

IX. NEPA and Other Environmental Requirements

Overview. Tribal Transportation Program (TTP) projects, like any federally funded project, must comply with a wide range of Federal and state environmental laws, regulations, and policies. Project development and environmental review begin after projects are identified in the Tribe's Long Range Transportation Plan (LRTP) and the approved Tribal Transportation Improvement Program (TTIP) (see [Chapter VII-Transportation Planning](#)).

Each project requires a NEPA document that must be completed and approved before the Plans, Specifications, and Estimates (PS&E) can be approved, before ROW acquisition can occur, and before project construction can start. The NEPA document should ideally be completed and approved at the 30% (preliminary) design phase (see [Chapter XI - Plans, Specifications, and Estimates \(PS&E\) Development](#)).

The National Environmental Policy Act of 1969 (NEPA) was signed into law on January 1, 1970. NEPA established the basic framework for integrating environmental consideration into decision making. NEPA requires the identification and consideration of potential impacts to the social and natural environment when considering approval of proposed transportation projects. The overall goal of the NEPA process is to engage in a sound process by which agency decisions are made. The NEPA document is the record of those decisions and how they are to be carried out through the design, construction, and future maintenance of the project.

Section 2 of NEPA states that its purposes are:

- To declare a national policy which will encourage productive and enjoyable harmony between man and his environment;
- to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man;
- to enrich the understanding of the ecological systems and natural resources important to the Nation; and
- to establish a Council on Environmental Quality.

The text of the NEPA law can be found at <http://energy.gov/nepa/downloads/national-environmental-policy-act-1969>

A primary element of project-development and environmental review is compliance with NEPA and related environmental requirements. NEPA is a procedural law (as opposed to a substantive law) as it does not require a specific outcome but rather prescribes a method for analyzing the environmental effects and making decisions on proposed Federal actions. NEPA requires, to the fullest extent possible, that the policies, regulations, and laws of the Federal government be interpreted and administered in accordance with its environmental protection goals. NEPA also requires Federal agencies to use an interdisciplinary approach in planning and decisionmaking for any action that adversely impacts the environment.

To assist Federal agencies in effectively implementing the environmental policy and “action- forcing” provisions of NEPA, the Council on Environmental Quality (CEQ) issued [40 CFR 1500-1508 Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act](#). The CEQ regulations address the basic decisionmaking framework and action-forcing provisions established in NEPA. NEPA decisionmaking includes:

- Use of a systematic and interdisciplinary approach.

- Appropriate consideration given to environmental, economic, and technical issues.
- For major Federal actions significantly affecting the environment, inclusion of a detailed statement on:
 - Environmental impacts of the proposed action.
 - Adverse impacts that cannot be avoided.
 - Alternatives to the proposed action.
 - Consequences of taking the proposed action.
- Consultation with other Federal, state, and local agencies.
- Public involvement.

A. Development of the NEPA Document. A Tribe has several options in the development of a NEPA document. A Tribe can develop a NEPA document in house or contract the service out to a consultant, FHWA Federal Lands (FLH), or BIA. In any option, the FHWA will be the lead (or co-lead) Federal agency and will approve the NEPA document. There should be no approval of right-of-way (ROW) acquisition, approval of PS&E, purchase of construction materials, or construction prior to completion and approval of the NEPA document.

If a Tribe is to contract a consultant to develop a NEPA document or perform other environmental compliance work, it is important that the Tribe writes a good Statement of Work (SOW) which defines in detail what the consultant must perform and submit to the Tribe, including the specific deliverables, due dates and period of performance. The SOW is written before a consultant is hired, and it becomes an important part of the contract with the consultant. A well written, specific SOW will help save the Tribe time and money.

B. Statutory/Regulatory Requirements.

- 1. NEPA and Transportation Decisionmaking.** FHWA must be the lead (or a co-lead) Federal agency for TTP funded projects proposed by FHWA Agreement Tribes. This means that NEPA approvals and certain other environmental requirements and determinations are inherently governmental and must be performed by FHWA (i.e. they cannot be delegated to a Tribe or other governmental agency). However, project development and environmental support functions (background research, surveys, supporting documents, etc.), are the responsibility of the Tribe. The Tribe should coordinate with the TTP Environmental Specialist early in the project development process to determine the scope of the environmental requirements.

To address NEPA responsibilities established by CEQ, FHWA (and FTA) issued regulations [23 CFR 771](#)– Environmental Impact and Related Procedures to ensure that possible adverse economic, social, and environmental effects are fully considered during transportation project development. These regulations must be followed by FHWA Agreement Tribes for TTP-funded projects. The FHWA NEPA project development process aims to balance the need for safe and efficient transportation systems with the need for protecting and enhancing the environment. Other Federal agencies may have their own NEPA implementing regulations. When working on projects that have multiple Federal agency interests, it is important to coordinate early with these agencies in the NEPA project development process.

Another good source to help guide the environmental process is Chapter 3 *Environmental Stewardship* of the Federal Lands Highway (FLH) Project Development and Design Manual (PDDM) at <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>. Chapter 3 of the PDDM also provides a recommended step-by-step environmental process, showing and

describing major environmental process activities, tasks within those activities, and the coordination relationships to the Planning, Engineering, Public Involvement, and Construction phases of project delivery.

