NEPA/404 MERGER PROCESS

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Objectives

General knowledge and understanding of:

- **Background of the Merger Process**
- **Roles and responsibilities of all parties**
- **Overview of processes I and II**
- **Conflict Dispute Resolution Process and potential triggers**

Overview of NEPA / Section 404

- **National Environmental Policy Act of 1969:**
  - Requires disclosure of environmental impacts (EIS / EA) when a major federal action is taken (e.g., FHWA funding, federal permit)
- **Clean Water Act of 1977 as amended:**
  - Permit required to discharge dredged or fill material into Waters of the United States
  - Requires NEPA compliance (EIS / EA) to issue Section 404 permit. Issuance of permit is a major federal action
- **Both Acts require:**
  - Identification of a purpose and need (Concurrence Point 1)
  - Identification of full range of alternatives (Concurrence Point 2)
  - Public notices and opportunity for public hearing and comment

Background

- **National**
  - **1992 Federal MOA between FHWA and USACE**
  - **Streamlining technique**
  - **“Merges” NEPA and Section 404**
  - **Overlap in key requirements and decisions**
- **North Carolina**
  - **Experiencing substantial delays in project development and permitting**
  - **Tailored Federal merger model to North Carolina**
  - **1997 MOA among FHWA, NCDOT, USACE-Wilmington District**

What is Merger?

- Shared decision-making process to streamline project development and permitting
- Cooperation and collaboration among NCDOT, FHWA, and all state and federal regulatory and review agencies
- Allows competing agency mandates to be balanced during shared decision making
- Satisfies requirements of SAFETEA-LU

What is Merger?

- **Agencies that have regulatory or discretionary authority over road development projects:**
  - **USACE – CWA and Rivers and Harbors Act**
  - **NCDWR – CWA 401, Buffer Rules, CAMA**
  - **USEPA – CWA 401 and 404q and CAA 309**
  - **FHWA – Funding authority**
  - **USFWS – Fish and Wildlife Coordination Act, Endangered Species Act**
  - **NCWRC – Fish and Wildlife Coordination Act**
  - **NCDCR – Historic Preservation Act**
  - **NCDOT – HES, NES, Design, Construction, Transportation Planning, and Division**

What is Merger?

- **Participation from the following agencies will be requested if within respective geographic areas:**
  - **NOAA- Fisheries and DENR-NCDMF & NCDCM**
  - **National Park Service**
  - **US Coast Guard**
  - **US Forest Service**
  - **Tennessee Valley Authority**
  - **Eastern Band of Cherokee Nation**
  - **Metropolitan Planning Organizations**
  - **Rural Planning Organizations**

What is Concurrence?

Each team member and the agency that he/she represents agrees to the decisions made at these defining points in the project development process and in doing so, pledges to abide by the decision made unless there is a profound changed condition.

Definitions

Concurrence – "I do not object to the proposed action based on the laws and regulations of my program and agency."

Non-Concurrence – "I do not concur as the information is not adequate for this stage and/or concurrence could violate the laws and regulations of my program and agency."

Abstention – "I do not actively object, but I am not signing the concurrence form. The Merger Process may continue, and I agree not to revisit the concurrence point subject to guidance on revisiting concurrence points."

Overview of Concurrence Points

CP 1-Purpose and Need and Study Area Defined: The foundation upon which justification of the project is established.

CP 2-Detailed Study Alternatives Carried Forward: Alternatives which satisfy the purpose and need for the project. These alternatives will be studied and evaluated in sufficient detail to ensure good transportation and permit decision making.

CP 2A-Bridging Decisions and Alignment Review: Identification of bridge locations and approximate lengths and a review of the preliminary alignment for each alternative.

CP 3-LEDPA / Preferred Alternative Selection: The alternative selected as the "least environmentally damaging practicable alternative" or LEDPA (NEPA preferred alternative), through the project development and permitting.

Overview of Concurrence Points

CP 4A-Avoidance and Minimization: A detailed, interdisciplinary, and interagency review to optimize the design and benefits of the project while reducing environmental impacts to both the human and natural environment.

CP 4B-30 Percent Hydraulic Review: A review of the development of the drainage design.

CP 4C-Permit Drawings Review: A review of the completed permit drawings after the hydraulic design is complete and prior to the permit application.

Merger Roles

Merger Roles include:

- **Primary MOU Signatory Agencies (NCDOT, FHWA, USACE and NCDWR)**
- **Partnering MOU Signatory Agencies**

Merger Team Meeting

- Project Team Leaders
- Chair
- Project Team Members
- Support Staff
  - Technical Experts
  - Facilitators
  - Recorders

Responsibilities
Project Team Leaders

- Screening projects for inclusion in the Merger Process
- If requests for additional information by Project Team Members are made, they are responsible for determining if the information can/will be provided and whether the meeting needs to be postponed
- Determining if a field meeting is necessary for decision-making and concurrence

Responsibilities
Project Team Member - NCDOT

- **Responsible for consulting with other Team Members in advance of the scheduled meeting to determine agenda, assembling and reviewing project packets, distributing packets at least 2 weeks in advance, and presenting packet information to the Team at the Merger meeting.**

Responsibilities
Project Team Members

- All participants in Merger Team Meetings are responsible for abiding by the Public Service Code of Conduct
- Ensuring they are empowered to represent their agency and are prepared to make decisions and sign the concurrence point forms
- Review packet in advance – notify Project Team if there are substantial concerns in advance of the meeting

