

Merger Frequently Asked Questions (FAQs)

1. Why merge NEPA and Section 404 of the Clean Water Act?

In the early 1990's, the Federal Highway Administration (FHWA) recognized the opportunity to incorporate NEPA planning and decision-making with the regulatory permitting process and decisions under the Clean Water Act. The U.S. Department of Transportation (USDOT), the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) formally recognized this potential streamlining initiative and signed a Memorandum of Agreement (MOA) entitled "Implementation of the Intermodal Surface Transportation Efficiency Act" (ISTEA) on May 1, 1992, to address the general agreement of 'merging' the two processes.

There is a 'common sense' overlap in certain critical path project requirements under NEPA and Section 404 of the Clean Water Act that can be integrated into one 'merged' process. In North Carolina, FHWA, USACE-Wilmington District and the North Carolina Department of Transportation signed a Memorandum of Agreement (MOA) entitled "An Interagency Agreement Integrating Section 404/NEPA" on May 14, 1997, to provide a 'Merger Process' for transportation projects requiring a Section 404 permit. In April of 2005, those three agencies and the N.C. Department of Environment and Natural Resources (NCDENR) signed the MOU for the Merger Process Implementation Guidelines as primary signatories. Several other agencies are included in the MOU as partnering agencies.

2. What is the "Merger Process" and why does it matter?

- A. Merger is a process to streamline the project development and permitting processes, agreed by the USACE, NCDENR (DWQ, DCM), NCDOT, FHWA and supported by other stakeholder Agencies and local units of government. To this effect, the Merger process provides a forum for appropriate agency representatives to discuss and reach consensus on ways to facilitate meeting the regulatory requirements of Section 404 of the Clean Water Act during the NEPA/SEPA decision-making phase of transportation projects.
- B. Why does it matter? The Merger Process allows agency representatives to work more efficiently (quicker and comprehensive evaluation and resolution of issues) by providing a common forum for them to discuss and find ways to comply with key elements of their agency's mission. The merger process helps to document how competing agency mandates are balanced during a shared decision-making process, which results in agency representatives reaching a "compromise based decision" to the regulatory and individual agency mandates.

3. Which Agencies are the Merger Process's primary signatories (i.e. process owners), and what are their roles and responsibilities?

NCDOT, FHWA, NCDENR and USACE are the Merger Process's primary signatories, also known as the process owners or sponsors. They are responsible for the successful implementation of the

Merger Process. They are the primary decision-making authority with regard to NEPA and Section 404 permitting and are responsible for conflict or dispute resolution.

4. Does the August 2005 transportation bill (SAFTEA-LU) affect the Merger Process?

Section 6002 of SAFETEA-LU, entitled Efficient Environmental Reviews for Project Decision Making, established an environmental review process for transportation projects that ensures that interested agencies have an opportunity to participate in environmental reviews, while respecting project schedules. All transportation projects requiring a Federal EIS for which the original Notice of Intent was published in the Federal Register after August 10, 2005 are required to follow the Section 6002 environmental review process. One element of this review process involves the development of an environmental coordination plan for subject projects.

Because NCDOT's Merger Process largely met the requirements of Section 6002, NCDOT approached FHWA and asked if the Merger Process could serve as a programmatic environmental coordination plan for NCDOT projects. FHWA agreed, provided that a few changes were made to the Merger Process Guidance to make it fully consistent and compliant with Section 6002. These changes include additional emphasis on agency participation in project scoping, public involvement prior to Concurrence Point 1.

5. Does the Merger Process slow down the Project Development and Environmental Analysis (PD&EA) phase?

The Merger Process may cause the appearance that the project development and environmental analysis phase has slowed down. However, there are several important aspects to the Merger Process that may outweigh any perceived delays: Early stakeholder involvement during planning, better quality decisions, and less likelihood of permit issuance delays. FHWA and other agencies have found that certain "EA-type" projects placed into the Merger Process at Concurrence Point 1 (Purpose and Need) can be 'processed' through merger within 2 to 3 years. Combining appropriate concurrence points and taking advantage of other FHWA/NCDOT streamlining provisions can also speed up the project development and environmental analysis phase.

6. Who determines which projects go into the Merger Process and which ones do not?

The Merger Process owner agencies (NCDOT, FHWA, NCDENR and USACE) decide which projects go into the Merger process using the screening criteria contained in the Merger Process Guidelines. The 'triggers' to place a project into the Merger process generally include the need for an Individual Permit (IP) by the USACE based upon the anticipated wetland or stream impacts, and/or potential impacts to two or more specified resources.

7. What are pipeline projects?

Pipeline projects are Merger eligible projects that were already underway in various stages of project development when the original Merger and/or Merger Process were implemented. The Merger process owners (NCDOT, FHWA, USACE and NCDENR) reviewed these projects and determined if and at what concurrence point they would be placed into the Merger process. A pipeline project may also include non-Merger projects that are placed into the process at Concurrence Points 4B (Hydraulic Review) and 4C (Permit Drawing Review). This second type of 'pipeline' project helps to ensure input from commenting and regulatory agencies prior to the submission of permits to DWQ, USACE and DCM, where appropriate.

8. Once in the Merger Process, can projects be taken out the process?

Yes. The four process owner agencies may take a project out of the Merger process. This decision may be made on a variety of factors (e.g., Change in project scope, selection of alternatives, reduction in anticipated wetland and stream impacts, etc.). The process owner agencies may request recommendations from other partnering agencies before the decision is made to take the project out of the Merger Process.

