

U.S. Department of Transportation

**COLLABORATIVE PROBLEM SOLVING:
BETTER AND STREAMLINED OUTCOMES FOR ALL**

**Guidance on Managing Conflict and Resolving Disputes
between State and Federal Agencies
During the Transportation Project Development
and Environmental Review Process**

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Overview

This guidance presents strategies for managing conflict and identifying issues that may arise during the transportation project development and environmental process reviews under the National Environmental Policy Act (NEPA) and related laws. These strategies should help Federal and state transportation and resource agencies to implement a coordinated environmental review process that streamlines unnecessary delays for highway and transit project construction. This guidance offers options for problem solving and is not an absolute prescription.

The following overarching topics are discussed in this document:

- **Environmental Streamlining:** In keeping with the emphasis on early and continuing involvement of all agencies in project planning and environmental review activities, a discussion on conflict management as a way to streamline project implementation while advancing effective and environmentally sound transportation decisions is presented.
- **Broad environmental streamlining strategies for engaging the relevant agencies to identify problems through early coordination:** Employing these strategies early in the project development process establishes an effective link to transportation planning. Key strategies include developing agreements that promote interest based problem solving, such as:
 - Interagency memoranda of understanding at the regional and state levels,
 - Programmatic agreements that simplify operating procedures for specified categories of projects including delegation of authority to transportation agencies to conduct environmental reviews for categories of projects, and
 - Environmental streamlining agreements for expedited project reviews.

These strategies should help to reduce the level of conflict and better manage disputes as they arise.

- **Traditional dispute resolution approaches successfully applied to solving issues that may surface during the NEPA process:** These are illustrated in a side-by-side layout of potential disputes and related strategies for minimizing or addressing conflicts.
- **Examples of prototypical procedural alternate dispute resolution frameworks for managing project-level conflict are provided:** These examples may be used to guide a structured review process in a way that can help keep everyone on track while addressing complex or controversial projects, or where a history of contention among the relevant agencies exists. Some may find this structured framework an especially useful way to foster constructive consultation and collaborative decision-making. The following elements are included:
 - Project time periods and guiding principles,
 - Meeting protocols and ground rules,
 - Dispute resolution procedures,
 - Procedures for upward referral of disputes, and
 - Procedures for obtaining assistance.

- **The appendices** include other useful information that can be used in conjunction with the guidance and illustrate how some of these strategies were applied in specific situations.

This guidance is one element of FHWA's National Dispute Resolution System. The other elements are specific elevation procedures to the USDOT Secretary, the roster of qualified neutral facilitators, and training in the application and use of alternative dispute resolution during project development. A further description of FHWA's four-part system for dispute resolution is also presented.

1. Introduction

The National Environmental Policy Act of 1969 (NEPA) created a deliberative process for effective environmental decision-making. NEPA requires appropriate consideration of impacts of Federal actions to the human and natural environments and to cultural/historical resources. When environmental considerations are introduced during transportation planning and refined during project reviews, more effective and environmentally sound decisions can be made. The focus of the U.S. Department of Transportation's (USDOT) environmental streamlining effort as directed by TEA-21 includes: improving the transportation process by reducing project delays and improving the integration of project development and NEPA, while protecting and enhancing the environment.

Strategies discussed in this document draw upon conflict management and alternative dispute resolution as a way to help all practitioners involved in the environmental review or permitting of transportation projects go beyond agreeing to disagree on controversial issues that arise during the environmental review process or throughout project development. In doing so, the conflict is assessed and resolved as it arises, not deferred to the final point of decision, only to then be revisited. The early assessment of resource issues associated with the transportation project development can help to identify a reasonable range of alternatives for a specific project or lead to the development of flexible mitigation strategies. This streamlines the NEPA process.

What does "managing conflict" involve?

NEPA is a deliberative process. It intends for impacts to the natural and human environment to be viewed and assessed through a multi-disciplinary lens and with full public disclosure. Competing interests (conservation vs. development), different needs (mobility and air quality) and a range of influences (political, statutory, philosophical) color the landscape in which the transportation project planning and development is carried out. So, invariably competing priorities of need, resource impacts, mitigation, and desired outcomes will come into play. Invariably disagreements that turn into full-blown conflicts, the need for additional information, or issue clarification are part of the process. Conflict left to its own devices will not go away. It has to be addressed, managed, disputed, and ultimately resolved. Employing interest-based negotiation sooner, rather than later, in the process can wind up saving time and money. Managing conflict, using alternative dispute resolution skills, or drawing upon third party neutrals to keep the process on track helps to reduce unnecessary delays and arrive at better transportation decisions. Effective conflict management requires:

- Understanding the nature of conflict;
- Knowing when conflict has become a problem in the project development process;
- Recognizing when conflict is interfering with progress toward an end;
- Knowing when to continue working on problem solving with the party involved and when to pursue other avenues, such as seeking assistance or elevating a dispute to a higher authority;
- Understanding how to establish an efficient mechanism for making these decisions; and
- Improving the knowledge and skills of those involved in project development, negotiation, and problem solving.

Hundreds of decisions are made in the context of each transportation project, including the ultimate one—whether to proceed and how. An effective project conflict management system can ensure that these decisions are timely, efficient, and arrived at by informed decision makers.

Managing conflict does not necessarily mean that parties have to agree.

Where agency missions diverge or agency representatives have fundamentally different interpretations of legal mandates, agreement may be elusive. However, disagreement does not have to produce an impasse and result in decision paralysis for the project.

Methodology

The development of this guidance is a result of the USDOT's environmental streamlining efforts, and is a critical component of the Agency's National Dispute Resolution System (see section 1.2 of this document). This guidance provides advice and recommendations; it is not a mandated design. The U.S. Institute for Environmental Conflict Resolution (USIECR) assisted the Federal Highway Administration (FHWA) with the preparation of this guidance.

The USIECR is a Federal agency charged with advancing the use of alternative dispute resolution methods for those involving public lands, natural resources and the environment, where a Federal interest is involved. Appendix A contains a description of the USIECR and its programs. The list of USIECR's team of experts used to assist FHWA in the original design of this guidance is found in Appendix B.

One of the initial activities associated with the development of this guidance was a telephone survey of Federal and state agency representatives involved in the development and/or review of transportation projects. The participants were asked to identify the following:

- How and why disputes arose,
- Strategies used for resolving disputes,
- Impediments to better conflict management,
- Experience with the use of neutral third parties to aid dispute resolution, and
- Types of training acquired to enhance negotiation skills and to build relationships with other agencies. The survey results are summarized in Appendix C.

As a result, the guidance provides procedural clarifications and information on the use of simple diagnostic tools to improve the management of interagency conflict and a menu of dispute resolution methods, protocols and structures for agencies to consider.

1.1 Environmental Streamlining

Section 1309 of the Transportation Equity Act for the 21st Century (TEA-21) called for a coordinated environmental review process to expedite Federal highway and transit projects without compromising environmental protection. Accomplishing this requires better and earlier coordination among Federal, state, tribal and local agencies. To avoid delays and costly duplication of effort in reviewing and approving transportation projects while protecting and enhancing the environment, agencies should:

- Establish an integrated review and permitting process that identifies key decision points and potential conflicts as early as possible;
- Integrate the NEPA process and other environmental considerations as early as possible in the scoping and if feasible, into the transportation planning processes;
- Encourage early and meaningful participation by all Federal, state, tribal and local agencies that must review a transportation construction project or issue a permit, license, approval, or opinion relating to the project; and
- Establish a dispute resolution mechanism to address unresolved issues.

Environmental Streamlining encompasses the spectrum of planning, development, and review activities. Early coordination and adequate resources help to reduce the number and intensity of disputes that occur at the planning and project review stages. Nevertheless, disagreements among agencies are likely to emerge, and some may develop into full-blown disputes.

The National Memorandum of Understanding (MOU) for Environmental Streamlining (Appendix D) was written and signed to implement Section 1309 of the TEA-21. The following Federal resource agencies are signatories to the MOU: U.S. Fish and Wildlife Service, U.S. Department of Agriculture (USDA), U.S. Department of Commerce, U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (USACE), and the Advisory Council on Historic Preservation. Under the MOU, the agencies agree to work cooperatively and to conduct concurrent project reviews under NEPA and other legal authorities for project permits, licenses, and approvals. As the Federal Interagency Workgroup, representatives of these agencies met regularly with the FHWA and FTA.

Being charged with lead on environmental streamlining, FHWA in coordination with the Federal Interagency Workgroup developed the Environmental Streamlining National Action Plan¹. The Action Plan identifies how the agencies will coordinate their streamlining commitments and manage conflict constructively. The Plan contains the following five elements:

- Program efficiency (early interagency involvement and concurrent reviews)
- Mitigation strategies (avoidance of impacts, innovative mitigation initiatives, and programmatic reviews)
- Resource management (allocation of resources to support early involvement and training)
- Continuous improvement (measuring and monitoring progress and accountability)
- Dispute resolution (keeping projects on schedule through conflict avoidance and resolution)

Dispute Resolution and Streamlining

Section 1309(c) of TEA-21 specifically addressed dispute resolution. Under it, the Secretary of Transportation shall after notice and consultation with an affected agency, close the record on matters before the Secretary if a Federal agency, subject to a time period for its environmental review or analysis, has not been met. If after timely compliance with the agreed upon time periods, an

¹ The Environmental Streamlining Interagency Working Group has prepared a National Action Plan. See the FHWA Web site for more information <www.fhwa.dot.gov/environment/strmlng.htm>.

environmental issue for which an affected Federal agency has jurisdiction has not been resolved, the Secretary and the head of the Federal agency shall resolve the issue in 30 days after the date of the finding by the Secretary.

This guidance is also designed to encourage collaborate decision making and facilitate the resolution of interagency disputes at lower levels of decision-making, thus avoiding the need for elevation to the Secretary.

1.2 National Dispute Resolution System

The USDOT is committed to the active management of conflicts that emerge during development of transportation projects. Conflict is to be expected given the dual goals of environmental streamlining i.e., developing and implementing coordinated and timely reviews for the advancement of highway and transit projects, while fully meeting environmental responsibilities.

Conflict that forces agencies to recognize differing views and the struggle to accommodate diverse interests can produce positive results. However, conflict must be managed carefully to avoid its deleterious effects, such as damage to working relationships and lack of progress in reaching needed decisions.

The USDOT's National Dispute Resolution system for addressing disagreements among Federal and state agencies within the context of environmental streamlining, includes the following:

- Guidance on how to manage conflict and resolve disputes, i.e., the focus of this document;
- National Procedures for elevating disputes involving Federal and state agencies to the Secretary of the USDOT,
- Access to qualified third-party neutrals who can provide professional assistance in managing conflict and resolving disputes (i.e., the Transportation Roster), and
- Training workshops to help Federal and state agency staff become familiar with the dispute resolution guidance and to develop more effective negotiation and problem solving skills.

Chapters 3, 4, and 5 provide strategies for achieving collaborative decision-making through early coordination and involvement. Conflict management strategies, if applied as part of environmental streamlining, can be helpful in yielding better outcomes for all.

2. Purpose and Applicability of the Guidance

2.1 Applicability

This guidance is designed to assist Federal and state agencies (such as departments or offices of transportation, environmental protection, fish and game, and historic preservation) as they interact at the transportation planning stage and during the review of individual transportation projects. Federal and state land management agencies may also be involved where the transportation project affects public lands. Most of the concepts presented in this guidance also have applicability to effective collaboration with local governments and tribes.

