plans		
9. Cost Estimates		
10. Cost Breakdown		
<b>k. SOIL &amp; GEOLOGY</b>		
1. Geological and Resource Mapping		
2. Geologic Formations and Sinkhole Data		
3. Soil Survey Data		
<b>l. WETLANDS</b>		
1. National Wetland Inventory/Maps		
2. List of Hydric Soils from DDOE		
3. List of Non-Hydric Soils from DDOE		
4. Infrared Aerial Photos ( if used)		
5. Field Data Sheets		
6. Mapping of Wetland Area and Extent of Study Area		
7. Wetlands Delineation – Preferred Alternative		

Topic	Adequately covered (Yes/ No/ NA)	Comments
8. Jurisdictional Determination from U.S. Army Corps of Engineers (USACE)		
9. Impact Calculations		
10. Letters, Meeting Reports, Field Review Reports		
11. Wetlands Delineation Report		
12. Avoidance Alternatives		
13. Minimization Options		
14. Conceptual Mitigation Plans		
15. List of Reference Materials		
16. Documentation of Coordination with USACE & DDOE (Permitting/WQC office)		
17. Determination of Type of Permit		
<b>m. FLOODPLAINS</b>		
1. Waterways Mapping		
2. Federal Emergency Management Agency Flood Insurance Rate Maps		
3. Hydrologic and Hydraulic Studies/Data/Reports		
4. Storm Water Management Facilities Mapping		
5. Pertinent Correspondence and Meeting Reports, Field Review Reports		
6. List of Reference Materials		
<b>n. STREAMS/RIVERS/WATERBODIES</b>		
1. Water Quality Data		
2. Aquatic Biota Data		
3. Protected, Designated Water Uses Data		
4. Headwater Habitat Evaluation evaluations		
5. Qualitative Habitat Evaluation		
6. Letters/Meeting Reports/Field Review Reports		
7. Type of Permits Needed		
<b>o. VEGETATION AND WILDLIFE</b>		
1. Land Use and Cover Type Maps (aerial)		
2. Wildlife Species Common to Study Area		
3. Endangered Species: Letters from U.S. Fish and Wildlife Service (FWS) &/or National Marine Fisheries (NMF)		
4. Endangered Species: Letters from DDOE Fish & Wildlife Office		
5. Field Review Reports on Threatened/Endangered Species and Coordination with Experts and Agencies		
6. Pertinent Correspondence/Meeting Reports/Field Review Reports		
7. Endangered Species Act (ESA) Sec 7 Consultation		
8. Biological Assessment (BA)		

Topic	Adequately covered (Yes/ No/ NA)	Comments
9. Determination of Effects for ESA Sec 7		
10. Concurrence of Effects for ESA Sec 7 by NMF or FWS		
11. List of Reference Material		
<b>p. HAZARDOUS MATERIALS/SITES</b>		
1. CERCLIS Review		
2. Environmental Site Assessment Screening Report		
3. Field "Windshield" Study Performed		
4. Health and Safety Plan for Phase I/II Studies		
5. Phase I Environmental Site Assessment		
6. Phase II Environmental Site Assessment Work Plan		
7. Phase II Environmental Site Assessment		
8. Investigative Reports and Lab Data (soil gas survey, geophysical investigation lab reports, etc.)		
9. Waste Management Plan, Plans Specifications, Estimates Document		
10. Environmental Notes		
11. Remedial Construction Monitoring Report (if required)		
12. List of Reference Materials		
<b>q. NOISE</b>		
1. Map of Receptor Site Locations and Listing		
2. Sensitive Receptor Descriptions		
3. Traffic Data		
4. Monitoring Data Sheets/Traffic Counts		
5. FHWA Traffic Noise Model Used		
6. Model Check Results		
7. Model Input and Output Files		
8. Ambient and Projected Noise Levels (data tables)		
9. List of All Assumptions Used for Analysis		
10. Noise Analysis Report		
11. List of Reference Materials		
<b>r. AIR QUALITY</b>		
1. Maps of Receptor Site Locations and Links Used in Analysis		
2. Traffic Data Used		
3. Identification of All Intersections with LOS "D" or Worse		
4. List of All Assumptions Used for Analysis		
5. Model Input and Output Files		
6. Mobile/MOVES Mode Used		
7. Mobile/MOVES Input and Output Files		
8. Air Quality Baseline Data		
9. Background Carbon Monoxide (CO) Concentrations		
10. Is the Project Listed in the Conformed CLRP?		

Topic	Adequately covered (Yes/ No/ NA)	Comments
11. Is the Project Listed in the Conformed TIP?		
12. Are the Project Links and Connections Properly Coded in the Travel Demand Model?		
13. TIP Information		
14. Conformity Statement		
15. List of All Assumptions Used for Analysis		
16. Pertinent Correspondence		
17. List of Reference Materials		
<b>s. SOCIAL ENVIRONMENT</b>		
1. Comprehensive Plans		
2. List of Reference Materials Used for Social Environment Evaluations		
3. Environmental Justice Data		
<b>u. LAND USE AND ZONING</b>		
1. Land use plans (existing and future)		
2. Existing and Proposed Development Plans and Information		
3. Redevelopment Plans		
4. Recreation Plans		
5. Tax Maps		
6. Zoning Maps (existing and future)		
7. Pertinent Correspondence		
<b>v. POPULATION AND HOUSING</b>		
1. Census Data		
2. Relocation Assistance		
3. List of Reference Materials		
<b>w. ECONOMY AND EMPLOYMENT</b>		
1. Business Census Data		
2. Listing and Mapping of Area Local Employers		
3. Map of Commercial/Industrial Centers		
4. Economic Trends/Forecasts		
5. Business Displacements		
<b>x. COMMUNITY FACILITIES</b>		
1. Listing and Map of Area Community Facilities and Services		
2. Detailed Information on Each Facility		
3. Map of Service Areas for Facilities and Planned Expansion		



Topic	Adequately covered (Yes/ No/ NA)	Comments
<b>y. COMMUNITY COHESION</b>		
1. List and Map of Communities, Neighborhoods, Subdivisions		
2. Maps of Pedestrian Crosswalks and Walkways		
3. Detailed Information on Neighborhoods		
4. Residential Displacements		
<b>z. VISUAL IMPACTS</b>		
1. List/Map/Photos of Sensitive Receptors		
2. Impact Analysis		
3. Photo Simulations		
<b>za. HISTORIC &amp; ARCHEOLOGICAL RESOURCES</b>		
1. List of Map of National Register of Historic places, Eligible or Listed Properties		
2. Literature Review		
3. Section 106 Consultation Initiation Letter to SHPO		
4. Section 106 Consultation Initiation Letter to ACHP		
5. APE Determination/Concurrence with SHPO Documentation		
6. Phase I History/Architecture Survey/Assessment Report		
7. Phase II History/Architecture Survey Assessment Report		
8. Letter of Submission of the Assessment Report to SHPO		
9. Documentation of Effect of the Preferred Alternative on Historic Resources		
10. Memorandum of Agreement/Programmatic Agreement		
11. Correspondence with Consulting Parties		
12. Correspondence from DC SHPO		
13. Correspondence from keeper of the National Register of Historic Places		
14. Correspondence from Advisory Council on Historic Preservation		
15. Correspondence to/from Section 106 Consulting Parties		
16. Consulting Parties Meeting Minutes		
<b>zb. SECTION 4(f) EVALUATION</b>		
1. Documentation of Nonapplicability		
2. Proposed Action		

Topic	Adequately covered (Yes/ No/ NA)	Comments
3. Identification of the Sec 4f Resources: <ul style="list-style-type: none"> <li>a. Map</li> <li>b. Size</li> <li>c. Ownership</li> <li>d. Function of the resource/site</li> <li>e. Description and location of all existing and planned facilities (ball diamonds, tennis courts, etc.)</li> <li>f. Access (pedestrian, vehicular)</li> <li>g. Usage (approximate number of users/visitors, etc.).</li> <li>h. Relationship to other similarly used lands in the vicinity</li> <li>i. Applicable clauses affecting the ownership, such as lease, easement, covenants, restrictions, or conditions, including forfeiture</li> <li>j. Unusual characteristics of the Section 4(f) property (flooding problems, terrain conditions, or other features) that either reduce or enhance the value of all or part of the property.</li> </ul>		
4. Impacts on the 4f Resource/Property		
5. Avoidance Alternative (s) and Evaluation		
6. Minimization Alternative (s) and Evaluation		
7. Measures to Minimize Harm		
8. Sec 4f Evaluation Document		
9. Written Agreement or Letter from the Resource Owner Agreeing to the Evaluation and Mitigations Proposed		
10. 4f Programmatic Evaluation		
11. Property/Parcel Maps, Deeds		
12. Management Plans/Reports		
13. Temporary Use		
<b>zc. SECONDARY AND CUMULATIVE IMPACTS</b>		
1. Defined Study Area (space and time)		
2. Methodology/Parameters		
3. Secondary Impacts Analysis		
4. Cumulative Impacts Analysis		
5. Mitigation Strategies		
<b>zd. OTHER TECHNICAL STUDIES</b>		
1. Methodology		
2. Data		
3. Impact Analysis		
4. Mitigation		
5. Correspondence		

Topic	Adequately covered (Yes/ No/ NA)	Comments
<b>ze. MITIGATION</b>		
1. Conceptual Mitigation Plans		
2. Environmental Commitments Summary		
3. Environmental Plan Notes		
4. Federal Authorization Request/Approval		
<b>zf. PERMITS &amp; APPROVAL</b>		
1. Identification of Types of Permits Needed		
2. Sec 404 Permit		
3. Sec 402 Permit		
4. Sec 401 WQC Permit		
5. Sec 10 Permit		
6. NPS Permits		
7. Other Permits		
<b>zg. OTHERS</b>		
<b>zh. COMMENTS:</b>		

Prepared By: \_\_\_\_\_

Name

Date



# APPENDIX K

## SAMPLE EA/EIS SCOPE OF WORK

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# EA/EIS Sample Scope of Work

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The purpose of this Scope of Work (SOW) is to prepare an EA document pursuant to the National Environmental Policy Act (NEPA) to analyze the ..... This EA/EIS document will also include National Historic Preservation Act – sec 106 and USDOT sec 4f evaluation/documentation.

## 1 – PURPOSE OF THE PROJECT:

The purpose of this project is to prepare:

- EA / EIS document
- Section 106 evaluation
- Section 4(f) evaluation

For the proposed roadways and transportation network in .....

The document will include all the Tasks mentioned under Section 3 of this document, at a minimum. The EA/EIS document will be per CEQ and FHWA NEPA regulations. The Scope will also include full assistance in the preparation of Finding of No Significant Impact (FONSI) for the EA or Record of Decision (ROD) if an EIS for FHWA (if appropriate). The Section 106 evaluation will be prepared as per 36 CFR 800, and all the relevant data and analysis will be prepared as per the National Historic Preservation Act and procedures described in 36 CFR 800. The Section 4(f) evaluation will be prepared as per U.S DOT regulations.

## 2 -STUDY AREA

The Project area for this is from X street to Y street. The project area is outlined in the map shown on the next page (figure 1). It should be noted that the study area may have to be extended based on the study requirements.

## 3 - SCOPE OF SERVICES:

The consultant shall conduct the following tasks:

1. Project Management
2. Purpose and Need Statement
3. Data Collection
4. Environmental Assessment/Environmental Impacts
5. Public Involvement and Interagency Coordination
6. EA/EIS Document
7. Section 4(f) Evaluation and Section 106 Evaluation

All NEPA, AASHTO, FHWA, Federal, and DC rules and regulations will be followed in all tasks of the project.

### Task 1 – Project Management (All Tasks)

Monthly Invoices and Progress Reports:

The consultant will provide monthly invoices to the DDOT project manager for approval and timely payment. Along with invoices, the consultant will prepare and submit monthly progress reports to the DDOT project manager, which will include the task accomplishments, minutes from meetings held, hard copies of all materials developed that month, status of deliverables, expected activities for the next period, issues for resolution and the responsible party, and problems and their disposition from the previous period.

Biweekly Project Progress Meeting:

The consultant shall meet with the DDOT Project Management Staff biweekly and provide project progress reports throughout the life of the project.

## Task 2 - Develop Purpose and Need

The consultant will develop a draft Purpose and Need Statement in close coordination with DDOT staff and other key stakeholders. The Purpose and Need statement will be consistent with guidance available through the FHWA technical advisory.

Task deliverables:

Final purpose and need statement

## Task 3 - Data Collection:

Collect all data necessary for the environmental study, using existing databases and studies, additional field surveys, sampling and exploration. The consultant will prepare a detailed inventory of all the environmental elements in the study area. The consultant shall perform a detailed environmental data collection. All data collection will be carried out according to NEPA, federal, and DC regulations and requirements. The environmental data collection, at a minimum, shall include:

1. Land use and Zoning
2. Land Acquisition and Displacement
3. Demographics
4. Community Resources, Economics and Development issues
5. Environmental Justice & Title VI
6. Transportation (including Transit, Pedestrian, Bike, Vehicular)
7. Utilities
8. Cultural/Historic Resources
9. Visual and Aesthetics
10. Vibration
11. Water Quality
12. Navigable Waters
13. Biotic Communities
14. Endangered and Threatened Species
15. Construction impacts
16. Archaeological Investigation and Report
17. Flood Plains
18. Wetlands and 404 Permit Requirements
19. NPDES (section 402) Permit Requirements
20. Fish and Wildlife issues
21. Hazardous waste and materials/contaminated soil investigation
22. Noise Analysis
23. Air Quality
24. Erosion
25. Indirect and Cumulative Impacts
26. Section 4f

Task Deliverables:

Existing Data and Inventory, 3 copies and 5 electronic file of the report in Adobe PDF format. One electronic copy in MS Word format will also be provided.

## Task 4- Environmental Assessment / Environmental Impacts

The consultant will analyze the existing environment for all environmental data listed in Task 4 and the impacts of the project to prepare the Affected Environment and Environmental Consequences Chapters. Details of some of the items are listed below.

### Transportation Analysis and Evaluation:

All appropriate data will be collected on a representative day of the week and time of year.

48 hour ATR (including vehicle classification) and 13 hour turning movement counts will be collected. For surface streets the following should be evaluated: Level of service – intersection,



Level of service – corridor, Signal warrant analysis, Queuing, Transit service types and levels, Pedestrian usage, Bicycle usage, Vehicle speeds, Vehicle throughput. The consultant will collect and prepare a safety conditions including accident and crash data report for the project area. The consultant will evaluate: 1) existing year; 2) Opening year; 3) Design year traffic volumes for the no-build & build conditions for weekday A.M. and P.M. peak hours as well as mid-day. Design year is 20-25 years in future and has to be consistent with the MWCOC horizon year. Opening and Future will be developed using the travel demand model developed by MWCOC. The forecasted traffic will then analyzed using SYNCHRO/SIM-TRAFFIC and/or VISSIM and CORSIM, based on the decision by DDOT. Both Intersection and Corridor level of service analysis will be performed.

Additional Task Deliverables (should be included in the Appendices):

Traffic Data and Analysis report, Synchro/VISSIM/CORSIM input and output files

#### **Concept Engineering, Alternatives Development and Analysis**

All roadways and freeways within the study area shall be evaluated per DDOT, AASHTO, and other relevant standards to locate any existing issues with roadway geometry or sight distance. This includes design exceptions, drainage, curvatures, grades, acceleration/ deceleration lanes lengths, lane widths.

The consultant team will develop and analyze at a minimum of three build alternatives and a no build alternative. The consultant team will develop all conceptual and preliminary engineering required to analyze the alternatives to make a preferred alternative selection that includes typical sections, plan, profiles, and geometrical layouts at a minimum.

Preliminary design of selected alternative(s) will be advanced of "functional plans" which can be up to (approximately 30% design). For 30% design Survey data such as topo, geotech, utilities, etc. will be needed.

Additional Task Deliverables (should be included in the Appendices):

Existing conditions report. Concept engineering and alternatives drawings and data, Alternatives analysis, A Project report for the task listed above.

#### **Cost Estimates and Constructability Review**

The consultant team will also develop construction cost estimates which will include cost break down and cost by line items. Consultant will provide constructability review of the alternatives.

Additional Task Deliverables (should be included in the Appendices):

Cost Estimates, Constructability Review report.

#### **Air Quality:**

For Air Quality, the analysis shall include Regional Conformity and Local/Hot Spot Analysis consistent with 40 CFR 93. Hotspot analysis has to include: 1) existing year; 2) Opening year; 3) Design year analysis for the no-build & build alternatives for CO (or other NAAQS), MSAT, and PM2.5. MSAT and PM2.5 is usually qualitative while NAAQS require quantitative analysis.

Additional Task Deliverables (should be included in the Appendices):

Air Quality Data and Analysis report, Model Input and output files

#### **Noise:**

For Noise Analysis, the analysis shall include Traffic Noise Model (TNM) analysis consistent with FHWA and DDOT Noise Policy. TNM should include: 1) existing year; 2) Opening year; 3) Design year analysis for the no-build & build alternatives.

Additional Task Deliverables (should be included in the Appendices):

Noise Data and Analysis report, Model Input and output files

#### **Historic/Cultural resources:**

For Cultural/Historic Resources evaluation will be performed consistent with the sec 106 of the BHPA. Appropriate Area of Potential Effect (APE) will be developed in consultation with SHPO, FHWA, ACHP (if applicable) and other consulting parties. Appropriate number of Consultation meetings will be held as needed. The Cultural resources report will include: APE, Determination of Eligibilities/Eligibility report, Assessment/Determination of Effects, Minimization/Mitigation measures, and MOA/PA/No Adverse Effect Letter (as applicable).

Additional Task Deliverables (should be included in the Appendices):

Historic/Cultural (sec 106) Report that includes all the items listed above.

Task Deliverables:

Environmental Analyses and Mitigation Report: 3 copies (printed) and 5 electronic copies of the manual. The electronic copies will be in Adobe PDF format. At least one electronic copy will be provided using MS Word Software.

### **Task 5 - Public Involvement and Interagency Coordination**

The consultant will develop a Public Involvement Plan (PIP) according to FHWA and DDOT requirements. The PIP shall include community meetings, public meetings, meeting announcement modes, and a public outreach plan. Agency coordination will include coordination with NPS, SHPO, DCOP, and other related federal and DC agencies. A total of 8 agency meetings will be held. The consultant team will hold and arrange at least three public meetings (2 public meetings & a public hearing) and 4-6 community meetings during the project. For an EIS a public hearing after the release of the DEIS is required per NEPA. The consultant will host and develop a project website.

Task Deliverables:

Public Involvement Plan (3 hardcopies), Project Meeting presentations and handouts, Maps, Graphic Display boards, other related material, meeting venue and logistics.

### **Task 6- EA/EIS Document**

The EA/EIS document will be produced consistent with CEQ, FHWA and DDOT regulations and requirements. The EA/EIS document will include: 1) Executive Summary; 2) Table of Content; 3) Purpose and Need; 4) Alternatives; 5) Affected Environment; 6) Environmental consequences; 7) Section 4(f); 8) Public & Agency Coordination; 9) References; 10) List of Preparers; 11) Sec 106 Report; 12) Other Appendices. The Final EA/FEIS will include all formal comments (public/agency) and must show how these comments were addressed or responded.

The consultant will also develop FONSI (if the EA determines no significant impacts) or a ROD if an FEIS was prepared.

Task 6 Deliverables:

EA/EIS draft document for internal review: 5 hard copies and 2 electronic copies; EA/DEIS, Final EA/FEIS, and FONSI/ROD documents: up to 30 hard copies, 20 electronic copies (on CDs) in PDF format, with 2 electronic copies of the text (only) delivered as a MS Word file.

### **Task 7 - Section 4(f) and Section 106 Evaluation**

The consultant will conduct 4(f) and Section 106 studies, included in the analysis of alternatives, and document and impacts and mitigation required. Consultant will provide coordination with Federal Highway Administration, National Park Service, State Historic Preservation Officer, and other District and federal agencies as appropriate.

Task deliverables:

Section 4(f) & Section 106 Evaluation document: 8 hard copies, 8 electronic (on CDs). The electronic copies will be in Adobe PDF format, with 2 electronic copies as MS Word file.

## **4- SCHEDULE:**

- A public involvement plan within 3 weeks of NTP
- Project Management Plan with key milestones within 2 weeks of NTP
- Existing Conditions report within 2 months of NTP
- Draft EA Document, sec 106 and sec 4f documents: 6 months of NTP OR DEIS draft, sec 106 and sec 4f documents: 10 months of NTP
- Completion of all tasks within 12 Months for EA OR Completion of all tasks within 18 Months for EIS

APPENDIX  
L

SAMPLE SECTION 106 MEMORANDUM OF AGREEMENT





**MEMORANDUM OF AGREEMENT**  
**AMONG**  
**THE FEDERAL HIGHWAY ADMINISTRATION,**  
**THE DISTRICT DEPARTMENT OF TRANSPORTATION,**  
**THE DISTRICT OF COLUMBIA STATE HISTORIC PRESERVATION OFFICE,**  
**AND**  
**THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,**  
**REGARDING**  
**TRANSPORTATION IMPROVEMENTS AT**  
**XYZ Street, WITHIN THE DISTRICT OF COLUMBIA**

This Memorandum of Agreement (“MOA”) is made as of the \_\_\_ day of \_\_\_\_\_ 2012 by and among the Federal Highway Administration (“FHWA”), the District Department of Transportation (“DDOT”), the District of Columbia State Historic Preservation Office (“DCSHPO”), and the Advisory Council on Historic Preservation (“ACHP”) (referred to collectively herein as the “Signatories” or individually as a “Signatory”), pursuant to Section 106 of the National Historic Preservation Act (“NHPA”) of 1966, as amended, 16 U.S.C. § 470f and its implementing regulations, 36 CFR Part 800.

**RECITALS**

**WHEREAS**, FHWA is the lead federal agency responsible for compliance with Section 106 of the NHPA, as amended, and the implementing regulations; and

**WHEREAS**, FHWA and DDOT plan to construct Street XYZ to provide connectivity and access to adjacent neighborhoods (collectively, the “Undertaking”). The Undertaking includes the realignment and construction of upgraded roads, parking lanes, new sidewalks, and bicycle lanes; and

**WHEREAS**, FHWA administers the Federal-Aid Highway Program in the District of Columbia authorized (23 U.S.C. 101 et seq.) through Federal-aid Agreement with DDOT as project sponsor (49 CFR 1.48) and, as such, DDOT is responsible for executing the Undertaking in accordance with the terms of this MOA; and

**WHEREAS**, FHWA anticipates funding and DDOT plans to construct the Undertaking, making the Undertaking subject to review under Section 106 of the NHPA, 16 U.S.C. § 470f, and its implementing regulations (36 CFR part 800); and

**WHEREAS**, XYZ Street is listed in the National Register of Historic Places (“NRHP”); and

**WHEREAS**, the area of potential effect (“APE”) for the Undertaking has been determined by FHWA in accordance with the definition provided in 36 CFR 800.16(d) and is demarcated by the boundaries, as illustrated in Attachment A; and

**WHEREAS**, FHWA has consulted with the DCSHPO pursuant to Section 106 of the NHPA and its implementing regulations, “Protection of Historic Properties” (36 CFR. part 800); and

**WHEREAS**, FHWA has determined that the Undertaking will have an adverse effect on the XYZ Street, which is comprised of elements that contribute to the significance of the NRHP property (“Contributing Elements”), as noted in Attachment B; and

**WHEREAS**, in accordance with 36 CFR § 800.6(a)(1), FHWA and DDOT notified the ACHP of its adverse effect determination providing the specified documentation, and the ACHP chose to participate in the consultation pursuant to 36 CFR § 800.6(a)(1)(iii); and

**WHEREAS**, the obligations of DDOT and the DCSHPO under this MOA are subject to the provisions of: 23 CFR 771.109 and (i) the federal Anti-Deficiency Act, 31 U.S.C 1341, 1342, 1351; (ii) the District of Columbia Anti-Deficiency Act, D.C. Official Code 47-355.01-335.08; (iii) D.C. Official Code 47-105; and (iv) D.C. Official Code 1-204.46 (2006 Supp.), as the foregoing statutes which may be amended from time to time, regardless of whether a particular obligation has been expressly so conditioned; and

**WHEREAS**, ACHP’s and FHWA’s obligations under this MOA are subject to the availability of appropriated funds, and the stipulations of this MOA are subject to the provisions of the federal Anti-Deficiency Act. ACHP and FHWA will make reasonable and good faith efforts to secure the necessary funds to implement this MOA in its entirety. If compliance with the Anti-Deficiency Act alters or impairs ACHP’s and FHWA’s ability to implement the stipulations of this MOA, they will consult in accordance with Sections XIV and XV of this MOA.

**WHEREAS**, DDOT is authorized to enter into this MOA pursuant to Sections 5(1)(A)-(D) and 6(b) of the Department of Transportation Establishment Act of 2002, D.C. Law 14-137, D.C. Official Code 50-921.04(1)(A)-(D) and 50-921.05(b); and

**WHEREAS**, since DDOT is the agency coordinating the Undertaking and has participated in consultation regarding the Undertaking’s effects on the NRHP property, FHWA has invited DDOT to execute this MOA as a Signatory; and

**WHEREAS**, FHWA and DDOT have, through the Section 106 process, consulted with the following parties (collectively referred to as the “Consulting Parties”): DCSHPO, the ACHP, National Park Service (NPS), National Trust for Historic Preservation, U.S. Commission of Fine Arts, National Capital Planning Commission, District of Columbia Office of Planning (“DCOP”), DC Department of General Services (formerly DC Department of Real Estate Services), the District of Columbia Preservation League, Joe Public, ANC, ABC Civic Association; and

**WHEREAS**, FHWA and DDOT have consulted with the Consulting Parties and other members of the public both at consulting party meetings and at NEPA public meetings in accordance with 36 CFR 800.8(a), regarding identification of historic properties and the effects of the Undertaking on historic properties; and

**NOW, THEREFORE**, FHWA, DDOT, DCSHPO, and ACHP agree that the Undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the Undertaking on historic properties.

#### STIPULATIONS

FHWA shall ensure that the following measures are carried out:

- I. FHWA and DDOT shall construct the XYZ Street in accordance with this MOA and the Site Plan in Attachment C.

- II. PREPARE HISTORIC AMERICAN BUILDING SURVEY/HISTORIC AMERICAN ENGINEERING RECORD (HABS/HAER) DOCUMENTATION:** FHWA and DDOT will produce Level I HABS documentation for Building 123 prior to reconstruction of the Street. The HABS documentation will include: measured drawings, photographs, and a history of the building, in accordance with Federal Register, Volume 68, No. 139 (Monday, July 21, 2003; ppg. 43159 - 62), and shall be provided to the NPS, DCSHPO, and the Washingtonian Division of the DC Public Library.
- III. INTERPRETIVE MARKERS:** FHWA and DDOT will coordinate development of interpretive markers and educational materials regarding the Undertaking with interpretive materials. DDOT, in consultation with DCSHPO will develop and install interpretive markers explaining the history of the Undertaking's site, the landscape and trees, the architecture, the pedestrian and vehicular circulation, and the scientific studies conducted on the site. Proposed marker text and location within the Site will be completed prior to the initiation of construction and provided to Signatories for review and comment. Wherever possible, the location of the markers should be consistent with the preferred locations for public art, historical markers, and street enlivening uses.
- IV. VIBRATION MONITORING:** The Undertaking may result in vibrations that could affect Contributing elements of the Site. FHWA and DDOT, in coordination with the Signatories, will prepare and adopt a Vibration Monitoring Plan to be implemented during construction of the Undertaking. The Vibration Monitoring Plan will set out the vibration criteria and monitoring provisions to be taken during construction of the Undertaking, where appropriate. The Vibration Monitoring Plan shall provide for an engineer and/or historical architect meeting the Secretary of the Interiors Historic Preservation Professional Qualifications Standards 62 Federal Register 33,707 (June 20, 1997) to supervise implementation of the plan. The Vibration Monitoring Plan shall establish appropriate monitoring based in part on the types of construction planned, the equipment to be used, and the proposed depth of excavations for each type of construction activity. FHWA and DDOT will assure that the contractors have the vibration monitoring plan.
- V. PERSONNEL QUALIFICATIONS:** DDOT, in consultation with FHWA, shall ensure that all work performed on the Undertaking's site that has the potential to have a direct or indirect effect on Contributing Buildings and/or Contributing Landscapes is performed or supervised by qualified individuals and/or teams that meet the Secretary of the Interior's Historic Preservation Professional Qualifications Standards 62 Federal Register 33,707 (June 20, 1997) for history, architectural history, architecture, historic architecture and conservation, landscape architecture, and/or archaeology, as appropriate.
- VI. DURATION:** This MOA will be null and void if its stipulations are not carried out within ten (10) years of the date of its execution. At such time, and prior to work continuing on the Undertaking, FHWA shall either (a) execute memoranda of agreement pursuant to 36 CFR § 800.6, or (b) request, take into account, and respond to the comments of the ACHP under 36 CFR § 800.7. FHWA may consult with the other Signatories to reconsider the terms of this MOA and amend it in accordance with Stipulation XIV below. FHWA shall notify the Signatories as to the course of action it will pursue.
- VII. POST-REVIEW DISCOVERIES:** If potential historic properties are discovered or unanticipated effects on historic properties are found or are reasonably foreseeable (beyond those already accounted

for herein), at the Undertaking's site, FHWA shall implement the Inadvertent Discoveries Plan included as Attachment E of this MOA.

- VIII. MONITORING AND REPORTING:** Each twelve (12) months following the execution of this MOA until it expires or is terminated, FHWA shall provide all Signatories a summary report detailing work carried out pursuant to the MOA's terms, including the status of any plans or reports resulting from activities carried out under these Stipulations. Such report shall include any scheduling changes proposed, any problems encountered, and any disputes or objections received in FHWA's efforts to carry out the terms of this MOA.
- XIII. DISPUTE RESOLUTION:** Should any Signatory object at any time to any actions proposed under the Undertaking or the manner in which the terms of this MOA are implemented, FHWA shall consult with such Signatory to resolve the objection. If FHWA determines that such objection cannot be resolved, FHWA will:
- A. Forward all documentation relevant to the dispute, including the FHWA's proposed resolution, to the ACHP. The ACHP shall provide FHWA with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, FHWA shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP and Signatories. FHWA will provide the Signatories with a copy of the written response. FHWA will then proceed according to its final decision.
  - B. If the ACHP does not provide advice regarding the dispute within thirty (30) days, FHWA may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, FHWA shall prepare a written response that takes into account any timely comments regarding the dispute from the Signatories, and provide the Signatories with a copy of the written response.
  - C. FHWA's responsibility to carry out all other actions subject to the terms of this MOA that are not the subject of the dispute, remain unchanged.
- XIV. AMENDMENTS:** This MOA may be amended when such an amendment is agreed to in writing by all Signatories.
- XV. TERMINATION:** If any Signatory determines that its terms will not or cannot be carried out, that Signatory shall immediately consult with the other Signatories in an attempt to develop an amendment per Stipulation XIV, above. If within thirty (30) days (or another time period agreed to by all Signatories) an amendment cannot be reached, any Signatory may terminate the MOA upon written notification to the other Signatories.

If this MOA is terminated, FHWA must either (a) execute new memoranda of agreement pursuant to 36 CFR § 800.6, or (b) request, take into account, and respond to the comments of the ACHP under 36 CFR § 800.7. FHWA shall notify the Signatories as to the course of action it will pursue.

- XVI. COUNTERPARTS:** This MOA may be executed in counterparts, each separately and together constituting one and the same document. Execution and delivery of this MOA by facsimile or electronic mail shall be sufficient for all purposes and shall be binding on any party to this MOA.



**XVII. SIGNATURES**

Execution of this MOA by FHWA, DDOT, DCSHPO, and ACHP and implementation of its terms evidence that FHWA has taken into account the effects of this Undertaking on historic properties and afforded the ACHP an opportunity to comment.

**District Department of Transportation**

\_\_\_\_\_  
**XYZ,**  
**Director** Date \_\_\_\_\_

**District of Columbia State Historic Preservation Office**

\_\_\_\_\_  
**XYZ,**  
**District of Columbia State Historic Preservation Officer** Date \_\_\_\_\_

**Federal Highway Administration**

\_\_\_\_\_  
**XYZ,**  
**Division Administrator, DC Division** Date \_\_\_\_\_

**Advisory Council on Historic Preservation**

\_\_\_\_\_  
**XYZ,**  
**Executive Director** Date \_\_\_\_\_

Attachments: Area of Potential Effect Map; etc.



APPENDIX  
M

SAMPLE SECTION 4(F) NET BENEFIT LETTER





**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
DEPARTMENT OF TRANSPORTATION**



XYZ  
State Historic Preservation Officer  
District of Columbia State Historic Preservation Office  
Washington, DC 20024

Re: XYZ Street Project –Section 4(f) Net-Benefit

Dear SHPO:

The purpose of this letter is to clearly document the achievement of a “Net Benefit,” pursuant to the requirements of Section 4(f) of the U.S. Department of Transportation Act of 1966, to the “ABC” historic property as a result of incorporating the provisions discussed below for the XYZ Street Project (“Project”). As you are aware through continued coordination with your office, the identified preferred alternative for the Project is a variation of Environmental Assessment Build Alternative 2. This is consistent with your office’s expressed preference for an alternative that minimizes the impact to the Plan of the City of Washington and other historic properties in the area.

From the outset of the overall National Environmental Policy Act (“NEPA”) process, including the Section 106 and Section 4(f) activities, the District Department of Transportation (“DDOT”) and Federal Highway Administration (“FHWA”) have worked with the District of Columbia State Historic Preservation Office (DC SHPO) to create the ultimate “win-win” solution following the FHWA Section 4(f) Programmatic Evaluation, entitled “*Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property.*” As defined by FHWA, a net benefit is achieved when the transportation use, the measures to minimize harm, and the mitigation incorporated into a project results in an overall enhancement of the Section 4(f) property when compared to both the “no-build” or avoidance alternatives and the present condition of the Section 4(f) property.

Extensive coordination with DC SHPO and other consulting parties have resulted in the following proposed measures to minimize harm, and mitigation measures to be incorporated into the Project to preserve the function and values of the Section 4(f) properties, which will result in a Net Benefit to the Section 4(f) properties:

**I.A XYZ Street**

To the maximum extent possible consistent with applicable safety and operational standards and requirements, and contingent upon all required approvals from FHWA and DDOT shall design the vertical elements associated with the street in a context-sensitive manner that avoids or minimizes visual obstruction of the view corridors and vistas associated with the street. All planning and design submissions by DDOT shall address the design of vertical elements from the standpoint of historic preservation. As part of its review of each submission, DDOT will seek comments on those elements from SHPO. SHPO will be provided documentation (including but not limited to plans, elevations, photo renderings, and visualizations) to allow for a meaningful evaluation of the proposed vertical elements with respect to historic preservation and will be given no fewer than 30 days to provide comments. All comments from SHPO shall be provided to DDOT in writing. If no comments from SHPO have been

submitted to DDOT 30 days after the receipt of the submission, DDOT may implement the plans as submitted. If comments are received, DDOT will address the comments.

**I.B Reservation 57274**

Though not a part of the reconstruction project, as a mitigation measure DDOT shall design and landscape Reservation No. 57274 in a context-sensitive manner and consistent as much as possible with the reservations’ historic appearance and function. As part of its review of the design and landscape of this reservation, DDOT will seek comments from SHPO. SHPO will be provided documentation to allow for a meaningful evaluation of the proposed design and landscape elements with respect to historic preservation and will be given no fewer than 30 days to provide comments. All comments from SHPO shall be provided to DDOT in writing. If no comments from SHPO have been submitted to DDOT 30 days after the receipt of the documentation, DDOT may implement the plans as submitted. If comments are received, DDOT will address the comments.

In fulfilling the duties and obligations discussed in this letter, the DC SHPO and DDOT shall comply with all applicable laws, regulations, and rules. Moreover, they acknowledge and agree that their respective obligations to fulfill financial obligations of any kind pursuant to any and all provisions discussed in this letter, or any agreement entered into by DDOT and DC SHPO subsequently or pursuant to this letter, are and shall remain subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351, (ii) the District of Columbia Anti-deficiency Act, D.C. Official Code §§ 47-355.01-355.08 (2001), (iii) D.C. Official Code § 47-105 (2001), and (iv) D.C. Official Code § 1-204.26 (2006 Supp.), as the foregoing statutes may be amended from time to time, regardless of whether a particular obligation has been expressly so conditioned.

The signatures below document that DDOT and DC SHPO agree in the determination of a Net Benefit to the Section 4(f) properties for the Project.

**SIGNATORIES:**

By: \_\_\_\_\_ Date \_\_\_\_\_  
ABC, Director  
District Department of Transportation

By: \_\_\_\_\_ Date \_\_\_\_\_  
XYZ  
District of Columbia State Historic Preservation Officer

**CONCURRENCE:**

By: \_\_\_\_\_ Date \_\_\_\_\_  
XYZ, DC Division Administrator  
Federal Highway Administration

# REFERENCES





FHWA-DDOT CATEGORICAL EXCLUSIONS  
PROGRAMMATIC AGREEMENT





**PROGRAMMATIC AGREEMENT  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION  
AND  
THE DISTRICT DEPARTMENT OF TRANSPORTATION  
REGARDING  
REVIEW AND APPROVAL PROCESS FOR CATEGORICAL EXCLUSIONS IN  
ACCORDANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT  
FOR THE FEDERAL AID HIGHWAY PROGRAM**

This Programmatic Agreement (“Agreement”) is entered into as of this 28th day of October, 2010, by and between the United States Department of Transportation, Federal Highway Administration by and through the Federal Highway Administration District of Columbia Division (“FHWA”) and the District Department of Transportation (“DDOT”) pursuant to D.C. Official Code §§ 50-921.01 et seq., individually referred to herein as “Party” and collectively referred to herein as the “Parties.”

**RECITALS**

**WHEREAS**, FHWA administers the Federal Aid Highway Program in the District of Columbia (“District”) through DDOT as authorized by 23 U.S.C. 101 et seq.; and

**WHEREAS**, DDOT, as the state Department of Transportation and the owner of the transportation infrastructure for the District, has jurisdictional and maintenance responsibility for the transportation infrastructure throughout the District; and

**WHEREAS**, FHWA has determined that the Federal Aid Highway Program requires review and approval of infrastructure construction projects to comply with the National Environmental Policy Act of 1969 (“NEPA”) and the Council on Environmental Quality (“CEQ”) regulations for implementing NEPA (40 CFR 1500 -1508); and

**WHEREAS**, in accordance with 40 CFR 1508.4 and 23 CFR 771.117 FHWA and DDOT agree that certain actions carried out through the Federal-Aid Highway Program do not have significant impacts on the human and natural environment; and

**WHEREAS**, this Agreement establishes a procedure that will reduce the paperwork and processing time for certain Federal actions for FHWA in administering the Federal Aid Highway Program for the District for actions that do not have significant impacts on the human and natural environment; and

**WHEREAS**, in accordance with 40 CFR 1500 -1508 and 23 CFR 771, FHWA and DDOT agree upon the advance review and approval process outlined in this Agreement.

**WHEREAS**, execution of this Agreement and implementation of its terms evidences that FHWA and DDOT have formalized the review and approval process to comply with the National Environmental Policy Act of 1970 (NEPA) (42 U.S.C. § 4321, et seq.) and the Council on Environmental Quality (CEQ) regulations for implementing NEPA (40 CFR § 1500 -1508) for the Federal Aid Highway Program for the District of Columbia.

**NOW, THEREFORE**, FHWA and DDOT agree that the Federal Aid Highway Program shall be administered in accordance with the terms and conditions as provided herein.

## **I. PURPOSE AND RESPONSIBILITIES**

- A. This Agreement sets forth the process by which FHWA, with the assistance of DDOT, shall fulfill its responsibilities under NEPA for the Federal Aid Highway Program administered in the District. This Agreement allows FHWA to provide an expeditious and efficient review and approval of documents related to infrastructure construction projects and to approve Categorical Exclusions (“CEs”) for projects which qualify for a CE determination under 23 CFR 771.117 (c) and (d). For the projects which meet the terms and conditions provided herein, this Agreement constitutes a one-time advance documentation and approval. As such, individual project review, documentation, and approval are not required by FHWA; provided however, that DDOT will prepare and maintain appropriate documentation for such projects.
- B. This Agreement establishes the basis for DDOT internal review of all projects funded through the Federal Aid Highway Program to comply with the requirements of 23 CFR 771.
- C. In compliance with its responsibilities under NEPA, and as a condition of its award to DDOT of any assistance under the Federal-Aid Highway Program, FHWA shall ensure that DDOT carries out the requirements of this Agreement. FHWA will make periodic reviews of DDOT’s procedures and documentation to ensure that all potential environmental impacts are being considered and to ensure that compliance with all applicable laws, regulations, executive orders, etc., is being properly documented.
- D. Pursuant to this Agreement, DDOT shall document all NEPA reviews and shall submit an Annual Report to FHWA which will include information on the projects that were approved using this Agreement. Further, DDOT shall certify that all terms and conditions provided herein have been satisfied for all of the projects processed under this Agreement.

## **II. CE ENVIRONMENTAL REVIEW AND APPROVAL PROCESS**

DDOT shall follow the following process:

1. All documents shall be prepared pursuant to the requirements of 40 CFR 1500 -1508 and 23 CFR 771;
2. DDOT shall develop environmental processes pursuant to the requirements of 40 CFR 1500 -1508 and 23 CFR 771 and document the processes in the DDOT Environmental Policy and Process Manual;
3. DDOT shall prepare the Project Development & Environmental Review Form (Form-I), as included in Appendix A, for all projects and actions under the Federal Aid Program. This includes actions taken when any project progresses from one phase to the next (i.e. from planning to design, or from design to construction) as well as change orders;
4. Level 1 CE Actions: All actions that qualify as CEs identified in 23 CFR 771.117(c) and which meet all the requirements listed in Section III.A of this document will be classified as Level 1 CE (“CE-1”) Actions.
5. Level 2 CE Actions: All actions that qualify as CEs identified in 23 CFR 771.117(c) & (d) and which meet all the requirements listed in Section III.B of this document will be classified as Level 2 CE (“CE-2”) Actions .
6. Level 3 CE Actions: All actions that qualify as CEs identified in 23 CFR 771.117(c) & (d) which do not meet the requirements listed in Section III.A and III.B of this document, will be classified as Level 3 CE (“CE-3”) Actions.

### **III. CE DETERMINATIONS**

In accordance with FHWA Environmental Impact and Related Procedures (23 CFR 771), CEs are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which:

- do not induce significant impacts to planned growth or land use for the area;
- do not require the relocation of significant numbers of people;
- do not have a significant impact on any natural, cultural, recreational, historic or other resource;
- do not involve significant air, noise, or water quality impacts;
- do not have significant impacts on travel patterns; and
- do not otherwise, either individually or cumulatively, have any significant environmental impacts.

#### **A. Level 1 Categorical Exclusion (CE-1)**

All actions that qualify as CEs, identified in 23 CFR 771.117(c) and that meet all the requirements of 40 CFR 1508.4, 23 CFR 771.117(a) & (b) and the requirements given

below, will be classified as CE-1 Actions. For such actions, Project Development & Environment Forms (Form I), included in Appendix A, will be prepared and no additional documentation will be necessary. The DDOT Environmental Division shall confirm that these actions meet the criteria of CE-1 projects and no significant impact exists. Only signature by the DDOT Environment Division Chief or his/her designee is required for CE-1 projects. Projects that do not meet the criteria of CE-1 actions shall be processed at the next appropriate higher level.

In order to qualify as a CE-1, the action cannot involve any of the following:

- a. Work outside the DDOT Right of Way (ROW) or ROW disposal/acquisition;
- b. Changes to the number of lanes (including General purpose, transit, and/or parking lanes);
- c. Decrease of the level of service of any intersection in the project area to “D” or worse;
- d. Adverse impact on minority, low-income, limited-English populations or any other population protected by Title VI of the Civil Rights Act of 1964;
- h. Any commercial or residential displacement;
- j. The use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303);
- k. The determination of an effect by the State Historic Preservation Office;
- l. Any Clean Water Act Section 404 Permits;
- m. Any effect to a federally-listed endangered or threatened species or critical habitat; or
- n. Any work on National Park Service (“NPS”) land except when approved by NPS as a CE.

## **B. Level 2 Categorical Exclusion (CE-2)**

All actions that qualify as CEs identified in 23 CFR 771.117(c) & (d) and that meet all the requirements of 40 CFR 1508.4, 23 CFR 771.117(a) & (b) and the requirements given below, will be classified as CE-2 Actions. For such actions CE-2 form, included in Appendix B, will be prepared. The DDOT Environmental Division shall confirm that these actions meet the criteria of CE-2 projects and no significant impact exists. Only DDOT Environment Division Chief’s signatures are required for Level 2 CE projects. Projects that do not meet the criteria of Level 2 CE shall be processed at the next appropriate higher level.

In order to qualify as a CE-2, the action cannot involve any of the following:

- a. Any right-of-way acquisition or disposal;
- b. Commercial or residential displacement;
- c. The use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303) except temporary use;

- d. The use of properties protected by Section 6(f) of the Land and Water Conservation Fund;
- e. A determination of adverse effect by the State Historic Preservation Office;
- f. Any Clean Water Act Section 404 Individual Permits
- g. Any Clean Water Act Section 402 (NPDES) Individual Permits;
- h. Any changes in access control on the freeway or the interstate system;
  
- k. Any known hazardous materials sites or previous land uses with potential for hazardous materials remains within the right-of-way;
- l. Any adverse effect to any federally listed endangered or threatened species or critical habitat;
- m. Adverse impacts to minority, low-income, limited-English populations or any other population protected by Title VI of the Civil Rights Act of 1964;
- n. Substantial Public controversy;
- o. Any work on NPS land except when approved by NPS as a CE; or

### **C. Level 3 Categorical Exclusion (CE-3)**

All actions that qualify as CEs, identified in 23 CFR 771.117(c) & (d) and which meet all the requirements of 40 CFR 1508.4, 23 CFR 771.117(a) & (b), but which do not meet the requirements of Sections III.A and III.B above, will be classified as CE-3 Actions. For such actions, the CE-3 form included in Appendix C hereto will be prepared. DDOT Environmental Division shall confirm that these actions meet the criteria of CE-3 projects and that no significant impact exists. FHWA approval and signatures are required for all CE-3 projects. Signature by the DDOT Environment Division Chief or his/her designee is required before FHWA approval. Projects that do not meet the criteria of any Level of CE shall be processed as an EA or EIS pursuant to 40 CFR 1500 and 23 CFR 771.

## **IV. REVIEW AND MONITORING**

DDOT will prepare an annual report for submittal to FHWA that covers the current Fiscal Year. The report will include summary information on projects processed under this Agreement. The report will also include all forms and documents prepared for all NEPA actions for the Federal Aid Program. Further, the report will include an assessment of the effectiveness of this Agreement, discuss concerns, if any, with the Agreement, and include recommendations for any proposed changes. This report may also identify any changes to the Environmental Forms (Form I, CE-2 Form, CE-3 document). FHWA and DDOT may change, revise, or update these forms at that time without amending this PA. The report shall be provided to the FHWA by November 1, 2011 and annually thereafter on or before November 1. FHWA will provide any review comments on the Annual Report, including recommendations for modifications to the Agreement, to DDOT within 30 days of receipt of the report.

FHWA shall monitor activities carried out pursuant to this Agreement. In compliance with its responsibilities under NEPA, and as a condition of its award to DDOT of any assistance under the Federal-Aid Highway Program, FHWA shall ensure that DDOT carries out the requirements of this Agreement. FHWA will make periodic reviews of the DDOTs procedures and documentation to ensure that all potential environmental impacts are being considered and compliance with all applicable laws, regulations, executive orders, etc., is being properly documented.

## **V. TERMINATION**

Any Party to this Agreement may terminate it for any reason by providing thirty (30) days written notice to the other Party. In the event that a notice of termination is issued by either Party, the Parties shall consult during the period prior to termination to seek agreement on amendments or other action that would avoid termination.

## **VI. MODIFICATION; AMENDMENT**

Any party to this Agreement may request that it be amended at any time, whereupon the parties will consult with each other to consider such amendment.

## **VII. DURATION**

This Agreement shall become effective upon execution by FHWA and DDOT and shall continue in full force for ten (10) years following the date the last signature is affixed hereto, unless terminated as provided above prior to expiration.

## **VIII. SEVERABILITY**

The Parties agree that if any part, term or provision of this Agreement is held to be illegal, unenforceable or in conflict with any applicable federal, state, or local law or regulation, such part, term or provision shall be severable, with the remainder of the Agreement remaining valid and enforceable.

## **IX. APPLICABLE LAW**

The Parties shall comply with all applicable laws, rules, and regulations whether now in force or hereafter enacted or promulgated that pertain to this Agreement.

## **X. RECITALS**

The above recitals are incorporated into this Agreement as if fully set forth herein.

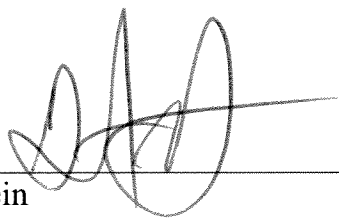


**XI. ANTI-DEFICIENCY**

The obligations of the District to fulfill financial obligations pursuant to this Agreement, or any subsequent agreement entered into pursuant to this Agreement or referenced herein (to which the District is a party), are and shall remain subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349-1351 1511-1519 (2004) (the "**Federal ADA**"), and D.C. Official Code §§ 1-206.03(e) and 47-105 (2001); (ii) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01 – 355.08 (2004 Supp.) (the "**D.C. ADA**" and (i) and (ii) collectively, as amended from time to time, the "**Anti-Deficiency Acts**"); and (iii) Section 446 of the District of Columbia Home Rule Act, D.C. Official Code § 1-204.46 (2001). Pursuant to the Anti-Deficiency Acts, nothing in this Agreement shall create an obligation of the District in anticipation of an appropriation by Congress for such purpose, and the District's legal liability for the payment of any charges under this Agreement shall not arise or obtain in advance of the lawful availability of appropriated funds for the applicable fiscal year as approved by Congress.

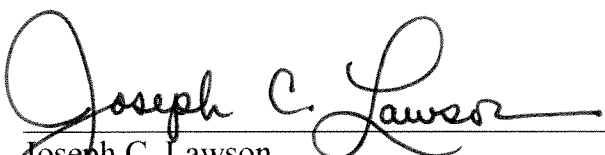
**IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as follows:**

**DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION**

  
\_\_\_\_\_  
Gabe Klein  
Director  
District Department of Transportation

\_\_\_\_\_  
Date 10/27/10

**FEDERAL HIGHWAY ADMINISTRATION**

  
\_\_\_\_\_  
Joseph C. Lawson  
Division Administrator  
Federal Highway Administration

\_\_\_\_\_  
Date 10/28/10

Forms and documents referenced in the PA are in Appendices A, B, and C.

# REFERENCE

DDOT-FHWA-SHPO-ACHP CITYWIDE SECTION 106 PA





**PROGRAMMATIC AGREEMENT**

**AMONG**

**THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,**

**THE FEDERAL HIGHWAY ADMINISTRATION,**

**THE DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION**

**AND**

**THE DISTRICT OF COLUMBIA STATE HISTORIC PRESERVATION OFFICE**

**REGARDING**

**IMPLEMENTATION OF THE FEDERAL AID HIGHWAY PROGRAM**

**WHEREAS**, the U.S. Department of Transportation, Federal Highway Administration (FHWA) administers the Federal Aid Highway Program in the District of Columbia authorized by 23 U.S.C. 101 et seq. (Undertaking) through the District of Columbia Department of Transportation (DDOT) (23 U.S.C. 315); and

**WHEREAS**, FHWA has consulted with the Advisory Council on Historic Preservation (Council) and the District of Columbia State Historic Preservation Office (DC SHPO) pursuant to 36 CFR Part 800, the regulations that implement Section 106 of the National Historic Preservation Act (16 U.S.C. 470f); and

**WHEREAS**, FHWA has determined that the Federal Aid Highway Program may have an effect on areas or properties included in or eligible for inclusion in the National Register of Historic Places (historic properties); and

**WHEREAS**, in accordance with 36 CFR 800.14(b)(1)(i), FHWA, Council, DDOT and DCSHPO agree that certain actions carried out through the Federal-Aid Highway Program will have similar and repetitive effects on historic properties and that those effects will not be adverse;

**NOW, THEREFORE**, FHWA, Council, DDOT and DCSHPO agree that the Federal Aid Highway Program shall be administered in accordance with the following stipulations.

## STIPULATIONS

FHWA shall ensure that the following measures are carried out:

### 1. Purpose and Responsibilities

A. This Programmatic Agreement (Agreement) sets forth the process by which FHWA, with the assistance of DDOT, shall fulfill its responsibilities under Section 106 of the National Historic Preservation Act (NHPA) for the Federal Aid Highway Program. Furthermore, this Agreement establishes the basis for DDOT internal review of certain activities which, because they are the types of activities that are unlikely to cause adverse effects to historic properties, are exempted from review by the DC SHPO and Council.

B. FHWA Responsibilities. In compliance with its responsibilities under the NHPA, and as a condition of its award to DDOT of any assistance under the Federal-Aid Highway Program, FHWA shall ensure that DDOT carries out the requirements of this Agreement.

C. DDOT Responsibilities. Pursuant to this Agreement, DDOT will prepare an Annual Review Report for submittal to the DC SHPO, Council, and FHWA that covers the calendar year. DDOT shall ensure that the Annual Review Report is submitted to the agencies referenced. This report will include summary information on projects that do not require a review by the DC SHPO as designated under this Agreement. The report will include an assessment of the effectiveness of the Agreement, discuss concerns with the Agreement, and include recommendations for any proposed changes to it.

### 2. Projects Exempted from Review

The following types of undertakings are activities in which DDOT routinely utilizes Federal Aid Highway Program funds. These undertakings generally do not adversely affect historic properties, provided they are limited to activities that are not part of a larger project. Absent extraordinary circumstances, these types of activities shall not require further consultation with the DC SHPO or the Council:

A. Roadway surface replacement, reconstruction, overlays, shoulder treatments, pavement repair, seal coating, pavement grinding, and pavement marking where there will be no expansion, provided these activities occur within curb to curb with no change in materials or the character/design of the cross section.

B. Bridge reconstruction and rehabilitation which does not include roadway widening or modification of existing piers and abutments, but which may include

bridge repairs, deck replacement or repair, railing repair, painting and other maintenance work, excluding historic bridges or bridges more than 40 years old.

- C. Replacement or extension of culverts and other drainage structures with waterway openings of 100 square feet (9.3 square meters) or less and which *do not* extend beyond previous construction limits.
- D. Installation of new lighting, signals, and other traffic control devices, and replacement or repair of lighting, signals, and traffic control devices where the existing units were installed less than 50 years ago.
- E. Installation of new lighting, signals, and other traffic control devices, and replacement or repair of lighting, signals, and traffic control devices in historic districts where DDOT historic district street light policy is used.
- F. Installation, replacement, or repair of safety appurtenances such as guardrails, barriers, glare screens, and energy attenuators, except on National Register listed or previously determined eligible bridges, properties, or districts.
- G. Temporary construction fencing, including salvage yards, provided no grading or other landscaping is involved.
- H. Replacement in kind of landscaping within the DDOT Right of Way and on fillslopes and backslopes only.
- I. Repair or replacement in kind of curbs, gutters, and catch basins.
- J. Repair or replacement in kind of sidewalks and access ramps.
- K. Signs, signal installation, or modification and surface improvements to existing railway/transit crossings.
- L. Emergency structural repairs to maintain the structural integrity of a bridge, unless the bridge is listed on or determined eligible for listing on the National Register.
- M. Placement of fill material on the side of slopes of intersection crossroads and accesses for purposes of flattening these slopes to meet safety criteria, provided that no topsoil is removed beyond the area of previous horizontal and vertical disturbance.
- N. Hazardous waste removal and disposal from within an area previously disturbed by vertical and horizontal construction activities, which constitutes a public hazard and which requires immediate removal.

- O. Placement of riprap materials within an area previously disturbed by vertical and horizontal construction activities to prevent erosion of waterways and bridge piers, excluding historic bridges.
- P. Routine roadway, roadside, and drainage system maintenance activities necessary to preserve existing infrastructure and maintain roadway safety, drainage conveyance, and storm water treatment in previously disturbed areas.

### **3. Projects Not Exempted From Review**

The FHWA, with the assistance of DDOT, shall carry out the process outlined in 36 CFR 800 for all Federal Aid Highway Program projects not exempted from review under Stipulation 2 of this Agreement.

### **4. Review and Monitoring**

The Annual Review Report shall be provided to the DC SHPO, Council, and FHWA by May 1, 2009 and annually thereafter on or before May 1<sup>st</sup>. The DC SHPO, FHWA, and Council will provide any review comments on the Annual Report, including recommendations for modifications to the Agreement, to DDOT within 30 days of receipt of the report. If requested by any signatory to this Agreement, DDOT will invite the signatories to a meeting to discuss and resolve any issues resulting from the review.

FHWA, the Council and the DC SHPO may monitor activities carried out pursuant to this Agreement, and the Council will review such activities if so requested. FHWA and DDOT shall cooperate with these parties in carrying out their monitoring and review responsibilities.

### **5. Terminate, Modify, Amend**

Any party to this Agreement may terminate it for any reason by providing thirty (30) days written notice to the other parties, provided that the parties shall consult during the period prior to termination to seek agreement on amendments or other action that would avoid termination. In the event of termination, FHWA shall conduct individual project review pursuant to 36 CFR Part 800.

Any party to this Agreement may request that it be amended at any time, whereupon the parties will consult with each other to consider such amendment.



**6. Duration**

This Agreement shall become effective upon execution by FHWA, DDOT, DC SHPO and the Council, and shall continue in full force and effect for ten years, or until it is amended or terminated as provided above. Prior to the end of the ten year term, FHWA will consult with DDOT, DC SHPO, and the Council to determine interest in renewing this agreement. The Agreement may be extended for an additional term upon the written agreement of the signatories.


Execution of this Agreement and implementation of its terms evidences that FHWA has taken into account the effects of its undertakings on historic properties and afforded the Council an opportunity to comment.

**ADVISORY COUNCIL ON HISTORIC PRESERVATION**

  
\_\_\_\_\_  
John M. Fowler, Executive Director  
Advisory Council on Historic Preservation

8/28/08  
\_\_\_\_\_  
Date

**FEDERAL HIGHWAY ADMINISTRATION**

  
\_\_\_\_\_  
Mark Kehrl  
Division Administrator  
Federal Highway Administration

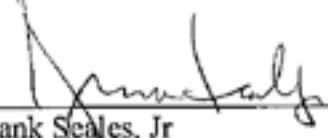
8/25/08  
\_\_\_\_\_  
Date

**DISTRICT OF COLUMBIA STATE HISTORIC PRESERVATION OFFICER**

  
\_\_\_\_\_  
David Maloney  
State Historic Preservation Officer  
District of Columbia State Historic Officer

8/20/08  
\_\_\_\_\_  
Date

**DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION**

  
\_\_\_\_\_  
Frank Seales, Jr  
Interim Director  
District Department of Transportation

8/19/08  
\_\_\_\_\_  
Date



FHWA SECTION 4(F) POLICY PAPER

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U.S. Department  
of Transportation

**Federal Highway  
Administration**

**OFFICE OF PLANNING, ENVIRONMENT, AND REALTY  
PROJECT DEVELOPMENT AND ENVIRONMENTAL REVIEW  
WASHINGTON, DC 20590**

# **SECTION 4(f) POLICY PAPER**

**JULY 20, 2012**



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# FHWA SECTION 4(f) POLICY PAPER

## PART I – SECTION 4(f) OVERVIEW

### 1.0 Introduction

This *Section 4(f) Policy Paper* supplements the Federal Highway Administration’s (FHWA) regulations governing the use of land from publicly owned parks, recreation areas, wildlife and waterfowl refuges, and public or private historic sites for Federal highway projects. Although these requirements are now codified at 23 U.S.C. § 138 and 49 U.S.C. § 303, this subject matter remains commonly referred to as Section 4(f) because the requirements originated in Section 4(f) of the *Department of Transportation Act of 1966* (Pub. L. 89-670, 80 Stat. 931). The *Section 4(f) Policy Paper* replaces the FHWA’s 2005 edition of the document. The FHWA’s Section 4(f) regulations, entitled *Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites*, are codified at 23 CFR Part 774. Many of the terms used in this *Section 4(f) Policy Paper* are defined in the regulation at 23 CFR 774.17.

### 1.1 Purpose

This *Section 4(f) Policy Paper* was written primarily to aid FHWA personnel with administering Section 4(f) in a consistent manner. In situations where a State has assumed the FHWA responsibility for Section 4(f) compliance, this guidance is intended to help the State fulfill its responsibilities. Such situations may arise when Section 4(f) responsibilities are assigned to the State in accordance with 23 U.S.C. §§ 325, 326, 327, or a similar applicable law. Unless otherwise noted, references to “FHWA” in this document include a State department of transportation (State DOT) acting in FHWA’s capacity pursuant to an assumption of FHWA’s responsibilities under such laws.

This guidance is also intended to help State DOTs and other applicants for grants-in-aid for highway projects to plan projects that minimize harm to Section 4(f) properties. Experience demonstrates that when Section 4(f) is given consideration early in project planning, the risk of a project becoming unnecessarily delayed due to Section 4(f) processing is minimized. Ideally, applicants should strive to make the preservation of Section 4(f) properties, along with other environmental concerns, part of their long and short range transportation planning processes. Information and tools to help State DOTs, metropolitan planning organizations and other applicants accomplish this goal are available on FHWA’s Planning and Environmental Linkages website located at: <http://environment.fhwa.dot.gov/integ/index.asp>.

This *Section 4(f) Policy Paper* is based on and is intended to reflect: the statute itself, the legislative history of the statute; the requirements of the Section 4(f) regulations; relevant court decisions; and FHWA’s experience with implementing the statute over four decades, including interactions with the public and with agencies having jurisdiction over Section 4(f) properties. The information presented is not regulatory and does not create any right of action

that may be enforced by a private citizen in a court of law. This *Section 4(f) Policy Paper* sets forth the official policy of FHWA on the applicability of Section 4(f) to various types of land and resources, and other Section 4(f) related issues. While the other United States Department of Transportation (U.S. DOT) agencies may choose to rely upon some or all of this *Section 4(f) Policy Paper* as a reference, it was not written as guidance for any U.S. DOT agency other than FHWA.

