



MEMORANDUM

TO: Project Managers
Designers
Environmental Scoping Managers
CO and District Environmental Staff

FROM: Sandra Bowman, Manager, Ecology and Waterway Permitting Office (EWPO)
Ron Bales, Manager, Environmental Policy Office

DATE: February 25, 2016

RE: NEPA Compliance and Waterway Permitting for Bundled Projects

Bundling is the grouping of projects for contractual purposes. An individual project is identified by the assignment of a designation number. A contract may contain a group of individual projects. The following guidance should help with the decision-making process with regard to NEPA compliance and waterway permitting.

National Environmental Policy Act (NEPA) Review Process

Under most circumstances, Environmental Services Division (ESD) advises PMs to treat each project as if it were federally funded. This will allow the project to be completed with federal funding if it is dropped from a state funded program without going through NEPA review at a later date. To assist with project bundling, the ESD recommends that each individual project be evaluated for community and natural resource impacts and have an individual NEPA document prepared. Impacts that may affect project delivery include:

Section 106

For most minor projects the Minor Projects Programmatic Agreement (Minor Projects PA) would be applicable and can save Section 106 compliance time. The Minor Projects PA Category A and B projects can range from a simple citation or 2-3 months if an archaeological investigation is required.

Projects that do not fall under the Minor Projects PA would require the full Section 106 process that can take 4-12 months to complete. PMs should be aware of projects involving historic districts, historic bridges, and National Register listed or eligible properties as they may require full Section 106 review.

Section 4(f)

Section 4(f) prohibits the use of lands for federally funded transportation facilities unless there is no feasible and prudent alternative. The law applies to publicly owned parks, recreation areas, and wildlife/waterfowl refuges, and National Register eligible or listed historic properties. Lands that are subject to this law are called Section 4(f) resources. Each Section 4(f) resource has activities, features, and/or attributes that make it eligible for protection. PMs should be aware that involvement with a Section 4(f) resource may require an evaluation. This process can take 2-12 months depending on the impact.

Threatened and Endangered Species

Each project requires Section 7 compliance. Most minor projects may fall under the 2013 *U.S. Fish and Wildlife Service Interim Policy for the Review of Highway Transportation Projects in Indiana* (Interim Policy), which has two coordination types (Programmatic and Full Coordination). For Programmatic Coordination, if construction activities meet all of the criteria established by the Interim Policy, the U.S. Fish and Wildlife Service (USFWS) concurs that the potential for impacts from these types of projects is minimal. These construction activities include:

- The project impacts < 0.5 acre of forested R/W (temporary and/or permanent), all of it is within 75 feet of the edge of the existing roadway or pavement.
- The project impacts < 300 feet of natural perennial and intermittent streams without relocation, with the following exceptions:
 - Assumed non-jurisdictional roadway ditches.
 - Assumed jurisdictional in disturbed areas where no wooded riparian habitat exists such as maintained legal and/or agricultural drains or waterways within residential, commercial and/or urban areas.
- The project impacts < 0.1 acre of wetlands, including both permanent and temporary impacts.
- The project does not occur in streams listed in the Interim Policy.
- The project does not occur in the National Lakeshore in Lake, Porter, and LaPorte counties.
- The project does not impact a surface karst feature within the karst region of Indiana as discussed in the Interim Policy.

In these cases, Programmatic Coordination constitutes the USFWSs early coordination roll, including Section 7 consultation requirements of the Endangered Species Act of 1973, as amended.

For projects that do not qualify for Programmatic Coordination, an early coordination letter will be provided to the USFWS describing the entire project and its impacts to wildlife habitats within the project area. The USFWS will provide a response within 30 days of receipt of the early coordination letter. If no response is received after 30 days, the NEPA document preparer would incorporate the standard recommendations listed in the Interim Policy into the NEPA document and Section 7 requirements will be considered fulfilled.

Project Managers should be aware that Section 7 requirements change regularly, and that we are currently preparing for new specific consultation requirements for Indiana bat and Northern long-eared bats.

