



Office of the Secretary of Transportation Infrastructure Permitting Improvement Center

Kelsey Owens

US Department of Transportation
Infrastructure Permitting Improvement Center

October 22, 2019

Infrastructure Permitting Improvement Center (IPIC)



- IPIC sits within the Office of the Secretary of Transportation's Office of Policy Development, Strategic Planning, and Performance.
- IPIC is responsible for
 - Improving performance of DOT's Federal environmental review and permitting of infrastructure projects,
 - Serving as the central resource for streamlining delivery of all DOT projects,
 - Advancing methods that facilitate efficient environmental review and approval of projects, and
 - Promoting the use of best practices across DOT to improve consistency and effectiveness in all phases of project delivery.

Infrastructure Permitting Improvement Center (IPIC)



- IPIC's key initiatives include
 - Implementing Fixing America's Surface Transportation Act (FAST Act) project delivery reforms;
 - Collaborating with the Federal Permitting Improvement Steering Council;
 - Managing and maintaining the online Permitting Dashboard;
 - Supporting DOT's Operating Administrations and the Build America Bureau; and
 - Coordinating with the White House Council on Environmental Quality.

Federal Environmental Review and Permitting 101

Kelsey Owens

US Department of Transportation
Infrastructure Permitting Improvement Center
October 22, 2019

Table of Contents

- National Environmental Policy Act (NEPA)
- Environmental Resource Laws
- Federal Agency Regulations
- State/Local Environmental Laws
- USDOT Environmental Tools

The National Environmental Policy Act (NEPA)

What is NEPA?

- The National Environmental Policy Act (NEPA) is the primary environmental regulation for Federal agencies.
- The goal of NEPA is to
 - Declare a national policy which will encourage productive and enjoyable harmony between humans and the environment;
 - Promote efforts that prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man;
 - Enrich the understanding of the ecological systems and natural resources important to the nation; and
 - Establish the White House Council on Environmental Quality (CEQ).

What is NEPA?

- NEPA ensures agencies' decisions evaluate environmental impacts along with economic and technical considerations.
- It does not mandate a decision, but is instead a decision-making tool.
- NEPA is triggered when a project sponsor indicates to a Federal agency their intent to pursue Federal funding/authorization/approval/permitting/etc.

NEPA Timing

- NEPA must be completed prior to the Federal agency making a final decision (e.g., before the agency disburses any funds or issues a permit).
- The environmental review process should be started **as early as possible** in project development to allow any required mitigation measures to be included in project design.
 - This can save years of time and thousands of dollars in costly re-designs later!
- As soon as the project sponsor thinks they might seek Federal funding or need a Federal permit/authorization, they should contact the Federal agency.

The NEPA Process

- The NEPA process involves collaboration among
 - Federal/state/local agencies,
 - Tribes,
 - The project sponsor, and
 - The public/stakeholders.
- The result (for non-excluded actions) is a document that details
 - The purpose and need for the project,
 - All reasonable alternatives,
 - Impacts to environmental and socio-economic resources, and
 - All methods that will be used to avoid/minimize/mitigate adverse effects.

Essential NEPA Terms

- **Lead and Cooperating Agencies:** To the maximum extent possible (and required, in some cases), all Federal agencies with a NEPA responsibility for the same action will consolidate their reviews into one.
 - **Lead Agency:** The agency with the most/longest review responsibility is typically designated as the lead agency (e.g., the agency with the most funding involved or the need to review the longest portion of a linear project).
 - **Cooperating Agency:** All other agencies with decision making roles or special expertise on an impacted resource will serve as cooperating agencies.

Essential NEPA Terms

- **Connected Actions:** Actions that are closely related must be discussed in the same NEPA document. These are actions that
 - Automatically trigger other actions,
 - Cannot/will not proceed unless other actions are taken previously or simultaneously, or
 - Are interdependent parts of a larger action and depend on the larger action for their justification.
- **Purpose and Need:** This is the basis of the NEPA document and sets out what the project is intended to accomplish and why it is necessary.