Many disputes arising in the transportation development process involve nongovernmental groups and the public at large. Public involvement and input is an integral component of the transportation planning project development process. These requirements are delineated in FHWA's statewide and metropolitan planning regulations (23 CFR 450) and FHWA's NEPA regulations (23 CFR 771). Problems that are identified by the public, related project controversies and the manner in which they are resolved can be found in those references. However, this document focuses exclusively on managing interagency relationships and conflicts. Keep in mind that these Federal agency reviews and public involvement occurs simultaneously and public input is continually integrated into the planning and environmental review processes.

2.2 Purpose

Given the complexity of decision-making and the diversity of competing needs to be addressed, conflict is usually a part of the transportation development business. Various agencies operate under different missions and mandates, each of which must be accommodated. Advanced planning, coordinated scheduling, sufficient time for reviews and adequate resources will help reduce the numbers and intensity of disputes that occur both at the planning stage and at the project review level. This guidance focuses on helping agencies identify when and how they are stuck, and most importantly, what to do next. Moving beyond an impasse is essential to getting back on schedule. Understanding how to avoid getting stuck again will help smooth the project review process in the long run.

2.3 Guidance, Not Prescription

In the following chapters, common aspects of conflicts that occur in the transportation planning and project review processes and suggestions for how to proceed are discussed. Examples of successful approaches to dispute resolution implemented in selected states are also presented. Flexibility and adaptation as well as early coordination and communication among involved parties are emphasized in order to accommodate local conditions, operating relationships, existing agreements, and political considerations.

2.4 Guiding Principles

Some guiding principles to consider:

- Engage all relevant agency representatives early, actively, and continually in collaborative problem solving during transportation planning and project review processes.
- Improve negotiation and problem solving skills of agency staff through training and coaching.
- Attempt to resolve disagreements at the earliest stage possible and at the lowest appropriate organizational level.
- Seek resolution first by focusing on how to meet agency interests and needs in the context of existing laws and regulations.
- Take advantage of experienced facilitators and mediators to assist agencies in designing conflict management processes and in resolving challenging disputes.
- Make effective use of higher-level authorities as appropriate for negotiating impasses or resolving higher-level issues.
- Educate each other as to legal authorities of each agency and structure collaborative processes to be respectful of those authorities.

Knowing when to elevate and recognizing that it is far more expedient to get issues addressed as soon as possible by those who are in the best position to solve them is not an indicator of failure. Instead, it is a hallmark of effective communication and good decision-making.

3. Collaborative Decision Making and Conflict Management Through Early Involvement and Coordination

Overview

This chapter presents strategies that advance good NEPA management practices, specifically those facilitating early involvement in transportation planning and coordinated, concurrent reviews of individual projects. The strategies include memoranda of understanding among agencies, delegations of programmatic authority, partnering initiatives, and other arrangements to promote environmental streamlining goals.

3.1 Expectations

Congress expected that environmental streamlining would lead to better coordination and predictable project delivery schedules through a process that is efficient, comprehensive, and streamlined. An efficient process allows agencies to agree on timeframes for conducting the required environmental reviews. Conceivably, these reviews would occur concurrently; the CEQ regulations state that agencies shall do concurrent reviews to the fullest extent possible.

Concurrent reviews would reduce duplication of effort, expedite agreement on outstanding issues, result in quicker acceptance of mitigation strategies, and help expedite the issuance of permits. This approach is ideal in theory. In reality, NEPA practitioners have learned that the missions of many transportation, environmental review, and permitting agencies do not intersect clearly. Distinct levels of legal review dictated by various environmental laws drive the level of information required, the nature of the documentation, the involvement of the various state and local resource agencies, and the standards of judicial review. All of this in addition to constrained resources can complicate the review process. Moreover, misinterpretation of the mandates, goals, and responsibilities of the agencies can make coordination a contentious affair, and can set the stage for conflict throughout the NEPA process.²

Legal Standards Applied In Environmental Law

The first level of legal standards applied in environmental law is "prohibition", such as the Endangered Species Act, where a finding of "jeopardy" stops the action.

Second is the standard applied under Section 4(f) of the Department of Transportation Act that must examine "feasible and prudent" alternatives and document "unique problems" of "extraordinary magnitude" before there is use of protected resources

The third test is one of "most practicable", such as Section 404 of the Clean Water Act. This requires a rigorous analysis and a decision that takes into account the best public interest.

The fourth standard is exemplified by NEPA, a law that sets out a process to foster good decision-making.

Finally there are the consultation laws, such as Section 106 of the National Historic Preservation Act or the Farmland Protection Act, which require consideration and coordination.

² The agencies' roles and responsibilities for NEPA, streamlining, and fulfilling environmental resource and protection mandates are summarized in Appendix K - Federal Agency Roles and Responsibilities Under NEPA and Environmental Streamlining.

Early coordination is emphasized as an essential ingredient of environmental streamlining. Congress recognized that the concerns of the involved parties should be identified early in the process. A lot of time can be spent debating poorly documented decisions based on incomplete information or inadequate documentation. Similarly, failure to clarify agency requirements, needs and expectations on a broader level can exacerbate conflict during specific project development phases. These project specific conflicts and the issues that arise during the NEPA process are addressed in Chapter 4.

Congress also recognized the need for additional resources to support enhanced resource agency engagement in transportation projects, and deemed efforts to support their involvement eligible for Federal aid reimbursement. State departments of transportation may chose to fund positions or activities to be carried out by resource agencies that meet agreed upon timeframes and streamlining objectives.

3.2 NEPA as a Decision Making Tool

NEPA established the national policy for protection of the human environment and natural environment, and applies to actions that involve a Federal agency making a decision. All Federal agencies are encouraged to use NEPA as a procedural framework for addressing compliance with applicable environmental laws.

A coordinated approach to planning and project development contributes to more effective and environmentally sound decisions about transportation investment choices and trade-offs. Title 23 of the U.S. Code makes clear that transportation planning is a state and locally driven process. State and local officials are responsible for defining their transportation investment strategies, planning a transportation system that best reflects their community needs, and selecting and setting priorities for transportation projects. Because this is not defined as a Federal action, transportation plans are not subject to NEPA.

Experience has shown that greater commitment to preventing adverse environmental impacts and integrated agency coordination can add significant value to the transportation decision-making process. By law, FHWA cannot require NEPA at the planning level. However, the outcomes of the transportation planning process need to be considered in a manner that respects state and local decisions and investment choices. The challenge is in reaching agreement and defining the appropriate levels and timing of Federal agency involvement in what begins as a Federally assisted state process and culminates in a Federally directed process – NEPA.

Some states will choose to accelerate interagency coordination early in the NEPA process, while others will engage agencies at the transportation planning stage, emphasizing balancing of transportation and environmental needs at a broader systems level. Both models will lead to collaboration and provide an opportunity to resolve whatever conflict may arise or modify the transportation proposal early in the process.

Actions that help build interagency relationships and institutionalize conflict management strategies define expectations and clarify each party's level of participation and contribution to streamlining. A

number of strategies available to facilitate collaborative decision-making or conflict management through the use of environmental streamlining are discussed in the following subsections.

3.3 Interagency Goals and Commitments to Advance the Principles of Streamlining

The National MOU on Environmental Streamlining reflects the intentions of the Federal resource agencies to achieve the goals of environmental streamlining—to expedite transportation projects while protecting and enhancing the environment. The signatories agree to work collaboratively, coordinate environmental review activities, and to become involved early in transportation planning activities. The Federal Interagency Work Group meets regularly in Washington, D.C. to facilitate the implementation of agency commitments under the MOU and serves as a conduit for quick agency response on issues that may generate conflict. Some responses require clarification of agency policy or guidance, or breaking logjams through specific agency directives.

3.4 Regional and State Strategies

Building on the National MOU and Action Plan, Federal agency field offices have defined approaches to achieve the environmental streamlining goals. They can be categorized as strategies that address process, program, or project efficiencies.

▪ Process Strategies

Several field offices have adopted principle-based agreements, patterned after the National MOU, for consistency in meeting the goals of reducing delays, enhancing, and protecting the environment. The regional and state MOUs incorporate distinct regional priorities and typically define the ground rules and expectations, and clarify agency roles and responsibilities for conducting project reviews. The parties can choose to include negotiated timeframes, which is encouraged by the FHWA. The MOUs may also include agreements for a transfer of funds from transportation to environmental agencies to support specific activities.

▪ Program Strategies

- Agencies often find it appropriate to address factors and actions using a programmatic approach. This allows the affected agencies to explore and seek resolution of broad issues that benefit a large number of actions. If an action has no significant environmental impact or is always resolved in the same way, eliminating the need to address the same types of issues repeatedly can save time and lead to repeatable and predictable outcomes.
- Programmatic agreements are useful for expeditiously addressing transportation system needs that are driven largely by safety and maintenance requirements. For many states, these are the bulk of their programs and are based on technical highway needs inventories and conditions, and performance of the physical structures.
- Efficient and proficient handling of operational transportation improvements should allow necessary resources to be dedicated to projects requiring the preparation of environmental impact statements. Projects of this nature typically involve the construction of new facilities or major

capacity expansion projects. These projects reflect the long-range transportation plans such as corridor studies, feasibility studies, or perhaps as illustrative projects.

- If a state has a long range plan that is a policy plan rather than a facility-specific plan, new facilities are generally discussed in terms of a range of transportation system options that consider the statewide and metropolitan planning factors listed in TEA-21. These projects are more specifically advanced into the transportation improvement program – a listing of projects or project phases to be advanced over the next 1-3 years.
- Transportation planning and air quality conformity requirements require regional analysis of the transportation projects anticipated to be advanced over the next 20 years. The transportation plan must be supported by documentation of financial commitment – the transportation improvement plan (TIP) must specify funding sources. Some projects, although still in planning, might be assigned dimensions and project descriptions as “placeholders” in order to fulfill planning and conformity requirements. While a significant amount of analysis and project related data collection through feasibility or corridor studies could be amassed in the planning phase, NEPA is not applied to these transportation system plans. For Federal transportation actions, NEPA is applied to the specific projects in the plan/transportation improvement program when the project enters the project development phase. From the perspectives of many environmental agencies, these statutory underpinnings have led to a perceived “procedural “ disconnect between transportation planning and NEPA. Conversely, transportation agencies become frustrated when environmental agencies fail to consider the results of the transportation planning process or do not fully appreciate the transportation agency’s responsibility as the lead agency to ensure full compliance with all environmental regulations under the “NEPA umbrella “ concept.
- If properly documented, the planning and analysis data that are developed could be used to justify and narrow the range of reasonable alternatives to be addressed during the NEPA process.
- Expedited project reviews through programmatic agreements or delegations of authority create the opportunity for agencies and states to successfully meet their environmental protection missions. In addition, the resource agencies have more time to become familiar with the transportation planning process and better understand the basis for the transportation agency’s proposals.

▪ **Streamlining Project Agreements**

- Project agreements define the processes and approaches to be used and set specified timeframes for project reviews. Project-specific streamlining or partnering agreements are generally used for large or complex projects, or those involving a host of complex impacts (e.g., significant historic, cultural or community impacts or issues).
- These projects could lead to prolonged environmental reviews, disagreements and significant project delays. A number of states are pursuing streamlining agreements for “pilot “ projects to test the benefits of more structured coordination.