FHWA manages the NEPA project-development and decisionmaking process as an “umbrella” under which all applicable environmental laws, Executive Orders, and regulations are considered and addressed prior to the final project decision and document approval. The cultural resource and environmental requirements for the TTP are listed in [25 CFR 170, Appendix A to Subpart D](#) and depicted below in Figure 9-1. These are environmental laws that are commonly applicable during the NEPA process, but others may be applicable as well.

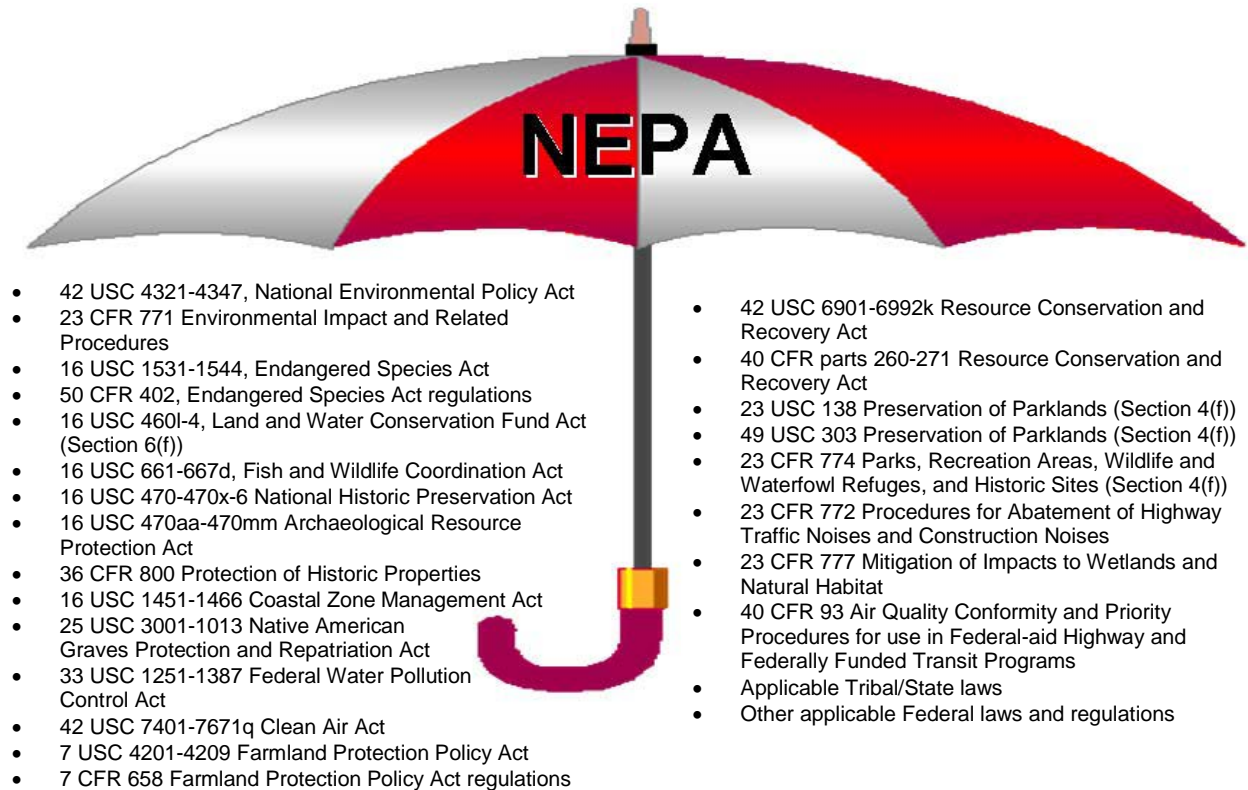


Figure 9-1: Applicable environmental laws listed in 25 CFR 170, Appendix A to Subpart D for TTP-funded actions

NOTES:

1. FHWA must be the lead (or co-lead) Federal agency and approves the NEPA documents for TTP-funded projects.
2. NEPA is an inherently governmental function and cannot be delegated.
3. FHWA Agreement Tribes must follow [23 CFR 771](#) for environmental impact and related procedures.
4. There should be no approval of ROW acquisition, final design, purchase of construction materials, or construction prior to completion of the NEPA process.

2. Essential Elements of the NEPA Process

- a. **Classes of Action.** There are three classes of actions, or “processing options,” under NEPA, depending on the significance of the environmental impact of the project under study. The

CEQ regulation at [40 CFR 1508.27](#) states that “significantly” or “significance” requires consideration of both context and intensity. Context means that the significance must be analyzed in several contexts such as society as a whole, national, affected region, affected interests, and the locality. Significance varies with the setting of the proposed action. Both short- and long-term effects are relevant. Intensity refers to the severity of the impact. Impacts may be both beneficial and adverse. The CEQ regulation lists ten factors to consider in evaluating the intensity of impacts.

