

## Memorandum of Understanding

### Section 404 of the Clean Water Act

And

### National Environmental Policy Act

## Integration Process for Surface Transportation Projects in North Carolina

#### ***Applicability:***

- A. These procedures will generally apply to all new location projects and all projects that require an individual permit under Section 404 of the Clean Water Act. FHWA, USACE, NCDENR, and NCDOT will consult early in the project development process and apply screening criteria to identify specific projects that will follow this process.

Note: If a project is being developed under the North Carolina Environmental Policy Act without FHWA involvement, this process will still be applicable but will be implemented without FHWA participation.

- 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 is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the agencies involved. In the event of any conflict between this process and other statutes or regulations, the statutes or regulations control.

#### ***Background:***

In a May 1, 1992 agreement, the U. S. Department of Transportation, the Office of the Assistant of the Army (Civil Works), and the U. S. Environmental Protection Agency (EPA) developed policy that would (a) improve interagency coordination and (b) would integrate NEPA and Section 404 procedures. On May 14, 1997, the Wilmington District of the USACE, the North Carolina Division of FHWA and NCDOT signed an Interagency Agreement that provided procedures to integrate NEPA and Section 404 for transportation projects in North Carolina. This integrated approach is part of an effort to streamline the project development and permitting processes. The objective is to ensure that the regulatory requirements of Section 404 of the Clean Water Act are incorporated into the NEPA decision-making process for transportation projects. The original process is hereby modified to incorporate experience gained with

years of use of the 1997 agreement, guidance from the USACE-NCDOT-NCDENR permit process improvement workshop, and incorporation of the streamlining provisions of the Transportation Equity Act for the 21<sup>st</sup> century (TEA-21). This process will continue to be regularly evaluated for its effectiveness and modified as appropriate.

**Concept of Concurrence:**

The process is conducted under the concept of “concurrence” with a project team organization. Concurrence implies that each team member and the agency they represent does not object to decisions made at strategic points in the project development process and in doing so “pledges” to abide by the decision made unless there is a profound changed condition. The USACE, NCDENR, NCDOT and FHWA jointly lead the project team. Concurrence points are defining points in the NEPA project development and Section 404 permitting process. Concurrence is sequential and must be achieved in proper order. As an example, it is not possible to have agreement on alternatives selected for detailed study (Concurrence Point 2) without first achieving agreement on purpose and need (Concurrence Point 1).

Each agency should enter discussion of a concurrence point with a solution oriented attitude. After sufficient discussion and an opportunity for NCDOT to provide requested information, each agency will either concur or non-concur, or, in exceptional cases, abstain.

If an organization decides to either non-concur or abstain, that 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. Definitions of concurrence, non-concurrence and abstention are provided below:

- **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.”
    - Non-concurrence should not be utilized based on lack of information without affording NCDOT a reasonable opportunity to provide the requested information.
- **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 the guidance on revisiting concurrence points”.

The intent of the streamlined process is to ensure that agency concurrences are obtained before proceeding to the next step or concurrence point. Concurrence will be documented by signature of a concurrence form summary statement. If an agency cannot concur, they agree to provide a written explanation of the basis for non-concurrence to the Project Team. All agencies agree to attempt to resolve issues causing non-concurrence and to try to do this on an informal basis within 15 working days of the subject concurrence meeting.

Having concurred at a particular milestone, a team member will not request to revisit previous concurrence points unless there is substantive new information that warrants a reevaluation. Examples of such a reevaluation might include:

- a change in the assumptions on which the project purpose or need was based;
- a change in regulatory authority that extends regulatory jurisdiction to include an area or resource that was not previously regulated;
- discovery of an impact, resource or additional information that was not previously identified or did not previously exist; or
- discovery of engineering limitations.

All team members agree that staffing changes are not sufficient reason to revisit a previous concurrence point and that newly involved agency staff will abide by the project decisions made by previous staff and the team. A request to revisit a previous concurrence point will be provided in writing to team leaders and will include supporting documentation. Team leaders (FHWA, USACE, NCDENR, and NCDOT) will respond to the request in writing with a carbon copy, or email with cc's, to the entire Project Team.

***Project Team:***

NCDOT will coordinate with the USACE, FHWA, and NCDENR to identify team members for each project. NCDOT will provide written verification of participating team members for each project. It is recognized that many statutes and regulations must be met in order to achieve concurrence and make good project decisions. Therefore, the following agencies will normally participate unless they decline.