3.5 Benefits of Early Involvement and Coordination of Reviews

Several states are addressing environmental resource protection issues at the transportation systems level. For example:

- Florida has adopted a strategy for incorporating environmental factors into its long range planning process.
- Oregon is defining a level of environmental review to apply during planning which allows the regulatory and resource agencies to provide input into the purpose and need as projects are identified in the planning phase.
- Indiana is developing an approach for conducting environmental assessments during transportation corridor planning studies.

One goal is to develop mitigation strategies that will increase the likelihood of avoidance, reduce mitigation costs, or establish mitigation credits off-site. These strategies ensure greater predictability for carrying out the transportation plan as envisioned at the state and local levels. Early involvement of environmental agencies might also encourage the use of natural systems (e.g., river basins, air sheds, ecosystems) as geographic units for transportation planning.

Several states have also developed frameworks for coordinating project-specific review processes. These efforts typically encompass Section 404 permitting and NEPA process requirements. The benefits are faster, more efficient reviews.

For more information on streamlining initiatives and strategies, refer to the FHWA Web site (<www.fhwa.dot.gov/environment/strmlng.htm>).

3.6 Making It Happen

▪ Role of the Lead Agency Under NEPA

As the lead agency for most transportation projects, the FHWA division office or Federal Transit Administration (FTA) regional office are responsible for facilitating effective decision making, managing conflict, and reducing the likelihood of disputes. They should:

- Convene and chair the initial and subsequent meetings for all the relevant Federal and state agencies.
- Support and assist with resource exchange arrangements between state departments of transportation and resource agencies where the state has exercised its option to do so.
- Suggest and arrange for activities that encourage team building, such as a partnering sessions conducted by a third party.
- Make available or assist with obtaining interagency training in problem solving, negotiation, and dispute resolution, as well as in traditional substantive areas.
- Model effective collaborative problem-solving behavior in its interactions with other agencies by employing interest-based negotiations. This implies that agency personnel have the requisite communication and problem-solving skills.

- Develop meeting facilitation skills and be prepared to chair interagency discussions (see Section 5.2).

FHWA and FTA must balance their responsibility as a proponent of the project sponsor, and should:

- Act impartially as the facilitator of a fair and balanced process,
- Advocate the decision-making process, and
- Extend the concept of partnership to all agencies in the process.

▪ **Role of Cooperating Agencies**

The role of cooperating agencies is addressed in the CEQ regulations (40 CFR 1501.6) and emphasizes the importance of cooperation early in the NEPA process. Upon the request of the lead agency, other Federal agencies, with jurisdiction by law or with special expertise on an environmental issue involved in the project, have the responsibility to be cooperating agencies. It is important that this is done as early as practicable, and includes not just Federal agencies, but also state, tribal, and local government agencies that are players in the NEPA decision-making process for that project.

Early in the NEPA process, the lead agency along with all cooperating agencies are urged to:

- Set time limits
- Identify milestones
- Assign responsibilities for analysis and documentation
- Specify the scope and detail each agency's contribution
- Establish appropriate ground-rules.

Cooperating agencies have a major role in ensuring that decisions made during the project development process are timely and conducted in an efficient manner. However, reaching agreements on agency roles could involve contentious deliberations. The decision-making authority of each agency and the level of consultation required can be the cause of ongoing disputes.

It is important to keep in mind that the benefits of cooperating agency participation include:

- Disclosing relevant information early in the process
- Applying available technical expertise
- Avoiding duplication with other Federal, state, tribal, or local procedures
- Establishing a mechanism for fostering inter and intra-governmental trust
- Understanding and appreciating various roles in the NEPA process.

Additional thoughts on lead and cooperating agencies are available on CEQ's NEPA Net website at <http://ceq.eh.doe.gov/nepa/nepanet.htm>

4. Disputes that Arise during NEPA Reviews of Transportation Projects

4.1 Issues that Can Lead to Disputes during the NEPA Process

As a project moves from planning through the phases of project development, conflicts may arise at any phase. Many states have established particular points of concurrence to be reached between state transportation agencies and various Federal and state agencies before moving on to the next phase of the project review process. Each phase has its set of issues that must be satisfactorily addressed to manage the potential for disagreements. Broad project development phases under NEPA, regardless of the action classification, include:

- Establishing purpose and need,
- Interagency coordination or scoping³,
- Alternatives analysis, and
- Selection of an alternative in the decision document.

Final design and implementation stages can also be problematic; however, this topic is beyond the scope of this guidance. Success in resolving disputes up to the Record of Decision, will allow for (but not guarantee) fewer problems through the project implementation phase.

The following issues typically emerge during key phases of the NEPA process. Each issue can be the focus of disagreements among agencies. However, some of the broader issues can be addressed at the planning level.

▪ Purpose and Need

Transportation problems are defined and the reasons for addressing them are proposed in a purpose and need statement. This establishes the basis for any proposed action to correct the problems and therefore, is critical to the evaluation of all reasonable alternatives. It is the responsibility of the transportation agencies to provide a clear and comprehensive justification of why the action is needed, and re-examine or update information throughout the project development process.

Key questions that may lead to disputes in this area pertain to:

- How was the transportation need defined?
- What are the underlying causes of the need?
- How were the traffic demands determined and what analyses were used?
- Does the purpose and need statement exclude any alternatives that should be evaluated?

³ For the purposes of this guidance, “scoping” refers to the open and continuous interaction among transportation and resource agencies that occurs throughout the NEPA process; it is focused on identifying issues and approaches, rather than regulatory formal scoping required for the preparation of an EIS.

▪ **Scoping**

The purpose of scoping activities is to identify issues early in the NEPA process that will need to be considered throughout project development. Scoping helps to determine:

- Study boundaries,
- Roles and expectations of agencies,
- Project schedule and review timeframes,
- Sensitive environmental factors to be considered for analyses, and
- Technical studies that may be required, including appropriate methodological approaches.

Each of these issues may lead to conflict or disputes and often involve questions concerning:

- Appropriate time requirements,
- Each agency's level of effort and how it will be accomplished,
- Environmental resources or evaluation of impacts that will be important factors in the decision-making,
- The extent or methodology for data collection or environmental analyses, and
- The appropriate classification level of documentation [Environmental Impact Statement (EIS), Environmental Assessment (EA) or Categorical Exclusion (CE)] for the proposed action.

▪ **Alternatives Analysis**

This analysis presents the rationale for which transportation alternatives are evaluated to meet the purpose and need established for the project. It also provides a comparison of environmental impacts associated with each alternative and other potential mitigation (avoidance, minimization, compensation). The issues tend to fall under the following categories:

- Number and type of alternatives (e.g., What is a reasonable number of alternatives? Is there sufficient rationale for elimination of an alternative? Are the alternatives consistent with local land-use plans? How are indirect effects to be addressed?)
- Data requirements for environmental studies and analysis of effects (e.g., How much data is sufficient? What data is credible? What data needs to be developed through new studies and what methodology should be used? What are the cumulative effects?)
- Proposed mitigation (e.g., What is the appropriate ratio for wetlands replacement? How are potential mitigation strategies identified, and at what level of detail? How to best quantify impacts and potential mitigation strategies to ensure a balanced decision?)

▪ **Identification of Selected Alternative Through the Final Decision Document**

The lead agency makes a final decision on the selection of an alternative. This decision is based on the transportation purpose and need, the views and comments of the public, the environmental impacts, and the input of resource agencies and other regulatory requirements.

Issues may arise over the evaluation of the no-build alternative, alternatives considered under other legal standards (e.g., Section 4(f) of USDOT Act, Section 404 of Clean Water Act) or acceptance of the conceptual mitigation package for the selected alternative.

The goal of the dispute resolution guidance is to provide strategies for resolving issues, so that the project can progress through the decision-making phases in a timely manner and toward an appropriate outcome.

4.2 The Nature of These Disputes

Disputes that may arise at various junctures in the NEPA process include the following.

Disputes over Interpretations of Terms:

These involve questions such as: “What is an indirect/cumulative effect?” “What does ‘practicable’ mean (in relation to project alternatives)?” and “What is the ‘public interest’?” (e.g., in relation to the USACE mandate under Section 404 of the Clean Water Act).

Questions that only pertain to the immediate project could be addressed within the context of the project. If the terms are associated with multiple projects, the dispute could be addressed by a specially designated group of representatives from the affected agencies.

However, the examples cited above involve terms found in authorizing legislation and agency rules, and their interpretation represents agency policy. Resolution is thus likely to require negotiation by higher-level decision makers in the relevant agencies.

Disputes over Information: These can take the form of insufficient information, or disagreeing with the data analysis or the methods employed, or adopting a different interpretation of the analysis.

Most of these disputes involve larger debates about agency jurisdiction and domains of expertise. Sometimes the agencies cannot agree on who has primacy for defining natural resource methodologies.

Disagreements between EPA and transportation agencies often involve the underlying planning assumptions used to arrive at vehicle miles of travel as inputs into travel demand models or for

Strategies for Preventing Disputes Concerning Interpretation of Terms

- **Share copies of guidance documents that define the terms.**
- **Hold joint education sessions conducted by specialists or policy makers.**
- **Develop jointly derived definitions that can apply across projects.**

Strategies for Preventing Disputes Concerning Information

- **Jointly identify the key questions that the information must address (such as anticipated impacts), prior to gathering the information.**
- **Agree on a methodology to be used for data collection and analysis.**
- **Respect each other's expertise.**
- **Accept the validation of information by the agency having jurisdictional authority.**

establishing mobile source emissions budgets. These disagreements may evolve into disputes about the interpretation of terms or overlapping legal mandates.

Disputes Associated with Insufficient Resources:

Sometimes the cause of missed deadlines is due to the lack of staff or other agency resources. It is best to refer these issues to higher levels within the affected agencies; or they may be resolved through funding agreements for staff positions. Resource problems are appropriately addressed as part of an interagency agreement. Nevertheless, resource issues may also emerge during the project review stage.

Disputes Caused by Failure to Deliver or Fulfill a Commitment:

Unrealized expectations can lead to serious disputes. The inability of an agency representative to honor a commitment (e.g., “That certainly is not my understanding of what we agreed”) or to deliver the signature of a higher agency authority on a negotiated agreement, can erode gains made on the current project, and can have a significant effect on future negotiations.

If the cause of the problem is a failure to persuade higher authorities to sign off on a negotiated agreement rather than bad faith bargaining by the negotiator, the problem could be a lack of understanding of the issues by the higher-level decision maker. In this case, resubmitting the agreement with a more complete explanation is appropriate. This underscores the importance of keeping decision makers informed throughout the negotiating process.

Unsigned agreements may also indicate the emergence of a substantive dispute and it may be a candidate for upward referral for negotiation among the affected agencies.

Strategies for Preventing Disputes Related to Insufficient Agency Resources

- **Jointly problem solve on how to make the review process easier and more efficient.**
- **Prioritize projects so agencies can focus attention where needed.**
- **Adjust meeting times and venues to accommodate limited staff resources. Use teleconferencing when travel funds are not available.**
- **Define resources needed (staffing, GIS mapping) to streamline transportation projects.**

Strategies for Preventing Disputes Caused by Failure to Fulfill a Commitment

- **Clarify each agency representative’s level of authority. Seek as much delegation of authority as is practical and appropriate.**
- **Clarify the level and specific elements of the commitment up front and document, as appropriate. Examine assumptions when a commitment appears to be broken.**
- **Establish parameters/conditions for revisiting issues, and avoid revisiting unless those conditions are present.**
- **Keep higher levels of authority informed of progress on a project and the rationale for decisions made.**
- **Use technology as appropriate to expedite reviews (e.g., electronic submissions, teleconferencing, etc.)**
- **Circulate meeting minutes signed by all participants and signed written agreements upon completing the negotiations.**

Fundamental Disagreements Based on Missions and Mandates: Sometimes agencies differ on the interpretation of their disparate mandates. These types of disputes often arise over the purpose and need for the project, the failure of the project sponsor to consider a full range of alternatives, or the selection of a preferred alternative.