The three classes of actions, or “processing options,” under NEPA are:

- **Categorical Exclusion (CE):** A determination appropriate for actions that do not individually or cumulatively have a significant effect on the environment ([23 CFR 771.117](#)). These actions are “excluded” from the requirements to prepare either an environmental assessment or an environmental impact statement based on experience that the actions do not normally result in significant impacts. It is expected that the vast majority of TTP funded projects fall under this class of action; however, it is not an exemption of NEPA or other environmental requirements.
- **Environmental Assessment (EA):** A process and documentation for actions in which the significance of the environmental impact is not clearly established ([23 CFR 771.119](#)). If it is determined during the EA process that a project will have no significant impact on the quality of the environment, a Finding of No Significant Impact (FONSI) is issued ([23 CFR 771.121](#)). If the project results in significant impacts, then an environmental impact statement is required. Some larger and more complicated TTP funded projects may require an EA.
- **Environmental Impact Statement (EIS):** A process and documentation for projects in which it is known that the action will have a significant effect on the environment ([23 CFR 771.123](#)). An EIS is a detailed statement required by NEPA for major federal actions significantly affecting the human environment. It is expected that few, if any, TTP funded projects will require an EIS.

These three “processing options” under NEPA determine how compliance with NEPA is carried out and documented (see Figure 9-2). The essential elements of the NEPA process, as discussed below, will come into play in various ways and degrees in terms of compliance, depending on the class of action of the project.

Resources:

- Federal Lands Highway (FLH) Project Development and Design Manual (PDDM), Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>
- Guidance on Project Development and Documentation Overview: <http://environment.fhwa.dot.gov/projdev/tdmpdo.asp>
- FHWA Environmental Guidebook: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>
- FHWA Technical Advisory T 6640.8A: <http://environment.fhwa.dot.gov/projdev/impta6640.asp>

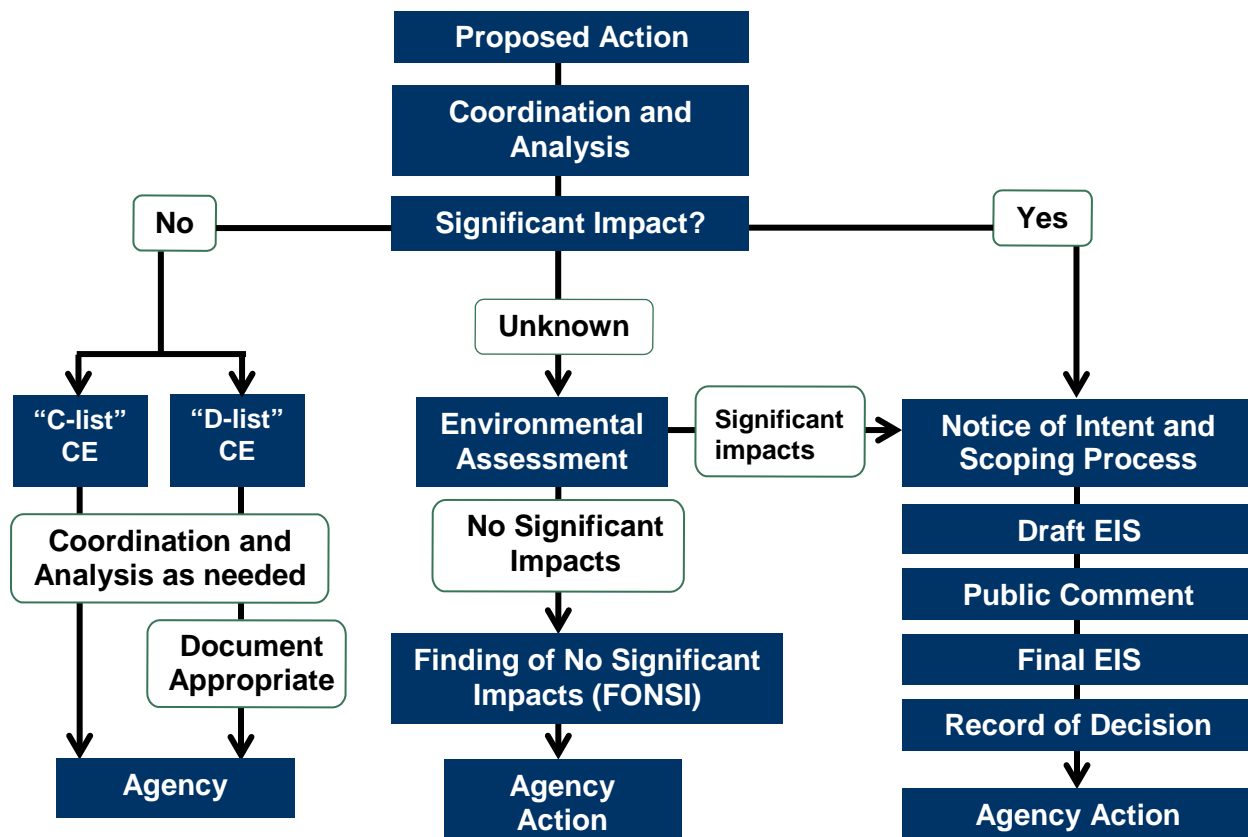


Figure 9-2: NEPA process flowchart

b. Purpose and Need. The identification of the purpose and need for a project is the foundation of the NEPA process and serves as the basis for identifying and evaluating alternatives. It establishes why the agency is proposing to spend taxpayers’ money while at the same time possibly causing significant environmental impacts. A project’s *need* establishes factual evidence of a current or future transportation problem or deficiency. A project’s *purpose* establishes what the project is intended to accomplish and presents objectives to address the project’s need. The need for a transportation project is initially identified during the transportation planning process. The project’s purpose and need is further refined at the onset of the NEPA process to ensure that a solid foundation for the project exists and is explained in terms the public can understand.