This guidance addresses the majority of situations related to Section 4(f) that may be encountered in the development of a transportation project. If a novel situation or project arises which does not completely fit the situations or parameters described in this *Section 4(f) Policy Paper*, the relevant FHWA Division Office,<sup>1</sup> the FHWA Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Service Team, and/or the Office of Chief Counsel should be consulted as appropriate for assistance. For additional information on Section 4(f) beyond that which is contained in this *Section 4(f) Policy Paper*, readers should refer to the FHWA Environmental Review Toolkit.<sup>2</sup>

## 1.2 Agency Authority and Responsibilities

### 1.2.1 Role of U.S. DOT

The authority to administer Section 4(f) and make Section 4(f) approvals resides with the Secretary of the U.S. DOT. The statute designates the Secretaries of the Interior, Housing and Urban Development, and Agriculture, as well as the States, for consultation roles as appropriate. This means that the Secretary of Transportation is responsible for soliciting and considering the comments of these other entities, as well as the appropriate official(s) with jurisdiction over the Section 4(f) property, as part of the administration of Section 4(f). However, the ultimate decision maker is the Secretary of Transportation. In a number of instances, the Section 4(f) regulations require the concurrence of various officials in limited circumstances as discussed below.

The Secretary of Transportation has delegated the authority for administering Section 4(f) to the FHWA Administrator in 49 CFR 1.48. The authority has been re-delegated to the FHWA Division Administrators, the Associate Administrator for Planning, Environment, and Realty, and the Federal Lands Highway Associate Administrator by *FHWA Order M1100.1A*, Chapter 5, Section 17e and Chapter 6, Section 7d. Any approval of the use of Section 4(f) property, other than a use with a *de minimis* impact or a use processed with an existing programmatic Section 4(f) evaluation is subject to legal sufficiency review by the Office of Chief Counsel.

---

<sup>1</sup> This may be a Federal Lands Highway Division Office if the project is located on Federal lands.

<sup>2</sup> <http://www.environment.fhwa.dot.gov/index.asp>

## 1.2.2 Role of Officials with Jurisdiction

### Consultation

The regulations define the entities and individuals who are considered the officials with jurisdiction for various types of property in 23 CFR 774.17. In the case of historic sites, the officials with jurisdiction are the State Historic Preservation Officer (SHPO), or, if the property is located on tribal land, the Tribal Historic Preservation Officer (THPO).<sup>3</sup> If the property is located on tribal land but the relevant Indian tribe has not assumed the responsibilities of the SHPO, then a representative designated by the tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the Advisory Council on Historic Preservation (ACHP) is involved in consultation concerning a property under Section 106 of the *National Historic Preservation Act* (NHPA) (16 U.S.C. § 470), the ACHP is also an official with jurisdiction over that resource for the purposes of Section 4(f). When the Section 4(f) property is a National Historic Landmark (NHL), the designated official of the National Park Service is also an official with jurisdiction over that resource for the purposes of Section 4(f). In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the officials with jurisdiction are the officials of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property.

### Coordination

The regulations require coordination with the official(s) with jurisdiction for the following situations prior to Section 4(f) approval (recognizing that additional coordination may be required under other statutes or regulations):

- Prior to making approvals, (23 CFR 774.3(a));
- Determining least overall harm, (23 CFR 774.3(c));
- Applying certain programmatic Section 4(f) evaluations, (23 CFR 774.5(c));
- Applying Section 4(f) to properties that are subject to Federal encumbrances, (23 CFR 774.5(d));
- Applying Section 4(f) to archeological sites discovered during construction, (23 CFR 774.9(e));
- Determining if a property is significant, (23 CFR 774.11(c));
- Determining application to multiple-use properties, (23 CFR 774.11(d));
- Determining applicability of Section 4(f) to historic sites, (23 CFR 774.11(e));
- Determining constructive use, (23 CFR 774.15(d));
- Determining if proximity impacts will be mitigated to equivalent or better condition, (23 CFR 774.15(f)(6)); and
- Evaluating the reasonableness of measures to minimize harm, (23 CFR 774.3(a)(2) and 774.17).

### Lack of Objection

The regulations require a finding that the official(s) with jurisdiction have been consulted and “have not objected” in the following situations:

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<sup>3</sup> *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities (16 U.S.C. § 470w).

- When applying the exception for restoration, rehabilitation, or maintenance of historic transportation facilities, (23 CFR 774.13(a)); and
- When applying the exception for archeological sites of minimal value for preservation in place. (23 CFR 774.13(b)(2)).

### Concurrence

The regulations require written concurrence of the official(s) with jurisdiction in the following situations:

- Finding there are no adverse effects prior to making *de minimis* impact findings, (23 CFR 774.5(b));
- Applying the exception for temporary occupancies, (23 CFR 774.13(d)); and
- Applying the exception for transportation enhancement activities and mitigation activities, (23 CFR 774.13(g)).

### 1.3 When Does Section 4(f) Apply?

The statute itself specifies that Section 4(f) applies when a U.S. DOT agency approves a transportation program or project that uses Section 4(f) property. The FHWA does not currently approve any transportation programs; thus, Section 4(f) is limited to project approvals. In addition, for the statute to apply to a proposed project there are four conditions that must all be true:

- 1) The project must require an approval<sup>4</sup> from FHWA in order to proceed;
- 2) The project must be a transportation project;<sup>5</sup>
- 3) The project must require the use of land from a property protected by Section 4(f) (*See* 23 U.S.C. § 138(a) and 49 U.S.C. § 303(a)); and
- 4) None of the regulatory applicability rules or exceptions applies (*See* 23 CFR 774.11 and 13).

Examples of the types of proposed situations where Section 4(f) would not apply include, but are not limited to:

- 1) A transportation project being constructed solely using State or local funds and not requiring FHWA approval.
- 2) A project intended to address a purpose that is unrelated to the movement of people, goods, and services from one place to another (i.e., a purpose that is not a transportation purpose).
- 3) A project to be located adjacent to a Section 4(f) property, causing only minor proximity impacts to the Section 4(f) property (i.e., no constructive use).
- 4) A project that will use land from a privately owned park, recreation area, or refuge.

Additional information about these examples and many other examples of situations where Section 4(f) approval is or is not required is located in the questions and answers provided in Part II of this

<sup>4</sup> Examples include the obligation of construction funds and the approval of access modifications on the Interstate System.

<sup>5</sup> Most projects funded by FHWA are transportation projects; however, in a few instances certain projects eligible for funding, such as the installation of safety enhancement barriers on a bridge, have been determined not to have a transportation purpose and therefore do not require a Section 4(f) approval.

*Section 4(f) Policy Paper.* In situations where FHWA has determined that Section 4(f) does not apply, the project file should contain sufficient information to demonstrate the basis for that determination (See Section 4.0, *Documentation*).

## 2.0 Background

The FHWA originally issued the *Section 4(f) Policy Paper* in 1985, with minor amendments in 1989. A 2005 edition provided comprehensive new guidance on when and how to apply the provisions of Section 4(f), including how to choose among alternatives that all would use Section 4(f) property. Later in 2005, Congress substantially amended Section 4(f) in the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* (SAFETEA-LU), (Pub. L. 109-59 (Aug. 10, 2005), 119 Stat. 1144). SAFETEA-LU directed the U.S. DOT to revise its Section 4(f) regulations. In response, FHWA and the Federal Transit Administration consulted with interested agencies and environmental organizations before drafting a notice of proposed rulemaking. The notice of proposed rulemaking was published for comment in the Federal Register (71 *Fed. Reg.* 42611, July 27, 2006).

Following careful consideration of the comments submitted, the new Section 4(f) regulations were issued in March 2008 (73 *Fed. Reg.* 13368, March 12, 2008). A minor technical correction followed shortly thereafter (73 *Fed. Reg.* 31609, June 3, 2008). The new Section 4(f) regulations clarified the feasible and prudent standard, implemented a new method of compliance for *de minimis* impact situations, and updated many other aspects of the regulations, including the adoption of regulatory standards based upon the 2005 edition of the *Section 4(f) Policy Paper* for choosing among alternatives that all use Section 4(f) property. This 2012 edition of the *Section 4(f) Policy Paper* includes guidance for all of the changes promulgated in the Section 4(f) regulations in 2008.

If any apparent discrepancy between this *Section 4(f) Policy Paper* and the Section 4(f) regulation should arise, the regulation takes precedence. The previous editions of this *Section 4(f) Policy Paper* are no longer in effect.

## 3.0 Analysis Process

### 3.1 Identification of Section 4(f) Properties

Section 4(f) requires consideration of:

- Parks and recreational areas of national, state, or local significance that are both publicly owned and open to the public
- Publicly owned wildlife and waterfowl refuges of national, state, or local significance that are open to the public to the extent that public access does not interfere with the primary purpose of the refuge<sup>6</sup>

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<sup>6</sup> Since the primary purpose of a refuge may make it necessary for the resource manager to limit public access for the protection of wildlife or waterfowl, FHWA's policy is that these facilities are not required to always be open to

- Historic sites of national, state, or local significance in public or private ownership regardless of whether they are open to the public (*See* 23 U.S.C. § 138(a) and 49 U.S.C. § 303(a))

When private institutions, organizations, or individuals own parks, recreational areas or wildlife and waterfowl refuges, Section 4(f) does not apply, even if such areas are open to the public. However, if a governmental body has a permanent proprietary interest in the land (such as a permanent easement, or in some circumstances, a long-term lease), FHWA will determine on a case-by-case basis whether the particular property should be considered publicly owned and, thus, if Section 4(f) applies (*See* Questions 1B and 1C). Section 4(f) also applies to all historic sites that are listed, or eligible for inclusion, in the National Register of Historic Places (NR) at the local, state, or national level of significance regardless of whether or not the historic site is publicly owned or open to the public.

A publicly owned park, recreational area or wildlife or waterfowl refuge must be a significant resource for Section 4(f) to apply (*See* 23 CFR 774.11(c) and Question 1A). Resources which meet the definitions above are presumed to be significant unless the official with jurisdiction over the site concludes that the entire site is not significant. The FHWA will make an independent evaluation to assure that the official's finding of significance or non-significance is reasonable. In situations where FHWA's determination contradicts and overrides that of the official with jurisdiction, the reason for FHWA's determination should be documented in the project file and discussed in the environmental documentation for the proposed action.

Section 4(f) properties should be identified as early as practicable in the planning and project development process in order that complete avoidance of the protected resources can be given full and fair consideration (*See* 23 CFR 774.9(a)). Historic sites are normally identified during the process required under Section 106 of the NHPA and its implementing regulations (*See* 36 CFR Part 800). Accordingly, the Section 106 process should be initiated and resources listed or eligible for listing in the NR identified early enough in project planning or development to determine whether Section 4(f) applies and for avoidance alternatives to be developed and assessed (*See* 23 CFR 774.11(e)).

### 3.2 Assessing *Use* of Section 4(f) Properties

Once Section 4(f) properties have been identified in the study area, it is necessary to determine if any of them would be used by an alternative or alternatives being carried forward for detailed study. *Use* in the Section 4(f) context is defined in 23 CFR 774.17 (*Definitions*) and the term has very specific meaning (*see* also Question 7 in this *Section 4(f) Policy Paper*). Any potential use of Section 4(f) property should always be described in related documentation consistent with this definition, as well as with the language from 23 CFR 774.13(d) (*Exceptions- temporary occupancy*) and 23 CFR 774.15 (*Constructive Use Determinations*), as applicable. It is not recommended to substitute similar terminology such as affected, impacted, or encroached upon in describing when a use occurs, as this may cause confusion or misunderstanding by the reader.

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the public. Some areas of a refuge may be closed to public access at all times or during parts of the year to accommodate preservation objectives.

The most common form of use is when land is permanently incorporated into a transportation facility. This occurs when land from a Section 4(f) property is either purchased outright as transportation right-of-way or when the applicant for Federal-aid funds has acquired a property interest that allows permanent access onto the property such as a permanent easement for maintenance or other transportation-related purpose.

The second form of use is commonly referred to as temporary occupancy and results when Section 4(f) property, in whole or in part, is required for project construction-related activities. The property is not permanently incorporated into a transportation facility but the activity is considered to be adverse in terms of the preservation purpose of Section 4(f). Section 23 CFR 774.13(d) provides the conditions under which “temporary occupancies of land...are so minimal as to not constitute a use within the meaning of Section 4(f).” If all of the conditions in Section 774.13(d) are met, the temporary occupancy does not constitute a use. If one or more of the conditions for the exception cannot be met, then the Section 4(f) property is considered used by the project even though the duration of onsite activities is temporary. Written agreement by the official(s) with jurisdiction over the property with respect to all the conditions is necessary and should be retained in the project file. Assurances that documentation will eventually be obtained via subsequent negotiations are not acceptable. Also, it is typical that the activity in question will be detailed in project plans as an integral and necessary feature of the project.

The third and final type of use is called constructive use. A constructive use involves no actual physical use of the Section 4(f) property via permanent incorporation of land or a temporary occupancy of land into a transportation facility. A constructive use occurs when the proximity impacts of a proposed project adjacent to, or nearby, a Section 4(f) property result in substantial impairment to the property’s activities, features, or attributes that qualify the property for protection under Section 4(f). As a general matter this means that the value of the resource, in terms of its Section 4(f) purpose and significance, will be meaningfully reduced or lost. The types of impacts that may qualify as constructive use, such as increased noise levels that would substantially interfere with the use of a noise sensitive feature such as a campground or outdoor amphitheater, are addressed in 23 CFR 774.15. A project’s proximity to a Section 4(f) property is not in itself an impact that results in constructive use. Also, the assessment for constructive use should be based upon the impact that is directly attributable to the project under review, not the overall combined impacts to a Section 4(f) property from multiple sources over time. Since constructive use is subjective, FHWA’s delegation of Section 4(f) authority to the FHWA Division Offices requires consultation with the Headquarters Office of Project Development and Environmental Review prior to finalizing any finding of constructive use.

In making any finding of use involving Section 4(f) properties, it is necessary to have up to date right-of-way information and clearly defined property boundaries for the Section 4(f) properties. For publicly owned parks, recreation areas, and refuges, the boundary of the Section 4(f) resource is generally determined by the property ownership boundary. Up-to-date right-of-way records are needed to ensure that ownership boundaries are accurately documented. For historic properties, the boundary of the Section 4(f) resource is generally the NR boundary. If the historic property boundary of an eligible or listed site has not been previously established via

Section 106 consultation, care should be taken in evaluating the site with respect to eligibility criteria. Depending upon its contributing characteristics, the actual legal boundary of the property may not ultimately coincide with the NR boundary. Since preliminary engineering level of detail (not final design) is customary during environmental analyses, it may be necessary to conduct more detailed preliminary design in some portions of the study area to finalize determinations of use.

Late discovery and/or late designations of Section 4(f) properties subsequent to completion of environmental studies may also occur. Each situation must be assessed to determine if the change in Section 4(f) status results in a previously unidentified need for a Section 4(f) approval pursuant to 23 CFR 774.13(c) (*See* Question 26). The determination should be considered and documented, as appropriate, in any re-evaluation of the project.

### 3.3 Approval Options

When FHWA determines that a project as proposed may use Section 4(f) property, there are three methods available for FHWA to approve the use:

- 1) Preparing a *de minimis* impact determination;
- 2) Applying a programmatic Section 4(f) evaluation; or
- 3) Preparing an individual Section 4(f) evaluation.

While the applicant will participate in gathering and presenting the documentation necessary for FHWA to make a Section 4(f) approval, the actual approval action is the FHWA's responsibility. The three approval options are set out in 23 CFR 774.3 and are discussed below.

#### 3.3.1 Determination of a *De Minimis* Impact to Section 4(f) Property

A *de minimis* impact is one that, after taking into account any measures to minimize harm (such as avoidance, minimization, mitigation or enhancement measures), results in either:

- 1) A Section 106 finding of no adverse effect or no historic properties affected on a historic property; or
- 2) A determination that the project would not adversely affect the activities, features, or attributes qualifying a park, recreation area, or refuge for protection under Section 4(f).

In other words, a *de minimis* impact determination is made for the net impact on the Section 4(f) property. The final project NEPA decision document must include sufficient supporting documentation for any measures to minimize harm that were applied to the project by FHWA in order to make the *de minimis* impact determination (*See* 23 CFR 774.7(b)). A use of Section 4(f) property having a *de minimis* impact can be approved by FHWA without the need to develop and evaluate alternatives that would avoid using the Section 4(f) property. A *de minimis* impact determination may be made for a permanent incorporation or temporary occupancy of Section 4(f) property.



A *de minimis* impact determination requires agency coordination and public involvement as specified in 23 CFR 774.5(b). The regulation has different requirements depending upon the type of Section 4(f) property that would be used. For historic sites, the consulting parties identified in accordance with 36 CFR Part 800<sup>7</sup> must be consulted. The official(s) with jurisdiction must be informed of the intent to make a *de minimis* impact determination and must concur in a finding of no adverse effect or no historic properties affected in accordance with 36 CFR Part 800. Compliance with 36 CFR Part 800 satisfies the public involvement and agency coordination requirement for *de minimis* impact findings for historic sites.

For parks, recreation areas, or wildlife and waterfowl refuges, the official(s) with jurisdiction over the property must be informed of the intent to make a *de minimis* impact determination, after which an opportunity for public review and comment must be provided. After considering any comments received from the public, if the official(s) with jurisdiction concurs in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection, then FHWA may finalize the *de minimis* impact determination. The public notice and opportunity for comment as well as the concurrence for a *de minimis* impact determination may be combined with similar actions undertaken as part of the NEPA process. If a proposed action does not normally require public involvement, such as for certain minor projects covered by a categorical exclusion, an opportunity for the public to review and comment on the proposed *de minimis* impact determination must be provided. The opportunity for public input may be part of a public meeting or another form of public involvement. The final determination should be made by the FHWA Division Administrator (or in the case of Federal Lands, the Division Engineer) and all supportive documentation retained as part of the project file (See Section 4.0, *Documentation*).

A *de minimis* impact determination (see Part II, Questions 11-12) is a finding. It is not an evaluation of alternatives and no avoidance or feasible and prudent avoidance alternative analysis is required. The definition of all possible planning in 23 CFR 774.17 explains that a *de minimis* impact determination does not require the traditional second step of including all possible planning to minimize harm because avoidance, minimization, mitigation, or enhancement measures are included as part of the determination.

A *de minimis* impact determination must be supported with sufficient information included in the project file to demonstrate that the *de minimis* impact and coordination criteria are satisfied (23 CFR 774.7(b)). The approval of a *de minimis* impact should be documented in accordance with the documentation requirements in 23 CFR 774.7(f). These requirements may be satisfied by including the approval in the NEPA documentation – i.e., an Environmental Assessment (EA), Environmental Impact Statement (EIS), or Categorical Exclusion (CE) determination, Record of Decision (ROD), or Finding of No Significant Impact (FONSI), -- or in an individual Section 4(f) evaluation when one is prepared for a project. When an individual Section 4(f) evaluation is required for a project in which one or more *de minimis* impact determinations will also be made, it is recommended that the individual Section 4(f) evaluation include the relevant documentation to support the proposed *de minimis* impact determination(s).

In situations where FHWA concludes in the individual Section 4(f) evaluation that there is no

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<sup>7</sup> Regulations implementing Section 106 of the NHPA.

feasible and prudent avoidance alternative and there are two or more alternatives that use Section 4(f) property, a least overall harm analysis will be necessary pursuant to 23 CFR 774.3(c) (See Section 3.3.3.2, *Alternative with Least Overall Harm*). In such instances, while the *de minimis* impact will be considered in that analysis, the *de minimis* impact is unlikely to be a significant differentiating factor between alternatives because the net harm resulting from the *de minimis* impact is negligible. The determination of least overall harm will depend upon a comparison of the factors listed in the regulation, 23 CFR 774.3(c)(1).

### 3.3.2 Programmatic Section 4(f) Evaluations

Programmatic Section 4(f) evaluations are a time-saving procedural option for preparing individual Section 4(f) evaluations (discussed in Section 3.3.3) for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by the FHWA based on experience with many projects that have a common fact pattern from a Section 4(f) perspective. Through applying a specific set of criteria, based upon common experience that includes project type, degree of use and impact, the evaluation of avoidance alternatives is standardized and simplified. An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in that programmatic evaluation are met. Programmatic evaluations can be nationwide, region-wide, or statewide. The development of any programmatic evaluation, including region-wide and statewide, must be coordinated with the FHWA Office of Project Development and Environmental Review and the FHWA Office of Chief Counsel.

As of the date of publication of this *Section 4(f) Policy Paper*, the FHWA has issued five nationwide programmatic Section 4(f) evaluations:<sup>8</sup>

- 1) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects
- 2) Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges
- 3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites
- 4) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges
- 5) Nationwide Programmatic Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property

Before being adopted, all of the nationwide programmatic Section 4(f) evaluations were published in draft form in the *Federal Register* for public review and comment. They were also provided to appropriate Federal agencies, including the Department of the Interior (U.S. DOI), for review. Each programmatic Section 4(f) evaluation was reviewed by FHWA's Office of Chief Counsel for legal sufficiency.

<sup>8</sup> <http://www.environment.fhwa.dot.gov/4f/4fnationwideevals.asp>

It is not necessary to coordinate project-specific applications of approved programmatic Section 4(f) evaluations with the U.S. DOI unless the U.S. DOI owns or has administrative oversight over the Section 4(f) property involved (is an official with jurisdiction or has an oversight role as described Questions 9D and 31). As specified in the applicable programmatic Section 4(f) evaluation, it is still necessary to coordinate with the official(s) with jurisdiction over such properties. A legal sufficiency review of a project-specific application of an approved programmatic Section 4(f) evaluation is not necessary. As such, a primary benefit to using the prescribed step-by-step approach contained in a programmatic evaluation is the reduction of time to process a Section 4(f) approval.

Documentation required to apply a programmatic Section 4(f) evaluation must support that the specific programmatic criteria have been met (*See* 23 CFR 774.3(d)(1)). A separate Section 4(f) document is not required but an indication in the NEPA documentation that Section 4(f) compliance was satisfied by the applicable programmatic evaluation is required (*See* 23 CFR 774.7(f)). As specified in the programmatic evaluations, the requirement to assess whether there is a feasible and prudent avoidance alternative and all possible planning applies. The necessary information supporting the applicability of the programmatic evaluation will be retained in the project file (*See* Section 4.0, *Documentation*).

### 3.3.3 Individual Project Section 4(f) Evaluations

An individual Section 4(f) evaluation must be completed when approving a project that requires the use of Section 4(f) property if the use, as described in Sections 3.1 and 3.2 above, results in a greater than *de minimis* impact and a programmatic Section 4(f) evaluation cannot be applied to the situation (23 CFR 774.3). The individual Section 4(f) evaluation documents the evaluation of the proposed use of Section 4(f) properties in the project area of all alternatives. The individual Section 4(f) evaluation requires two findings, which will be discussed in turn:

- 1) That there is no feasible and prudent alternative that completely avoids the use of Section 4(f) property; and
- 2) That the project includes all possible planning to minimize harm to the Section 4(f) property resulting from the transportation use (*See* 23 CFR 774.3(a)(1) and (2)).

#### 3.3.3.1 Feasible and Prudent Avoidance Alternatives

The intent of the statute, and the policy of FHWA, is to avoid and, where avoidance is not feasible and prudent, minimize the use of significant public parks, recreation areas, wildlife and waterfowl refuges and historic sites by our projects. Unless the use of a Section 4(f) property is determined to have a *de minimis* impact, FHWA must determine that no feasible and prudent avoidance alternative exists before approving the use of such land (*See* 23 CFR 774.3). The Section 4(f) regulations refer to an alternative that would not require the use of any Section 4(f) property as an avoidance alternative. Feasible and prudent avoidance alternatives are those that avoid using any Section 4(f) property and do not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property (23 CFR 774.17). This section of the *Section 4(f) Policy Paper* focuses on the identification,

development, evaluation, elimination and documentation of potential feasible and prudent avoidance alternatives in a Section 4(f) evaluation document.

The first step in determining whether a feasible and prudent avoidance alternative exists is to identify a reasonable range of project alternatives including those that avoid using Section 4(f) property. The avoidance alternatives will include the no-build. The alternatives screening process performed during the scoping phase of NEPA is a good starting point for developing potential section 4(f) avoidance alternatives and/or design options.<sup>9</sup> Any screening of alternatives that may have occurred during the transportation planning phase may be considered as well. It may be necessary, however, to look for additional alternatives if the planning studies and the NEPA process did not identify Section 4(f) properties and take Section 4(f) requirements into account. If Section 4(f) avoidance alternatives were eliminated during the earlier phases of project development for reasons unrelated to Section 4(f) impacts or a failure to meet the project purpose and need, they may need to be reconsidered in the Section 4(f) process. In addition, it is often necessary to develop and analyze new alternatives, or new variations of alternatives rejected for non-Section 4(f) reasons during the earlier phases.

The no-action or no-build alternative is an avoidance alternative and should be included in the analysis as such. In identifying other avoidance alternatives, FHWA should consider the reasonable alternatives that meet the purpose and need of the project. Potential alternatives to avoid the use of Section 4(f) property may include one or more of the following, depending on project context:

- **Location Alternatives** - A location alternative refers to the re-routing of the entire project along a different alignment.
- **Alternative Actions** - An alternative action could be a different mode of transportation, such as rail transit or bus service, or some other action that does not involve construction such as the implementation of transportation management systems or similar measures.
- **Alignment Shifts** - An alignment shift is the re-routing of a portion of the project to a different alignment to avoid a specific resource.
- **Design Changes** - A design change is a modification of the proposed design in a manner that would avoid impacts, such as reducing the planned median width, building a retaining wall, or incorporating design exceptions.

When considering alignment shifts and design changes, it is important to keep in mind the range of allowable configurations and design values for roadway elements and different types of roads. These guidelines are contained within the official state standards and/or the “Green Book,” properly titled *A Policy on the Geometric Design of Highways and Streets* and published by the American Association of State Highway and Transportation Officials. The guidelines set out the generally acceptable ranges of dimensions for roadway elements and typical applications on different types of roadway facilities. These ranges of values provide planners and designers the

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<sup>9</sup> In the Section 4(f) statute, the term *alternative* is used in the context of an option which avoids using land from a Section 4(f) property and is not limited to the context of the end-to-end alternative as defined by the project applicant. This section of the *Section 4(f) Policy Paper* uses the phrase “avoidance alternatives and/or design options” in order to clarify that, depending upon the project context, the potential alternatives that should be evaluated to avoid Section 4(f) property may be end-to-end alternatives *or* may be a change to only a portion of the end-to-end project.

ability to develop projects at an acceptable cost and level of performance (e.g. safety, traffic flow, sustainability), while balancing the site-specific conditions, constraints, and implications of design decisions. Where it may be appropriate to select a value or dimension outside of the ranges that are established in State and national guidelines, design exceptions are encouraged and permitted. However, the consideration and selection of a value outside of the established ranges should be based on the context of the facility and an analysis of how the design may affect the safety, flow of traffic, constructability, maintainability, environment, cost, and other related issues.

An important consideration in identifying potential avoidance alternatives is that they should have a reasonable expectation of serving traffic needs that have been identified in the project purpose and need. A final limitation in identifying potential avoidance alternatives is that a project alternative that avoids one Section 4(f) property by using another Section 4(f) property is not an avoidance alternative. The goal is to identify alternatives that would not use any Section 4(f) property. (Note: A determination of a *de minimis* impact for a specific Section 4(f) property may be made without considering avoidance alternatives for that property, even if that use occurs as part of an alternative that also includes other uses that are greater than *de minimis*.) Consequently, at this step of analysis the degree of impact to Section 4(f) property is not relevant – the only question is whether the alternative would require any use of Section 4(f) property because an alternative using any amount of Section 4(f) property is not an avoidance alternative. Subsequent steps in the analysis will consider the degree of impact as well as the availability of measures to minimize impacts.

Once the potential avoidance alternative(s) have been identified, the next task is to determine, for each potential avoidance option, whether avoiding the Section 4(f) property is feasible and prudent. The Section 4(f) regulations specify how FHWA is to determine whether a potential avoidance alternative is feasible and prudent in 23 CFR 774.17. The definition explains that a “feasible and prudent avoidance alternative” is one that avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property. In order to determine whether there are other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property, both the feasibility and the prudence of each potential avoidance alternative must be considered.

Care must be taken when making determinations of feasibility and prudence not to forget or de-emphasize the importance of protecting the Section 4(f) property. This stems from the statute itself, which requires that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The regulation incorporates this aspect of the statute in the definition of feasible and prudent avoidance alternative which states that “it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.” In effect, the first part of the definition recognizes the value of the individual Section 4(f) property in question, relative to other Section 4(f) properties of the same type. This results in a sliding scale approach that maximizes the protection of Section 4(f) properties that are unique or otherwise of special significance by recognizing that while all Section 4(f) properties are important, some Section 4(f) properties are worthy of a greater degree of protection than others.

The regulations state that a potential avoidance alternative is not feasible if it cannot be built as a matter of sound engineering judgment (23 CFR 774.17). If a potential avoidance alternative cannot be built as a matter of sound engineering judgment it is not feasible and the particular engineering problem with the alternative should be documented in the project files with a reasonable degree of explanation. In difficult situations, the FHWA Division may obtain assistance from FHWA subject matter experts located in FHWA Headquarters or the FHWA Resource Center.

The third and final part of the *feasible and prudent avoidance alternative* definition sets out standards for determining if a potential avoidance alternative is prudent. An alternative is not prudent if:

- 1) It compromises the project to a degree that it is unreasonable to proceed in light of the project's stated purpose and need (i.e., the alternative doesn't address the purpose and need of the project);
- 2) It results in unacceptable safety or operational problems;
- 3) After reasonable mitigation, it still causes severe social, economic, or environmental impacts; severe disruption to established communities; severe or disproportionate impacts to minority or low-income populations; or severe impacts to environmental resources protected under other Federal statutes;
- 4) It results in additional construction, maintenance, or operational costs of extraordinary magnitude;
- 5) It causes other unique problems or unusual factors; or
- 6) It involves multiple factors as outlined above that, while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

The prudence determination involves an analysis that applies each of the six factors, if applicable, to the potential avoidance alternative. If a factor is not applicable FHWA recommends simply noting that fact in the analysis.

Supporting documentation is required in the Section 4(f) evaluation for findings of no feasible and prudent alternatives (*See* 23 CFR 774.7(a)). Documentation of the process used to identify, develop, analyze and eliminate potential avoidance alternatives is very important. The Section 4(f) evaluation should describe all efforts in this regard. This description need not include every possible detail, but it should clearly explain the process that occurred and its results. It is appropriate to maintain detailed information in the project file with a summary in the Section 4(f) evaluation. If the information is especially voluminous, a technical report should be prepared, summarized, and referenced in the Section 4(f) evaluation. The discussion may be organized within the Section 4(f) evaluation in any manner that allows the reader to understand the full range of potential avoidance alternatives identified, the process by which potential avoidance alternatives were identified and analyzed for feasibility and prudence. Possible methods for organizing the discussion include a chronological discussion; a discussion organized geographically by project alternatives or project phases of construction; or by the type of Section 4(f) properties.

For larger highway projects with multiple Section 4(f) properties in the project area, it may be desirable to divide the analysis into a macro and a micro-level evaluation in order to distinguish

the analysis of end-to-end project alternatives that avoid using any Section 4(f) property from the analysis of design options to avoid using a single Section 4(f) property. The macro-level evaluation would address any end-to-end avoidance alternatives that can be developed, as well as any alternative actions to the proposed highway project such as travel demand reduction strategies or enhanced transit service in the project area. The micro-level evaluation would then address, for each Section 4(f) property, whether the highway could be routed to avoid the property by shifting to the left or right, by bridging over, or tunneling under the property, or through another alignment shift or design change. The analysis may be presented in any manner that demonstrates, for each Section 4(f) property used, that there is no feasible and prudent avoidance alternative. Even if all of the alternatives use a Section 4(f) property, there is still a duty to try to avoid the individual Section 4(f) properties within each alternative.

### 3.3.3.2 Alternative with Least Overall Harm

If the analysis described in the preceding section concludes that there is no feasible and prudent avoidance alternative, then FHWA may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that causes the least overall harm in light of the statute's preservation purpose. Pursuant to substantial case law, if the assessment of overall harm finds that two or more alternatives are substantially equal, FHWA can approve any of those alternatives. This analysis is required when multiple alternatives that use Section 4(f) property remain under consideration.

To determine which of the alternatives would cause the least overall harm, FHWA must compare seven factors set forth in 23 CFR 774.3(c)(1) concerning the alternatives under consideration. The first four factors relate to the net harm that each alternative would cause to Section 4(f) property:

- 1) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
- 2) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
- 3) The relative significance of each Section 4(f) property; and
- 4) The views of the officials with jurisdiction over each Section 4(f) property.

When comparing the alternatives under these factors, FHWA policy is to develop comparable mitigation measures where possible. In other words, the comparison may not be skewed by over-mitigating one alternative while under-mitigating another alternative for which comparable mitigation could be incorporated. In addition, the mitigation measures relied upon as part of this comparison should be incorporated into the selected alternative. If subsequent design or engineering work occurs after the alternative is selected that requires changes to the mitigation plans for Section 4(f) property, FHWA may require revisions to previous mitigation commitments commensurate with the extent of design changes in accordance with 23 CFR 771.109(b) and (d), 127(b), 129, and 130.

The remaining three factors enable FHWA to take into account any substantial problem with any of the alternatives remaining under consideration on issues beyond Section 4(f). These factors

are:

- 5) The degree to which each alternative meets the purpose and need for the project;
- 6) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and
- 7) Substantial differences in costs among the alternatives.

By balancing the seven factors, four of which concern the degree of harm to Section 4(f) properties, FHWA will be able to consider all relevant concerns to determine which alternative would cause the least overall harm in light of the statute's preservation purpose. The least overall harm balancing test is set forth in 774.3(c)(1). This allows FHWA to fulfill its statutory mandate to make project decisions in the best overall public interest required by 23 U.S.C. § 109(h). Through this balancing of factors, FHWA may determine that a serious problem identified in factors (v) through (vii) outweighs relatively minor net harm to a Section 4(f) property. The least overall harm determination also provides FHWA with a way to compare and select between alternatives that would use different types of Section 4(f) properties when competing assessments of significance and harm are provided by the officials with jurisdiction over the impacted properties. In evaluating the degree of harm to Section 4(f) properties, FHWA is required by the regulations to consider the views (if any) expressed by the official(s) with jurisdiction over each Section 4(f) property. If an official with jurisdiction states that all resources within that official's jurisdiction are of equal value, FHWA may still determine that the resources have different value if such a determination is supported by information in the project file. Also, if the officials with jurisdiction over two different properties provide conflicting assessments of the relative value of those properties, FHWA should consider the officials' views but then make its own independent judgment about the relative value of those properties. Similarly, if the official(s) with jurisdiction decline to provide any input at all regarding the relative value of the affected properties, FHWA should make its own independent judgment about the relative value of those properties.

FHWA is required to explain how the seven factors were compared to determine the least overall harm alternative (*See* 23 CFR 774.7(c)). The draft Section 4(f) evaluation will disclose the various impacts to the different Section 4(f) properties thereby initiating the balancing process. It should also disclose the relative differences among alternatives regarding non-Section 4(f) issues such as the extent to which each alternative meets the project purpose and need. The disclosure of impacts should include both objective, quantifiable impacts and qualitative measures that provide a more subjective assessment of harm. Preliminary assessment of how the alternatives compare to one another may also be included. After circulation of the draft Section 4(f) evaluation in accordance with 23 CFR 774.5(a), FHWA will consider comments received on the evaluation and finalize the comparison of all factors listed in 23 CFR 774.3(c)(1) for all the alternatives. The analysis and identification of the alternative that has the overall least harm must be documented in the final Section 4(f) evaluation (*See* 23 CFR 774.7(c)). In especially complicated projects, the final approval to use the Section 4(f) property may be made in the decision document (ROD or FONSI).



### 3.4 Examples of Section 4(f) Approvals

The table below describes five project alternative scenarios. In each project scenario various alternatives are considered and there are various options available to approve the use of the Section 4(f) property needed for the project. The examples illustrate the approval options as well as the point that in some situations FHWA may only approve a certain alternative. These examples are not intended to address every possible scenario.

In Project 1 there is a single build alternative A, for which FHWA determines the use to be a *de minimis* impact and therefore does not require an individual Section 4(f) evaluation. Once the coordination required by 23 CFR 774.5(b) is completed, FHWA may approve the *de minimis* impact and the applicant may proceed with the build alternative.

Project 2 has two alternatives. The FHWA determines that alternative A has a *de minimis* impact on one Section 4(f) property, and alternative B has a *de minimis* impact on three Section 4(f) properties. Upon completion of the coordination required by 23 CFR 774.5(b), FHWA may approve either alternative under Section 4(f). As in the previous example, an individual Section 4(f) evaluation is not required, therefore the feasibility and prudence of avoiding Section 4(f) properties does not have to be determined. Furthermore, when there are only *de minimis* impacts, even among multiple alternatives, a least harm analysis is not necessary and there is no need to compare the significance of the competing Section 4(f) properties. The process to choose between alternatives A or B in the second example may be based on non-Section 4(f) considerations as determined appropriate through the project development process.

In Project 3, there are three alternatives under consideration. The FHWA determines that alternative A meets the criteria of a *de minimis* impact, while alternative B has a minor impact on a Section 4(f) property for which the programmatic Section 4(f) evaluation for minor uses is applicable. Alternative C would use a Section 4(f) property to an extent that a *de minimis* impact determination is not possible and no programmatic Section 4(f) evaluation applies. In this example, all three alternatives use a Section 4(f) property and thus none can be considered to be an avoidance alternative. For this project, alternative A may proceed immediately once the coordination required by 23 CFR 774.5 is complete, through an approved *de minimis* impact determination. Alternative B may be approved by following the procedures designated in the applicable programmatic Section 4(f) evaluation, whose end result demonstrates no feasible and prudent avoidance alternative. However, in this example if the applicant favors alternative C, then an individual Section 4(f) evaluation can be prepared to consider whether or not alternative C can be approved under Section 4(f). The individual Section 4(f) evaluation first determines that there is no feasible and prudent avoidance alternative as defined in 23 CFR 774.17. The evaluation then considers which alternative (A, B, or C) has the least overall harm using the factors in 23 CFR 774.3(c). Alternative C could only be approved if it is identified as having the least overall harm, which would be possible; for example, if alternatives A and B both have severe impacts to an important non-Section 4(f) resource and the impacts of alternative C can be adequately mitigated. In that case, upon completion of the coordination required by 23 CFR 775.5(a) and all possible planning to minimize harm as defined in 23 CFR 774.17, alternative C could be approved.

Project 4 differs slightly in having multiple *de minimis* impacts to Section 4(f) properties with alternative A, and a mix of *de minimis* impacts and greater than *de minimis* impacts not covered by a programmatic section 4(f) evaluation with alternative B. If alternative A is chosen, FHWA would satisfy Section 4(f) by making a *de minimis* impact determination for each property used in accordance with 23 CFR 774.3(b), 774.5(b), and 774.7(c). To consider selecting alternative B, an individual Section 4(f) evaluation would be prepared in accordance with 23 CFR 774.3(a), 774.5(a), and 774.7(a); however, a determination of *de minimis* impact for a specific Section 4(f) property can be made without considering avoidance alternatives for that property, even if that use occurs as part of an alternative that also includes other uses that are greater than *de minimis*. In this example, an additional alternative C is developed as part of the Section 4(f) evaluation. Alternative C avoids using any Section 4(f) property, and the evaluation then determines, using the definition in 23 CFR 774.17, that alternative C is feasible and prudent. Alternative C may proceed immediately because it does not use any Section 4(f) property and no Section 4(f) approval is needed. In this example, since alternative C is a feasible and prudent avoidance alternative the FHWA may not approve alternative B, although alternative A would still be available for selection because its impacts on Section 4(f) properties are *de minimis*. However, if the facts are changed and we now assume that the evaluation of avoidance alternative C had found that it was not feasible and prudent, then the Section 4(f) evaluation could be completed. The evaluation would determine the least overall harm amongst alternatives A and B using the factors in 23 CFR 774.3(c). (In this variation of the example, the least overall harm determination does not include alternative C in the comparison because alternative C was previously eliminated when it was found not to be feasible and prudent.) Alternative B could only be approved if it is identified as having the least overall harm. This would be possible, for example if alternative A would not meet the project purpose and need as well as alternative B, alternative A would be substantially more expensive, and the Section 4(f) property used by alternative B has no unusual significance and could be adequately mitigated. In that example, upon completion of the coordination required by 23 CFR 774.5(a) and all possible planning to minimize harm as defined in 23 CFR 774.17, alternative B could be approved even though it uses Section 4(f) property.

Project 5 has two alternatives, both having greater than *de minimis* impacts on a different Section 4(f) property. To choose among alternatives A and B, an individual Section 4(f) evaluation must be prepared in accordance with 23 CFR 774.3(a), 774.5(a), and 774.7(a) that demonstrates no feasible and prudent avoidance alternative exists, and a least overall harm analysis must be completed using the factors in 23 CFR 774.3(c). The alternative identified as having the least overall harm may proceed upon completion of the coordination required by 23 CFR 774.5(a) and all possible planning to minimize harm as defined in 23 CFR 774.17.

**Table 1. Project Alternative Scenarios**

ALTERNATIVE	USE OF SECTION 4(f) PROPERTY	INDIVIDUAL SECTION 4(f) EVALUATION?	OUTCOME
Project 1, alternative A	<i>De minimis</i> impact	Not necessary	May proceed with A
Project 2, alternative A	<i>De minimis</i> impact on one property	Not necessary	May proceed with A or B; Section 4(f) is not determinative
Project 2, alternative B	<i>De minimis</i> impact on three properties	Not necessary	

ALTERNATIVE	USE OF SECTION 4(f) PROPERTY	INDIVIDUAL SECTION 4(f) EVALUATION?	OUTCOME
Project 3, alternative A	<i>De minimis</i> impact	Not necessary	May proceed with A or B; Section 4(f) is not determinative
Project 3, alternative B	Minor use, programmatic Section 4(f) evaluation is applicable	Not necessary	
Project 3, alternative C	Greater than <i>de minimis</i> impact	Necessary. If no feasible and prudent avoidance alternative is identified, then a least overall harm analysis would compare A, B, and C.	May proceed with C only if C has less overall harm than A or B.
Project 4, alternative A	<i>De minimis</i> impact on two properties	Not necessary	May proceed with A
Project 4, alternative B	<i>De minimis</i> impact on one property & greater than <i>de minimis</i> impact on another property	Necessary. As part of the evaluation, a new Alternative C is developed that avoids using Section 4(f) property.	If C is found feasible and prudent, cannot proceed with B. If C is not feasible and prudent, may proceed with B only if B has less overall harm than A.
Project 4, alternative C	None	Not necessary to complete the Section 4(f) evaluation to proceed with C.	May proceed with C; no Section 4(f) approval is required.
Project 5, alternative A	Greater than <i>de minimis</i> impact	Necessary. The evaluation must seek to identify feasible and prudent avoidance alternatives. Assuming none are found, then a least harm analysis will compare A and B.	Least overall harm analysis determines which alternative, A or B, may proceed.
Project 5, alternative B	Greater than <i>de minimis</i> impact		

### 3.5 All Possible Planning to Minimize Harm

After determining that there are no feasible and prudent alternatives to avoid the use of Section 4(f) property, the project approval process for an individual Section 4(f) evaluation requires the consideration and documentation of all possible planning to minimize harm to Section 4(f) property (*See* 23 CFR 774.3(a)(2)). *All possible planning*, defined in 23 CFR 774.17, means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project. All possible planning to minimize harm does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1).

Minimization of harm may entail both alternative design modifications that reduce the amount of Section 4(f) property used and mitigation measures that compensate for residual impacts. Minimization and mitigation measures should be determined through consultation with the official(s) with jurisdiction. These include the SHPO and/or THPO for historic properties or officials owning or administering the resource for other types of Section 4(f) properties.

Mitigation measures involving public parks, recreation areas, or wildlife or waterfowl refuges may involve a replacement of land and/or facilities of comparable value and function, or monetary compensation to enhance the remaining land. Neither the Section 4(f) statute nor regulations requires the replacement of Section 4(f) property used for highway projects, but this option may be the most straightforward means of minimizing harm to parks, recreation areas, and wildlife waterfowl refuges and is permitted under 23 CFR 710.509 as a mitigation measure for direct project impacts.

Mitigation of historic sites usually consists of those measures necessary to preserve the historic integrity of the site and agreed to in accordance with 36 CFR 800 by FHWA, the SHPO or THPO, and other consulting parties. In any case, the cost of mitigation should be a reasonable public expenditure in light of the severity of the impact on the Section 4(f) property in accordance with 23 CFR 771.105(d). Additional laws such as Section 6(f) of the Land and Water Conservation Fund Act may have separate mitigation and approval requirements and compliance with such) requirements should also be described within the Section 4(f) discussion of all possible planning to minimize harm.

#### **4.0 Documentation**

U.S. DOT departmental requirements for documenting Section 4(f) analysis and approvals (DOT Order 5610.1C) have been incorporated into FHWA regulations, guidance and policy. The FHWA's procedures regarding the preparation and circulation of Section 4(f) documents is contained in 23 CFR 774.5 and FHWA's Technical Advisory, T 6640.8A, Guidance for Preparing and Processing of Environmental and Section 4(f) Documents.<sup>10</sup>

The documentation of all Section 4(f) determinations, consultations, coordination and approvals is intended to establish a record of FHWA's compliance with the regulatory process. Documentation also provides evidence that the substantive requirements have been met. Section 4(f) documentation and processing requirements vary depending on the type of Section 4(f) property used and whether or not the use meets the criteria of a de minimis impact. However, all situations which involve Section 4(f) property will necessitate some degree of documentation: either in the NEPA document, a Section 4(f) evaluation, or the project file.

The project file is the agency's written record that memorializes the basis for determining that an impact is de minimis or that there is no feasible and prudent avoidance alternative to the use of the Section 4(f) property and that FHWA undertook all possible planning to minimize harm to Section 4(f) property. When the agency determines that Section 4(f) is not applicable to a particular resource, written documentation of that decision should be maintained as part of the project file. The project file should include all relevant correspondence which may include emails and other electronic information that is applicable to the decision-making process. The project file should generally be retained until three years after FHWA reimbursement on Federal-aid projects and three years after final payment on non-Federal aid projects (See FHWA Order M.1324.1A, 49 CFR 18.42, and 49 CFR 19.53).

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<sup>10</sup> These and other resources are available at the FHWA Environmental Toolkit <http://environment.fhwa.dot.gov/index.asp>.

### ***De Minimis* Impact Determinations**

The *de minimis* impact determination must include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement measures are taken into account, are *de minimis* as defined in 23 CFR 774.17; and that the coordination required by 23 CFR 774.5(b) was completed.

Information related to the *de minimis* impact determination should be included in the project NEPA document (EA or EIS), or in the project file for a project processed as a CE (*See* 23 CFR 774.7(c)). Circulation of this information in the project NEPA document may satisfy the public involvement requirements required for *de minimis* impact findings. For projects which include both *de minimis* impacts and use of Section 4(f) property with more than a *de minimis* impact, the determination and supporting data should be included in a separate section of the Section 4(f) evaluation.

### **Applying Programmatic Section 4(f) Evaluations**

Information related to an approval to use Section 4(f) property by applying a programmatic Section 4(f) evaluation should be included in the project NEPA document (EA or EIS), or in the project file for a project processed as a CE. For projects which include both a programmatic Section 4(f) approval and a use of Section 4(f) property for which there is more than a *de minimis* impact, information regarding the application of the programmatic Section 4(f) evaluation should be included in a separate section of the Section 4(f) evaluation.

The project file should include sufficient supporting documentation to demonstrate that the programmatic evaluation being relied upon applies to the use of the specific Section 4(f) property. In addition, the project file should include documentation that the coordination required by the applicable programmatic evaluation was completed and that all specific conditions of the applicable programmatic evaluation were met.

### **Individual Section 4(f) Evaluations**

Individual Section 4(f) evaluations must include sufficient analysis and supporting documentation to demonstrate that there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm (23 CFR 774.7(a)). For projects requiring a least overall harm analysis under 23 CFR 774.3(c), that analysis must be included within the individual Section 4(f) evaluation (23 CFR 774.7(c)).

Individual Section 4(f) evaluations are processed in two distinct stages: draft and final. Draft evaluations must be circulated to the U.S. DOI and shared with the official(s) with jurisdiction. The public may review and comment on a draft evaluation during the NEPA process. When a project is processed as a CE the Section 4(f) evaluation must be circulated independently to the U.S. DOI. In all cases, final Section 4(f) evaluations are subject to FHWA legal sufficiency review prior to approval (23 CFR 774.5(d)).

### **Project Files**

In general, the project file should contain the following essential information, with analysis, regarding Section 4(f):

- When making *de minimis* impact determinations

- 1) Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project;
  - 2) Whether or not there is a use of section 4(f) property;
  - 3) Records of public involvement, or Section 106 consultation;
  - 4) Results of coordination with the officials with jurisdiction;
  - 5) Comments submitted during the coordination procedures required by 23 CFR 774.5 and responses to the comments; and
  - 6) Avoidance, minimization or mitigation measures that were relied upon to make the *de minimis* impact finding.
- When applying programmatic Section 4(f) evaluations
    - 1) Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project;
    - 2) Whether or not there is a use of section 4(f) property;
    - 3) Records of public involvement, if any;
    - 4) Results of coordination with the officials with jurisdiction; and
    - 5) Documentation of the specific requirements of the programmatic evaluation that is being applied.
  - When preparing an individual Section 4(f) evaluation
    - 1) Applicability or non-applicability of Section 4(f) to the park, recreation, refuge or historic property proposed to be used by the project;
    - 2) Whether or not there is a use of Section 4(f) property;
    - 3) Activities, features, and attributes of the Section 4(f) property;
    - 4) Analysis of the impacts to the Section 4(f) property;
    - 5) Records of public involvement;
    - 6) Results of coordination with the officials with jurisdiction;
    - 7) Alternatives considered to avoid using the Section 4(f) property, including analysis of the impacts caused by avoiding the Section 4(f) property;
    - 8) A least overall harm analysis, if appropriate;
    - 9) All measures undertaken to minimize harm to the Section 4(f) property;
    - 10) Comments submitted during the coordination procedures required by 23 CFR 774.5 and responses to the comments; and
    - 11) Results of the internal legal sufficiency review.

### **Administrative Records**

If a Section 4(f) approval is legally challenged, the project file will be the basis of the administrative record that must be filed in the court for review. The administrative record will be reviewed in accordance with the *Administrative Procedure Act* (APA), (5 U.S.C. §706 (2)(A)), which provides judicial deference to U.S. DOT actions. Under the APA, the agency's action must be upheld unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The court will review the administrative record to determine whether FHWA complied with the essential elements of Section 4(f). If an inadequate administrative record is prepared, the court will lack the required Section 4(f) documentation to review and, therefore, will be unable to defer to FHWA's decision, especially when a Section 4(f) evaluation was not required. While agency decisions are entitled to a presumption of regularity and the courts are not empowered to substitute their judgment for that of the agency, judges will carefully review whether FHWA followed the applicable requirements.

## **PART II – QUESTIONS AND ANSWERS REGARDING SECTION 4(f) APPLICABILITY AND COMPLIANCE**

The following questions and answers are intended to provide additional and detailed guidance for complying with the requirements of Section 4(f). Examples to aid in determining the applicability of Section 4(f) to various types of property and project situations are included. These examples represent FHWA's policy regarding Section 4(f) compliance for situations most often encountered in the project development process. Since it is impossible to address every situation that could occur, it is recommended that the FHWA Division Office be consulted for advice and assistance in determining the applicability of Section 4(f) to specific circumstances not covered in this paper. The FHWA Division Offices are encouraged to consult with the Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Services Team and/or the Office of the Chief Counsel in cases where additional assistance in Section 4(f) matters is required.

### **IDENTIFICATION OF SECTION 4(f) PROPERTIES**

#### **1. Public Parks, Recreation Areas and Wildlife and Waterfowl Refuges**

##### **Question 1A: When is publicly owned land considered to be a park, recreation area or wildlife and waterfowl refuge?**

**Answer:** Publicly owned land is considered to be a park, recreation area or wildlife and waterfowl refuge when the land has been officially designated as such by a Federal, State or local agency, and the officials with jurisdiction over the land determine that its primary purpose is as a park, recreation area, or refuge. Primary purpose is related to a property's primary function and how it is intended to be managed. Incidental, secondary, occasional or dispersed activities similar to park, recreational or refuge activities do not constitute a primary purpose within the context of Section 4(f). Unauthorized activities, such as ad hoc trails created by the public within a conservation area, should not be considered as part of FHWA's determination of Section 4(f) applicability.

In addition, the statute itself requires that a property must be a significant public park, recreation area, or wildlife and waterfowl refuge. The term significant means that in comparing the availability and function of the park, recreation area or wildlife and waterfowl refuge, with the park, recreation or refuge objectives of the agency, community or authority, the property in question plays an important role in meeting those objectives. Except for certain multiple-use land holdings (Question 4), significance determinations are applicable to the entire property and not just to the portion of the property proposed for use by a project.

Significance determinations of publicly owned land considered to be a park, recreation area, or wildlife and waterfowl refuge are made by the official(s) with jurisdiction over the property. The meaning of the term significance, for purposes of Section 4(f), should be explained to the official(s) with jurisdiction if the official(s) are not familiar with Section

4(f). Management plans or other official forms of documentation regarding the land, if available and up-to-date, are important and should be obtained from the official(s) and retained in the project file. If a determination from the official(s) with jurisdiction cannot be obtained, and a management plan is not available or does not address the significance of the property, the property will be presumed to be significant. However, all determinations, whether stated or presumed, and whether confirming or denying significance of a property for the purposes of Section 4(f), are subject to review by FHWA for reasonableness pursuant to 23 CFR 774.11. When FHWA changes a determination of significance, the basis for this determination will be included in the project file and discussed in the environmental documentation for the proposed action.

**Question 1B: Can an easement or other encumbrance on private property result in that property being subject to Section 4(f)?**

**Answer:** Yes, in certain instances. Generally, an easement is the right to use real property without possessing it, entitling the easement holder to the privilege of some specific and limited use of the land. Easements take many forms and are obtained for a variety of purposes by different parties. Easements or similar encumbrances restricting a property owner from making certain uses of his/her property, such as conservation easements, are commonly encountered during transportation project development. Easements such as these often exist for the purpose of preserving open space, protection of habitat, or to limit the extent and density of development in a particular area, and they may be held by Federal, State or local agencies or non-profit groups or other advocacy organizations.

Although a conservation easement may not meet all of the requirements necessary to treat the property as a significant publicly-owned public park, recreation area, or wildlife and waterfowl refuge, it is a possibility that mandates careful case-by-case consideration when encountered. The terms of the easement should be carefully examined to determine if Section 4(f) applies to the property. Factors to consider include, but are not limited to, the views of the official(s) with jurisdiction, the purpose of the easement, the term of the easement, degree of public access to the property, how the property is to be managed and by whom, what parties obtained the easement (public agency or non-public group), termination clauses, and what restrictions the easement places on the property owner's use of the easement area. Questions on whether or not an easement conveys Section 4(f) status to a property should be referred to the FHWA Division Office and, if necessary, the Division Office should consult with the Headquarters Office of Project Development and Environmental Review, the Headquarters Office of Real Estate Services, the Resource Center Environment Technical Service Team, or the Office of Chief Counsel.

Easements and deed restrictions for the purpose of historic preservation are also commonly encountered during transportation project development. Section 4(f) applicability questions are unlikely to be encountered for these properties because if the property is not on or eligible for the NR Section 4(f) does not apply, notwithstanding the preservation easement. If the property is on or eligible for the NR, Section 4(f) applies. However, the existence and nature of such easements should be documented and considered as necessary within the



feasible and prudent analysis and least harm analysis if a Section 4(f) evaluation is prepared.

**Question 1C: When does a lease agreement with a governmental body constitute public ownership?**

**Answer:** In some instances, a lease agreement between a private landowner and a governmental body may constitute a proprietary interest in the land for purposes of Section 4(f). Generally, under a long term lease to a governmental body, such land may be considered to be “publicly owned” land and if the property is being managed by the governmental body as a significant public park, recreation area, or wildlife and waterfowl refuge then a use of the property will be subject to the requirements of Section 4(f). Such lease agreements should be examined on a case-by-case basis with consideration of such factors as the term of the lease, the understanding of the parties to the lease, the existence of a cancellation clause, and how long the lease has been in place. Questions on whether or not the leasehold constitutes public ownership should be referred to the FHWA Division Office, and if necessary the Division Office should consult with the Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Service Team, or the Office of Chief Counsel. If FHWA determines that the lease agreement creates a proprietary interest that is equivalent to public ownership, FHWA must then determine whether the property is in fact being managed by the government body as a significant public park, recreation area, or wildlife and waterfowl refuge. If so, the property is subject to Section 4(f).

**Question 1D: Are significant publicly owned parks and recreation areas that are not open to the general public subject to the requirements of Section 4(f)?**

**Answer:** The requirements of Section 4(f) would apply if the entire public park or public recreation area permits visitation of the general public at any time during the normal operating hours. Section 4(f) would not apply when visitation is permitted to a select group only and not to the entire public. Examples of select groups include residents of a public housing project; military service members and their dependents; students of a public school; and students, faculty, and alumni of a public college or university (*See* Question 18B). The FHWA does, however, strongly encourage the preservation of such parks and recreation areas even though they may not be open to the general public or are not publicly owned and therefore are not protected by Section 4(f).

It should be noted that wildlife and waterfowl refuges have not been included in this discussion. Many wildlife and waterfowl refuges allow public access, while others may restrict public access to certain areas within the refuge or during certain times or seasons of the year for the protection of refuge habitat or species. In these cases, the property should be examined by the FHWA Division Office to verify that the primary purpose of the property is for wildlife and waterfowl refuge activities and not for other non-Section 4(f) activities, and that the restrictions on public access are limited to measures necessary to protect refuge habitat or species. If it is determined that the primary purpose of the property is for wildlife and waterfowl refuge activities and that the restrictions on public access are limited to the measures necessary to protect the refuge habitat or species, then the property is

subject to Section 4(f) notwithstanding the access restriction.

**Question 1E: What is a wildlife and waterfowl refuge for purposes of Section 4(f)?**

**Answer:** The term wildlife and waterfowl refuge is not defined in the Section 4(f) law. On the same day in 1966 that Section 4(f) was passed, Congress also passed the *National Wildlife Refuge System Administration Act* (Pub. L. 89-669, 80 Stat. 926) to provide for the conservation, protection, and propagation of native species of fish and wildlife, including migratory birds, that are threatened with extinction; to consolidate the authorities relating to the administration by the Secretary of the Interior of the National Wildlife Refuge System; and for other purposes. The Refuge System referred to in that Act includes areas that were designated as wildlife refuges and waterfowl refuges.<sup>11</sup> FHWA has considered this contemporaneous legislation in our implementation of Section 4(f) regarding refuges. For purposes of Section 4(f), National Wildlife Refuges<sup>12</sup> are always considered wildlife and waterfowl refuges by FHWA in administering Section 4(f); therefore no individual determination of their Section 4(f) status is necessary. In addition, any significant publicly owned public property (including waters) where the primary purpose of such land is the conservation, restoration, or management of wildlife and waterfowl resources including, but not limited to, endangered species and their habitat is considered by FHWA to be a wildlife and waterfowl refuge for purposes of Section 4(f).

In determining the primary purpose of the land, consideration should be given to:

- 1) The authority under which the land was acquired;
- 2) Lands with special national or international designations;
- 3) The management plan for the land; and,
- 4) Whether the land has been officially designated, by a Federal, State, or local agency with jurisdiction over the land, as an area whose primary purpose and function is the conservation, restoration, or management of wildlife and waterfowl resources including, but not limited to, endangered species and their habitat.

Many refuge-type properties permit recreational activities that are generally considered not to conflict with species conservation, such as trails, wildlife observation and picnicking. Other activities, such as educational programs, hunting, and fishing, may also be allowed when the activity is consistent with the broader species conservation goals for the property.

Examples of properties that may function as wildlife and waterfowl refuges for purposes of

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<sup>11</sup> The *National Wildlife Refuge System* is currently comprised of the various categories of areas that are administered by the Secretary for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas (16 U.S.C. § 668dd(a)(1)).

<sup>12</sup> The DOI's regulations state: "All national wildlife refuges are maintained for the primary purpose of developing a national program of wildlife and ecological conservation and rehabilitation. These refuges are established for the restoration, preservation, development and management of wildlife and wildlands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wildlands to obtain the maximum benefits from these resources" (50 CFR 25.11(b)).

Section 4(f) include: State or Federal wildlife management areas, a wildlife reserve, preserve or sanctuary; and waterfowl production areas including wetlands and uplands that are permanently set aside (in a form of public ownership) primarily for refuge purposes. The FHWA should consider the ownership, significance, function and primary purpose of such properties in determining if Section 4(f) will apply. In making the determination, the FHWA should review the existing management plan and consult with the Federal, State or local official(s) with jurisdiction over the property. In appropriate cases, these types of properties will be considered multiple-use public land holdings (*See* 23 CFR 774.11(d) and Question 4) and must be treated accordingly.

The U.S. DOI administers a variety of Federal grant programs in support of hunting, fishing, and related resource conservation. While the fact that a property owned by a State or local government has at some time in the past been the beneficiary of such a grant does not automatically confer Section 4(f) status, the existence and terms of such a prior grant, when known, should be considered along with the other aspects of the property described above when determining if the property should be treated as a wildlife and waterfowl refuge for purposes of Section 4(f). Finally, it should be noted that sites purchased as mitigation for transportation projects (e.g., for endangered species impacts) can be considered refuges for purposes of Section 4(f) if the mitigation sites meet all of the applicable criteria for Section 4(f) status as a refuge, including public ownership and access, significance, and functioning primarily as a refuge.

## 2. Historic Sites

### Question 2A: How is Section 4(f) significance of historic sites determined?

**Answer:** *Historic site* is defined in 23 CFR 774.17. For purposes of Section 4(f), a historic site is significant only if it is on or eligible for the NR. Pursuant to the NHPA, FHWA in cooperation with the applicant consults with the SHPO and/or THPO, tribes that may attach religious and cultural significance to the property, and when appropriate, with local officials to determine whether a site is eligible for the NR. In case of disagreement between FHWA and the SHPO/THPO or if so requested by the ACHP, FHWA shall request a determination of eligibility from the Keeper of the NR (36 CFR 800.4(c)(2)). Any third party may also seek the involvement of the Keeper by asking the ACHP to request that the Federal agency seek a determination of eligibility.