Appealing to the mutual respect for each agency's mandate and making specific reference to commitments made in the National MOU (and perhaps complementary region- or state-level MOUs) may help move the agencies toward compromise or creative solutions. However, where project redesign or mitigation measures are not successful in reaching an accord, upward referral of the dispute should be considered.

Other Types of Disagreements: Some disputes are due to personalities, attitudes, or differences in agency cultures. Deeply embedded behavioral patterns and attitudes are difficult to change during relatively brief attempts at dispute resolution within the context of a project review process, thus leading to impasse.

Agency cultures are also difficult to remold and may require assessment and intervention by organizational development specialists. Interagency training sessions where participants become more familiar with the mission and operating style of their counterparts may prove to be useful.

Strategies for Preventing Disputes Due to Differing Missions and Mandates

- **Conduct joint training to build mutual understanding of each agency's mission, mandates, and procedures.**
- **Consider and accommodate each agency's procedural requirements.**
- **Create opportunities for management-level discussions or reviews to distinguish between personal interpretations and agency policies.**
- **Respect each agency's mission and mandate to serve the public interest and, as appropriate, accept joint responsibility to help the other agency fulfill its mandate.**
- **Create a partnership or team approach to work together to address all aspects of the public interest.**

Strategies for Preventing Disagreements due to Other Differences

- **Participate in training to understand different communication styles, issue-processing approaches, and motivational strengths. Apply this understanding by becoming more tolerant of the differences.**
- **Become more effective by modifying one's own behavior to be more accommodating of others' styles.**
- **Build relationships through opportunities for informal conversation and interaction.**
- **Avoid making assumptions about the motives of others. Examine assumptions before reacting.**
- **Learn – through training and conversation – about other agencies' cultures and operating styles.**

5. Approaches to Managing Conflict and Resolving Disputes at the Project Level

5.1 The Nature of Conflict

Why do people disagree, and why do some disagreements escalate into full-blown arguments or disputes? Conflict arises when the interests of two or more parties cannot be simultaneously satisfied, or at least the parties perceive this to be the case. The separate interests may involve competition to obtain scarce resources, fundamental differences in values, identification with adversarial groups, power imbalance in the parties' relationship, a difference in style or culture, or a simple dislike or distrust of each other. Nevertheless, conflict can be positive.

- Addressing conflict in a forthright manner can produce positive results.
- Conflict forces the recognition of differing perspectives, and provides opportunities to arrive at new understandings.
- Struggling to accommodate diverse interests can be rewarding.
- Addressing conflict also provides the option of responding in either a competitive or a cooperative fashion. If a competitive posture is chosen, damaged working relationships and a lack of progress in achieving goals is often the result.

Understanding the nature of conflict and how to manage it constructively are keys to achieving desired outcomes effectively and efficiently. In the case of transportation projects, the dual objectives are to meet transportation needs and protect the environment, all within a specified time frame. TEA-21, NEPA, and the various related environmental laws and regulations comprise the context within which conflicts among interdependent agencies must be managed.

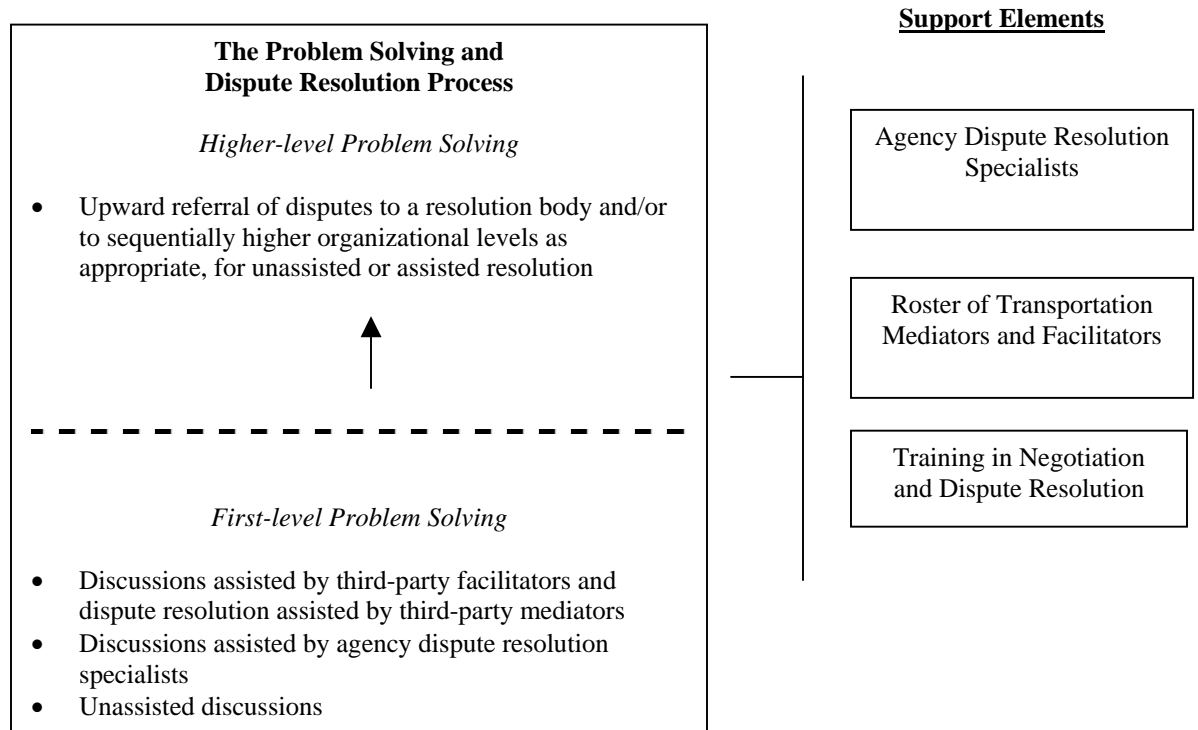
The following sections describe each element of the framework. The discussions assume that general agreements and operational understandings among the participating agencies have not necessarily been established at the transportation planning stage.

5.2 Dispute Resolution Framework

The Dispute Resolution framework as illustrated in Figure 1, can serve as an option for a more formal, structured dispute resolution model at the project level. It encompasses collaborative problem solving, with various supporting elements, and presents a general process for dispute resolution starting from the lowest organizational level, with possible elevation to higher levels per existing laws and regulations of the organization.

The three elements of the support system are presented as: agency dispute resolution specialists; third-party process neutrals (mediators and facilitators) on a transportation roster; and trainers for help in developing or improving negotiation, problem solving, and dispute resolution skills. These support elements can be used at any point in the problem solving and dispute resolution processes.

Figure 1. Dispute Resolution Framework



5.3 Unassisted Problem Solving

Face-to-face dialogue is the medium of problem solving and dispute resolution. Through direct discussion, participants can share ideas, troubleshoot proposals, and negotiate agreements.

Establishing a process up-front for collaborative problem solving and dispute resolution can help reduce conflict later on, or at least smooth the process for managing subsequent conflict.

Rules to guide meetings are important. Timelines should be established and explicit guidelines for determining progress developed. Agreements reached along the way need to be documented and signed. This will help guide the process and keep it on track.

Attitudes that Can Promote Unassisted Problem Solving

1. All agencies are mandated to serve the public interest.
2. Every agency should respect the mandate of the other agencies.
3. Public interest has many facets, and all are important.
4. It takes a team effort to address the full range of public interest.
5. Comments that identify problems carry a responsibility to offer recommendations for overcoming those problems or by providing useful information or guidance.
6. An objection is driven by an underlying unmet need. The goal is to understand and meet that need in order to remove the objection.
7. Effectiveness is enhanced through mutual understanding of agency mandates and procedures.

Discussions can begin upon establishing the timeline and strategy. Simple rules of thumb will help to make the discussions productive and efficient.

- Strict adherence to the process agreements is useful, especially in the beginning, to set the stage for timely, efficient discussions.
- Meetings should be held as scheduled and start on time.
- Substitute representatives should participate when designated representatives are not available.
- Good faith means honoring commitments to participate consistently and to provide information and decisions when promised.
- All participants in the process should be kept informed. Sidebar conversations between individuals should be shared with the group at appropriate times. Avoid surprises.
- Success in negotiation and problem solving is also dependent on the knowledge and skill of the participants. Understanding the nature of the issues (technical, legal, administrative, and perhaps political aspects) is essential. In addition, process skills and personal attitudes are key.
- Participants should engage in problem solving with openness and a desire to achieve mutually agreeable results. They should be candid about differences that exist and be respectful of other perspectives.
- In the case of transportation projects, multiple objectives must be achieved, such as improvement in human safety and mobility, conservation of natural resources, protection of wildlife and preservation of historical structures. Agency representatives need to be aware that these objectives must be achieved within the context of authorizing laws and regulations. Blending the achievement of these objectives becomes the challenge.

Suggested Steps for Interest-based Negotiation

1. Affirm the goal of working together to find a solution that will be satisfactory to all the agencies.
2. Frame the question or issue as a mutual problem to be mutually solved (What can be done to meet the collective interests of all the parties?).
3. Make sure representatives from all relevant agencies educate each other by identifying the specific regulatory language or policy guidance for their area of responsibility.
4. Have all relevant agencies articulate their specific needs or concerns (interests) that must be addressed.
5. Generate ideas and options that address these interests, looking for ways to make an idea work rather than for reasons to object. If there is an existing proposal, present it as an option to be considered.
6. Identify information needs by posing specific questions to be answered, share information, and identify other information sources.
7. Evaluate ideas and options by using the collective set of interests as criteria and by comparing the costs and benefits of these options
8. Select promising ideas or options that emerge, and develop or refine them further to enhance their benefit and enable final agreement.
9. Plan for the implementation of the selected idea or option, with consideration toward each agency's procedural need under its mandate.
10. Document the agreement.
11. Develop evaluation procedures and performance measures (e.g., time savings, cost avoidance, customer satisfaction and improved relationships).

Early stages of problem solving should focus on:

- Identifying the interests that underline the stated positions of the participants. This is sometimes referred to as “interest-based” negotiation. Often the “position” is stated in a manner that suggests no compromise is possible. Through careful listening and probing, positional language can reveal central interests or objectives. In many cases the interests of several parties are held in common.
- How participants can best achieve these mutual interests. Developing mitigation plans or redesigning the project, perhaps by altering the route or substituting one mode for another, is the art of identifying and satisfying multiple interests, at least some of which may be held in common.

Artful communication is a key to managing conflict and involves:

- The tone and speed of oral communication
- The use of body language which results in messages that differ from the meaning of the words.
- Communication behavior often reflects and sometimes creates conflict, but it is also the vehicle for constructive conflict management.

▪ **Develop Timelines for Streamlined Environmental Reviews**

All agencies involved in streamlining environmental reviews of transportation projects should cooperatively establish time periods for concurrent reviews. At a minimum, this includes the FHWA or the FTA as the lead Federal agency, and all cooperating agencies in the NEPA process. This may include the USFWS, the NMFS, and the USACE.