Resources:

- The Importance of Purpose and Need: <http://environment.fhwa.dot.gov/projdev/tdmneed.asp>
- Elements of Purpose and Need: <http://www.environment.fhwa.dot.gov/projdev/tmelements.asp>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

- c. Alternatives.** Alternatives are developed and analyzed in the NEPA process in order to (1) address the purpose and need of the project, and (2) look for ways to avoid and minimize project impacts to the environment, address other environmental issues, provide the best engineering solution, and minimize overall project costs. A few general principles concerning alternatives development and analysis are as follows:
- For an EA and an EIS, an analysis of the “no-build” or “no-action” alternative is always included. The no-build, or do-nothing, alternative generally serves as a baseline against which other alternatives are evaluated and compared.
 - All proposals and alternatives must have logical termini and independent utility (including those in a CE). In other words, the endpoints of alternatives must make sense from a transportation standpoint, and the alternatives must be usable and represent a reasonable expenditure even if no additional transportation improvements in the area are made.
 - An EIS must include and objectively evaluate a range of reasonable alternatives. Reasonable alternatives are those that meet the purpose and need. Additional considerations in the “screening” of alternatives include the effects on environmental resources and communities and other constraints.
 - The reasonable range of alternatives may, in certain circumstances, include alternatives that are not within the jurisdiction of the lead agency, for example, public transportation options.
 - In analyzing alternatives, substantial treatment should be devoted to each reasonable alternative being considered in detail so that reviewers may evaluate the comparative merits of the alternatives.
 - During the NEPA process, it is generally good practice to provide other agencies and the public with an opportunity to be involved in the development of alternatives. For EIS projects, the involvement of the public and participating agencies in the development of the range of alternatives is required. FHWA is also required to determine, in collaboration with participating agencies, the appropriate methodologies to be used and the level of detail required in the analysis of alternatives [[23 USC 139\(f\)\(4\)](#)].

Resources:

- Guidance on Development and Evaluation of Alternatives: <http://www.environment.fhwa.dot.gov/projdev/tdmalts.asp>
 - SAFETEA-LU Environmental Review Process Question and Answers: <http://www.fhwa.dot.gov/hep/section6002/index.htm>
 - PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>
- d. Impacts.** For each reasonable alternative, the environmental impacts are assessed during alternatives analysis. Alternatives may be refined or modified in an effort to avoid or minimize impacts to the environment caused by the alternative. CEQ regulations define three types of impacts that must be considered and addressed:
- *Direct effects:* Caused by the action and occurring at the same time and place.
 - *Indirect effects:* Caused by the action and occurring later in time or farther removed in distance, but still reasonably foreseeable.
 - *Cumulative impacts:* Resulting from the incremental impact of the action when it is added to other past, present, and reasonably foreseeable future actions, regardless of which agency or person is, was, or will be responsible for such actions.

Resources:

- Guidance on environmental impacts:
<http://www.environment.fhwa.dot.gov/projdev/tdmimpacts.asp>
- AASHTO Practitioner's Handbook: Assessing Indirect Effects and Cumulative Impacts under NEPA:
http://environment.transportation.org/pdf/programs/practitioners_handbook_12.pdf
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

e. Mitigation. Mitigation is generally defined as avoidance, minimization, and compensation of impacts to the environment caused by the project. Avoidance and minimization of impacts to the environment is an integral component of the alternatives-development and analysis process. As alternatives are developed, impacts are assessed and possible avoidance, minimization, and compensation strategies are considered. The ordered approach to mitigation involves ([40 CFR 1508.20](#)):

- Avoiding the impact altogether by not taking a certain action or parts of an action.
- Minimizing the impact by limiting the degree or magnitude of the action and its implementation.
- Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- Compensating for the impact by replacing or providing substitute resources or environments.

TTP funds can be used for “mitigation activities required by tribal, state, or Federal regulatory agencies and 42 U.S.C. 4321, *et seq.*, the National Environmental Policy Act” (see 25 CFR Appendix A to Subpart B). FHWA’s mitigation policy ([23 CFR 771.105](#)) states that measures necessary to mitigate adverse impacts will be incorporated into the action and are eligible for Federal funding when FHWA determines that:

- The impacts for which the mitigation is proposed actually result from FHWA action.
- The proposed mitigation represents a reasonable public expenditure after the impacts of the action and the benefits of the proposed mitigation measures have been considered. In making this determination, FHWA will consider, among other factors, the extent to which the proposed measures would assist in complying with a Federal statute, Executive Order, or Administration regulation or policy.

