

## CHAPTER 2

# NATIONAL ENVIRONMENTAL POLICY ACT AND RELATED PROCEDURES

### A NATIONAL ENVIRONMENTAL POLICY

The 1960's brought about an increased public awareness and concern for the pressure that human development was placing on the condition of the environment. In response to this, Congress passed and President Nixon signed into law, the National Environmental Policy Act of 1969 (NEPA). The Act, considered to be the basic "National Charter" for protection of the environment, included three major goals that have influenced the Federal Highway Administration (FHWA) and all Federal agencies. The NEPA:

- set national environmental policy,
- established a basis for environmental impact statements (EISs), and
- created the Council on Environmental Quality (CEQ).

NEPA requires that, to the extent possible, the policies, regulations, and laws of the Federal Government be interpreted and administered in accordance with NEPA. It also requires Federal agencies to use an interdisciplinary approach in planning and decision-making for actions that impact the environment. Finally, NEPA requires the preparation of an Environmental Impact Statement (EIS) on all major Federal actions *significantly* affecting the natural or human environment.

NEPA called for the creation of the CEQ. The CEQ is an office within the Executive Office of the President and has four main functions:

- develop environmental policies for the nation,
- monitor environmental quality,
- prepare an annual environmental quality report, and
- monitor Federal actions.

NEPA requires Federal agencies to use an interdisciplinary approach in planning and decision-making for actions that impact the environment.

## COUNCIL ON ENVIRONMENTAL QUALITY REGULATIONS

CEQ Regulations for Implementing NEPA can be found on the World Wide Web (WWW) at:

[http://ceq.eh.doe.gov/nepa/regs/ceq/toc\\_ceq.htm](http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm)

The scoping process is intended to get the lead and cooperating agencies and other interested groups together early in the project development process to determine the scope of the issues to be addressed, and identify any important issues related to the proposed action.

In 1970, CEQ issued guidelines for the preparation of environmental documents. The FHWA prepared a policy directive in response to those guidelines, as did some other Federal agencies. The CEQ monitored Federal environmental processing of all the agencies, and found that EISs were too long with less important issues being discussed at great length, that there was poor or no early coordination, and that the process led to unnecessary delays caused by confusion over differing terminology and procedures among Federal agencies. To remedy these problems, President Carter issued Executive Order (EO) 11991 in May 1977. The key provision of the EO was that CEQ could issue mandatory regulations, not just guidelines, for implementing the provisions of NEPA consistently throughout the Federal Government. The result was the CEQ regulations for "Implementing the Provisions of the National Environmental Policy Act," 40 CFR Parts 1500-1508.

The principal goals of the CEQ regulations are to reduce paperwork and delays, and to produce better environmental decisions. The regulations focus on four key areas:

- early coordination,
- uniform processing options for all agencies,
- completing the environmental process, and
- faster and better processing.

### EARLY COORDINATION

To improve early coordination, the CEQ regulations introduced the concept of "lead agency" and "cooperating agency". The lead agency is responsible for the Federal action and supervising the preparation of

the environmental document. Cooperating agencies are those agencies specifically requested by the lead agency to assist during the environmental process. Cooperating agencies are those Federal agencies with special expertise (e.g. US Fish and Wildlife Service, National Marine Fisheries Service) or jurisdiction by law (e.g. US Army Corps of Engineers (COE) the US Coast Guard (USCG) when a permit is necessary, the US Fish and Wildlife Service for involvement with federally-listed threatened or endangered species or habitat, the National Marine Fisheries Service for involvement with designated Essential Fish Habitat, or other Federal agencies where a land transfer from that agency is needed. The CEQ also instituted a scoping process which was intended to get the lead and cooperating agencies and other interested groups together early in the project development process to determine the scope of the issues to be addressed, and identify any important issues related to the proposed action. By properly using the early coordination process, agencies could avoid conflicts later, and could assure the full input from the various interests.

SAFETEA-LU further established and defined “participating agencies” to allow more state, local, and tribal agencies a formal role in the environmental review process. Like the cooperating agencies, participating agencies are invited by the lead federal agency to participate in the environmental review process. However, unlike cooperating agencies, participating agencies are not limited to federal agencies.

#### UNIFORM PROCESSING

The CEQ regulations also established uniform processing options for all Federal agencies. These options are the Categorical Exclusion

(CE), the Environmental Assessment (EA), and the Environmental Impact Statement (EIS).