- The USACE reviews the project if a Section 404 of the Clean Water Act permit is required.
- The USFWS (and/or the NMFS) may be engaged through consultation on endangered species or essential fish habitats;
- EPA is involved through its review and approval responsibilities under Section 309 of the Clean Air Act; and
- The state department of transportation is usually the project applicant, and other state environmental and historic preservation offices may be involved depending on their role in their respective state and the nature of the project. The SHPO/THPO coordinates compliance with Section 106 of the National Historic Preservation Act and 36 CFR Part 800.
- The pertinent tribal government is involved if any tribal lands or interests are impacted by the transportation project.

Establishing a project timeline at the scoping stage, provides points of reference for developing a shared set of expectations that will frame the problem-solving and dispute resolution process. Agency decision points in the NEPA process should be considered, and the time required for each agency to analyze data and conduct its review. Timelines should encompass permits that may be required by the USACE, USFWS or the NMFS under the Endangered Species Act. (Note that specific timelines set by law or rule applies to the section 404 permit process and to reviews under the Endangered Species Act, and specific phases of the NEPA process.) Several states have merged their NEPA and 404 permitting processes.

Give careful thought on how to conduct the discussion during the first official project meeting for all affected agencies. As the lead agency, the FHWA division office or FTA regional office should identify someone to chair the meeting. An independent facilitator could help manage the initial and/or subsequent meetings, and assist in designing the process for developing a timeline (and for the reviews which follow). For example, a facilitator was employed at the start of the review process for the recent I-93 project in New Hampshire. A “partnering” concept borrowed from the construction industry was used in conjunction with an existing NEPA/404 merged process to establish timeframes and concurrent points for the project, during the first meeting.

Other examples of interagency agreements that contain timelines are posted on the FHWA Environmental Streamlining Web site: < <http://environment.fhwa.dot.gov/strmlng/index/asp>>.

- **Establish Guiding Principles**

The first few meetings of the project team provide the opportunity to articulate principles that will guide constructive dialogue and collaborative problem solving. Agreeing on guiding principles could either precede or follow agreement on the project timeline. A general set of principles that underpin the guidance provided here was set out in Section 2.4. Another set of principles drawn from specific projects in several states is offered as an example in Appendix E. The principles are broad statements about engaging the agency representatives and managing conflict during the review process.

- **Define Meeting Protocols**

Upon establishing the project timeline and guiding principles, the participating agencies should appoint a chairperson, and develop protocols for consultation and collaborative problem solving, these include: frequency of meetings, identify appropriate participants (and substitutes) and appoint a note-taker, establish ground rules, and agree on managing record-keeping.

The chair manages the meeting logistics (e.g., start and end the meeting on time, make sure the agenda items are covered and minutes are taken), and maintains impartiality during the discussions. As the lead agency, the FHWA or FTA representative(s) could assume the role as chair. This would require the individual to be impartial despite their traditional role as project advocates. Staff from the participating agencies could also chair the meetings, perhaps on a rotating basis.

The use of an outside facilitator on a regular basis could be considered if the project appears to be particularly contentious. Suggestions for obtaining assistance appear in Section 5.4.

▪ **Define Ground Rules for Problem Solving**

Specific ground-rules governing interactions among the participants should be established. Ground rules are designed to ensure that exchanges of ideas and information are constructive and efficient – that participants have opportunities to present their interests and concerns, and are treated with respect. Appendix F contains an example set of discussion ground rules.

▪ **Define Procedures for Addressing Impasses and Resolving Disputes**

Working through disagreements is the essence of problem solving. Initial discussions should include strategies for resolving future disputes. When disagreements become disputes, a mechanism for resolution is often critical to reaching agreement and continuing the project review process.

Designing an effective dispute resolution process, including rules for upward referrals to higher-level decision makers (see Section 5.5), requires distinguishing among the different types of disputes, which may require the assistance of a mediator with design expertise. Knowing when the group is “stuck” and understanding the nature of the dispute is key to getting the appropriate dispute resolution process started. The following are suggestions for preventing impasses, recognizing when an impasse has been reached, and moving forward again with constructive problem solving.

- If a serious dispute is building or an impasse has been reached, the agency representatives should seek counsel from their agency dispute resolution specialists. The specialists can assess the problem from their agency’s perspective and provide advice on a process to move the negotiations forward.
- Sometimes a dispute resolution expert from one of the disputing agencies will have the confidence of negotiators from the other agency, can provide advice to everyone, and act as the mediator.
- Another option is to obtain the services of a third-party mediator from the roster of qualified mediators and facilitators, such as the one maintained by the U.S. Institute for Environmental Conflict Resolution (USIECR) or from another source. To learn more about the “Transportation Roster,” (which is a subset of the USIECR consisting of third-party mediators with specific experience in the transportation development process) see www.ecr.gov.

Upon deciding to use a facilitator or a mediator, establish rules to address:

- Who will initiate an assisted negotiation process (one that uses a mediator possibly in conjunction with a technical expert). Any agency can make the request. However, all of the disputing agencies must agree before the deadline ends.
- The duration of the dispute resolution process should be sufficient for the mediator or expert to understand the issues and conduct discussions, but short enough to move the deliberations toward resolution.

- The consequences for failing to resolve the dispute typically involve referral to higher-level authorities.

Preventing Impasses
<ul style="list-style-type: none"> • Establish clear decision rules (e.g., all comments on draft documents must be received by a date certain). • Carefully document all understandings and agreements, with provision for signing by all participants. • Invite participants who object to proposals to propose alternatives. • Review project goals and objectives, conflict management guiding principles, and broad mission statements in interagency MOUs.

Getting “Unstuck”
<ul style="list-style-type: none"> • Intensify discussions; focus structured problem solving on the issue (try harder to identify interests which underlie stated positions). • Obtain advice from agency dispute resolution specialists. • Obtain assistance from a mediator – within or outside the agency. • Obtain technical assistance (third-party expert or panel of experts) for disputes over facts or technical issues. • Request a change of agency representatives if the problem is mistrust or a personality clash.

These rules should recognize and accommodate existing regulatory processes for elevation of disputes, as explained in the Section 5.5 and existing processes. (In particular, a project sponsor or the state Governor initiates the USDOT referral process whenever an agency fails to comply with a project timeline).

5.4 Assisted Problem Solving

Most negotiations proceed without the assistance of a trained facilitator. However, a facilitator can help guide the process in situations where the issues appear contentious. If critical disagreements emerge in the course of problem solving that need timely resolution the participants should consider engaging a mediator. The differences between facilitation and mediation are not crucial to this discussion, except:

- Mediators will focus on a specific dispute and assist in reaching explicit written agreements.
- Competent facilitators (and mediators) can help improve the efficiency and effectiveness of the process, and:
 - Help participants establish and enforce meeting and discussion rules.
 - Assist in moving discussions beyond a statement of positions to identification of key issues and the interests of the parties.
 - Clarify and reframe questions and issues helps to make the discussions more productive.
 - Assist in managing technical information and presentations by experts, and thus help focus areas of disagreement.
- Facilitators and mediators do not make decisions. They help the participants with their problem-solving process.

Most agencies may continue to conduct discussions in an unassisted manner. This is particularly true for agencies that have long-established and good working relationships with other agencies. Assistance should be considered when the process is not working well and when disputes arise frequently. Guidance on obtaining assistance from a third-party facilitator or mediator is provided below.

▪ **Define Procedures for Obtaining Assistance**

Much of the routine discussion about a transportation project and its impacts will typically be “unassisted problem solving.” That is, the participants discuss and negotiate various aspects of the project and possible mitigation proposals without assistance of a trained facilitator or mediator.

Guidelines for determining when assistance should be requested are summarized as follows:

- At the beginning and periodically during the negotiations (if the discussions are not going well), obtain advice from agency dispute resolution specialists on collaborative problem solving.
- For contentious projects, consider using a trained facilitator for all meetings (who could be an agency dispute resolution specialist who has the confidence of all the agencies, or an independent party).
- Consider using a trained process neutral with expertise in designing the dispute resolution system.
- If disagreements lead to impasses, use one of the agreed-upon dispute resolution processes. If the chosen process is assisted negotiation, it will involve a mediator (possibly a dispute resolution specialist from an agency or an independent mediator).
- If the dispute involves data analysis and interpretation, consider obtaining additional assistance from independent technical experts. The most efficient approach to obtaining these services is through local colleges and universities where respected experts in a variety of technical fields are located. However, obtaining the services of these experts in a timely fashion may not always be possible. Other sources of technical expertise include relevant Federal and state agencies not involved in the dispute. Remember, however, that questions about information and data analysis frequently involve issues of agency jurisdiction.

A checklist for designing the conflict management and dispute resolution framework (Figure 2) for specific projects is provided below. The lead agency can use it to document each element in the framework and the decisions that are reached.

Figure 2. Project-Level Conflict Management and Dispute Resolution Checklist

Timelines and Guiding Principles

- 1. Time periods for concurrent review specified: _____
- 2. Points of concurrence identified: _____
- 3. Guiding principles established: _____

Meeting Protocols and Ground Rules

- 1. Frequency of meetings established: _____
- 2. Agency representation established: _____
- 3. Rules for meeting attendance established: _____
- 4. Operational rules for meetings (ground rules) established: _____
- 5. Meeting recorder(s) identified: _____
- 6. Rules for circulating and approving/signing minutes and agreements established: _____
- 7. Need for a meeting “chair” and/or facilitator discussed: _____
 - Decision: FHWA to provide: _____
 - Other agency to provide (which?): _____
 - Rotation among agencies: _____
 - Outside Facilitator (how obtained?): _____

Dispute Resolution Procedures

- 1. Need for a dispute resolution design expert discussed: _____
 - Decision: No need: _____
 - Agency dispute resolution specialist: _____
 - Outside dispute resolution design expert: _____
- 2. Rules for when disputes become impasses established: _____
- 3. Rules for who can activate the process established: _____
- 4. Timelines for resolving disputes established: _____
- 5. Rules for the use of mediators discussed: _____
 - Use of agency dispute resolution specialists discussed: _____
 - Use of outside mediators discussed: _____
 - Decision (how obtained): _____
- 6. Rules for use of technical experts discussed: _____
 - Decision (how obtained if needed): _____

Procedures for Obtaining Assistance

- 1. Mechanism(s) for obtaining facilitators and mediators established: _____
- 2. Mechanism(s) for obtaining technical experts established: _____

Upward Referral of Disputes

- 1. Rules for when to refer a dispute established: _____
- 2. Comparable levels of agency decision making established: _____
- 3. Timelines and consequences for failure to resolve established: _____
- 4. Rules for presentation of issues at next higher level established: _____
- 5. Rules for recommended use of mediators discussed: _____
 - Decision: _____

5.5 Upward Referral

Every effort should always be made to resolve disputes at the lowest level. This is the level where the project and the issues are well understood by the agency representatives who are familiar with the problem-solving environment and each other. However, disputes involving reviews of transportation projects could be referred to a special resolution body or elevated to higher level authorities within the respective disputing agencies. The higher authorities could negotiate, with or without assistance. If the dispute remains unresolved, it could be elevated further to an ultimate authority as governed by applicable laws and regulations. Specific suggestions for upward referral of transportation disputes are presented below.