Essential NEPA Terms

- **Scoping:** The process by which the agency seeks public and agency/tribal input to determine the scope of issues that will be considered in the NEPA review.
- **Alternatives:** Agencies must consider all reasonable alternatives that substantially meet the project's purpose and need.
- **Direct, Indirect, and Cumulative Effects:**
 - **Direct:** Caused by the action, or occur at the same time and place.
 - **Indirect:** Caused by the action, but are later in time or farther away.
 - **Cumulative:** Combined, incremental effects of human activity.

Essential NEPA Terms

- **Extraordinary Circumstances:** Circumstances that may cause a normally excluded action to have a significant impact.
 - Public or scientific controversy
 - Adverse impacts to protected resources
 - Threatened or endangered species
 - Wetlands
 - Historic resources
 - Floodplains
 - Etc.
 - Violations of Federal, state, or local laws

NEPA's Three Categories

| Categorical Exclusions ~ 90% of projects | Environmental Assessments ~ 9% of projects | Environmental Impact Statements ~ 1% of projects |
|---|--|---|
| Typically <1 year | Typically 1-2 years | DOT average of 6.5 years |
| Small action or agency has extensive experience with similar projects | Larger in scope or has multiple resources that could be impacted | Large in scope and can affect multiple resources |
| No significant impacts (absent extraordinary circumstances) | Significant impacts not known | Significant impacts |
| Minimal analysis | Some analysis | Extensive analysis |
| Limited public involvement | Some public involvement | Extensive public involvement |

NEPA Categorical Exclusion (CE) Process



1. The Federal action is identified.
2. The Federal agency/project sponsor engages in any necessary Federal/state/local agency and tribal consultation.
3. Additional information is compiled to document the absence of extraordinary circumstances, if required.
4. The Federal agency's CE documentation is completed by the agency or project sponsor, as appropriate.

NEPA Environmental Assessment (EA) Process



1. The Federal action is identified.
2. The Federal agency/project sponsor engages in any necessary Federal/state/local agency and tribal consultation.
3. The project sponsor/contractor/Federal agency prepares the draft EA.
4. The EA goes out for public review, followed by a [usually] 14-30 day public comment period.
5. Any substantial comments are responded to/the EA document is revised, if needed.
6. The Finding of No Significant Impact (FONSI) is executed, if appropriate.

NEPA Environmental Impact Statement (EIS) Process



1. A Federal action and a lead Federal agency is identified.
2. Early engagement is performed and potential cooperating agencies/tribes are identified.
3. Formal scoping is conducted, starting with the publication of a Notice of Intent to Prepare an EIS (minimum of 30 days).
4. The project sponsor's contractor/Federal agency prepares the draft EIS.
5. Draft EIS is published, followed by a comment period (minimum of 45 days).
6. Any substantial comments are responded to/the EIS document is revised, if needed.
7. The final EIS is issued, followed by a waiting period (minimum 30 days).
8. The Record of Decision is executed.

Environmental Resource Laws

Environmental Resource Laws

- Laws protecting individual environmental resources are considered to be under the “**NEPA umbrella**,” meaning that the project’s compliance with these laws is considered in the NEPA process.
- Compliance is outlined within the NEPA document.
- If a project qualifies for a NEPA categorical exclusion, that does not automatically mean that no environmental resource laws apply.



Environmental Resource Laws

50+ Environmental Resource Laws, Including

- Bald and Golden Eagle Protection Act
- Coastal Barriers Resources Act
- Coastal Zone Management Act
- **Clean Air Act**
- **Clean Water Act**
- **Endangered Species Act**
- E.O. 12734 "Intergovernmental Review of Federal Programs"
- Magnuson-Stevens Act
- Migratory Bird Treaty Act
- **National Historic Preservation Act**
- Noise Control Act
- Rivers and Harbors Act of 1899
- Etc.