U. S. Army Corps of Engineers  
Federal Highway Administration  
North Carolina Department of Transportation  
U. S. Environmental Protection Agency  
U. S. Fish and Wildlife Service  
North Carolina DENR, Division of Water Quality  
North Carolina Wildlife Resources Commission  
North Carolina Department of Cultural Resources

The following agencies will be requested to participate when a project is within their respective geographic area:

North Carolina DENR, Division of Coastal Management (within the twenty coastal counties)  
Metropolitan Planning Organizations (MPO's)/Rural Planning Organizations (RPO's)\*  
National Park Service (in the vicinity of national parklands)  
U. S. Coast Guard (Coast Guard permitted bridges)  
U. S. Forest Service (in the vicinity of national forest property)  
Tennessee Valley Authority (within TVA region)  
U. S. Fish and Wildlife Service – Refuge (in the vicinity of federal refuges)  
Eastern Band of Cherokee Nation-Tribal Historic Preservation Officer  
North Carolina Division of Marine Fisheries and National Oceanic and Atmospheric Administration (NOAA) (when there is any possibility that resources under their jurisdiction are in the project vicinity. Appendix B provides a list of Coastal Plain counties where the NOAA and NCDMF should be contacted to determine their participation in projects in these counties.)

- \* Each MPO and RPO representative serving on a project team will have authority to sign Merger concurrence forms. The effect of multiple MPO/RPO signatures for concurrence will be evaluated 24 months after the date of execution of this MOU and recommendations for revisions made as needed.

Each participating agency will develop protocol to determine which office or individual of each agency will participate. NCDOT's representative on the Project Team will be the Project Development Engineer. To represent NCDOT in all areas of concern related to the natural and human environment, design and safety considerations, a representative from the Human Environment Section, the Natural Environment Section, the Design Engineers (Roadway Design, Hydraulics, Structure, Geotechnical, etc.), Construction Engineers, Transportation Planning and the Division Office should also be invited to attend Project Team meetings to provide technical information and input. (Each agency will determine whom to invite to the meeting based on project issues.)

### ***Concurrence Points and Project Phases***

There are seven strategic decision (concurrence) points in the NEPA project development and permitting process:

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

- 2A. Bridging Decisions and Alignment Review: Identification of bridge and box culvert locations and their approximate lengths and dimensions, and a review of the preliminary alignment for each alternative.
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 process.
- 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.
- 4B. 30 Percent Hydraulic Design Review: A review of the development of the stormwater best management practices and hydraulic design.
- 4C. Permit Drawings Review: A review of the completed permit drawings after the hydraulic design is complete and prior to permit application.

#### **Implementation Procedures:**

Attached to this MOU are implementation procedures which provide detailed information that have been developed to provide guidance for the Section 404/ NEPA Merger Process (Merger Process). These implementation procedures have been developed for three basic types of projects as follows:

- ◆ Process I - Projects on New Location
- ◆ Process II - Widening and Other Improvement Projects
- ◆ Process III - Bridge Replacement Projects Processed as a Categorical Exclusion

The guidance for each of these processes consists of a flow chart and detailed guidance on how to complete each step of the flow chart. If there is doubt as to which process to follow, the Project Team will decide which process to use.

#### ***Conflict or Dispute Resolution:***

Concurrence at critical identified points in the project development and permitting process is the key to the success of the Merger Process. However, it is recognized that there may be instances where the Project Team cannot reach concurrence due to diverse agency missions, philosophical differences or policy issues. If the team members of an agency or agencies cannot concur, the approved guidance for conflict or dispute resolution will be initiated. See Appendix C.

***Modification:***


Substantive changes to this process will require approval of all primary 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.

*Signatures:*

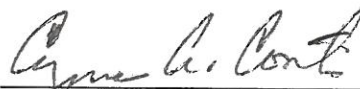
The four agencies listed below as primary signatories are the process owners of the Merger Process. These agencies are the primary decision-making authority with regard to NEPA and Section 404 permitting and are responsible for conflict or dispute resolution.

The agencies listed as partnering signatories 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. Nearly all of the listed agencies are currently participating as project team members under the existing Merger Process. In addition, many of the listed agencies have participated in developing the Merger Process procedures. By signing this document, these agencies agree to participate and abide by the procedures described in the Merger Process. Such agreement does not compromise or eliminate statutory or regulatory remedies available to the listed agencies (e.g. 404(q) or (c)) nor does it circumvent statutory requirements that are mandated to specific agencies. The intent of this agreement is to provide an interactive, predictable process that allows agencies to address their statutory and regulatory requirements **during** the development of transportation projects within the State of North Carolina.


**Primary Signatories:**

  
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Steven A. Baker  
Colonel, US Army  
District Commander


5/18/12  
Date

  
\_\_\_\_\_  
Eugene A. Conti, Secretary  
North Carolina Department of Transportation

5/21/12  
Date

  
\_\_\_\_\_  
John Sullivan, III, Division Administrator  
FHWA, North Carolina Division

5/24/12  
Date

  
\_\_\_\_\_  
Dee Freeman, Secretary  
North Carolina Department of Environment and Natural Resources

5-25-12  
Date