### COMPLETING THE ENVIRONMENTAL PROCESS

In order to aid in completing the process, CEQ introduced two specific formal decision documents:

- Finding of No Significant Impact (FONSI) - A document prepared by a Federal agency briefly presenting the reasons why an action/project will not have a significant effect on the natural or human environment and for which an environment impact statement will not be prepared.
- Record of Decision (ROD) - A document prepared by a Federal agency that presents the basis for selecting and approving a specific transportation proposal that has been evaluated through various environmental and engineering studies.

### FEDERAL HIGHWAY ADMINISTRATION AND NEPA

The CEQ regulations provided the basic framework for all Federal agencies to follow in complying with the law. For transportation decision-making, FHWA adopted a policy of managing the NEPA process as an "umbrella" under which all other environmental laws, Executive Orders, and regulations are considered prior to the final decision of a proposed action or project. This FHWA regulation is "Environmental Impact and Related Procedures," 23 CFR 771, effective November 28, 1987.

The FHWA NEPA project development process includes and considers the input of other agencies and the public through established coordination and a public involvement process.

The FHWA NEPA project development process is a balanced approach to transportation decision-making



Achieving NEPA's goals entails assessing a potential project in light of all other social, economic, and environmental requirements reaching a single decision that satisfies multiple concerns in the best overall public interest.

that takes into account the potential impacts on the human and natural resources and the public's need for safe and efficient transportation improvements.

It is FHWA's policy that all environmental protection requirements and enhancement goals be completed as part of a coordinated review process that includes and considers the input of other agencies and the public through established coordination and a public involvement process.

SAFETEA-LU builds on 23 CFR 771, and the environmental stewardship and environmental streamlining initiatives established in ISTEA and TEA-21. The legislation:

- Strengthens the link between planning and NEPA by encouraging Metropolitan Planning Organizations (MPOs) to consult or coordinate with planning officials responsible for other types of planning activities affected by transportation, including environmental protection
- Emphasizes public involvement in the development of the Statewide Transportation Improvement Program (STIP)
- Emphasizes involvement and considering the concerns of Tribal governments in planning
- Establishes “participating agencies” to allow more state, local, and tribal agencies a formal role and rights in the environmental review process
- Emphasizes that the lead federal agency has the authority and responsibility to define the project’s purpose and need for purposes of any document which the lead federal agency is responsible for preparing

Requires development of a Coordination Plan establishing public and agency participation.

- Emphasizes that the lead federal agency has the authority and responsibility to define the range of alternatives for consideration in any document which the lead federal agency is responsible for preparing.

To further streamline the environmental process and minimize delays in project reviews, SAFETEA-LU also:

- Requires development of a Coordination Plan establishing a plan for coordinating public and agency participation in and comment on the environmental review process
- Establishes a period of not more than 60-days for receiving public or agency comments on a Draft EIS, unless agreed to otherwise
- Establishes a 30-day maximum agency/public comment period for most other reviews, unless agreed to otherwise
- Establishes a mechanism for elevating any issue that cannot be resolved
- Establishes a 180-day maximum agency decision period for any Federal laws relating to the project, including issuance or denial of permits
- Establishes a 180-day statute of limitations for lawsuits challenging lead federal agency approvals provided the decision is published in the Federal Register.

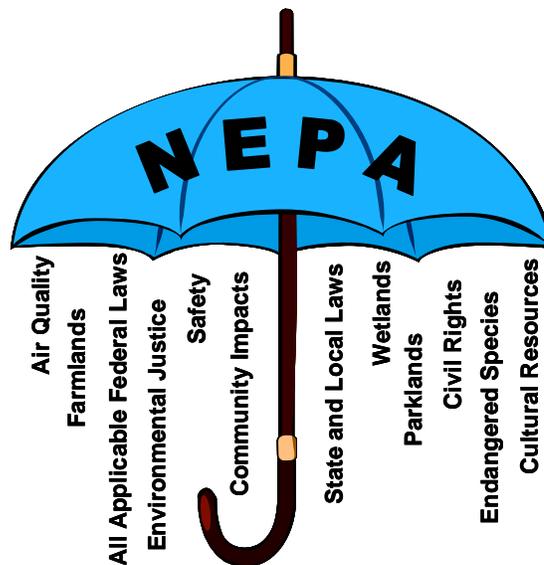
Establishes a 180-day statute of limitations for lawsuits challenging a ROD provided that the decision is published in the Federal Register.

