

# **An Interagency Agreement**

## **Integrating Section 404/NEPA**

**Wilmington District,  
U.S. Army Corps of Engineers**



**US Army Corps  
of Engineers.**

Wilmington District

**The Federal Highway Administration**



**North Carolina Department of  
Transportation**



**INTEGRATING SECTION 404 PERMIT REQUIREMENTS  
WITH THE NEPA PROCESS**

**A TEAM APPROACH FOR TRANSPORTATION PROJECTS  
IN NORTH CAROLINA**

**AN AGREEMENT BETWEEN THE WILMINGTON DISTRICT,  
U.S. ARMY CORPS OF ENGINEERS;  
THE FEDERAL HIGHWAY ADMINISTRATION;  
AND THE NORTH CAROLINA DEPARTMENT  
OF TRANSPORTATION**

**OPERATING PROCEDURES**  
**National Environmental Policy Act**  
**and**  
**Section 404 of the Clean Water Act**  
**Integration Process for Surface Transportation Projects in North Carolina**

**I. Applicability:**

A. These procedures apply to all projects needing Federal Highway Administration (FHWA) action under the National Environmental Policy Act (NEPA) and a Corps of Engineers (Corps) Individual Permit under Section 404 of the Clean Water Act. These procedures are limited to those projects determined by FHWA and the North Carolina Department of Transportation (NCDOT) to be processed with an Environmental Impact Statement (EIS) to comply with NEPA, and/or those projects that require an Individual Section 404 Permit.

B. Regulatory/Resource Agency participation in this process does not imply endorsement of all aspects of a transportation plan or project. Nothing in these procedures or Appendix "A" is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the agencies involved.

**II. Background:**

In a May 1, 1992, agreement, the U.S. Department of Transportation, the Office of the Assistant Secretary of the Army (Civil Works), and the U.S. Environmental Protection Agency developed policy that would (a) improve interagency coordination and (b) would integrate the NEPA and Section 404 procedures. H. Martin Lancaster, the current Assistant Secretary of the Army for Civil Works, and Garland B. Garrett Jr., North Carolina Secretary of Transportation, have both been unequivocal in their commitments to improve the regulatory process and environmental protection as it relates to highway construction in North Carolina.

**III. NEPA - Section 404 Integration:**

The signatories to these procedures are committed to integrating NEPA and Section 404 of the Clean Water Act in the transportation planning, design, and implementation stages. We are committed to ensuring the earliest possible consideration of environmental concerns pertaining to waters of the United States, including wetlands, at each of these three stages. Avoidance of adverse impacts to waters of the United States and associated sensitive resources is the preferable alternative in consideration of environmental concerns and will always be employed, when practicable.

Whenever avoidance of waters of the United States is not practicable, minimization of impacts will be achieved, and unavoidable impacts will be mitigated to the extent



appropriate and practicable. We will improve interagency cooperation, communication and consultation at all levels of our agencies throughout the process.

IV. Benefits of this process:

- A. Improve coordination and efficiency of our operations at all levels, thereby better serving the public;
- B. Expedite construction of necessary transportation projects, with benefits to mobility and the economy at large;
- C. Enable more transportation projects to proceed on budget and on schedule;
- D. Improve the protection and enhancement of the waters of the United States, which will benefit North Carolina's aquatic ecosystems and the public's interest.

V. Implementation Procedures:

Appendix "A" is an outline of the procedures developed to merge the NEPA - Section 404 Process. Appendix "B" is a copy of the Wetland Mitigation Partnering Charter that was signed by FHWA, the Corps, NCDOT, USNMFS, USFWS, NCDENR, NCDOT, and NCWRC in December, 1995. A review of this charter will reveal that the mechanism to cooperatively work together, to coordinate, and to communicate, has already been put into place.

VI. Concurrence/Non-Concurrence:

- A. Timeliness: Regulatory/Resource Agencies are strongly encouraged to provide their written comments as quickly as possible for each stage of this process.
- B. Concurrence: Once consensus is achieved, the project will proceed to the next stage (or next phase of project development). Agencies agree not to revisit previous concurrences unless there is significant new information or significant changes to the project, the environment, or laws and regulations.
- C. Non-concurrence (written determination) that:
  - 1. The information to date is not adequate for this stage, or
  - 2. The potential adverse impacts of the project are severe, or
  - 3. Concurrence would violate or lead to a violation of the Section 404(b)(1) guidelines or other agency regulations or policy.