9. Which project Concurrence Points can be combined and which cannot?

Under the Merger Process, Concurrence Points 1 and 2, 2 and 2A, 2A and 3, and 3 and 4A and 2A and 4A can be potentially combined. Concurrence Points 2A and 4A should be combined for pipeline projects that are inserted into the Merger process at Concurrence Point 3 or after. Concurrence Points 2 and 3 cannot be combined due to the timing of the issuance of the draft NEPA document, the initiation of the Section 404 public review and notification process and the selection of the 'LEDPA' from the Concurrence Point 2 Detailed Study Alternatives Carried Forward. This potential situation may be referred to as being 'pre-decisional' under Section 404 where one of the alternatives under consideration is selected or concurred upon by USACE and other agencies before the opportunity for input from the public.

10. Which Concurrence Points require signed forms?

Under the Merger Process Guidelines, Concurrence Points 1, 2, 2A, 3 and 4A require signed concurrence forms.

11. What are the Definitions of "concurrence", "non- concurrence", and "abstain" for the purposes of the Merger Process?

- A. Concurrence - "I do not object to the proposed action based on the laws and regulations of my program and agency."
- B. 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."
- C. Abstain - "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 the guidance on revisiting concurrence points" (documented on page 2 of the Merger Memorandum of Understanding).

12. Which agencies are partnering agencies?

The partnering agencies as follows: U.S. Environmental Protection Agency; U.S. Fish and Wildlife Service; National Marine Fisheries Service; N.C. Wildlife Resources Commission; N.C. Department of Cultural Resources; U.S. Coast Guard; U.S. Forest Service; Tennessee Valley Authority; National Park Service, Metropolitan Planning Organizations (MPO's), the Eastern Band of Cherokee Nation, and Rural Planning Organizations (RPO's). Partnering agencies have a significant role as project team members in the Merger Process, and in some cases, may have a statutory compliance role or regulatory function to fulfill. Some of the partnering agencies will participate only when the project is in their respective geographic area of responsibility or statutory authority.

13. What are the roles and responsibilities of agencies that participate in the Merger Process?

The roles and responsibilities of participating agencies include, but are not limited to:

- A. Participating in the NEPA Merger Process if the project may impact resources within their purview at the earliest possible time, especially with regard to the development of the purpose and need statement, range of alternatives, methodologies, and the preferred alternative.
- B. Providing meaningful and early input on unresolved issues.
- C. Identifying, as early as practicable, any issues of concern regarding the project's potential environmental or socioeconomic impacts. Participating agencies also are allowed to participate in the issue resolution process.
- D. Participating in the scoping process as part of the Merger Process.

14. What do I need to do if I do not concur or I abstain at the end of a Merger meeting?

If an organization decides to either non-concur or abstain, that organization will indicate such by a statement on the concurrence form and will sign the statement. The organization is

responsible for documenting its reasons in writing and providing that documentation to all Project Team Members within 5 business days of the Project Team meeting. Primary agencies are responsible for reviewing the reasons for abstaining to determine if the process should move forward.

15. What should I do if I have a concurrence meeting in the next week or two but have not received any information regarding the project (information packet) from NCDOT?

Project Team members are responsible for notifying the NCDOT Concurrence Meeting Coordinator with a "cc" to the NCDOT Project Team Member in a timely manner prior to a team meeting if the packet is not received by 2 weeks in advance of the meeting.

16. What should I do if, after reviewing the information packet, I know that I will not be able to concur at the upcoming meeting because I do not have sufficient information for my agency to move forward?

Project Team Members are responsible for forwarding any substantial concerns to the NCDOT Project Team Member either in writing or via e-mail with a copy to other Project Team Members in advance of team meetings.

- A. Agency concerns regarding predictive methodology (e.g. traffic projections) should describe the alternative methodology which it prefers and why.
- B. An agency objecting to or expressing reservations about the proposal on grounds of environmental impacts shall specify the avoidance and minimization measures considered necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrence.

17. Can I request additional information to what has been provided in the information packet?

- A. Project Team Members may request additional information in advance of Project Team meetings. Such requests will be in writing and sent to the NCDOT Project Team Member with a copy to other Project Team members.
- B. Requests for additional information shall be as specific as possible and may address either the adequacy of the Purpose & Need statement or the merits of the alternatives discussed or both.
- C. An 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.

18. What is the difference between a Participating agency and Cooperating agency?

Cooperating agencies are, by definition, already participating agencies, and the roles and responsibilities of cooperating and participating agencies are very similar. Cooperating agency status, however, may require a greater degree of involvement in the environmental review process, since cooperating agencies are, by definition, agencies with jurisdiction by law or special expertise, whereas participating agencies are those with only an interest in the project.

Another distinguishing feature of cooperating agencies is that Section 1501.6 of the CEQ regulations states that cooperating agencies may "assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise." Participating agencies cannot assume this same responsibility.

An additional distinction is that pursuant to 40 CFR 1506.3 "a cooperating agency may adopt the environmental impact statement of a lead agency (without re-circulating) when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied." This provision is particularly important to permitting agencies, such as the U.S. Army Corps of Engineers, who routinely adopt FHWA documents.