FHWA is drafting implementing regulations and guidance in response to the SAFETEA-LU legislation. The SAFETEA-LU legislation, Section 6002 – Efficient Environmental Reviews for Project Decisionmaking, is included in the Appendix.



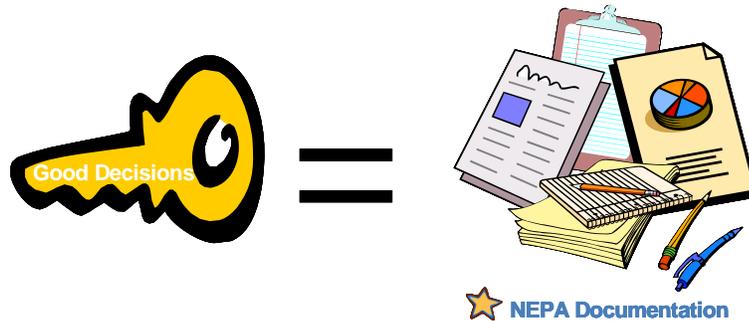
## ENVIRONMENTAL DOCUMENTATION

Achieving NEPA's goals entails assessing a potential project in light of all other social, economic, and environmental requirements. NEPA acts as an "umbrella" under which those laws, Executive Orders, and regulations are administered. Chapter 7 contains a list of these environmental statutes and regulations. Concluding the NEPA process therefore means reaching a single decision that satisfies multiple concerns in the best overall interest of the public.



In meeting the requirements of NEPA, government agencies must share the results of their analysis of the effects of projects upon the environment. Good decisions are the objective of the NEPA process, and good NEPA documentation is essential to a broad understanding of the activities and analysis that went into that decision.

**Good decisions are the objective of the NEPA process.**



**The key to making good decisions rests on good NEPA documentation of activities.**

The environmental documentation is to address:

- purpose of and need for the proposed action,
- environmental impacts of the proposed action,
- adverse environmental effects which cannot be avoided should the proposal be implemented,
- alternatives to the proposed action, including the no-build alternative,
- relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.

Different kinds of transportation projects will have varying degrees of complexity or potential to affect the environment. The CEQ regulations implementing NEPA identifies three classifications of actions, defining

the way that compliance with NEPA is documented in terms of the action's impacts:

- An Environmental Impact Statement (EIS) is prepared for projects where it is known that the action will have a significant effect on the environment.
- Categorical Exclusions (CE) are for actions that do not individually or cumulatively have a significant environmental effect.
- An Environmental Assessment (EA) is prepared for actions in which the significance of the environmental impact is not clearly established.

Although the size and apparent complexity of the three levels of NEPA documentation is quite different, they all serve the same purpose – to achieve NEPA's goals of a collaborative decision making process and ultimately to make the public aware of the rationale behind the transportation decision.

### SIGNIFICANCE

**Context and Intensity** should be considered, and are essential in determining the significance of a project's environmental impacts.

To determine the appropriate class of action and thereby the requisite level of documentation necessary to comply with NEPA, it is essential to understand the term "significance." The CEQ regulations (40 CFR 1508.27) state that two main points should be considered in determining significance: **context** and **intensity**.

Impacts can be considered in the context of society as a whole, the affected region, or locality. In the case of a site-specific action, significance would usually depend on the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.



For example, filling one acre of a one hundred-acre wetland probably could be considered not significant, but filling one acre of a two-acre wetland may be considered, under certain circumstances, a significant impact. The intensity is the same, but the context is different.

Factors to consider regarding intensity or severity of impacts include:

- impacts that may be both beneficial and adverse
- degree to which the proposed action affects public health or safety
- unique characteristics of the geographical area
- degree to which the effects on the quality of the human environment are likely to be highly controversial
- degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks
- degree to which the action may establish a precedent for future actions with significant effects
- whether the action is related to other actions with individually insignificant but cumulatively significant impacts
- degree to which the action may adversely affect resources listed in or eligible for listing in the National Register of Historic Places
- degree to which the action may adversely affect an endangered or threatened species or its habitat
- whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

### NEPA/SECTION 404 MERGED PROCESS

The NEPA/Section 404 merged process was designed to improve the efficiency of how the FHWA NEPA process works, using early and active interagency coordination to focus efforts on reaching an environmentally sound project.