Mitigation commitments agreed upon during NEPA must be completed. Communication and documentation are essential to ensuring that project commitments are implemented. Mitigation activities may extend through a project’s final design, construction, operation, and maintenance.

Resources:

- Guidance on mitigation:
<http://www.environment.fhwa.dot.gov/projdev/tdmmitig2.asp>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

f. Public Involvement. It is important to keep the local public and other interested parties apprised of project development and to solicit and address the public’s concerns. Effective public involvement is a key to successful project development. A public involvement plan

may be prepared to guide these public involvement activities, which should be consistent with and build on the efforts made during the earlier planning process. Public involvement can be accomplished with a variety of techniques, depending on the type and magnitude of the project, the issues involved and the interest and background of the public.

Resources:

- Guidance on Public Involvement:
<http://www.environment.fhwa.dot.gov/projdev/tdmpubinv2.asp>
- Context sensitive solutions: <http://www.fhwa.dot.gov/context/index.cfm>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

g. Interagency and Internal Coordination

The NEPA process requires interagency coordination and cooperation in the project development decisionmaking process. As with members of the public, coordination with agencies should be early and continuous to ensure their concerns are appropriately considered and to avoid project delays or unexpected costs.

It is also a recommended practice to develop coordination/communication practices between the environmental specialists, the planners, and the designers working on a project. Good communication between these specialists during project development ensures the following: common understanding of project purpose and need, alternatives to consider, and design/construction impacts; environmentally sensitive areas that may affect design or utility locations; development of avoidance, minimization, or mitigation of resources; balancing of design/safety considerations and environmental impacts; as well as many other benefits.

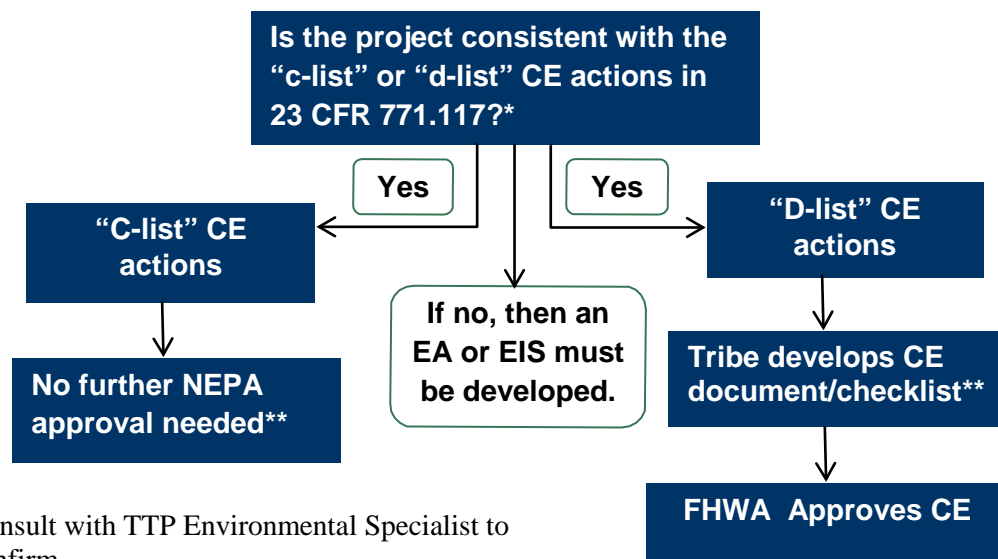
Resources:

- Guidance on Interagency Coordination:
<http://www.environment.fhwa.dot.gov/projdev/tdminterag2.asp>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

C. Documentation and Processing. NEPA requires that Federal agencies disclose the results of their analysis and the effects of project implementation on the environment. The purpose of documenting the NEPA process is to provide for complete disclosure to the public; to allow others an opportunity to provide input and to comment on proposals, alternatives, and environmental impacts; and to make the appropriate information available to decisionmakers to ensure a reasoned choice among alternatives. As NEPA is a procedural law, the administrative record provides evidence that the process was followed. The following section provides information on the three processing options.

- 1. Categorical Exclusions.** When an action meets the definitions in 23 CFR 771.117, a CE is the appropriate classification. A specific list of CE actions are identified in [23 CFR 771.117\(c\) and \(d\)](#). Based on past experience, these actions have normally been shown to result in no significant impacts. The “c-list” CE actions normally do not require documentation or FHWA approval; however, a record must be established that demonstrates that the action is consistent with an action(s) on the “c-list” and has no unusual circumstances as set forth in [23 CFR 771.117\(b\)](#). CE actions on the “d-list” require (1) environmental analyses and documentation to show the action would result in no significant environmental effects, and (2) FHWA approval based on review of the documentation. See Figure 9-3 for an overview of the steps involved in the development of a CE.