Agencies agree to provide an explanation of the basis for non-concurrence. All agencies agree to attempt to resolve issues causing the non-concurrence, and to try to do so on an informal basis within 15 days before entering into a formal dispute resolution.

VII. Dispute Resolution:

In the event that a dispute arises, such that concurrence or consensus cannot be reached by the project team, resolution will be initiated by either the North Carolina FHWA Division Administrator; the U.S. Army Corps of Engineers, Wilmington District Engineer; or the North Carolina State Highway Administrator contacting the others to resolve the issue as quickly as possible. Reasons for disputes may include: (a) unresolved written non-concurrence, (b) lack of response within any agreed upon time limits, and/or (c) substantive departure from the procedures contained in Appendix "A".

VIII. Agency Commitments:

A. Pipeline Projects:

NCDOT/FHWA will provide a prioritized list of pipeline projects. A meeting will then be scheduled to review the list and to determine which projects may be "grandfathered" with final permit processing being completed under the existing system and which projects will be developed and reviewed under this integration process.

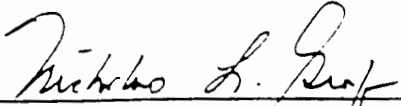
B. NCDOT/FHWA agrees to request Regulatory/Resource Agency involvement early in the NEPA process.

C. The Corps agrees to participate in project development processes when aquatic resource impacts are substantial until/unless an agency determines that it does not have jurisdiction or concerns.


IX. Modification:

These procedures may be modified upon approval of all signatories. Modification may be proposed by one or more signatories. Proposals for modification will be circulated to all signatories for a 30-day review period. Approval of such proposals will be indicated by written acceptance. A signatory may terminate participation in this agreement upon 30-day written notice to all other signatories.



  
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Nicholas L. Graf, North Carolina Division Administrator  
Federal Highway Administration

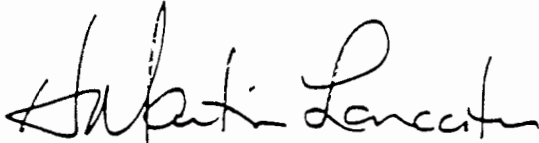
5/14/97  
Date

  
\_\_\_\_\_  
Colonel Terry R. Youngbluth, District Engineer  
U.S. Army Corps of Engineers, Wilmington District

14/MAY/97  
Date

  
\_\_\_\_\_  
Garland B. Garrett, Jr., Secretary  
North Carolina Department of Transportation

5/14/97  
Date

  
\_\_\_\_\_  
H. Martin Lancaster, Assistant Secretary of the Army (Civil Works)

5-14-97  
Date

## APPENDIX "A"

1. The North Carolina Department of Transportation (NCDOT) and the Federal Highway Administration (FHWA), in coordination with the U.S. Army Corps of Engineers (Corps), will assemble a project team at the start of the planning process. This project team will meet to review, discuss, and reach **consensus** on the "purpose and need" of a given project. Upon completion of this initial meeting and after **consensus** is reached by the project team, **the Corps will provide written concurrence** on the "purpose and need." Additionally, at this first meeting, the project team will be presented with potential alternatives based upon the findings of NCDOT's Planning and Environmental Branch and/or their Statewide Planning Branch.

2. Based upon the input provided by the project team, potential alternatives will be analyzed. Development of those alternatives will consider available socio-economic data, land use data, and environmental data that will meet the purpose and need of the project.

3. A second project team meeting will be held to determine study alternatives. The intent of this meeting is to obtain consensus from the project team on which alignments will be fully evaluated as alternatives, including the "no build" alternative, in the draft environmental document. Those alternatives selected must meet the purpose and need of the project, with the exception of the "no build" alternative. Once **consensus** on the alternatives is reached by the project team, **the Corps will provide written concurrence**.

4. Functional designs will be prepared on each alternative considered reasonable and feasible (that meet the purpose and need of the project) that are being considered in the draft environmental document. The environmental effects of each alternative will be evaluated and reported in the environmental document based upon the functional design; however, a wider corridor will normally be included in the document for public comment such that alignment modifications may be made and still meet the NEPA requirements. Protected species, cultural resources, wetlands, and other environmental issues will be evaluated in sufficient detail to make informed decisions. In regard to wetlands, this evaluation will include jurisdictional determinations (vice delineations) based upon the use of USGS mapping, aerial photography, soils mapping, DOI National Wetlands Inventory mapping, and field review with sufficient ground truthing. Adverse wetland impacts for each alternative will be determined and evaluations made with regard to functions and values. Potential wetland mitigation sites will be discussed at this time. The draft environmental document will be circulated and a Section 404 permit application will be submitted to the Corps. The Corps Public Notice will be issued at this time for concurrent review and comment.