If a site is determined not to be on or eligible for the NR, FHWA still may determine that the application of Section 4(f) is appropriate when an official (such as the Mayor, president of the local historic society, etc.) formally provides information to indicate that the historic site is of local significance. In rare cases such as this, FHWA may determine that it is appropriate to apply Section 4(f) to that property. In the event that Section 4(f) is found inapplicable, the FHWA Division Office should document the basis for not applying Section 4(f). Such documentation might include the reasons why the historic site was not eligible for the NR.

**Question 2B: How does Section 4(f) apply in historic districts that are on or eligible for the NR?**

**Answer:** Within a NR listed or eligible historic district, FHWA's long-standing policy is that Section 4(f) applies to those properties that are considered contributing to the eligibility of the historic district, as well as any individually eligible property within the district. Elements within the boundaries of a historic district are assumed to contribute, unless they are determined by FHWA in consultation with the SHPO/THPO not to contribute (*See also* Question 7C).

**Question 2C: How should the boundaries of a property eligible for listing on the NR be determined where a boundary has not been established?**

**Answer:** In this situation, FHWA makes the determination of a historic property's boundary under the regulations implementing Section 106 of the NHPA in consultation with the SHPO/THPO. The identification of historic properties and the determination of boundaries should be undertaken with the assistance of qualified professionals during the early stages of the NEPA process. This process should include the collection, evaluation and presentation of the information to document FHWA's determination of the property boundaries. The determination of eligibility, which would include boundaries of the site, rests with FHWA, but if the SHPO or THPO objects, or if the ACHP or the Secretary of the Interior so requests, then FHWA shall obtain a determination from the Keeper of the NR (36 CFR 800.4(c)(2)).

Selection of boundaries is a judgment based on the nature of the property's significance, integrity, setting and landscape features, functions and research value. Most boundary determinations will take into account the modern legal boundaries, historic boundaries (identified in tax maps, deeds, or plats), natural features, cultural features and the distribution of resources as determined by survey and testing for subsurface resources. Legal property boundaries often coincide with the proposed or eligible historic site boundaries, but not always and, therefore, should be individually reviewed for reasonableness. The type of property at issue, be it a historic building, structure, object, site or district and its location in either urban, suburban or rural areas, should include the consideration of various and differing factors set out in the *National Park Service Bulletin: Defining Boundaries for National Register Properties*.<sup>13</sup>

**Question 2D: How do you reconcile the phased approach to identification and evaluation and treatment of historic properties under Section 106 of the NHPA with the timing for the completion of Section 4(f) requirements?**

**Answer:** Compliance with Section 4(f) requires FHWA to carry out a reasonable level of effort to identify historic properties prior to issuing a Section 4(f) approval. The reasonableness of the level of effort depends upon the anticipated effects of the project and nature of likely historic resources present in the affected project area. Accordingly, the reasonable level of effort varies from project to project. While a visual survey may be

<sup>13</sup> <http://www.cr.nps.gov/nr/publications/bulletins/boundaries>

necessary to identify above ground resources, it may be possible to rule out the likelihood for the presence of significant below ground resources based on literature review, prior studies of the area, consultation with consulting parties (e.g., Indian tribes) and factors that relate to archeological preservation such as soil and slope types. If a phased approach to identification and evaluation of historic properties is adopted pursuant to the Section 106 regulations, the methodology for that approach should be coordinated with FHWA to ensure that it will also satisfy Section 4(f) requirements.

You may be able to establish without carrying out a field survey that there is little or no potential for the presence of archeological resources that have value for preservation in place, and therefore are subject to Section 4(f). The project file should include documentation of the level of effort and justification for the conclusion that it is unlikely that there are additional unrecorded historic properties that could be subject to Section 4(f). A Memorandum of Agreement or project specific Programmatic Agreement focusing on a process for subsequent compliance should be executed prior to project approval. Those agreements may provide for the completion of additional identification and evaluation (e.g., archeological resource studies), assessment of effects, and refinement of mitigation measures after NEPA is approved.

### **Question 2E: How are National Historic Landmarks (NHL) treated under Section 4(f)?**

**Answer:** Section 4(f) requirements related to the potential use of an NHL designated by the Secretary of Interior are essentially the same as they are for any historic property determined eligible under the Section 106 process, except that the July 5, 1983 *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges* may not be relied upon to approve the use of a historic bridge that is an NHL.

Section 110(f) of the NHPA (16 U.S.C. § 470-h-2) outlines the specific actions that an Agency must take when a NHL may be directly and adversely affected by an undertaking. Agencies must, "to the maximum extent possible...minimize harm" to the NHL affected by an undertaking. While not expressly stated in the Section 4(f) statute or regulations, the importance and significance of the NHL should be considered in the FHWA's Section 4(f) analysis of least overall harm pursuant to 23 CFR 774.3(c)(1)(iii). In addition, where there is a potential adverse effect to an NHL determined under the Section 106 process, the Secretary of Interior must be notified and given the option to participate in the Section 106 process. When the U.S. DOI has elected to participate, their representative (typically, the National Park Service) should be recognized as an additional official with jurisdiction and included in the required coordination in the course of the Section 4(f) process.

## **3. Archeological Resources**

### **Question 3A: When does Section 4(f) apply to archeological sites?**

**Answer:** Section 4(f) applies to archeological sites that are on or eligible for the NR and that warrant preservation in place, including those sites discovered during construction as

discussed in Question 3B. Section 4(f) does not apply if FHWA determines, after consultation with the SHPO/THPO, federally recognized Indian tribes (as appropriate), and the ACHP (if participating) that the archeological resource is important chiefly because of what can be learned by data recovery (even if it is agreed not to recover the resource) and has minimal value for preservation in place, and the SHPO/THPO and ACHP (if participating) does not object to this determination (*See* 23 CFR 774.13(b)). The destruction of a significant archeological resource without first recovering the knowledge of the past inherent in that resource should not be taken lightly. Efforts to preserve the resource or develop and execute a data recovery plan should be addressed in the Section 106 process.

**Question 3B: How are archeological sites discovered during construction of a project handled?**

**Answer:** When archeological sites are discovered during construction (23 CFR 774.9(e) and 11(f)), FHWA must determine if an approval is necessary or if an exception applies under 23 CFR 774.13(c) (*See* Question 26). Where preservation in place is warranted and a Section 4(f) approval would be required, the Section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take into account the level of investment already made. The review process, including the consultation with other agencies should be shortened, as appropriate consistent with the process set forth in Section 106 of the NHPA regulations and should include Indian tribes that may attach religious and cultural significance to sites discovered (36 CFR 800.13). Discoveries may be addressed prior to construction in agreement documents that set forth procedures that plan for subsequent discoveries. When discoveries occur without prior planning, the Section 106 regulation calls for reasonable efforts to avoid, minimize, or mitigate such sites and provides an expedited timeframe for interested parties to reach resolution regarding treatment of the site. A decision to apply Section 4(f), based on the outcome of the Section 106 process, to an archeological discovery during construction would trigger an expedited Section 4(f) evaluation. Because the U.S. DOI has a responsibility to review individual Section 4(f) evaluations and is not usually a party to the Section 106 process, the U.S. DOI should be notified and any comments they provide considered within a shortened response period.

**Question 3C: How do the Section 4(f) requirements apply to archaeological districts?**

**Answer:** Section 4(f) requirements apply to archeological districts in the same way they apply in historic districts, but only where preservation in place is warranted. There would not be a Section 4(f) use if, after consultation with the SHPO/THPO, FHWA determines that the project would use only a part of the archeological district which is considered a non-contributing element of that district or that the project occupies only a part of the district which is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. As with a historic district, if the project does not use any individual contributing element of the archeological district which is significant for preservation in place and FHWA determines that the project will result in an adverse effect, then FHWA must consider whether or not the proximity impacts will result in a constructive use in accordance with 23 CFR 774.15.

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#### 4. Public Multiple-Use Land Holdings

**Question 4: Are multiple-use public land holdings (e.g., National Forests, State Forests, Bureau of Land Management lands) subject to the requirements of Section 4(f)?**

**Answer:** When applying Section 4(f) to multiple-use public land holdings, FHWA must comply with 23 CFR 774.11(d). Section 4(f) applies only to those portions of a multiple-use public property that are designated by statute or identified in an official management plan of the administering agency as being primarily for public park, recreation, or wildlife and waterfowl refuge purposes, and are determined to be significant for such purposes. Section 4(f) will also apply to any historic sites within the multiple-use public property that are on or eligible for the NR. Multiple-use public land holdings are often vast in size, and by definition these properties are comprised of multiple areas that serve different purposes. Section 4(f) does not apply to those areas within a multiple-use public property that function primarily for any purpose other than significant park, recreation or refuge purposes. For example, within a National Forest, there can be areas that qualify as Section 4(f) resources (e.g. campgrounds, trails, picnic areas) while other areas of the property function primarily for purposes other than park, recreation or a refuge such as timber sales or mineral extraction. Coordination with the official(s) with jurisdiction and examination of the management plan for the area will be necessary to determine if Section 4(f) should apply to an area of a multiple-use property that would be used by a transportation project.

For multiple-use public land holdings which either do not have formal management plans or when the existing formal management plan is out-of-date, FHWA will examine how the property functions and how it is being managed to determine Section 4(f) applicability for the various areas of the property. This review will include coordination with the official(s) with jurisdiction over the property.

#### 5. Tribal Lands and Indian Reservations

**Question 5: How are lands owned by Federally Recognized Tribes, and/or Indian Reservations treated for the purposes of Section 4(f)?**

**Answer:** Federally recognized Indian Tribes are sovereign nations and the land owned by them is not considered publicly owned within the meaning of Section 4(f). Therefore, Section 4(f) does not automatically apply to tribal land. In situations where it is determined that the property or resource owned by a Tribal Government or within an Indian Reservation functions as a significant public park, recreational area, or wildlife and waterfowl refuge (which is open to the general public), or is eligible for the NR, the land would be considered Section 4(f) property.



## 6. Traditional Cultural Places (TCPs)

### Question 6: Are lands that are considered to be traditional cultural places subject to the provisions of Section 4(f)?

**Answer:** A TCP is defined generally as land that may be eligible for inclusion in the NR because of its association with cultural practices or beliefs of a living community that; (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.<sup>14</sup> Land referred to as a TCP is not automatically considered historic property, or treated differently from other potentially historic property. A TCP must also meet the NR criteria as a site, structure, building, district, or object to be eligible under Section 106, and thus for Section 4(f) protection. For those TCPs of significance to an Indian tribe or Native Hawaiian Organization (NHO), the THPO or designated representative of the Indian tribe or NHO should be acknowledged as possessing special expertise to assess the NR eligibility of the resources that possess religious and cultural significance to them. TCPs may be eligible under multiple criteria and therefore should not be presumed to be eligible only as archeological resources (*See* 23 CFR 774.11(e)).

## USE OF SECTION 4(f) PROPERTIES

### 7. Use of Section 4(f) Property

#### Question 7A: What constitutes a transportation use of property from publicly owned public parks, public recreation areas, wildlife and waterfowl refuges and public or privately owned historic sites?

**Answer:** A use of Section 4(f) property is defined in 23 CFR 774.17. A use occurs when:

- 1) Land is permanently incorporated into a transportation facility;
- 2) There is a temporary occupancy of land that is adverse in terms of the Section 4(f) statute's preservationist purposes; or
- 3) There is a constructive use of a Section 4(f) property.

**Permanent Incorporation:** Land is considered permanently incorporated into a transportation project when it has been purchased as right-of-way or sufficient property interests have otherwise been acquired for the purpose of project implementation. For example, a permanent easement required for the purpose of project construction or that grants a future right of access onto a Section 4(f) property, such as for the purpose of routine maintenance by the transportation agency, would be considered a permanent incorporation of land into a transportation facility.

**Temporary Occupancy:** Examples of temporary occupancy of Section 4(f) land include right-of-entry, project construction, a temporary easement, or other short- term arrangement

<sup>14</sup> For more information on the subject of TCPs see National Register Bulletin #38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* <http://www.nps.gov/history/NR/publications/bulletins/nrb38/nrb38.pdf>

involving a Section 4(f) property. A temporary occupancy will not constitute a Section 4(f) use when all of the conditions listed in 23 CFR 774.13(d) are satisfied:

- 1) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;
- 2) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) property are minimal;
- 3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis;
- 4) The land being used must be fully restored, i.e., the property must be returned to a condition which is at least as good as that which existed prior to the project; and
- 5) There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

In situations where the above criteria cannot be met, the temporary occupancy will be a use of Section 4(f) property and the appropriate Section 4(f) analysis, coordination, and documentation will be required (*See* 23 CFR 774.13(d)). In those cases where a temporary occupancy constitutes a use of Section 4(f) property and the *de minimis* impact criteria (Questions 10 and 11) are also met, a *de minimis* impact finding may be made. *De minimis* impact findings should not be made in temporary occupancy situations that do not constitute a use of Section 4(f) property.

**Constructive Use:** FHWA must comply with 23 CFR 774.15 to determine whether or not there is a constructive use of Section 4(f) property. Constructive use of Section 4(f) property is only possible in the absence of a permanent incorporation of land or a temporary occupancy of the type that constitutes a Section 4(f) use. Constructive use occurs when the proximity impacts of a project on an adjacent or near-by Section 4(f) property, after incorporation of impact mitigation, are so severe that the activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs when the protected activities, features, or attributes of the Section 4(f) property are substantially diminished. As a general matter this means that the value of the resource, in terms of its Section 4(f) purpose and significance (Questions 1 and 2), will be meaningfully reduced or lost. The degree of impact and impairment must be determined in consultation with the officials with jurisdiction in accordance with 23 CFR 774.15(d)(3). In those situations where a potential constructive use can be reduced below a substantial impairment by the inclusion of mitigation measures, there will be no constructive use and Section 4(f) will not apply.

The Section 4(f) regulations identify specific project situations where constructive use would and would not occur. The impacts of projects adjacent to or in reasonable proximity of Section 4(f) property should be carefully examined early in the NEPA process pursuant to 23 CFR Part 771. If it is determined that the proximity impacts do not cause a substantial impairment, FHWA can reasonably conclude that there will be no constructive use. The analysis of proximity impacts and potential constructive use should be documented in the project file. Documentation of a finding of *no constructive use* should apply the legal standards and terminology used in 23 CFR 774.15, *Constructive Use Determinations*. The use

of the term “constructive use” is not required in such documentation, but should be used when appropriate – for example, when responding to comments in NEPA documents that specifically address constructive use, or where it is useful in demonstrating that FHWA has specifically considered the potential for a constructive use. Where a constructive use determination seems likely, the FHWA Division Office is required by the Administrator’s delegation of Section 4(f) authority to consult with the Headquarters Office of Project Development and Environmental Review before the determination is finalized.

Since a *de minimis* impact finding can only be made where the transportation use does not adversely affect the activities, features, or attributes that qualify a property for protection under Section 4(f), a *de minimis* impact finding is inappropriate where a project results in a constructive use (*See* 23 CFR 774.3(b) and the definition of *de minimis* impact in 774.17).

**Question 7B: Does Section 4(f) apply when there is an adverse effect determination under the regulations implementing Section 106 of the NHPA?**

**Answer:** FHWA’s determination of adverse effect under the Section 106 process (*See* 36 CFR 800.5) does not automatically mean that Section 4(f) will apply. Nor does a determination of no adverse effect mean that Section 4(f) will not apply in some cases. When a project permanently incorporates land of a historic site, regardless of the Section 106 determination, Section 4(f) will apply. If a project does not permanently incorporate land from the historic property but results in an adverse effect, it will be necessary for FHWA to further assess the proximity impacts of the project in terms of the potential for constructive use (Question 7A). This analysis is necessary to determine if the proximity impact(s) substantially impair the features or attributes that contribute to the NR eligibility of the historic site. If there is no substantial impairment, notwithstanding an adverse effect determination, there is no constructive use and Section 4(f) does not apply. The FHWA determines if there is a substantial impairment by consulting with all identified officials with jurisdiction, including the SHPO/THPO and the ACHP if participating, to identify the activities, features, and attributes of the property that qualify it for Section 4(f) protection and by analyzing the proximity impacts of the project (including any mitigation) on those activities, features, and attributes (*See* 23 CFR 774.15(d)(3)). The determination of Section 4(f) applicability is ultimately FHWA’s decision, and the considerations and consultation that went into that decision should be documented in the project file.

An example of a situation in which there is a Section 106 adverse effect but no Section 4(f) use, is a proposed transportation enhancement project that would convert a historic railroad depot into a tourist center. For public use, the project will require consistency with the American with Disabilities Act (ADA). The incorporation of accessible ramps or elevator may result in a determination of adverse effect; however, there is no permanent incorporation of Section 4(f) land into a transportation facility. The FHWA may determine, after consultation with the SHPO/THPO on the historic attributes and impacts thereto, that the project will not substantially impair the attributes of the historic property. There would not be a Section 4(f) use in this case. There would be a Section 4(f) use only if land from the property is either incorporated into a transportation facility or if the property is substantially impaired.

Another example of an adverse effect where there is no Section 4(f) use might be construction of a new highway within the immediate view shed of a historic farmstead that results in an adverse effect finding under Section 106 for the diminishment of the setting. It is unlikely this visual intrusion would reach the threshold of substantial impairment of the attributes which cause the farmstead to be eligible for the NR as it would still retain its historic fabric and use features; however, a constructive use could occur where the proximity of the proposed project substantially impairs esthetic features or attributes of a property protected by Section 4(f), where such features or attributes are considered important contributing elements to the value of the property.

An example of a Section 4(f) use without a Section 106 adverse effect involves a project on existing alignment, which proposes minor modification at an intersection. To widen the roadway sufficiently a small amount of land from an adjacent historic site will be acquired. The land acquisition does not alter the integrity of the historic site and the SHPO concurs in FHWA's determination of no adverse effect. Even though under Section 106 there is no adverse effect, land from the site will be permanently incorporated into the transportation facility and Section 4(f) will apply. The use would likely qualify as a *de minimis* impact or may be approved using the *Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites*<sup>15</sup> depending on the circumstances of the project.

#### **Question 7C: How is a Section 4(f) use determined in historic districts?**

**Answer:** When a project requires land from a non-historic or non-contributing property lying within a historic district and does not use other land within the historic district that is considered contributing to its historic significance, FHWA's longstanding policy is that there is no direct use of the historic district for purposes of Section 4(f). With respect to constructive use, if the Section 106 consultation results in a determination of no historic properties affected or no adverse effect, there is no Section 4(f) constructive use of the district as a whole. If the project requires land from a non-historic or non-contributing property, and the Section 106 consultation results in a determination of adverse effect to the district as a whole, further assessment is required pursuant to 23 CFR 774.15 to determine whether or not there will be a constructive use of the district. If the use of a non-historic property or non-contributing element substantially impairs the activities, features, or attributes that are related to the NR eligibility of the historic district, then Section 4(f) would apply. In any case, appropriate steps, including consultation with the SHPO/THPO on the historic attributes of the district and impacts thereto, should be taken to establish whether the property is contributing or non-contributing to the district and whether its use would substantially impair the historic attributes of the historic district.

For example, an intersection improvement proposed in a NR listed or eligible historic district, requires the demolition of a modern building that is neither individually eligible for the NR nor is a contributing element of the district. Although no right-of-way will be acquired from an individually eligible or contributing property, it is consistent with the

<sup>15</sup> <http://www.environment.fhwa.dot.gov/projdev/pd5sec4f.asp>

NHPA regulations that there will be an adverse effect to the historic district because of changes resulting from the wider intersection and installation of more extensive traffic signals. It may be reasonably determined, however, that no individually eligible property, contributing element, or the historic district as a whole will be substantially impaired. Accordingly, in this example a Section 4(f) use will not occur in the form of either a permanent incorporation or a constructive use.

When a project uses land from an individually eligible property within a historic district, or a property that is a contributing element to the historic district, Section 4(f) is applicable. In instances where a determination is made under Section 106 of no historic properties affected or no adverse effect, then the use may be approved with a *de minimis* impact determination. If the use does not qualify for a *de minimis* impact determination, an individual Section 4(f) evaluation will be necessary. Exceptions recognized in 23 CFR 774.13 may be applied to individually eligible or contributing properties within a historic district, and to contributing elements within a historic district.

**Question 7D: How are historic resources within highway rights-of-way considered?**

**Answer:** In some parts of the country it is not uncommon for historic objects or features not associated with the roadway to exist within the highway right-of-way. Examples include rock walls, fences, and structures that are associated with an adjacent historic property. Others are linear properties such as drainage systems or railroad corridors. These properties, objects, or features are either not transportation in nature or are part of the roadway itself. This condition occurs for various reasons such as historic property boundaries coinciding with the roadway centerline or edge of the road, or situations where right-of-way was acquired but historic features were allowed to remain in place. When a future transportation project is advanced resulting in a Section 106 determination of no historic properties affected or no adverse effect to such resources, there would be no Section 4(f) use. If the historic features are determined to be adversely affected, the adverse effect should be evaluated to determine whether it results in a Section 4(f) use.

**8. Historic Bridges, Highways and Other Transportation Facilities**

**Question 8A: How does Section 4(f) apply to historic transportation facilities?**

**Answer:** The Section 4(f) statute imposes conditions on the use of land from historic sites for highway projects but makes no mention of bridges, highways, or other types of facilities such as railroad stations or terminal buildings, which may be historic and are already serving as transportation facilities. The FHWA's interpretation is that the Congress clearly did not intend to restrict the rehabilitation or repair, of historic transportation facilities. The FHWA therefore established a regulatory provision that Section 4(f) approval is required only when a historic bridge, highway, railroad, or other transportation facility is adversely affected by the proposed project; e.g. the historic integrity (for which the facility was determined eligible for the NR) is adversely affected by the proposed project (*See* 23 CFR 774.13(a)).

**Question 8B: Will Section 4(f) apply to the replacement of a historic bridge that is left in place?**

**Answer:** FHWA's longstanding policy is that Section 4(f) does not apply to the replacement of a historic bridge on new location when the historic bridge is left in its original location and its historic integrity and value will be maintained. To maintain the integrity of the historic bridge, FHWA should ensure that a mechanism is in place for continued maintenance of the bridge that would avoid harm to the bridge due to neglect. In these situations it is also necessary to consider whether or not the proximity impacts of the new bridge will result in substantial impairment of the historic bridge that is left in place or whether there are other properties present which should be afforded consideration pursuant to Section 4(f). These considerations should be documented in the project file.

**Question 8C: How do the requirements of Section 4(f) apply to donations of historic bridges to a State, locality, or responsible private entity?**

**Answer:** A State DOT or local public agency that proposes to demolish a historic bridge for a replacement project may first make the bridge available for donation to a State, locality or a responsible private entity. This process is commonly known as marketing the historic bridge and often involves relocation of the structure, if the bridge is of a type suitable for relocation. Provided the State, locality or responsible entity that accepts the bridge enters into an agreement to maintain the bridge and the features that contribute to its historic significance and assume all future legal and financial responsibility for the bridge, Section 4(f) will not apply to the bridge.

If the bridge marketing effort is unsuccessful and the bridge will be demolished or relocated without preservation commitments, Section 4(f) will apply and the appropriate Section 4(f) analysis, consultation and documentation will be required. The *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*<sup>16</sup> may be used.

**Question 8D: Can the *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges* be applied to the replacement of a historic bridge or culvert that lacks individual distinction but is identified as a contributing element of a historic district that is on or eligible for listing on the NR?**

**Answer:** Historic districts may include properties or elements that lack individual distinction but possess sufficient integrity to contribute to the overall significance of the district, as well as individually distinctive features that may be separately listed or determined eligible for the NR. All contributing properties or elements, including identified features and their settings are considered eligible for the NR and are therefore Section 4(f) resources. As such, bridges in historic districts may be individually eligible but may also be identified as contributing features within the larger historic district. The *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic*

<sup>16</sup> The Section 4(f) programmatic evaluations are available at <http://www.environment.fhwa.dot.gov/4f/index.asp>

*Bridges*<sup>17</sup> may be applied to any historic bridge or culvert, either contributing to a district or individually eligible. The application of the historic bridge programmatic Section 4(f) evaluation would be limited to the bridge replacement or rehabilitation only and must meet all the applicability criteria stated in the programmatic Section 4(f) evaluation. If the bridge replacement requires use, either direct or constructive, of surrounding or adjoining property that contributes to the significance of the historic district, the use of that property would have to be evaluated via another form of Section 4(f) evaluation, including possibly an individual evaluation.

**Question 8E: Does Section 4(f) apply to the construction of an access ramp providing direct vehicular ingress/egress to a public boat launch area from an adjacent highway?**

**Answer:** When an access ramp is constructed as part of a project to construct a new bridge or to reconstruct, replace, repair, or alter an existing bridge on a Federal-aid system, FHWA's longstanding policy is that Section 4(f) approval is not necessary for the access ramp and public boat launching area. This policy was jointly developed by FHWA and the U.S. DOI in response to the enactment of section 147 of the *Federal-Aid Highways Act of 1976* (Pub. L. 94-280 (HR 8235) May 5, 1976). Where public boat launching areas are located in publicly owned parks, recreational areas, or refuges otherwise protected by the provision of Section 4(f), it would be contrary to the intent of section 147 to search for feasible and prudent alternatives to the use of such areas as a site for an access ramp to the public boat launching area. Such ramps must provide direct access to a public boat launching area adjacent to the highway. This policy only applies to the access ramp and public boat launching area; any other use of Section 4(f) property for the project will require Section 4(f) approval.

**Question 8F: Is compliance with Section 4(f) necessary for park roads and parkways projects funded under FHWA's Federal Lands Highway Program, 23 U.S.C. § 204?**

**Answer:** No. Park roads and parkways projects funded under FHWA's Federal Lands Highway Program, 23 U.S.C. § 204, are expressly excepted from Section 4(f) requirements within the Section 4(f) statute itself and by 23 CFR 774.13(e). A park road is "a public road, including a bridge built primarily for pedestrian use, but with capacity for use by emergency vehicles, that is located within, or provides access to, an area in the National Park System with title and maintenance responsibilities vested in the United States" and a parkway is a road "authorized by Act of Congress on lands to which title is vested in the United States" (23 U.S.C. § 101(a)).

## **OFFICIALS WITH JURISDICTION; CONSULTATION; AND DECISIONMAKING**

### **9. Officials with Jurisdiction**

**Question 9A: Who are the officials with jurisdiction for a park, recreation area, or wildlife**

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<sup>17</sup> The Section 4(f) programmatic evaluations are available at <http://www.environment.fhwa.dot.gov/><sup>18</sup> 36 CFR Part 800 (<http://www.achp.gov/work106.html>)

**and waterfowl refuge and what is their role in determining Section 4(f) applicability?**

**Answer:** The officials with jurisdiction are defined in 23 CFR 774.17. Under that definition, there may be more than one official with jurisdiction for the same Section 4(f) property. For public parks, recreation areas, and wildlife and waterfowl refuges (Question 1) the official(s) with jurisdiction are the official(s) of an agency or agencies that own and/or administer the property in question and who are empowered to represent the agency on matters related to the property.

There may be instances where the agency owning or administering the land has delegated or relinquished its authority to another agency, via an agreement on how some of its land will function or be managed. The FHWA will review the agreement and determine which agency has authority on how the land functions. If the authority has been delegated or relinquished to another agency, that agency should be contacted to determine the purposes and significance of the property. Management plans that address or officially designate the purposes of the property should be reviewed as part of this determination. After consultation, and in the absence of an official designation of purpose and function by the officials with jurisdiction, FHWA will base its decision of Section 4(f) applicability on an examination of the actual functions that exist (*See* 23 CFR 774.11(c)).

The final decision on the applicability of Section 4(f) to a particular property is the responsibility of FHWA. In reaching this decision FHWA will rely on the official(s) with jurisdiction to identify the kinds of activities and functions that take place, to indicate which of these activities constitute the primary purpose, and to state whether the property is significant. Documentation of the determination of non- applicability should be included in the project file.

**Question 9B: Who are the officials with jurisdiction for historic sites?**

**Answer:** The officials with jurisdiction are defined in 23 CFR 774.17. For historic properties (Question 2 and 7) the official with jurisdiction is the State Historic Preservation Officer (SHPO). If the historic property is located on tribal land the Tribal Historic Preservation Officer (THPO) is considered the official with jurisdiction. If the property is located on tribal land but the tribe has not assumed the responsibilities of the SHPO, as provided for in the NHPA, then the representative designated by the tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the Advisory Council on Historic Preservation (ACHP) is involved in the consultation concerning a property under Section 106 of the NHPA,<sup>18</sup> the ACHP will also be considered an official with jurisdiction over that resource. For a NHL, the National Park Service is also an official with jurisdiction over that resource.

**Question 9C: Who are the officials with jurisdiction when a park, recreation area, or refuge is also a historic site or contains historic sites within its boundaries?**

**Answer:** Some public parks, recreation areas, and wildlife and waterfowl refuges are also

<sup>18</sup> 36 CFR Part 800 (<http://www.achp.gov/work106.html>)



historic properties either listed or eligible for listing on the NR. In other cases, historic sites are located within the property boundaries of public parks, recreation areas, or wildlife and waterfowl refuges. When either of these situations exists and a project alternative proposes the use of land from the historic site there will be more than one official with jurisdiction. For historic sites the SHPO/THPO and ACHP if participating are officials with jurisdiction. Coordination will also be required with the official(s) of the agency or agencies that own or administer the property in question and who are empowered to represent the agency on matters related to the property, such as commenting on project impacts to the activities, features, or attributes of property and on proposed mitigation measures. For a NHL, the National Park Service is also an official with jurisdiction over that resource.

### **Question 9D: When is coordination with the U.S. DOI required?**

**Answer:** Prior to FHWA's final approval of a Section 4(f) use, individual Section 4(f) evaluations are provided to the U.S. DOI Office of Environmental Compliance and Policy, which coordinates the comments of all U.S. DOI agencies involved in the project (*See* 23 CFR 774.5(a)). However, the official with jurisdiction for Section 4(f) purposes is typically the field official charged with managing the Section 4(f) property at issue. For example, the official with jurisdiction for a project involving the use of a National Wildlife Refuge would be the Refuge Manager. If it is not clear which individual within the U.S. DOI is the official with jurisdiction for a particular Section 4(f) property, U.S. DOI's Office of Environmental Compliance and Policy should be consulted to resolve the question. The U.S. DOI has very specific expectations regarding the submission of Section 4(f) documents.<sup>19</sup> If the Section 4(f) property is under the jurisdiction of the U.S. Forest Service, the Department of Agriculture would be contacted for its review. The final authority on the content and format of Section 4(f) documents is FHWA's, as specified in 23 CFR Part 774, this *Section 4(f) Policy Paper* and the *Technical Advisory*, T 6640.8A, *Guidance for Preparing and Processing of Environmental and Section 4(f) Documents*.

It is not necessary to coordinate project specific applications of existing programmatic Section 4(f) evaluations with the U.S. DOI unless the U.S. DOI owns or has administrative oversight over the Section 4(f) property involved. In these cases, FHWA will need written concurrence from the U.S. DOI as the official with jurisdiction as stipulated in the applicable programmatic Section 4(f) evaluation. Consultation with the U.S. DOI was conducted during the development of all the existing programmatic Section 4(f) evaluations. Development of any new programmatic Section 4(f) evaluations would also require coordination with the U.S. DOI before they are made available for use (*See* 23 CFR 774.3(d)(2)).

Similarly, it is not necessary to conduct project-level coordination with the U.S. DOI when processing *de minimis* impact determinations unless the U.S. DOI has administrative oversight over the public park, recreation area, or wildlife and waterfowl refuge involved. In these situations, FHWA must obtain concurrence from the U.S. DOI as the official having jurisdiction that there is no adverse effect to the activities, features, or attributes of the property (*See* 23 CFR 774.5(b)). When a *de minimis* impact determination is anticipated for a historic site owned or administered by the U.S. DOI, and when the historic site is a NHL,

<sup>19</sup> [http://www.doi.gov/pmb/oepec/nrm/upload/Environmental\\_Review\\_Process.pdf](http://www.doi.gov/pmb/oepec/nrm/upload/Environmental_Review_Process.pdf)

the U.S. DOI will have the opportunity to participate during the Section 106 consultation as a consulting party (*See* Questions 11 through 13 for further guidance on de minimis impact determinations).

For situations in which the Section 4(f) property is encumbered with a Federal interest, for example as a result of a U.S. DOI grant, the answer to Question 1D or Question 31 may apply.

**Question 9E: What is the official status of the *Handbook on Departmental Reviews of Section 4(f) Evaluations*, originally issued in February 2002 (and any subsequent revisions) by the U.S. DOI Office of Environmental Policy and Compliance?**

**Answer:** The U.S. DOI Handbook<sup>20</sup> is intended to provide guidance to the National Park Service (NPS), the U.S. Fish and Wildlife Service and other designated lead bureaus in the preparation of U.S. DOI comments on the Section 4(f) evaluations prepared by the U.S. DOT pursuant to the authority granted in the Section 4(f) statute. The Handbook is an official U.S. DOI document and includes departmental opinion related to the applicability of Section 4(f) to lands for which they have jurisdiction and authority. The Section 4(f) statute requires U.S. DOT to consult and cooperate with the U.S. DOI as well as the Departments of Agriculture and Housing and Urban Development, as appropriate in Section 4(f) program and project related matters. The FHWA values the U.S. DOI's opinions related to the resources under their jurisdiction, and while the Handbook is a resource which FHWA may consider, it is not the final authority on Section 4(f) determinations.

Official FHWA policy on the applicability of Section 4(f) to lands that fall within the jurisdiction of the U.S. DOI is contained within 23 CFR 774 and this Section 4(f) Policy Paper. While FHWA is not legally bound by the guidance contained within the Handbook or the comments provided by the U.S. DOI or lead bureaus, every attempt should be made to reach agreement during project consultation. In some situations, one of the bureaus may be an official with jurisdiction. When unresolved conflicts arise during coordination with the U.S. DOI related to the applicability of Section 4(f) to certain types of property, it might be necessary for the Division Office to contact the FHWA Headquarters Office of Project Development and Environmental Review for assistance.

**Question 9F: Section 4(f) also requires cooperation and consultation with the U.S. Department of Agriculture (USDA) and the U.S. Department of Housing and Urban Development (HUD). When is coordination with the USDA or HUD on a Section 4(f) matter appropriate?**

**Answer:** Many national forests under the jurisdiction of the U.S. Forest Service of the USDA serve as multiple-use land holdings as described in Question 4. If the project uses land of a national forest, coordination with the USDA as the official with jurisdiction over the resource would be appropriate in determining the purposes served by the land holding and the resulting extent of Section 4(f) applicability to the land holding. HUD would be involved only in cases where HUD had an interest in a Section 4(f) property.

<sup>20</sup> <http://www.doi.gov/oepc/handbook.html>

### Question 9G: Who makes Section 4(f) decisions and *de minimis* impact determinations?

**Answer:** The FHWA Division Administrator is the responsible official for all Section 4(f) applicability decisions, approvals, and *de minimis* impact determinations for Federal-aid projects. The FHWA Federal Lands Highway Division Engineer has this authority for Federal Lands projects. Coordination with the FHWA Headquarters or the FHWA Office of the Chief Counsel is not required for routine *de minimis* impact determinations but is recommended where assistance is needed for controversial projects or complex situations. It will be necessary for FHWA to consult and coordinate with the official(s) with jurisdiction as discussed above in making determinations of applicability and in approving the use of Section 4(f) property. When a programmatic Section 4(f) evaluation is relied upon to satisfy Section 4(f), the consultation requirements and approval process for the specific programmatic evaluation must be followed (*See* 23 CFR 774.3(d)).

## 10. Section 4(f) Evaluations for Tiered Projects

### Question 10: How is Section 4(f) handled in tiered NEPA documents?

**Answer:** The FHWA must comply with 23 CFR 774.7(e) when tiered NEPA documents are used. In a tiered Environmental Impact Statement (EIS), the project development process moves from a broad scale examination at the first-tier stage to a more site specific evaluation in the second-tier stage. During the first-tier stage the detailed information necessary to complete the Section 4(f) approval may not be available. Even so, this does not relieve the FHWA from its responsibility to determine the possibility of making *de minimis* impact determinations or to consider alternatives that avoid the use of Section 4(f) properties during the first-tier stage. This analysis and documentation should address potential uses of Section 4(f) property and whether those uses could have a bearing on the decision to be made during this tier.

If sufficient information is available, a preliminary Section 4(f) approval may be made at the first-tier stage as to whether the impacts resulting from the use of a Section 4(f) property are *de minimis* or whether there are feasible and prudent avoidance alternatives. This preliminary approval must include all possible planning to minimize harm to the extent that the level of detail available at this stage allows (23 CFR 774.7(e)(1)). This planning may be limited to a commitment to ensure that opportunities to minimize harm at subsequent stages in the project development process have not been precluded by decisions made at the first-tier stage. Any preliminary Section 4(f) approvals must be incorporated into the first-tier EIS (23 CFR 774.7(e)(1)).

If sufficient information is unavailable during the first-tier stage, then the EIS may be completed without any preliminary Section 4(f) approvals. The documentation should state why no preliminary approval is possible during the first-tier stage and clearly explain the process that will be followed to complete Section 4(f) evaluations during subsequent tiers. The extent to which a Section 4(f) approval (preliminary or final) anticipated to be made in a

subsequent tier may have an effect on any decision made during the first-tier stage should be discussed. Schedules to complete Section 4(f) evaluations, if available, should also be reported.

Preliminary first-tier Section 4(f) approvals will be finalized in the second-tier CE, EA, final EIS, ROD or FONSI, as appropriate (*See* 23 CFR 774.7(e)(2)). If no new Section 4(f) use, other than a *de minimis* impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

## **DE MINIMIS IMPACT DETERMINATIONS**

### **11. *De minimis* Impact Determinations for Parks, Recreation Areas, and Wildlife and Waterfowl Refuges**

#### **Question 11A: What constitutes a *de minimis* impact with respect to a park, recreation area, or wildlife and waterfowl refuge?**

**Answer:** An impact to a public park, recreation area, or wildlife and waterfowl refuge may be determined to be *de minimis* if the transportation use of the Section 4(f) property, including incorporation of any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures), does not adversely affect the activities, features, or attributes that qualify the resource for protection under Section 4(f). Language included in the SAFETEA-LU Conference Report provides additional insight on the meaning of *de minimis* impact:

The purpose of the language is to clarify that the portions of the resource important to protect, such as playground equipment at a public park, should be distinguished from areas such as parking facilities. While a minor but adverse effect on the use of playground equipment should not be considered a *de minimis* impact under Section 4(f), encroachment on the parking lot may be deemed *de minimis*, as long as the public's ability to access and use the site is not reduced.

(Conference Report of the Committee of Conference on H.R. 3, Report 109-203, page 1057). This simple example helps to distinguish the activities, features, or attributes of a Section 4(f) property that are important to protect from those which can be used without resulting in adverse effects. Playground equipment in a public park may be central to the recreational value of the park that Section 4(f) is designed to protect. The conference report makes it clear that when impacts are proposed to playground equipment or other essential features, a *de minimis* impact finding will at a minimum require a commitment to replace the equipment with similar or better equipment at a time and in a location that results in no adverse effect to

the recreational activity. A parking lot encroachment or other similar type of land use, on the other hand, could result in a *de minimis* impact with minimal mitigation, as long as there are no adverse effects on public access and the official(s) with jurisdiction agree.

The impacts of a transportation project on a park, recreation area, or wildlife and waterfowl refuge that qualifies for Section 4(f) protection may be determined to be *de minimis* if:

- 1) The transportation use of the Section 4(f) property, together with any impact avoidance, minimization, and mitigation or enhancement measures incorporated into the project, does not adversely affect the activities, features, or attributes that qualify the resource for protection under Section 4(f);
- 2) The public has been afforded an opportunity to review and comment on the effects of the project on the protected activities, features, or attributes of the Section 4(f) property; and
- 3) The official(s) with jurisdiction over the property, after being informed of the public comments and FHWA's intent to make the *de minimis* impact finding, concur in writing that the project will not adversely affect the activities, features, or attributes that qualify the property for protection under Section 4(f).

(See 23 CFR 774.5(b)(2), 23 CFR 774.17). The concurrence of the official(s) with jurisdiction that the protected activities, features, or attributes of the resource are not adversely affected must be in writing (23 CFR 774.5(b)(2)(ii)). The written concurrence can be in the form of a signed letter on agency letterhead, signatures in concurrence blocks on transportation agency documents, agreements provided via e-mail or other method deemed acceptable by the FHWA Division Administrator. Obtaining these agreements in writing and retaining them in the project file is consistent with effective practices related to preparing project administrative records.

#### **Question 11B: What role does mitigation play in the *de minimis* impact finding?**

**Answer:** *De minimis* impact determinations are based on the degree of impact after the inclusion of any measure(s) to minimize harm, (such as any avoidance, minimization, mitigation, or enhancement measures) to address the Section 4(f) use (i.e., net impact). The expected positive effects of any measures included in a project to mitigate the adverse effects to a Section 4(f) property must be taken into account when determining whether the impact is *de minimis* (See 23 CFR 774.3(b)). The purpose of taking such measures into account is to encourage the incorporation of Section 4(f) protective measures as part of the project. *De minimis* impact findings must be expressly conditioned upon the implementation of any measures that were relied upon to reduce the impact to a *de minimis* level (See 23 CFR 774.7(b)). The implementation of such measures will become the responsibility of the project sponsor with FHWA oversight (See 23 CFR 771.109(b)).

#### **Question 11C: What constitutes compliance with the public notice, review and comment requirements for *de minimis* impact findings for parks, recreation areas or wildlife and waterfowl refuges?**

**Answer:** Information supporting a *de minimis* impact finding for a park, recreation area or

refuge should be included in the NEPA document prepared for the project. This information includes, at a minimum, a description of the involved Section 4(f) property(ies), use and impact(s) to the resources and any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) that are included in the project as part of the *de minimis* impact finding. The public involvement requirements associated with specific NEPA document and process will, in most cases, be sufficient to satisfy the public notice and comment requirements for the *de minimis* impact finding (See 23 CFR 774.5(b)(2)).

In general, the public notice and comment process related to *de minimis* impact findings will be accomplished through the State DOT's approved public involvement process (See 23 CFR 771.111(h)(1)). For those actions that do not routinely require public review and comment (e.g., certain categorical exclusions and re-evaluations) but for which a *de minimis* impact finding will be made, a separate public notice and opportunity for review and comment will be necessary. In these cases, appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of the Section 4(f) property, the impacts, and public interest. Possible methods of public involvement are many and include newspaper advertisements, public meetings, public hearings, notices posted on bulletin boards (for properties open to the public), project websites, newsletters, and placement of notices or documents at public libraries. All comments received and responses thereto, should be documented in the same manner that other comments on the proposed action would be incorporated in the project file. Where public involvement was initiated solely for the purpose of a *de minimis* impact finding, responses or replies to the public comments may not be required, depending on the substantive nature of the comments. All comments and responses should be documented, as appropriate, in the project file.

## 12. *De minimis* Impact Determinations on Historic Sites

### Question 12A: What are the requirements for *de minimis* impact on a historic site?

**Answer:** A finding of *de minimis* impact on a historic site may be made when:

- 1) FHWA has considered the views of any consulting parties participating in the consultation required by Section 106 of the NHPA, including the Secretary of the Interior or his representative if the property is a NHL;
- 2) The SHPO/THPO, and Advisory Council on Historic Preservation (ACHP) if participating in the Section 106 consultation, are informed of FHWA's intent to make a *de minimis* impact finding based on their written concurrence in the Section 106 determination of "no adverse effect;" and
- 3) The Section 106 process results in a determination of "no adverse effect" with the written concurrence of the SHPO/THPO, and ACHP if participating in the Section 106 consultation.<sup>21</sup>

<sup>21</sup> Although the Section 4(f) statute and regulations also provide for a *de minimis* impact determination in the situation where there is a use of a historic site resulting in a Section 106 determination of *no historic properties affected*, FHWA has not yet encountered any such situation in practice. If such situation arises, a *de minimis* impact determination would be appropriate.

(See 23 CFR 774.5(b)(1) and the definition of *de minimis* impact in 23 CFR 774.17.)

**Question 12B: How should the concurrence of the SHPO/THPO, and ACHP if participating in the Section 106 determination of effect, be documented when the concurrence will be the basis for a *de minimis* impact finding?**

**Answer:** Section 4(f) requires that the SHPO/THPO, and ACHP if participating, must concur in writing in the Section 106 determination of no adverse effect (See 23 CFR 774.5(b)(1)(ii)). The request for concurrence in the Section 106 determination should include a statement informing the SHPO/THPO, and ACHP if participating, that FHWA or FTA intends to make a *de minimis* impact finding based upon their concurrence in the Section 106 determination.

Under the Section 106 regulation, if a SHPO/THPO does not respond within a specified time frame FHWA may move forward to the next step of the Section 106 process but Section 4(f) explicitly requires their written concurrence (See 23 CFR 774.5(b)(1)(ii)). It is therefore recommended that transportation officials share this guidance with the SHPOs and THPOs in their States so that these officials fully understand the implication of their concurrence in the Section 106 determinations and the reason for requesting written concurrence.

**Question 12C: For historic sites, will a separate public review process be necessary for the determination of a *de minimis* impact?**

**Answer:** No. The FHWA will consult with the parties participating in the Section 106 process but is not required to provide additional public notice or provide additional opportunity for review and comment. Documentation of consulting party involvement is required (See 23 CFR 774.5(b) and 774.7(b)). In addition, for projects requiring the preparation and distribution of a NEPA document, the information supporting a *de minimis* impact finding will be included in the NEPA documentation and the public will be afforded an opportunity to review and comment during the formal NEPA process.

**Question 12D: Certain Section 106 programmatic agreements (PAs) allow the lead agency to assume the concurrence of the SHPO/THPO in the determination of *no adverse effect* or *no historic properties affected* if a response to a request for concurrence is not received within the time period specified in the PA. Does such concurrence through non-response, in accordance with a written and signed Section 106 PA, constitute the written concurrence needed to make a *de minimis* impact finding?**

**Answer:** In accordance with the provisions of a formal Section 106 programmatic agreement (PA), if the SHPO/THPO does not respond to a request for concurrence in the Section 106 determination within a specified time frame, the non-response together with the written PA, will be considered written concurrence in the Section 106 determination that will be the basis for the *de minimis* impact finding by FHWA. The FHWA must inform the SHPO/THPO who are parties to such PAs, in writing, that a non-response which is treated as a concurrence in a no adverse effect or no historic properties affected determination will also be treated as

the written concurrence for purposes of the FHWA *de minimis* impact finding (*See* 23 CFR 774.5(b)(1)(ii)). It is recommended that this understanding of the parties be documented via formal correspondence or other written means and appended to the existing PA. There is no need to amend the PA itself.



### 13. Other *De minimis* Impact Considerations

#### **Question 13A: Are *de minimis* impact findings limited to any particular type of project or National Environmental Policy Act (NEPA) document?**

**Answer:** No, the *de minimis* impact criteria may be applied to any project, as appropriate, regardless of the type of environmental document required by the NEPA process as described in the FHWA Environmental Impact and Related Procedures (See 23 CFR 771.115).

#### **Question 13B: What effect does the *de minimis* impact provision have on the application of the existing FHWA nationwide programmatic Section 4(f) evaluations?**

**Answer:** None. Existing FHWA programmatic Section 4(f) evaluations<sup>22</sup> remain in effect and may be applied, as appropriate, to the use of Section 4(f) property by a highway project.

#### **Question 13C: Can a *de minimis* impact finding be made for a project as a whole, when multiple Section 4(f) properties are involved?**

**Answer:** No, when multiple Section 4(f) properties are present in the study area and potentially used by a transportation project, *de minimis* impact findings must be made for the individual Section 4(f) properties because 23 CFR 774.3 requires an approval to use Section 4(f) property. The impacts to Section 4(f) properties and any impact avoidance, minimization, and mitigation or enhancement measures must be considered on an individual resource basis and *de minimis* impact findings made individually for each Section 4(f) property. When there are multiple resources for which *de minimis* impact findings are appropriate, however, the procedural requirements of Section 4(f) can and should be completed in a single process, document and circulation, so long as it is clear that distinct determinations are being made. Also in these cases, the written concurrence of the official(s) with jurisdiction may be provided for the project as a whole, so as long as the *de minimis* impacts findings have been made on an individual resource basis. For example, a no adverse effect determination made on an undertaking as a whole may be used to support individual *de minimis* impact findings provided individual historic sites are clearly identified in the Section 106 documentation.

### **ADDITIONAL EXAMPLES AND OTHER CONSIDERATIONS**

#### **14. School Playgrounds**

#### **Question 14: Are publicly owned school playgrounds subject to the requirements of Section 4(f)?**

**Answer:** While the primary purpose of public school playgrounds is generally for structured physical education classes and recreation for students, these properties may also serve significant public recreational purposes and therefore may be subject to Section 4(f) requirements. When a public school playground serves only school activities and functions,

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<sup>22</sup> <http://environment.fhwa.dot.gov/projdev/4finspeval.asp>

the playground is not subject to Section 4(f). When a public school playground is open to the public and serves either organized or substantial walk-on recreational purposes that are determined to be significant (*See* Question 1), it will be subject to the requirements of Section 4(f). The actual function of the playground is the determining factor in these circumstances. Documentation should be obtained from the officials with jurisdiction over the facility stating whether or not the playground is of local significance for recreational purposes.

There may be more than one official with jurisdiction over a school playground. A school official is considered to be the official with jurisdiction of the land during school activities. However, in some cases a school board may have authorized another public agency (e.g., the city park and recreation department) to control the facilities after school hours. In such cases, the public agency with authority to control the playground would be considered an official with jurisdiction with regard to any after-hours use of the playground. The FHWA is responsible for determining which official or officials have jurisdiction over a playground.

The term playground refers to the area of the school property developed and/or used for public park or recreation purposes such as baseball diamonds, soccer fields, tennis courts, track and field facilities, and other features such as jungle gyms or swing sets. This can also include open space or practice fields if those areas serve a park or recreation function. Section 4(f) would apply to the playground areas only and not the entire campus, unless the school and campus are also significant historic sites.

## 15. Trails and Shared Use Paths

### Question 15A: Do the requirements of Section 4(f) apply to shared use paths or similar facilities?

**Answer:** FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. If the publicly owned facility is primarily used for transportation and is an integral part of the local transportation system, the requirements of Section 4(f) would not apply since it is not a recreational area. Section 4(f) would apply to a publicly owned, shared use path or similar facility (or portion thereof) designated or functioning primarily for recreation, unless the official(s) with jurisdiction determines that it is not significant for such purpose. During early consultation, it should be determined whether or not a management plan exists that addresses the primary purpose of the facility in question. If the exceptions in 23 CFR 774.13(f) and (g) do not apply, the utilization of the *Programmatic Section 4(f) Evaluation for Independent Bikeway or Walkway Construction Projects* should be considered if the facility is within a park or recreation area. Whether Section 4(f) applies or not, it is FHWA's policy that every reasonable effort should be made to maintain the continuity of existing and designated shared use paths and similar facilities.<sup>23</sup>

<sup>23</sup> Title 23, Section 109(m) states: "The Secretary shall not approve any project or take any regulatory action under this title that will result in the severance of an existing major route or have significant adverse impact on the safety for non-motorized transportation traffic and light motorcycles, unless such project or regulatory action provides for a

**Question 15B: The National Trails System Act permits the designation of scenic, historic, and recreation trails. Are these trails or other designated scenic or recreation trails on publicly owned land subject to the requirements of Section 4(f)?**

**Answer:** FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. National Scenic Trails (other than the Continental Divide National Scenic Trail) and National Recreation Trails that are on publicly owned recreation land are subject to Section 4(f), provided the trail physically exists on the ground thereby enabling active recreational use.

The Continental Divide National Scenic Trail and National Historic Trails are treated differently. Public Law 95-625 provides that “except for designated protected components of the trail, no land or site located along a designated National Historic Trail or along the Continental Divide National Scenic Trail shall be subject to the provisions of [Section 4(f)] unless such land or site is deemed to be of historical significance under the appropriate historical criteria such as those for the [NR].” FHWA interprets this to mean that while the Continental Divide National Scenic Trail and the National Historic Trails themselves are exempt from Section 4(f), trail segments (including similar components such as trail buffers or other adjacent sites that were acquired to complement the trails) that are on or eligible for the NR are subject to Section 4(f) (*See* 23 CFR 774.13(f)(2)).

**Question 15C: Are shared use paths, bikeways, or designated scenic or recreational trails on highway rights-of-way subject to the requirements of Section 4(f)?**

**Answer:** FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. If a path or trail is simply described as occupying the right-of-way of the highway and is not limited to any specific location within the right-of-way, a use of land would not occur provided that adjustments or changes in the alignment of the highway or the trail would not substantially impair the continuity of the path or trail. In this regard, it would be helpful if all future designations, including those made under the National Trails System Act, describe the location of the trail only as generally in the right-of-way.

**Question 15D: Are trails on privately owned land, including land under public easement and designated as scenic or recreational trails subject to the requirements of Section 4(f)?**

**Answer:** FHWA must comply with 23 CFR 774.13(f) when determining if a Section 4(f) approval is necessary for the use of a trail, path, bikeway, or sidewalk. Section 4(f) generally does not apply to trails on privately owned land. Section 4(f) could apply if an existing public easement permits public access for recreational purposes. In any case, it is FHWA’s policy that every reasonable effort should be made to maintain the continuity of existing and designated trails.

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reasonable alternate route or such a route exists.”

**Question 15E: Does Section 4(f) apply to trail-related projects funded under the Recreational Trails Program (RTP)?**

**Answer:** No, projects funded under the Recreational Trails Program (RTP)<sup>24</sup> are exempt from the requirements of Section 4(f) by statute.<sup>25</sup> The exemption is limited to Section 4(f) and does not apply to other environmental requirements, such as NEPA or the NHPA.

**16. User or Entrance Fees**

**Question 16: Does the charging of an entry or user fee affect Section 4(f) eligibility?**

**Answer:** Many eligible Section 4(f) properties require a fee to enter or use the facility such as State Parks, National Parks, publicly owned ski areas, historic sites and public golf courses. The assessment of a user fee is generally related to the operation and maintenance of the facility and does not in and of itself negate the property's status as a Section 4(f) property. Therefore, it does not matter in the determination of Section 4(f) applicability whether or not a fee is charged, as long as the other criteria are satisfied.

Consider a public golf course as an example. Greens-fees are usually if not always required (Question 18A) and these resources are considered Section 4(f) properties when they are open to the public and determined to be significant. The same rationale should be applied to other Section 4(f) properties in which an entrance or user fee is required.

**17. Transportation Enhancement Projects**

**Question 17A: How is Section 4(f) applied to transportation enhancement activity projects?<sup>26</sup>**

**Answer:** FHWA must comply with 23 CFR 774.13(g) when determining if a Section 4(f) approval is necessary for a use by a transportation enhancement project or a mitigation activity. A transportation enhancement activity (TEA) is one of the specific types of activities set forth by statute at 23 U.S.C. § 101(a)(35). TEAs often involve the enhancement of an activity, feature or attribute on property that qualifies as a Section 4(f) property. In most cases, such work would be covered by the exception in 23 CFR 774.13(g) when the work is solely for the purpose of preserving or enhancing an activity, feature or attribute that qualified the property for Section 4(f) protection. The official(s) with jurisdiction over the Section 4(f) property must concur in writing with this assessment. For a use of Section 4(f) property to occur in conjunction with a TEA, there must be a transportation use of land from an existing Section 4(f) property. In other words, the State DOT or other applicant as defined in 23 CFR 774.17 must acquire land from a Section 4(f) property and convert its function from

<sup>24</sup> More information on the Recreational Trails Program is available at [www.fhwa.dot.gov/environment/rectrails/](http://www.fhwa.dot.gov/environment/rectrails/).

<sup>25</sup> 23 U.S.C. § 206(h)(2) Recreational purpose.--A project funded under this section is intended to enhance recreational opportunity and is not subject to section 138 of this title or section 303 of title 49.

<sup>26</sup> For more information see the *FHWA Final Guidance on Transportation Enhancement Activities*; December 17, 1999, and the *TE Program Related Questions & Answers*; August 2002, found at the Transportation Enhancement Website ([www.fhwa.dot.gov/environment/te/index.htm](http://www.fhwa.dot.gov/environment/te/index.htm)).

park, recreation, refuge or historic purposes to a transportation purpose.

Many TEA-funded activities will occur on land that remains owned by a non- transportation entity (such as a local or State parks and recreation agency). An example would be a TEA proposed to construct a new bicycle/pedestrian path within a public park or to reconstruct an already existing bicycle/pedestrian path within a public park. Though related to surface transportation, this type of project is primarily intended to enhance the park. Either scenario would qualify as an exception for Section 4(f) approval assuming the official(s) with jurisdiction agree in writing that the TEA provides for enhancement of the bicycle/pedestrian activities within the park.

A variation of the above example is local public agency that proposes a TEA for construction of a new bicycle/pedestrian facility that requires the acquisition of land from a public park. The purpose of the project is to promote a non- motorized mode of travel for commuters even though some recreational use of the facility is likely to occur. This TEA requires a transfer of land from the parks and recreation agency to the local transportation authority for ultimate operation and maintenance of the newly constructed bicycle/pedestrian facility. Since this TEA would involve the permanent incorporation of Section 4(f) land into a transportation facility, there is a use of Section 4(f) land and the appropriate Section 4(f) evaluation and documentation would be required. In this instance, the *Programmatic Section 4(f) Evaluation for Independent Bikeway or Walkway Construction Projects*<sup>27</sup> would likely apply depending on the particular circumstances of the project.

Other TEAs that involve acquisition of scenic or historic easements, or historic sites, often result in ultimate ownership and management of the facility by a non- transportation entity (such as a tourism bureau or historical society). An example would be the acquisition and/or restoration of a historic railroad station for establishment of a museum operated by a historical society. Even though Federal-aid transportation funds were used to acquire a historic building, a non- transportation entity ultimately will own and manage it. Accordingly, this TEA would qualify as an exception for Section 4(f) approval.

Section 106 still applies for any TEA involving a historic site on or eligible for listing on the NR. Please refer to the Nationwide Programmatic Agreement for Implementation of Transportation Enhancement Activities<sup>28</sup> that was issued in 1997 for more details.

For other complex or complicated situations involving TEA projects, it is recommended that the FHWA Division Office contact the Headquarters Office of Project Development and Environmental Review, the Resource Center Environment Technical Services Team, or the Office of the Chief Counsel for assistance.

**Question 17B: Is the exception in 23 CFR 774.13(g) limited solely to work that is funded as a TEA pursuant to 23 U.S.C. § 101(a)(35)?**

**Answer:** No. The exception cited in 23 CFR 774.13(g) refers to TEAs – though the term

<sup>27</sup> <http://www.environment.fhwa.dot.gov/projdev/4fbikeways.asp>

<sup>28</sup> [http://www.fhwa.dot.gov/environment/te/gmemo\\_program.htm](http://www.fhwa.dot.gov/environment/te/gmemo_program.htm)

“project” is used instead of “activity” - and to mitigation activities (*See* Question 29 regarding mitigation activities). The discussion in the corresponding section of the preamble to the regulation involves TEAs within the context of 23 U.S.C. § 101(a)(35), but does not explicitly limit the exception to TEAs funded via the 10% set aside of Surface Transportation Program funds (*See 73 Fed. Reg.*13368, March 12, 2008). If proposed work very closely resembles a TEA but is not proposed for funding as a TEA, there are several options to consider.

If the proposed work could be characterized as a project mitigation feature, then the exception in 23 CFR 774.13(g) would apply without further consideration contingent upon the official(s) with jurisdiction concurring in writing that the work is solely for the purpose of preserving or enhancing an activity, feature or attribute that qualified the property for Section 4(f) protection.

In addition, the introductory paragraph of this section of the regulation indicates that the “exceptions include, but are not limited to” those listed in the ensuing paragraphs. If proposed work resembles a TEA, avoidance of the property could be characterized as being inconsistent with the preservation purpose of the Section 4(f) statute. Uses of Section 4(f) property under the statute have long been considered to include only adverse uses that harm or diminish the resource that the statute seeks to protect. Further, this exception is limited to situations in which the official(s) with jurisdiction over the Section 4(f) property agrees that the use will either preserve or enhance an activity, feature, or attribute of the property that qualifies it for protection under Section 4(f). Work similar to TEAs may be very carefully evaluated on a case-by-case basis to determine if an exception for Section 4(f) approval might be justified consistent with the preservation purpose of the statute and 23 CFR 774.13(g).

If a Section 4(f) use is identified, under any scenario, the potential for complying with Section 4(f) via a *de minimis* impact finding or utilization of an approved programmatic Section 4(f) evaluation should be considered.

**Question 17C: Is it possible for a TEA to create a Section 4(f) property?**

**Answer:** Yes. TEA projects that are funded under TEA categories (A) *Provision of facilities for pedestrians and bicycles* and (H) *Preservation of abandoned railway corridors* (including the conversion and use of the corridors for pedestrian or bicycle trails) could create a new Section 4(f) resource. If a future Federal-aid highway project were to use the property, the fact that the resource was created with TEA funding would not preclude the application of Section 4(f).

**18. Golf Courses**

**Question 18A: Are public golf courses subject to Section 4(f), even when fees and reservations are required?**

**Answer:** Section 4(f) applies to golf courses that are owned, operated and managed by a

public agency for the primary purpose of public recreation and determined to be significant. Section 4(f) does not apply to privately owned and operated golf courses even when they are open to the general public. Golf courses that are owned by a public agency but managed and operated by a private entity may still be subject to Section 4(f) requirements depending on the structure of the agreement.

The fact that greens-fees (Question 16) or reservations (tee times) are required by the facility does not alter the Section 4(f) applicability, as long as the standards of public ownership, public access and significance are met.

Some golf courses are also historic sites. If a golf course is on or eligible for listing in the NR, then the Section 4(f) requirement for public ownership and public access will not apply.

**Question 18B: Are military golf courses subject to the requirements of Section 4(f)?**

**Answer:** Military golf courses are publicly owned (by the Federal Government) but are not typically open to the public at large. Because the recreational use of these facilities is limited to active duty and retired military personnel, family, and guests they are not considered to be public recreational areas and are not subject to the requirements of Section 4(f) (*See* Question 1D), unless they are significant historic sites (Question 2A).