CE projects are subject to all applicable laws, executive orders, and regulations under the NEPA umbrella. Appropriate environmental studies and documentation will be completed by the Tribe and submitted to FHWA for review. Some environmental laws (i.e. the National Historic Preservation Act, Endangered Species Act, etc.) may require specific consultation by FHWA with appropriate agencies. The Tribe will complete the CE documentation, including the results of compliance with other applicable environmental laws, and submit it to FHWA for review and approval. An example format of a narrative type CE is provided in Appendix A - [Exhibit 9.1](#), or the Tribe may use the “CE Checklist” provided in Appendix A - [Exhibit 9.2](#). The Tribe should coordinate with the TTP Environmental Specialist early in project development to determine the appropriate CE classification, needed environmental studies, and suitable documentation. The FHWA is the “approving” agency for documented CE’s.



* Consult with TTP Environmental Specialist to confirm.

** Environmental studies/evaluations to meet requirements of other environmental laws and regulations may be necessary. Work with the TTP Environmental Specialist to determine what, if any, studies are needed.

Figure 9-3: Categorical Exclusion process flowchart.

Resources:

- Project Development and Documentation Overview: <http://environment.fhwa.dot.gov/projdev/tdmpdo.asp>
- Guidance on Categorical Exclusions: <http://www.environment.fhwa.dot.gov/projdev/docuce.asp>
- CEQ - Regulations for Implementing NEPA: http://www.whitehouse.gov/files/ceq/epa_comments_-_ceq_draft_nepa_efficiencies_guidance.pdf
- Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations: <http://energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

2. Environmental Assessments. When the significance of the environmental, social, and economic impacts of an action is not clearly established, an EA should be undertaken ([23 CFR 771.119](#)) (see Figure 9-4 for an overview of the steps involved in the development of an EA). The Tribe or the Tribe’s contractor will complete the EA, including the results of compliance with other applicable environmental laws, and submit it to FHWA for review and approval. If the EA is prepared by a Tribe’s contractor, the Tribe should review the EA prior to submittal to FHWA for review and approval. There is no required format for the EA; however FHWA’s Technical Advisory (TA)T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents, provides a recommended format. The example EA format provided in Appendix A - [Exhibit 9.3](#) follows the TA’s recommended format. The Tribe should coordinate with the TTP Environmental Specialist if an alternative EA format is being proposed.

Once the EA is approved (i.e., signed) by FHWA, the Tribe will place a notice in a newspaper(s) advising the public of the availability of the EA for public comment and where to obtain information regarding the action. When a newspaper notice is impractical for advising the community, other appropriate means of providing a notice should be considered (e.g., Tribal website, posting in prominent publicly available places such as Tribal headquarters, post office, recreation center, etc. An example notice of availability is provided in Appendix A - [Exhibit 9.4](#).

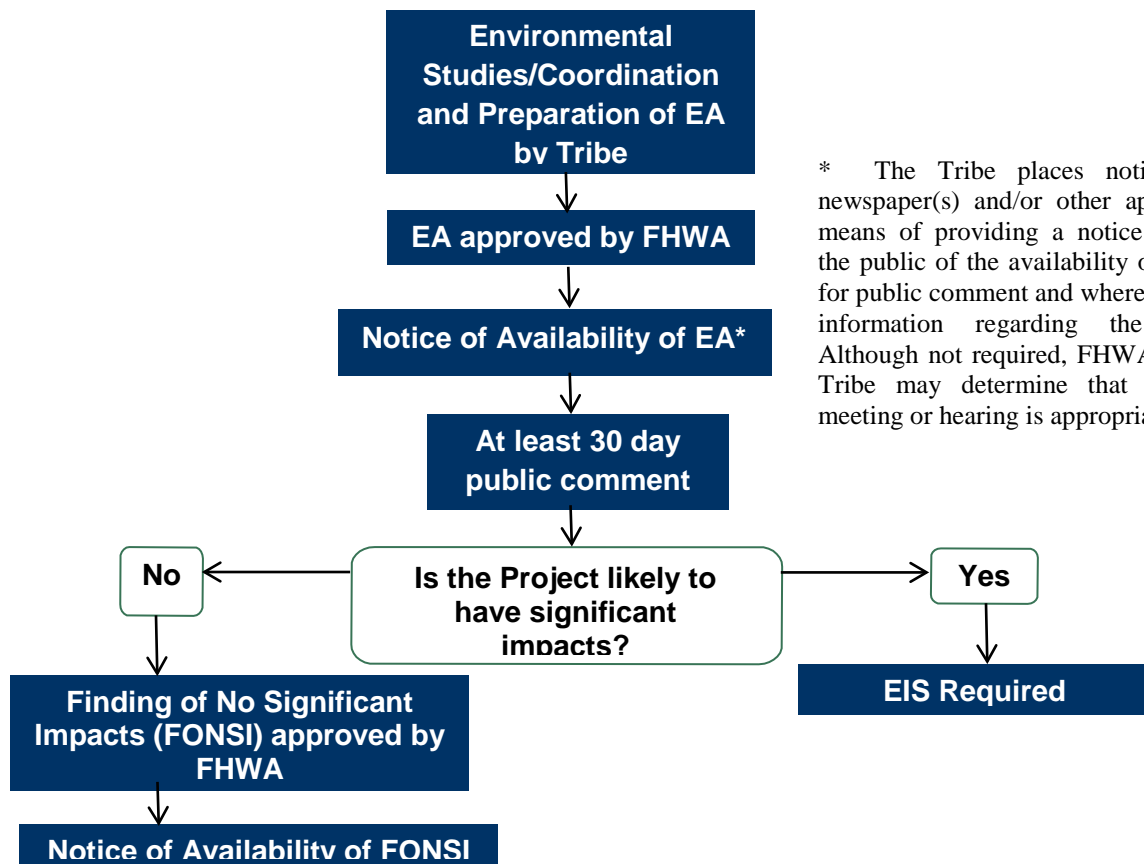


Figure 9-4: Environmental Assessment process flowchart.