5. A public hearing will be scheduled by NCDOT/FHWA after the Draft NEPA document is circulated. The Corps will attend this corridor public hearing. Concurrently with this action, the Corps will consider the comments they have received, as a result of their Public Notice, from the concerned agencies and the general public and coordinate those comments with NCDOT and



FHWA. This coordination will involve, not only consideration of the comments received from the commenting agencies and the general public, but all other information that will be used in selecting the "least environmentally damaging practicable alternative" (LEDPA), which will be presented in the "final environmental document". At this point in the process, FHWA, NCDOT, and the Corps will participate in a "post hearing" meeting to select a proposed LEDPA.

6. A project team meeting will be held at the completion of the review. At this time, the LEDPA and the rationale for its selection will be presented. If **consensus** is reached, **the Corps will concur in writing** that, based upon the current information, the alternative selected appears to be the LEDPA and NCDOT/FHWA will proceed with developing the final environment document. With concurrence from the project team, it is assumed that this procedure will fulfill the requirements of "avoidance" as required by the Section 404(b)(1) guidelines.

7. NCDOT/FHWA will prepare the final environmental document for the LEDPA. In preparing the document, more detailed environmental studies will be undertaken for the recommended corridor. A more specific protected species study will be undertaken, if necessary, to complete consultation as required by Section 7 of the Endangered Species Act. Detailed cultural resources investigations will also be completed in order to carry out Section 106 of the National Historic Preservation Act requirements. Section 4(f) of the Department of Transportation Act requirements will be completed. Wetland delineations will be completed for the entire corridor. Utilizing the additional information generated and mapped to GPS standards for the LEDPA, a preliminary design will be undertaken that will minimize environmental impacts. The project team will be provided the opportunity to review the preliminary design before the final environmental document is completed and any comments they have will be considered in finalizing the alignment. The potential for onsite mitigation will also be addressed.

8. The final environmental document will be circulated and **written concurrence or non-concurrence** regarding the Section 404(b)(1) Guidelines avoidance and minimization mitigation requirements **will be provided by the Corps**. The final document will also respond to all comments received on the draft document as well as input received through the public hearing process.

9. Upon approval of the "Record of Decision" (ROD) by FHWA, NCDOT will prepare a compensatory wetlands mitigation plan and submit it to the Corps.

10. After considering the compensatory mitigation plan during the public interest review and upon final approval of that plan, a Department of the Army Section 404 permit decision will be made.