## **19. Museums, Aquariums, and Zoos**

**Question 19: Does Section 4(f) apply to museums, aquariums and zoos?**

**Answer:** Publicly owned museums, aquariums, and zoos are not normally considered parks, recreational areas, or wildlife and waterfowl refuges and are therefore not subject to Section 4(f), unless they are significant historic sites (Question 2A).

Publicly owned facilities such as museums, aquariums or zoos may provide additional park or recreational opportunities and will need to be evaluated on a case-by-case basis to determine if the primary purpose of the resource is to serve as a significant park or recreation area. To the extent that zoos are considered to be significant park or recreational areas, or are significant historic sites they will be treated as Section 4(f) properties.

## **20. Fairgrounds**

**Question 20: Are publicly owned fairgrounds subject to the requirements of Section 4(f)?**

**Answer:** Section 4(f) is not applicable to publicly owned fairgrounds that function primarily for commercial purposes (e.g. stock car races, horse racing, county or state fairs), rather than as park or recreation areas. When fairgrounds are open to the public and function primarily for public recreation other than an annual fair, Section 4(f) applies only to

those portions of land determined significant for park or recreational purposes (*See* Question 1A), unless they are significant historic sites (Question 2A).

## 21. Bodies of Water

### Question 21A: How does the Section 4(f) apply to publicly owned lakes and rivers?

**Answer:** Lakes are sometimes subject to multiple, even conflicting, activities and do not readily fit into one category or another. Section 4(f) would only apply to those portions of publicly owned lakes and/or adjacent publicly owned lands that function primarily for park, recreation, or refuge purposes. Section 4(f) does not apply to areas which function primarily for other purposes or where recreational activities occur on incidental, secondary, occasional or dispersed basis.

In general, rivers are not subject to the requirements of Section 4(f). Those portions of publicly owned rivers, which are designated as recreational trails are subject to the requirements of Section 4(f). Of course, Section 4(f) would also apply to lakes and rivers, or portions thereof, which are contained within the boundaries of a park, recreation area, refuge, or historic site to which Section 4(f) otherwise applies.

### Question 21B: Are Wild and Scenic Rivers (WSR) subject to Section 4(f)?

**Answer:** FHWA must comply with 23 CFR 774.11(g) when determining if there is a use of a WSR. The *National Wild and Scenic Rivers Act* (WSRA) (16 U.S.C. § 1271 et seq. and 36 CFR 297.3) identifies those rivers in the United States which are designated as part of the WSR System. A WSR is defined as a river and the adjacent area within the boundaries of a component of the National Wild and Scenic Rivers System (National System). WSRs may be designated by Congress or, if certain requirements are met, the Secretary of the Interior. Each river is administered by either a Federal or state agency. Four Federal agencies have primary responsibility for the National Wild and Scenic Rivers System, specifically the Forest Service, the National Park Service, the Fish and Wildlife Service and the Bureau of Land Management.

Within this system there are wild, scenic and recreational designations. A single river can be classified as having separate or combined wild, scenic and recreation areas along the entire river. The designation of a river under the WSRA does not in itself invoke Section 4(f) in the absence of significant Section 4(f) attributes and qualities. In determining whether Section 4(f) is applicable to these rivers, FHWA should consult with the official with jurisdiction (Question 21D) to determine how the river is designated, how the river is being used and examine the management plan over that portion of the river. If the river is publicly owned and designated a recreational river under the WSRA or is a recreation resource under a management plan, then it would be a Section 4(f) property. Conversely, if a river is included in the System and designated as wild but is not being used as or designated under a management plan as a park, recreation area, wildlife and waterfowl refuge and is not a historic site, then Section 4(f) would not apply.



Significant publicly owned public parks, recreation areas, or wildlife and waterfowl refuges and historic sites (on or eligible of the NR) in a WSR corridor are subject to Section 4(f). Other lands in WSR corridors managed for multiple purposes may or may not be subject to Section 4(f) requirements, depending on the manner in which they are administered by the managing agency. Close examination of the management plan (as required by the WSRA) prior to any use of these lands for transportation purposes is necessary. Section 4(f) would apply to those portions of the land designated in a management plan for recreation or other Section 4(f) purposes as discussed above. Where the management plan does not identify specific functions, or where there is no plan, FHWA should consult further with the official with jurisdiction (Question 21D) prior to making the Section 4(f) determination. Privately owned lands in a WSR corridor are not subject to Section 4(f), except for significant historic and archeological sites when important for preservation in place (Question 3).

**Question 21C: Does Section 4(f) apply to potential WSR corridors and adjoining lands under study (pursuant to Section 5(a) of the WSRA)?**

**Answer:** No, Section 4(f) does not apply to potential WSRs and adjoining lands. In these cases, Section 4(f) would apply only to existing significant publicly owned public parks, recreation areas, refuges, or significant historic sites in the potential river corridor. It must be noted, however, that such rivers are protected under Section 12(a) of the WSRA,<sup>29</sup> which directs all Federal departments and agencies to protect river values and further recognizes that particular attention should be given to timber harvesting, road construction, and similar activities, which might be contrary to the purposes of this Act.

**Question 21D: Who are the Officials with Jurisdiction for WSRs?**

**Answer:** The definition of officials with jurisdiction is located in 23 CFR 774.17. For those portions of a WSR to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers<sup>30</sup> the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

## 22. Scenic Byways

**Question 22: How does Section 4(f) apply to scenic byways?**

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<sup>29</sup> “The Secretary of the Interior, the Secretary of Agriculture, and the head of any other Federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System or under consideration for such inclusion, in accordance with section 2(a)(ii), 3(a), or 5(a), shall take such action respecting management policies, regulations, contracts, plans, affecting such lands, following the date of enactment of this sentence, as may be necessary to protect such rivers in accordance with the purposes of this Act.”

<sup>30</sup> Section 2(a)(ii) of the WSRA, 16 U.S.C. § 1273(a)(ii)

**Answer:** The designation of a road as a scenic byway is not intended to create a park or recreation area within the meaning of Section 4(f). The reconstruction, rehabilitation, or relocation of a publicly-owned scenic byway would not trigger Section 4(f) unless they are significant historic sites (Question 8).

## 23. Cemeteries

### Question 23A: Does Section 4(f) apply to cemeteries?

**Answer:** Cemeteries would only be considered Section 4(f) properties if they are determined to be on or eligible for the NR as historic sites deriving significance from association with historic events, from age, from the presence of graves of persons of transcendent importance, or from distinctive design features.<sup>31</sup>

### Question 23B: Does Section 4(f) apply to other lands that contain human remains?

**Answer:** Informal graveyards, family burial plots, or Native American burial sites and those sites that contain Native American grave goods associated with burials, are not in and of themselves considered to be Section 4(f) property except when they are individually listed in or eligible for the NR. These sites should not automatically be considered only as archeological resources as many will have value beyond what can be learned by data recovery. If these sites are considered archeological resources on or eligible for the NR and also warrant preservation in place, Section 4(f) applies (*See* Question 3A).

When conducting the Section 4(f) determination for lands that may be Native American burial sites or sites with significance to a federally recognized tribe, consultation with appropriate representatives from the federally recognized tribes with interest in the site is essential. Sites containing human remains may also have cultural and religious significance to a tribe (*See* Question 6 for a discussion of Traditional Cultural Places).

## 24. Joint Development (Park with Highway Corridor)

### Question 24: When a public park, recreation area, or wildlife and waterfowl refuge is established and an area within the Section 4(f) property is reserved for transportation use prior to or at the same time the Section 4(f) property was established, do the requirements of Section 4(f) apply?

**Answer:** The FHWA must comply with 23 CFR 774.11(i) when determining if Section 4(f) applies to a property that was jointly planned for development with a future transportation corridor. Generally, the requirements of Section 4(f) do not apply to the

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<sup>31</sup> For more information on the subject of historic cemeteries see National Register Bulletin #41, *Guidelines for Evaluating and Registering Cemeteries and Burial Places*, 1992  
<http://www.cr.nps.gov/nr/publications/bulletins/nrb41/>

subsequent use of the reserved area for its intended transportation purpose. This is because the land used for the transportation project was reserved from and, therefore, has never been part of the protected Section 4(f) property. Nor is a constructive use of the Section 4(f) property possible, since it was jointly planned with the transportation project. The specific governmental action that must be taken to reserve a transportation corridor with the Section 4(f) property is a question of State and local law, but may include ordinances, adopted land use plans, deed restrictions, or other actions. Evidence that the reservation was contemporaneous with or prior to the establishment of the Section 4(f) property should be documented in the project file. Subsequent statements of intent to construct a transportation project within the resource should not be considered sufficient documentation. All measures which have been taken to jointly develop the transportation corridor and the park should be completely documented in the project files. To provide flexibility for the future transportation project, State and local transportation agencies are advised to reserve wide corridors. Reserving a wide corridor will allow the future transportation project to be designed to minimize impacts on the environmental resources in the corridor. The FHWA encourages the joint planning for the transportation project and the Section 4(f) property to specify that any land not needed for the transportation project right-of-way be transferred to the adjacent Section 4(f) property once the transportation project is completed.

## 25. Planned Section 4(f) Properties

**Question 25: Do the requirements of Section 4(f) apply to publicly owned properties planned for park, recreation area, or wildlife refuge and waterfowl refuge purposes, even though they are not presently functioning as such?**

**Answer:** Section 4(f) applies when the land is one of the enumerated types of publicly owned lands and the public agency that owns the property has formally designated and determined it to be significant for park, recreation area, or wildlife and waterfowl refuge purposes. Evidence of formal designation would be the inclusion of the publicly owned land, and its function as a Section 4(f) property into a city or county Master Plan. A mere expression of interest or desire is not sufficient. For example, when privately held properties of these types are formally designated into a Master Plan for future park development, Section 4(f) is not applicable. The key is whether the planned facility is presently publicly owned, presently formally-designated for Section 4(f) purposes, and presently significant. When this is the case, Section 4(f) would apply.

## 26. Late Designation and Late Discovery of Section 4(f) Properties

**Question 26A: Are properties in the transportation right-of-way designated (as park and recreation lands, wildlife and waterfowl refuges, or historic sites) late in the development of a proposed project subject to the requirements of Section 4(f)?**

**Answer:** FHWA must comply with 23 CFR 774.13(c) when determining if a Section

4(f) approval is necessary to use a late-designated property. Except for archaeological resources, including those discovered during construction (Question 3B), a project may proceed without consideration under Section 4(f) if that land was purchased for transportation purposes prior to the designation or prior to a change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to the acquisition. The adequacy of effort made to identify properties protected by Section 4(f) should consider the requirements and standards that existed at the time of the search.

**Question 26B: How do you address a Section 4(f) use identified late in the process?**

**Answer:** When there will be a use of a Section 4(f) property that has changed or was not identified prior to processing a CE, FONSI, or ROD, a separate Section 4(f) approval will be required (23 CFR 774.9(c)) if a proposed modification of the alignment or design would require use of a Section 4(f) property; FHWA determines that Section 4(f) applies to the use of a property; or if a proposed modification of the alignment, design, or measures to minimize harm would result in a substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm. Where a separate Section 4(f) approval is required, any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis. A late discovery situation could also result when a property is overlooked despite a good faith effort to carry out adequate identification efforts and FHWA decides Section 4(f) now applies to a property. In cases where Section 4(f) may apply to archeological sites discovered during construction, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance alternatives will take account of the level of investment already made (*See* Question 3B).

**27. Temporary Recreational Occupancy or Use of Highway Rights-of-way**

**Question 27: Does Section 4(f) apply to temporary recreational uses of land owned by a State DOT or other applicant and designated for transportation purposes?**

**Answer:** FHWA must comply with 23 CFR 774.11(h) when determining the applicability of Section 4(f) to non-park properties that are temporarily functioning for recreation purposes. In situations where land owned by a SDOT or other applicant and designated for future transportation purposes (including highway rights-of-way) is temporarily occupied or being used for either authorized or unauthorized recreational purposes such as camping or hiking, Section 4(f) does not apply (*See* 23 CFR 774.11(h)). For authorized temporary occupancy of transportation rights-of-way for park or recreation purposes, it is advisable to make clear in a limited occupancy permit, with a reversionary clause that no long-term right is created and the park or recreational activity is a temporary one that will cease once completion of the highway or transportation project resumes.

## 28. Tunneling or Bridging (Air Rights) and Section 4(f) Property

### **Question 28A: Is tunneling under a publicly owned public park, recreation area, wildlife or waterfowl refuge, or historic site subject to the requirements of Section 4(f)?**

**Answer:** Section 4(f) applies to tunneling only if the tunneling:

- 1) Disturbs archaeological sites that are on or eligible for the NR which warrant preservation in place;
- 2) Causes disruption which would permanently harm the purposes for which the park, recreation, wildlife or waterfowl refuge was established;
- 3) Substantially impairs the historic values of a historic site; or
- 4) Otherwise does not meet the exception for temporary occupancy (*See* Question 7A).

### **Question 28B: Do the requirements of Section 4(f) apply to bridging over a publicly owned public park, recreation area, wildlife or waterfowl refuge, or historic site?**

**Answer:** Section 4(f) applies to bridging a Section 4(f) property if piers or other appurtenances are physically located in the Section 4(f) property, requiring an acquisition of land from the property (actual use). Where the bridge will span the Section 4(f) property entirely, the proximity impacts of the bridge on the Section 4(f) property should be evaluated to determine if the placement of the bridge will result in a constructive use (*See* 23 CFR 774.15 and Question 7A). An example of a potential constructive use would be substantial impairment to the utility of a trail resulting from severely restricted vertical clearance. If temporary occupancy of a Section 4(f) property is necessary during construction, the criteria discussed in Question 7A will apply to determine use.

## 29. Mitigation Activities on Section 4(f) Property

### **Question 29: Does the expenditure of Title 23 funds for mitigation or other non-transportation activity on a Section 4(f) property result in a use of that property?**

**Answer:** FHWA must comply with 23 CFR 774.13(g) when determining if a Section 4(f) approval is necessary for a proposed mitigation activity. A Section 4(f) use occurs only when Section 4(f) land is permanently incorporated into a transportation facility, there is a temporary occupancy that is adverse, or there is a constructive use. If mitigation activities proposed within a Section 4(f) property are solely for the preservation or enhancement of the resource and the official(s) with jurisdiction agrees in writing with this assessment, a Section 4(f) use does not occur.

An example involves the enhancement, rehabilitation or creation of wetland within a park or other Section 4(f) property as mitigation for a transportation project's wetland impacts. Where this work is consistent with the function of the existing park and

considered an enhancement of the Section 4(f) property by the official with jurisdiction, then Section 4(f) would not apply. In this case the Section 4(f) land is not permanently incorporated into the transportation facility, even though it is a part of the project as mitigation.

### 30. Emergencies

#### Question 30: How does Section 4(f) apply in emergency situations?

**Answer:** In emergency situations, the first concern is responding to immediate threats to human health or safety, or immediate threats to valuable natural resources. Compliance with environmental laws, such as Section 4(f), is considered later. The FHWA may participate in the costs of repair or reconstruction of Federal-aid highways and roads on Federal lands which have suffered serious damage as a result of (1) natural disasters or (2) catastrophic failures from an external cause. The Emergency Relief (ER) Program, (23 U.S.C. § 125), supplements the commitment of resources by States, their political subdivisions, or other Federal agencies to help pay for unusually heavy expenses resulting from extraordinary conditions. As FHWA retains discretionary control over whether to fund projects under this program, Section 4(f) applies to all ER funding decisions. The general sequence of events following the emergency is:

- 1) Restore essential service. State and local highway agencies are empowered to respond immediately, which includes beginning emergency repairs to restore essential traffic service and to prevent further damage to Federal-aid highway facilities. Section 4(f) compliance is not required at this stage.
- 2) Governor's proclamation
- 3) Preliminary notification
- 4) Acknowledgement
- 5) Damage assessments
- 6) Formal state request
- 7) Division Administrator's finding
- 8) Implementation of projects (this is where Section 4(f) compliance occurs)

Under the ER Program, repairs are categorized either as “emergency” or “permanent.” Emergency repairs are made during and immediately following a disaster to restore essential traffic, to minimize the extent of damage, or to protect the remaining facilities. Permanent repairs to restore the highway to its pre-disaster condition normally occur after the emergency repairs have been completed.

Section 4(f) compliance occurs during the “implementation of projects” stage for both emergency repairs and permanent repairs. For emergency repairs, Section 4(f) compliance is undertaken after the emergency repairs have been completed. For permanent repairs, Section 4(f) compliance is undertaken as part of the normal NEPA project development process, just as it would be for any other type of Federal-aid or Federal lands project (i.e. it must be completed prior to the authorization of

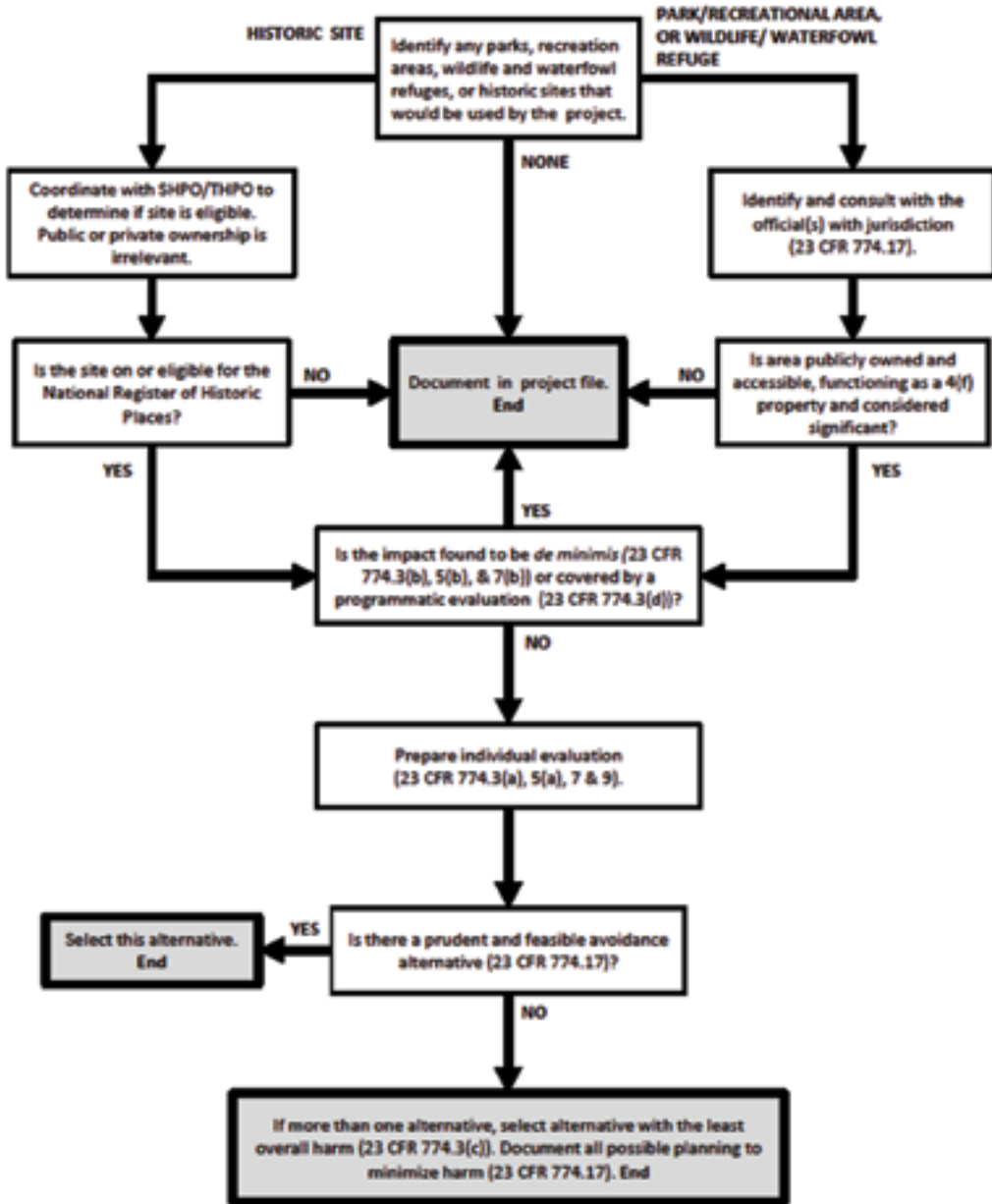
right-of-way and construction).

### **31. Section 6(f) and Other Non-U.S. DOT Grant-in-Aid Program Requirements**

**Question 31: How are Section 6(f) of the Land and Water Conservation Fund Act and other non-U.S. DOT Federal grant-in-aid program requirements administered for purposes similar to Section 4(f)'s preservationist purpose treated in the Section 4(f) process?**

**Answer:** For projects that propose the use of land from a Section 4(f) property purchased or improved with Federal grant-in-aid funds under the *Land and Water Conservation Fund Act*, the *Federal Aid in Fish Restoration Act* (Dingell-Johnson Act), the *Federal Aid in Wildlife Act* (Pittman-Robertson Act), or other similar law, or the lands are otherwise encumbered with a Federal interest, coordination with the appropriate Federal agency is required to ascertain the agency's position on the land conversion or transfer. Other Federal requirements that may apply to the property should be determined through consultation with the officials with jurisdiction and/or appropriate U.S. DOI, Housing and Urban Development, Federal Emergency Management Agency, or other Federal officials (*See 23 CFR 774.5(d)*). These Federal agencies may have regulatory authority or other requirements for converting land to a different use. These requirements are independent of the Section 4(f) requirements and must be satisfied during the project development process.

## Section 4(f) Process





## **GLOSSARY OF ACRONYMS**

ACHP – Advisory Council on Historic Preservation

CE – Categorical Exclusion

CFR – Code of Federal Regulations

DOI –Department of the Interior

DOT –Department of Transportation

EIS – Environmental Impact Statement

EA – Environmental Assessment

FHWA – Federal Highway Administration

FONSI – Finding of No Significant Impact

NEPA – National Environmental Policy Act

NHL – National Historic Landmark

NHPA – National Historic Preservation Act

NR – National Register of Historic Places

RTP – Recreational Trails Program

ROD – Record of Decision

TCP – Traditional Cultural Place

TEA – Transportation Enhancement Activity

THPO – Tribal Historic Preservation Officer

U.S.C. – United States Code

WSR – Wild and Scenic River



SECTION 4(F) PROGRAMMATIC EVALUATIONS

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SECTION 4(F) STATEMENT AND DETERMINATION FOR  
INDEPENDENT BIKEWAY OR WALKWAY CONSTRUCTION PROJECTS

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## Section 4(f)

### Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects

#### MEMORANDUM

#### Background

There is a growing interest in bicycling and walking for commuting, for recreation, and for other trip purposes. Where this activity occurs on high-speed roadways, both safety and efficiency can be impaired because of the mixture of motorized and nonmotorized modes of travel. Construction of bikeways or pedestrian walkways can promote safety and will assist in retaining the motor vehicle carrying capacity of the highway while enhancing bicycle capacity.

The United States Congress recognized the importance of bicycle and pedestrian travel by including special provisions for these modes in the Federal-Aid Highway Act of 1973, Public Law 93-87. Section 124 of this Act (amended Title 23, U.S. Code, by adding Section 217) contained the following principal provisions:

(1) Federal funds available for the construction of preferential facilities to serve pedestrians and bicyclists are those apportioned in accordance with paragraphs (1), (2), (3), and (6) of Section 104(b), 23 U.S.C., and those authorized for Forest highways, Forest development roads and trails, public land development roads and trails, park roads and trails, parkways, Indian reservation roads, and public land highways.

(2) Not more than \$40 million (amended to \$45 million by Section 134 of the Federal-Aid Highway Act of 1976) apportioned in any fiscal year for purposes described in the preceding paragraph may be obligated for bicycle projects and pedestrian walkways.

(3) No State shall obligate more than \$2 million (amended to \$2.5 million by Section 134 of the Federal-Aid Highway Act of 1976) of Federal-aid funds for such projects in any fiscal year.

(4) Such projects shall be located and designed pursuant to an overall plan which will provide due consideration for safety and contiguous routes.

The funding limitations described in (2) and (3) above are applicable only to independent bikeway or walkway construction projects.

#### Project Description

Independent bikeway or walkway construction projects are those highway construction projects which provide bicycle or pedestrian facilities in contrast to a project whose primary purpose is to serve motorized vehicles. The requirements for qualification of proposed bikeway or walkway facilities as independent bikeway or walkway construction projects are contained in Volume 6, Chapter 1, Section 1, Subsection 1, of the Federal-Aid Highway Program Manual \* (*the Federal -aid Highway Program Manuals were replaced by the Federal-aid Program Guide which includes selected verbatim sections of the CFR*), codified as Part 652 of Chapter 1 of Title 23 of the Code of Federal Regulations (CFR).

The bikeways and walkways will be designed and constructed in a manner suitable to the site conditions and the anticipated extent of usage. In general, a bikeway will be designed with an alignment and profile suitable for bicycle use with a surface that will be reasonably durable that incorporates drainage as necessary, and that is of a width appropriate for the planned one-way or two-way use.

The facilities will be accessible to the users or will form a segment located and designed pursuant to an overall plan.

Projects may include the acquisition of land outside the right-of-way, provided the facility will accommodate traffic which would have normally used a Federal-aid highway route, disregarding any legal prohibitions on the use of the route by cyclists or pedestrians.

It is required that a public agency be responsible for maintenance of the federally funded bikeway or walkway. No motorized vehicles will be permitted on the facilities except those for maintenance purposes and snowmobiles where state or local regulations permit.

#### Application

This negative declaration/preliminary Section 4(f) document is only applicable for independent bikeway or walkway construction projects which require the use of recreation and park areas established and maintained primarily for active recreation, open space, and similar purposes. Additionally, this document is applicable only when the official having specific jurisdiction over the Section 4(f) property has given his approval in writing that the project is acceptable and consistent with the designated use of the property and that all possible planning to minimize harm has been accomplished in the location and design of the bikeway or walkway facility. This document does not apply if the project would require the use of critical habitat of endangered species.

This document does not cover the use of any land from a publicly owned wildlife or waterfowl refuge or any land from a historic site of national, State, or local significance. It also does not cover those projects where there are unusual circumstances (major impacts, adverse effects, or controversy). A separate Section 4(f) statement and environmental document must be prepared in these categories.

This document does not cover bicycle or pedestrian facilities that are incidental items of construction in conjunction with highway improvements having the primary purpose of serving motor vehicular traffic.

### Summary

The primary purpose for the development of independent bikeway and walkway projects is to provide a facility for traffic which would have normally used a Federal-aid highway route. In some cases, the bikeway and walkway projects can serve a dual function by also providing for recreational use. Where this situation occurs, artificially routing a bikeway or walkway around a compatible park area is not a prudent alternative because it would decrease the recreational value of the bikeway or walkway.

The written approval of the official having specific jurisdiction over the Section 4(f) property and construction authorization by FHWA will confirm that all possible planning to minimize harm has been accomplished in the location and design of the bikeway or walkway facility.

Noise and air quality will not be affected by bicycles. There would be increase in the noise level if snowmobiles are permitted. However, this would likely occur at a time when other uses of the recreational facilities will be minimal.

Temporary impacts on water quality will be minimal. Erosion control measures will be used through the construction period. A certain amount of land will be removed from other uses. The type of land and uses will vary from project to project. However, due to the narrow crosssection of the bikeways and walkways, a minimal amount of land will be required for the individual projects. The projects will be blended into the existing terrain to reduce any visual impacts.

Displacement of families and businesses will not be required.

No significant adverse social or economic impacts are anticipated. There will be beneficial impacts such as the enhancement of the recreational potential of the parks and the provision of an alternate mode of transportation for the commuter.

### Comments and Coordination

A draft of this negative declaration/Section 4(f) statement was published in the *Federal Register* (42 F.R. 15394), March 21, 1977, inviting interested persons to comment. The majority of the letters received were favorable and recommended approval of the document.

The document was also circulated to the Departments of the Interior (DOI), Housing and Urban Development (HUD), and Agriculture. Comments were received from DOI and HUD and are included in the appendix along with our responses.

Individual projects will be coordinated at the earliest feasible time with all responsible local officials, including the State Outdoor Recreation Liaison Officer. The use of properties acquired or developed with Federal monies from the Land and Water Conservation Fund will also be coordinated with the Bureau of Outdoor Recreation of DOI.

If HUD Community Development Block Grant Funds are used in conjunction with Federal Highway Administration Funds, HUD environmental review procedures set forth in 24 CFR, Section 58, are applicable.

### Determination

Based on the above and on the scope of these bikeway and walkway projects, it is determined that they will not have a significant effect upon the quality of the human environment. It is also our determination that (1) there is no feasible and prudent alternative to the use of Section 4(f) lands, and (2) the conditions for approval will insure that the bikeway proposals will include all possible planning to minimize harm resulting from such use.

Date: May 23, 1977 /Original signed by/ Les Lamm For William M. Cox Federal Highway Administrator

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**APPENDIX**

(Letter)United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

In reply refer to: (ER-77/105)

MAR 21, 1977

Dear Mr. Lash:

This is in response to your February, 1977 request for the Department of the Interior comments on the proposed Negative Declaration/Section 4(f) statement for Independent Bikeway or Walkway Construction Projects.

We are pleased that the proposed document responds to a number of the comments made in our letter of June 25, 1976, on the Bikeway Demonstration Program. We note that the present document is not applicable to the use of land from a publicly owned wildlife or waterfowl refuge or any land from a historic site, nor is it applicable if the project would require the use of critical habitat of endangered species. We note further that the document applies only to the use of recreation and park areas established and maintained primarily for active recreation, open space, and similar purposes.

We concur with these limitations on the application of the proposed Negative Declaration/Section 4(f) statement. However, we wish to again express our opinion that the proposed document not be applicable to: (1)

1. Significant wetlands;
2. Unique ecological areas set aside for the preservation, interpretation, or scientific study of plant and animal communities, e.g., Registered Natural Landmarks and Registered Environmental Education Landmarks.
3. Play areas for small children (tot lots, etc.); and
4. Small park areas where the bikeway or walkway may use a significant portion of the available space (vest-pocket parks, etc.).

We are also pleased that the document makes provision for early coordination with all responsible local officials, including the State Outdoor Recreation Liaison Officer, and the Bureau of Outdoor Recreation (BOR) when Land and Water Conservation Fund grants are involved. We suggest, however, that you may wish to coordinate all projects of this type with the appropriate Regional Office of BOR for the technical assistance they can provide on bikeways and walkways. (2)

According to our calculations, a funding level of \$45,000,000 for these bikeways and walkways would amount to somewhere between 1,800 and 4,500 miles of trail per year. This would directly remove from all other use (including use by flora and fauna) roughly 1,000 to 6,800 acres per year. This impact should be addressed in the proposed negative declaration. (3)

Thank you for the opportunity to review this proposed document.

Sincerely yours, /original signed by/ (unknown) Deputy Assistant Secretary of the Interior (at the time)

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Mr. Michael Lash  
Director of Environmental Policy  
U.S. Department of Transportation  
Federal Highway Administration  
Washington, D. C. 20590

Responses to the Department of the Interior  
Letter of March 21, 1977

- (1) We believe the Application section is adequate to cover those cases where there are unusual circumstances such as major impacts or adverse effects. The key point is that the official having specific jurisdiction over the Section 4(f) property has to agree that the project is acceptable and consistent with the designated use of the property, and that the location and design have been accomplished in a manner that will not cause harm to the property.
  - (2) The FHWA Division Administrator and the local officials will have the option of requesting additional coordination with the Bureau of Outdoor Recreation on all bikeway and walkway projects.
  - (3) The use of land for the bikeways and walkways has been addressed in the Summary section. However, it should be understood that this document is for individual projects and was not prepared to address the impacts of the entire bikeway program.
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(Letter) DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, D.C. 20410

FEB 15 1977

Office of the Assistant Secretary  
For community Planning and Development (CSR)

Mr. Michael Lash  
Director of Environmental Policy  
Department of Transportation  
Federal Highway Administration  
Nassif Building - Room 3234  
Washington, D. C. 20590

Dear Mr. Lash:

Thank you for providing this Office with the opportunity to review and comment on the proposed draft negative declaration/Section 4(f) for the construction of independent bikeways and pedestrian walkways. While your negative declaration proposal will reduce processing time, we propose for your consideration the following recommendations:

1. Under the caption **Application** insert the following before the last sentence in the first paragraph: The project must be in accord with a unified and officially coordinated program for the development of open space land as part of local and area wide comprehensive planning. (1)
2. Under the caption **Application** add the following to the second paragraph: If unusual natural or manmade conditions exist in the proposed project area which might be deleteriously affected by the proposed bikeway or pedestrian walkway, then a Section 4(f) and an environmental impact statement shall be prepared for the project. (2)
3. Under the caption **Coordination**, second paragraph add the following: If HUD Community Development Block Grant (CDBG) funds are used by applicants in conjunction with Section 124 funds, HUD environmental review procedures set forth in 24 CFR Section 58 are, applicable. The CDBG program permits the use of funds for the construction of certain public works in conjunction with recreational purposes. (3)

Sincerely yours, /Original signed by/ Richard H. Brown Director, Office of Environmental Quality

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**Responses to the Department of Housing  
and Urban Development Letter of February 15, 1977**

- (1) We do not believe it is necessary to add this sentence to the Application section since this is already a Federal-aid qualification requirement. (See 23 CFR, Part 652.)
- (2) This provision has been added to the Application section.
- (3) The Coordination section has been expanded to include this situation.

PROGRAMMATIC SECTION 4(F) EVALUATION AND APPROVAL FOR  
FHWA PROJECTS THAT NECESSITATE THE USE OF HISTORIC BRIDGES

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## Section 4(f)

### *Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges*

This statement sets forth the basis for a programmatic Section 4(f) approval that there are no feasible and prudent alternatives to the use of certain historic bridge structures to be replaced or rehabilitated with Federal funds and that the projects include all possible planning to minimize harm resulting from such use. This approval is made Pursuant to Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303, and Section 18(a) of the Federal-Aid Highway Act of 1968 23 U.S.C. 138.

#### Use

The historic bridges covered by this programmatic Section 4(f) evaluation are unique because they are historic, yet also part of either a Federal-aid highway system or a state or local highway system that has continued to evolve over the years. Even though these structures are on or eligible for inclusion on the National Register of Historic Places, they must perform as an integral part of a modern transportation system. When they do not or cannot, they must be rehabilitated or replaced in order to assure public safety while maintaining system continuity and integrity. For the purpose of this programmatic Section 4(f) evaluation, a proposed action will "use" a bridge that is on or eligible for inclusion on the National Register of Historic Places when the action will impair the historic integrity of the bridge either by rehabilitation or demolition. Rehabilitation that does not impair the historic integrity of the bridge as determined by procedures implementing the national Historic Preservation Act of 1966, as amended (FHWA), is not subject to Section 4(f).

#### Applicability

This programmatic Section 4(f) evaluation may be applied by the Federal Highway Administration (FHWA) to projects which meet the following criteria:

1. The bridge is to be replaced or rehabilitated with Federal funds.
2. The project will require the use of a historic bridge structure which is on or is eligible for listing on the National Register of Historic Places.
3. The bridge is not a National Historic Landmark.
4. The FHWA Division Administrator determines that the facts of the project match those set forth in the sections of this document labeled Alternatives, Findings, and Mitigation.
5. Agreement among the FHWA, the State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Preservation (ACHP) has been reached through procedures pursuant to Section 106 of the NHPA.

#### Alternatives

The following alternatives avoid any use of the historic bridge:

1. Do nothing.
2. Build a new structure at a different location without affecting the historic integrity of the old bridge, as determined by procedures implementing the NHPA.
3. Rehabilitate the historic bridge without affecting the historic integrity of the structure, as determined by procedures implementing the NHPA.

This list is intended to be **all-inclusive**. The programmatic Section 4(f) evaluation does not apply if a reasonable alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated and it must further demonstrate that all applicability criteria listed above were met before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

#### Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. **Do Nothing.** The do nothing alternative has been studied. The do nothing alternative ignores the basic transportation need. For the following reasons this alternative is not feasible and prudent:
  - a. Maintenance - The do nothing alternative does not correct the situation that causes the bridge to be considered structurally deficient or deteriorated. These deficiencies can lead to sudden collapse and potential injury or loss of life. Normal maintenance is not considered adequate to cope with the situation.
  - b. Safety - The do nothing alternative does not correct the situation that causes the bridge to be considered deficient.

Because of these deficiencies the bridge poses serious and unacceptable safety hazards to the traveling public or places intolerable restriction on transport and travel.

2. **Build on New Location Without Using the Old Bridge.** Investigations have been conducted to construct a bridge on a new location or parallel to the old bridge (allowing for a one- way couplet), but, for one or more of the following reasons, this alternative is not feasible and prudent:

- a. **Terrain** - The present bridge structure has already been located at the only feasible and prudent site, i.e., a gap in the land form, the narrowest point of the river canyon, etc. To build a new bridge at another site will result in extraordinary bridge and approach engineering and construction difficulty or costs or extraordinary disruption to established traffic patterns.

- b. **Adverse Social , Economic, or Environmental Effects** - Building a new bridge away from the present site would result in social, economic, or environmental impact of extraordinary magnitude. Such impacts as extensive severing of productive farmlands, displacement of a significant number of families or businesses, serious disruption of established travel patterns, and access and damage to wetlands may individually or cumulatively weigh heavily against relocation to a new site.

- c. **Engineering and Economy** - Where difficulty associated with the new location is less extreme than those encountered above, a new site would not be feasible and prudent where cost and engineering difficulties reach extraordinary magnitude. Factors supporting this conclusion include significantly increased roadway and structure costs, serious foundation problems, or extreme difficulty in reaching the new site with construction equipment. Additional design and safety factors to be considered include an ability to achieve minimum design standards or to meet requirements of various permitting agencies such as those involved with navigation, pollution, and the environment.

- d. **Preservation of Old Bridge** - It is not feasible and prudent to preserve the existing bridge, even if a new bridge were to be built at a new location. This could occur when the historic bridge is beyond rehabilitation for a transportation or an alternative use, when no responsible party can be located to maintain and preserve the bridge, or when a permitting authority, such as the Coast Guard requires removal or demolition of the old bridge.

3. **Rehabilitation Without Affecting the Historic Integrity of the Bridge.** Studies have been conducted of rehabilitation measures, but, for one or more of the following reasons, this alternative is not feasible and prudent:

- a. The bridge is so structurally deficient that it cannot be rehabilitated to meet minimum acceptable load requirements without affecting the historic integrity of the bridge.

- b. The bridge is seriously deficient geometrically and cannot be widened to meet the minimum required capacity of the highway system on which it is located without affecting the historic integrity of the bridge. Flexibility in the application of the American Association of State Highway and Transportation Officials geometric standards should be exercised as permitted in 23 CFR Part 625 during the analysis of this alternative.

### Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. This has occurred when:

1. For bridges that are to be rehabilitated, the historic integrity of the bridge is preserved, to the greatest extent possible, consistent with unavoidable transportation needs, safety, and load requirements;
2. For bridges that are to be rehabilitated to the point that the historic integrity is affected or that are to be moved or demolished, the FHWA ensures that, in accordance with the Historic American Engineering Record (HAER) standards, or other suitable means developed through consultation, fully adequate records are made of the bridge;
3. For bridges that are to be replaced, the existing bridge is made available for an alternative use, provided a responsible party agrees to maintain and preserve the bridge; and
4. For bridges that are adversely affected, agreement among the SHPO, ACHP, and FHWA is reached through the Section 106 process of the NHPA on measures to minimize harm and those measures are incorporated into the project. This programmatic Section 4(f) evaluation does not apply to projects where such an agreement cannot be reached.

### Procedures

This programmatic Section 4(f) evaluation applies only when the FHWA Division Administrator:

1. Determines that the project meets the applicability criteria set forth above;
2. Determines that all of the alternatives set forth in the Findings section have been fully evaluated;



#### Section 4(f) Programmatic Evaluations

3. Determines that use of the findings in this document that there are no feasible and prudent alternatives to the use of the historic bridge is clearly applicable;
4. Determines that the project complies with the Measures to Minimize Harm section of this document;
5. Assures that implementation of the measures to minimize harm is completed; and
6. Documents the project file that the programmatic Section 4(f) evaluation applies to the project on which it is to be used.

#### **Coordination**

Pursuant to Section 4(f), this statement has been coordinated with the Departments of the Interior, Agriculture, and Housing and Urban Development.

Issued on: July 5, 1983 Approved: /Original Signed By/ Ali F. Sevin, Director Office of Environmental Policy Federal Highway Administration



FINAL NATIONWIDE SECTION 4(F) EVALUATION  
AND APPROVAL FOR FEDERALLY AIDED HIGHWAY PROJECTS  
WITH MINOR INVOLVEMENTS WITH HISTORIC SITES

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## Section 4(f)

### *Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Historic Sites*

This programmatic Section 4(f) evaluation has been prepared for projects which improve existing highways and use minor amounts of land (including non-historic improvements thereon) from historic sites that are adjacent to existing highways. This programmatic Section 4(f) evaluation satisfies the requirements of Section 4(f) for all projects that meet the applicability criteria listed below. No individual Section 4(f) evaluations need be prepared for such projects. (Note a similar programmatic Section 4(f) evaluation has been prepared for projects which use minor amounts of publicly owned public parks, recreation lands, or wildlife and waterfowl refuges).

The FHWA Division Administrator is responsible for reviewing each individual project to determine that it meets the criteria and procedures of this programmatic Section 4(f) evaluation. The Division Administrator's determinations will be thorough and will clearly document the items that have been reviewed. The written analysis and determinations will be combined in a single document and placed in the project record and will be made available to the public upon request. This programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

#### **Applicability**

This programmatic Section 4(f) evaluation may be applied by FHWA only to projects meeting the following criteria:

1. The proposed project is designed to improve the operational characteristics, safety, and/or physical condition of existing highway facilities on essentially the same alignment. This includes "4R" work (resurfacing, restoration, rehabilitation and reconstruction); safety improvements, such as shoulder widening and the correction of substandard curves and intersections; traffic operation improvements, such as signalization, channelization, and turning or climbing lanes; bicycle and pedestrian facilities; bridge replacements on essentially the same alignment, and the construction of additional lanes. This programmatic Section 4(f) evaluation does not apply to the construction of a highway on a new location.
2. The historic site involved is located adjacent to the existing highway.
3. The project does not require the removal or alteration of historic buildings, structures or objects on the historic site.
4. The project does not require the disturbance or removal of archeological resources that are important to preserve in place rather than to remove for archeological research. The determination of the importance to preserve in place will be based on consultation with the State Historic Preservation Officer (SHPO) and, if appropriate, the Advisory Council on Historic Preservation (ACHP).
5. The impact on the Section 4(f) site resulting from the use of the land must be considered minor. The word minor is narrowly defined as having either a "no effect" or "no adverse effect" (when applying the requirements of Section 106 of the National Historic Preservation Act and 36 CFR Part 800) on the qualities which qualified the site for listing or eligibility on the National Register of Historic Places. The ACHP must not object to the determination of "no adverse effect."
6. The SHPO must agree, in writing, with the assessment of impacts of the proposed project on and the proposed mitigation for the historic sites.
7. This programmatic evaluation does not apply to projects for which an environmental impact statement (EIS) is prepared, unless the use of Section 4(f) lands is discovered after the approval of the final EIS.

Should any of the above criteria not be met, this programmatic Section 4(f) evaluation cannot be used, and an individual Section 4(f) evaluation must be prepared.

#### **Alternatives**

The following alternatives avoid any use of the historic site.

1. Do nothing.
2. Improve the highway without using the adjacent historic site.
3. Build an improved facility on new location without using the historic site.

This list is intended to be all-inclusive. The programmatic Section 4(f) evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

## Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. **Do Nothing Alternative.** The Do Nothing Alternative is not feasible and prudent because: (a) it would not correct existing or projected capacity deficiencies or (b) it would not correct existing safety hazards; or (c) it would not correct existing deteriorated conditions and maintenance problems; **and** (d) not providing such correction would constitute a cost or community impact of extraordinary magnitude, or would result in truly unusual or unique problems, when compared with the proposed use of the Section 4(f) lands.
2. **Improvement without Using the Adjacent Section 4(f) Lands.** It is not feasible and prudent to avoid Section 4(f) lands by roadway design or transportation system management techniques (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversions or other traffic management measures) because implementing such measures would result in: (a) substantial adverse community impacts to adjacent homes, businesses or other improved properties; **or** (b) substantially increased roadway or structure cost; **or** (c) unique engineering, traffic, maintenance, or safety problems, **or** (d) substantial adverse social, economic, or environmental impacts; or (e) the project not meeting identified transportation needs; and (f) the impacts, costs, or problems would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of American Association (page 4) of State Highway and Transportation officials (AASHTO) geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.
3. **Alternatives on New Location.** It is not feasible and prudent to avoid Section 4(f) lands by constructing on new alignment because (a) the new location would not solve existing transportation safety or maintenance problems; **or** (b) the new location would result in substantial adverse social, economic, or environmental impacts (including such impacts as extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of established travel patterns, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) lands); or (c) the new location would substantially increase costs or engineering difficulties (such as an inability to achieve minimum design standards, or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, and the environment); **and** (d) such problems, impacts, costs, or difficulties would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.

## Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. Measures to minimize harm will consist of those measures necessary to preserve the historic integrity of the site and agreed to, in accordance with 36 CFR Part 800 by the FHWA, the SHPO, and as appropriate, the ACHP.

## Coordination

The use of this programmatic evaluation and approval is conditioned upon the satisfactory completion of coordination with the SHPO, the ACHP, and interested persons as called for in 36 CFR Part 800. Coordination with interested persons, such as the local government, the property owner, a local historical society, or an Indian tribe, can facilitate in the evaluation of the historic resource values and mitigation proposals and is therefore highly encouraged.

For historic sites encumbered with Federal interests, coordination is required with the Federal agencies responsible for the encumbrances.

Before applying this programmatic evaluation to projects requiring an individual bridge permit, the Division Administrator shall coordinate with the U.S. Coast Guard District Commander.

## Approval Procedure

This programmatic Section 4(f) approval applies only after the FHWA Division Administrator has:

1. Determined that the project meets the applicability criteria set forth above;
2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;
3. Determined that the findings in this document (which conclude that there are no feasible and prudent alternatives to the use of land from or non-historic improvements on the historic site) are clearly applicable to the project;
4. Determined that the project complies with the Measures to Minimize Harm section of this document;
5. Determined that the coordination called for in this programmatic evaluation has been successfully completed;

Section 4(f) Programmatic Evaluations

6. Assured that the measures to minimize harm will be incorporated in the project; and
7. Documented the project file clearly identifying the basis for the above determinations and assurances.

Issued on: 12/23/1986 Approved: /Original Signed By/ Ali F. Sevin, Director Office of Environmental Policy Federal Highway Administration





FINAL NATIONWIDE SECTION 4(F) EVALUATION AND APPROVAL FOR FEDERALLY  
AIDED HIGHWAY PROJECTS WITH MINOR INVOLVEMENTS WITH PUBLIC PARKS,  
RECREATION LANDS, AND WILDLIFE AND WATERFOWL REFUGES

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## Section 4(f)

### ***Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements with Public Parks, Recreation Lands, and Wildlife and Waterfowl Refuges***

This programmatic Section 4(f) evaluation has been prepared for projects which improve existing highways and use minor amounts of publicly owned public parks, recreation lands, or wildlife and waterfowl refuges that are adjacent to existing highways. This programmatic Section 4(f) evaluation satisfies the requirements of Section 4(f) for all projects that meet the applicability criteria listed below. No individual Section 4(f) evaluations need be prepared for such projects. (Note: a similar programmatic Section 4(f) evaluation has been prepared for projects which use minor amounts of land from historic sites).

The FHWA Division Administrator is responsible for reviewing each individual project to determine that it meets the criteria and procedures of this programmatic Section 4(f) evaluation. The Division Administrator's determinations will be thorough and will clearly document the items that have been reviewed. The written analysis and determinations will be combined in a single document and placed in the project record and will be made available to the public upon request. This programmatic evaluation will not change the existing procedures for project compliance with the National Environmental Policy Act (NEPA) or with public involvement requirements.

### **Applicability**

This programmatic Section 4(f) evaluation may be applied by FHWA only to projects meeting the following criteria:

1. The proposed project is designed to improve the operational characteristics, safety, and/or physical condition of existing highway facilities on essentially the same alignment. This includes "4R" work (resurfacing, restoration, rehabilitation, and reconstruction), safety improvements, such as shoulder widening and the correction of substandard curves and intersections; traffic operation improvements, such as signalization, channelization, and turning or climbing lanes; bicycle and pedestrian facilities; bridge replacements on essentially the same alignment; and the construction of additional lanes. This programmatic Section 4(f) evaluation does not apply to the construction of a highway on a new location.
2. The Section 4(f) lands are publicly owned public parks, recreation lands, or wildlife and waterfowl refuges located adjacent to the existing highway.
3. The amount and location of the land to be used shall not impair the use of the remaining Section 4(f) land, in whole or in part, for its intended purpose. This determination is to be made by the FHWA in concurrence with the officials having jurisdiction over the Section 4(f) lands, and will be documented in relation to the size, use, and/or other characteristics deemed relevant.

The total amount of land to be acquired from any Section 4(f) site shall not exceed the values in the following Table:

Total Size of Section 4(f) Site Maximum to Be Acquired	
< 10 acres	10 percent of site
10 acres - 100 acres	1 acre
> 100 acres	1 percent of site

4. The proximity impacts of the project on the remaining Section 4(f) land shall not impair the use of such land for its intended purpose. This determination is to be made by the FHWA in concurrence with the officials having jurisdiction over the Section 4(f) lands, and will be documented with regard to noise, air and water pollution, wildlife and habitat effects, aesthetic values, and/or other impacts deemed relevant.
5. The officials having jurisdiction over the Section 4(f) lands must agree, in writing, with the assessment of the impacts of the proposed project on, and the proposed mitigation for, the Section 4(f) lands.
6. For projects using land from a site purchased or improved with funds under the Land and Water Conservation Fund Act, the Federal Aid in Fish Restoration Act (Dingell-Johnson Act), the Federal Aid in Wildlife Act (Pittman-Robertson Act), or similar laws, or the lands are otherwise encumbered with a Federal interest (e.g., former Federal surplus property), coordination with the appropriate Federal agency is required to ascertain the agency's position on the land conversion or transfer. The programmatic Section 4(f) evaluation does not apply if the agency objects to the land conversion or transfer.
7. This programmatic evaluation does not apply to projects for which an environmental impact statement (EIS) is prepared, unless the use of Section 4(f) lands is discovered after the approval of the final EIS. Should any of the above criteria not be met, this programmatic Section 4(f) evaluation cannot be used, and an individual Section 4(f) evaluation must be prepared.

## Alternatives

The following alternatives avoid any use of the public park land, recreational area, or wildlife and waterfowl refuge:

1. Do nothing.
2. Improve the highway without using the adjacent public park, recreational land, or wildlife and waterfowl refuge.
3. Build an improved facility on new location without using the public park, recreation land, or wildlife or waterfowl refuge.

This list is intended to be all-inclusive. The programmatic Section 4(f) evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated before the FHWA Division Administrator concluded that the programmatic Section 4(f) evaluation applied to the project.

## Findings

In order for this programmatic Section 4(f) evaluation to be applied to a project, each of the following findings must be supported by the circumstances, studies, and consultations on the project:

1. **Do Nothing Alternative.** The Do Nothing Alternative is not feasible and prudent because: (a) it would not correct existing or projected capacity deficiencies; or (b) it would not correct existing safety hazards; or (c) it would not correct existing deteriorated conditions and maintenance problems; and (d) not providing such correction would constitute a cost or community impact of extraordinary magnitude, or would result in truly unusual or unique problems, when compared with the proposed use of the Section 4(f) lands.
2. **Improvement without Using the Adjacent Section 4(f) Lands.** It is not feasible and prudent to avoid Section 4(f) lands by roadway design or transportation system management techniques (including, but not limited to, minor alignment shifts, changes in geometric design standards, use of retaining walls and/or other structures, and traffic diversions or other traffic management measures) because implementing such measures would result in: (a) substantial adverse community impacts to adjacent homes, businesses or other improved properties; or (b) substantially increased roadway or structure cost; or (c) unique engineering, traffic, maintenance, or safety problems; or (d) substantial adverse social, economic, or environmental impacts; or (e) the project not meeting identified transportation needs; and (f) the impacts, costs, or problems would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of American Association of State Highway and Transportation Officials (AASHTO) geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.
3. **Alternatives on New Location.** It is not feasible and prudent to avoid Section 4(f) lands by constructing on new alignment because (a) the new location would not solve existing transportation, safety, or maintenance problems; or (b) the new location would result in substantial adverse social, economic, or environmental impacts (including such impacts as extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of established patterns, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) lands or (c) the new location would substantially increase costs or engineering difficulties (such as an inability to achieve minimum design standards, or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, and the environment); and (d) such problems, impacts, costs, or difficulties would be truly unusual or unique, or of extraordinary magnitude when compared with the proposed use of Section 4(f) lands. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR 625, during the analysis of this alternative.

## Measures to Minimize Harm

This programmatic Section 4(f) evaluation and approval may be used only for projects where the FHWA Division Administrator, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm. This has occurred when the officials having jurisdiction over the Section 4(f) property have agreed, in writing, with the assessment of impacts resulting from the use of the Section 4(f) property and with the mitigation measures to be provided. Mitigation measures shall include one or more of the following:

1. Replacement of lands used with lands of reasonably equivalent usefulness and location and of at least comparable value.
2. Replacement of facilities impacted by the project including sidewalks, paths, benches, lights, trees, and other facilities.
3. Restoration and landscaping of disturbed areas.
4. Incorporation of design features (e.g., reduction in right-of-way width, modifications to the roadway section, retaining walls, curb and gutter sections, and minor alignment shifts); and habitat features (e.g., construction of new, or

enhancement of existing, wetlands or other special habitat types); where necessary to reduce or minimize impacts to the Section 4(f) property. Such features should be designed in a manner that will not adversely affect the safety of the highway facility. Flexibility in the application of AASHTO geometric standards should be exercised, as permitted in 23 CFR 625, during such design.

5. Payment of the fair market value of the land and improvements taken or improvements to the remaining Section 4(f) site equal to the fair market value of the land and improvements taken.
6. Such additional or alternative mitigation measures as may be determined necessary based on consultation with, the officials having jurisdiction over the parkland, recreation area, or wildlife or waterfowl refuge.

If the project uses Section 4(f) lands that are encumbered with a Federal interest (see **Applicability**), coordination is required with the appropriate agency to ascertain what special measures to minimize harm, or other requirements, may be necessary under that agency's regulations. To the extent possible, commitments to accomplish such special measures and/or requirements shall be included in the project record.

#### **Coordination**

Each project will require coordination in the early stages of project development with the Federal, state and/or local agency officials having jurisdiction over the Section 4(f) lands. In the case of non-Federal Section 4(f) lands, the official with jurisdiction will be asked to identify any Federal encumbrances. Where such encumbrances exist coordination will be required with the Federal agency responsible for the encumbrance.

For the interests of the Department of Interior, Federal agency coordination will be initiated with the Regional Directors of the U.S. Fish and Wildlife Service, the National Park Service, and the Bureau of Reclamation; the State Directors of the Bureau of Land Management, and the Area Directors of the Bureau of Indian Affairs. In the case of Indian lands, there will also be coordination with appropriate Indian Tribal officials.

Before applying this programmatic evaluation to projects requiring an individual bridge permit the Division Administrator shall coordinate with the U.S. Coast Guard District Commander.

Copies of the final written analysis and determinations required under this programmatic Section 4(f) evaluation shall be provided to the officials having jurisdiction over the involved Section 4(f) area and to other parties upon request.

#### **Approval Procedure**

This programmatic Section 4(f) approval applies only after the FHWA Division Administrator has:

1. Determined that the project meets the applicability criteria set forth above;
2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;
3. Determined that the findings in this document (which conclude that there are no feasible and prudent alternatives to the use of the publicly owned public park, recreation area, or wildlife or waterfowl refuge) are clearly applicable to the project;
4. Determined that the project complies with the Measures to Minimize Harm section of this document;
5. Determined that the coordination called for in this programmatic evaluation has been successfully completed;
6. Assured that the measures to minimize harm will be incorporated in the project; and
7. Documented the project file clearly identifying the basis for the above determinations and assurances.

Issued on: 12/23/86 Approved: /Original Signed By/ Ali F. Sevin Office of Environmental Policy Federal Highway Administration



SECTION 4(F) EVALUATION AND APPROVAL FOR TRANSPORTATION  
PROJECTS THAT HAVE A NET BENEFIT TO A SECTION 4(F) PROPERTY

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## Section 4(f)

### **Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property**

This nationwide programmatic Section 4(f) evaluation (programmatic evaluation) has been prepared for certain federally assisted transportation improvement projects on existing or new alignments that will use property of a Section 4(f) park, recreation area, wildlife or waterfowl refuge, or historic property, which in the view of the Administration and official(s) with jurisdiction over the Section 4(f) property, the use of the Section 4(f) property will result in a net benefit to the Section 4(f) property.

#### **Definitions:**

"Administration" refers to the Federal Highway Division Administrator or Division Engineer (as appropriate).

"Applicant" refers to a State Highway Agency or State Department of Transportation, local governmental agency acting through the State Highway Agency or State Department of Transportation.

A "net benefit" is achieved when the transportation use, the measures to minimize harm and the mitigation incorporated into the project results in an overall enhancement of the Section 4(f) property when compared to both the future do-nothing or avoidance alternatives and the present condition of the Section 4(f) property, considering the activities, features and attributes that qualify the property for Section 4(f) protection. A project does not achieve a "net benefit" if it will result in a substantial diminishment of the function or value that made the property eligible for Section 4(f) protection.

"Official(s) with jurisdiction" over Section 4(f) property (typically) include: for a park, the Federal, State or local park authorities or agencies that own and/or manage the park; for a refuge, the Federal, State or local wildlife or waterfowl refuge owners and managers; and for historic sites, the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), whichever has jurisdiction under Section 106 of the National Historic Preservation Act (16 U.S.C. 470f).

#### **Applicability**

The Administration is responsible for review of each transportation project for which this programmatic evaluation is contemplated to determine that it meets the criteria and procedures of this programmatic evaluation. The information and determination will be included in the applicable National Environmental Policy Act (NEPA) documentation and administrative record. This programmatic evaluation will not change any existing procedures for NEPA compliance, public involvement, or any other applicable Federal environmental requirement.

This programmatic evaluation satisfies the requirements of Section 4(f) for projects meeting the applicability criteria listed below. An individual Section 4(f) evaluation will not need to be prepared for such projects:

1. The proposed transportation project uses a Section 4(f) park, recreation area, wildlife or waterfowl refuge, or historic site.
2. The proposed project includes all appropriate measures to minimize harm and subsequent mitigation necessary to preserve and enhance those features and values of the property that originally qualified the property for Section 4(f) protection.
3. For historic properties, the project does not require the major alteration of the characteristics that qualify the property for the National Register of Historic Places (NRHP) such that the property would no longer retain sufficient integrity to be considered eligible for listing. For archeological properties, the project does not require the disturbance or removal of the archaeological resources that have been determined important for preservation in-place rather than for the information that can be obtained through data recovery. The determination of a major alteration or the importance to preserve in-place will be based on consultation consistent with 36 CFR part 800.
4. For historic properties, consistent with 36 CFR part 800, there must be agreement reached amongst the SHPO and/or THPO, as appropriate, the FHWA and the Applicant on measures to minimize harm when there is a use of Section 4(f) property. Such measures must be incorporated into the project.
5. The official(s) with jurisdiction over the Section 4(f) property agree in writing with the assessment of the impacts; the proposed measures to minimize harm; and the mitigation necessary to preserve, rehabilitate and enhance those features and values of the Section 4(f) property; and that such measures will result in a net benefit to the Section 4(f) property.
6. The Administration determines that the project facts match those set forth in the Applicability, Alternatives, Findings, Mitigation and Measures to Minimize Harm, Coordination, and Public Involvement sections of this programmatic evaluation.

This programmatic evaluation can be applied to any project regardless of class of action under NEPA.

#### **Alternatives**

To demonstrate that there are no feasible and prudent alternatives to the use of Section 4(f) property, the programmatic evaluation analysis must address alternatives that avoid the Section 4(f) property. The following alternatives avoid the use of the Section 4(f) property:

1. Do nothing.
2. Improve the transportation facility in a manner that addresses the project's purpose and need without a use of the Section 4(f) property.
3. Build the transportation facility at a location that does not require use of the Section 4(f) property.

This list is intended to be all-inclusive. The programmatic evaluation does not apply if a feasible and prudent alternative is identified that is not discussed in this document. The project record must clearly demonstrate that each of the above alternatives was fully evaluated before the Administration can conclude that the programmatic evaluation can be applied to the project.

### Findings

For this programmatic evaluation to be utilized on a project there must be a finding, given the present condition of the Section 4(f) property, that the do-nothing and avoidance alternatives described in the Alternatives section above are not feasible and prudent. The findings (1, 2, and 3. below) must be supported by the circumstances, studies, consultations, and other relevant information and included in the administrative record for the project. This supporting information and determination will be documented in the appropriate NEPA document and/or project record consistent with current Section 4(f) policy and guidance.

To support the finding, adverse factors associated with the no-build and avoidance alternatives, such as environmental impacts, safety and geometric problems, decreased transportation service, increased costs, and any other factors may be considered collectively. One or an accumulation of these kinds of factors must be of extraordinary magnitude when compared to the proposed use of the Section 4(f) property to determine that an alternative is not feasible and prudent. The net impact of the do-nothing or build alternatives must also consider the function and value of the Section 4(f) property before and after project implementation as well as the physical and/or functional relationship of the Section 4(f) property to the surrounding area or community.

1. Do-Nothing Alternative.  
The Do-Nothing Alternative is not feasible and prudent because it would neither address nor correct the transportation need cited as the NEPA purpose and need, which necessitated the proposed project.
2. Improve the transportation facility in a manner that addresses purpose and need without use of the Section 4(f) property.

It is not feasible and prudent to avoid Section 4(f) property by using engineering design or transportation system management techniques, such as minor location shifts, changes in engineering design standards, use of retaining walls and/or other structures and traffic diversions or other traffic management measures if implementing such measures would result in any of the following:

- Substantial adverse community impacts to adjacent homes, businesses or other improved properties; or
- Substantially increased transportation facility or structure cost; or
- Unique engineering, traffic, maintenance or safety problems; or
- Substantial adverse social, economic or environmental impacts; or
- A substantial missed opportunity to benefit a Section 4(f) property; or
- Identified transportation needs not being met; and
- Impacts, costs or problems would be truly unusual, unique or of extraordinary magnitude when compared with the proposed use of Section 4(f) property after taking into account measures to minimize harm and mitigate for adverse uses, and enhance the functions and value of the Section 4(f) property.