Formal consultation is required if the USFWS indicates in their early coordination response that the project “will likely adversely affect” an endangered or threatened species. This can take 6-18 months.

Hazardous Materials

In most circumstances, each project will require the preparation of a red flag investigation (RFI). The RFI is a review of all applicable geographic information system (GIS) layers that include water resources, recognized environmental concerns, managed lands, infrastructure items, and others. The summary and recommendations of the RFI may indicate the need for environmental site assessments due to recognized environmental concerns. This may require coordination with the ESD Hazardous Materials Office.

Waterway and Wetland Permitting Review Process

Definitions

- Single and complete non-linear project - The total project proposed or accomplished by one owner/ developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility.
- Single and complete linear project - All crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.
- Independent utility - A test to determine what constitutes a single and complete project in USACE regulatory program.¹ A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

¹ This is not the same as the independent nexus test under NEPA.

Permitting Guidance

An individual project is identified by the assignment of a designation number. Individual projects may be bundled together under one contract that can be classified as a single and complete linear project. An example of this would be a contract for a segment of a new terrain road that contains five individual projects – the segment of new road, a bridge over a county road, a precast box culvert and northbound and southbound bridges over a creek. In this example, the projects would not be able to meet the independent utility requirement.

Projects can also be bundled together but each individual project would meet the independent utility requirement. An example of this is a grouping of pipe lining or box culvert replacement projects under one contract. Each project could meet the independent utility requirement if they would be constructed absent the construction of other projects in the area.

The following guidance should be used to determine the permit procedures for bundled projects, but should not be used to determine whether a specific project requires a permit or the type of permit required. Permit determinations for individual projects are made by the EWPO permit specialist assigned to the district where the project is located.

404/401 Permits

- Projects that meet the USACE definition of “single and complete” do not have to be combined with other projects for determination of impacts and mitigation requirements. If a project meets the definition of “single and complete” it should be permitted individually.
- Permit requests should be submitted when individual projects are ready and not wait for incorporation into a group.
- If the permits have not been submitted for some of the projects in a contract bundle, i.e. they are earlier in the development process, they can be grouped in one permit application.
 - Use the State Form 51821 individual permit application.
 - Information for each project should be easily identified (DES number on each document) and grouped together (waters report, plan sheets, early coordination letters, etc.) This will facilitate the assignment of a permit number for each project.
 - Permit applications should only include projects located in the same USACE district area of responsibility.
 - Chicago – Lake, Porter, and La Porte (I-94 and above) counties.
 - Detroit – Allen, DeKalb, Elkhart, Jasper, Kosciusko, La Grange, La Porte (below I-94), Marshall, Newton, Noble, St. Joseph, Starke, Steuben, and Whitley counties.
 - Louisville – All other counties.
 - The IDEM cover letter should include a list of all projects within the group, the permit status (to include permit number) and the Section 7 and Section 106 standing for each project.
- If a single and complete project crosses USACE district boundaries the regulatory agencies will determine on a case-by-case basis how the project permit will be processed. Contact the ESD to start this coordination.

Construction in a Floodway (CIF) Permits

- A permit may be required for impacts at each waterway crossing within a project area. The assigned EWPO permit specialist is responsible for making the permit determination.

Rule 5 Permit

- All projects must follow the current INDOT Standard Specifications Section 105 for temporary erosion and sediment control (TESC).
- An individual project that has < 1 acre of disturbance does not require a Rule 5 Notice of Intent (NOI).
- An individual project that has ≥ 1 acre of disturbance requires an NOI.
- Projects bundled into a single contract which are each < 1 acre of disturbed area and are not a part of a larger project will be treated as separate and distinct from other projects in the contract. A NOI will not be required.
- A project that is separated from a larger project due to timing of environmental or funding needs and that has a total disturbed acreage for the separated project of ≥ 1 acre will require a Rule 5 permit.
- If a contract bundle includes a project with a NOI the contract cannot be closed until the project acquires a Notice of Termination (NOT).
- The Erosion and Sediment Control Specialist at central office should be consulted when project impacts are > 0.9 acre to discuss risks and options for risk management.