The NEPA/Section 404 merged process was initiated to streamline project decision-making on Federal-aid Highway Projects. The reason for merging the FHWA NEPA and Section 404 permit processes is to provide the opportunity to expedite project decision-making by executing one overall Federal public interest decision, at one point in time, for a Federal-aid project. Both processes involve evaluation of alternatives and assessment of effect to resources against the need for a project, and officials of all agencies involved recognized the opportunity to avoid duplication and inefficiencies within them.

The NEPA/Section 404 merged process was designed to improve the efficiency of how the FHWA NEPA process works, using early and active interagency coordination to focus efforts on reaching an environmentally sound project. For projects involving dredge/fill operations in waters of the United States including jurisdictional wetlands, the US Army Corps of Engineers is responsible for issuing permits and assessing whether the action is appropriate. The requirements for that permitting process are under Section 404 of the Clean Water Act. Often in securing a 404 permit there can be many federal agencies involved such as the US Army Corps of Engineers, US Fish and Wildlife Service, National Marine Fisheries Service and the Environmental Protection Agency, along with state agencies with delegated federal authority (e.g. Louisiana Department of Natural Resources, Coastal Management Division in designated coastal zones).

In 1985, the FHWA, the US Army Corps of Engineers, the Environmental Protection Agency, the US Fish and Wildlife Service (FWS), and the National Marine Fisheries Services (NMFS) jointly

convened a workgroup to develop guidance entitled "Applying the Section 404 Permit Process to Federal-aid Highway Projects". Better known as the "Red Book," this document provides numerous measures to improve interagency coordination on Federal-aid highway projects, emphasizes innovative and cost-effective approaches, and integrates the NEPA and Section 404 permit processes.

In 1996 the FHWA Region 6, the Environmental Protection Agency Region 6, the US Army Corps of Engineers Lower Mississippi Valley and Southwestern Divisions, the US Fish and Wildlife Service Regions 2 and 4, and the National Marine Fisheries Service Southeast Region entered into an Interagency NEPA and Section 404/10 Concurrent Process Agreement for Transportation Projects that established the framework for the NEPA/Section 404 merged process in Louisiana, Texas, Arkansas, New Mexico, and Oklahoma. This attempt at merging the two processes required concurrence by the signatories of the agreement at the following stages of the NEPA process:

- Purpose and Need for the Action
- Alternatives evaluated
- Preferred Alternative for the Draft environmental document

Since FHWA has abandoned its regional system of oversight, the agreement has not been re-signed. However, with the passage of SAFETEA-LU, it is not expected that concurrence points in the process will be necessary due to the emphasis on the lead federal agency's authority to define the purpose and need and the range of alternatives to be considered. Therefore, the Project Manager should request comments from the Cooperating and Participating agencies on these

issues in order to address any comments as early in the process as possible.

DOTD has agreed to meet with its Federal and State partners bi-yearly to discuss procedural matters regarding new environmental regulations and guidance and yearly to discuss projects which will be requiring processing or permitting in the near future. It is through these regularly scheduled meetings that the spirit of merging NEPA and Section 404 should be reinforced in the future.

### CONTEXT SENSITIVE SOLUTIONS

Context sensitive solutions (CSS) is an element of FHWA's Environmental Stewardship and Streamlining efforts. CSS considers the total context within which a transportation improvement project will exist. It 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. CSS places preservation of historic, scenic, natural environment, and other community values on an equal basis with mobility, safety, and economics.



Context sensitive solutions (CSS) is an element of FHWA's Environmental Stewardship and Streamlining efforts that places preservation of historic, scenic, natural environment, and other community values on an equal basis with mobility, safety, and economics.

The following are widely accepted principles of CSS.

#### QUALITIES OF EXCELLENCE IN TRANSPORTATION DESIGN

- The project satisfies the purpose and need as agreed to by a full range of stakeholders. This agreement is forged in the earliest

CSS is an opportunity to connect with the communities and the constituents that we serve.

phase of the project and 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 environmental, scenic, aesthetic, historic, and natural resource values of the area (for CSS, determination of context for the project).
- The project exceeds the expectations of both designers and stakeholders and achieves a level of excellence in people's minds.
- The project involves efficient and effective use of the 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.