Flexibility in the use of applicable design standards is encouraged during the analysis of these feasible and prudent alternatives.

3. Build a new facility at a new location without a use of the Section 4(f) property. It is not feasible and prudent to avoid Section 4(f) property by constructing at a new location if:
  - The new location would not address or correct the problems cited as the NEPA purpose and need, which necessitated the proposed project; or

- The new location would result in substantial adverse social, economic or environmental impacts (including such impacts as extensive severing of productive farmlands, displacement of a substantial number of families or businesses, serious disruption of community cohesion, jeopardize the continued existence of any endangered or threatened species or resulting in the destruction or adverse modification of their designated critical habitat, substantial damage to wetlands or other sensitive natural areas, or greater impacts to other Section 4(f) properties); or
- The new location would substantially increase costs or cause substantial engineering difficulties (such as an inability to achieve minimum design standards or to meet the requirements of various permitting agencies such as those involved with navigation, pollution, or the environment); and
- Such problems, impacts, costs, or difficulties would be truly unusual or unique or of extraordinary magnitude when compared with the proposed use of the Section 4(f) property after taking into account proposed measures to minimize harm, mitigation for adverse use, and the enhancement of the Section 4(f) property's functions and value.

Flexibility in the use of applicable design standards is encouraged during the analysis of feasible and prudent alternatives.

#### **Mitigation and Measures To Minimize Harm**

This programmatic evaluation and approval may be used only for projects where the Administration, in accordance with this evaluation, ensures that the proposed action includes all possible planning to minimize harm, includes appropriate mitigation measures, and that the official(s) with jurisdiction agree in writing.

#### **Coordination**

In early stages of project development, each project will require coordination with the Federal, State, and/or local agency official(s) with jurisdiction over the Section 4(f) property. For non-Federal Section 4(f) properties, i.e., State or local properties, the official(s) with jurisdiction will be asked to identify any Federal encumbrances. When encumbrances exist, coordination will be required with the Federal agency responsible for such encumbrances.

Copies of the final written report required under this programmatic evaluation shall be offered to the official(s) with jurisdiction over the Section 4(f) property, to other interested parties as part of the normal NEPA project documentation distribution practices and policies or upon request.

#### **Public Involvement**

The project shall include public involvement activities that are consistent with the specific requirements of 23 CFR 771.111, Early coordination, public involvement and project development. For a project where one or more public meetings or hearings are held, information on the proposed use of the Section 4(f) property shall be communicated at the public meeting(s) or hearing(s).

#### **Approval Procedure**

This programmatic evaluation approval applies only after the Administration has:

1. Determined that the project meets the applicability criteria set forth in Applicability section;
2. Determined that all of the alternatives set forth in the Findings section have been fully evaluated;
3. Determined that the findings in the programmatic evaluation (which conclude that the alternative recommended is the only feasible and prudent alternative) result in a clear net benefit to the Section 4(f) property;
4. Determined that the project complies with the Mitigation and Measures to Minimize Harm section of this document;
5. Determined that the coordination and public involvement efforts required by this programmatic evaluation have been successfully completed and necessary written agreements have been obtained; and
6. Documented the information that clearly identifies the basis for the above determinations and assurances.

[FR Doc. 05-7812 Filed 4-19-05; 8:45 am]

BILLING CODE 4910-22-P

For additional information, view the Preamble on the Federal Register's website  
<http://a257.g.akamaitech.net/7/257/2422/01jan2005/1800/edocket.access.gpo.gov/2005/05-7812.htm>.



DCEPA

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REFERENCE



November 3, 1989

**COUNCIL OF THE DISTRICT OF COLUMBIA**

**NOTICE**

**D.C. LAW 8-36**

**"District of Columbia Environmental Policy Act of 1989"**

Pursuant to Section 412 of the District of Columbia Self-Government and Governmental Reorganization Act, P. L. 93-198., "the Act", the Council of the District of Columbia adopted Bill No. 8-8 on first and second readings, June 27, 1989, and July 11, 1989, respectively. Following the signature of the Mayor on July 27, 1989, this legislation was assigned Act No. 8-65, published in the August 11, 1989, edition of the D.C. Register, (Vol. 36 page 5741) and transmitted to Congress on August 4, 1989 for a 30-day review in accordance with Section 602(c)(1) of the Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional Review Period has expired, and therefore, cites this enactment as D.C: Law 8-36, effective October 18, 1989.

David R. Clarke  
Chairman of the Council

Dates Counted During the 30-day Congressional Review Period:

August 4  
September 6,7,8,11,12,13,14,15,18,19,20,21,22,25,26,27,28,29.  
October 2,3,4,5,6,10,11,12,13,16,17 '

DC Act 8-65

In the Council of the District of Columbia

July 27, 1989

To require the Mayor or any District of Columbia board, commission, authority, or person to prepare an environmental impact statement if the Mayor, board, commission, authority, or person proposes or approves an action that, if implemented, is likely to have a significant effect on the quality of the environment; to ensure the residents of the District of Columbia safe, healthful, productive, and aesthetically pleasing surroundings; and to develop a policy to ensure that economic, technical, and population growth occurs in an environmentally sound manner.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "District of Columbia Environmental Policy Act of 1989".

Sec. 2. Purpose.

The purpose of this act is to promote the health, safety and welfare of District of Columbia ("District") residents, to afford the fullest possible preservation and protection of the environment through a

requirement that the environmental impact of proposed District government and privately initiated actions be examined before implementation and to require the Mayor, board, commission, or authority to substitute or require an applicant to substitute an alternative action or mitigating measures for a proposed action, if the alternative action or mitigating measures will accomplish the same purposes as the proposed action with minimized or no adverse environmental effects.

### Sec. 3. Definitions.

For the purposes of this act, the term:

(1) "Action" means (i) a new project or activity directly undertaken by the Mayor or a board, Commission, or authority of the District government or (ii) a project or activity that involves the issuance of a lease, permit, license, certificate, other entitlement, or permission to act by an agency of the District government.

(2) "Major action" means any action that costs over 1 million dollars and that may have a significant impact on the environment, except that, subject to the exemptions in section 7, the Mayor, pursuant to rules issued in accordance with section 10, shall classify any action that costs less than -1 million dollars as a major action, if the action imminently and substantially affects the public health, safety, or welfare. The cost level of 1 million dollars shall be based on 1989 dollars adjusted annually according to the Consumer Price Index.

(3) "Environment" means the physical conditions that will be affected by a proposed action, including but not limited to, the land, air, water, minerals, flora and fauna.

(4) "Hazardous substance" means any solid, liquid, gaseous, or semisolid form or combination that, because of its nature, concentration, physical, chemical, or infectious characteristic, as established by the Mayor, may:

(A) Cause or significantly contribute to an increase in mortality or an increase in a serious, irreversible or incapacitating reversible illness; or

(B) Pose a substantial hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed, including substances that are toxic, carcinogenic, flammable, irritants, strong sensitizers, or that generate pressure through decomposition, heat, or other means and containers and receptacles previously used in the transportation, storage, use, or application of hazardous substances.

(5) "Lead agency" means the District agency designated by the Mayor to have primary responsibility for the preparation of an Environmental Impact Statement (EIS).

(6) "Functional equivalent" means the full and adequate description and analysis of the environmental impact of a proposed action by an agency, board, commission, or authority of the District government that examines or imposes environmental controls under procedures that provide for notice, opportunity for public comment, and the creation of a reviewable record.



Sec. 4. Environmental Impact Statement requirements.

(a) Whenever the Mayor or a board, commission, authority, or person proposes or approves a major that is likely to have substantial negative impact on the environment, if implemented, the Mayor, board, commission, authority, or person shall prepare or cause to be prepared, and transmit, in accordance with subsection (b) of this section, a detailed EIS at least 60 days prior to implementation of the proposed major action, unless the Mayor determines that the proposed major action has been or is subject to the functional equivalent of an EIS. The EIS shall be written in a concise manner. The EIS shall describe and, where appropriate, analyze:

- (1) The goals and nature of the proposed major action and its environment;
- (2) The relationship of the proposed major action to the goals of the adopted Comprehensive Plan, requirements as promulgated by the Zoning Commission, and any District or federal environmental standards;
- (3) Any adverse environmental impact that cannot be avoided if the proposed major action is implemented;
- (4) Alternatives to the proposed major action, including alternative locations, and the adverse and beneficial effects of the alternatives;
- (5) Any irreversible and irretrievable commitment of resources involved in the implementation of the proposed major action;
- (6) Mitigation measures proposed to minimize any adverse environmental impact;
- (7) The impact of the proposed major action on the use and conservation of energy resources, if applicable and significant;
- (8) The cumulative impact of the major action when considered in conjunction with other proposed actions;
- (9) The environmental effect of future expansion or action, if expansion or action is a reasonably foreseeable consequence of the initial major action and the future expansion or action will likely change the scope or nature of the initial major action or its environmental effects;
- (10) Responses to comments provided by the Council, any affected Advisory Neighborhood Commission, and interested members of the public; and
- (11) Any additional information that the Mayor or a board, commission, or authority determines to be helpful in assessing the environmental impact of any proposed major action and the suggested alternatives.

(b) The Mayor, board, commission, or authority shall transmit a copy of any EIS prepared pursuant to subsection (a) of this section to the Council, any District agency that has responsibility for implementing the major action or special expertise with respect to any environmental impact involved, and any affected Advisory Neighborhood Commission. A copy of the EIS shall be made available for review by the public in the main office of the agency

primarily responsible for implementing or permitting the proposed major action. The Mayor, board, commission, or authority shall provide a reasonable period consistent with title 1 of the District of Columbia Administrative Procedure Act approved October 21, 1968 (82 Stat. 1204; D.C. Code, sec. 1-1501 et seq.) ("APA"), for comment on any EIS required to be prepared pursuant to subsection (a) of this section. If 25 registered voters in an affected single member district request a public hearing on an EIS or supplemental EIS or there is significant public interest, the Mayor, board, commission, or authority shall conduct a public hearing pursuant to the rules issued in accordance with section 10(a).

(c)(1) The Mayor, board, agency, commission, or authority of the District government shall determine within 30 days, excluding Saturdays, Sundays, and legal holidays, of receipt of an application for a proposed major action whether an EIS is required, if the action involves the grant or issuance of a lease, permit, license, certificate, or other entitlement by a District agency.

(2) If the Mayor, or a board, commission, or authority of the District government determines that an EIS is not required for a major action that is likely to involve the creation, use, transportation, storage, or disposal of a hazardous substance, the Mayor shall prepare, make available for public inspection, and transmit to the Council a written determination that describes why an EIS is not required prior to the grant or issuance of any applicable lease, permit, license, certificate, entitlement, or permission to act.

(3) If the major action involves the grant or issuance to an applicant of a lease, permit, license, certificate, or other entitlement by a District agency:

(A) The agency shall notify the applicant, in writing, if a determination has been made that an EIS is required. Notice of the determination and the findings that support the determination shall be kept on file by the Mayor.

(B) The Mayor, board, commission, or authority may require an applicant to prepare an EIS. A non-governmental applicant shall be charged a fee to cover the cost of agency review of the EIS. No lease, permit, license, certificate, or other entitlement shall be issued, unless the applicant required to prepare an EIS has completed the EIS in compliance with this act and paid any fee charged pursuant to this paragraph.

(C) The applicant shall assist the Mayor, or the board, commission, or authority at any stage of the review of the proposed major action by timely submitting all relevant information concerning impact, costs, benefits, and alternatives. The Mayor, board, commission, or authority shall deny a proposed action, if the applicant fails to submit relevant information as specified in rules promulgated pursuant to section 10.

#### Sec.5. Adverse impact findings.

If the EIS identifies an adverse effect from a proposed major action and contains a finding that the public health, safety, or welfare is imminently and substantially endangered by the action, the Mayor, board, commission, or authority of the District government shall disapprove the action, unless the applicant proposes mitigating measures or substitutes a reasonable alternative to avoid the danger.

Sec.6. Supplemental EIS.

(a) The Mayor, or a board, commission, authority, or person shall prepare a supplemental EIS if:

- (1) The agency or applicant makes or proposes a substantial change in the proposed action that is relevant to environmental concerns; or
- (2) There are significant new circumstances or information relevant to environmental concerns that affect the proposed action or the impact of the proposed action.

(b) The supplemental EIS shall be prepared, transmitted, and funded in accordance with the requirements of section 4.

Sec .7. Exemptions to an action.

(a) No EIS shall be required by this act with respect to an action:

(1) For which an EIS has been prepared in accordance with the National Environmental Policy Act of 1969, approved January 1, 1970 (83 Stat. 852'; 42 U.S.C. 4321 et seq.), and its implementing regulations, or a determination has been made under NEPA and its implementing regulations that no impact statement is required due to a finding of significant impact or a finding that the proposed action categorically excluded from consideration;

(2) For which a request has been made for the authorization or allocation of funds for a project that involves only feasibility or planning study for a possible future action that has not been approved, adopted, or funded. The study, however, shall include consideration of environmental factors;

(3) Whose impact on the environment has been considered in the functional equivalent of an EIS;

(4) That has reached a critical stage of completion prior to the effective date of this act and the cost of altering or abandoning the action for environmental reasons outweighs the benefits derived from the action;

(5)Of an environmentally protective regulatory nature;

(6) Exempted by rules approved pursuant to section 10(a);

(7) Within the Central Employment Area as defined in the Zoning Regulations of the District of Columbia; or

(8) For which a lease, permit, certificate, or any other entitlement or permission to act by a District government agency has been approved before December 31, 1989.

(b) The Mayor or a board, commission, authority, or person shall prepare a supplemental EIS for any action exempted pursuant to subsections (a)(1) or (a)(3) of this section, if a substantial and relevant question remains with regard to the impact of the action on the environment that would otherwise be addressed in an EIS prepared in accordance with this act.

Sec.8. Lead agencies; files.

(a) The Mayor shall designate a lead agency to prepare an EIS or supplemental EIS when the preparation of the EIS requires the input of more than 1 agency. The lead agency shall, if necessary, oversee the preparation of a single, omnibus EIS, ensure reasoned consideration of and distinction among any inconsistent conclusions, and promote coordination with public and private organizations and individuals with a special expertise or recognized interest.

(b) The Mayor shall maintain a file of all EIS's and supplemental EIS's for public review.

Sec. 9. Judicial Review.

Where an EIS is prepared in connection with the issuance or approval of a lease, permit, license, certificate, or any other entitlement or permission to act by a District government agency that is subject to administrative or judicial review under applicable laws or regulations, the administrative or judicial review shall be governed by the applicable laws and regulations.

Sec.10. Rules.

(a) Within 180 days of the effective date of this act, the Mayor shall, pursuant to title 1 of the APA, issue proposed rules to implement the provisions of this act, including rules that establish categorical exemptions for major actions that would have no significant impact on the environment. The proposed rules shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution within this 45-day review period, the proposed rules shall be deemed approved.

(b) Within 180 days of the effective date of this act, the Department of Consumer and Regulatory Affairs shall issue rules to assist District agencies in the preparation of an EIS, pursuant to title 1 of the APA.

Sec.11. Construction.

Nothing in this act shall be construed to supercede the requirements of District government zoning statutes and regulations or federal and District government environmental statutes or regulations.

Sec.12. Effective date.

This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code, sec. 1-233(c)(1)), and publication in either the District of Columbia Register, the District of Columbia Statutes-at-Large, or the District of Columbia Municipal Regulations.

Signed David E. Carke  
Council of the District of Columbia

APPROVED: July 27, 1989

Introduced as Bill 8-8 on Jan. 3, 1989 by Councilmember Winter.

FIRST READING: 6-27-89; Adopted by approved voice vote; Lightfoot absent.

FINAL READING: 7-1f-89; Adopted by approved voice vote; all present.

Transmitted to the Mayor: July 14, 1989



DCEPA RULE MAKING

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**MAY 9 1997**

**DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS**  
**NOTICE OF FINAL RULEMAKING**

The Director of the Department of Consumer and Regulatory Affairs, pursuant to § 10 of the District of Columbia Environmental Policy Act of 1989, D.C. Law 8-36, effective October 18, 1989, D.C. Code § 6-989, and Mayor's Order 92-151 (December 1, 1992) hereby gives notice of the adoption of the following new Chapter 72 ("Environmental Policy Act Regulations") of Title 20 DCMR, ("Environment"). These rules were adopted on July 11, 1995 and will implement the Environmental Policy Act

On April 22, 1994, the Director of the Department of Consumer and Regulatory Affairs ("DCRA") published in the District of Columbia Register ("D.C. Register") for notice and comment proposed rules to implement the District of Columbia Environmental Policy Act of 1989, D.C.- Law 8-36 (41 DCR 2251 (April 22, 1994))

Section 10 of Law 8-36 requires the Mayor to submit the proposed rules to the District of Columbia Council (the "Council") for review during a review period consisting of 45 days, excluding Saturdays, Sundays, legal holidays, and days of Council recess. (D.C. Code § 6-989(a) (1995)). In accordance with that requirement, the Mayor and DCRA submitted the proposed rules to the Council on October 15, 1994. Also submitted to the Council with the proposed rules was a report responding to citizens comments received in response to the April 22, 1994 Notice of Proposed Rulemaking. This report recommended several changes in the proposed rules, including changes to Sections 7201, 7202, 7203, 7205, 7206, 7209, and 7212. Section 10 of the Act further provides that "if the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution within this 45-day review period, the proposed rules shall be deemed approved"

The Council took no action on the proposed rules or the recommended changes to the proposed rules, and by letter dated March 2, 1995, Council Chairman Clarke stated that by virtue of the Council having taken no action to disapprove it, Proposed Resolution PR10-724, entitled "District of Columbia Environmental Policy Act Proposed Rulemaking Approval Resolution of 1994, was deemed approved on February 18, 1995.

These final rules take effect immediately upon publication of this notice in the D.C. Register.

At the same time as the publication of this Notice of Final Rulemaking, DCRA is also publishing a Notice of Proposed Rulemaking which addresses citizen comments on the April 22, 1994 Proposed Rulemaking and proposes amendments to the sections listed above.

## CHAPTER 72 ENVIRONMENTAL POLICY ACT REGULATIONS

### 7200 GENERAL PROVISIONS

7200.1 Before an agency, board, commission, or authority of the District of Columbia government shall approve any major action, or issue any lease, permit, license, certificate, or other entitlement or permission to act for a proposed major action, the environmental impact of the action must be adequately considered and reviewed by the District government, as provided in these regulations.

7200.2 Agencies, boards, and commissions under the mayor's authority shall integrate, and agencies, boards and commissions not under the mayor's authority shall be requested to integrate the Environmental Impact Statement (EIS) process with other planning processes at the earliest stages of their planning for major actions they intend to propose, when the widest range of feasible alternatives is open for consideration, and before there has been any irretrievable commitment of resources, in order to ensure that planning and decisions reflect environmental values, in order to avoid delays later in the process, and to head off potential conflicts.

### 7201 MAJOR ACTIONS FOR WHICH ENVIRONMENTAL IMPACT SCREENING FORMS ARE REQUIRED

7201.1 An Environmental Impact Screening Form (EISF) shall be prepared for any action that would cost over one million dollars (\$1 million) based on 1989 dollars adjusted annually according to the Consumer Price Index and that may have a significant impact on the environment.

7201.2 An action costing \$1 million or more may have significant impact on the environment and, thus, may be a major action subject to the EISF requirement of § 7201.1 if any of the following conditions are met:

- (a) The action might have a significant adverse effect on a rare or endangered species of animal or plant, or the habitat of the species;
- (b) The action might violate published national or local standards relating to hazardous waste, solid waste or litter control;
- (c) The action might significantly deplete or degrade ground water resources;
- (d) The action might significantly interfere with ground water recharge;
- (e) The action might induce significant growth or concentration of population;
- (f) The action might cause significant flooding, erosion or sedimentation;
- (g) The action might extend a sewer trunk line with capacity to serve new development;
- (h) The action might significantly diminish habitat for fish, wildlife or plants;

- (i) The action might disrupt or divide the physical arrangement of an existing community;
  - (j) The action might create a potential public health hazard or would involve the use, production or disposal of materials that pose a hazard to people, animal or plant populations in the area;
  - (k) The action might violate any ambient air quality standard, contribute significantly to an existing or projected air quality violation, or expose sensitive receptors to significant pollutant concentration;
  - (l) The action might cause significant adverse change in existing surface water quality or quantity;
  - (m) The action might cause a significant adverse change in the use and conservation of energy resources, including an adverse impact on quantity or type of energy used;
  - (n) The action might cause significant adverse change in the existing level of noise in the vicinity of the action;
  - (o) The action might result in the exceedance of any Federal or District standards regarding electric and magnetic fields (EMF), if and when such standards are promulgated.
  - (p) The action, together with other actions proposed concurrently by the applicant, might have a cumulative impact that would be significant under the criteria described in S 7201.2(a)-(0).
- 7201.3 An EISF shall be prepared for any action that would cost less than 1 million dollars (\$1,000,000) based on 1989 dollars adjusted annually according to the consumer Price Index, if the action imminently and substantially affects the public health, safety, or welfare.
- 7201.4 A project imminently and substantially affects the public health, safety, or welfare if any of the following conditions are met:
- (a) The action would violate Federal or District standards relating to hazardous waste, energy resources, air pollution, surface and ground water pollution, soil erosion, storm water, and flooding;
  - (b) The action would negatively affect a rare or endangered species of animal or plant, or the habitat of that species;
  - (c) The action would contaminate a public water supply;
  - (d) The action would create a public health hazard under applicable District regulations; or
  - (e) The action would involve the use, production or disposal in the affected area of hazardous substances as defined in § 7299.1 of these regulations in violation of federal or District environmental regulations.

**7202 ACTIONS FOR WHICH NO ENVIRONMENTAL IMPACT SCREENING FORM IS REQUIRED**

7202.1 No agency shall require that an EISF or an EIS be prepared for the following actions:

- (a) Any action that costs less than 1 million dollars (\$1,000,000) based on 1989 dollars adjusted annually according to the Consumer Price Index, unless that action meets the criteria of § 7201.3 and 7201.4 of these rules;
- (b) Any action for which an Environmental Impact statement ("EIS") has been prepared in accordance with the National Environmental Policy Act of 1969, approved January 1, 1970 (83 Stat.852; 42 U.S.C. § 4321 et seq. ) (NEPA) and its implementing regulations, or a determination has been made under NEPA and its implementing regulations that no impact statement is required due to a finding of no significant impact or a finding that the proposed action is categorically excluded from consideration;
- (c) Any action for which a request has been made for the authorization or allocation of funding that involves only a feasibility or a planning study for a possible future action that has not been approved, adopted or funded. The study, however, shall include consideration of environmental factors;
- (d) Any action whose impact on the environment has been or is considered in the functional equivalent of an EIS, where equivalency is determined by the lead agency;
- (e) Any action that reached a critical stage of completion prior to October 18, 1989, and the cost of altering or abandoning the action for environmental reasons outweighs the benefits derived from the action;
- (f) Any action of an environmentally protective regulatory nature;
- (g) Any action within the Central Employment Area as defined in the zoning Regulations of the District of Columbia; and
- (h) Any action for which a lease, permit, certificate, or any other entitlement or permission to act by a District government agency has been approved before December 31, 1989.

7202.2 In addition to the actions listed in § 7202.1, no agency shall require that an EISF or EIS be prepared for the following classes of actions:

- (a) Class 1. Operation, repair, maintenance, or minor alteration of existing public structures, facilities, mechanical equipment, or topographical features, including replacement of roofs, HVAC, electrical, plumbing, elevator, sprinkler or other systems, plus interior work to common areas and individual units, involving negligible or no expansion of use beyond that previously existing;
- (b) Class 2. Replacement, renovation, or reconstruction of existing structures and facilities, where the new or renovated structure meets the requirements of the Zoning Regulations, is located on the same site as the structure replaced, renovated, or

reconstructed, will have substantially the same purpose and capacity as the structure replaced, renovated, or reconstructed, and will not exceed the density of that structure;

(c) Class 3. Construction and location of limited numbers of small facilities or structures; installation of new equipment in small structures, including replacement of HVAC, electrical, plumbing, elevator, sprinkler or other systems; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. This class includes, but is not limited to:

(1) Single family residences not in conjunction with the building of two or more such units;

(2) Small commercial structures not involving the use of significant amounts of hazardous substances;

(3) Water main, sewage, electrical, and other utility extensions of reasonable length to serve such construction; and

(4) Accessory structures such as garages, patios, swimming pools, and fences;

(d) Class 4. Minor public or private alterations in the condition of land, water, or vegetation which do not involve the removal of mature, healthy trees. This class includes, but is not limited to:

(1) Grading on land with a slope of less than ten percent (10%), except in waterways, wetlands, or officially designated scenic areas;

(2) New gardening, landscaping or planting of trees or other vegetation;

(3) Temporary use of land having negligible permanent effects, such as carnivals, fairs, and sales of Christmas trees; and

(4) The creation of bicycle lanes on existing rights-of-way;

(e) Class 5. Minor alterations in land use limitation in areas with an average slope of less than twenty percent (20%), which do not result in any changes in land use or density. This class includes, but is not limited to:

(1) Minor lot line adjustments, side yard and set back variances; and

(2) Issuance of minor encroachment permits;

(f) Class 6. Actions taken by District agencies as authorized by law or regulation to assure the maintenance, restoration, or enhancement of a natural resource or the environment, where the regulatory process involves procedures for protection of the environment. This includes basic data collection, research, experimental management and resource evaluation activities which do not result in a serious or major disturbance to the environment and activities limited entirely to inspections to check for performance of an operation, or the quality, health or safety of a project;

(g) Class 7. Construction or placement of minor structures accessory to existing commercial, industrial, or institutional facilities. This class includes, but is not limited to:

(1) On-premise signs;

(2) Small parking lots (fewer than 50 vehicles); and;

(3) Placement of seasonal or temporary use items such as mobile food units, portable restrooms, or similar items in generally the same locations from time to time in publicly owned parks, stadiums, or other facilities designed for public use;

(h) Class 8. Action in the nature of a response to an emergency as determined by the Mayor;

(i) Class 9. Action in the nature of remedial actions related to leaking underground storage tanks, removal of PCB equipment, hazardous substances, or other environmental contaminants pursuant to all lawfully required and issued permits;

(j) Class 10. Actions related to the removal of asbestos pursuant to all lawfully required and issued permits;

(k) Class 11. Residential structure projects, or portions of projects, within the R-1 through R-5-A zoning districts, as defined under Chapters 2 and 3 of Title 11, DCMR (Zoning);

(l) Class 12. Actions within Development Zones as defined pursuant to the District of Columbia Economic Development Zone Incentives Act of 1988 (D.C. Law 7-177).

7202.3 An applicant may submit an existing environmental description and analysis of a proposed action to the lead agency, which must make a written determination within thirty (30) days of receipt of the document as to whether or not (i) the environmental description and analysis qualifies as a functional equivalent of an EIS, and (ii) the action is exempt under § 7202.1.

### **7203 DESIGNATION AND RESPONSIBILITIES OF LEAD AND REVIEW AGENCIES**

7203.1 The lead agency responsible for the coordination of the preparation and review of the EISF, and the EIS if necessary, shall be as follows:

(a) For any major action proposed by an applicant that would require any license, permit, certificate of occupancy or other approval from a District Agency prior to implementation, the District agency responsible for the first District government authorization of the project shall be the lead agency;

(b) For any major action proposed by the District government, the agency proposing the project shall be the lead. agency.

- 7203.2 For any public or private major action for which the lead agency is an agency other than DCRA, the lead agency shall submit any EISF send EIS to the DCRA, as review agency, for review, and shall consider the recommendations of DCRA in determining whether to request additional information on environmental impacts pursuant to § 7203.4 and in decisions concerning the major action that is the subject of the EISF or EIS.
- 7203.3 DCRA shall submit its recommendations concerning the need for an EIS to the lead agency within fourteen (14) days of receipt of the submission of the EISF from the lead agency. DCRA shall submit its recommendations concerning any EIS to the lead agency by the end of the period for public comment on the EIS.
- 7203.4 The lead agency may request relevant information from the applicant concerning impact, costs, benefits, and alternatives that it reasonably determines to be necessary in evaluating the proposed major action. If the lead agency has not received any response to the request for information within ninety (90) calendar days, the lead agency shall deny approval of the project.
- 7203.5 For District government projects, DCRA may request relevant information from the lead agency concerning impact, costs, benefits, and alternatives that it reasonably determines to be necessary in evaluating the proposed major action. If DCRA has not received any response to the request for information within ninety (90) calendar days, DCRA shall deny approval of the project
- 7203.6 No agency shall issue any license, permit, certificate, or authorization until completion of the environmental impact review process by the lead agency.

#### **7204 PREPARATION OF ENVIRONMENTAL IMPACT SCREENING FORM**

- 7204.1 The lead agency or the applicant shall complete an EISF for major actions that are not exempted by § 7202.1 or § 7202.2.
- 7204.2 The applicant for a permit for a major action shall file an EISF and five (5) copies with the lead agency for review and determination of whether an EIS is required.
- 7204.3 Along with the EISF, the applicant shall submit a project description and any other available information relative to the environmental impacts of the proposed major action, including, but not limited to, environmental assessments, traffic analyses, computer analyses and any other reports which will assist the lead agency in making its determination.
- 7204.4 Upon the request of the lead agency, the applicant shall provide any additional information requested to complete or clarify the description of the proposed major action and potential environmental impacts. If the applicant has not responded to the request for information within ninety (90) calendar days, the lead agency shall deny approval of the project.

**7205 REVIEW OF ENVIRONMENTAL IMPACT SCREENING FORM**

- 7205.1 The lead agency shall make a written determination, within thirty (30) working days of the submission by an applicant of a complete EISF pursuant to § 7204.2 and 7204.3 for a major action that- is not exempt under 7202.1 or 7202.2, whether or not the action is likely to have substantial negative impact on the environment, arid whether an EIS is required.
- 7205.2 If the lead agency determines that an EIS is required, no lease, permit, license, certificate, or other entitlement shall be issued by the District government until the EIS has been prepared consistent with these regulations and the Environmental Policy Act, has been reviewed arid approved by the District government, and all applicable fees have been paid.
- 7205.3 If the lead agency determines that an EIS is not required for a major action that is likely to involve the creation, use, storage, transportation, or disposal of a hazardous substance, the lead agency shall prepare within ten (10) days of such determination, a written explanation of why an EIS is not required.
- 7205.4 The lead agency shall make the written determination required by § 7205.3 available to the public by publishing a notice in the D.C. Register and transmit a copy to the Council of the District of Columbia prior to granting or issuing of any applicable lease, permit, license, certificate, entitlement, or permission to act.

**7206 PREPARATION OF TFIE ENVIRONMENTAL IMPACT STATEMENT**

- 7206.1 For major actions proposed by an applicant, the applicant shall be responsible for the preparation of the EIS.
- 7206.2 The EIS shall include the following information and will describe and, where appropriate, analyze the following:
- (a) The goals and nature of the proposed major action and its environment;
  - (b) The relationship of the proposed major action to the goals of the adopted comprehensive Plan, requirements as promulgated by the Zoning Commission, and any District or federal environmental standards;
  - (c) Any adverse environmental impact that cannot be avoided if the proposed major action is implemented;
  - (d) Alternatives to the proposed major action, including alternative locations and the adverse and beneficial effects of the alternatives;
  - (e) Any irreversible or irretrievable, commitment of resources involved in the implementation of the proposed major action;
  - (f) Mitigation measures proposed to minimize any adverse environmental impact;



- (g) The impact of the proposed major action on the use of energy resources, if applicable and significant;
- (h) The cumulative impact of the major action when considered in conjunction with other proposed actions;
- (i) The environmental effect of future expansion or action, if expansion or action is a reasonably foreseeable consequence of the initial major action and the future expansion or action will likely change the scope or nature of the initial major action or its environmental effects;
- (j) Responses to comments on the EIS provided by the Council, any affected Advisory Neighborhood Commission, and interested members of the public; and
- (k) Any additional information that the Mayor or a board, commission, or authority determines to be helpful in assessing the environmental impact of any proposed major action and the suggested alternatives.

7206.3 For any given major action covered by this Chapter, only one EIS shall be required.

#### **7208 PUBLIC REVIEW OR ENVIRONMENTAL IMPACT STATEMENTS**

- 7208.1 The lead agency shall transmit a copy of the completed EIS to the Council of the District of Columbia, any District agency that has responsibility for implementing the major action or that has special expertise with respect to any environmental impact involved, and any affected Advisory Neighborhood Commission-
- 7208.2 The lead agency shall publish in the D.C. Register a notice of the availability of the EIS for a forty-five day (45) public comment period.
- 7208.3 The lead agency shall make available to the public for inspection a copy of the EIS, by providing a copy of the EIS in its main office and in the M.L. King Public Library-

#### **7209 PUBLIC HEARING REQUIREMENT**

- 7209.1 The lead agency shall hold a public hearing on an EIS within forty-five (45) calendar days of any request made during the public comment period by twenty-five (25) registered voters in a single member district, or if there is significant public interest in the action that is the subject of the EIS.
- 7209.2 The hearing shall provide an opportunity for the citizens affected by the environmental impacts of the proposed major action and other interested parties to present written and oral comments.
- 7209.3 The applicant shall be given an opportunity to respond to all verbal or written public comments. Comments shall be addressed both individually and collectively and shall be responded to by:

- (a) Supplementing, improving or modifying the analyses in the original EIS;

(b) Making factual corrections to the original EIS;

(c) Explaining why the comments do not warrant further response, by citing the sources, authorities, or reasons which support the position, and if appropriate, indicating those circumstances which would trigger agency reappraisal or further response; and

(d) By attaching to the response all comments received, whether or not the comment is thought merit individual discussion and response. All written and oral comments, and responses to those comments, become part of the record and shall be considered by the lead agency in deciding whether the EIS identifies an adverse effect and that the public health, safety or welfare is imminently and substantially endangered by the action.

## **2710 FINDING AS TO ENVIRONMENTAL IMPACT**

7210.1 The lead agency shall make a written finding, taking into account written and oral public comments, and the responses to those comments, that the EIS either.:

(a) Identifies no adverse effect;

(b) Identifies an adverse effect, but the public health, safety, or welfare is not imminently and substantially endangered; or

(c) Identifies an adverse effect and the public -health, safety, or welfare is imminently and substantially endangered.

7210.2 The lead agency shall make a finding as to the environmental impact of the proposed major action within thirty (30) working days after completion of a public hearing, if one is required, or within thirty (30) working days of the close of the public comment period, if no public hearing is required.

7210.3 If the lead agency makes a finding that the EIS identifies an adverse effect and that the public health, safety, or welfare is imminently and substantially endangered, the lead agency shall disapprove the project unless the lead agency or applicant submits mitigating measures or substitutes a reasonable alternative to avoid the danger.

7210.4 If the lead agency makes a finding that the final EIS identifies no adverse effect, or identifies an adverse effect and the public health safety or welfare is not imminently and substantially endangered, the proposed action shall be approved with respect to the requirements of Law B-36,

7210.5 The lead agency's written finding shall be published in the D.C. Register.

## **7211 REQUIREMENTS FOR A SUPPLEMENTAL EIS**

- 7211.1 The lead agency or applicant shall prepare a supplemental EIS if:
- (a) The lead agency or applicant makes or proposes a substantial change in the proposed major action that is relevant to environmental concerns and not addressed in the EIS;
  - (b) There are significant new circumstances or information relevant to environmental concerns that affect the proposed action or the impact of the proposed action; or
  - (c) The lead agency determines for any action exempted from the EIS process pursuant to § 7202.1(b) (an action subject to the federal EIS requirements under NEPA), or § 7202.1(d) (an action for which a EIS functional equivalent has been prepared), that a substantial And relevant question remains with regard to the impact of -he action on the environment that would otherwise be addressed in an EIS prepared in accordance with these regulations.
- 7211.2 The supplemental EIS shall be prepared, transmitted, funded and reviewed in accordance with the requirements of § 7206.1, 7206.3, 7208, 7209 and 7210.

## **7212 FEES**

- 7212.1 The lead agency shall charge the applicant a fee for the review of the EIS.
- 7212.2 The EIS review fee is forty dollars (\$40) per hour.
- 7212.3 For any EIS, the total review fee shall not exceed one percent (1.0%) of the total project cost of the proposed major action.

## **7213 PROJECT COSTS**

- 7213.1 The total project cost of a proposed action shall include the cost of supplying utility service to the project, the cost of site preparation, the cost of labor and material, the cost of any process equipment required by the project, and the cost of installation of any process equipment.
- 7213.2 The cost of site preparation shall include both pre and post-construction site work, including clearing of trees and vegetation, grading and excavation, implementation of soil erosion and sedimentation control plans, installation of storm water management facilities, and the post-construction replacement of trees and vegetation and other landscaping.
- 7213.3 Site preparation costs shall not include the costs of any remediation actions taken to remove .contaminated sails or to treat contaminated soils or ground water on. site.

**7299 DEFINITIONS**

7299.1 When used in this chapter of this title, the following terms shall have the meanings ascribed:

Act - The District of Columbia Environmental Policy Act of 1989 (34 DCMR 5741).

Action - (i) a new project or activity directly undertaken by an agency, board, commission, or authority of the District government, or (ii) a project or activity that involves the issuance of a lease, permit, license, certificate, or other entitlement, or permission to act by an agency of the District government

Adverse effects - any effect from a proposed action which has a significant negative environmental impact on the public health, safety, or welfare.

Affected ANC - the ANC within which the proposed action will be implemented and ANCs directly adjacent to that ANC.

ANC - Advisory Neighborhood Commission

Applicant - non-governmental party, institution, or corporation which applies to the District of Columbia government for a lease, permit, license, certificate, or other entitlement or permission to act.

Council - the Council of the District of Columbia

Critical stage - that phase of a proposed action where the cost of altering or abandoning the action outweighs the benefits to the environment.

DCRA - the District of Columbia Department of Consumer and Regulatory Affairs.

EISF - Environmental Impact Screening Form

EIS - Environmental Impact Statement

Emergency - any immediate threat to the public health, safety, or welfare, or the quality of the environment for which an immediate response is required by the public or private sector.

Environment - the physical conditions that will be affected by a proposed action, including but not limited to, the land, air, water, minerals, flora, and fauna.

Functional Equivalent – the full and adequate description and analysis of the environmental impact of a proposed action by an agency, board, commission, or authority of the District government that examines or imposes environmental controls under procedures that provide for notice, opportunity for public comment, and the creation of a reviewable record, where the description and analysis discusses impacts on the environment, as defined in these regulations, and includes information concerning, at a minimum, (1) the relationship of the proposed action to any applicable

District or federal environmental standards; (2) any potential unavoidable adverse environmental impact from the project, if implemented; (3) any irreversible and irretrievable commitment of resources involved in the implementation of the project; (4) any significant impact on the use and conservation of energy resources; and (5) the cumulative impact of the project on the environment when considered in conjunction with other actions proposed concurrently by the applicant.

Hazardous substance - any solid, liquid, gaseous, or semisolid form or combination that, because of its nature, concentration, physical, chemical, or infectious characteristic, as established by the agency, may:

(a) Cause or significantly contribute to an increase in mortality or an increase in a serious irreversible or incapacitating reversible illness; or

(b) Pose a substantial hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed, including substances that are toxic, carcinogenic, flammable, irritants, strong sensitizers, or that generate pressure through decomposition, heat, or other means, and containers and receptacles previously used in the transportation, storage, use, or application of hazardous substances.

Lead agency - the District government agency designated by the mayor to have primary responsibility for coordinating the preparation of an Environmental Impact Statement.

Major Action - any action that costs over 1 million dollars and that under S 7201.2 may have a significant impact on the environment, or any action that costs less than 1 million dollars and that under S 7201.4 imminently and substantially affects the public health, safety, or welfare.

Public Structure - any government-owned building, roadway, bridge, alley, sidewalk, curb, gutter, or utility, including structures and equipment related to the pumping or distribution of water, sanitary sewage, storm water, or combination of storm water and sanitary sewage.

Review Agency - the Department of Consumer and Regulator Affairs (DCRA).

Significant - the degree to which an action has a major impact on public health, safety, or welfare, or the quality of the environment.

Significant Negative Impact - any impact, which when considered in its entirety, will result in a significant degradation of the environment.



23 CFR 774 – PARKS, RECREATION AREAS, WILDLIFE  
AND WATERFOWL REFUGES, AND HISTORIC  
SITES (SECTION 4(F))







**Federal Highway Administration, DOT**

**Pt. 774**

(b) A State DOT may amend its application no earlier than one year after a MOU has been executed to request additional highway projects, classes of highway projects, or more environmental responsibilities. However, prior to making any such amendments, the State DOT must provide notice and solicit public comments with respect to the intended amendments. In submitting the amendment to the FHWA, the State DOT must provide copies of all comments received and note the changes, if any, that were made in response to the comments.

**APPENDIX A TO PART 773—FHWA ENVIRONMENTAL RESPONSIBILITIES THAT MAY BE ASSIGNED UNDER SECTION 6005**

*Federal Procedures*

National Environmental Policy Act (NEPA), 42 U.S.C. 4321-43351.  
 FHWA Environmental Regulations at 23 CFR Part 771, 772 and 777  
 CEQ Regulations at 40 CFR 1500-1508  
 Clean Air Act, 42 U.S.C. 7401-7671(q). *Any determinations that do not involve conformity.*

*Noise*

Compliance with the noise regulations at 23 CFR part 772

*Wildlife*

Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531-1544, and Section 1536  
 Marine Mammal Protection Act, 16 U.S.C. 1361  
 Anadromous Fish Conservation Act, 16 U.S.C. 757(a)-757(g)  
 Fish and Wildlife Coordination Act, 16 U.S.C. 661-667(d)  
 Migratory Bird Treaty Act, 16 U.S.C. 703-712  
 Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801 *et seq.*

*Historic and Cultural Resources*

Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470(f) *et seq.*  
 Archeological Resources Protection Act of 1977, 16 U.S.C. 470(aa)-11  
 Archeological and Historic Preservation Act, 16 U.S.C. 469-469(c)  
 Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001-3013

*Social and Economic Impacts*

American Indian Religious Freedom Act, 42 U.S.C. 1996

Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201-4209

*Water Resources and Wetlands*

Clean Water Act, 33 U.S.C. 1251-1377  
 Section 404  
 Section 401  
 Section 319  
 Coastal Barrier Resources Act, 16 U.S.C. 3501-3510  
 Coastal Zone Management Act, 16 U.S.C. 1451-1465  
 Safe Drinking Water Act (SDWA), 42 U.S.C. 300(f)-300(j)(6)  
 Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403  
 Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287  
 Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931  
 TEA-21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(11)  
 Flood Disaster Protection Act, 42 U.S.C. 4001-4128

*Parklands*

Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303  
 Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601-4604

*Hazardous Materials*

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601-9675  
 Superfund Amendments and Reauthorization Act of 1986 (SARA)  
 Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901-6992(k)

*Executive Orders Relating to Highway Projects*

E.O. 11990 Protection of Wetlands  
 E.O. 11988 Floodplain Management  
 E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations  
 E.O. 13112 Invasive Species

**PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(F))**

Sec.  
 774.1 Purpose.  
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 774.5 Coordination.  
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 774.11 Applicability.  
 774.13 Exceptions.  
 774.15 Constructive use determinations.  
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**§ 774.1**

**AUTHORITY:** 23 U.S.C. 103(c), 109(h), 138, 325, 326, 327 and 204(h)(2); 49 U.S.C. 303; Section 6009 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109–59, Aug. 10, 2005, 119 Stat. 1144); 49 CFR 1.48 and 1.51.

**SOURCE:** 73 FR 13395, Mar. 12, 2008, unless otherwise noted.

**§ 774.1 Purpose.**

The purpose of this part is to implement 23 U.S.C. 138 and 49 U.S.C. 303, which were originally enacted as Section 4(f) of the Department of Transportation Act of 1966 and are still commonly referred to as “Section 4(f).”

**§ 774.3 Section 4(f) approvals.**

The Administration may not approve the use, as defined in § 774.17, of Section 4(f) property unless a determination is made under paragraph (a) or (b) of this section.

(a) The Administration determines that:

(1) There is no feasible and prudent avoidance alternative, as defined in § 774.17, to the use of land from the property; and

(2) The action includes all possible planning, as defined in § 774.17, to minimize harm to the property resulting from such use; or

(b) The Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact, as defined in § 774.17, on the property.

(c) If the analysis in paragraph (a)(1) of this section concludes that there is no feasible and prudent avoidance alternative, then the Administration may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that:

(1) Causes the least overall harm in light of the statute’s preservation purpose. The least overall harm is determined by balancing the following factors:

(i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);

(ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or fea-

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tures that qualify each Section 4(f) property for protection;

(iii) The relative significance of each Section 4(f) property;

(iv) The views of the official(s) with jurisdiction over each Section 4(f) property;

(v) The degree to which each alternative meets the purpose and need for the project;

(vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and

(vii) Substantial differences in costs among the alternatives.

(2) The alternative selected must include all possible planning, as defined in § 774.17, to minimize harm to Section 4(f) property.

(d) Programmatic Section 4(f) evaluations are a time-saving procedural alternative to preparing individual Section 4(f) evaluations under paragraph (a) of this section for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by the Administration based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of avoidance alternatives.<sup>1</sup> An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in the programmatic evaluation are met

(1) The determination whether a programmatic Section 4(f) evaluation applies to the use of a specific Section 4(f) property shall be documented as

<sup>1</sup> FHWA has issued five programmatic Section 4(f) evaluations: (1) Final Nationwide Programmatic Section 4(f) Evaluation and Determination for Federal-Aid Transportation Projects That Have a Net Benefit to a Section 4(f) Property; (2) Nationwide Section 4(f) Evaluations and Approvals for Federally-Aided Highway Projects With Minor Involvement With Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges, and Historic Sites; (3) Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites; (4) Historic Bridges; Programmatic Section 4(f) Evaluation and Approval; and (5) Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects.

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specified in the applicable programmatic Section 4(f) evaluation.

(2) The Administration may develop additional programmatic Section 4(f) evaluations. Proposed new or revised programmatic Section 4(f) evaluations will be coordinated with the Department of Interior, Department of Agriculture, and Department of Housing and Urban Development, and published in the FEDERAL REGISTER for comment prior to being finalized. New or revised programmatic Section 4(f) evaluations shall be reviewed for legal sufficiency and approved by the Headquarters Office of the Administration.

(e) The coordination requirements in § 774.5 must be completed before the Administration may make Section 4(f) approvals under this section. Requirements for the documentation and timing of Section 4(f) approvals are located in §§ 774.7 and 774.9, respectively.

[73 FR 13395, Mar. 12, 2008, as amended at 73 FR 31610, June 3, 2008]

**§ 774.5 Coordination.**

(a) Prior to making Section 4(f) approvals under § 774.3(a), the Section 4(f) evaluation shall be provided for coordination and comment to the official(s) with jurisdiction over the Section 4(f) resource and to the Department of the Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. The Administration shall provide a minimum of 45 days for receipt of comments. If comments are not received within 15 days after the comment deadline, the Administration may assume a lack of objection and proceed with the action.

(b) Prior to making *de minimis* impact determinations under § 774.3(b), the following coordination shall be undertaken:

(1) For historic properties:

(i) The consulting parties identified in accordance with 36 CFR part 800 must be consulted; and

(ii) The Administration must receive written concurrence from the pertinent State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), and from the Advisory Council on Historic Preservation (ACHP) if participating in the consultation process, in a finding of “no

adverse effect” or “no historic properties affected” in accordance with 36 CFR part 800. The Administration shall inform these officials of its intent to make a *de minimis* impact determination based on their concurrence in the finding of “no adverse effect” or “no historic properties affected.”

(iii) Public notice and comment, beyond that required by 36 CFR part 800, is not required.

(2) For parks, recreation areas, and wildlife and waterfowl refuges:

(i) Public notice and an opportunity for public review and comment concerning the effects on the protected activities, features, or attributes of the property must be provided. This requirement can be satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.

(ii) The Administration shall inform the official(s) with jurisdiction of its intent to make a *de minimis* impact finding. Following an opportunity for public review and comment as described in paragraph (b)(2)(i) of this section, the official(s) with jurisdiction over the Section 4(f) resource must concur in writing that the project will not adversely affect the activities, features, or attributes that make the property eligible for Section 4(f) protection. This concurrence may be combined with other comments on the project provided by the official(s).

(c) The application of a programmatic Section 4(f) evaluation to the use of a specific Section 4(f) property under § 774.3(d)(1) shall be coordinated as specified in the applicable programmatic Section 4(f) evaluation.

(d) When Federal encumbrances on Section 4(f) property are identified, coordination with the appropriate Federal agency is required to ascertain the agency’s position on the proposed impact, as well as to determine if any other Federal requirements may apply to converting the Section 4(f) land to a different function. Any such requirements must be satisfied, independent of the Section 4(f) approval.

**§ 774.7 Documentation.**

(a) A Section 4(f) evaluation prepared under § 774.3(a) shall include sufficient

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supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property.

(b) A *de minimis* impact determination under § 774.3(b) shall include sufficient supporting documentation to demonstrate that the impacts, after avoidance, minimization, mitigation, or enhancement measures are taken into account, are *de minimis* as defined in § 774.17; and that the coordination required in § 774.5(b) has been completed.

(c) If there is no feasible and prudent avoidance alternative the Administration may approve only the alternative that causes the least overall harm in accordance with § 774.3(c). This analysis must be documented in the Section 4(f) evaluation.

(d) The Administration shall review all Section 4(f) approvals under §§ 774.3(a) and 774.3(c) for legal sufficiency.

(e) A Section 4(f) approval may involve different levels of detail where the Section 4(f) involvement is addressed in a tiered EIS under § 771.111(g) of this chapter.

(1) When the first-tier, broad-scale EIS is prepared, the detailed information necessary to complete the Section 4(f) approval may not be available at that stage in the development of the action. In such cases, the documentation should address the potential impacts that a proposed action will have on Section 4(f) property and whether those impacts could have a bearing on the decision to be made. A preliminary Section 4(f) approval may be made at this time as to whether the impacts resulting from the use of a Section 4(f) property are *de minimis* or whether there are feasible and prudent avoidance alternatives. This preliminary approval shall include all possible planning to minimize harm to the extent that the level of detail available at the first-tier EIS stage allows. It is recognized that such planning at this stage may be limited to ensuring that opportunities to minimize harm at subsequent stages in the development process have not been precluded by decisions made at the first-tier stage. This preliminary Section 4(f) approval is

then incorporated into the first-tier EIS.

(2) The Section 4(f) approval will be finalized in the second-tier study. If no new Section 4(f) use, other than a *de minimis* impact, is identified in the second-tier study and if all possible planning to minimize harm has occurred, then the second-tier Section 4(f) approval may finalize the preliminary approval by reference to the first-tier documentation. Re-evaluation of the preliminary Section 4(f) approval is only needed to the extent that new or more detailed information available at the second-tier stage raises new Section 4(f) concerns not already considered.

(3) The final Section 4(f) approval may be made in the second-tier CE, EA, final EIS, ROD or FONSI.

(f) In accordance with §§ 771.105(a) and 771.133 of this chapter, the documentation supporting a Section 4(f) approval should be included in the EIS, EA, or for a project classified as a CE, in a separate document. If the Section 4(f) documentation cannot be included in the NEPA document, then it shall be presented in a separate document. The Section 4(f) documentation shall be developed by the applicant in cooperation with the Administration.

**§ 774.9 Timing.**

(a) The potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.

(b) Except as provided in paragraph (c) of this section, for actions processed with EISs the Administration will make the Section 4(f) approval either in the final EIS or in the ROD. Where the Section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its Section 4(f) approval in the ROD. Actions requiring the use of Section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until notification by the Administration of Section 4(f) approval.

(c) After the CE, FONSI, or ROD has been processed, a separate Section 4(f) approval will be required, except as provided in § 774.13, if:

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(1) A proposed modification of the alignment or design would require the use of Section 4(f) property; or

(2) The Administration determines that Section 4(f) applies to the use of a property; or

(3) A proposed modification of the alignment, design, or measures to minimize harm (after the original Section 4(f) approval) would result in a substantial increase in the amount of Section 4(f) property used, a substantial increase in the adverse impacts to Section 4(f) property, or a substantial reduction in the measures to minimize harm.

(d) A separate Section 4(f) approval required under paragraph (c) of this section will not necessarily require the preparation of a new or supplemental NEPA document. If a new or supplemental NEPA document is also required under § 771.130 of this chapter, then it should include the documentation supporting the separate Section 4(f) approval. Where a separate Section 4(f) approval is required, any activity not directly affected by the separate Section 4(f) approval can proceed during the analysis, consistent with § 771.130(f) of this chapter.

(e) Section 4(f) may apply to archaeological sites discovered during construction, as set forth in § 774.11(f). In such cases, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, will be shortened as appropriate.

**§ 774.11 Applicability.**

(a) The Administration will determine the applicability of Section 4(f) in accordance with this part.

(b) When another Federal agency is the Federal lead agency for the NEPA process, the Administration shall make any required Section 4(f) approvals unless the Federal lead agency is another U.S. DOT agency.

(c) Consideration under Section 4(f) is not required when the official(s) with jurisdiction over a park, recreation area, or wildlife and waterfowl refuge determine that the property, considered in its entirety, is not significant.

In the absence of such a determination, the Section 4(f) property will be presumed to be significant. The Administration will review a determination that a park, recreation area, or wildlife and waterfowl refuge is not significant to assure its reasonableness.

(d) Where Federal lands or other public land holdings (e.g., State forests) are administered under statutes permitting management for multiple uses, and, in fact, are managed for multiple uses, Section 4(f) applies only to those portions of such lands which function for, or are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife and waterfowl refuge purposes. The determination of which lands so function or are so designated, and the significance of those lands, shall be made by the official(s) with jurisdiction over the Section 4(f) resource. The Administration will review this determination to assure its reasonableness.

(e) In determining the applicability of Section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the official(s) with jurisdiction to identify all properties on or eligible for the National Register of Historic Places (National Register). The Section 4(f) requirements apply to historic sites on or eligible for the National Register unless the Administration determines that an exception under § 774.13 applies.

(1) The Section 4(f) requirements apply only to historic sites on or eligible for the National Register unless the Administration determines that the application of Section 4(f) is otherwise appropriate.

(2) The Interstate System is not considered to be a historic site subject to Section 4(f), with the exception of those individual elements of the Interstate System formally identified by FHWA for Section 4(f) protection on the basis of national or exceptional historic significance.

(f) Section 4(f) applies to all archaeological sites on or eligible for inclusion on the National Register, including those discovered during construction, except as set forth in § 774.13(b).

(g) Section 4(f) applies to those portions of federally designated Wild and

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Scenic Rivers that are otherwise eligible as historic sites, or that are publicly owned and function as, or are designated in a management plan as, a significant park, recreation area, or wildlife and waterfowl refuge. All other applicable requirements of the Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287, must be satisfied, independent of the Section 4(f) approval.

(h) When a property formally reserved for a future transportation facility temporarily functions for park, recreation, or wildlife and waterfowl refuge purposes in the interim, the interim activity, regardless of duration, will not subject the property to Section 4(f).

(i) When a property is formally reserved for a future transportation facility before or at the same time a park, recreation area, or wildlife and waterfowl refuge is established and concurrent or joint planning or development of the transportation facility and the Section 4(f) resource occurs, then any resulting impacts of the transportation facility will not be considered a use as defined in §774.17. Examples of such concurrent or joint planning or development include, but are not limited to:

(1) Designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation facility and the Section 4(f) property; or

(2) Designation, donation, planning, or development of property by two or more governmental agencies with jurisdiction for the potential transportation facility and the Section 4(f) property, in consultation with each other.

**§ 774.13 Exceptions.**

The Administration has identified various exceptions to the requirement for Section 4(f) approval. These exceptions include, but are not limited to:

(a) Restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:

(1) The Administration concludes, as a result of the consultation under 36 CFR 800.5, that such work will not adversely affect the historic qualities of

the facility that caused it to be on or eligible for the National Register, and

(2) The official(s) with jurisdiction over the Section 4(f) resource have not objected to the Administration conclusion in paragraph (a)(1) of this section.

(b) Archeological sites that are on or eligible for the National Register when:

(1) The Administration concludes that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken and where the Administration decides, with agreement of the official(s) with jurisdiction, not to recover the resource; and

(2) The official(s) with jurisdiction over the Section 4(f) resource have been consulted and have not objected to the Administration finding in paragraph (b)(1) of this section.

(c) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of a proposed action. With the exception of the treatment of archeological resources in §774.9(e), the Administration may permit a project to proceed without consideration under Section 4(f) if the property interest in the Section 4(f) land was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by Section 4(f) prior to acquisition. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section.

(d) Temporary occupancies of land that are so minimal as to not constitute a use within the meaning of Section 4(f). The following conditions must be satisfied:

(1) Duration must be temporary, *i.e.*, less than the time needed for construction of the project, and there should be no change in ownership of the land;

(2) Scope of the work must be minor, *i.e.*, both the nature and the magnitude

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of the changes to the Section 4(f) property are minimal;

(3) There are no anticipated permanent adverse physical impacts, nor will there be interference with the protected activities, features, or attributes of the property, on either a temporary or permanent basis;

(4) The land being used must be fully restored, *i.e.*, the property must be returned to a condition which is at least as good as that which existed prior to the project; and

(5) There must be documented agreement of the official(s) with jurisdiction over the Section 4(f) resource regarding the above conditions.

(e) Park road or parkway projects under 23 U.S.C. 204.

(f) Certain trails, paths, bikeways, and sidewalks, in the following circumstances:

(1) Trail-related projects funded under the Recreational Trails Program, 23 U.S.C. 206(h)(2);

(2) National Historic Trails and the Continental Divide National Scenic Trail, designated under the National Trails System Act, 16 U.S.C. 1241–1251, with the exception of those trail segments that are historic sites as defined in § 774.17;

(3) Trails, paths, bikeways, and sidewalks that occupy a transportation facility right-of-way without limitation to any specific location within that right-of-way, so long as the continuity of the trail, path, bikeway, or sidewalk is maintained; and

(4) Trails, paths, bikeways, and sidewalks that are part of the local transportation system and which function primarily for transportation.

(g) Transportation enhancement projects and mitigation activities, where:

(1) The use of the Section 4(f) property is solely for the purpose of preserving or enhancing an activity, feature, or attribute that qualifies the property for Section 4(f) protection; and

(2) The official(s) with jurisdiction over the Section 4(f) resource agrees in writing to paragraph (g)(1) of this section.

**§ 774.15 Constructive use determinations.**

(a) A constructive use occurs when the transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.

(b) If the project results in a constructive use of a nearby Section 4(f) property, the Administration shall evaluate that use in accordance with § 774.3(a).

(c) The Administration shall determine when there is a constructive use, but the Administration is not required to document each determination that a project would not result in a constructive use of a nearby Section 4(f) property. However, such documentation may be prepared at the discretion of the Administration.

(d) When a constructive use determination is made, it will be based upon the following:

(1) Identification of the current activities, features, or attributes of the property which qualify for protection under Section 4(f) and which may be sensitive to proximity impacts;

(2) An analysis of the proximity impacts of the proposed project on the Section 4(f) property. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project; and

(3) Consultation, on the foregoing identification and analysis, with the official(s) with jurisdiction over the Section 4(f) property.

(e) The Administration has reviewed the following situations and determined that a constructive use occurs when:

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(1) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a property protected by Section 4(f), such as:

(i) Hearing the performances at an outdoor amphitheater;

(ii) Sleeping in the sleeping area of a campground;

(iii) Enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance;

(iv) Enjoyment of an urban park where serenity and quiet are significant attributes; or

(v) Viewing wildlife in an area of a wildlife and waterfowl refuge intended for such viewing.

(2) The proximity of the proposed project substantially impairs esthetic features or attributes of a property protected by Section 4(f), where such features or attributes are considered important contributing elements to the value of the property. Examples of substantial impairment to visual or esthetic qualities would be the location of a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from the setting of a Section 4(f) property which derives its value in substantial part due to its setting;

(3) The project results in a restriction of access which substantially diminishes the utility of a significant publicly owned park, recreation area, or a historic site;

(4) The vibration impact from construction or operation of the project substantially impairs the use of a Section 4(f) property, such as projected vibration levels that are great enough to physically damage a historic building or substantially diminish the utility of the building, unless the damage is repaired and fully restored consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties, *i.e.*, the integrity of the contributing features must be returned to a condition which is substantially similar to that which existed prior to the project; or

(5) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife and waterfowl refuge adjacent to the project, substantially interferes with the access to a wildlife and waterfowl refuge when such access is necessary for established wildlife migration or critical life cycle processes, or substantially reduces the wildlife use of a wildlife and waterfowl refuge.

(f) The Administration has reviewed the following situations and determined that a constructive use does not occur when:

(1) Compliance with the requirements of 36 CFR 800.5 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register, results in an agreement of "no historic properties affected" or "no adverse effect;"

(2) The impact of projected traffic noise levels of the proposed highway project on a noise-sensitive activity do not exceed the FHWA noise abatement criteria as contained in Table 1 in part 772 of this chapter, or the projected operational noise levels of the proposed transit project do not exceed the noise impact criteria for a Section 4(f) activity in the FTA guidelines for transit noise and vibration impact assessment;

(3) The projected noise levels exceed the relevant threshold in paragraph (f)(2) of this section because of high existing noise, but the increase in the projected noise levels if the proposed project is constructed, when compared with the projected noise levels if the project is not built, is barely perceptible (3 dBA or less);

(4) There are proximity impacts to a Section 4(f) property, but a governmental agency's right-of-way acquisition or adoption of project location, or the Administration's approval of a final environmental document, established the location for the proposed transportation project before the designation, establishment, or change in the significance of the property. However, if it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section; or



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(5) Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a property for protection under Section 4(f);

(6) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur if the project were not built, as determined after consultation with the official(s) with jurisdiction;

(7) Change in accessibility will not substantially diminish the utilization of the Section 4(f) property; or

(8) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of protected activities, features, or attributes of the Section 4(f) property.

**§ 774.17 Definitions.**

The definitions contained in 23 U.S.C. 101(a) are applicable to this part. In addition, the following definitions apply:

*Administration.* The FHWA or FTA, whichever is making the approval for the transportation program or project at issue. A reference herein to the Administration means the State when the State is functioning as the FHWA or FTA in carrying out responsibilities delegated or assigned to the State in accordance with 23 U.S.C. 325, 326, 327, or other applicable law.