▪ Define Procedures for Upward Referral of Disputes

- Resolution at a low level allows state/district/division offices to maintain control of the process. However, the ability to refer disputes to higher levels can be crucial to resolving them and maintaining momentum.
- Knowing when to make an upward referral can be challenging. The desire to maintain control of negotiations by project-level agency representatives must be balanced against the need to keep moving in the review or permit approval process.
- Establishing rules about who and when to make referrals will provide incentives to negotiate earnestly at the lowest organizational levels.
- Higher-level negotiations may benefit from assistance. Procedures for upward referral should identify opportunities for obtaining the services of a mediator.
- Higher-level authorities can bring broader perspectives on unresolved disputes. Project-level agency representatives may want to move on with other aspects of the project review or permitting process while attempts are made to resolve one or more specific disputes. This will maintain progress but at the risk of wasting time if the unresolved disputes involve decisions that could “make or break” the project or redirect it.

▪ Establishing Criteria for Upward Referral

A dispute may be appropriate for upward referral based on either of two criteria:

- The impasse is not broken with either unassisted negotiations or the use of a mediator.
- The dispute involves or is caused by:
 - Delays due to lack of sufficient agency resources,
 - Interpretation of agency policy, procedures, or legal mandates, or definitions of law terms or regulations.
 - Other types of disputes may also be appropriate for upward referral.

▪ **Identifying Organizational Levels for Upward Referral**

Careful consideration should be given to how an upward referral system will operate. The objective should be to identify comparable levels of decision making for each of the disputing agencies so that higher-level negotiation can take place. Identifying comparable levels for referral is not straightforward, as Federal and state transportation and the resource agencies do not have parallel organizational structures.

Some states are developing a hybrid structure for upward referrals—a board of interagency supervisors that meets regularly to hear disputes. This structure eases first-level upward referrals and brings supervisory personnel into the dispute resolution process on a regular basis. Establishing such a body provides a clear message to project-level staff that agency managers are dedicated to resolving disputes quickly and effectively. Examples of structures and processes are provided in Appendices G and H.

▪ **Establishing Operating Rules and Time Frames**

Beyond the architecture of the referral system, operating rules to identify whom and at what point referrals can be made, and the length of time required for each step in the process need to be developed. A useful rule is to allow referrals by any disputing agency whenever a dispute is not resolved through assisted negotiation or involves higher-level issues (specifically defined).

Also critical is the specification of timelines. The desire to act expeditiously must be balanced against the time required to assemble and present information to the higher-level decision makers, and the time needed for negotiations to take place. Nevertheless, establishing specific timelines and specifying the consequences if deadlines are missed is crucial. Such consequences typically involve referrals to yet higher-level decision makers.

▪ **Preparing Higher-Level Decision Makers**

- The use of joint briefing statements prepared collaboratively by representatives of the disputing agencies is highly recommended. (Appendix I contains an example format for a joint statement.)
- The individual agencies may also wish to prepare position papers for their upper management and possibly for exchange with the other agencies. The first meeting of higher-level agency negotiators preferably would be a joint briefing by agency representatives who prepared the briefing statement. Note that the preparation of the joint statement may require the services of a facilitator or mediator and may prompt resolution of the dispute, negating the need for upward referral.

▪ **Recognizing Formal Processes for the Highest Level Upward Referral**

Decisions on whether and when to refer disputes to the highest level should consider other opportunities for elevating disputes under existing rules. These decisions are typically reserved for the last stage of dispute resolution when all other avenues have been exhausted.

Formal Upward Referral Processes

CEQ Referral

- Under Section 309 of the Clean Air Act and the Council on Environmental Quality's (CEQ) regulations at 40 CFR Part 1504, any Federal agency may refer a dispute over an action proposed by another Federal agency to the CEQ. The head of the department or agency must make the referral within 25 days after the notice of availability of the FEIS. CEQ determines whether to take the referral based on several criteria, including a determination of whether the issue is of national importance.
- If the CEQ takes the referral, several options are available for resolution, including making recommendations to the President. The most typical outcome is the publication of Findings and Recommendations. The referral process focuses on the underlying proposed action and how it does/does not meet the policy goals of NEPA, rather than procedural compliance with NEPA.

404(q) Elevation Process

- Under Section 404(q) of the Clean Water Act, the EPA, the USFWS, or the NMFS may request the elevation of a Section 404 permit decision by the USACE. Elevation can occur through successively higher levels, culminating with the Assistant Administrator of the EPA, an Assistant Secretary of the Department of the Interior, the Undersecretary of the Department of Commerce, and an Assistant Secretary of the Army.
- Procedural or policy issues and those related to a specific project can be elevated, if the project would impact water resources of national importance. However, the USACE decides whether elevation will occur and makes the final permit decision. (Note that the EPA has separate authority under the Clean Water Act to prohibit or restrict disposal of dredged or fill material into waters of the U.S. under certain circumstances, and thus can veto a 404 permit issued by the USACE.)

Dispute Resolution under USDOT Order 5611.1A

- Elevation of disputes to the Secretary of the USDOT, by the FHWA Division Administrator or the FTA Regional Administrator is also possible under USDOT Order 5611.1A. Elevation is triggered by failure or anticipated failure to comply with project timelines. This elevation process is available on the FHWA environmental streamlining website (<http://environment.fhwa.dot.gov/strmling/adrguide/adr5.asp>)

Figure 3. Effective Agency Dispute Resolution

Recommended steps for effectively resolving disputes within and between agencies:

10 Steps To Effective Dispute Resolution

1. **A commitment from the agency leadership and staff to resolve issues is needed.** Ignoring issues may result in working themselves out later in the process. More often, they keep surfacing and will delay the process at the end. A commitment for as much closure as possible during the process is essential.
2. **To resolve disputes, someone has to acknowledge that the parties are stuck.** Concurrence points provide an opportunity for agencies to recognize unresolved issues, and to work on solutions.
3. **Half the work of resolving an issue is defining it.** When parties work to articulate the issue that needs to be resolved, they sometimes find there is no issue - or clear definition points for its resolution and who needs to be involved.
4. **Surfacing issues and referring them to a higher authority should be seen as a good thing, not as a failure.** Some issues must be elevated to get resolution – to bring policy perspective, command over resources, broad agency perspectives, and fresh **ideas**. Upper level decision makers should use their role to remove barriers to resolution, and not engage in finger pointing.
5. **Successful upward referral of issues requires a clear path.** Identify the agency counterparts and who will address the issues when they arise.
6. **If an issue is elevated, management can respond most effectively if it is well prepared on the specific issue and the broader context.** Additionally, a joint briefing by all the affected agencies, not just the agency's staff, is most useful.
7. **Have the right conversations.** Discuss the interests of each agency, what they are trying to accomplish, and set mutual outcome goals to resolve disputes and disagreements.
8. **Outside facilitation helps.** A neutral facilitator can: keep agencies focused on the issue, disciplined in their discussion, and moving forward toward decisions. Ask hard questions, probe beneath the surface of a participant's remarks or position to obtain the real concern without being viewed with suspicion about hidden agendas; and identify when the parties agree or disagree, and clarify what the disagreement is about. Groups that have been at an impasse can make significant progress in a single facilitated meeting.
9. **One size does not fit all.** Dispute resolution needs to be a menu of choices so that agencies can use the approach that will fit their culture, leadership styles, and organizational structures.
10. **Finally, a dispute resolution system only works if people use it; otherwise, it is simply another plan on the shelf.**

5.6 Training in Problem Solving and Dispute Resolution

Study, training, and practice are keys to improving communication and conflict management skills. Appendix K contains a bibliography of conflict management and dispute resolution literature. Additional training opportunities include:

- FHWA will conduct regional interagency workshops on communication, negotiation, and dispute resolution based on this guidance.
- A list of available courses and schedule of offerings at the National Highway Institute can be found on the FHWA Web site <www.nhi.fhwa.dot.gov>.
- Interagency training at the beginning of a major transportation project should be considered. This may be the best way to build the team prior to initiating the review process, especially if key staff from the participating agencies are included, and examples of transportation projects from the local area are discussed or used in role-playing exercises. Recommended courses are those featuring “hands-on,” interactive activities or sessions that are adapted specifically for project level team building.

Many resource agencies offer courses that would be useful. Information regarding the courses can be found on the relevant agency’s website. These courses provide an opportunity to enhance knowledge and skills, and to learn about the missions and operating regimes of other agencies; this helps to strengthen interagency relationships. Periodic refresher training also provides an opportunity to reinforce and strengthen new skills and knowledge.

APPENDIX A

U.S. Institute for Environmental Conflict Resolution

The U. S. Institute for Environmental Conflict Resolution is a Federal program established by the U. S. Congress to assist parties in resolving environmental, natural resource, and public lands conflicts. The Institute is part of the Morris K. Udall Foundation, an independent Federal agency of the executive branch overseen by a board of trustees appointed by the President. The Institute serves as an impartial, non-partisan institution providing professional expertise, services, and resources to all parties involved in such disputes, regardless of who initiates or pays for assistance. The Institute helps parties determine whether collaborative problem solving is appropriate for specific environmental conflicts, how and when to bring all the parties to the table, and whether a third-party facilitator or mediator might be helpful in assisting the parties in their efforts to reach consensus or to resolve the conflict.

The provision of third party neutrals to provide professional assistance in managing conflict and resolving disputes is a principal component of the FHWA's National Dispute Resolution System. The U.S. Institute for Environmental Conflict Resolution (USIECR) assembled a panel of qualified facilitators and mediators to help the resource agencies obtain the services of these independent neutrals. The USIECR maintains a National Roster of Environmental Dispute Resolution and Consensus Building Professionals, and has assembled the Sub-Roster of Transportation Mediators and Facilitators (Transportation Roster). The Transportation Roster members are professionals with expertise in facilitating environmental reviews of transportation projects and mediating disputes that arise from such reviews. They received training on the USDOT's Environmental Streamlining efforts and the dispute resolution strategies presented in this document.

Transportation Roster membership covers a wide geographic area, with most states having at least one member. Contracting for the services of a member involves contacting the USIECR, describing the location of the project, the need for a facilitator or mediator, and working with USIECR staff to obtain profiles of candidate practitioners, and making a selection.

Rapid selection is obviously a critical need in order to start or restart the negotiation process or to resolve a dispute to maintain momentum and meet project timelines. Note that Federal Acquisition Regulations (FAR, Section 6.302 and 41 USC 253(c)399(c)) exempt the hiring of certain experts and neutrals used in dispute resolution from "full and open competition." This can expedite the procurement process. The mechanics of using the USIECR's services and contracting for a transportation mediator or facilitator are described on their website at www.ecr.gov. The cost of contracting can be covered by project funds.

APPENDIX B

Guidance Development and Review Process

The guidance presented in this document addresses a system to resolve a class of disputes – those associated with the review of transportation projects – rather than a process for resolving one specific dispute. To assist in designing the dispute resolution system, the USIECR assembles a team of specialist in ADR, several of whom have special expertise in the design of dispute resolution systems. Members included ADR practitioners in the private sector as well as ADR specialists in the public sector. The members of the development team were:

Robert Baum
Office of Hearings & Appeals
Department of the Interior
Washington, DC

Doug Thompson
US EPA, Region 1
Office of Ecosystem Protection
Boston, MA

Robert M. Jones, Director
Florida Conflict Resolution Consortium
Tallahassee, FL

Louise Smart
CDR Associates
Boulder, CO

Larry Gadt
Department of Agriculture, U.S. Forest Service
Washington, DC

John G. Wofford
Private Practitioner
Boston, MA

Jack Mahon
U.S. Army Corps of Engineers
Washington, DC

Discussions with the design team on designing the dispute resolution system were held during two meetings held in Washington, D.C., and in numerous conference calls. Some team members were also involved in reviewing drafts of the guidance document.