Responsibilities
Project Team Members

- Notifying Team leaders of changes in membership, including if their participation is no longer desired or warranted
- Documenting reasons for non-concurrence or abstention on form, as well as in writing to Team Members
- Initiating the Conflict/Dispute Resolution as appropriate when the Team cannot concur

Responsibilities
Participation

- **Project Team Members are strongly encouraged to attend meetings on-site. Video conferencing should be used as a last resort.**
- **Should a Project Team Member not be able to attend a meeting, the Project Team Member is responsible for notifying NCDOT.**

Responsibilities – Post Meeting

Concurrence:

- The NCDOT Project Team Member will pursue signing of the concurrence form from Project Team members who did not attend the concurrence meeting but indicated intent to concur.
- Project Team Members who do not attend concurrence meetings, but indicated intent to concur, will provide written concurrence to the NCDOT Project Team Member.

Non-Concurrence:

- Issues of non-concurrence will be documented and the Conflict/Dispute Resolution Process will be initiated.

Abstention:

- Issues of abstention will be documented and provided to all Project Team Members within 5 days of the meeting. The process may continue and the agency representative agrees not to revisit the concurrence point.

General

- **The Project Team is responsible for focusing on limiting alternatives while considering a “reasonable” range of alternatives.**
- **Elevation is appropriate when the Team cannot concur. The Conflict/Dispute Resolution Process will begin in a timely manner.**

Introduction to Processes I, II & III

- **The Merger Process includes three different categories or types of road projects**
  - **Process I – New Location Projects**
  - **Process II – Widening and Other Improvement Projects**
  - **Process III – Bridge Replacement Projects**

Introduction to Processes I, II & III

- **Key components common to all 3 processes:**
  - **All integrate project development with regulatory requirements**
  - **All have a Project Team**
  - **All have a series of concurrence points**
  - **All have a step-by-step progression**
  - **All integrate coordination and review at strategic points**

Introduction to Process I

New Location Projects

- Full merger process
- Most controversial and complex projects
- Can require an EIS or EA
- Documentation of Purpose and Need extremely important
- Widest range of alternatives considered – including a full range of highway corridors
- Requires the most coordination

Introduction to Process II

Widening and Other Improvement Projects

- Usually require EA
- Corridor already selected – existing corridor
- Alternatives focus on road alignment (where to widen) within the existing corridor
- Impact minimization focuses on bridge locations, median widths, slopes, construction techniques, etc.

Process I Concurrence Points

New Location Projects

- Concurrence Point 1 – Purpose and Need and Study Area Defined
- Concurrence Point 2 – Detailed Study Alternatives Carried Forward
- Concurrence Point 2A – Bridging Decisions & Alignment Review
- Concurrence Point 3 – LEDPA/Corridor Selection
- Concurrence Point 4A – Avoidance and Minimization
- Concurrence Point 4B – 30% Hydraulic Review
- Concurrence Point 4C – Permit Drawings Review

Process II Concurrence Points

Widening and Other Improvement Projects

- Concurrence Point 1 – Purpose and Need and Study Area Defined
- Concurrence Point 2 – Design Options for Detailed Study
- Concurrence Point 2A – Bridging Decisions & Final Alternatives to Carry Forward
- Concurrence Point 3 – LEDPA/Alignment Selection
- Concurrence Point 4A – Avoidance and Minimization
- Concurrence Point 4B – 30% Hydraulic Review
- Concurrence Point 4C – Permit Drawings Review

Concurrent Concurrence Points

- **Allowable to combine concurrence points**
- **Typically CP 1 and CP 2 are handled in the same meeting. CP 3 and 4A at same meeting**

MERGER PROCESS

CONFLICT / DISPUTE RESOLUTION PROCESS

Conflict / Dispute Resolution

Review Board Established

The CDR process established a Review Board (RB) comprising:

- USACE – Chief, Regulatory Division
- NCDENR – Chief Deputy Secretary
- NCDOT – Chief Engineer
- FHWA – Assistant Division Administrator

Conflict / Dispute Resolution

- First Level Review – Merger Management Team
- NCDOT Project Manager invites Merger Team members to attend MMT meeting
- Issue(s) discussed at MMT meeting
- Outcome – Resolved, continue with merger process or
- Not Resolved, elevate to Review Board

Conflict / Dispute Resolution

Resolution

- **Review Board discusses and resolves issue(s) during the meeting**
- **Review Board's decision is documented and the MMT is notified**
- **NCDOT Project Manager distributes the documentation to the Merger Team**
- **The concurrence form is signed and the Merger Process continues**

Merger Guidance

Merger Guidance can be found at the following site:

https://connect.ncdot.gov/resources/environmental

QUESTIONS?

PARTING THOUGHTS….

Parting Thoughts…..

- The Merger Process is a structured process to assure compliance with legal requirements and that all appropriate issues are adequately addressed
- Nothing in the Merger Process says you can’t use common sense!
- Although the process is structured, it allows for flexibility
- The Project Team is empowered to make decisions that move a project forward
- The Merger Process is a collaborative process

Parting Thoughts…..

- The Merger Process works well!
- Approximately 275 projects have moved through the process to date
- About 85% of concurrence points are reached with one meeting – virtually all in two meetings
- There is one project currently in the Conflict/Dispute Resolution Process – several others have been there but have moved forward or issues are being addressed by the Merger Management Team