*All possible planning.* All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project.

(1) With regard to public parks, recreation areas, and wildlife and waterfowl refuges, the measures may include (but are not limited to): design modifications or design goals; replacement of land or facilities of comparable value and function; or monetary compensation to enhance the remaining property or to mitigate the adverse impacts of the project in other ways.

(2) With regard to historic sites, the measures normally serve to preserve the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) re-

source in accordance with the consultation process under 36 CFR part 800.

(3) In evaluating the reasonableness of measures to minimize harm under § 774.3(a)(2), the Administration will consider the preservation purpose of the statute and:

(i) The views of the official(s) with jurisdiction over the Section 4(f) property;

(ii) Whether the cost of the measures is a reasonable public expenditure in light of the adverse impacts of the project on the Section 4(f) property and the benefits of the measure to the property, in accordance with § 771.105(d) of this chapter; and

(iii) Any impacts or benefits of the measures to communities or environmental resources outside of the Section 4(f) property.

(4) All possible planning does not require analysis of feasible and prudent avoidance alternatives, since such analysis will have already occurred in the context of searching for feasible and prudent alternatives that avoid Section 4(f) properties altogether under § 774.3(a)(1), or is not necessary in the case of a *de minimis* impact determination under § 774.3(b).

(5) A *de minimis* impact determination under § 774.3(b) subsumes the requirement for all possible planning to minimize harm by reducing the impacts on the Section 4(f) property to a *de minimis* level.

*Applicant.* The Federal, State, or local government authority, proposing a transportation project, that the Administration works with to conduct environmental studies and prepare environmental documents. For transportation actions implemented by the Federal government on Federal lands, the Administration or the Federal land management agency may take on the responsibilities of the applicant described herein.

*CE.* Refers to a Categorical Exclusion, which denotes an action with no individual or cumulative significant environmental effect pursuant to 40 CFR 1508.4 and § 771.117 of this chapter; unusual circumstances are taken into account in making categorical exclusion determinations.

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*De minimis impact.* (1) For historic sites, *de minimis* impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have “no adverse effect” on the historic property in question.

(2) For parks, recreation areas, and wildlife and waterfowl refuges, a *de minimis* impact is one that will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

*EA.* Refers to an Environmental Assessment, which is a document prepared pursuant to 40 CFR parts 1500–1508 and § 771.119 of this title for a proposed project that is not categorically excluded but for which an EIS is not clearly required.

*EIS.* Refers to an Environmental Impact Statement, which is a document prepared pursuant to NEPA, 40 CFR parts 1500–1508, and §§ 771.123 and 771.125 of this chapter for a proposed project that is likely to cause significant impacts on the environment.

*Feasible and prudent avoidance alternative.* (1) A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute.

(2) An alternative is not feasible if it cannot be built as a matter of sound engineering judgment.

(3) An alternative is not prudent if:

(i) It compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need;

(ii) It results in unacceptable safety or operational problems;

(iii) After reasonable mitigation, it still causes:

(A) Severe social, economic, or environmental impacts;

(B) Severe disruption to established communities;

(C) Severe disproportionate impacts to minority or low income populations; or

(D) Severe impacts to environmental resources protected under other Federal statutes;

(iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;

(v) It causes other unique problems or unusual factors; or

(vi) It involves multiple factors in paragraphs (3)(i) through (3)(v) of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

*FONSI.* Refers to a Finding of No Significant Impact prepared pursuant to 40 CFR 1508.13 and § 771.121 of this chapter.

*Historic site.* For purposes of this part, the term “historic site” includes any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register.

*Official(s) with jurisdiction.* (1) In the case of historic properties, the official with jurisdiction is the SHPO for the State wherein the property is located or, if the property is located on tribal land, the THPO. If the property is located on tribal land but the Indian tribe has not assumed the responsibilities of the SHPO as provided for in the National Historic Preservation Act, then a representative designated by such Indian tribe shall be recognized as an official with jurisdiction in addition to the SHPO. When the ACHP is involved in a consultation concerning a property under Section 106 of the NHPA, the ACHP is also an official with jurisdiction over that resource for purposes of this part. When the Section 4(f) property is a National Historic Landmark, the National Park Service is also an official with jurisdiction over that resource for purposes of this part.

(2) In the case of public parks, recreation areas, and wildlife and waterfowl refuges, the official(s) with jurisdiction are the official(s) of the agency or agencies that own or administer the

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property in question and who are empowered to represent the agency on matters related to the property.

(3) In the case of portions of Wild and Scenic Rivers to which Section 4(f) applies, the official(s) with jurisdiction are the official(s) of the Federal agency or agencies that own or administer the affected portion of the river corridor in question. For State administered, federally designated rivers (section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii)), the officials with jurisdiction include both the State agency designated by the respective Governor and the Secretary of the Interior.

*ROD.* Refers to a Record of Decision prepared pursuant to 40 CFR 1505.2 and § 771.127 of this chapter.

*Section 4(f) evaluation.* Refers to the documentation prepared to support the granting of a Section 4(f) approval under § 774.3(a), unless preceded by the word “programmatically.” A “programmatically Section 4(f) evaluation” is the documentation prepared pursuant to § 774.3(d) that authorizes subsequent project-level Section 4(f) approvals as described therein.

*Section 4(f) Property.* Section 4(f) property means publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance.

*Use.* Except as set forth in §§ 774.11 and 774.13, a “use” of Section 4(f) property occurs:

(1) When land is permanently incorporated into a transportation facility;

(2) When there is a temporary occupancy of land that is adverse in terms of the statute’s preservation purpose as determined by the criteria in § 774.13(d); or

(3) When there is a constructive use of a Section 4(f) property as determined by the criteria in § 774.15.

## **PART 777—MITIGATION OF IMPACTS TO WETLANDS AND NATURAL HABITAT**

Sec.

777.1 Purpose.

777.2 Definitions.

777.3 Background.

777.5 Federal participation.

777.7 Evaluation of impacts.

777.9 Mitigation of impacts.

777.11 Other considerations.

*AUTHORITY:* 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 303; 23 U.S.C. 101(a), 103, 109(h), 133(b)(1), (b)(11), and (d)(2), 138, 315; E.O. 11990; DOT Order 5660.1A; 49 CFR 1.48(b).

*SOURCE:* 65 FR 82924, Dec. 29, 2000, unless otherwise noted.

### **§ 777.1 Purpose.**

To provide policy and procedures for the evaluation and mitigation of adverse environmental impacts to wetlands and natural habitat resulting from Federal-aid projects funded pursuant to provisions of title 23, U.S. Code. These policies and procedures shall be applied by the Federal Highway Administration (FHWA) to projects under the Federal Lands Highway Program to the extent such application is deemed appropriate by the FHWA.

### **§ 777.2 Definitions.**

In addition to those contained in 23 U.S.C. 101(a), the following definitions shall apply as used in this part:

*Biogeochemical transformations* means those changes in chemical compounds and substances which naturally occur in ecosystems. Examples are the carbon, nitrogen, and phosphorus cycles in nature, in which these elements are incorporated from inorganic substances into organic matter and recycled on a continuing basis.

*Compensatory mitigation* means restoration, enhancement, creation, and under exceptional circumstances, preservation, of wetlands, wetland buffer areas, and other natural habitats, carried out to replace or compensate for the loss of wetlands or natural habitat area or functional capacity resulting from Federal-aid projects funded pursuant to provisions of title 23, U.S. Code. Compensatory mitigation usually occurs in advance of or concurrent with the impacts to be mitigated, but may occur after such impacts in special circumstances.

*Mitigation bank* means a site where wetlands and/or other aquatic resources or natural habitats are restored, created, enhanced, or in exceptional circumstances, preserved, expressly for the purpose of providing



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## PART 1500—PURPOSE, POLICY, AND MANDATE

Sec.

- 1500.1 Purpose.
- 1500.2 Policy.
- 1500.3 Mandate.
- 1500.4 Reducing paperwork.
- 1500.5 Reducing delay.
- 1500.6 Agency authority.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

### § 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains “action-forcing” provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

### § 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

### § 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council’s intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made

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a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

### § 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(o) Combining environmental documents with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

### § 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.



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### § 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly

and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

## PART 1501—NEPA AND AGENCY PLANNING

Sec.

- 1501.1 Purpose.
- 1501.2 Apply NEPA early in the process.
- 1501.3 When to prepare an environmental assessment.
- 1501.4 Whether to prepare an environmental impact statement.
- 1501.5 Lead agencies.
- 1501.6 Cooperating agencies.
- 1501.7 Scoping.
- 1501.8 Time limits.

**AUTHORITY:** NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

**SOURCE:** 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

### § 1501.1 Purpose.

The purposes of this part include:

- (a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.
- (b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of advisory comments on a completed document.
- (c) Providing for the swift and fair resolution of lead agency disputes.
- (d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.
- (e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

### § 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

- (a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.
- (b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be cir-

culated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

### § 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

### § 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

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(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

### § 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

### § 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning

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which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

**§ 1501.7 Scoping.**

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are relat-

ed to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

**§ 1501.8 Time limits.**

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

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- (vii) Degree to which the action is controversial.
- (viii) Other time limits imposed on the agency by law, regulations, or executive order.
- (2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:
  - (i) Decision on whether to prepare an environmental impact statement (if not already decided).
  - (ii) Determination of the scope of the environmental impact statement.
  - (iii) Preparation of the draft environmental impact statement.
  - (iv) Review of any comments on the draft environmental impact statement from the public and agencies.
  - (v) Preparation of the final environmental impact statement.
  - (vi) Review of any comments on the final environmental impact statement.
  - (vii) Decision on the action based in part on the environmental impact statement.
- (3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.
- (c) State or local agencies or members of the public may request a Federal Agency to set time limits.

## PART 1502—ENVIRONMENTAL IMPACT STATEMENT

- Sec.
- 1502.1 Purpose.
  - 1502.2 Implementation.
  - 1502.3 Statutory requirements for statements.
  - 1502.4 Major Federal actions requiring the preparation of environmental impact statements.
  - 1502.5 Timing.
  - 1502.6 Interdisciplinary preparation.
  - 1502.7 Page limits.
  - 1502.8 Writing.
  - 1502.9 Draft, final, and supplemental statements.
  - 1502.10 Recommended format.
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  - 1502.24 Methodology and scientific accuracy.
  - 1502.25 Environmental review and consultation requirements.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

### § 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

### § 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

### § 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

### § 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in

## § 1502.5

effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

### § 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encour-

aged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

### § 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

### § 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

### § 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

### § 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate

**§ 1502.14**

points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

**§ 1502.10 Recommended format.**

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

- (a) Cover sheet.
- (b) Summary.
- (c) Table of contents.
- (d) Purpose of and need for action.
- (e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).
- (f) Affected environment.
- (g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).
- (h) List of preparers.
- (i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.
- (j) Index.
- (k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further de-

scribed in §§ 1502.11 through 1502.18, in any appropriate format.

**§ 1502.11 Cover sheet.**

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

**§ 1502.12 Summary.**

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

**§ 1502.13 Purpose and need.**

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

**§ 1502.14 Alternatives including the proposed action.**

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly



## § 1502.15

discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

### § 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

### § 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

### § 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

### § 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

### § 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

**§ 1502.23**

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

**§ 1502.20 Tiering.**

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

**§ 1502.21 Incorporation by reference.**

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

**§ 1502.22 Incomplete or unavailable information.**

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement

and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

**§ 1502.23 Cost-benefit analysis.**

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are

## § 1502.24

important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

### **§ 1502.24 Methodology and scientific accuracy.**

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

### **§ 1502.25 Environmental review and consultation requirements.**

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

## PART 1503—COMMENTING

Sec.

- 1503.1 Inviting comments.
- 1503.2 Duty to comment.
- 1503.3 Specificity of comments.
- 1503.4 Response to comments.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

### § 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A–95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

### § 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall com-

ment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

### § 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

### § 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous),

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should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agen-

cies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).

## PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.

1504.1 Purpose.

1504.2 Criteria for referral.

1504.3 Procedure for referrals and response.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

### § 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is “unsatisfactory from the standpoint of public health or welfare or environmental quality,” section 309 directs that the matter be referred to the Council (hereafter “environmental referrals”).

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

[43 FR 55998, Nov. 29, 1978]

### § 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

[43 FR 55998, Nov. 29, 1978]

### § 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency’s comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter’s environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

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(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

- (1) Address fully the issues raised in the referral.
- (2) Be supported by evidence.
- (3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

- (1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

## PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

1505.1 Agency decisionmaking procedures.

1505.2 Record of decision in cases requiring environmental impact statements.

1505.3 Implementing the decision.

**AUTHORITY:** NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

**SOURCE:** 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

### § 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

### § 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

### § 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.



## PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

- 1506.1 Limitations on actions during NEPA process.
- 1506.2 Elimination of duplication with State and local procedures.
- 1506.3 Adoption.
- 1506.4 Combining documents.
- 1506.5 Agency responsibility.
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- 1506.8 Proposals for legislation.
- 1506.9 Filing requirements.
- 1506.10 Timing of agency action.
- 1506.11 Emergencies.
- 1506.12 Effective date.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

### § 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement; and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance.

Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (*e.g.* long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

### § 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

- (1) Joint planning processes.
- (2) Joint environmental research and studies.
- (3) Joint public hearings (except where otherwise provided by statute).
- (4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

### § 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

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(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

### § 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

### § 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead

agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

### § 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rule-making may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

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(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

**§ 1506.7 Further guidance.**

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

**§ 1506.8 Proposals for legislation.**

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality

of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) and the Wilderness Act (16 U.S.C. 1131 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

**§ 1506.9 Filing requirements.**

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street SW., Washington, DC 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the

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public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10.

### § 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

### § 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

### § 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under section 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

## PART 1507—AGENCY COMPLIANCE

Sec.

1507.1 Compliance.

1507.2 Agency capability to comply.

1507.3 Agency procedures.

**AUTHORITY:** NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

**SOURCE:** 43 FR 56002, Nov. 29, 1978, unless otherwise noted.

### § 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.

### § 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize eco-

logical information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

### § 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Execu-

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tive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

## PART 1508—TERMINOLOGY AND INDEX

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AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

### § 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

### § 1508.2 Act.

*Act* means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as “NEPA.”

### § 1508.3 Affecting.

*Affecting* means will or may have an effect on.

### § 1508.4 Categorical exclusion.

*Categorical exclusion* means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its proce-

dures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

### § 1508.5 Cooperating agency.

*Cooperating agency* means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

### § 1508.6 Council.

*Council* means the Council on Environmental Quality established by title II of the Act.

### § 1508.7 Cumulative impact.

*Cumulative impact* is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

### § 1508.8 Effects.

*Effects* include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

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### § 1508.9 Environmental assessment.

*Environmental assessment:*

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

### § 1508.10 Environmental document.

*Environmental document* includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

### § 1508.11 Environmental impact statement.

*Environmental impact statement* means a detailed written statement as required by section 102(2)(C) of the Act.

### § 1508.12 Federal agency.

*Federal agency* means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

### § 1508.13 Finding of no significant impact.

*Finding of no significant impact* means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

### § 1508.14 Human environment.

*Human environment* shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

### § 1508.15 Jurisdiction by law.

*Jurisdiction by law* means agency authority to approve, veto, or finance all or part of the proposal.

### § 1508.16 Lead agency.

*Lead agency* means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

### § 1508.17 Legislation.

*Legislation* includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

### § 1508.18 Major Federal action.

*Major Federal action* includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing



**§ 1508.25**

funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

**§ 1508.19 Matter.**

*Matter* includes for purposes of part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

**§ 1508.20 Mitigation.**

*Mitigation* includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

**§ 1508.21 NEPA process.**

*NEPA process* means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

**§ 1508.22 Notice of intent.**

*Notice of intent* means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

**§ 1508.23 Proposal.**

*Proposal* exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

**§ 1508.24 Referring agency.**

*Referring agency* means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

**§ 1508.25 Scope.**

*Scope* consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

## § 1508.26

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

### § 1508.26 Special expertise.

*Special expertise* means statutory responsibility, agency mission, or related program experience.

### § 1508.27 Significantly.

*Significantly* as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

### § 1508.28 Tiering.

*Tiering* refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

SECTION 404 NATIONWIDE PERMITS  
MARCH 2007 PAGE 11092, 11180-11198





**DEPARTMENT OF DEFENSE****Department of the Army, Corps of Engineers**

[ZRIN 0710-ZA02]

**Reissuance of Nationwide Permits****AGENCY:** Army Corps of Engineers, DoD.**ACTION:** Final notice.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) is reissuing all existing nationwide permits (NWP), general conditions, and definitions, with some modifications. The Corps is also issuing six new NWPs, two new general conditions, and 13 new definitions. The effective date for the new and reissued NWPs will be March 19, 2007. These NWPs will expire on March 18, 2012. The NWPs will protect the aquatic environment and the public interest while effectively authorizing activities that have minimal individual and cumulative adverse effects on the aquatic environment.

**DATES:** The NWPs and general conditions will become effective on March 19, 2007.

**ADDRESSES:** U.S. Army Corps of Engineers, Attn: CECW-CO, 441 G Street NW., Washington, DC 20314-1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson at 202-761-4922 or by e-mail at [david.b.olson@usace.army.mil](mailto:david.b.olson@usace.army.mil) or access the U.S. Army Corps of Engineers Regulatory Home Page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

**SUPPLEMENTARY INFORMATION:****Background**

In the September 26, 2006, issue of the **Federal Register** (71 FR 56258), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 43 existing nationwide permits (NWPs) and issue six new NWPs. The Corps also proposed to reissue its general conditions and add one new general condition.

The Corps proposal is intended to simplify the NWP program while continuing to provide environmental protection, by ensuring that the NWPs authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment and satisfy other public interest factors.

As a result of the comments received in response to the September 26, 2006, proposal, we have made a number of changes to the NWPs, general conditions, and definitions to further clarify the permits, facilitate their

administration, and strengthen environmental protection. These changes are discussed in the preamble.

The Corps is reissuing the 43 existing NWPs, issuing six new NWPs, reissuing 26 existing general conditions, and issuing one new general condition. The Corps is also reissuing many of the NWP definitions, and providing 13 new definitions. The effective date for these NWPs, general conditions, and definitions is March 19, 2007. These NWPs, general conditions, and definitions expire on March 18, 2012.

While the Administrative Procedure Act requires a substantive rule to be published in the **Federal Register** at least 30 days before its effective date, exceptions to this requirement can be made for good cause (5 U.S.C. 553(d)(3)). We are utilizing this good cause exception to reduce hardships on the regulated public.

**Grandfather Provision for Expiring NWPs**

In accordance with 33 CFR 330.6(b), activities authorized by the current NWPs issued on January 15, 2002, that have commenced or are under contract to commence by March 18, 2007, will have until March 18, 2008, to complete the activity under the terms and conditions of the current NWPs.

**Clean Water Act Section 401 Water Quality Certifications (WQC) and Coastal Zone Management Act (CZMA) Consistency Determinations**

In the September 26, 2006, **Federal Register** notice and concurrent with letters from Corps Districts to the appropriate state agencies, the Corps requested initial 401 certifications and CZM consistency determinations. This began the Clean Water Act section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency determination processes.

Today's **Federal Register** notice begins the 60-day period for states, Indian Tribes, and EPA to complete their WQC process for the NWPs. This **Federal Register** notice also provides a 60-day period for coastal states to complete their CZMA consistency determination processes. This 60-day period will end on May 11, 2007.

While the states, Indian Tribes, and EPA complete their WQC processes and the states complete their CZMA consistency determination processes, the use of an NWP to authorize a discharge into waters of the United States is contingent upon obtaining individual water quality certification or a case-specific WQC waiver. Likewise, the use of an NWP to authorize an activity within, or outside, a state's

coastal zone that will affect land or water uses or natural resources of that state's coastal zone, is contingent upon obtaining an individual CZMA consistency determination, or a case-specific presumption of CZMA concurrence. We are taking this approach to reduce the hardships on the regulated public that would be caused by a substantial gap in NWP coverage if we were to wait 60 days before these NWPs would become effective.

After the 60-day period, the latest version of any written position take by a state, Indian tribe, or EPA on its WQC for any of the NWPs will be accepted as the state's final position on those NWPs. If the state, Indian tribe, or EPA takes no action by May 11, 2007, WQC will be considered waived for those NWPs.

After the 60-day period, the latest version of any written position take by a state on its CZMA consistency determination for any of the NWPs will be accepted as the state's final position on those NWPs. If the state takes no action by May 11, 2007, CZMA concurrence will be presumed for those NWPs.

**Discussion of Public Comments****I. Overview**

In response to the September 26, 2006, **Federal Register** notice, we received more than 22,500 comments. We reviewed and fully considered all comments received in response to that notice.

**General Comments**

Many commenters provided general support for the proposal, and some of them stated that the changes are a step forward in improving consistency in the NWP program. Some commenters said that the proposed NWPs provide a balance between environmental protection and allowing development to occur. One commenter said that the NWP program provides sufficient environmental protection, through its general conditions and the ability for the district engineer to exercise discretionary authority to require individual permits. Several commenters stated that the proposed NWPs are simpler, clearer, and easier to understand. Three commenters said that further streamlining is necessary. One commenter recommended adopting a standard numbering system for paragraphs and subparagraphs within the NWP text. Three commenters said that the Corps should retain appropriate references to general conditions in the text of NWPs, for purpose of clarification.

To the extent that it is feasible, we have adopted a standard format for the

significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The NWP's issued today are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, these NWP's do not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

#### *Executive Order 13175*

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The phrase “policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

The NWP's issued today do not have tribal implications. They are generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, Executive Order 13175 does not apply to this proposal. Corps districts are conducting government-to-government consultation with Indian tribes to develop regional conditions that help protect tribal rights and trust resources, and to facilitate compliance with general condition 16, Tribal Rights.

#### *Environmental Documentation*

A decision document, which includes an environmental assessment and Finding of No Significant Impact (FONSI), has been prepared for each NWP. These decision documents are available at: <http://www.regulations.gov> (docket ID number COE-2006-0005). They are also available by contacting

Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW., Washington, DC 20314-1000.

#### *Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing the final NWP's and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The proposed NWP's are not a “major rule” as defined by 5 U.S.C. 804(2).

#### *Executive Order 12898*

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The NWP's issued today are not expected to negatively impact any community, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

#### *Executive Order 13211*

The proposed NWP's are not a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

#### *Authority*

We are issuing new NWP's, modifying existing NWP's, and reissuing NWP's without change under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.).

Dated: March 1, 2007.

**Don T. Riley,**

*Major General, U.S. Army, Director of Civil Works.*

#### **Nationwide Permits, Conditions, Further Information, and Definitions**

##### *A. Index of Nationwide Permits, Conditions, Further Information, and Definitions*

##### *Nationwide Permits*

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2. Structures in Artificial Canals.
3. Maintenance.
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.
5. Scientific Measurement Devices.
6. Survey Activities.
7. Outfall Structures and Associated Intake Structures.
8. Oil and Gas Structures on the Outer Continental Shelf.
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Nationwide Permit General Conditions

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Further Information

Definitions.

Best management practices (BMPs).  
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 Single and complete project.  
 Stormwater management.  
 Stormwater management facilities.  
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 Structure.

Tidal wetland.  
 Vegetated shallows.  
 Waterbody.

#### B. Nationwide Permits

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66). (Section 10)

2. *Structures in Artificial Canals.* Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

3. *Maintenance.* (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of and within existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional riprap to protect the structure. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance

dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the district engineer under separate authorization. The placement of riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.

(c) This NWP also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation or beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

*Notification:* For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). Where maintenance dredging is proposed, the pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (Sections 10 and 404)

**Note:** This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Clean Water Act Section 404(f) exemption for maintenance.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and

clam and oyster digging, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Sections 10 and 404)

5. *Scientific Measurement Devices.* Devices, whose purpose is to measure and record scientific data, such as staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. (Sections 10 and 404)

6. *Survey Activities.* Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, and historic resources surveys. For the purposes of this NWP, the term "exploratory trenching" means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 25 cubic yards. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under Section 402 of the Clean Water Act. (Sections 10 and 404)

7. *Outfall Structures and Associated Intake Structures.* Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or that are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System

Program (Section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

8. *Oil and Gas Structures on the Outer Continental Shelf.* Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps designated dredged material disposal areas.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 10)

9. *Structures in Fleeting and Anchorage Areas.* Structures, buoys, floats and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where the U.S. Coast Guard has established such areas for that purpose. (Section 10)

10. *Mooring Buoys.* Non-commercial, single-boat, mooring buoys. (Section 10)

11. *Temporary Recreational Structures.* Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use, provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

12. *Utility Line Activities.* Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss

of greater than 1/2 acre of waters of the United States.

*Utility lines:* This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The term "utility line" does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

*Utility line substations:* This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2 acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

*Foundations for overhead utility line towers, poles, and anchors:* This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than



a larger single pad) are used where feasible.

**Access roads:** This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the total discharge from a single and complete project does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a

jurisdictional area (i.e., water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 27.) (Sections 10 and 404)

**Note 1:** Where the proposed utility line is constructed or installed in navigable waters of the United States (i.e., section 10 waters), copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

**Note 2:** Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, accordance with the requirements for temporary fills.

**Note 3:** Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

**13. Bank Stabilization.** Bank stabilization activities necessary for erosion prevention, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless this criterion is waived in writing by the district engineer;

(c) The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line, unless this criterion is waived in writing by the district engineer;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless this criterion is waived in writing by the district engineer;

(e) No material is of the type, or is placed in any location, or in any manner, to impair surface water flow

into or out of any water of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and, (g) The activity is not a stream channelization activity.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot along the bank below the plane of the ordinary high water mark or the high tide line. (See general condition 27.) (Sections 10 and 404)

**14. Linear Transportation Projects.** Activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

This NWP also authorizes temporary structures, fills, and work necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds 1/10 acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 27.) (Sections 10 and 404)

**Note:** Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

15. *U.S. Coast Guard Approved Bridges.* Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit. (Section 404)

16. *Return Water From Upland Contained Disposal Areas.* Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs on the upland and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. (Section 404)

17. *Hydropower Projects.* Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

18. *Minor Discharges.* Minor discharges of dredged or fill material

into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than 1/10 acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 27.) (Sections 10 and 404)

19. *Minor Dredging.* Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). (Sections 10 and 404)

20. *Oil Spill Cleanup.* Activities required for the containment and cleanup of oil and hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing state contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. (Sections 10 and 404)

21. *Surface Coal Mining Operations.* Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations provided the activities are already authorized, or are

currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

**Notification:** The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

22. *Removal of Vessels.* Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 27.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the "Historic Properties" general condition is completed. (Sections 10 and 404)

**Note 1:** If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

**Note 2:** Compliance with general condition 17, Endangered Species, and general condition 18, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the likelihood that submerged vessels may be historic properties.

23. *Approved Categorical Exclusions.* Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from environmental documentation, because it is included within a category of actions which neither individually nor

cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW-CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

**Notification:** Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Sections 10 and 404)

**Note:** The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are the: Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rglsindx.htm>. Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same Web site.

**24. Indian Tribe or State Administered Section 404 Programs.** Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899. (Section 10)

**Note 1:** As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

**Note 2:** Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Pub. L. 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.3(a)(2)).

**25. Structural Discharges.** Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and

walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a section 10 permit if located in navigable waters of the United States. (Section 404)

26. [Reserved]  
**27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities.** Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas and the restoration and enhancement of non-tidal streams and other non-tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands. This NWP does not authorize stream channelization. This NWP does not

authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

**Reversion.** For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. Fish and Wildlife Service (FWS), the National Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the OSM or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland that has not been abandoned or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal

or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity result in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

**Reporting:** For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSM or the applicable state agency. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

**Notification.** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27), except for the following activities:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. FWS, NRCS, FSA, NMFS, NOS, or their designated state cooperating agencies;

(2) Voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSM or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation. (Sections 10 and 404)

**Note:** This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee programs.

However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

**28. Modifications of Existing Marinas.** Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Section 10)

**29. Residential Developments.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

**Subdivisions:** For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/2 acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

**30. Moist Soil Management for Wildlife.** Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient

riparian areas must be maintained adjacent to all open water bodies, including streams to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies. (Section 404).

**Note:** The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

**31. Maintenance of Existing Flood Control Facilities.** Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) were previously authorized by the Corps by individual permit, general permit, by 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline," as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an upland site or an authorized disposal site in waters of the United States, and proper siltation controls must be used.

**Maintenance Baseline:** The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline

based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels, but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

**Mitigation:** The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental impacts are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no

further mitigation will be required for maintenance activities within the maintenance baseline. In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require compensatory mitigation and/or best management practices as appropriate.

**Emergency Situations:** In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

**Notification:** The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 27). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the dredged material disposal site. (Sections 10 and 404)

**32. Completed Enforcement Actions.** Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of Section 404 of the Clean Water Act, provided that:

(a) The unauthorized activity affected no more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the

unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an

enforcement action brought by the United States under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, Section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself. Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e). (Sections 10 and 404)

**33. Temporary Construction, Access, and Dewatering.** Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged

material may be allowed if the district engineer determines that it will not cause more than minimal adverse effects on aquatic resources. Following completion of construction, temporary fill must be entirely removed to upland areas, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. (Sections 10 and 404)

**34. Cranberry Production Activities.** Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

**Notification:** The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 27.) (Section 404)

**35. Maintenance Dredging of Existing Basins.** Excavation and removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less, provided the

dredged material is deposited at an upland site and proper siltation controls are used. (Section 10)

**36. Boat Ramps.** Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the 50 cubic yard limit is waived in writing by the district engineer;

(b) The boat ramp does not exceed 20 feet in width, unless this criterion is waived in writing by the district engineer;

(c) The base material is crushed stone, gravel or other suitable material;

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and,

(e) No material is placed in special aquatic sites, including wetlands.

The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging may be authorized by another NWP, a regional general permit, or an individual permit.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 27.) (Sections 10 and 404)

**37. Emergency Watershed Protection and Rehabilitation.** Work done by or funded by:

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the prospective permittee should wait until the district engineer issues an NWP verification before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). (Sections 10 and 404)

**38. Cleanup of Hazardous and Toxic Waste.** Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

**Note:** Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

**39. Commercial and Institutional Developments.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants,

business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses, new ski areas, or oil and gas wells is not authorized by this NWP.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

**40. Agricultural Activities.** Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams, unless for drainage ditches constructed in intermittent and ephemeral streams, this 300 linear foot limit is waived in writing by the district engineer.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

**Note:** Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act Section 404(f)(1)(C) exemption because of the recapture provision at Section 404(f)(2).

**41. Reshaping Existing Drainage Ditches.** Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. The reshaping of the ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the ditch as originally constructed (i.e., the capacity of the ditch must be the same as originally constructed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality.

This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity, if more than 500 linear feet of drainage ditch will be reshaped. (See general condition 27.) (Section 404)

**42. Recreational Facilities.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (e.g., football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it

does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

**43. Stormwater Management Facilities.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction and maintenance of stormwater management facilities, including the excavation of stormwater ponds/facilities, detention basins, and retention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

**Notification:** For the construction of new stormwater management facilities, or the expansion of existing stormwater management facilities, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility. (Section 404)

**44. Mining Activities.** Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities. The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into

non-tidal wetlands adjacent to tidal waters.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

45. *Repair of Uplands Damaged by Discrete Events.* This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

**Notification:** The permittee must submit a pre-construction notification to the district engineer (see general condition 27) within 12-months of the date of the damage. The pre-construction notification should include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. (Sections 10 and 404)

**Note:** Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.)

46. *Discharges in Ditches.* Discharges of dredged or fill material into non-tidal ditches that are: (1) Constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) are determined to be

waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

47. *Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.* Activities required for the inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that have been identified by the Pipeline and Hazardous Materials Safety Administration's Pipeline Safety Program (PHP) within the U.S. Department of Transportation as time-sensitive (see 49 CFR parts 192 and 195) and additional maintenance activities done in conjunction with the time-sensitive inspection and repair activities. All activities must meet the following criteria:

(a) Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable when temporary structures, work and discharges, including cofferdams, are necessary for construction activities or access fills or dewatering of construction sites;

(b) Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect);

(c) Temporary fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate;

(d) In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench so that there is no change in preconstruction contours;

(e) To the maximum extent practicable, the restoration of open waters must be to the pre-construction course, condition, capacity, and location of the waterbody;

(f) Any exposed slopes and stream banks must be stabilized immediately upon completion of the project;

(g) Additional maintenance activities done in conjunction with the time-sensitive inspection or repair must not result in additional losses of waters of the United States; and,

(h) The permittee is a participant in the Pipeline Repair and Environmental Guidance System (PREGS).

**Reporting:** The permittee must submit a post construction report to the PHP within seven days after completing the work. The report must be submitted electronically to PHP via PREGS. The report must contain the following information: Project sites located in waters of the United States, temporary access routes, stream dewatering sites, temporary fills and temporary structures identified on a map of the pipeline corridor; photographs of the pre- and post-construction work areas located in waters of the United States; and a list of best management practices employed for each pipeline segment shown on the map. (Section 10 and 404)

**Note:** Division engineers may modify this NWP by adding regional conditions to protect the aquatic environment, as long as those regional conditions do not require pre-construction notification or other actions that would delay time sensitive inspections and repairs. Examples of appropriate regional conditions include best management practices.

48. *Existing Commercial Shellfish Aquaculture Activities.* This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures necessary for the continued operation of the existing commercial aquaculture activity. This NWP also authorizes discharges of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize new operations or the expansion of the project area for an existing commercial shellfish aquaculture activity. This NWP does not authorize the cultivation of new species (i.e., species not previously cultivated in the waterbody). This NWP



does not authorize attendant features such as docks, piers, boat ramps, stockpiles, staging areas, or the deposition of shell material back into waters of the United States as waste.

**Reporting:** For those activities that do not require pre-construction notification, the permittee must submit a report to the district engineer that includes the following information: (1) The size of the project area for the commercial shellfish aquaculture activity (in acres); (2) the location of the activity; (3) a brief description of the culture method and harvesting method(s); (4) the name(s) of the cultivated species; and (5) whether canopy predator nets are being used. This is a subset of the information that would be required for pre-construction notification. This report may be provided by letter or using an optional reporting form provided by the Corps. Only one report needs to be submitted during the period this NWP is valid, as long as there are no changes to the operation that require pre-construction notification. The report must be submitted to the district engineer within 90 days of the effective date of this NWP.

**Notification:** The permittee must submit a pre-construction notification to the district engineer if: (1) The project area is greater than 100 acres; or (2) there is any reconfiguration of the aquaculture activity, such as relocating existing operations into portions of the project area not previously used for aquaculture activities; or (3) there is a change in species being cultivated; or (4) there is a change in culture methods (e.g., from bottom culture to off-bottom culture); or (5) dredge harvesting, tilling, or harrowing is conducted in areas inhabited by submerged aquatic vegetation. (See general condition 27.) (Sections 10 and 404)

**Note:** The permittee should notify the applicable U.S. Coast Guard office regarding the project.

**49. Coal Remining Activities.** Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal, provided the activities are already authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI) Office of Surface Mining (OSM), or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977. Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond

forfeiture contracts. The permittee must clearly demonstrate to the district engineer that the reclamation plan will result in a net increase in aquatic resource functions. As part of the project, the permittee may conduct coal mining activities in an adjacent area, provided the newly mined area is less than 40 percent of the area being remined plus any unmined area necessary for the reclamation of the remined area.

**Notification:** The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

**50. Underground Coal Mining Activities.** Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

**Notification:** The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

**Note:** Coal preparation and processing activities outside of the mine site may be authorized by NWP 21.

#### **C. Nationwide Permit General Conditions**

**Note:** To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as appropriate, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP.

**1. Navigation.** (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

**2. Aquatic Life Movements.** No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

**3. Spawning Areas.** Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

**4. Migratory Bird Breeding Areas.** Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

**5. Shellfish Beds.** No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48.

**6. Suitable Material.** No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

**7. Water Supply Intakes.** No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement

of public water supply intake structures or adjacent bank stabilization.

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. *Fills Within 100-Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. *Equipment.* Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.

13. *Removal of Temporary Fills.* Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety.

15. *Wild and Scenic Rivers.* No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official

study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

16. *Tribal Rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

17. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed

species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until Section 7 consultation has been completed.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWPs.

(e) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. FWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide Web pages at <http://www.fws.gov/> and <http://www.noaa.gov/fisheries.html> respectively.

18. *Historic Properties.* (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State

Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, explaining the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate

Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

19. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the district engineer after notice and opportunity for public comment. The district engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NHPAs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, and 50 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NHPAs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with general condition 27, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NHPAs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

20. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed  $\frac{1}{10}$  acre and require pre-construction notification, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-

specific waiver of this requirement. For wetland losses of  $\frac{1}{10}$  acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment. Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream restoration, to ensure that the activity results in minimal adverse effects on the aquatic environment.

(e) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NHPAs. For example, if an NHPA has an acreage limit of  $\frac{1}{2}$  acre, it cannot be used to authorize any project resulting in the loss of greater than  $\frac{1}{2}$  acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that a project already meeting the established acreage limits also satisfies the minimal impact requirement associated with the NHPAs.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. Riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland

compensatory mitigation for wetland losses.

(g) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

(h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level.

21. *Water Quality.* Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

22. *Coastal Zone Management.* In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

23. *Regional and Case-By-Case Conditions.* The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

24. *Use of Multiple Nationwide Permits.* The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United

States for the total project cannot exceed  $\frac{1}{3}$ -acre.

25. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

\_\_\_\_\_  
(Transferee)

\_\_\_\_\_  
(Date)

26. *Compliance Certification.* Each permittee who received an NWP verification from the Corps must submit a signed certification regarding the completed work and any required mitigation. The certification form must be forwarded by the Corps with the NWP verification letter and will include:

(a) A statement that the authorized work was done in accordance with the NWP authorization, including any general or specific conditions;

(b) A statement that any required mitigation was completed in accordance with the permit conditions; and

(c) The signature of the permittee certifying the completion of the work and mitigation.

27. *Pre-Construction Notification.* (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, as a general rule, will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review

process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity:

(1) Until notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) If 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 17 that listed species or critical habitat might be affected or in the vicinity of the project, or to notify the Corps pursuant to general condition 18 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that is “no effect” on listed species or “no potential to cause effects” on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) is completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee cannot begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to

determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) The PCN must include a delineation of special aquatic sites and other waters of the United States on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters of the United States, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, where appropriate;

(5) If the proposed activity will result in the loss of greater than  $\frac{1}{10}$  acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(6) If any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, for non-Federal applicants the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

(7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

(c) *Form of Pre-Construction Notification:* The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is a PCN and must include all of

the information required in paragraphs (b)(1) through (7) of this general condition. A letter containing the required information may also be used.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(2) For all NWP 48 activities requiring pre-construction notification and for other NWP activities requiring pre-construction notification to the district engineer that result in the loss of greater than  $\frac{1}{2}$ -acre of waters of the United States, the district engineer will immediately provide (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy of the PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(3) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by Section 305(b)(4)(B) of the

Magnuson-Stevens Fishery Conservation and Management Act.

(4) Applicants are encouraged to provide the Corps multiple copies of pre-construction notifications to expedite agency coordination.

(5) For NWP 48 activities that require reporting, the district engineer will provide a copy of each report within 10 calendar days of receipt to the appropriate regional office of the NMFS.

(e) *District Engineer's Decision:* In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If the proposed activity requires a PCN and will result in a loss of greater than  $\frac{1}{10}$  acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any conditions the district engineer deems necessary. The district engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the district engineer to be minimal, the district engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan.

28. *Single and Complete Project.* The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

#### D. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project.

#### E. Definitions

*Best management practices (BMPs):* Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

*Compensatory mitigation:* The restoration, establishment (creation), enhancement, or preservation of aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all

appropriate and practicable avoidance and minimization has been achieved.

*Currently serviceable:* Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

*Discharge:* The term "discharge" means any discharge of dredged or fill material and any activity that causes or results in such a discharge.

*Enhancement:* The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

*Ephemeral stream:* An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

*Establishment (creation):* The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

*Historic Property:* Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

*Independent utility:* A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

*Intermittent stream:* An intermittent stream has flowing water during certain

times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

*Loss of waters of the United States:* Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities eligible for exemptions under Section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

*Non-tidal wetland:* A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

*Open water:* For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of "open waters" include rivers, streams, lakes, and ponds.

*Ordinary High Water Mark:* An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)).

**Perennial stream:** A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

**Practicable:** Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

**Pre-construction notification:** A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

**Preservation:** The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

**Re-establishment:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area.

**Rehabilitation:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

**Restoration:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: Re-establishment and rehabilitation.

**Riffle and pool complex:** Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

**Riparian areas:** Riparian areas are lands adjacent to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects waterbodies with their adjacent uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 20.)

**Shellfish seeding:** The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

**Single and complete project:** The term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete project must have independent utility (see definition). For linear projects, a "single and complete project" is all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

**Stormwater management:** Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse

effects of changes in land use on the aquatic environment.

**Stormwater management facilities:** Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

**Stream bed:** The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

**Stream channelization:** The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

**Structure:** An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

**Tidal wetland:** A tidal wetland is a wetland (i.e., water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(d).

**Vegetated shallows:** Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

**Waterbody:** For purposes of the NWP, a waterbody is a jurisdictional

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water of the United States that, during a year with normal patterns of precipitation, has water flowing or standing above ground to the extent that an ordinary high water mark (OHWM) or other indicators of jurisdiction can be determined, as well as any wetland area

(see 33 CFR 328.3(b)). If a jurisdictional wetland is adjacent—meaning bordering, contiguous, or neighboring—to a jurisdictional waterbody displaying an OHWM or other indicators of jurisdiction, that waterbody and its adjacent wetlands are considered

together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of “waterbodies” include streams, rivers, lakes, ponds, and wetlands.

[FR Doc. E7-3960 Filed 3-9-07; 8:45 am]

**BILLING CODE 3710-92-P**



36 CFR 800

PROTECTION OF HISTORIC PROPERTIES





**36 CFR PART 800 -- PROTECTION OF HISTORIC PROPERTIES (incorporating amendments effective August 5, 2004)**

**Subpart A -- Purposes and Participants**

Sec.

800.1 Purposes.

800.2 Participants in the Section 106 process.

**Subpart B -- The Section 106 Process**

800.3 Initiation of the section 106 process.

800.4 Identification of historic properties.

800.5 Assessment of adverse effects.

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800.10 Special requirements for protecting National Historic Landmarks.

800.11 Documentation standards.

800.12 Emergency situations.

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**Subpart C -- Program Alternatives**

800.14 Federal agency program alternatives.

800.15 Tribal, State and Local Program Alternatives. (Reserved)

800.16 Definitions.

Appendix A – Criteria for Council involvement in reviewing individual section 106 cases

**Authority:** 16 U.S.C. 470s.

**Subpart A-Purposes and Participants**

**§ 800.1 Purposes.**

(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of

project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) *Relation to other provisions of the act.* Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) *Timing.* The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

**§ 800.2 Participants in the Section 106 process.**

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the

implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.* Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) *Council.* The Council issues regulations to implement section 106,

provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) *Council entry into the section 106 process.* When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) *Council assistance.* Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) *Consulting parties.* The following parties have consultative roles in the section 106 process.

(1) *State historic preservation officer.*

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) *Indian tribes and Native Hawaiian organizations.*

(i) *Consultation on tribal lands.*

(A) *Tribal historic preservation officer.* For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) *Tribes that have not assumed SHPO functions.* When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) *Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.* Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant

preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall

provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) *Representatives of local governments.* A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) *Applicants for Federal assistance, permits, licenses and other approvals.* An applicant for Federal assistance or for a Federal permit, license or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government to government relationships with Indian tribes.

(5) *Additional consulting parties.* Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) *The public.*

(1) *Nature of involvement.* The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and

the relationship of the Federal involvement to the undertaking.

(2) *Providing notice and information.* The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) *Use of agency procedures.* The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

#### **Subpart B-The section 106 Process**

##### **§ 800.3 Initiation of the section 106 process.**

(a) *Establish undertaking.* The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) *No potential to cause effects.* If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) *Program alternatives.* If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) *Coordinate with other reviews.* The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation, such as section 4(f) of the Department of

Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State or tribal law to meet the requirements of section 106.

(c) *Identify the appropriate SHPO and/or THPO.* As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) *Tribal assumption of SHPO responsibilities.* Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) *Undertakings involving more than one State.* If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) *Conducting consultation.* The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) *Failure of the SHPO/THPO to respond.* If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) *Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) *Plan to involve the public.* In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) *Identify other consulting parties.* In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) *Involving local governments and applicants.* The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) *Involving Indian tribes and Native Hawaiian organizations.* The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) *Requests to be consulting parties.* The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) *Expediting consultation.* A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

#### **§ 800.4 Identification of historic properties.**

(a) *Determine scope of identification efforts.* In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) *Identify historic properties.* Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews,

sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's Standards and Guidelines for Identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal and local laws, standards and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) *Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14 (b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) *Evaluate historic significance.*

(1) *Apply National Register criteria.*

In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's Standards and Guidelines for Evaluation, the agency official shall

apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) *Results of identification and evaluation.*

(1) *No historic properties affected.* If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv)(A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in

accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

#### **§ 800.5 Assessment of adverse effects.**

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) *Examples of adverse effects.*

Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) *Finding of no adverse effect.* The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) *Consulting party review.* If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) *Agreement with, or no objection to, finding.* Unless the Council is reviewing the finding pursuant to paragraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) *Disagreement with finding.*

(i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) *Council review of findings.*

(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have

been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) *Results of assessment.*

(1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.



(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

**§ 800.6 Resolution of adverse effects.**

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process.

Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility

in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects.*

(1) *Resolution without the Council.*

(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse

effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) *Memorandum of agreement.* A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a

memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) *Invited signatories.*

(i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) *Concurrence by others.* The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories

shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

**§ 800.7 Failure to resolve adverse effects.**

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the

agency official when it executes the memorandum of agreement.

(c) *Comments by the Council.*

(1) *Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

**§ 800.8 Coordination With the National Environmental Policy Act.**

(a) *General principles.*

(1) *Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan

their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a “major Federal action significantly affecting the quality of the human environment,” and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party roles.* SHPO/THPOs, Indian tribes and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with Section 106.* During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and

(v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents.*

(i) The agency official shall submit the EA, DEIS or EIS to the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection.

(i) If the Council agrees with the objection:

(A) The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the issue of the objection.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council. The head of the agency may delegate his or her duties under this paragraph to the agency's senior Policy Official. If the agency official's initial decision regarding the matter that is the subject of the objection will be revised, the agency official shall proceed in accordance with the revised decision. If the final decision of the agency is to affirm the initial agency decision, once the summary of the final decision has been sent to the Council, the agency official shall continue its compliance with this section.

(ii) If the Council disagrees with the objection, the Council shall so notify the agency official, in which case the agency official shall continue its compliance with this section.

(iii) If the Council fails to respond to the objection within the 30 day period, the agency official shall continue its compliance with this section.

(4) *Approval of the undertaking.* If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this

subpart shall then be satisfied when either:

- (i) a binding commitment to such proposed measures is incorporated in
  - (A) the ROD, if such measures were proposed in a DEIS or EIS; or
  - (B) an MOA drafted in compliance with § 800.6(c); or
- (ii) the Council has commented under § 800.7 and received the agency's response to such comments.

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.

#### **§ 800.9 Council review of section 106 compliance.**

(a) *Assessment of agency official compliance for individual undertakings.* The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the

agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) *Intentional adverse effects by applicants.*

(1) *Agency responsibility.* Section 110(k) of the act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

(2) *Consultation with the Council.* When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

(3) *Compliance with Section 106.* If an agency official, after consulting with

the Council, determines to grant the assistance, the agency official shall comply with §§ 800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

(d) *Evaluation of Section 106 operations.* The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

(1) *Information from participants.*

Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

(2) *Improving the operation of section 106.* Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

#### **§ 800.10 Special requirements for protecting National Historic Landmarks.**

(a) *Statutory requirement.* Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When

commenting on such undertakings, the Council shall use the process set forth in §§ 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) *Resolution of adverse effects.* The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.

(c) *Involvement of the Secretary.* The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) *Report of outcome.* When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

#### § 800.11 Documentation standards.

(a) *Adequacy of documentation.* The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information needed to meet the standard. At the request of the agency official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

(b) *Format.* The agency official may use documentation prepared to comply with other laws to fulfill the

requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) *Confidentiality.*

(1) *Authority to withhold information.* Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) *Consultation with the Council.*

When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

(3) *Other authorities affecting confidentiality.* Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency official to protect the privacy of non-governmental applicants.

(d) *Finding of no historic properties affected.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;

(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and

(3) The basis for determining that no historic properties are present or affected.

(e) *Finding of no adverse effect or adverse effect.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;

(2) A description of the steps taken to identify historic properties;

(3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;

(4) A description of the undertaking's effects on historic properties;

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

(f) *Memorandum of agreement.*

When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

(g) *Requests for comment without a memorandum of agreement.*

Documentation shall include:

(1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;

(2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;

(3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and

(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).

#### § 800.12 Emergency situations.

(a) *Agency procedures.* The agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 800.3 through 800.6.

(b) *Alternatives to agency procedures.* In the event an agency official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:

(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or

(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) *Local governments responsible for section 106 compliance.* When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.

(d) *Applicability.* This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

#### § 800.13 Post-review discoveries.

(a) *Planning for subsequent discoveries.*

(1) *Using a programmatic agreement.* An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the

Archeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) *Eligibility of properties.* The agency official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

#### Subpart C-Program Alternatives

##### § 800.14 Federal agency program alternatives.

(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the Federal Register and take other appropriate steps to seek public input during the development of alternate procedures.

(2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the Federal Register.

(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic agreements.* The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of programmatic agreements.* A programmatic agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing programmatic agreements for agency programs.*

(i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) *Public Participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until

it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) *Developing programmatic agreements for complex or multiple undertakings.* Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

(4) *Prototype programmatic agreements.* The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) *Exempted categories.*

(1) *Criteria for establishing.* The Council or an agency official may propose a program or category of undertakings that may be exempted

from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

(2) *Public participation.* The proponent of the exemption shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The proponent of the exemption shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The proponent of the exemption shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council review of proposed exemptions.* The Council shall review an exemption proposal that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the relevant agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic

properties in accordance with section 214 of the act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) *Notice.* The proponent of the exemption shall publish notice of any approved exemption in the Federal Register.

(d) *Standard treatments.*

(1) *Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the Federal Register.

(2) *Public participation.* The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interested. Where an agency official has proposed a standard treatment, the Council may request the agency official to arrange for public involvement.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Termination.* The Council may terminate a standard treatment by publication of a notice in the Federal Register 30 days before the termination takes effect.

(e) *Program comments.* An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) *Agency request.* The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council action.* Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the Federal Register of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.



(ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed program alternative has nationwide applicability, the agency official shall identify an appropriate government to government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda and applicable provisions of law.

(2) *Results of consultation.* The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views

into account in reaching a final decision on the proposed program alternative.

#### **§ 800.15 Tribal, State, and local program alternatives. (Reserved)**

#### **§ 800.16 Definitions.**

(a) *Act* means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470-470w-6.

(b) *Agency* means agency as defined in 5 U.S.C. 551.

(c) *Approval of the expenditure of funds* means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) *Comment* means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

(g) *Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) *Day or days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) *Head of the agency* means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local or tribal government has assumed or has

been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(l)(1) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) *Indian tribe* means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) *Local government* means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) *Memorandum of agreement* means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) *National Historic Landmark* means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(q) *National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) *National Register criteria* means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s)(1) *Native Hawaiian organization* means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of

historic preservation that are significant to Native Hawaiians.

(2) *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) *Programmatic agreement* means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).

(u) *Secretary* means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) *State Historic Preservation Officer (SHPO)* means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) *Tribal Historic Preservation Officer (THPO)* means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

(z) *Senior policy official* means the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.

#### **Appendix A to Part 800 -- Criteria for Council Involvement in Reviewing Individual section 106 Cases**

(a) *Introduction.* This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) *General policy.* The Council may choose to exercise its authorities under

the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) *Specific criteria.* The Council is likely to enter the section 106 process at the steps specified in the regulations in this part when an undertaking:

(1) *Has substantial impacts on important historic properties.* This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

(3) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to § 800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other

authorities, such as the Native American Graves Protection and Repatriation Act.

## 40 CEQ FREQUENTLY ASKED QUESTIONS

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## NEPA'S FORTY MOST ASKED QUESTIONS

1. Range of Alternatives.
2. Alternatives Outside the Capability of Applicant or Jurisdiction of Agency.
3. No-Action Alternative.
4. Agency's Preferred Alternative.
5. Proposed Action v. Preferred Alternative.
6. Environmentally Preferable Alternative.
7. Difference Between Sections of EIS on Alternatives and Environmental Consequences.
8. Early Application of NEPA.
9. Applicant Who Needs Other Permits.
10. Limitations on Action During 30-Day Review Period for Final EIS.
11. Limitations on Actions by an Applicant During EIS Process.
12. Effective Date and Enforceability of the Regulations.
13. Use of Scoping Before Notice of Intent to Prepare EIS.
14. Rights and Responsibilities of Lead and Cooperating Agencies.
15. Commenting Responsibilities of EPA.
16. Third Party Contracts.
17. Disclosure Statement to Avoid Conflict of Interest.
18. Uncertainties About Indirect Effects of A Proposal.
19. Mitigation Measures.
20. Worst Case Analysis. [Withdrawn.]
21. Combining Environmental and Planning Documents.
22. State and Federal Agencies as Joint Lead Agencies.
23. Conflicts of Federal Proposal With Land Use Plans, Policies or Controls.
24. Environmental Impact Statements on Policies, Plans or Programs.
25. Appendices and Incorporation by Reference.
26. Index and Keyword Index in EISs.
27. List of Preparers.
28. Advance or Xerox Copies of EIS.
29. Responses to Comments.
30. Adoption of EISs.
31. Application of Regulations to Independent Regulatory Agencies.
32. Supplements to Old EISs.
33. Referrals.
34. Records of Decision.
35. Time Required for the NEPA Process.
36. Environmental Assessments (EA).
37. Findings of No Significant Impact (FONSI).
38. Public Availability of EAs v. FONSI.
39. Mitigation Measures Imposed in EAs and FONSI.
40. Propriety of Issuing EA When Mitigation Reduces Impacts.

### 1a. Range of Alternatives. What is meant by "range of alternatives" as referred to in Sec. 1505.1(e)?

A. The phrase "range of alternatives" refers to the alternatives discussed in environmental documents. It includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. Section 1502.14. A decisionmaker must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents. Moreover, a decisionmaker must, in fact, consider all the alternatives discussed in an EIS. Section 1505.1(e).

### 1b. How many alternatives have to be discussed when there is an infinite number of possible alternatives?

A. For some proposals there may exist a very large or even an infinite number of possible reasonable alternatives. For example, a proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest. When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS. An appropriate

series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.

### 2a. Alternatives Outside the Capability of Applicant or Jurisdiction of Agency. If an EIS is prepared in connection with an application for a permit or other federal approval, must the EIS rigorously analyze and discuss alternatives that are outside the capability of the applicant or can it be limited to reasonable alternatives that can be carried out by the applicant?

A. Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.

### 2b. Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized?

A. An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).

### 3. No-Action Alternative. What does the "no action" alternative include? If an agency is under a court order or legislative command to act, must the EIS address the "no action" alternative?

A. Section 1502.14(d) requires the alternatives analysis in the EIS to "include the alternative of no action." There are two distinct interpretations of "no action" that must be considered, depending on the nature of the proposal being evaluated. The first situation might involve an action such as updating a land management plan where ongoing programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases "no action" is "no change" from current management direction or level of management intensity. To construct an alternative that is based on no management at all would be a useless academic exercise. Therefore, the "no action" alternative may be thought of in terms of continuing with the present course of action until that action is changed. Consequently, projected impacts of alternative management schemes would be compared in the EIS to those impacts projected for the existing plan. In this case, alternatives would include management plans of both greater and lesser intensity, especially greater and lesser levels of resource development.

The second interpretation of "no action" is illustrated in instances involving federal decisions on proposals for projects. "No action" in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.

Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

In light of the above, it is difficult to think of a situation where it would not be appropriate to address a "no action" alternative. Accordingly, the regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives. It is also an example of a reasonable alternative outside the jurisdiction of the agency which must be analyzed. Section 1502.14(c). See Question 2 above. Inclusion of such an

analysis in the EIS is necessary to inform the Congress, the public, and the President as intended by NEPA. Section 1500.1(a).

**4a. Agency's Preferred Alternative. What is the "agency's preferred alternative"?**

A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative," although in some cases one alternative may be both. See Question 6 below. It is identified so that agencies and the public can understand the lead agency's orientation.

**4b. Does the "preferred alternative" have to be identified in the Draft EIS and the Final EIS or just in the Final EIS?**

A. Section 1502.14(e) requires the section of the EIS on alternatives to "identify the agency's preferred alternative if one or more exists, in the draft statement, and identify such alternative in the final statement . . ." This means that if the agency has a preferred alternative at the Draft EIS stage, that alternative must be labeled or identified as such in the Draft EIS. If the responsible federal official in fact has no preferred alternative at the Draft EIS stage, a preferred alternative need not be identified there. By the time the Final EIS is filed, Section 1502.14(e) presumes the existence of a preferred alternative and requires its identification in the Final EIS "unless another law prohibits the expression of such a preference."

**4c. Who recommends or determines the "preferred alternative"?**

A. The lead agency's official with line responsibility for preparing the EIS and assuring its adequacy is responsible for identifying the agency's preferred alternative(s). The NEPA regulations do not dictate which official in an agency shall be responsible for preparation of EISs, but agencies can identify this official in their implementing procedures, pursuant to Section 1507.3.

Even though the agency's preferred alternative is identified by the EIS preparer in the EIS, the statement must be objectively prepared and not slanted to support the choice of the agency's preferred alternative over the other reasonable and feasible alternatives.

**5a. Proposed Action v. Preferred Alternative. Is the "proposed action" the same thing as the "preferred alternative"?**

A. The "proposed action" may be, but is not necessarily, the agency's "preferred alternative." The proposed action may be a proposal in its initial form before undergoing analysis in the EIS process. If the proposed action is [46 FR 18028] internally generated, such as preparing a land management plan, the proposed action might end up as the agency's preferred alternative. On the other hand the proposed action may be granting an application to a non-federal entity for a permit. The agency may or may not have a "preferred alternative" at the Draft EIS stage (see Question 4 above). In that case the agency may decide at the Final EIS stage, on the basis of the Draft EIS and the public and agency comments, that an alternative other than the proposed action is the agency's "preferred alternative."

**5b. Is the analysis of the "proposed action" in an EIS to be treated differently from the analysis of alternatives?**

A. The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the "proposed action." Section 1502.14 is titled "Alternatives including the proposed action" to reflect such comparable treatment. Section 1502.14(b) specifically requires "substantial treatment" in the EIS of each alternative including the proposed action. This regulation does not dictate an amount of information to be provided, but rather, prescribes a level of treatment, which may in turn require varying amounts of information, to enable a reviewer to evaluate and compare alternatives.

**6a. Environmentally Preferable Alternative. What is the meaning of the term "environmentally preferable alternative" as used in the regulations with reference to Records of Decision? How is the term "environment" used in the phrase?**

A. Section 1505.2(b) requires that, in cases where an EIS has been prepared, the Record of Decision (ROD) must identify all alternatives that were considered, ". . . specifying the alternative or alternatives which were considered to be environmentally preferable." The environmentally preferable alternative is the alternative that will promote the national environmental policy as expressed in NEPA's Section 101. Ordinarily, this means the alternative that causes the least damage to the biological and

physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.

The Council recognizes that the identification of the environmentally preferable alternative may involve difficult judgments, particularly when one environmental value must be balanced against another. The public and other agencies reviewing a Draft EIS can assist the lead agency to develop and determine environmentally preferable alternatives by providing their views in comments on the Draft EIS. Through the identification of the environmentally preferable alternative, the decisionmaker is clearly faced with a choice between that alternative and others, and must consider whether the decision accords with the Congressionally declared policies of the Act.

**6b. Who recommends or determines what is environmentally preferable?**

A. The agency EIS staff is encouraged to make recommendations of the environmentally preferable alternative(s) during EIS preparation. In any event the lead agency official responsible for the EIS is encouraged to identify the environmentally preferable alternative(s) in the EIS. In all cases, commentators from other agencies and the public are also encouraged to address this question. The agency must identify the environmentally preferable alternative in the ROD.

**7. Difference Between Sections of EIS on Alternatives and Environmental Consequences. What is the difference between the sections in the EIS on "alternatives" and "environmental consequences"? How do you avoid duplicating the discussion of alternatives in preparing these two sections?**

A. The "alternatives" section is the heart of the EIS. This section rigorously explores and objectively evaluates all reasonable alternatives including the proposed action. Section 1502.14. It should include relevant comparisons on environmental and other grounds. The "environmental consequences" section of the EIS discusses the specific environmental impacts or effects of each of the alternatives including the proposed action. Section 1502.16. In order to avoid duplication between these two sections, most of the "alternatives" section should be devoted to describing and comparing the alternatives. Discussion of the environmental impacts of these alternatives should be limited to a concise descriptive summary of such impacts in a comparative form, including charts or tables, thus sharply defining the issues and providing a clear basis for choice among options. Section 1502.14. The "environmental consequences" section should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives. It forms the analytic basis for the concise comparison in the "alternatives" section.

**8. Early Application of NEPA. Section 1501.2(d) of the NEPA regulations requires agencies to provide for the early application of NEPA to cases where actions are planned by private applicants or non-Federal entities and are, at some stage, subject to federal approval of permits, loans, loan guarantees, insurance or other actions. What must and can agencies do to apply NEPA early in these cases?**

A. Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed. Through early consultation, business applicants and approving agencies may gain better appreciation of each other's needs and foster a decisionmaking process which avoids later unexpected confrontations.

Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program", such as a means for prospective applicants to conduct pre-application consultations with the lead and cooperating agencies. Applicants need to find out, in advance of project planning, what environmental studies or other information will be required, and what mitigation requirements are likely, in connection with the later federal NEPA process. Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application

procedures and information requirements in newsletters or other media used by potential applicants.

Complementing Section 1501.2(d), Section 1506.5(a) requires agencies to assist applicants by outlining the types of information required in those cases where the agency requires the applicant to submit environmental data for possible use by the agency in preparing an EIS.