The draft guidance was reviewed by FHWA and other Federal agency representatives, as well as state agency representatives. The draft was also posted on the FHWA website where review comments were solicited.

The final guidance represents the collective input and wisdom of the agency representatives that were interviewed (see Appendix C), agency representatives who reviewed the draft, the FHWA Office of NEPA Facilitation, the USIECR design team, and the USIECR.

APENDIX C

Agency Stakeholder Interviews – Summary and Conclusions

This is an abstract of a report on the results of interviews with representatives from transportation, environmental resource, environmental regulatory and historic preservation agencies: *Environmental Streamlining Dispute Resolution Project, Alternative Dispute Resolution System Design – Stakeholder Interview Summary*, W. Steve Lee and Dale Keyes, U.S. Institute for Environmental Conflict Resolution, for the U.S. Department of Transportation, Federal Highway Administration, September 2000.

Purpose and Process

An important early step in designing an ADR system is to conduct an assessment of how disputes are currently managed or resolved and whether there is a need for new or improved dispute resolution processes. Stakeholders¹ are the best source of this information. The assessment results set the context for the design of an ADR system.

The USIECR sought from the FHWA and the other signatory agencies to the Environmental Streamlining National Memorandum of Understanding (MOU) recommendations of individuals from Federal and some key state agencies to consult during the assessment. In addition to the USDOT (FHWA and FTA), the signatory agencies to the MOU include the:

- U.S. Department of the Interior (Fish and Wildlife Service - USFWS and National Park Service - NPS)
- U.S. Department of Agriculture (U.S. Forest Service - USFS)
- U.S. Department of Commerce (National Marine Fisheries Service - NMFS)
- U.S. Army Corps of Engineers (USACE)
- U.S. Environmental Protection Agency (EPA), and
- Advisory Council on Historic Preservation

The FHWA and other members of the Environmental Streamlining Interagency Work Group² provided the names of the people with experience in transportation planning and NEPA. These included representatives from each of the Federal agencies listed above, state departments of transportation (state DOTs), and state historic preservation offices (SHPOs). As the table below shows, a total of 34 interviews were conducted with individuals with at least one interview in each of ten Federal regions. In

¹ A stakeholder is one who is directly affected by the outcome of a decision-making process, and can include government agencies, advocacy groups and individual citizens. However, because this effort focuses on disputes involving Federal and state agencies, the stakeholders referenced in this discussion are the individuals most likely to represent an agency's interests in a negotiation.

² The Environmental Streamlining Interagency Work Group includes representatives from each of the signatory agencies to the National Environmental Streamlining MOU. The purpose of the Work Group is to implement and support environmental streamlining efforts in their respective agencies.

addition, eight consultations were conducted with headquarters staff of environmental resource and regulatory agencies in Washington, DC (see footnote 4).

INTERVIEWS BY AGENCY AND FEDERAL REGION³

Federal Region

AGENCY (Interviews)	1	2	3 ⁴	4	5	6	7	8	9	10
USACE (4)										
FHWA ⁵ (5)										
FTA (4)										
USFWS (2)										
NMFS (5)										
SHPO ⁶ (2)										
EPA (3)										
USFS (2)										
State DOTs (14)										
Other ⁷ (1)										

The interviews were conducted by telephone during May and June 2000 by W. Steve Lee. Each interview lasted an average of 45 minutes.

The purpose of the interviews was to capture individual experiences and observations related to the NEPA review process as it is applied to transportation projects. The interview subjects were not provided any questions in advance of the interview. It is important to note that the interview subjects spoke on the understanding that the comments would not be attributed to a specific individual. However, many of the statements below do mention specific agencies. In some instances the interviews included more than one representative from the agency.

The interviews collectively constitute a survey of stakeholders. However, no attempt was made to assure statistical representativeness whereby results could be evaluated quantitatively by geographical area or agency. Instead, common experiences and general themes were sought that could be used to inform the design of an ADR system.

Interview Topics

The following topics were used as an organizing structure for the interviews:

- Factors that Slow the Project Development and NEPA Review Processes
- Conflicts that Lead to Impasse
- How Conflicts are Resolved Currently

³ See Appendix A for more detail.

⁴ This column includes discussions with headquarters staff in Washington, DC to identify particular concerns for their agency and to identify candidates for consultation.

⁵ This row includes state level FHWA Division Offices and Regional Resource Centers. See Appendix A for more detail.

⁶ SHPO is an acronym for State Historic Preservation Office(er). There is a designated SHPO in each state.

⁷ This represents a nonprofit environmental organization.

- Experience with Facilitation/Mediation and Training
- Examples of Successful Conflict Management and Resolution
- Suggested Roles for the FHWA

Conclusions

Following are general conclusions drawn from the interviews:

1. Experience with transportation development and environmental review varies substantially among states and among agencies. A “one size fits all” approach to environmental streamlining and, more specifically, to the design of an ADR system, is not appropriate.
2. Collaborative planning and decision-making in the early stages of transportation project development should work seamlessly with conflict resolution processes implemented at the NEPA review stage. Taken together, they should be viewed as conflict management.
3. Collaborative activities during the NEPA review process are also useful in reducing the frequency and intensity of conflict.
4. Financial constraints continue to be a major limitation to the ability of resource and regulatory agencies to engage in collaborative processes. Funding of resource and regulatory agency positions by state DOTs as allowed under TEA-21 appears to overcome this impediment where it has been used.
5. Reaching agreements among agencies on points of concurrence, timelines for sign-offs, and the written records of concurrence will set the stage for faster reviews and better management of disputes when they arise.
6. Most current dispute resolution systems employ elevation procedures. However, the nature of the elevation varies significantly among agencies and by applicable regulation.
7. Model environmental streamlining structures address conflict resolution by identifying specific points of concurrence in the environmental review process, and designing processes to be applied at each of these points.

APPENDIX D

ENVIRONMENTAL STREAMLINING NATIONAL MEMORANDUM OF UNDERSTANDING

Section 1309 of the Transportation Equity Act for the 21st Century (TEA-21) calls for a coordinated environmental review process to expedite Federal highway and transit projects. The agencies below agree to streamline environmental review processes in accordance with TEA-21 and other relevant environmental statutes in ways that reinforce our Federal responsibility to protect the environment. To meet this commitment, we agree to:

Reduce Project Delays

- Identify solutions such as programmatic agreements to reduce unnecessary project delays, including delays caused by staffing constraints, and to amend rules and policies where needed without compromising environmental quality.
- Apply the necessary technical and financial resources to identify and resolve issues early, especially on projects that are not typical or have potential to create the most damaging impacts to the environment.
- Direct field organizations to work collaboratively to develop processes that assure the timely, cost-effective development of sound transportation plans and projects.
- Emphasize the use of concurrent review of plans and projects.
- Develop national procedures for dispute resolution and encourage the use of appropriate mechanisms and organizations.
- Provide timely review and constructive comments on transportation proposals focusing additional information requests on information which is needed to reach an informed decision.
- Support and encourage field offices to explore flexible streamlining opportunities on their own and with state transportation and environmental partners including developing MOUs to lay out mutual expectations, funding agreements in support of streamlining, and concurrent review within cooperatively determined time frames. One example might be pilot projects to investigate new methodologies that lead to a single public interest decision to satisfy multiple agency requirements.
- Establish, with stakeholder input, goals, performance measures, and benchmarks to evaluate transportation and environmental decision making

Protect and Enhance Environmental Quality

- Work with project sponsors to ensure that they comply fully with all applicable environmental laws, regulations, and policies, and address fully any information needs associated with such statutes by providing complete and high quality information within the relevant timeframes.
- Seek to identify information needs early so the relevant environmental statutes can be addressed fully.

- Recognize effective local or regional coordination processes that are currently underway, build upon and publicize successful practices, and promote creative solutions and innovative methods that reduce economic and environmental costs.
- Assess alternative actions and identify the action that is in the best overall public interest.
- Ensure broad stakeholder involvement, including nontraditional stakeholder, as well as underserved and underrepresented constituencies, and public participation throughout the environmental review process.

We will strive to ensure that transportation projects are protective of and more compatible with the natural and human environment and we commit to continuously improve and streamline the processes used to develop those projects.



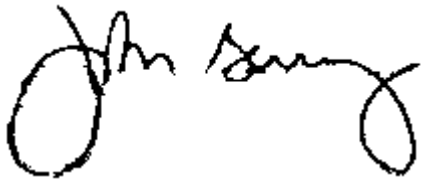
Mortimer L. Downey
Deputy Secretary
U.S. Department of Transportation
7-20-99

Date



Joseph W. Westphal
Assistant Secretary of the Army
U.S. Army Corps of Engineers
7-01-99

Date



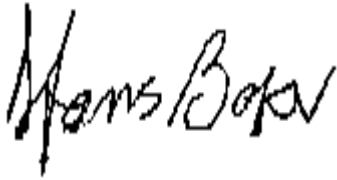
John Berry
Assistant Secretary
Policy, Management and Budget
U.S. Department of Interior
7-08-99

Date



Peter D. Robertson
Acting Deputy Administrator
U.S. Environmental Protection Agency
7-01-99

Date



D. James Baker
Undersecretary for Oceans
and Atmosphere
U.S. Department of Commerce

7-14-99

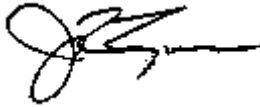
Date



Cathryn Buforn Slater
Chairman
Advisory Council for Historic Preservation

7-08-99

Date



James R. Lyons
Under Secretary for Natural
Resources and Environment
U.S. Department of Agriculture

7-20-99

Date

APPENDIX E

Example Guiding Principles for Problem Solving and Dispute Resolution

Following are overarching principles for negotiating, solving problems and resolving disputes during the project review stage. They have been borrowed from programs in selected states, and are offered here as initial considerations for developing a framework for negotiations and dispute resolution.

- Each agency has a seat at the table, and its role and responsibility must be respected.
- Each agency should come to the table with an open mind, prepared to work to find an acceptable transportation solution that is compatible with its mission.
- Agencies will strive to provide sufficient staffing for full participation in the process.
- Scoping is open and continuous throughout the process.
- At major project milestones, agencies will participate in concurrence points.
- After formal concurrence, agencies will not revisit a milestone unless there is substantive new information that warrants reconsideration.
- To resolve disagreements, issues should be addressed as soon as possible and at the lowest level possible.

APPENDIX F

Example Discussion Groundrules

Discussion groundrules provide a structure for negotiation and problem solving in meetings. They are designed to manage discussion, encourage constructive exchange of ideas, and move participants toward solutions to disagreements. Groundrules should be developed and agreed upon by all participants at the beginning of the transportation planning or project review process.

General groundrules may cover a wide range of topics, such as: representation and attendance, speaking issues (e.g., the order and length of presentations), the structure of discussions, how agreement will be determined (e.g., majority vote or consensus and how consensus will be defined), documentation of agreements, and issues of confidentiality and relationships with the media. Many of these items are discussed separately in Section 5. The focus here is on discussion groundrules. Following are typical groundrules for assuring that discussions are constructive and efficient:

- Wait to be recognized by the chair before speaking.
- Be focused and brief in your presentation; stay on the subject being discussed.
- Be open and forthcoming; share information, ideas and concerns.
- Be respectful; no put-downs or use of derogatory language.
- Allow the other participants to speak without interruption.
- Listen carefully to what is said; try to understand the basic interests of the presenter.
- Check that you understand by restating what you heard in your own words.
- Try to think of ways in which everyone's interests can be satisfied.