Although not required, FHWA and the Tribe may determine that a public meeting or hearing is appropriate. The public and applicable agencies must be given at least 30 days to comment on the EA. After considering comments received during this period, FHWA determines if the action

will result in significant impacts. If impacts are determined not to be significant, FHWA develops and approves a Finding of No Significant Impact (FONSI), and the Tribe will send a notice of availability of the FONSI to affected agencies. If impacts are determined significant, then an EIS would need to be developed.

Resources:

- Project Development and Documentation Overview:
<http://environment.fhwa.dot.gov/projdev/tdmpdo.asp>
- Guidance on Environmental Assessments:
<http://www.environment.fhwa.dot.gov/projdev/docuea.asp>
- CEQ - Regulations for Implementing NEPA:
http://www.whitehouse.gov/files/ceq/epa_comments_-_ceq_draft_nepa_efficiencies_guidance.pdf
- Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations: <http://energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

- 3. Environmental Impact Statement.** NEPA requires Federal agencies to prepare an EIS for major Federal actions that significantly affect the quality of the human environment. An EIS is a full-disclosure document and includes consideration of a range of reasonable alternatives (one of which must be the no-build alternative), analyzes the potential impacts resulting from the alternatives, and demonstrates compliance with other applicable environmental laws and Executive Orders. Because few, if any, TTP funded projects are anticipated to require an EIS, the EIS development process will not be discussed further in this guidance. However, additional information can be found at the links provided below.

Resources:

- Project Development and Documentation Overview:
<http://environment.fhwa.dot.gov/projdev/tdmpdo.asp>
- NEPA Documentation – Environmental Impact Statement (EIS):
<http://www.environment.fhwa.dot.gov/projdev/docueis.asp>
- CEQ - Regulations for Implementing NEPA:
http://www.whitehouse.gov/files/ceq/epa_comments_-_ceq_draft_nepa_efficiencies_guidance.pdf
- Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations: <http://energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

4. Reevaluation

After approval of a ROD, FONSI, or CE designation, the Tribe shall consult with FHWA prior to requesting any major project approvals or grants, to establish whether or not the approved environmental document or CE designation remains valid. This is accomplished through a reevaluation ([23 CFR 771.129](#)), a process to determine if there are new circumstances or information that affect the adequacy or validity of a previous decision. If the previous decision is found to be valid, the findings should be documented in the project file and the process continued. If the findings are no longer valid, a documented reevaluation may be required or a new or supplemental document may be required. The Tribe will coordinate with FHWA to provide

information supporting a reevaluation. An example reevaluation is provided in Appendix A - [Exhibit 9.5](#).

Resources:

- Project Development and Documentation Overview:
<http://environment.fhwa.dot.gov/projdev/tdmpdo.asp>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

5. Administrative Record

The administrative record is a fundamental component of the NEPA project decisionmaking and documentation process. It is intended to provide evidence that the agency's decision was derived in accordance with NEPA and is in compliance with other requirements. The administrative record consists of the NEPA documents and other documentation that supports or is referenced in them, such as public-hearing transcripts, correspondence, and studies/evaluations/technical reports. It includes e-mail, meeting minutes, and information that support the facts and decisions made during the NEPA process, such as purpose and need, alternatives development, impact analysis, public involvement, and interagency coordination. The administrative record should fully reflect the deliberative process that the agency took to reach its decision.

Resources:

- AASHTO Practitioner Handbook - Maintaining a Project File and Preparing an Administrative Record for a NEPA Study:
<http://environment.transportation.org/pdf/programs/PG01.pdf>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

D. Other Environmental Laws and Requirements. As described above, the NEPA process involves compliance with a number of additional environmental laws and requirements. The following section highlights some of the environmental laws and requirements that commonly come into play in transportation projects. For a more detailed discussion on other additional environmental laws and requirements, see the PDDM Chapter 3:

<http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

- 1. Section 4(f).** Section 4(f) refers to the original section in the U.S. Department of Transportation Act of 1966 that provides protection for publicly owned parks, recreational areas, wildlife and waterfowl refuges, and public or private historical sites from use by transportation projects. The law, now codified in 49 USC §303 and 23 USC §138, is implemented by FHWA/FTA through regulation ([23 CFR 774](#)).

If a project proposes to use a property protected by Section 4(f), FHWA must either determine that impacts are *de minimis* or prepare a Programmatic or Individual Section 4(f) evaluation to determine that no feasible and prudent avoidance alternatives exist. FHWA, with assistance from the Tribe, is ultimately responsible for making all decisions related to Section 4(f) compliance. These decisions include whether Section 4(f) applies to a property, whether a use would occur, whether a *de minimis* impact determination may be made, what each alternative's impacts will be on Section 4(f) properties, and whether the law allows the selection of a particular alternative that uses 4(f) property after the appropriate officials with jurisdiction have been consulted.