Section 1506.5(b) allows agencies to authorize preparation of environmental assessments by applicants. Thus, the procedures should also include a means for anticipating and utilizing applicants' environmental studies or "early corporate environmental assessments" to fulfill some of the federal agency's NEPA obligations. However, in such cases the agency must still evaluate independently the environmental issues [46 FR 18029] and take responsibility for the environmental assessment.

These provisions are intended to encourage and enable private and other non-federal entities to build environmental considerations into their own planning processes in a way that facilitates the application of NEPA and avoids delay.

**9. Applicant Who Needs Other Permits. To what extent must an agency inquire into whether an applicant for a federal permit, funding or other approval of a proposal will also need approval from another agency for the same proposal or some other related aspect of it?**

A. Agencies must integrate the NEPA process into other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Specifically, the agency must "provide for cases where actions are planned by . . . applicants," so that designated staff are available to advise potential applicants of studies or other information that will foreseeably be required for the later federal action; the agency shall consult with the applicant if the agency foresees its own involvement in the proposal; and it shall insure that the NEPA process commences at the earliest possible time. Section 1501.2(d). (See Question 8.)

The regulations emphasize agency cooperation early in the NEPA process. Section 1501.6. Section 1501.7 on "scoping" also provides that all affected Federal agencies are to be invited to participate in scoping the environmental issues and to identify the various environmental review and consultation requirements that may apply to the proposed action. Further, Section 1502.25(b) requires that the draft EIS list all the federal permits, licenses and other entitlements that are needed to implement the proposal.

These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval, or whether the applicant is waiting until a proposal has been substantially developed before requesting federal aid or approval.

Thus, a federal agency receiving a request for approval or assistance should determine whether the applicant has filed separate requests for federal approval or assistance with other federal agencies. Other federal agencies that are likely to become involved should then be contacted, and the NEPA process coordinated, to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions. The agency should inform the applicant that action on its application may be delayed unless it submits all other federal applications (where feasible to do so), so that all the relevant agencies can work together on the scoping process and preparation of the EIS.

**10a. Limitations on Action During 30-Day Review Period for Final EIS. What actions by agencies and/or applicants are allowed during EIS preparation and during the 30-day review period after publication of a final EIS?**

A. No federal decision on the proposed action shall be made or recorded until at least 30 days after the publication by EPA of notice that the particular EIS has been filed with EPA. Sections 1505.2 and 1506.10. Section 1505.2 requires this decision to be stated in a public Record of Decision.

Until the agency issues its Record of Decision, no action by an agency or an applicant concerning the proposal shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives. Section 1506.1(a). But this does not preclude preliminary planning or

design work which is needed to support an application for permits or assistance. Section 1506.1(d).

When the impact statement in question is a program EIS, no major action concerning the program may be taken which may significantly affect the quality of the human environment, unless the particular action is justified independently of the program, is accompanied by its own adequate environmental impact statement and will not prejudice the ultimate decision on the program. Section 1506.1(c).

**10b. Do these limitations on action (described in Question 10a) apply to state or local agencies that have statutorily delegated responsibility for preparation of environmental documents required by NEPA, for example, under the HUD Block Grant program?**

A. Yes, these limitations do apply, without any variation from their application to federal agencies.

**11. Limitations on Actions by an Applicant During EIS Process. What actions must a lead agency take during the NEPA process when it becomes aware that a non-federal applicant is about to take an action within the agency's jurisdiction that would either have an adverse environmental impact or limit the choice of reasonable alternatives (e.g., prematurely commit money or other resources towards the completion of the proposal)?**

A. The federal agency must notify the applicant that the agency will take strong affirmative steps to insure that the objectives and procedures of NEPA are fulfilled. Section 1506.1(b). These steps could include seeking injunctive measures under NEPA, or the use of sanctions available under either the agency's permitting authority or statutes setting forth the agency's statutory mission. For example, the agency might advise an applicant that if it takes such action the agency will not process its application.

**12a. Effective Date and Enforceability of the Regulations. What actions are subject to the Council's new regulations, and what actions are grandfathered under the old guidelines?**

A. The effective date of the Council's regulations was July 30, 1979 (except for certain HUD programs under the Housing and Community Development Act, 42 U.S.C. 5304(h), and certain state highway programs that qualify under Section 102(2)(D) of NEPA for which the regulations became effective on November 30, 1979). All the provisions of the regulations are binding as of that date, including those covering decisionmaking, public participation, referrals, limitations on actions, EIS supplements, etc. For example, a Record of Decision would be prepared even for decisions where the draft EIS was filed before July 30, 1979.

But in determining whether or not the new regulations apply to the preparation of a particular environmental document, the relevant factor is the date of filing of the draft of that document. Thus, the new regulations do not require the redrafting of an EIS or supplement if the draft EIS or supplement was filed before July 30, 1979. However, a supplement prepared after the effective date of the regulations for an EIS issued in final before the effective date of the regulations would be controlled by the regulations.

Even though agencies are not required to apply the regulations to an EIS or other document for which the draft was filed prior to July 30, 1979, the regulations encourage agencies to follow the regulations "to the fullest extent practicable," i.e., if it is feasible to do so, in preparing the final document. Section 1506.12(a).

**12b. Are projects authorized by Congress before the effective date of the Council's regulations grandfathered?**

A. No. The date of Congressional authorization for a project is not determinative of whether the Council's regulations or former Guidelines apply to the particular proposal. No incomplete projects or proposals of any kind are grandfathered in whole or in part. Only certain environmental documents, for which the draft was issued before the effective date of the regulations, are grandfathered and [46 FR 18030] subject to the Council's former Guidelines.

**12c. Can a violation of the regulations give rise to a cause of action?**

A. While a trivial violation of the regulations would not give rise to an independent cause of action, such a cause of action would arise from a substantial violation of the regulations. Section 1500.3.

**13. Use of Scoping Before Notice of Intent to Prepare EIS. Can the scoping process be used in connection with preparation of an**

**environmental assessment, i.e., before both the decision to proceed with an EIS and publication of a notice of intent?**

A. Yes. Scoping can be a useful tool for discovering alternatives to a proposal, or significant impacts that may have been overlooked. In cases where an environmental assessment is being prepared to help an agency decide whether to prepare an EIS, useful information might result from early participation by other agencies and the public in a scoping process.

The regulations state that the scoping process is to be preceded by a Notice of Intent (NOI) to prepare an EIS. But that is only the minimum requirement. Scoping may be initiated earlier, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.

However, scoping that is done before the assessment, and in aid of its preparation, cannot substitute for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, and the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.

**14a. Rights and Responsibilities of Lead and Cooperating Agencies. What are the respective rights and responsibilities of lead and cooperating agencies? What letters and memoranda must be prepared?**

A. After a lead agency has been designated (Sec. 1501.5), that agency has the responsibility to solicit cooperation from other federal agencies that have jurisdiction by law or special expertise on any environmental issue that should be addressed in the EIS being prepared. Where appropriate, the lead agency should seek the cooperation of state or local agencies of similar qualifications. When the proposal may affect an Indian reservation, the agency should consult with the Indian tribe. Section 1508.5. The request for cooperation should come at the earliest possible time in the NEPA process.

After discussions with the candidate cooperating agencies, the lead agency and the cooperating agencies are to determine by letter or by memorandum which agencies will undertake cooperating responsibilities. To the extent possible at this stage, responsibilities for specific issues should be assigned. The allocation of responsibilities will be completed during scoping. Section 1501.7(a)(4).

Cooperating agencies must assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. Section 1501.6(b)(3). Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its preparation, much earlier in the NEPA process -- primarily at the scoping and Draft EIS preparation stages. If a cooperating agency determines that its resource limitations preclude any involvement, or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. Section 1501.6(c).

In other words, the potential cooperating agency must decide early if it is able to devote any of its resources to a particular proposal. For this reason the regulation states that an agency may reply to a request for cooperation that "other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement." (Emphasis added). The regulation refers to the "action," rather than to the EIS, to clarify that the agency is taking itself out of all phases of the federal action, not just draft EIS preparation. This means that the agency has determined that it cannot be involved in the later stages of EIS review and comment, as well as decisionmaking on the proposed action. For this reason, cooperating agencies with jurisdiction by law (those which have permitting or other approval authority) cannot opt out entirely of the duty to cooperate on the EIS. See also Question 15, relating specifically to the responsibility of EPA.

**14b. How are disputes resolved between lead and cooperating agencies concerning the scope and level of detail of analysis and the quality of data in impact statements?**

A. Such disputes are resolved by the agencies themselves. A lead agency, of course, has the ultimate responsibility for the content of an EIS. But it is supposed to use the environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the

maximum extent possible, consistent with its own responsibilities as lead agency. Section 1501.6(a)(2).

If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. Thus, both lead and cooperating agencies have a stake in producing a document of good quality. Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determined early in the EIS process.

Because the EIS is not the Record of Decision, but instead constitutes the information and analysis on which to base a decision, disagreements about conclusions to be drawn from the EIS need not inhibit agencies from issuing a joint document, or adopting another agency's EIS, if the analysis is adequate. Thus, if each agency has its own "preferred alternative," both can be identified in the EIS. Similarly, a cooperating agency with jurisdiction by law may determine in its own ROD that alternative A is the environmentally preferable action, even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable.

**14c. What are the specific responsibilities of federal and state cooperating agencies to review draft EISs?**

A. Cooperating agencies (i.e., agencies with jurisdiction by law or special expertise) and agencies that are authorized to develop or enforce environmental standards, must comment on environmental impact statements within their jurisdiction, expertise or authority. Sections 1503.2, 1508.5. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should simply comment accordingly. Conversely, if the cooperating agency determines that a draft EIS is incomplete, inadequate or inaccurate, or it has other comments, it should promptly make such comments, conforming to the requirements of specificity in section 1503.3.

**14d. How is the lead agency to treat the comments of another agency with jurisdiction by law or special expertise which has failed or refused to cooperate or participate in scoping or EIS preparation?**

A. A lead agency has the responsibility to respond to all substantive comments raising significant issues regarding a draft EIS. Section 1503.4. However, cooperating agencies are generally under an obligation to raise issues or otherwise participate in the EIS process during scoping and EIS preparation if they reasonably can do so. In practical terms, if a cooperating agency fails to cooperate at the outset, such as during scoping, it will find that its comments at a later stage will not be as persuasive to the lead agency.

**15. Commenting Responsibilities of EPA. Are EPA's responsibilities to review and comment on the environmental effects of agency proposals under Section 309 of the Clean Air Act independent of its responsibility as a cooperating agency?**

A. Yes. EPA has an obligation under Section 309 of the Clean Air Act to review and comment in writing on the environmental impact of any matter relating to the authority of the Administrator contained in proposed legislation, federal construction projects, other federal actions requiring EISs, and new regulations. 42 U.S.C. Sec. 7609. This obligation is independent of its role as a cooperating agency under the NEPA regulations.

**16. Third Party Contracts. What is meant by the term "third party contracts" in connection with the preparation of an EIS? See Section 1506.5(c). When can "third party contracts" be used?**

A. As used by EPA and other agencies, the term "third party contract" refers to the preparation of EISs by contractors paid by the applicant. In the case of an EIS for a National Pollution Discharge Elimination System (NPDES) permit, the applicant, aware in the early planning stages of the proposed project of the need for an EIS, contracts directly with a consulting firm for its preparation. See 40 C.F.R. 6.604(g). The "third party" is EPA which, under Section 1506.5(c), must select the consulting firm, even though the applicant pays for the cost of preparing the EIS. The consulting firm



is responsible to EPA for preparing an EIS that meets the requirements of the NEPA regulations and EPA's NEPA procedures. It is in the applicant's interest that the EIS comply with the law so that EPA can take prompt action on the NPDES permit application. The "third party contract" method under EPA's NEPA procedures is purely voluntary, though most applicants have found it helpful in expediting compliance with NEPA.

If a federal agency uses "third party contracting," the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c). Federal procurement requirements do not apply to the agency because it incurs no obligations or costs under the contract, nor does the agency procure anything under the contract.

**17a. Disclosure Statement to Avoid Conflict of Interest. If an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement. What criteria must the firm follow in determining whether it has any "financial or other interest in the outcome of the project" which would cause a conflict of interest?**

A. Section 1506.5(c), which specifies that a consulting firm preparing an EIS must execute a disclosure statement, does not define "financial or other interest in the outcome of the project." The Council interprets this term broadly to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit. If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.

When a consulting firm has been involved in developing initial data and plans for the project, but does not have any financial or other interest in the outcome of the decision, it need not be disqualified from preparing the EIS. However, a disclosure statement in the draft EIS should clearly state the scope and extent of the firm's prior involvement to expose any potential conflicts of interest that may exist.

**17b. If the firm in fact has no promise of future work or other interest in the outcome of the proposal, may the firm later bid in competition with others for future work on the project if the proposed action is approved?**

A. Yes.

**18. Uncertainties About Indirect Effects of A Proposal. How should uncertainties about indirect effects of a proposal be addressed, for example, in cases of disposal of federal lands, when the identity or plans of future landowners is unknown?**

A. The EIS must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are "reasonably foreseeable." Section 1508.8(b). In the example, if there is total uncertainty about the identity of future land owners or the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decisions.

**19a. Mitigation Measures. What is the scope of mitigation measures that must be discussed?**

A. The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. The measures must include such things as design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant." Once the proposal itself is considered as a whole to have

significant effects, all of its specific effects on the environment (whether or not "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. Sections 1502.14(f), 1502.16(h), 1508.14.

**19b. How should an EIS treat the subject of available mitigation measures that are (1) outside the jurisdiction of the lead or cooperating agencies, or (2) unlikely to be adopted or enforced by the responsible agency?**

A. All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed as part of the RODs of these agencies. Sections 1502.16(h), 1505.2(c). This will serve to [46 FR 18032] alert agencies or officials who can implement these extra measures, and will encourage them to do so. Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation.

However, to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies. Sections 1502.16(h), 1505.2. If there is a history of nonenforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or nonenforcement. If the necessary mitigation measures will not be ready for a long period of time, this fact, of course, should also be recognized.

**20. Worst Case Analysis. [Withdrawn.]**

**21. Combining Environmental and Planning Documents. Where an EIS or an EA is combined with another project planning document (sometimes called "piggybacking"), to what degree may the EIS or EA refer to and rely upon information in the project document to satisfy NEPA's requirements?**

A. Section 1502.25 of the regulations requires that draft EISs be prepared concurrently and integrated with environmental analyses and related surveys and studies required by other federal statutes. In addition, Section 1506.4 allows any environmental document prepared in compliance with NEPA to be combined with any other agency document to reduce duplication and paperwork. However, these provisions were not intended to authorize the preparation of a short summary or outline EIS, attached to a detailed project report or land use plan containing the required environmental impact data. In such circumstances, the reader would have to refer constantly to the detailed report to understand the environmental impacts and alternatives which should have been found in the EIS itself.

The EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives. Section 1502.1. But, as long as the EIS is clearly identified and is self-supporting, it can be physically included in or attached to the project report or land use plan, and may use attached report material as technical backup.

Forest Service environmental impact statements for forest management plans are handled in this manner. The EIS identifies the agency's preferred alternative, which is developed in detail as the proposed management plan. The detailed proposed plan accompanies the EIS through the review process, and the documents are appropriately cross-referenced. The proposed plan is useful for EIS readers as an example, to show how one choice of management options translates into effects on natural resources. This procedure permits initiation of the 90-day public review of proposed forest plans, which is required by the National Forest Management Act.

All the alternatives are discussed in the EIS, which can be read as an independent document. The details of the management plan are not repeated in the EIS, and vice versa. This is a reasonable functional separation of the documents: the EIS contains information relevant to the choice among alternatives; the plan is a detailed description of proposed management activities suitable for use by the land managers. This procedure provides for concurrent compliance with the public review requirements of both NEPA and the National Forest Management Act.

Under some circumstances, a project report or management plan may be totally merged with the EIS, and the one document labeled as both “EIS” and “management plan” or “project report.” This may be reasonable where the documents are short, or where the EIS format and the regulations for clear, analytical EISs also satisfy the requirements for a project report.

**22. State and Federal Agencies as Joint Lead Agencies. May state and federal agencies serve as joint lead agencies? If so, how do they resolve law, policy and resource conflicts under NEPA and the relevant state environmental policy act? How do they resolve differences in perspective where, for example, national and local needs may differ?**

A. Under Section 1501.5(b), federal, state or local agencies, as long as they include at least one federal agency, may act as joint lead agencies to prepare an EIS. Section 1506.2 also strongly urges state and local agencies and the relevant federal agencies to cooperate fully with each other. This should cover joint research and studies, planning activities, public hearings, environmental assessments and the preparation of joint EISs under NEPA and the relevant “little NEPA” state laws, so that one document will satisfy both laws.

The regulations also recognize that certain inconsistencies may exist between the proposed federal action and any approved state or local plan or law. The joint document should discuss the extent to which the federal agency would reconcile its proposed action with such plan or law. Section 1506.2(d). (See Question 23).

Because there may be differences in perspective as well as conflicts among [46 FR 18033] federal, state and local goals for resources management, the Council has advised participating agencies to adopt a flexible, cooperative approach. The joint EIS should reflect all of their interests and missions, clearly identified as such. The final document would then indicate how state and local interests have been accommodated, or would identify conflicts in goals (e.g., how a hydroelectric project, which might induce second home development, would require new land use controls). The EIS must contain a complete discussion of scope and purpose of the proposal, alternatives, and impacts so that the discussion is adequate to meet the needs of local, state and federal decisionmakers.

**23a. Conflicts of Federal Proposal With Land Use Plans, Policies or Controls. How should an agency handle potential conflicts between a proposal and the objectives of Federal, state or local land use plans, policies and controls for the area concerned? See Sec. 1502.16(c).**

A. The agency should first inquire of other agencies whether there are any potential conflicts. If there would be immediate conflicts, or if conflicts could arise in the future when the plans are finished (see Question 23(b) below), the EIS must acknowledge and describe the extent of those conflicts. If there are any possibilities of resolving the conflicts, these should be explained as well. The EIS should also evaluate the seriousness of the impact of the proposal on the land use plans and policies, and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area. Comments from officials of the affected area should be solicited early and should be carefully acknowledged and answered in the EIS.

**23b. What constitutes a “land use plan or policy” for purposes of this discussion?**

A. The term “land use plans,” includes all types of formally adopted documents for land use planning, zoning and related regulatory requirements. Local general plans are included, even though they are subject to future change. Proposed plans should also be addressed if they have been formally proposed by the appropriate government body in a written form, and are being actively pursued by officials of the jurisdiction. Staged plans, which must go through phases of development such as the Water Resources Council’s Level A, B and C planning process should also be included even though they are incomplete.

The term “policies” includes formally adopted statements of land use policy as embodied in laws or regulations. It also includes proposals for action such as the initiation of a planning process, or a formally adopted policy statement of the local, regional or state executive branch, even if it has not yet been formally adopted by the local, regional or state legislative body.

**23c. What options are available for the decisionmaker when conflicts with such plans or policies are identified?**

A. After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts, among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal, among the other requirements of Section 1505.2. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area.

**24a. Environmental Impact Statements on Policies, Plans or Programs. When are EISs required on policies, plans or programs?**

A. An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal “may exist in fact as well as by agency declaration that one exists.” Section 1508.23.

**24b. When is an area-wide or overview EIS appropriate?**

A. The preparation of an area-wide or overview EIS may be particularly useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography. For example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.

**24c. What is the function of tiering in such cases?**

A. Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa. In the example given in Question 24b, this would mean that an overview EIS would be prepared for all of the energy activities reasonably foreseeable in a particular geographic area or resulting from a particular development program. This impact statement would be followed by site-specific or project-specific EISs. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement.

**25a. Appendices and Incorporation by Reference. When is it appropriate to use appendices instead of including information in the body of an EIS?**

A. The body of the EIS should be a succinct statement of all the information on environmental impacts and alternatives that the decisionmaker and the public need, in order to make the decision and to ascertain that every significant factor has been examined. The EIS must explain or summarize methodologies of research and modeling, and the results of research that may have been conducted to analyze impacts and alternatives.

Lengthy technical discussions of modeling methodology, baseline studies, or other work are best reserved for the appendix. In other words, if only technically trained individuals are likely to understand a particular discussion then it should go in the appendix, and a plain language summary of the analysis and conclusions of that technical discussion should go in the text of the EIS.

The final statement must also contain the agency’s responses to comments on the draft EIS. These responses will be primarily in the form of changes in the document itself, but specific answers to each significant comment should

also be included. These specific responses may be placed in an appendix. If the comments are especially voluminous, summaries of the comments and responses will suffice. (See Question 29 regarding the level of detail required for responses to comments.)

**25b. How does an appendix differ from incorporation by reference?**

A. First, if at all possible, the appendix accompanies the EIS, whereas the material which is incorporated by reference does not accompany the EIS. Thus the appendix should contain information that reviewers will be likely to want to examine. The appendix should include material that pertains to preparation of a particular EIS. Research papers directly relevant to the proposal, lists of affected species, discussion of the methodology of models used in the analysis of impacts, extremely detailed responses to comments, or other information, would be placed in the appendix.

The appendix must be complete and available at the time the EIS is filed. Five copies of the appendix must be sent to EPA with five copies of the EIS for filing. If the appendix is too bulky to be circulated, it instead must be placed in conveniently accessible locations or furnished directly to commentors upon request. If it is not circulated with the EIS, the Notice of Availability published by EPA must so state, giving a telephone number to enable potential commentors to locate or request copies of the appendix promptly.

Material that is not directly related to preparation of the EIS should be incorporated by reference. This would include other EISs, research papers in the general literature, technical background papers or other material that someone with technical training could use to evaluate the analysis of the proposal. These must be made available, either by citing the literature, furnishing copies to central locations, or sending copies directly to commentors upon request.

Care must be taken in all cases to ensure that material incorporated by reference, and the occasional appendix that does not accompany the EIS, are in fact available for the full minimum public comment period.

**26a. Index and Keyword Index in EISs. How detailed must an EIS index be?**

A. The EIS index should have a level of detail sufficient to focus on areas of the EIS of reasonable interest to any reader. It cannot be restricted to the most important topics. On the other hand, it need not identify every conceivable term or phrase in the EIS. If an agency believes that the reader is reasonably likely to be interested in a topic, it should be included.

**26b. Is a keyword index required?**

A. No. A keyword index is a relatively short list of descriptive terms that identifies the key concepts or subject areas in a document. For example it could consist of 20 terms which describe the most significant aspects of an EIS that a future researcher would need: type of proposal, type of impacts, type of environment, geographical area, sampling or modelling methodologies used. This technique permits the compilation of EIS data banks, by facilitating quick and inexpensive access to stored materials. While a keyword index is not required by the regulations, it could be a useful addition for several reasons. First, it can be useful as a quick index for reviewers of the EIS, helping to focus on areas of interest. Second, if an agency keeps a listing of the keyword indexes of the EISs it produces, the EIS preparers themselves will have quick access to similar research data and methodologies to aid their future EIS work. Third, a keyword index will be needed to make an EIS available to future researchers using EIS data banks that are being developed. Preparation of such an index now when the document is produced will save a later effort when the data banks become operational.

**27a. List of Preparers. If a consultant is used in preparing an EIS, must the list of preparers identify members of the consulting firm as well as the agency NEPA staff who were primarily responsible?**

A. Section 1502.17 requires identification of the names and qualifications of persons who were primarily responsible for preparing the EIS or significant background papers, including basic components of the statement. This means that members of a consulting firm preparing material that is to become part of the EIS must be identified. The EIS should identify these individuals even though the consultant's contribution may have been modified by the agency.

**27b. Should agency staff involved in reviewing and editing the EIS also be included in the list of preparers?**

A. Agency personnel who wrote basic components of the EIS or significant background papers must, of course, be identified. The EIS should also list the technical editors who reviewed or edited the statements.

**27c. How much information should be included on each person listed?**

A. The list of preparers should normally not exceed two pages. Therefore, agencies must determine which individuals had primary responsibility and need not identify individuals with minor involvement. The list of preparers should include a very brief identification of the individuals involved, their qualifications (expertise, professional disciplines) and the specific portion of the EIS for which they are responsible. This may be done in tabular form to cut down on length. A line or two for each person's qualifications should be sufficient.

**28. Advance or Xerox Copies of EIS. May an agency file xerox copies of an EIS with EPA pending the completion of printing the document?**

A. Xerox copies of an EIS may be filed with EPA prior to printing only if the xerox copies are simultaneously made available to other agencies and the public. Section 1506.9 of the regulations, which governs EIS filing, specifically requires Federal agencies to file EISs with EPA no earlier than the EIS is distributed to the public. However, this section does not prohibit xeroxing as a form of reproduction and distribution. When an agency chooses xeroxing as the reproduction method, the EIS must be clear and legible to permit ease of reading and ultimate microfiche of the EIS. Where color graphs are important to the EIS, they should be reproduced and circulated with the xeroxed copy.

**29a. Responses to Comments. What response must an agency provide to a comment on a draft EIS which states that the EIS's methodology is inadequate or inadequately explained? For example, what level of detail must an agency include in its response to a simple postcard comment making such an allegation?**

A. Appropriate responses to comments are described in Section 1503.4. Normally the responses should result in changes in the text of the EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain briefly why. An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology. For example, if a commentor on an EIS said that an agency's air quality dispersion analysis or methodology was inadequate, and the agency had included a discussion of that analysis in the EIS, little if anything need be added in response to such a comment. However, if the commentor said that the dispersion analysis was inadequate because of its use of a certain computational technique, or that a dispersion analysis was inadequately explained because computational techniques were not included or referenced, then the agency would have to respond in a substantive and meaningful way to such a comment.

If a number of comments are identical or very similar, agencies may group the comments and prepare a single answer for each group. Comments may be summarized if they are especially voluminous. The comments or summaries must be attached to the EIS regardless of whether the agency believes they merit individual discussion in the body of the final EIS.

**29b. How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?**

A. This question might arise in several possible situations. First, a commentor on a draft EIS may indicate that there is a possible alternative which, in the agency's view, is not a reasonable alternative. Section 1502.14(a). If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response. Section 1503.4(a). For example, a commentor on a draft EIS on a coal fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits, or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commentator on a draft EIS on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commentator on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest, and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2,000, 4,000, or 6,000 units. A commentator on the draft EIS might urge the consideration of constructing 5,000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered, and, therefore, could be addressed in the final EIS.

A fourth possibility is that a commentator points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a reasonable alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commentator on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

If the new alternative was not raised by the commentator during scoping, but could have been, commentators may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all alternatives.

**30. Adoption of EISs. When a cooperating agency with jurisdiction by law intends to adopt a lead agency's EIS and it is not satisfied with the adequacy of the document, may the cooperating agency adopt only the part of the EIS with which it is satisfied? If so, would a cooperating agency with jurisdiction by law have to prepare a separate EIS or EIS supplement covering the areas of disagreement with the lead agency?**

A. Generally, a cooperating agency may adopt a lead agency's EIS without recirculating it if it concludes that its NEPA requirements and its comments and suggestions have been satisfied. Section 1506.3(a), (c). If necessary, a cooperating agency may adopt only a portion of the lead agency's EIS and may reject that part of the EIS with which it disagrees, stating publicly why it did so. Section 1506.3(a).

A cooperating agency with jurisdiction by law (e.g., an agency with independent legal responsibilities with respect to the proposal) has an independent legal obligation to comply with NEPA. Therefore, if the cooperating agency determines that the EIS is wrong or inadequate, it

must prepare a supplement to the EIS, replacing or adding any needed information, and must circulate the supplement as a draft for public and agency review and comment. A final supplemental EIS would be required before the agency could take action. The adopted portions of the lead agency EIS should be circulated with the supplement. Section 1506.3(b). A cooperating agency with jurisdiction by law will have to prepare its own Record of Decision for its action, in which it must explain how it reached its conclusions. Each agency should explain how and why its conclusions differ, if that is the case, from those of other agencies which issued their Records of Decision earlier.

An agency that did not cooperate in preparation of an EIS may also adopt an EIS or portion thereof. But this would arise only in rare instances, because an agency adopting an EIS for use in its own decision normally would have been a cooperating agency. If the proposed action for which the EIS was prepared is substantially the same as the proposed action of the adopting agency, the EIS may be adopted as long as it is recirculated as a final EIS and the agency announces what it is doing. This would be followed by the 30-day review period and issuance of a Record of Decision by the adopting agency. If the proposed action by the adopting agency is not substantially the same as that in [46 FR 18036] the EIS (i.e., if an EIS on one action is being adapted for use in a decision on another action), the EIS would be treated as a draft and circulated for the normal public comment period and other procedures. Section 1506.3(b).

**31a. Application of Regulations to Independent Regulatory Agencies. Do the Council's NEPA regulations apply to independent regulatory agencies like the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission?**

A. The statutory requirements of NEPA's Section 102 apply to "all agencies of the federal government." The NEPA regulations implement the procedural provisions of NEPA as set forth in NEPA's Section 102(2) for all agencies of the federal government. The NEPA regulations apply to independent regulatory agencies, however, they do not direct independent regulatory agencies or other agencies to make decisions in any particular way or in a way inconsistent with an agency's statutory charter. Sections 1500.3, 1500.6, 1507.1, and 1507.3.

**31b. Can an Executive Branch agency like the Department of the Interior adopt an EIS prepared by an independent regulatory agency such as FERC?**

A. If an independent regulatory agency such as FERC has prepared an EIS in connection with its approval of a proposed project, an Executive Branch agency (e.g., the Bureau of Land Management in the Department of the Interior) may, in accordance with Section 1506.3, adopt the EIS or a portion thereof for its use in considering the same proposal. In such a case the EIS must, to the satisfaction of the adopting agency, meet the standards for an adequate statement under the NEPA regulations (including scope and quality of analysis of alternatives) and must satisfy the adopting agency's comments and suggestions. If the independent regulatory agency fails to comply with the NEPA regulations, the cooperating or adopting agency may find that it is unable to adopt the EIS, thus forcing the preparation of a new EIS or EIS Supplement for the same action. The NEPA regulations were made applicable to all federal agencies in order to avoid this result, and to achieve uniform application and efficiency of the NEPA process.

**32. Supplements to Old EISs. Under what circumstances do old EISs have to be supplemented before taking action on a proposal?**

A. As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.

If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).

**33a. Referrals. When must a referral of an interagency disagreement be made to the Council?**

A. The Council's referral procedure is a pre-decision referral process for interagency disagreements. Hence, Section 1504.3 requires that a referring agency must deliver its referral to the Council not later than 25 days after publication by EPA of notice that the final EIS is available (unless the lead agency grants an extension of time under Section 1504.3(b)).

**33b. May a referral be made after this issuance of a Record of Decision?**

A. No, except for cases where agencies provide an internal appeal procedure which permits simultaneous filing of the final EIS and the record of decision (ROD). Section 1506.10(b)(2). Otherwise, as stated above, the process is a pre-decision referral process. Referrals must be made within 25 days after the notice of availability of the final EIS, whereas the final decision (ROD) may not be made or filed until after 30 days from the notice of availability of the EIS. Sections 1504.3(b), 1506.10(b). If a lead agency has granted an extension of time for another agency to take action on a referral, the ROD may not be issued until the extension has expired.

**34a. Records of Decision. Must Records of Decision (RODs) be made public? How should they be made available?**

A. Under the regulations, agencies must prepare a "concise public record of decision," which contains the elements specified in Section 1505.2. This public record may be integrated into any other decision record prepared by the agency, or it may be separate if decision documents are not normally made public. The Record of Decision is intended by the Council to be an environmental document (even though it is not explicitly mentioned in the definition of "environmental document" in Section 1508.10). Therefore, it must be made available to the public through appropriate public notice as required by Section 1506.6(b). However, there is no specific requirement for publication of the ROD itself, either in the Federal Register or elsewhere.

**34b. May the summary section in the final Environmental Impact Statement substitute for or constitute an agency's Record of Decision?**

A. No. An environmental impact statement is supposed to inform the decisionmaker before the decision is made. Sections 1502.1, 1505.2. The Council's regulations provide for a 30-day period after notice is published that the final EIS has been filed with EPA before the agency may take final action. During that period, in addition to the agency's own internal final review, the public and other agencies can comment on the final EIS prior to the agency's final action on the proposal. In addition, the Council's regulations make clear that the requirements for the summary in an EIS are not the same as the requirements for a ROD. Sections 1502.12 and 1505.2.

**34c. What provisions should Records of Decision contain pertaining to mitigation and monitoring?**

A. Lead agencies "shall include appropriate conditions [including mitigation measures and monitoring and enforcement programs] in grants, permits or other approvals" and shall "condition funding of actions on mitigation." Section 1505.3. Any such measures that are adopted must be explained and committed in the ROD.

The reasonable alternative mitigation measures and monitoring programs should have been addressed in the draft and final EIS. The discussion of mitigation and monitoring in a Record of Decision must be more detailed than a general statement that mitigation is being required, but not so detailed as to duplicate discussion of mitigation in the EIS. The Record of Decision should contain a concise summary identification of the mitigation measures which the agency has committed itself to adopt.

The Record of Decision must also state whether all practicable mitigation measures have been adopted, and if not, why not. Section 1505.2(c). The Record of Decision must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they are adopted as part of the agency's decision. If the proposed action is the issuance of a permit or other approval, the specific details of the mitigation measures shall then be included as appropriate conditions in whatever grants, permits, funding or other approvals are being made by the federal agency. Section 1505.3 (a), (b). If the proposal is to be carried out by the [46 FR 18037] federal agency itself, the Record of Decision should delineate the mitigation and monitoring measures in sufficient detail to constitute an enforceable commitment, or incorporate by reference the portions of the EIS that do so.

**34d. What is the enforceability of a Record of Decision?**

A. Pursuant to generally recognized principles of federal administrative law, agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Records of Decision. This is based on the principle that an agency must comply with its own decisions and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein.

**35. Time Required for the NEPA Process. How long should the NEPA process take to complete?**

A. When an EIS is required, the process obviously will take longer than when an EA is the only document prepared. But the Council's NEPA regulations encourage streamlined review, adoption of deadlines, elimination of duplicative work, eliciting suggested alternatives and other comments early through scoping, cooperation among agencies, and consultation with applicants during project planning. The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from NEPA.

The time required for the preparation of program EISs may be greater. The Council also recognizes that some projects will entail difficult long-term planning and/or the acquisition of certain data which of necessity will require more time for the preparation of the EIS. Indeed, some proposals should be given more time for the thoughtful preparation of an EIS and development of a decision which fulfills NEPA's substantive goals.

For cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months, and in many cases substantially less, as part of the normal analysis and approval process for the action.

**36a. Environmental Assessments (EA). How long and detailed must an environmental assessment (EA) be?**

A. The environmental assessment is a concise public document which has three defined functions. (1) It briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) it aids an agency's compliance with NEPA when no EIS is necessary, i.e., it helps to identify better alternatives and mitigation measures; and (3) it facilitates preparation of an EIS when one is necessary. Section 1508.9(a).

Since the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).

While the regulations do not contain page limits for EAs, the Council has generally advised agencies to keep the length of EAs to not more than approximately 10-15 pages. Some agencies expressly provide page guidelines (e.g., 10-15 pages in the case of the Army Corps). To avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues.

**36b. Under what circumstances is a lengthy EA appropriate?**

A. Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 and where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

**37a. Findings of No Significant Impact (FONSI). What is the level of detail of information that must be included in a finding of no significant impact (FONSI)?**

A. The FONSI is a document in which the agency briefly explains the reasons why an action will not have a significant effect on the human environment and, therefore, why an EIS will not be prepared. Section 1508.13. The finding itself need not be detailed, but must succinctly state the reasons for deciding that the action will have no significant environmental effects, and, if relevant, must show which factors were weighted most heavily in the determination. In addition to this statement, the FONSI must include, summarize, or attach and incorporate by reference, the environmental assessment.

**37b. What are the criteria for deciding whether a FONSI should be made available for public review for 30 days before the agency's final determination whether to prepare an EIS?**

A. Public review is necessary, for example, (a) if the proposal is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS. Sections 1501.4(e)(2), 1508.27. Agencies also must allow a period of public review of the FONSI if the proposed action would be located in a floodplain or wetland. E.O. 11988, Sec. 2(a)(4); E.O. 11990, Sec. 2(b).

**38. Public Availability of EAs v. FONSI. Must (EAs) and FONSI be made public? If so, how should this be done?**

A. Yes, they must be available to the public. Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSI. These are public "environmental documents" under Section 1506.6(b), and, therefore, agencies must give public notice of their availability. A combination of methods may be used to give notice, and the methods should be tailored to the needs of particular cases. Thus, a Federal Register notice of availability of the documents, coupled with notices in national publications and mailed to interested national groups might be appropriate for proposals that are national in scope. Local newspaper notices may be more appropriate for regional or site-specific proposals.

The objective, however, is to notify all interested or affected parties. If this is not being achieved, then the methods should be reevaluated and changed. Repeated failure to reach the interested or affected public would be interpreted as a violation of the regulations.

**39. Mitigation Measures Imposed in EAs and FONSI. Can an EA and FONSI be used to impose enforceable mitigation measures, monitoring programs, or other requirements, even though there is no requirement in the regulations in such cases for a formal Record of Decision?**

A. Yes. In cases where an environmental assessment is the appropriate environmental document, there still may be mitigation measures or alternatives that would be desirable to consider and adopt even though the impacts of the proposal will not be "significant." In such cases, the EA should include a discussion of these measures or alternatives to "assist [46 FR 18038] agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary." Section 1501.3(b), 1508.9(a)(2). The appropriate mitigation measures can be imposed as enforceable permit conditions, or adopted as part of the agency final decision in the same manner mitigation measures are adopted in the formal Record of Decision that is required in EIS cases.

**40. Propriety of Issuing EA When Mitigation Reduces Impacts. If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?**

[N.B.: Courts have disagreed with CEQ's position in Question 40. The 1987-88 CEQ Annual Report stated that CEQ intended to issue additional guidance on this topic. Ed. note.]

A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. Sections 1508.8, 1508.27.

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such possible mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

EXAMPLE ESA BIOLOGICAL ASSESSMENT

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# 14<sup>th</sup> Street Bridges Rehabilitation Project

## Shortnose Sturgeon Biological Assessment



**d.**  
District Department of  
Transportation



14<sup>th</sup> Street Bridges Rehabilitation Project

Shortnose Sturgeon Biological Assessment

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# 14<sup>th</sup> Street Bridges Rehabilitation Project

## Shortnose Sturgeon Biological Assessment

### 1. Introduction

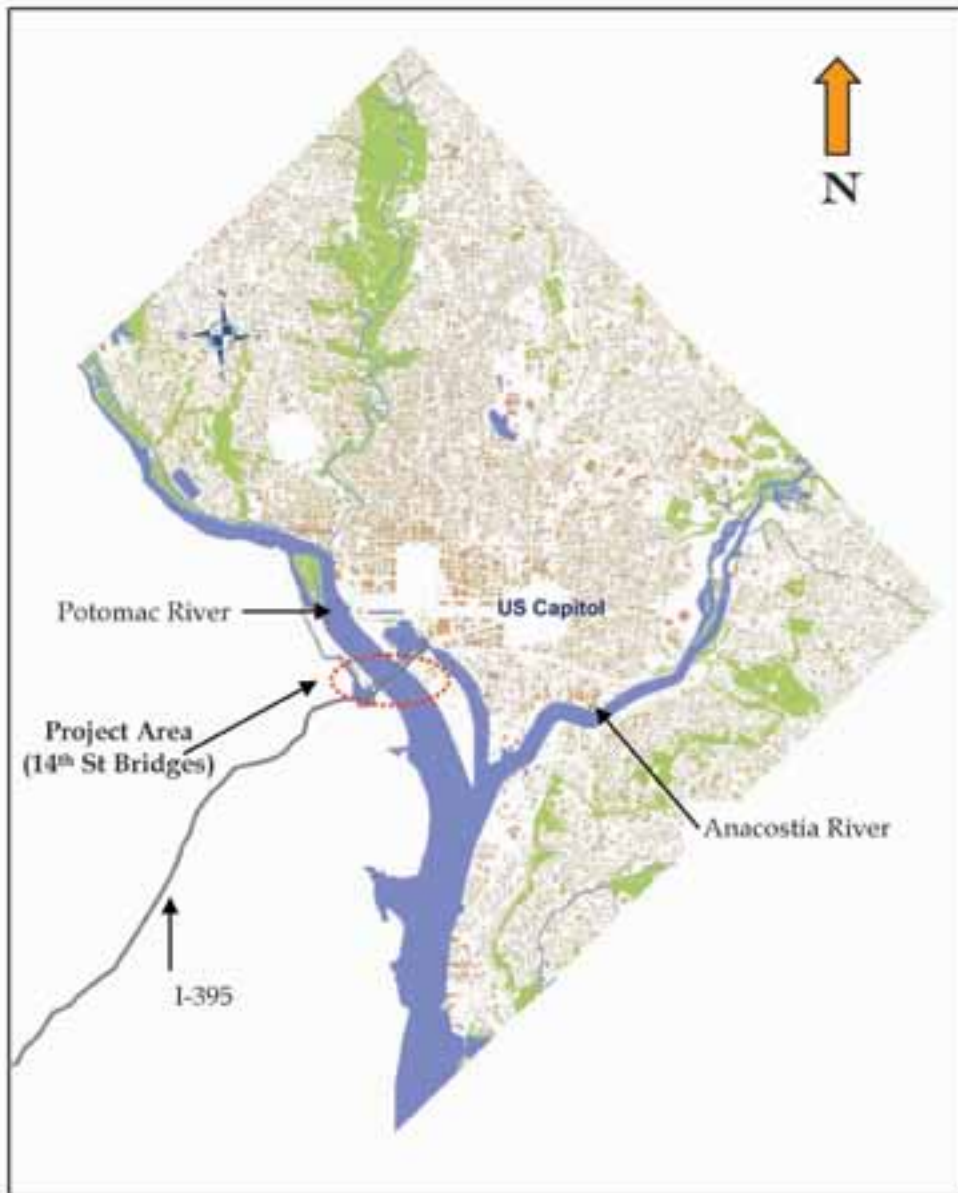
The District Department of Transportation (DDOT) and the Federal Highway Administration (FHWA) are preparing to rehabilitate the northbound and southbound 14<sup>th</sup> Street Bridges over the Potomac River. The two bridges connect Virginia, south of the river and the Washington DC, north of the river. This memo is being prepared to assess the effect of the 14<sup>th</sup> Street Bridge Rehabilitation project on the *Acipenser brevirostrum* (shortnose sturgeon). The shortnose sturgeon is federally listed as an endangered species, and recent surveys conducted by the U.S. Fish and Wildlife Service (USFWS) have documented the presence of shortnose sturgeon in the nearby Potomac River. Through Section 7 consultations, mandated by the Endangered Species Act, federal agencies are required to assess the impact(s) of federal projects on shortnose sturgeon.

This biological assessment for the shortnose sturgeon evaluates the impact of the 14<sup>th</sup> Street Bridge Rehabilitation Project and incorporates information from similar assessments for other projects on the Anacostia and Potomac Rivers: including the Woodrow Wilson Bridge (WWB) project (Potomac Crossing Consultants, 2000), the South Capitol Street project (DDOT, 2007), and the 11<sup>th</sup> Street Bridges project (CH2MHill, 2006).

### 2. Project Description

#### Action Area

The northbound 14<sup>th</sup> St. Bridge, also known as the Arland D. Williams Jr. Memorial Bridge, is a single bascule span structure with fifteen approach spans. The bridge, which carries four lanes, one-way northbound of 14th Street over the Potomac River and Ohio Drive, was originally constructed in 1950 and rehabilitated in 1976. The bridge is 78 ft. wide out-to-out, 62 ft. wide curb-to-curb, and 2,434 ft. long.



The southbound 14<sup>th</sup> St Bridge, also known as the George Mason Memorial Bridge, is a fifteen span continuous multi-steel plate girder structure with a composite concrete deck. The structure has two approach spans (including an exit ramp on the south approach span) consisting of concrete rigid frames supported on concrete abutments with stone fascia, and fourteen piers with stone fascia. The bridge, which carries four lanes of one-way 14<sup>th</sup> Street southbound traffic over the Potomac River and Ohio Drive, was originally constructed in 1960 and rehabilitated in 1984. The bridge is 66-1/2 ft. wide out-to-out, with a clear roadway width of 55 ft., and a total structure length of 2,265 ft.

Other bridges over the Potomac River in the vicinity of the 14<sup>th</sup> Street Bridge and the project include the Rochambeau Memorial Bridge, Metrorail, and CSX railroad bridges, upstream and down stream respectively (Figure 1).

## Rehabilitation Activities

The rehabilitation work involves rehabilitation of some piers on north direction of the bridge and cleaning and structural repair work on the southern direction of the bridge. Rehabilitation activities on both sides of the bridge will require work inside the Potomac River and will be conducted from platforms, barges and other watercraft floating on the Potomac River. Weighted turbidity curtains capable of accommodating tidal fluctuations will be placed around all barges and other watercraft to be stationed in the river and will remain in place until the watercrafts leave the site. Testing of water, sediments and turbidity samples will be conducted at the location of each turbidity curtain in accordance with the requirements of the District Department of the Environment (DDOE) Water Quality Certification. Details of rehabilitation activities on each direction are discussed below.



### *Northbound 14<sup>th</sup> Street Bridge Rehabilitation Work*

Rehabilitation on the northbound 14<sup>th</sup> Street Bridge will include the construction of cofferdams to repair and arrest the cracking of Piers 3, 4, 5, 6, and 14. Turbidity curtains around the cofferdams will be installed prior to cofferdams construction and remain in place to the end of the work. Specific pier rehabilitation work will include the following:

- Designing and installing a cofferdam system around each pier to facilitate the excavation and construction of the pier rehabilitation on "dry" land. This will require dewatering of the area inside the cofferdam.
- The casting of a tremie seal course in the bottom of the cofferdam and dewatering to expose the pier shaft and the footing. The work also includes any other work required to seal the bottom of the cofferdam.

- The removal of masonry cladding and concrete from the pier shaft. The disposal away from the site of all removed cladding; except those stones to be reinstalled, if any.
- Washing the entire exposed surfaces of the footing and pier shafts with low pressure, clean, potable water. Inspection of these surfaces for all sizes of cracks and spalls. Preparation of a location map detailing the width and length of the visible cracks and spalls of each surface.
- Roughening of the surface of and drilling holes in existing concrete and installation of dowels in the holes.
- Installation of reinforcement for the encasement and ducts and anchorage hardware for the post-tensioning system.
- Forming and casting of a reinforced concrete encasement around the footings and pier shafts, including supplying all reinforcement and incidentals as shown on the contract drawings. Self-consolidating concrete shall be used for the entire encasement.
- Installation of post-tensioning tendons and anchorage hardware and post-tensioning and grouting the system.
- Backfilling inside the cofferdam to the original elevation of the river bed.
- Removal and the disposal of the cofferdam away from the site. The turbidity curtain shall remain in place during cofferdam removal and will be removed and disposed of away from the site.

Other rehabilitation will include the design, installation and removal of temporary protection shields beneath and along portion of the superstructure repairs and as required during performance of the work to provide protection to pedestrians, vehicular traffic, bicycle traffic, parkland, river traffic and Potomac River from encroachment of construction items and debris.

The bituminous bridge wearing surface will be replaced with a Latex-Modified Concrete overlay on the fixed spans and on the cellular abutments. Additionally, the wearing surface on the bascule span and the approach slabs will be replaced with asphalt after other concrete repairs to the deck, top of cellular abutment and approach slabs and repairs to the steel deck plate of the movable span have been completed. Final rehabilitation activities will include the following:

- Strengthening of existing Trunnion Support 1, 2, and 3;
- Replacement of the elastomeric joint seal and rebuilding the bridge deck expansion joint, at the North Abutment;
- Repair of the other existing piers and the abutments concrete and masonry joints;
- Operator's House repairs;
- Removal of existing paint, blast cleaning and application of new coatings on site for portions of the steel structures of the existing Northbound 14th Street Bridge and other metal appurtenances at locations indicated on plans and to all new steel installed under this contract.
- Repair of concrete cracks, spalled and deteriorated concrete areas and otherwise defective concrete in the structure.



- Bascule shear lock repairs and bascule girder repairs and strengthening.

#### ***Southbound of 14<sup>th</sup> Street Bridge Rehabilitation Work***

Rehabilitation on the southbound 14<sup>th</sup> Street Bridge will include removal and disposal of existing paint; blast cleaning and application of new coatings to all existing and newly installed steel structures and other metal appurtenance. Other repair work on the southbound structure will include deck repairs, deck joint repairs, parapet repairs, structural steel repairs, substructure concrete repairs, traffic railing repairs, pier masonry repairs, and other miscellaneous repairs.

Temporary protection shields will be installed beneath and along portion of the superstructure repairs during performance of the work to provide protection to pedestrians, vehicular traffic, bicycle traffic, park land, river traffic and Potomac River from encroachment of construction items and debris.

### **3. Status of Shortnose Sturgeon in Potomac River**

The shortnose sturgeon was originally listed as endangered by the USFWS on March 11, 1967 under the Endangered Species Preservation Act (32 FR 4001, Appendix I). The National Marine Fisheries Service (NMFS) later assumed jurisdiction for the shortnose sturgeon under a 1974 government reorganization plan (38 FR 41370). Generally, USFWS manages land and freshwater species, while NMFS manages marine and anadromous species.

Shortnose sturgeon historically occurred in most large river systems along the east coast of North America. However, the species is now considered to be rare to absent from many of the rivers of its former range, including the Potomac. Shortnose sturgeon numbers have declined drastically from pollution and over fishing to the point where the species is severely depleted in most of its former range. It is stated in the South Capitol Street Project's biological assessment that in the past years, surveys for shortnose sturgeon within the Potomac River have found very few fish (DDOT, 2007).

The first published account of shortnose sturgeon in the Potomac River was 1876 record from a general list of the fishes of Maryland (NMFS, 1998). A U.S. Army Corps of Engineers sponsored netting study that took place in the late 1990s through 2000, which surveyed the Potomac River from the Chesapeake Bay to Little Falls, did not catch any shortnose sturgeon. Based on sampling of fish by the DC Fisheries and Wildlife Division, seven shortnose sturgeon have been documented in the Potomac River at the following locations: two at the mouth of the river near Ophelia, Virginia (May 3, 2000, and March 26, 2001); one at the mouth of Saint Mary's River (April 21, 1998); three at the mouth of Potomac Creek (May 17, 1996, and March 8, 2002) (NMFS, 2005).

In a Potomac River shortnose sturgeon netting study initiated in 2004 by the National Park Service, U.S. Geological Survey, and the USFWS, one adult female shortnose sturgeon with fully developed eggs was captured in September of 2005 just above Indian Head, Maryland off of Craney Island (Kynard et al. 2006). This fish was fitted with a radio transmitter, and its movements were tracked every seven to ten days. Based on an August 22, 2006 email from Matthew Breece, project manager for the study, the female sturgeon remained in the general area

of its capture until late March or early April 2006, at which time it moved up the Potomac River. On April 10, 2006 the egg-laden female arrived at Chain Bridge below Little Falls. This area of the Potomac River has suitable spawning habitat for sturgeon. However, the study team attempted to net spawned eggs and also looked for additional sturgeon near the location of the tagged female, but with no success. After seven days, the female returned downriver, and by May was located in an area near Port Tobacco, Maryland. A second egg-bearing female shortnose sturgeon was captured and fitted with a transmitter in April of 2006 in Pope Creek. This fish did not move upriver as the other tagged female. According to Matthew Breece, both tagged female shortnose sturgeon have remained within an area between Quantico Marine Base and Indian Head since June 2006.

## 4. Shortnose Sturgeon Habitat Characteristics

Shortnose sturgeons are found in rivers, estuaries, and the sea, but populations are confined mostly to natal rivers and estuaries. The species appears to be estuarine anadromous in the southern part of its range, but in some northern rivers it is "freshwater amphidromous" (i.e., adults spawn in freshwater but regularly enter saltwater habitats during their life) (NMFS, 1998). The species tend to migrate from the marine environment to fresh water to spawn during late winter-early summer (Shepherd, 2006). Young of the year (YOY) tends to remain completely within fresh water for 3 to 5 years before migrating to the near-shore saline environment. Direct evidence from the egg-bearing female shortnose sturgeon tagged in the fall of 2005 from the Potomac River, indicated that during the fall of 2005 and winter of 2006 the fish remained within freshwater just upstream of the saltwater wedge (Kynard et al. 2006).

Shortnose sturgeon typically spawn within channel habitats with firm bottom substrates (gravel, rubble, boulders) at the farthest upstream location to which they have access (NMFS 1998). Eggs are deposited on hard surfaces on the bottom where they adhere for 4 to 6 days until hatching (Shepherd, 2006). Spawning adults tend to migrate directly to spawning sites and then wander back downstream. According to information contained within the WWB shortnose sturgeon biological assessment, as well as discussions with researchers for the South Capitol Street Project biological assessment (Mike Mangold, USFWS, personal communication), it is presumed that the primary, and possibly only potential spawning location in the Potomac River is just below Little Falls a short distance from the action area (DDOT, 2007). Hatched embryos would likely remain near the point of hatching until their yolk-sac had been absorbed before beginning to move downstream (Richmond and Kynard 1995). These YOY would likely remain in deeper channels within the fresh water portion of the Potomac River, and would not be expected to move downstream.

Shortnose sturgeons are considered to be benthic omnivores, and their diet shifts during different life stages (NMFS 1998). Juveniles feed primarily on insect larvae and small crustaceans, while adults feed primarily on small molluscs (Dadswell et al. 1984). However, some older juveniles and non-spawning adults may move upstream to feed on shallow shoals that support submerged aquatic vegetation (SAV). Asiatic clam is the likely food source of adult shortnose sturgeon in the upper Potomac River.

## 5. Analysis of Effects on Shortnose Sturgeon

### Direct and Indirect Effects

A Final Recovery Plan for the shortnose sturgeon was prepared by the NMFS in 1998 (NMFS, 1998). The plan indicates that projects that may adversely affect sturgeon include dredging, pollutant or thermal discharges, bridge construction/removal, dam construction, removal and relicensing, and power plant construction and operation. These activities could result in direct effects to shortnose sturgeon resulting in the taking of adult or young sturgeon during construction or through the disruption of migratory pathways. The term "take" as defined by the Endangered Species Act (Section 3(19)) means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. These types of effects seem unlikely since the likelihood of sturgeon being present in the action area is extremely low. Additionally, none of the activities stated in the Recovery Plan are expected to occur during the 14<sup>th</sup> Street Bridge Rehabilitation Project. All rehabilitation work would occur from barges, thus avoiding the need for dredging. There will be no demolition or major construction. Cofferdams will be installed to minimize impacts and their installation and removal may cause minor, localized resuspension of some sediment. Turbidity curtains will be used to provide sedimentation protection and prevent debris in the water. Other temporary protection shields would be installed as added protection.

Indirect effects could occur later in time if long term impacts to water quality or sturgeon habitat result from bridge construction. The project is not expected to have long term negative effects on water quality or habitat, and therefore, no indirect effects are anticipated from the project.

### Cumulative Effects

The other project likely to occur over the Potomac River is the improvement from the 14<sup>th</sup> Corridor Project. This project is currently in the planning stages and may require more extensive construction than the 14<sup>th</sup> Street Bridge Rehabilitation Project. Additionally, the 14<sup>th</sup> Street Corridor Project will not occur at the same time as the 14<sup>th</sup> Street Bridge Rehabilitation Project. Other projects in the area include the Frederick Douglass Memorial Bridge Project and the 11th Street Bridges Project. However, these projects will occur over the Anacostia River, away from the action area. A Biological Assessment of the potential impacts to shortnose sturgeon from the 11th Street Bridges project was completed in early August 2006 (CH2M HILL 2006). The Biological Assessment concludes that the project is not likely to adversely affect shortnose sturgeon. In a letter dated August 29, 2006 (Appendix B), the NMFS concurred with that finding. Therefore, a cumulative adverse effect on shortnose sturgeon or an incidental taking of sturgeon is not anticipated. No other river projects are known.

## 6. Conservation Measures

The following conservation measures were taken from the WWB Project and modified for the 14<sup>th</sup> Street Rehabilitation Project since blasting and dredging will not occur. These methods have been proven effective in reducing impacts to fish during construction of the WWB.

## Time of Year Restrictions

Time-of-year restrictions on rehabilitation activities (cofferdam installation and pier repair) will be used so that these activities will occur outside of the likely period of shortnose sturgeon occurrence. The life history of the shortnose sturgeon suggests that YOY sturgeon within the Potomac River could potentially be present in the project action area from February 15 to July 1. This time period will also satisfy DC DOH and DC DOH Fish and Wildlife Management Division (DCFWMD) time-of-year restrictions to protect spawning anadromous fishes in general. This would likewise protect any potential spawning/migrating adult sturgeon within the project area in the Potomac River as well. Therefore, the FHWA and DDOT propose to restrict rehabilitation work from February 15 to July 1 for the 14th Street Rehabilitation Project.

## Technical Impact Reduction

Technical impact reduction techniques are structures or methods used to reduce potential impacts by reducing pressure waves from constant movement in the water in the immediate area. Impact reduction techniques such as physical barriers (e.g., cofferdams and bubble curtains) described in the Biological Assessments for the WWB (PCC 2000, 2003) will be used to mitigate potential impacts from underwater activities during this project. Cofferdams are the most widely used and are proven to substantially reduce impacts (Keevin, 1998). Turbidity curtains will also be used around pier repair work and badges to provide a physical barrier between the rehabilitation activities and fish. These curtains would also act to contain suspended solids from leaving the work site.

## 7. Conclusion

The 14<sup>th</sup> Street Rehabilitation Project will involve rehabilitation of five piers on north direction of the bridge and cleaning and structural repair work on the southern direction of the bridge. Rehabilitation activities on both sides of the bridge will require work inside the Potomac River and will be conducted from platforms, barges and other watercraft floating on the Potomac River. Weighted turbidity curtains capable of accommodating tidal fluctuations will be placed around all barges and other watercraft to be stationed in the river and will remain in place until the watercrafts leave the site. These curtains would also act to contain suspended solids from leaving the work site. Testing of water, sediments and turbidity samples will be conducted at the location of each turbidity curtain in accordance with the requirements of the DDOE Water Quality Certification.

There have been records of two adult female shortnose sturgeon within the Potomac River; however, based on studies and research conducted for the WWB Project and the South Capital Street Project, and habitat characteristics of the shortnose sturgeon, it is presumed that the primary, and possibly only potential location for the fish is in the upper Potomac River. The shortnose sturgeon was last recorded in the Potomac River, in June 2006. The likely food source for the shortnose sturgeon, Asiatic clams, is prevalent in the upper Potomac River. Although it is likely that the fish could swim towards the action area, conservation measures outlined above, including the use of cofferdams and avoidance of underwater blasting techniques and dredging,

will reduce the possibility for direct impacts to shortnose sturgeon. These techniques will include time-of-year restrictions to avoid potential conflict with sturgeon and other anadromous fishes. This time-of-year restriction will be from February 15 to July 1. Other protective measures will include techniques used by the WWB Project to reduce potential impacts to sturgeon and other fishes from shock waves associated with cofferdam installation, and pier repair.

For these reasons, based on the best available scientific and commercial data and professional judgment, is that the rehabilitation activities associated with the 14th Street Bridge Rehabilitation is not likely to adversely affect the federally listed endangered shortnose sturgeon.

## 8. References

- Dadswell, M.J., B.D. Taubert, T.S. Squiers, D. Marchette, and J. Buckley. 1984. Synopsis of Biological Data on Shortnose Sturgeon, *Acipenser brevirostrum* Lesueur 1818. NOAA Technical Report, NMFS 14 (FAO Fishes Synopsis No. 140). U. S. Bureau of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service
- District Department of Transportation(DDOT), 2007. Biological Assessment of Impacts to the Shortnose Sturgeon. South Capitol Street Project, Replacement of the Frederick Douglass Memorial Bridge over the Anacostia River, Washington D.C.
- District Department of Transportation(DDOT), 2007. Biological Assessment of Impacts to the Shortnose Sturgeon. 11<sup>th</sup> Street Bridges Project over the Anacostia River, Washington D.C.
- Kynard, B. 1997. Life history, latitudinal patterns, and status of the shortnose sturgeon, *Acipenser brevirostrum*. Environmental Biology of Fishes
- Kynard, B., M. Breece, M. Kieffer, M. Atcheson, and M. Mangold. 2006. Status of Shortnose Sturgeon in the Potomac River: Part I - Field Studies. Prepared for National Park Service
- National Marine Fisheries Service (NMFS). 1998. Final Recovery Plan for the Shortnose Sturgeon *Acipenser brevirostrum*. U.S. Department of Commerce, National Oceanic and Atmospheric Administration. December 1998.
- Phelps, H.L. 1985. Summer 1984 Survey of Mollusk Populations of the Potomac and Anacostia Rivers near Washington, D.C. Report to D.C. Environmental Services.
- Potomac Crossing Consultants (PCC). 2000. Shortnose Sturgeon Biological Assessment, Woodrow Wilson Bridge Project. Prepared for the United States Federal Highway Administration. March.
- PCC. 2003. Supplemental Shortnose Sturgeon Biological Assessment, Woodrow Wilson Bridge Project. Prepared for the United States Federal Highway Administration. January.
- Shepherd, Gary, 2006. Atlantic and Shortnose Sturgeons, December 2006, Washington D.C.



U.S. Department  
of Transportation  
Federal Highway  
Administration

District of Columbia Division  
(202) 219-3536 FAX 219-3545

1990 K Street, NW  
Suite 510  
Washington, DC 20006-1103

APR 14 2009

In Reply Refer To: HDA-DC

Ms. Mary Colligan  
Assistant Regional Administrator for Protected Resources  
National Marine Fisheries Service  
Northeast Regional Office  
1 Blackburn Drive  
Gloucester, MA 01930-2298

Dear Ms. Colligan:

In compliance with 50 CFR §402.08, the District of Columbia Division of the Federal Highway Administration (FHWA) designates the District of Columbia Department of Transportation (DDOT) to act as FHWA's non-Federal representative for the purpose of conducting informal consultation with National Marine Fisheries Service regarding Section 7 of the Endangered Species Act.

The assigned designation of non-federal representation by FHWA to DDOT is specific to issues concerning the potential of occurrence regarding the presence of Shortnose Sturgeon (*Acipenser brevirostrum*) in the Potomac River located in Washington, DC. This informal consultation request for ESA section 7 is crucial regarding compliance with the National Environmental Policy Act (NEPA) as it relates to the 14<sup>th</sup> Street Bridges Rehabilitation Project.