#### CHARACTERISTICS OF THE PROCESS CONTRIBUTING TO EXCELLENCE

- Communication with all stakeholders is open, honest, early, and continuous.
- A multidisciplinary team is established early, 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 project development process is tailored to meet the circumstances. This process should examine multiple alternatives that will 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 (e.g., visualization).

A transportation facility is an integral part of the community's fabric and it can help define the character of the community or it can destroy it. CSS is an opportunity to connect with the communities and the constituents that DOTD serves. DOTD's policy on Achieving Context Sensitive Solutions is included in the Appendix.

#### SECTION 4(F)

Section 4(f) of the USDOT Act of 1966 applies to all historic sites, and to publicly owned land of a public park, recreational area, or wildlife and waterfowl refuge.

Section 4(f) of the USDOT Act of 1966, provides protection to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

Section 4(f) applies to all historic sites, and to publicly owned land of a public park, recreational area, or wildlife and waterfowl refuge. If a governmental body has a proprietary interest in the land (such as fee ownership, drainage easements or wetland easement), it can be considered "publicly-owned." Typically, Section 4(f) does not apply when parks, recreational areas, and wildlife and waterfowl refuges are owned by private institutions and individuals, even if such areas are



open to the public. The final applicability of Section 4(f) to a property is always made by FHWA.

Lands protected by Section 4(f) can be used for a transportation project only if:

- there is no prudent and feasible alternative to the use of these resources
- all possible planning has been taken to minimize harm to the resource.

If land protected by Section 4(f) is used, a Section 4(f) evaluation must be prepared following FHWA guidance.

In order to demonstrate that there is no prudent and feasible alternative to the use of Section 4(f) land, the evaluation must address location alternatives and design shifts that avoid the Section 4(f) land and demonstrate that such alternatives result in unique problems. Unique problems are present when there are truly unusual factors or when the costs or community disruption reach extraordinary magnitude.

When a Section 4(f) evaluation is being performed as part of an EIS or EA, the Section 4(f) evaluation is often included as a separate section of the NEPA document. For Categorical Exclusions or, in certain cases, for EAs and EISs, the Section 4(f) evaluation may be processed as a separate document.

### ***GUIDANCE DOCUMENTS***

Guidance for preparing environmental and Section 4(f) documents are contained in the FHWA's Technical Advisory (T6640.8A), "Guidance for Preparing and Processing Environmental and Section 4(f)

Documents”. Additional direction and guidance in specific areas of environmental concern and consideration are provided in numerous other regulations, Executive Orders, FHWA guidance documents and DOTD policies and publications, many of which are located on the World Wide Web (WWW). Chapter 7 contains a list of other federal and state resource agency websites.

### ***DOTD AND THE STAGE 1 ENVIRONMENTAL PROCESS***

All projects, regardless of classification (preservation, operations, safety, capacity, or other) or funding source, will be developed and carried forward through the Stage 1 Environmental Process. Projects that are federally funded, or otherwise require a federal action or permit in order to be implemented, will follow a process in accordance with the National Environmental Policy Act (NEPA). Projects developed in accordance with NEPA will result in one of the following types of environmental decision documents:

- Categorical Exclusion (CE)
- Environmental Assessment / Finding of No Significant Impact (EA/FONSI)
- Environmental Impact Statement / Record of Decision (EIS/ROD)

Projects that may not initially be considered for federal funding and do not require a federal action or permit will be developed following a process closely adhering to the NEPA process. As a result, such projects may be eligible for future federal funding at subsequent stages of project development, thereby maximizing funding sources and minimizing delay. Actions normally taken by the lead federal agency under NEPA will be the responsibility of the Chief Engineer and may be

delegated at the Chief Engineer’s discretion. Environmental documentation will be one of the following types:

- Environmental Exclusion (EE)
- Environmental Assessment / Environmental Finding (EA/EF)
- Environmental Impact Statement / Environmental Record (EIS/ER)

NEPA Environmental or Decision Document	DOTD Equivalent Environmental or Decision Document
Categorical Exclusion (CE)	Environmental Exclusion (EE)
Environmental Assessment (EA)	Environmental Assessment (EA)
Finding of No Significant Impact (FONSI)	Environmental Finding (EF)
Environmental Impact Statement (EIS)	Environmental Impact Statement (EIS)
Record of Decision (ROD)	Environmental Record (ER)

The DOTD Project Delivery Manual and the Stage 1 – Planning / Environmental Manual of Standard Practice will be used to guide the development of Stage 1 documentation.