Resources:

- FHWA Section 4(f) Program Overview: <http://environment.fhwa.dot.gov/4f/index.asp>
- FHWA Section 4(f) Policy Paper: <http://environment.fhwa.dot.gov/4f/4fpolicy.asp>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

- 2. Section 106 of the National Historic Preservation Act.** Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended, requires Federal agencies to take into account the effects of their actions on historic properties and to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. The historical preservation review process mandated by Section 106 is outlined in [36 CFR 800](#). Section 106 requires Federal agencies to consult with the State Historic Preservation Office (SHPO) and/or Tribal Historic Preservation Office (THPO), property owners, local governments, and other parties when a Federal undertaking may affect historic properties that are on or are eligible for inclusion in the National Register of Historic Places. In certain cases, the ACHP may be invited to participate in the consultation process.

The Tribe is responsible for ensuring appropriate surveys and reports are completed in compliance with the NHPA, however, early coordination with the TTP Environmental Specialist is recommended to ensure the appropriate level of study and any appropriate consultation by FHWA is undertaken. Also, any reports should be reviewed by FHWA prior to being finalized. FHWA is typically responsible for consultation with the SHPO and/or THPO.

Resources:

- FHWA Historic Preservation Website: <http://environment.fhwa.dot.gov/histpres/index.asp>
- Section 106 Users Guide: <http://www.achp.gov/usersguide.html>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

- 3. Section 7 of the Endangered Species Act of 1973.** The Endangered Species Act (ESA), codified in 16 USC 1531 and implemented in [50 CFR 402](#), provides for the conservation of ecosystems upon which threatened and endangered species of fish, wildlife, and plants depend. US Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) share responsibility for administration of the ESA. Section 7 of the ESA requires Federal agencies to ensure that any action authorized, funded, or carried out by them is not likely to jeopardize the continued existence of listed species or to adversely modify their critical habitat.

If FHWA and its joint lead agencies find that the project will have “no effect” on listed species or designated critical habitat, consultation with the Services is not required. If they find that the project “may affect, but not likely to adversely affect” listed species or modify designated critical habitat, they must conduct informal consultation with the appropriate Service(s). The Service(s) must concur with this finding in writing to conclude the informal consultation process. Formal consultation is initiated by the Federal lead agency when a project “may affect, likely to adversely affect” listed species or modify designated critical habitat. At the conclusion of the formal consultation process, the Service(s) will issue a biological opinion.

The Tribe is responsible for ensuring appropriate surveys and reports (a Biological Assessment is required for informal and formal consultation) are completed in compliance with the ESA, however, early coordination with the TTP Environmental Specialist is recommended to ensure the appropriate level of study and any appropriate consultation by FHWA is undertaken. Also,

any reports should be reviewed by FHWA prior to being finalized. FHWA is typically responsible for consultation with the Services on “may affect...” determinations.

Resources:

- FHWA ESA Webtool: <http://www.environment.fhwa.dot.gov/esawebtool>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>
- Endangered Species Section 7 Handbook: http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf

- 4. Sections 401, 402, and 404 of the Clean Water Act.** Section 401 of the Clean Water Act (CWA), ([33 USC 1341](#)), the State Water Quality Certification Program, requires that states certify compliance of Federal permits or licenses with state water quality requirements and other applicable state laws. Under Section 401, states have authority to review any Federal permit or license that may result in a discharge to wetlands and other waters under state jurisdiction to ensure that the actions would be consistent with the state’s water quality requirements.

Section 402 of the CWA ([33 USC 1342](#)), the National Pollutant Discharge Elimination System (NPDES) Program, regulates discharges from point sources to waters of the United States. Under NPDES, all facilities that discharge pollutants from any point source into waters of the United States are required to obtain a permit. A point source is defined by the CWA as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or floating craft, from which pollutants are or may be discharged.”

Section 404 of the CWA ([33 USC 1344](#)) establishes a program to regulate the discharge of dredged and fill material into waters of the United States, including wetlands. Responsibility for administering and enforcing Section 404 is shared by the United States Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA). Under Section 404, no discharge of dredged or fill material can be permitted if a practicable alternative exists that is less damaging to the aquatic environment or if the nation’s waters would be significantly degraded. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation. When applying for a permit, an agency must show that it has, to the extent practicable:

- Taken steps to avoid wetlands impacts.
- Minimized potential impacts on wetlands.
- Provided compensation for any remaining unavoidable impacts.

The Tribe is responsible for obtaining CWA permits. Early coordination with appropriate agencies and the TTP Environmental Specialist is recommended to ensure the appropriate level of study and documentation is pursued.

Resources:

- Wetlands and Section 401 Certification Fact Sheet: <http://www.epa.gov/owow/wetlands/facts/fact24.html>
- NPDES Website: <http://cfpub.epa.gov/npdes>
- Overview of Section 404 Permitting: <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis>
- PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>