If there are any questions, please contact Mr. Michael Hicks at (202) 219-3513 ([michael.hicks@fhwa.dot.gov](mailto:michael.hicks@fhwa.dot.gov))

Sincerely,

Mark R. Kehrli  
Division Administrator

cc: Faisal Hameed, DDOT  
Konjit Eskender, DDOT  
Julie Crocker, NOAA

**MOVING THE  
AMERICAN  
ECONOMY**



GOVERNMENT OF THE DISTRICT OF COLUMBIA  
DEPARTMENT OF TRANSPORTATION



Transportation Policy & Planning Administration

May 20, 2009

Ms. Julie Crocker  
Endangered Species Coordinator  
National Marine Fisheries Service  
Northeast Regional Office  
Protected Resources Division  
1 Blackburn Drive  
Gloucester, MA 01930-2298

Dear Ms. Crocker:

Re: Section 7 Endangered Species Act Consultation for the 14<sup>th</sup> Street Bridge Rehabilitation Project, Washington, DC

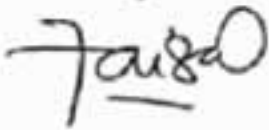
In compliance with 50 CFR §402.12, the District Department of Transportation (DDOT) is submitting for your review, an assessment of impacts relative to the potential of occurrence for the presence of the Shortnose Sturgeon (*Acipenser brevirostrum*) in the Potomac River located in Washington, DC. DDOT is the non-Federal representative of Federal Highway Administration (FHWA), as nominated by FHWA in its letter dated April 14, 2009.

As discussed in the enclosed Assessment document and in our early coordination in April 2009, it is our assessment that the 4<sup>th</sup> Street Bridge Rehabilitation Project poses no risk to the Shortnose Sturgeon or its habitat. Our analysis and assessment was prepared using information presented in the Woodrow Wilson Bridge Biological Assessment for Shortnose Sturgeon (2000, 2003), 11<sup>th</sup> Street Bridges Biological Assessment for Shortnose Sturgeon (2007), and South Capitol Street Biological Assessment for Shortnose Sturgeon (2008). Further information was obtained by coordination with Army Corps of Engineers, FHWA, and the DC Department of Environment (DDOE).



In accordance with the Endangered Species Act, we would like to request your concurrence that the 14<sup>th</sup> Street Bridge Rehabilitation Project is not likely to adversely affect the endangered Shortnose Sturgeon.

Sincerely,

A handwritten signature in black ink, appearing to read "Faisal Hameed". The signature is stylized and cursive.

Faisal Hameed  
Manager,  
Project Development & Environment Branch  
202-671-2326

cc: Mike Hicks (FHWA)  
Mark Clabaugh (DDOT)  
Konjit Eskender (DDOT)  
Austina Casey (DDOT)



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
NORTHEAST REGION  
55 Great Republic Drive  
Gloucester, MA 01930-2276

JUL - 1 2009

Faisal Hameed, Manager  
Project Development and Environment Branch  
Government of the District of Columbia  
Department of Transportation  
2000 14<sup>th</sup> Street, VW  
Washington, DC 20009

Diane Pavek  
National Park Service  
National Capital Region  
Center for Urban Ecology  
4598 MacArthur Blvd, NW  
Washington, DC 20007

Re: 14<sup>th</sup> Street Bridges Project

Dear Mr. Hameed and Ms. Pavek,

This is in response to correspondence regarding the 14<sup>th</sup> Street Bridges Rehabilitation Project. The District of Columbia Department of Transportation (DDOT) and the Federal Highway Administration (FHWA) are preparing to rehabilitate the northbound and southbound 14th Street Bridges over the Potomac River. The two bridges connect Virginia, south of the river and Washington DC, north of the river. As noted in the letter dated April 14, 2009 from Mark Kehrl of the US Federal Highway Administration (FHWA), the DDOT has been designated by the FHWA as a non-federal representative for the purposes of conducting consultation pursuant to Section 7 of the Endangered Species Act (ESA) of 1973, as amended.

DDOT, in cooperation with FHWA, proposes to rehabilitate the 14<sup>th</sup> Street Bridges which cross the Potomac River. DDOT, acting as the FHWA's non-federal representative, is the lead agency for the proposed action and is receiving funding from FHWA for the rehabilitation project. As the river bottom at the project site is under the jurisdiction of the National Park Service (NPS), the NPS is proposing to issue a Special Use Permit to DDOT. In a letter dated June 15, 2009, NPS indicated to National Marine Fisheries Service (NMFS) that they had reviewed the proposed action and DDOT's Biological Assessment and that they agreed that DDOT was the appropriate lead agency for the consultation and that the subject consultation letter would also encompass the NPS' permitting action. DDOT has made the preliminary determination that the proposed action is not likely to adversely affect any species listed under the jurisdiction of NMFS and has requested that NMFS concur with this determination.

#### **Proposed Action**

The northbound 14th St. Bridge, also known as the Arland D. Williams Jr. Memorial Bridge, is a single bascule span structure with fifteen approach spans. The bridge, which carries four lanes, one way northbound of 14th Street over the Potomac River and Ohio Drive, was originally



constructed in 1950 and rehabilitated in 1976. The southbound 14th St Bridge, also known as the George Mason Memorial Bridge, is a fifteen span continuous multi-steel plate girder structure with a composite concrete deck. The structure has two approach spans (including an exit ramp on the south approach span) consisting of concrete rigid frames supported on concrete abutments with stone fascia, and fourteen piers with stone fascia. The bridge, which carries four lanes of one-way 14th Street southbound traffic over the Potomac River and Ohio Drive, was originally constructed in 1960 and rehabilitated in 1984.

The rehabilitation work involves rehabilitation of some piers on the north direction of the bridge and cleaning and structural repair work on the southern direction of the bridge. The proposed project will include repairs to the bridge superstructure, including the roadway, as well as work on the operator's house located on top of the bridge. In-water work is limited to repairs on several of the northbound and southbound bridge piers and will occur within sealed sheet pile cofferdams. For the northbound bridge, there are thirteen piers across the river, five are planned for repairs, with a maximum of three piers under construction at any time. Structural work will include: installing cofferdams around the piers so that work can proceed in the dry, excavating around piers within the cofferdams, removing cladding, casting concrete pier jackets, and making repairs to the bascule span support system. Repairs to the southbound bridge will be performed simultaneously with northbound bridge work, and will involve cleaning and painting the superstructure steel and minor structural repairs. Prior to any work on the bridge structure, cofferdams will be placed around the bridge piers. All cofferdams will be constructed outside of the February 15 – July 1 time frame when listed species will be present.

#### **NMFS Listed Species in the Action Area**

The action area is defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action" (50CFR§402.02). For this project, the action area includes the footprint of the two bridges as well as the area encompassed by the cofferdams and the underwater area where effects of sheet pile installation for the cofferdams (i.e., increase in suspended sediment and noise) will be experienced. This area is expected to encompass all of the effects of the proposed dredging project. The 14<sup>th</sup> Street Bridges are located approximately 12 km downstream of the Little Falls Dam at approximately river kilometer (rkm) 179.

The federally endangered shortnose sturgeon (*Acipenser brevirostrum*) is known to be present in the Potomac River. Through March 2008, the incidental capture of 73 individual shortnose sturgeon in Maryland waters of the Chesapeake Bay has been reported via the Fish and Wildlife Service's Atlantic Sturgeon reward program. Two fish were recaptured within one to two weeks of their initial capture date (February 1999 in the mainstem of the Bay and then in the Sassafraz River and May/June 2000 in the mainstem of the Bay). All of these fish were captured alive in either commercial or recreational fisheries.

Most of the shortnose sturgeon documented in the reward program have been caught in the upper Bay, from Kent Island to the mouth of the Susquehanna River and the C&D Canal, in Fishing Bay and around Hoopers Island in the middle Bay, and in the Potomac River (Litwiler 2001, Skjeveland et al. 2000; Welsh et al, 2002). Twelve shortnose sturgeon have been captured in the

Potomac River since 1996. The eleven shortnose sturgeon captured in the Potomac River and reported via the FWS reward program were documented in the following locations: six at the mouth of the river (May 3, 2000, March 26, 2001, two on March 8, 2002, December 10, 2004, May 22, 2005); one at the mouth of the Saint Mary's River (April 21, 1998); one at the mouth of Potomac Creek (May 17, 1996); one at rkm 63 (March 22, 2006); one at rkm 57 (Cobb Bar; December 23, 2007); and, one at rkm 48 (March 14, 2008). Additionally, 1 adult female was captured by USGS researchers within the Potomac River (at rkm 103) in September 2005.

An ongoing tagging and telemetry study of shortnose sturgeon in the Potomac River began in 2004 (Kynard 2007). Three shortnose sturgeon (the 9/22/05, 3/22/06 and 3/14/08 fish mentioned above) have been tagged with CART tags (Combined Acoustic and Radio Transmitting). While the sex and reproductive status of the 2008 fish is unknown, the 2005 and 2006 fish were both females with late stage eggs. Tracking has demonstrated that the two females spent the majority of the year in a 79-km reach between river km 141–63. The 2005 female migrated upstream in spring 2006 to a 2-km reach (river km 187–185) containing habitat determined to be suitable for spawning (Kynard et al. 2007). The fish tagged in 2008 has not been detected by the telemetry array that is within the Potomac River. This suggests that the fish either shed the tag or that the fish has left the Potomac River. Information available to date indicates that the 2005 and 2006 fish have remained within the Potomac River since they were tagged, with both fish overwintering in the Potomac River near Mattawoman Creek. The occurrence of pre-spawning females in the Potomac River suggests that a spawning population of shortnose sturgeon continues to exist in this river system.

While an extensive study of shortnose sturgeon in the Potomac River has not been conducted, the data resulting from the tracking of the two females by Kynard et al. (2007) provides valuable information on habitat use and the likely distribution of the species within the River. The two tracked fish have been concentrated in a 79km stretch of the river, from rkm 141 to rkm 63, with excursions upstream of this reach limited to the spring time when one female made a presumed spawning migration to the area below Little Falls. The researchers also indicate that not much change would be expected in the size of the foraging-overwintering concentration area even with a larger sample size of tracked adults. The type of habitat used did not change based on season, with the majority of time spent in the channel or channel edge, with very few excursions to shoal habitat. The range of water depth used was 7.0 – 21.3 meters. The limited use of areas outside of the deep water channel is likely due to the lack of forage items in those habitats, which is supported by evidence of limited shortnose sturgeon forage items in the River (Kynard et al. 2007). As shortnose sturgeon use similar habitats throughout their range, it is possible to make some conclusions regarding the likelihood of shortnose sturgeon occurring in a particular location. Shortnose sturgeon are typically found in the deepest areas (i.e., greater than 3 meters) with suitable dissolved oxygen (i.e., greater than 5 parts per million); often this type of habitat occurs in deepwater navigation channels. While foraging, shortnose sturgeon can also be found in shallower water over mudflats of shellfish beds. During the winter or during the summer while seeking out thermal refugia, shortnose sturgeon are known to occur in deep holes. These assumptions regarding shortnose sturgeon distribution are well supported by the Kynard et al. (2007) study as they found that shortnose sturgeon were largely restricted to the deep water channel as forage items in shallower areas were limited.

Shortnose sturgeon have been documented to spawn between 8 and 18°C. Shortnose sturgeon eggs generally hatch after approximately 9-12 days (Buckley and Kynard 1981). The larvae are photonegative, remaining on the bottom for several days. Larvae are expected to begin swimming downstream at 9-14 days old (Richmond and Kynard 1995). This initial downstream migration generally lasts two to three days (Richmond and Kynard 1995). Studies (Kynard and Horgan 2002) suggest that larvae move approximately 7.5km/day during this initial 2 to 3 day migration. Based on water temperature data in the Potomac River from 2004-2007, water temperatures are expected to be between 8 and 15°C for several days between March 20 and April 23 each year (Kynard 2007). Temperatures typically reach 18°C by May 15.

As noted above, the only time of year when adult shortnose sturgeon are likely to occur this far upstream is while migrating to and from the presumed spawning area near Little Falls, likely between rkm 187 (Chain Bridge) and rkm 184.5 (Fletchers Landing) and return rapidly downstream into the tidal river after spawning. As spawning is limited to a several day period between late March and mid-May, adult shortnose sturgeon could be present in the action area throughout this time period. Due to the demersal, adhesive nature of shortnose sturgeon eggs, eggs will be restricted to the immediate spawning area and do not occur in the action area. Larvae are likely to migrate through the action area; based on the likely dates of spawning, larvae are likely to begin migrating from the spawning grounds between March 29 and June 11. As larvae migrate approximately 7.5km/day during their 2-3 migration period, and the action area is located within 7.5km of the spawning grounds, larvae would not be present past June 12. Based on the best available information, all life stages of shortnose sturgeon are only likely to be present in the action area between mid March and mid June of any year.

#### **Effects of the Action**

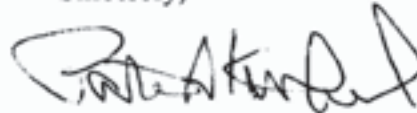
As noted above, the proposed project involves the rehabilitation of two bridges over the Potomac River. In-water work will be limited to structural repairs to existing bridge piers. Work will be accomplished within sheet-pile cofferdams and from barges temporarily sited within the river. An in-water work window will prohibit the installation of cofferdams between February 15 and July 1 of any year.

As noted above, shortnose sturgeon are only likely to occur in the action area between mid-March and mid-June; as such, no shortnose sturgeon will be present in the action area when cofferdams are installed (July 2 – February 14 only). Based on an analysis of steel sheet pile driving activities, effects of increased under water noise will be experienced only within approximately 10 meters of the pile being driven (Jones and Stoke 2007). As any shortnose sturgeon in the river are likely to be several kilometers downstream of the action area, no shortnose sturgeon will be exposed to increased levels of underwater noise resulting from the installation of the steel sheet piles that will compose the cofferdam. Additionally, as any increases in turbidity will be limited to the immediate area surrounding the sheet piles, no shortnose sturgeon will be exposed to these increases in turbidity. As such, the effects of cofferdam installation on shortnose sturgeon are discountable.

During the time of year when shortnose sturgeon could be migrating through the action area, work will be ongoing from barges and within the cofferdams. However, as only an extremely small percentage of the river will be enclosed within cofferdams, there will be sufficient zone of passage for migrating adults and larvae and any effect to migratory movements of any life stage of shortnose sturgeon. Further, while the cofferdams will preclude the use of the enclosed area by foraging shortnose sturgeon, the extremely small area affected combined with the location within a migratory corridor where only opportunistic foraging is likely to occur, makes any effects to the availability of prey for shortnose sturgeon insignificant. The presence of barges and work occurring on these barges will not affect shortnose sturgeon as it will not cause any changes in their behavior or otherwise effect any individuals. As all of the other work on the bridge (i.e., repainting, replacement and repair of decking) will occur above the water line where shortnose sturgeon do not occur, there will be no effect to this species from this work.

Based on the analysis that any effects to shortnose sturgeon from the proposed action will be insignificant or discountable, NMFS is able to concur with the determination that the proposed 14<sup>th</sup> Street Bridges rehabilitation is not likely to adversely affect any listed species under NMFS jurisdiction. Therefore, no further consultation pursuant to section 7 of the ESA is required. Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (a) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered in the consultation; (b) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the consultation; or (c) If a new species is listed or critical habitat designated that may be affected by the identified action. Should you have any questions about this correspondence please contact Julie Crocker of my staff at (978) 282-8480 or by e-mail (Julie.Crocker@Noaa.gov).

Sincerely,



Patricia A. Kurkul  
Regional Administrator

Ec: Crocker, F/NER3  
Nichols, F/NER4 – Annapolis

## DDOT NOISE POLICY

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## REFERENCE





District Department of  
Transportation

# NOISE POLICY







# District of Columbia Department of Transportation

# NOISE POLICY

4/8/2011  
Date of Approval

  
Terry Bellamy  
Interim Director  
District Department of Transportation

4/11/2011  
Date of Approval

  
Joseph C. Lawson  
Division Administrator  
Federal Highway Administration  
DC Division Office



# District of Columbia Department of Transportation

## NOISE POLICY

Date of Issuance: 7 April 2011  
Effective Date: 11 July 2011

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This Policy document replaces the previous DDOT Noise Policy approved 30 June 1997.

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# DISTRICT DEPARTMENT OF TRANSPORTATION NOISE POLICY

## 1. INTRODUCTION:

This document provides the procedural guidelines for assessing noise impacts associated with the construction and operation of highway improvements. These procedures are based on the Federal Highway Administration's (FHWA) noise policy at Part 772 of Title 23 of the Code of Federal Regulations (23 CFR 772) (Appendix B). The procedures described in this document require compliance with the National Environmental Policy Act (NEPA) of 1969, FHWA environmental regulations as described in 23 CFR 771, sec 4f of the U.S DOT Act, Sec 106 of the National Historic Preservation Act, and other laws as applicable.

During the rapid expansion of the Interstate Highway System and other roadways in the 20th century, communities began to recognize that highway traffic noise and construction noise had become important environmental impacts. In the 1972 Federal-aid Highway Act, Congress required FHWA to develop a noise standard for new Federal-aid highway projects. While providing national criteria and requirements for all highway agencies, the FHWA Noise Standard gives highway agencies flexibility that reflects state-specific attitudes and objectives in approaching the problem of highway traffic and construction noise. This policy contains DDOT's policy on how highway traffic noise impacts are defined, how noise abatement is evaluated, and how noise abatement decisions are made. In addition to defining traffic noise impacts, the FHWA Noise Standard requires that noise abatement measures be considered when traffic noise impacts are identified for Type I Federal projects. Noise abatement measures that are found to be feasible and reasonable must be constructed for such projects. Feasible and reasonable noise abatement measures are eligible for Federal-aid participation at the same ratio or percentage as other eligible project costs.

## 2. PURPOSE:

This policy describes DDOT program to implement 23 CFR 772. Where FHWA has given DDOT the flexibility in implementing the standard, this policy describes DDOT's approach to implementation. Protection of the public health and welfare is an important responsibility that FHWA and DDOT help to accomplish during the planning and design of a highway project. In the 1970 Federal-Aid Highway Act, the U.S. Congress directed FHWA to develop noise standards. The District of Columbia Noise Control Act of 1977

(DC Law 2-53) as amended, by the DC Noise Control Act Amendment of 1996 (DC Law 11-161) and its implementing regulations declared it a policy of the District of Columbia (District) to reduce the ambient noise level in the District to promote public health, safety, welfare, and the peace and quiet of the inhabitants of the District, and to facilitate the enjoyment of the natural attraction of the District.

### 3. DEFINITIONS:

**Abatement:** Any mitigation technique that results in lower noise levels.

**“Approach” NAC:** 1.0 db(A) less than NAC.

**Barrier:** A natural or man-made object that interrupts the path of sound from the sound source to the sound receptor.

**Benefited Receptor:** The recipient of an abatement measure that receives a noise reduction at or above the minimum threshold of 5 dB(A), but not to exceed the highway agency’s reasonableness design goal. DDOT defines a benefited receptor as any receptor predicted to receive a 7 dB(A) reduction from the proposed noise abatement measure.

**Common Noise Environment:** A group of receptors within the same Activity Category in Table 1 that are exposed to similar noise sources and levels; traffic volumes, traffic mix, and speed; and topographic features. Generally, common noise environments occur between two secondary noise sources, such as interchanges, intersections, cross-roads.

**Date of Public Knowledge:** The date of approval of the Categorical Exclusion (CE), the Finding of No Significant Impact (FONSI), or the Record of Decision (ROD), as defined in 23 CFR 771.

**Descriptors, acoustical:** The following descriptors are often used:

- i. dBA: A-weighted sound level measured in decibels
- ii. Leq: The equivalent steady-state sound level which in a stated period of time contains the same acoustic energy as the time-varying sound level during the same time period, with Leq(h) being the hourly value of Leq.

**Design Year:** The future year used to estimate the probable traffic volume for which a highway is designed.

**Existing Noise Levels:** The worst noise hour resulting from the combination of natural and mechanical sources and human activity usually present in a particular area.



**Feasibility:** The combination of acoustical and engineering factors considered in the evaluation of a noise abatement measure.

**Impacted Receptor:** The recipient that has a traffic noise impact.

**Multifamily Dwelling:** A residential structure containing more than one residence. Each residence in a multifamily dwelling shall be counted as one receptor when determining impacted and benefited receptors.

**Noise Barrier:** A physical obstruction that is constructed between the highway noise source and the noise sensitive receptor(s) that lowers the noise level, including stand alone noise walls, noise berms (earth or other material), and combination berm/wall systems.

**Noise Reduction Design Goal:** The optimum desired dB(A) noise reduction determined from calculating the difference between future build noise levels with abatement, to future build noise levels without abatement. The noise reduction design goal shall be at least 7 dB(A), but not more than 10 dB(A). The DDOT reasonable design goal is 7 dB(A).

**Permitted:** A definite commitment to develop land with an approved specific design of land use activities as evidenced by the issuance of a building permit.

**Property Owner:** An individual or group of individuals that holds a title, deed, or other legal documentation of ownership of a property or a residence.

**Reasonableness:** The combination of social, economic, and environmental factors considered in the evaluation of a noise abatement measure.

**Receptor:** A discrete or representative location of a noise sensitive area(s), for any of the land uses listed in Table 1.

**Residence:** A dwelling unit. Either a single family residence or each dwelling unit in a multifamily dwelling.

**Statement of Likelihood:** A statement provided in the environmental clearance document based on the feasibility and reasonableness analysis completed at the time the environmental document is being approved.

**Substantial Construction:** The granting of a building permit, prior to right-of-way acquisition or construction approval for the highway.

**Substantial noise increase:** One of two types of highway traffic noise impacts. For a Type I project, in DDOT an increase in noise levels of 10.0 dB(A) or more in the design

year over the existing noise level.

**Traffic Noise Impacts:** Design year build condition noise levels that approach or exceed the NAC listed in Table 1 for the future build condition; or design year build condition noise levels that create a substantial noise increase over existing noise levels.

**Type I Project:** Following projects are considered Type 1 projects:

1. The construction of a highway on new location; or,
2. The physical alteration of an existing highway where there is either:
  - a. Substantial Horizontal Alteration. A project that halves the distance between the traffic noise source and the closest receptor between the existing condition to the future build condition; or,
  - b. Substantial Vertical Alteration. A project that removes shielding therefore exposing the line-of-sight between the receptor and the traffic noise source. This is done by either altering the vertical alignment of the highway or by altering the topography between the highway traffic noise source and the receptor; or,
3. The addition of a through-traffic lane(s). This includes the addition of a through-traffic lane that functions as a HOV lane, High-Occupancy Toll (HOT) lane, bus lane, or truck climbing lane; or,
4. The addition of an auxiliary lane, except for when the auxiliary lane is a turn lane; or,
5. The addition or relocation of interchange lanes or ramps added to a quadrant to complete an existing partial interchange; or,
6. Restriping existing pavement for the purpose of adding a through-traffic lane or an auxiliary lane; or,
7. The addition of a new or substantial alteration of a weigh station, rest stop, ride-share lot or toll plaza.
8. If a project is determined to be a Type I project per § 772.5 then the entire project area as defined in the environmental document is a Type I project.

**Type II Project:** A Federal or Federal-aid highway project for noise abatement on an existing highway. For a Type II project to be eligible for Federal-aid funding, the highway agency must develop and implement a Type II program in accordance with section 772.7(e). The Type II program is optional for participation by highway agencies. Currently DDOT does not participate in Type II program.

**Type III Project:** A Federal or Federal-aid highway project that does not meet the classifications of a Type I or Type II project. Type III projects do not require a noise analysis

## 4. APPLICABILITY:

This policy applies to all Federal highway projects in the District of Columbia; that is, any projects that receive Federal-aid highway funds or are otherwise subject to FHWA approval. These procedures are applicable to federally funded projects and are based on the Federal Highway Administration's (FHWA) noise policy at Part 772 of Title 23 of the Code of Federal Regulations (23 CFR 772) (see Appendix A) and are applicable to all Type I and Type II projects.

## 5. SUMMARY OF KEY LEGISLATION, REGULATIONS & GUIDANCE:

Relative to noise, two principal sources are considered:

1. The impacts associated with vehicular traffic using a new or improved roadway (highway traffic noise)
2. The impacts associated with building a new roadway or improving an existing roadway (construction noise)

### 5.1. Highway Traffic Noise:

As noted earlier, 23 CFR 772 contains the FHWA noise policy. This policy is further defined in *Highway Traffic Noise: Analysis and Abatement Guidance* (FHWA 2010). All federal-aid highway projects must be developed in conformance with these directives. The FHWA process for evaluating traffic-related noise impacts is often summarized by the following steps:

1. Identify existing activities (sensitive receptors)
2. Determine existing noise levels
3. Predict future noise levels
4. Identify potential impacts
5. Evaluate abatement measures
6. Include feasible and reasonable abatement measures in the project plans, specifications and estimates

These steps apply to only Type I projects (as defined in the definition section). Type II projects are noise abatement activities along existing federal-aid highways. Currently, DDOT does not have a Type II program.

## **5.2. Construction Noise:**

Construction noise analysis related to transportation projects is typically documented in conjunction with the project's highway traffic noise analysis. At each point in project development where highway traffic noise data are produced, a complementary construction noise subsection will be included in the documentation. Most projects will not require modeling of construction noise. In many cases, construction noise analyses may be adequately addressed through the narrative discussion or an application of a simplified manual calculation technique. The use of sophisticated modeling techniques is typically only required for the most complex projects.

In the District of Columbia, construction noise is regulated by Title 20 of the District of Columbia Code of Municipal Regulations (DCMR). These regulations are the appropriate standards to use when assessing project-related impacts.

## 6. GENERAL METHODOLOGY OF EVALUATION:

This section summarizes the general methodology associated with investigating highway traffic noise and construction noise. Section 6.1 explains the DDOT policy regarding noise impact and abatement measures, and relates the analysis of noise to the DDOT Project Development Process. The technical procedures for analyzing noise according to the FHWA methods are explained later in this document.

**Table 1: Noise Abatement Criteria (NAC)**

(Hourly A-Weighted Sound Level decibels (dBA)\* )

Source: 23 CFR, Part 772

Activity Category	Activity Criteria	Evaluation Location	Activity Description
	Leq (h)		
A	57	Exterior	Lands on which serenity and quiet are of extraordinary significance and serve an important public need and where the preservation of those qualities is essential if the area is to continue to serve its intended purpose.
B	67	Exterior	Residential
C	67	Exterior	Active sport areas, amphitheaters, auditoriums, campgrounds, cemeteries, day care centers, hospitals, libraries, medical facilities, parks, picnic areas, places of worship, playgrounds, public meeting rooms, public or nonprofit institutional structures, radio studios, recording studios, recreation areas, Section 4(f) sites, schools , television studios, trails, and trail crossings
D	52	Interior	Auditoriums, day care centers, hospitals, libraries, medical facilities, places of worship, public meeting rooms, public or nonprofit institutional structures, radio studios, recording studios, schools, and television studios
E	72	Exterior	Hotels, motels, offices, restaurants/bars, and other developed lands, properties or activities not included in A-D or F.
F	--	--	Agriculture, airports, bus yards, emergency services, industrial, logging, maintenance facilities, manufacturing, mining, rail yards, retail facilities, shipyards, utilities (water resources, water treatment, electrical), and warehousing
G	--	--	Undeveloped lands that are not permitted

## 6.1. DDOT Highway Traffic Noise Analysis and Policy:

It is DDOT policy that noise mitigation should be considered whenever a project-related highway traffic noise impact is expected to occur. A highway traffic noise impact is deemed to occur when predicted (design-year) noise levels either approach or exceed the applicable NAC or substantially increase the existing noise levels. Generally, an effective noise abatement treatment is reasonable if its cost per benefited residential unit is no more than \$40,000 and it meets all of the other reasonableness criteria (see Section 7.3). Work related to the highway traffic noise analysis is conducted at three points within the DDOT Project Development process.

Preliminary investigations are conducted during the early planning steps, before the DDOT Environmental Compliance review meeting. Important background data are collected that will assist in the planning process. The key question is: *are there sensitive receptors in the project area?* If there are, the distribution of the sensitive receptors within the project area will be valuable information for the planning study. If no sensitive receptors are present, no further noise analysis may be necessary. The data collected at this stage will be presented in a Sensitive Receptor Identification Technical Memorandum. The bulk of a project's highway traffic noise analysis will be conducted during the development of the NEPA document. Two deliverables are expected:

- The preliminary noise report documents the evaluation of the project's feasible alternatives. The key question will be to determine: *is a highway traffic noise impact expected to occur?* The answer will be obtained by determining existing noise levels, modeling to predict future noise levels, and evaluating the results against the appropriate standards. These data will be useful in evaluating the feasible alternatives and selecting a preferred alternative.
- The final noise report provides an update of the noise analysis for the preferred alternative. The important questions answered in this report are: *has the preferred alternative been modified materially since the preliminary noise analysis? And, if a highway traffic noise impact is predicted, is mitigation feasible and reasonable?* The answers to these questions will be essential to developing appropriate mitigation measures.

The final component of a highway traffic noise analysis will be conducted during project design. If mitigation is required, the analysis will be updated, as necessary, and the mitigation (typically noise barriers) will be designed and included in the construction plans.

## 6.2. FHWA Highway Traffic Noise Analysis:

The steps involved in the FHWA process for evaluating traffic-related noise impacts are described below:

1. Identify Existing Activities
2. Measure Existing Noise Levels
3. Predict Future Noise Levels
4. Identify Potential Impacts
5. Evaluate Appropriate Abatement Measures

### 6.2.1. Identify Existing Activities (Sensitive Receptors)

To inform the planning process and develop the information necessary for scoping future noise-related activities, the following data will be required:

- Assigning land use activities
- Identifying sensitive receptors
- Establishing representative monitoring locations and modeling sites

#### **Assign Land Use Activities:**

Because NACs are categorized by land use activity (see Table 1), the land uses within the project area must be identified. This can be accomplished through a review of existing materials. An inventory of existing/planned land uses and existing/planned zoning classifications are available through Title 10 and 11 of the DCMR. Where land adjacent to the project boundaries is undeveloped, the analysis shall consider whether there is a commitment to develop the property. A commitment is denoted by the issuance of a building permit, which serves to demonstrate a reasonable vested financial interest in developing the property.

#### **Identify Sensitive Receptors:**

Based on the land use assignments, noise-sensitive land uses (sensitive receptors) can be established. A sensitive receptor is a noise-sensitive location registering measurable sound levels as described in 23 CFR 772 – typically a residence or other use that would be negatively affected by noise. In a noise model, a modeling site may represent one or more noise-sensitive locations/residences.

#### **Establish Representative Monitoring Locations and Modeling Sites:**

Using the preceding information, representative locations for monitoring existing noise conditions can be established (monitoring locations). Monitoring locations should be representative of the land uses they are meant to represent. A photolog and project mapping should document the monitoring locations proposed. Because their primary use will be the calibration of the traffic noise model, the distribution and number of field monitoring locations should be adequate for that purpose.

Similarly, representative sites for noise prediction (modeling sites) can be established. It is not necessary to have modeling sites for each residence. However, sufficient noise modeling sites must be used to adequately represent the entire population of sensitive receptors. A photolog and project mapping should document the modeling sites proposed. Monitoring locations and modeling sites should be placed in areas of outdoor activity and at least 3 meters away from buildings. Also, it is often helpful for monitoring locations and modeling sites to be distributed such that front row and second row receptor evaluation is possible. Monitoring locations and modeling sites are typically limited to within 600 feet of the proposed improvements.

### **6.2.2. Measure Existing Noise Levels:**

At the representative monitoring locations, existing noise levels will be measured using a noise meter during peak noise hour traffic conditions. The field measurements must be consistent with the guidelines contained in the FHWA *Highway Traffic Noise: Analysis and Abatement Guidance (June 2010- Revised January 2011, FHWA's Measurement of Highway Related Noise (1996)* and DCMR Chapter 29, Noise Measuring Test Procedures.

The field measurements will be used to validate the traffic noise model. As the noise level is dependent on traffic volumes at the time of the measurement, traffic counts must also be taken during the measurement period to properly populate the validation run. If the difference between the field measurements and the validation run is less than 3 dBA, the model can be said to be properly validated. If the difference between field measurements and validation run is more than 3 dBA, then model should be calibrated (or re-run) accordingly until the difference is less than 3 dBA. In instances involving new roadways on new alignments, the measured noise levels will represent the existing noise levels. In all other cases, the validated model (using peak hour certified/project traffic volumes) will be used to produce the existing noise levels against which the future noise levels will be compared to determine impacts.

### **6.2.3. Predict Future Noise Levels:**

The prediction of future noise levels relies on the certified/project traffic volumes for the peak noise hour in the design-year. The peak noise hour is often the peak truck hour. Future noise-level predictions are required for all build alternatives under consideration and for the no-build alternative. Noise prediction methodologies should be consistent with current FHWA approved methods. Currently, this involves the use of TNM version 2.5. The construction of an adequate model requires three-dimensional coordinates for the existing conditions and for the proposed alternatives. The methods used to create the model require documentation, adequate to ensure that the stakeholders can assess its robustness. Typically, the engineering data available with which to construct noise models improves as the project advances through the project development process. The prediction of noise levels should use the posted speed limit or the highest overall speed



that a driver can travel on a given road, under favorable conditions.

#### **6.2.4. Identify Potential Impacts:**

As noted earlier, a highway traffic noise impact is deemed to occur when predicted (design-year) noise levels either approach or exceed the applicable NAC listed in Table 1 or substantially increase over existing noise levels. If either of these conditions exists, a highway traffic noise impact occurs and noise abatement must be considered. Please see “definition” section of this document for definitions of “approach” and “substantial noise increase”.

#### **6.2.5. Evaluate Appropriate Abatement Measures:**

At a minimum, potential traffic noise abatement measures include the following:

- Constructing noise barriers within the proposed right-of-way
- Modifying the proposed horizontal and/or vertical alignment of the roadway
- Acquiring property to serve as a buffer zone
- Modifying speed limits
- Restricting truck traffic
- Providing noise insulation

Of these abatement measures, the noise barrier option is usually the most practical and effective choice, however, the District of Columbia (District) is a dense urban area. Most of the District has existing roadways with a narrow right of way. The District also has a historic character with view sheds of national importance. The addition of noise walls in such areas can cause severe impacts to the historic character of the area and to views to the national monuments. Nevertheless, for all *possible* abatement measures, a cost/benefit analysis is required. In most cases, this will focus on the practicality of the abatement method. In order for a noise abatement option to be selected, it must be both feasible and reasonable.

### **6.3. Traffic Noise Mitigation Feasibility and Reasonableness Criteria:**

#### **Feasibility:**

For a noise abatement technique to be considered feasible, all of the following must be true:

1. Achievement of at least a 5 dB(A) highway traffic noise reduction at impacted receptors. Per 23 CFR 772, FHWA requires the highway agency to determine the number of impacted receptors required to achieve at least 5 dB(A) of reduction. DDOT requires that fifty percent (50%) or more of the impacted receptors experience 5 dB(A) or more of insertion loss to be feasible; and

2. The determination that it is possible to design and construct the noise abatement measure. The factors related to the design and construction include: safety, barrier height, topography, drainage, utilities, geometry, structural integrity of the facilities, and maintenance of the abatement measure, maintenance access to adjacent properties, and general access to adjacent properties (i.e. arterial widening projects). Accepted engineering practices shall be exercised and AASHTO and DDOT Standards shall be used when considering the factors associated with the design and construction of a noise abatement measure. All conflict(s) must be analyzed thoroughly and documented before a determination is made.
3. Placement of a barrier will not restrict pedestrian or vehicular access
4. Construction of a barrier will not cause safety or maintenance problems

### **Reasonableness:**

For a noise abatement technique to be considered reasonable the factors given below must be considered. The parameters used during the NEPA process are also used during the Final Design Phase when making a determination of noise barrier reasonableness. When performing a reasonableness analysis for the NEPA document, some parameters (e.g., desires of the benefiting receptors) will not yet be quantifiable. Questions relating to these parameters will be answered in the Warranted, Feasible, and Reasonable Worksheets in order to determine the proposed noise barrier's reasonableness.

All of the reasonableness factors listed below must collectively be achieved in order for a noise abatement measure to be deemed reasonable.

### **Viewpoints of the benefited receptors:**

The FHWA highway traffic noise regulation requires DDOT to consider the viewpoints of the benefited receptors in determining the reasonableness of noise abatement. A final survey and determination shall occur after the approved final design noise analysis; however, comments will be considered throughout the entire design process. DDOT shall solicit the viewpoints of all benefited receptors through certified mailings and obtain enough responses to document a decision as to whether or not there is a desire for the proposed noise abatement measure. Fifty percent (50%) or more of the respondents shall be required to favor the noise abatement measure in determining reasonableness.

### **Cost-effectiveness:**

Cost of an abatement measure is an important consideration but only one of a number of factors to consider. The FHWA allows DDOT to consider the actual construction cost of noise abatement. The construction of a noise barrier is not reasonable if the cost is more than \$40,000 per benefited receptor. The barrier cost will include the cost of construction (material and labor), the cost of additional right-of-way, the additional cost of relocating utilities and any other costs associated with the barrier. The estimated cost of construction (material and labor) will be \$25 per square foot. All receptors with noise

reductions of 5 dBA or more will be counted. Each house will be counted as one receptor. The reasonableness calculation for Category C, D and E receptors are given in Appendix A.

**Noise Reduction Design Goals:**

The design goal is a reasonableness factor indicating a specific reduction in noise levels that DDOT uses to identify that a noise abatement measure effectively reduces noise. It is a comparison of the design year noise level with the abatement measure to the design year noise level without the abatement measure. The design goal establishes a criterion, selected by DDOT that noise abatement must achieve. The design goal is not the same as acoustic feasibility, which is the minimum level of effectiveness of a noise abatement measure. Acoustic feasibility indicates that the noise abatement measure can, at a minimum, achieve a discernible reduction in noise levels. As required by FHWA, DDOT shall define the design goal of at least 7 dB(A) but not more than 10 dB(A), and shall define the number of benefited receptors that must achieve this design goal. DDOT's design goal is 7 dB(A) of insertion loss for at least one benefited receptor.

## **7. CONSTRUCTION NOISE EVALUATION METHODOLOGY:**

There is nothing particularly unique about construction noise. It is produced by construction equipment or activities with sufficient magnitude (loudness) and within a certain frequency range (audible spectrum) such that human beings can hear it. While mostly annoying at night, construction noise can be equally unwelcome during the daytime. For instance, in commercial areas it can interfere with the ability to conduct business. Consequently, if not properly addressed, public concerns related to a project's construction noise impacts can unnecessarily affect/delay project development. The general steps associated with a construction noise analysis are:

- Identifying activities that may be negatively affected by construction noise
- Identifying the measures needed to minimize adverse construction noise impacts
- Incorporating appropriate abatement measures into the project's plans

Data regarding construction noise should be assessed in conjunction with the project's highway traffic noise analysis.

### **7.1. Identifying Activities That May Be Negatively Affected by Construction Noise:**

The identification of activities that may be negatively affected by construction noise should mirror the process described in Section 6.

## **7.2. Identifying the Measures Needed to Minimize Adverse Construction Noise Impacts:**

Most projects will not require modeling. In many cases, construction noise may be adequately evaluated through a narrative discussion or an application of a simplified manual calculation technique. The use of sophisticated modeling techniques is typically only required for the most complex projects. The state-of-the-art model is the FHWA Roadway Construction Noise Model (RCNM). The RCNM enables the prediction of construction noise levels for various construction operations based on a compilation of empirical data and the application of acoustical propagation formulas. If a construction noise impact is anticipated at a particular sensitive receptor, the use of the model contained in FHWA's *Highway Construction Noise Measurement, Prediction and Mitigation* is generally acceptable. The scope of needed construction-related noise analysis should be delineated during the project's planning steps.

In the District of Columbia, construction noise is regulated by Title 20 of the District of Columbia Municipal Regulations (DCMR). These regulations are the appropriate standards to use when assessing project-related impacts. The basic protocol under the DCMR is the establishment of maximum noise levels for the District's various land uses. Chapter 27 of Title 20 addresses general provisions, exemptions, and other procedural issues. Chapter 28 establishes maximum noise levels. Chapter 29 establishes noise measuring procedures. The DCMR provides construction-timing limitations as well as sound-level limitations. Both are typically distributed by land use type.

## **7.3. Incorporate needed abatement measures into the project's plans:**

Abatement measures to minimize construction noise impacts, in accordance with the DCMR, should be incorporated into the project's environmental commitments. Typically, adherence with the DDOT construction and material specifications is adequate to comply with the DCMR limitations. A common sense approach to noise mitigation should be implemented. Low-cost and easy-to-implement measures are usually adequate. Environmental commitments should avoid unnecessarily constraining construction activities. Only in unusual circumstances should specific techniques be mandated.

## 8. APPENDICES:

- Appendix A: Activity Category C, D & E Calculations
- Appendix B: 23 CFR 772. 2010. Procedures for Abatement of Highway Traffic Noise and Construction Noise.
- Appendix C. FHWA Highway Traffic Noise Analysis and Abatement Guidance. June 2010 (Revised January 2011).

## 9. ADDITIONAL INFORMATION:

- a. DDOT. 2010. *DDOT Environmental Policy and Process Manual*.
- b. DDOT. 2005. *Design and Engineering Manual*.
- c. District of Columbia. *District of Columbia Municipal Regulations*.
- d. FHWA. 2006. *FHWA Roadway Construction Noise Model User's Guide*. Report No. *FHWA-HEP-05-054*. Washington DC. January.
- e. FHWA. 1998. *Traffic Noise Model (Look-Up Tables)*. Report No. *FHWA-PD-98-047*. Washington DC. July.
- f. FHWA. 1998. *Traffic Noise Model Technical Manual*. Report No. *FHWA-PD-96-010*. Washington DC. February.
- g. FHWA. 1998. *Traffic Noise Model User's Guide*. Report No. *FHWA-PD-96-009*. Washington DC. January.
- h. FHWA. 1996. *Measurement of Highway Related Noise*.

## Appendix A

### Activity Category C, D and E Calculation

#### Activity Category C Calculation

Activity Category C in FHWA noise abatement criteria includes Active sport areas, amphitheaters, auditoriums, campgrounds, cemeteries, day care centers, hospitals, libraries, medical facilities, parks, picnic areas, places of worship, playgrounds, public meeting rooms, public or nonprofit institutional structures, radio studios, recording studios, recreation areas, Section 4(f) sites, schools, television studios, trails, and trail crossings. The activity category is for exterior noise levels.

FHWA has required that states and agencies using Federal-aid highway funds develop feasibility and reasonableness criteria for noise barriers. The emphasis of such criteria focused primarily on residential sites since they represent the vast majority of noise-sensitive sites benefited by noise barriers. No formal or standard quantitative procedures for evaluating such land uses that would minimize the judgment needed to make those barrier decisions have been developed for the District of Columbia or the majority of states. For a barrier to be determined to be cost effective (one of the reasonableness criteria), DDOT requires that the maximum square foot per benefited residence not exceed 1,600 square feet. For a one mile long, average height barrier, protecting a single row of residences, this limiting value would be obtained with residential dwellings spaced at approximately 96 feet as calculated below:

$87,804 \text{ s.f. per mile} / 1,600 \text{ s.f. per residence} = 55 \text{ residences per mile}$   
 $5,280 \text{ feet per mile} / 55 \text{ residences per mile} = 96 \text{ feet per residence; round to 100 feet.}$

Assuming that park lands and other outdoor activities within Activity Category C will be treated in a similar manner as Activity Category B residential areas, the following procedure is presented for consideration:

1. Locate closest active area of park at each border of park closest to highway. Mark these points.
2. Draw a line connecting the above points and continue the line to the park boundaries.
3. Treat this line as the first row of receptors and space points at every 96 feet along this line beginning at the left side park boundary.
4. Using the above line and point as a base, establish a perpendicular grid with points spaced at 96 foot intervals in both directions. Mark only those points with areas that are publicly used.

5. Model all marked points and determine which ones are impacted (Leq noise levels greater than or equal to 66 dBA or substantial increase over existing noise levels). Consider only these points in further analysis. Treat each site as one residence for all areas of public use.
6. Determine parameters (height, length, cost, benefited receptors, etc.) of the barrier system required to protect the park. If part of the barrier also protects adjacent residential areas, treat the entire barrier by adding benefited homes with qualifying park receptor points.
7. Calculate square feet per benefited receptor values.

Other factors which may be considered in the above evaluation include:

1. Adding value to sites (by treating as more than one residence each) based on park usage.
2. Adjusting value to sites based on existing noise level; quiet parks may warrant use of higher site values than parks with high existing levels.

This process is to be used for exterior uses at public use facilities, as listed in Category C. However, it is not intended to be used for calculating the cost effectiveness of a noise barrier for the non-public use facilities listed in that category, such as radio studios and recording studios. These facilities are to be counted as a single receptor only.

#### **Activity Category D Calculation:**

To address interior noise mitigation, a one to one conversion of the maximum square feet per benefited receptor to cost per benefited receptor is recommended using current engineering costs for noise barriers. A sample calculation is provided below. The sample equation assumes a cost of \$25 per square feet for noise barrier materials and installation.

Example: if one receptor is predicted to experience interior noise level impacts, multiply the 1,600 maximum square feet by \$25 per square feet for a total of \$40,000 per benefited resident.

#### **Activity Category E Calculation:**

Category E includes the exterior impact criteria for developed lands that are less sensitive to highway noise. Highway traffic noise abatement shall be considered for hotels, motels, offices, restaurants/bars, and other developed lands, properties or activities not included in Activity Categories A, D or F whenever the exterior design year predicted noise levels

approach or exceed 72 dB(A) (Leq). These facilities are to be counted as a single receptor only to determine reasonableness. For Activity Category E, if exterior areas of frequent human use are identified and noise mitigation is feasible and reasonable, owners of these establishments will be contacted to ascertain their desire to have a noise barrier constructed. The construction of a noise barrier is not reasonable if the cost is more than \$40,000 per benefited receptor. The barrier cost will include the cost of construction (material and labor), the cost of additional right-of-way, the additional cost of relocating utilities and any other costs associated with the barrier. All receptors with noise reductions of 5 dBA or more will be counted.



PRELIMINARY DESIGN ORDER

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REFERENCE





U.S. DEPARTMENT OF  
TRANSPORTATION

**Federal Highway  
Administration**

# Order

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**Subject**  
**FHWA Policy on Permissible Project Related Activities  
During the NEPA Process**

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<b>Classification Code</b>	<b>Date</b>	<b>OPI</b>
6640.1A	October 1, 2010	HEPE-1

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Par.

1. What is the purpose of this Directive?
2. Is this a new Directive?
3. What authorities govern this Directive?
4. What definitions are used in this Directive?
5. What is FHWA's policy regarding which project activities may be advanced prior to a National Environmental Policy Act decision?
6. What activities may be considered preliminary design for purposes of this Directive?
7. What activities may be considered final design for purposes of this Directive?
8. What safeguards should be taken to ensure the FHWA does not authorize final design activities?
9. Should the division administrators report any information to Washington Headquarters?
10. Will guidance regarding the implementation of this Directive be issued?
11. Who should I contact for additional information?

1. **What is the purpose of this Directive?** This Directive clarifies the Federal Highway Administration's (FHWA) policy regarding the permissible project-related activities that may be advanced prior to the conclusion of the National Environmental Policy Act (NEPA) process.

2. **Is this a new Directive?** Yes. This is a new Directive.

3. **What authorities govern this Directive?**

- a. Title 23, Code of Federal Regulations (CFR), Section 771.113(a) ([23 CFR §771.113\(a\)](#)) provides the following: "The lead agencies in cooperation with the applicant (if not the lead agency), will perform the work necessary to complete a finding of no significant impact (FONSI) or a record of decision (ROD) and comply with other related environmental laws and regulations to the maximum extent possible during the NEPA process. This work includes environmental studies, related engineering studies, agency coordination, and public

involvement. However, final design activities, property acquisition, purchase of construction materials or rolling stock, or project construction shall not proceed until the following have been completed, except as otherwise provided in law or in paragraph (d) of this section:

- (1) The action has been classified as a categorical exclusion, or a FONSI has been approved, or a final environmental impact statement has been approved and available for the prescribed period of time and a ROD has been signed;
- (2) For actions proposed for FHWA funding, the Administration has received and accepted the certifications and any required public hearing transcripts required by Title 23, United States Code (U.S.C.), Section 128;
- (3) For activities proposed for FHWA funding, the programming requirements of 23 CFR, part 450, subpart B, and 23 CFR, part 630, subpart A, have been met.

b. Title 23, CFR, Section 636.103 (23 CFR §636.103), defines the terms “Preliminary Design” and “Final Design” as follows:

- (1) “*Final design* means any design activities following preliminary design and expressly includes the preparation of final construction plans and detailed specifications for the performance of construction work.”
- (2) “*Preliminary design* defines the general project location and design concepts. It includes, but is not limited to, preliminary engineering and other activities and analyses, such as environmental assessments, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for the final design. Prior to completion of the NEPA review process, any such preliminary engineering and other activities and analyses must not materially affect the objective consideration of alternatives in the NEPA review process.”

c. Title 40, CFR, Section 1502.2(f) (40 CFR §1502.2(f)) provides the following: “Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (Sec. 1506.1).”

- d. Title 40, CFR, Section 1506.1(a) (40 CFR §1506.1(a)) provides the following: “Until an agency issues a record of decision, as provided in §1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:
  - (1) Have an adverse environmental impact; or
  - (2) Limit the choice of reasonable alternatives.”

4. **What definitions are used in this Directive?**

- a. **Design-bid-build.** The traditional project delivery method where design and construction are sequential steps in the project development process. With the design-bid-build method, a contracting agency may award a design contract to an engineering firm using a qualifications-based procurement process and then, when the design phase is complete, a construction contract will be awarded to a contractor with the lowest responsive bid through a competitive process.
- b. **Design-build.** A project delivery method where both the design and construction phases of the project are combined into one contract and awarded to a single entity. With the design-build method, the contracting agency may award the contract on a low-bid basis or best value basis through the evaluation of certain factors that are identified in a request for proposals.
- c. **Final design.** For purposes of this Directive, the term “final design” shall have the same meaning as defined at 23 CFR §636.103, which is stated in Paragraph 3b(1) above, and clarified in this Directive.
- d. **NEPA decision.** The point in the NEPA evaluation process at which the Federal lead agency issues a CE, FONSI, or a ROD.
- e. **Preliminary design.** For purposes of this Directive, the term “preliminary design” shall have the same meaning as defined at 23 CFR §636.103, which is stated in Paragraph 3b(2) above, and clarified in this Directive.
- f. **Project delivery mechanism.** The method used by a contracting agency to deliver a project, including the design-bid-build and design-build methods.

5. **What is FHWA's policy regarding which project activities may be advanced prior to a NEPA decision?**
- a. State departments of transportation (DOTs) and other contracting agencies may perform preliminary design activities prior to a NEPA decision regardless of the project delivery mechanism that is used. However, final design activities may not be advanced until a NEPA decision has been issued.
  - b. The definitions of *preliminary design* and *final design* found at 23 CFR §636.103, and clarified in this Directive, shall be relied upon by the FHWA regardless of the project delivery mechanism used.
6. **What activities may be considered preliminary design for purposes of this Directive?**
- a. As specified in the definition of *preliminary design*, preliminary design encompasses general project location and design concepts. The activities that relate to defining general project location and design concepts are those needed to establish the parameters for final design.
  - b. The definition of *preliminary design* includes examples of specific activities that are needed to adequately analyze alternatives and establish the parameters for final design. These activities are considered preliminary design. However, the activities specified in the definition are not the only activities that are considered preliminary design. Appendix A provides examples of other activities considered to be preliminary design.
  - c. The activities specified in the definition of *preliminary design* and Appendix A are deemed to not materially affect the objective consideration of alternatives or have adverse environmental impacts. However, on a case-by-case basis, if the division administrator believes that special factors are present related to the NEPA analysis, division administrators may determine that one or more activities listed in the definition of *preliminary design* and Appendix A do materially affect the objective consideration of alternatives in the NEPA review process or have adverse environmental impacts. In such cases, the activity shall not be advanced as preliminary design.
  - d. The list of activities in the definition of *preliminary design* and Appendix A is not exclusive. Other activities necessary to the NEPA decision and that establish the parameters for final design may proceed as preliminary design so long as those activities do not

materially affect the objective consideration of alternatives in the NEPA process or have an adverse environmental impact. The determination as to whether any activity materially affects the objective consideration of alternatives or has an adverse environmental impact is a discretionary FHWA determination that is to be made by the division administrator. In making this determination, division administrators should consider the factors identified in Paragraph 6e below. Division administrators may make this determination on a programmatic or case-by-case basis. For activities that are not identified in the definition of *preliminary design* or Appendix A, division administrators must consult with the Office of Project Development and Environmental Review (HEPE-1) in deciding whether to advance the activity as preliminary design in order to ensure nationwide consistency.

- e. In determining whether any activity that is not needed to complete the NEPA process or to obtain other environmental permits or approvals materially affects the objective consideration of alternatives, division administrators must focus on whether the level of activities advanced prior to the NEPA decision goes too far in focusing on a particular alternative. In making this determination, division administrators may consider and balance any relevant factors, including:
  - (1) The actual bias on the part of the decisionmaker that the proposed preliminary design activity to be advanced will create with respect to any alternative under consideration;
  - (2) The perception of bias on the part of the community at large with respect to the advancement of the proposed preliminary design activity;
  - (3) The extent to which the proposed preliminary design activity is specific to only one alternative under consideration;
  - (4) The degree of preliminary design activities advanced for any given alternative relative to other alternatives under consideration;
  - (5) The estimated cost of the proposed preliminary design activity standing alone is substantial; and
  - (6) The degree to which the proposed preliminary design activity relates to any specific point of controversy regarding an alternative under consideration.

- f. In all cases, regardless of what activities are advanced prior to a NEPA decision, division administrators must exercise independent judgment and retain the discretion to approve any reasonable alternative under consideration. Division administrators retain this discretion regardless of the amount of preliminary design activities advanced (in terms of both quantity and cost) for any alternative.
- 7. What activities are considered final design for purposes of this Directive?**
    - a. The activities in the definition of *final design* are considered to be final design. Other activities constituting final design include final plans, project site plan, final quantities, and final engineer's estimate for construction.
    - b. Activities considered to be advanced as preliminary design for a project but rejected as materially affecting the objective consideration of alternatives or having an adverse environmental impact are considered final design.
- 8. What safeguards should be taken to ensure the FHWA does not authorize final design activities?**
    - a. In project agreements in which Federal funds are authorized for preliminary engineering, a notation should be made that Federal funds are authorized only for preliminary design.
    - b. The execution or modification of a project agreement to authorize final design for design-bid-build projects shall not occur until after the NEPA decision. Also, as provided at 23 CFR §636.106(a)(7), the execution or modification of the project agreement to authorize final design and physical construction for design-build projects shall not occur until after the NEPA decision. However, preliminary design activities may be authorized for both design-bid-build and design-build projects.
    - c. Division administrators shall work with their State DOTs to develop State specific preliminary design policies for:
      - (1) Direct oversight projects;
      - (2) State administered projects;
      - (3) Local public agency projects; and



- (4) Design-bid-build, design-build, and other project delivery methods that may be used in that State.
  - d. For design-build projects, a contract may be awarded prior to the NEPA decision. In these cases, the contract should be divided into two phases, such as “notice to proceed 1” and “notice to proceed 2.” The work in “notice to proceed 1” should be limited to preliminary design, and the work in “notice to proceed 2” should include final design and construction. The contract should clearly state that no commitment is being made to any alternatives under consideration in the NEPA process, that all alternatives will be fairly considered, and that the issuance of “notice to proceed 2” is conditioned upon the selection an alternative in the NEPA decision. You should refer to 23 CFR §636.109 and §636.302 for the express regulatory requirements regarding the release of a request for proposals and award of a design-build contract prior to a NEPA decision.
9. **Should the division administrators report any information to Washington headquarters?**
- a. Starting on September 30, 2011, and each year thereafter, division administrators will submit a report to the Office of Project Development and Environmental Review listing whether the Division has executed an agreement with the State DOT to develop State-specific preliminary design policies in accordance with this Directive.
  - b. Starting on September 30, 2011, and each year thereafter, division administrators will submit a report to the Office of Project Development and Environmental Review identifying the activities permitted to be advance as preliminary design that are not listed in the definition of *preliminary design* or Appendix A.
10. **Will guidance regarding the implementation of this Directive be issued?** Appendix B to this Directive contains guidance and explanatory notes regarding the issuance and implementation of this Directive. Additional guidance may be issued in the future as needed.
11. **Who should I contact for additional information?**

Project Development Team Leader  
Office of Project Development and Environmental Review (HEPE-10)  
202-366-1598

Pre-Construction Team Leader  
Office of Program Administration  
202-366-2221

Senior Attorney Advisor  
Office of Chief Counsel  
202-366-4928

Attachments



A handwritten signature in blue ink, appearing to read "Victor M. Mendez".

**Victor M. Mendez**  
Administrator

## **Appendix A – Preliminary Design Activities**

Preliminary design activities include, but are not limited to:

1. Activities listed in the definition of *preliminary design*: environmental assessments, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials.
2. Other activities: design and engineering activities to be undertaken for the purposes of defining project alternatives; completing the NEPA alternatives analysis and review process; complying with other related environmental laws and regulations; environmental justice analyses; supporting agency coordination, public involvement, and permit applications; development of environmental mitigation plans; development of typical sections, grading plans, geometric alignment (horizontal alignment, vertical alignment and any clearances necessary to meet approved design criteria), noise wall justifications, bridge type/size/location studies, temporary structure requirements, staged bridge construction requirements, structural design (substructure and superstructure), retaining wall design, noise wall design, design exceptions, guardrail length/layout, existing property lines, title and deed research, soil borings, cross sections with flow line elevations, ditch designs, intersection design/configuration, interchange design/configuration, pavement design, storm/sanitary sewer design(plan/profile), culvert design, identification of removal items, quantity estimates, pavement details/elevation tables, and preliminary traffic control plans to be maintained during construction.

## **Appendix B – Explanatory Notes**

### **Q1 Why is this Directive being issued?**

A1 This Directive is being issued to clarify FHWA policy regarding the extent to which design activities may be permitted prior to a NEPA decision without compromising the integrity of the NEPA process.

### **Q2 Why is the FHWA clarifying the scope of preliminary design?**

A2 The FHWA is clarifying the scope of preliminary design to help ensure consistency with respect to the advancement of preliminary design among the various project delivery mechanisms used by the States in the Federal-aid highway program and to ensure compliance with applicable legal requirements. In the design-build regulations at 23 CFR 636.109(a)(5), the FHWA permits State departments of transportation to proceed with preliminary design activities. These activities, as defined at 23 CFR 636.103, include any activity that establishes the parameters for final design that does not materially affect the objective consideration of alternatives in the NEPA review process. Accordingly, by making the definition of *preliminary design* in the design-build regulations applicable to other project delivery mechanisms, the FHWA is able to bring consistency with respect to the advance of preliminary design throughout the Federal-aid highway program.

### **Q3 Is allowing activities beyond what is necessary to complete the NEPA process consistent with FHWA regulations?**

A3 Yes. In the preamble to the final rule establishing 23 CFR 771.113(a) (52 FR 32646), the FHWA states that 771.113(a) supports and should be read in conjunction with 40 CFR 1506.1 to ensure that NEPA decisions are not influenced by a previous commitment to a particular course of action. In the FHWA's experience, the activities in the definition of *preliminary design* and Appendix A are not of such a significant nature as to commit the agency to any particular course of action. With respect to design-build projects, the definition of *preliminary design* (23 CFR 636.103) was modified in the final rule in response to comments that limiting preliminary design activities to those activities necessary to complete the NEPA review process was too restrictive. As a result, the FHWA modified the definition in the final rule (72 FR 45329) to include any activity needed to establish the parameters for final design so long as the activity does not materially affect the objective consideration of alternatives in the NEPA review process.

**Q4 Should the activities listed in the definition of *preliminary design* and Appendix A be allowed on a routine basis for any alternative?**

A4 Yes. These activities are deemed not to bias the NEPA process or have adverse environmental impacts whenever advanced for one or more alternatives.

**Q5 May the FHWA prohibit any of the activities listed in the definition of *preliminary design* and Appendix A?**

A5 Yes. On a case-by-case basis, depending on the circumstances of the project, the division administrator may prohibit the activity if the division administrator believes that the activity will materially affect the objective consideration of alternatives in the NEPA review process or cause an adverse environmental impact.

**Q6 May division administrators allow activities to be advanced that are not listed in the definition of *preliminary design* and Appendix A?**

A6 Yes. Division administrators may allow additional activities that do not constitute final design to be advanced as preliminary design if the division administrator determines that such activities do not materially affect the objective consideration of alternatives in the NEPA review process and/or cause adverse environmental impacts. Division administrators may permit such activities either on a case-by-case basis or programmatic basis. In making the determination as to whether any activity materially affects the objective consideration of alternatives in the NEPA review process or causes adverse environmental impacts, division administrators must consult with the Office of Project Development and Environmental Review (HEPE-1), and document the decision.

**Q7 How should the level of preliminary design activities conducted for any alternative affect the presentation of the alternatives in the NEPA document?**

A7 Under 40 CFR 1502.14(a) and (b), agencies must rigorously explore and objectively evaluate all reasonable alternatives and devote substantial treatment to each alternative considered in detail sufficient to enable reviewers to evaluate their comparative merits. As such, the comparison of alternatives has to be done in a fair and balanced manner. Key issues for the NEPA alternatives evaluations in these cases will be the use of "apples-to-apples" comparisons of alternatives, and the assurance that additional information developed on any particular alternative is evaluated to identify and address any new or different information that might affect the choice of alternatives. If there are substantial differences in the levels of information available for the alternatives, it may be necessary to apply assumptions about impacts or mitigation to make the comparisons fair. For example, if mitigation is designed only for the preferred alternative, then

assumptions that comparable measures can be taken to mitigate the impacts of the other alternatives should be included in the comparative analysis of the alternatives even though those other alternatives are not designed to the same level of detail. This comparison of mitigation across alternatives will ensure that any particular alternative is not presented in an artificially positive manner as a result of its greater design detail. If the environmental impacts identified at the higher level of design detail are substantially different than other alternatives under consideration, the level of analysis conducted for other alternatives should be reviewed to determine whether additional work on other alternatives is warranted.