National Historic Preservation Act (NHPA) Section 106 Consultation



- The NHPA seeks to protect the nation's historic resources.
- Section 106 requires Federal agencies to determine if the projects they fund/authorize/permit/etc. will impact historic properties.
 - This MUST be completed before construction begins.
- The project sponsor is responsible for providing any information the agency needs to make their determination, possibly including
 - Archaeological surveys
 - Architectural surveys



Photo Source: <http://www.architecture.org/learn/resources/architecture-dictionary/entry/worlds-columbian-exposition-of-1893/>

National Historic Preservation Act (NHPA) Section 106 Process



1. Initiate the process by identifying the undertaking and the appropriate SHPO/tribes/stakeholders to be involved throughout the process.
2. Identify historic properties within the area of potential effects and determine if they are listed, or may be eligible for listing, on the National Register of Historic Places (NRHP).
3. Assess any effects to NRHP-listed or eligible properties to determine if they are adverse.
4. Develop a plan to minimize, avoid, or mitigate adverse effects.

Endangered Species Act Section 7 Consultation



- The goal of the Endangered Species Act is to “protect and recover imperiled species and the ecosystems upon which they depend.”
- Section 7 requires Federal agencies to determine if projects they fund/authorize/permit/etc. will adversely impact an endangered, threatened, or candidate species (“listed species”).
- The Federal agency may need to consult with the US Fish and Wildlife Service (USFWS) and/or the National Marine Fisheries Service (NMFS).
- The project sponsor is responsible for providing any information/studies the agency needs to make a finding.



Photo Source: <https://www.audubon.org/field-guide/bird/red-cockaded-woodpecker>

Endangered Species Act Section 7 Consultation Findings



- **No Effect-** The project will not impact a listed species (does not require concurrence from USFWS/NMFS).
- **May Affect, Not Likely to Adversely Affect-** Impacts to the species are unlikely (requires USFWS/NMFS concurrence).
- **May Affect, Likely to Adversely Affect-** Adverse impacts are likely to occur, but consultation with USFWS/NMFS is required to determine if the project will jeopardize the existence of the species.
- **No Jeopardy-** The project will adversely affect the species, but will not jeopardize the species' existence.
- **Jeopardy-** The project will jeopardize the species' existence.

Clean Water Act Section 404 Permits

- Clean Water Act was enacted to preserve the integrity of the nation's waters.
- A project may need a Clean Water Act permit if it impacts **Waters of the United States (WOTUS)**, which are waters
 - Used in interstate or foreign commerce;
 - Interstate waters, including wetlands;
 - Interstate waters and wetlands whose use, degradation, or destruction could affect interstate or foreign commerce (e.g., recreational use, fisheries, commerce, and industrial purposes);
 - Tributaries and impoundments; and
 - Wetlands adjacent to jurisdictional waters.

Clean Water Act Section 404 Permits

- Section 404 regulates the discharge of dredged or fill material into the WOTUS.
- The US Army Corps of Engineers (USACE) and the Environmental Protection Agency jointly administer the Section 404 program, but USACE is responsible for reviewing and issuing permits.
- USACE allows compensatory mitigation (restoration, establishment, enhancement, or preservation).

Clean Water Act Section 404 Permits

- USACE requires the use of the Least Environmental Damaging Alternative (LEDPA):
 - There must be no “practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”
 - “Practicable” means “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”

Clean Air Act Permits

- The Clean Air Act (CAA) gave the EPA authority to establish National Ambient Air Quality Standards (NAAQS) to protect public health and the environment.
 - NAAQS have been established for six pollutants: particulate matter, ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead.
- EPA designates three types of areas for each pollutant:
 - **Attainment areas** meet the NAAQS standard,
 - **Non-attainment areas** exceed the NAAQS standards, and
 - **Maintenance areas** were formerly non-attainment areas that must maintain sub-NAAQS levels for two 10-year periods in order to be re-designated.

Clean Air Act Federal Requirements

- Federal actions must
 - Conform to a state's implementation plan (SIP) for achieving attainment of all NAAQS,
 - Cannot cause new violations,
 - Cannot worsen existing violations, and
 - Cannot delay timely attainments of the NAAQS.
- If a project is within an attainment/maintenance area, SIP conformity may need to be evaluated.
- Two types of conformity apply to transportation projects:
 - Transportation and
 - General.