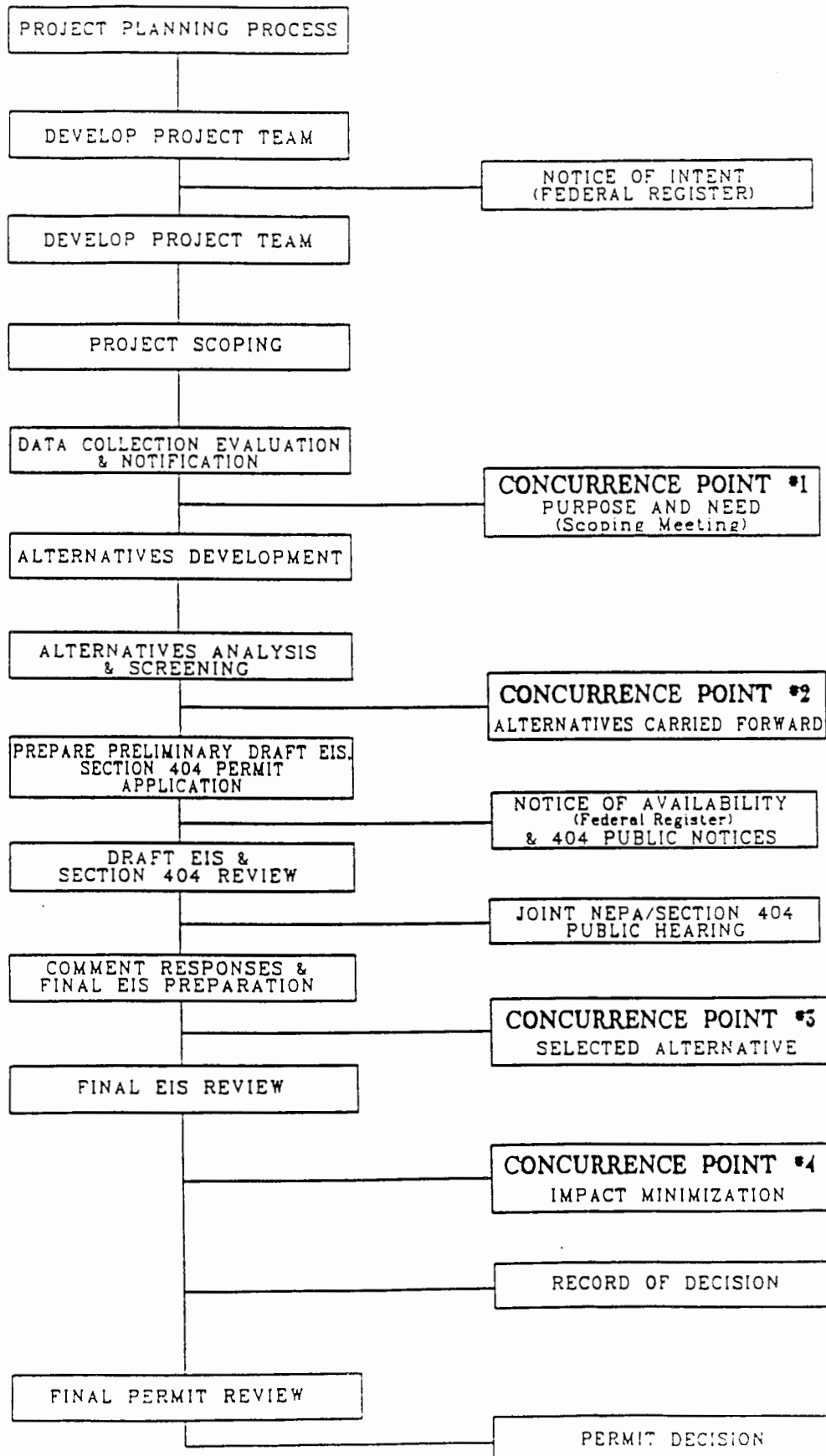
11. When final designs are completed, any necessary permit modifications, based upon the final design, will be submitted to the Corps for authorization of construction of project segments as appropriate in the highway scheduling process. Additionally, all outstanding mitigation plans will be finalized and submitted to the Corps for authorization of construction. If necessary, the Corps amended Public Notice will be circulated at this time for review. It is



understood that there will be outstanding compensatory wetland mitigation issues to be resolved for "pipeline" projects. It is also understood that compensatory wetlands mitigation plans must be approved in advance of Section 404 permit issuance on all future projects.

12. NCDOT will begin highway construction and implementation of appropriate mitigation measures.










# Summary of NEPA/404 Process





# Wetland Mitigation Partnering Charter

We the undersigned members of the Wetland Mitigation Team agree to work together in the spirit of cooperation and professionalism to assist the North Carolina Department of Transportation in fulfilling its responsibilities in providing successful compensatory mitigation for transportation projects by:

-  *Establishing and maintaining honest, clear and open communication between the partners in a way that mitigation issues are dealt with quickly, efficiently and at the lowest level of authority.*
-  *Partnering at all levels within and between our respective organizations.*
-  *Developing a list of working definitions of common terms relating to mitigation.*
-  *Identifying efficient and effective approaches to compensate for lost wetland functions and values.*
-  *Assisting the North Carolina Department of Transportation in the advance identification and evaluation of potential mitigation sites.*
-  *Establishing an acceptable closure process for mitigation sites, including long term ownership and/or dispensation.*
-  *Striving to make timely and consistent decisions based upon the best available scientific information.*
-  *Offering technical advice to the North Carolina Department of Transportation in the resolution of mitigation that has not met the established success criteria.*
-  *Conducting partnering meetings to implement this Charter.*

We, the team, individually and collectively, commit ourselves and our organizations to this Charter. All processes and procedures developed through this Charter will be consistent with current Federal and State laws and regulations.



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