Photo source: <https://www.cbsnews.com/news/londons-1952-killer-fog-cause-revealed/>

Clean Air Act Conformity

- Transportation applies to FHWA/FTA projects and regionally significant state-only projects.
- All other transportation projects must comply with general conformity requirements.
- Multi-modal projects may require both types of conformity.
- For projects in non-attainment/maintenance areas, projects are considered exempt from General Conformity if they
 - Are actions covered by transportation conformity;
 - Have emissions at or below *de minimis* levels set by EPA;
 - Are explicitly exempted in the CAA rule; or
 - Are covered by the EPA list of activities that are “presumed to conform.”

Clean Air Act Transportation Conformity



- Transportation plans must conform with SIPs in order to be approved by FHWA/FTA.
- Individual FHWA/FTA projects must demonstrate that they are included in an approved transportation plan in order to remove the requirement for additional CAA conformity analysis.
- Metropolitan planning organizations (MPOs) make the initial conformity determination, which is then approved by FHWA/FTA.
- For those areas without MPOs that are in non-attainment/maintenance areas (rare), special rules apply.

Projects on Federal Land

- If the project will need to be located on or cross Federal land (Bureau of Land Management, National Park Service, US Forest Service, etc.), a right-of-way or special use permit may be required.
- The lead agency will assist with identifying which land management agencies will need to be contacted.

Federal Agency Regulations

Federal Agency Regulations

- Each Federal agency has regulations that set out how they implement Federal environmental laws.
- These regulations will detail:
 - Additional agency environmental policies,
 - Which actions fall into each NEPA review category, and
 - The format and required information for environmental review documentation.
- **Read these regulations up front, and always feel free to ask questions about them!!!**

State/Local Environmental Laws

State/Local Laws

- States and localities may also have their own environmental resource laws that have additional requirements of the project/project sponsor.
 - These laws may be more stringent.
- Some states have a NEPA-like law of their own (e.g., California Environmental Quality Act).
- Lead and cooperating Federal agencies will work with project sponsors to identify all appropriate state agencies that need to be involved in the environmental review.
- Compliance with state/local laws will also be outlined in the NEPA document.

USDOT Environmental Tools

USDOT Environmental Tools

- USDOT has some unique environmental review capabilities:
 - **NEPA Assignment-** USDOT can delegate most NEPA responsibilities to a state DOT.
 - **FHWA Liaisons-** Personnel housed in Federal and state resource agencies that facilitate the environmental review and permitting process for transportation projects.
 - **Combined Final EIS and Record of Decision-** Issuing this combined document removes 30 days from the EIS process.

USDOT Environmental Tools

- **Permitting Dashboard-** An online tracking system for FHWA, FRA, FTA, and FAA environmental reviews (<https://www.permits.performance.gov/>).
- **FAST Act Environmental Review Checklist-** A checklist to be used by USDOT and the project sponsor to aid in the preparation of NEPA documents.
- **Planning and Environmental Linkages (PEL)-** An approach to efficient decision-making that considers benefits and impacts of transportation system improvements on the environment.
- **Environmental Guides and Videos-** DOT's Operating Administrations have a wide variety of instructional guides and videos.

New USDOT Guidance

- **One Federal Decision (OFD) Implementation Guidance-** E.O. 13807 created the OFD process aimed at streamlining and speeding the completion of NEPA for major infrastructure projects (MIPs) (infrastructure construction projects with identified funding that require an EIS and multiple authorizations from multiple Federal agencies). OFD requires
 - Preparation of a single EIS;
 - Execution of a shared ROD;
 - Lead and cooperating agency concurrence on the purpose and need, range of alternatives, and preferred alternative; and
 - Goal of an agency 2-year average for the completion of MIP EISs, plus 90 additional days to complete all remaining authorizations/permits.

QUICK SUMMARY

- NEPA will apply to projects seeking Federal funding or requiring a Federal review/permit/approval/authorization/etc.
- Other state/local and environmental resource laws may apply depending on the nature and location of the project.
- The environmental review process should start as early as possible in project development, and must be completed prior to the Federal agency(ies) making a final decision.
- **USE THE FEDERAL AGENCY(IES) AS A RESOURCE- ENVIRONMENTAL REVIEWS ARE COLLABORATIVE EFFORTS!**

Questions?