APPENDIX G

Maryland Conflict Resolution Hierarchy

*MARYLAND'S
STREAMLINED
ENVIRONMENTAL
AND REGULATORY
PROCESS*

(for Transportation Projects)

CONFLICT RESOLUTION PROCESS

While the conflict resolution process will likely be used most often to resolve issues associated with the streamlined environmental/regulatory process concurrence points, SHA and/or any of the concurring/commenting agencies may request that the process be initiated to resolve any issue when an impasse has been reached. (Depending on the nature of the conflict, it may be appropriate to involve agencies other than those actually initiating the resolution process (i.e., other interested environmental agencies, local governments, etc.)) The sample process outlined below indicates how the process is envisioned to work in resolving issues relating to the environmental/regulatory concurrence process.

After reviewing the draft concurrence/comment package prior to the formal Interagency Review presentation, an agency may identify an issue which would prevent it from concurring. The agency should notify SHA of the issue via E-mail, no later than 2 weeks prior to the formal presentation. This notification should specify whether any additional information is needed and should also specifically request time to caucus at the upcoming monthly Interagency Review meeting, if necessary. SHA will try to address these concerns at the upcoming Interagency Review meeting.

SAMPLE PROCESS

- After the formal Interagency Review presentation, a caucus session may be convened (if requested) as Step 1 in the conflict resolution process. Following the caucus, the results should be reported before conclusion of the interagency meeting, along with a determination of whether resolution was achieved. If not, agencies must specify what information is required to resolve the issue to their satisfaction and whether Step 2 of the conflict resolution should be initiated.
- If resolution of the issue was achieved, SHA will circulate the final version of the concurrence/comment package to the agencies within 2 weeks of the Interagency Review meeting, updated to include any supplemental information requested at the meeting.
- If SHA is unable to address agency comments on the preliminary package, the cover letter transmitting the formal package will indicate the reason why this information has not been furnished, and may include a request by SHA to initiate Step 2 of the conflict resolution process.

- Within 2 weeks of receipt of the formal concurrence/comment package, a non-concurring agency sends formal written correspondence to SHA, specifying issues still preventing concurrence and identifying any additional information needed to resolve the issue(s). The letter should also document that Step 2 in the conflict resolution process has been initiated and request that a meeting with appropriate agencies be scheduled.
- A Step 2 meeting of appropriate working staff and/or first level managers from the agencies in conflict is scheduled (within 15 days of receipt of a written or verbal request), and additional information is developed for presentation at the meeting.
- At least 7 days prior to the meeting, SHA provides an agenda outlining the purpose of the meeting, issues to be discussed, and any new information that will be provided in response to agency requests.
- At the conclusion of the meeting, the participants should recommend elevating any issues still in dispute to subsequent steps in the conflict resolution process. Minutes of the meeting should be prepared and distributed by SHA within 7 days of the meeting which reflect any agreements reached, any issues still outstanding, and concluding recommendations for further action (if required).
- Should the conflict remain unresolved past Step 2 in the process, the issue(s) will be elevated through subsequent meetings between the Interagency Managers, using the same procedure previously outlined, until a resolution of the issue(s) has been agreed upon.

APPENDIX H

Example Executive Panel Structure for Upward Referral of Disputes

Following is a “Standing Executive Panel” form of conflict resolution under consideration by a state DOT. This structure could be used on a project-specific basis, or it could be established on an on-going basis for a series of projects.

Agreement:

The key to prevention/resolution of conflicts on complex transportation projects, which involve 404 issues, is regular, continuous dialogue across the agencies, at all levels. The leadership of these agencies (the state DOT, FHWA, and US Army Corps of Engineers) will meet regularly as a Board to model an open, trusting, and problem solving approach where concerns can be laid on the table and the agencies will focus attention on working them out. The Board process will serve as the state’s conflict resolution plan. This process must be defined so it can continue if and when personnel changes occur in leadership positions in these agencies.

Implementation:

The FHWA Division Administrator, the District Commander of the US Army Corps of Engineers, and the Deputy Director of the state DOT (chosen because of his environmental leadership role for the DOT) will serve as an Executive Board (“the Board,”) and will meet regularly. The Board will serve as the state’s conflict resolution process. The purpose of this Board is to:

- Advance the program or project through resolution of issues and meeting the needs of the transportation, regulatory, and resource agencies
- Provide corporate guidance on tough projects where: there are unresolved issues, timely agreement at key project development points cannot be achieved at the staff level, or higher authority is needed to approve a course of action or use of resources suggested by the staff level
- Forge general agreements that may impact multiple projects or issues
- Model a practice of working together to solve problems and a commitment to moving the program forward to whatever outcome is appropriate

The philosophy of the Board is that the Board’s function is to help the project managers be successful by using the Board’s authority to remove barriers to resolution and to assume risks where necessary. The focus will be to attack the problem, not to criticize an agency or person. Board members will approach issues both from their agency viewpoint and from a corporate, multi-agency perspective.

Operational structure of the Board:

1. The Board will meet monthly at first (shifting to bi-monthly later, if appropriate). Board meetings will typically be scheduled for two hours.

2. The Board will hold special meetings when an issue arises that needs their attention and that cannot wait until the regularly scheduled meeting. The project manager can request special meetings of the Board.
3. The Board meetings will be working sessions where the Board discusses issues in the presence of relevant staff. The Board decides what staff is needed for each meeting, depending on the issues on the agenda. The staff help the Board maintain perspective on local, pragmatic needs inherent in the presented issue.
4. The responsibility for hosting the meeting (arranging the meeting place and developing the agenda) will rotate among Board members.
5. The host agency will gather agenda items from its staff and from the other agencies and will then distribute the agenda to the agencies so that each agency can bring the appropriate staff/information to the meeting.
6. Any project manager or agency may raise an issue to the Board. The Board will focus on those issues that will affect time, quality, cost, and location/design of the project as well as those more general issues that have crosscutting implications for multiple projects or interagency processes.
7. The person who raises an issue will take the lead in the discussion of the issue. Each affected agency will participate in the briefing on the issue.
8. Regular Board meeting agendas will include:
 - Informational updates
 - Review of critical projects with problems
 - Decision making on application of policy, procedures (general things)
 - Relationship building/sharing what's going on
9. Where there is lack of agreement at key points in the streamlining program/project development process, including non-agreement from other agencies, the Board will make a decision on whether the project should advance to the next step.
10. Documentation from each Board meeting will include (a) decisions that were made and (b) actions that were agreed to, identifying the party responsible for undertaking the action and the time frame for the action.
11. When people raise issues that are not appropriate for Board deliberations, the Board or an individual Board member can make procedural decisions on how to address these issues, or an individual Board member can take action outside Board meetings to get these issues resolved.

APPENDIX I

Joint Briefing Paper Template

Following is a template that could be used to prepare joint briefing paper to accompany a dispute that is referred upward for resolution by higher authorities.

The purpose of the Joint Briefing Paper is three-fold:

- (1) To ensure there is a common definition of the issue and to focus the decision makers on the question to be resolved.
- (2) To indicate the nature of the issue and the type of expertise needed to aid informed decision making.
- (3) To clarify areas of agreement and disagreement and provide a simple, succinct description of the issue(s) and situation.

The paper is prepared jointly by the participating agencies. In cases where decisions makers request agency position papers or “background papers,” these should be prepared separately by the respective agencies.

A. Joint overview of the issues (3-5 pages):

1. *The Question.* [The key question to be answered by the decision makers, including a joint statement of recommendation, if any, by the agencies.]
2. *Issue Descriptions.* [A brief statement of the nature of the issue, identifying whether they are legal, technical, policy or resource in nature. The issue description may identify sub-issues that are included under the main issue.]
3. *The Urgency of the issues.* [A description of the need and a recommended timeline for decision making, including a statement of the consequences of delay in decision making.]
4. *The Potential Impact of the Issues/Decision.* [An identification of the risk, cost, precedent-setting nature, local/regional/national significance and other impacts and implications of the issues.]
5. *Assertions.* [A listing of the assertions of each participating agency relevant to each unresolved issue.]
6. *Background and Findings of Fact.* [A succinct description of the historical and/or environmental conditions of the site or situation that sets the stage or context for the issue. This section may include a stipulation of relevant facts to which the parties agree and an identification of facts which remain in disagreement. Quotations from relevant documents may be included as part of the informational background to the issue.]
7. *Options Considered to Date.* [A listing, with brief descriptions, of the options that have been considered to date by one or more of the participating agencies. The listed options provide a set of decisions from which the decision makers may

or may not select. This listing of options provides specificity to the decision makers about the response that is requested.]

- B. Supportive documents. [Relevant attachments, such as cost analyses, technical or legal evaluations, documents from regulatory agencies, etc.]

APPENDIX J

Bibliography of Conflict Management and Dispute Resolution Literature

Following is a selected list of key books on various aspects of conflict management and dispute.

Meeting Facilitation

Doyle, Michael and Straus, David (1984). *How to Make Meetings Work*. New York, NY: Jove Books.

Communication and Negotiation

Fisher, Roger and Ury, William (1985). *Getting to Yes: Negotiating Agreement Without Giving In*. New York, NY: Penguin Books.

Lewicki, Roy. J.; Saunders, David M.; and Minton, John W. (1999). *Negotiation*. Boston, MA: Irwin/McGraw-Hill.

Ury, William (1993). *Getting Past No*. New York, NY: Bantam Books

Collaborative Problem Solving and Consensus-Building

Gray, Barbara (1989). *Collaborating: Finding Common Ground for Multiparty Problems*. San Francisco, CA: Jossey-Bass Publishers.

Policy Consensus Initiative (1999). *A Practical Guide to Consensus*. Bismark, ND: Policy Consensus Initiative.

Susskind, L., and Cruikshank, Jeffrey (1987). *Breaking the Impasse. Consensual Approaches to Resolving Public Disputes*. New York, NY: Basic Books.

Susskind, L.; McKernan, Sarah; and Thomas-Larmer, Jennifer (1999). *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*. Thousand Oaks, CA: Sage Publications.

Mediation and Dispute Resolution

Moore, Christopher W. (1986). *The Mediation Process. Practical Strategies for Resolving Conflict*. San Francisco, CA: Jossey-Bass Publishers.

Nagel, Stuart S. and Mills, Miriam K. (eds) (1991). *Systematic Analysis in Dispute Resolution*. New York: Quorum Books.

Ury, William L.; Brett, Jeanne M.; and Goldberg, Stephen B. (1993). *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*. Cambridge, MA: Program on Negotiation at Harvard Law School.

Environmental Conflict Resolution

Bingham, Gail (1986). *Resolving Environmental Disputes: A Decade of Experience*. Washington, DC: The Conservation Foundation.

Rubino, Richard G. (1990). *Mediation and Negotiation for Planning, Land Use Management, and Environmental Protection: An Annotated Bibliography of Materials*. 1980-1989. Chicago, IL: Council of Planning Librarians.

Susskind, Lawrence; Bacow, Lawrence; and Wheeler, Michael (eds) (1983). *Resolving Environmental Regulatory Disputes*. Cambridge, MA: Schenkman, Publishing Co.

Managing Scientific and Technical Data in Collaborative Processes

Adler, Peter; Barrett, Robert; Bean, Martha; Birkhoff, Juliana; Ozawa, Connie; Rudi, Emily (2000). *Managing Scientific and Technical Information in Environmental Cases: Principles and Practices for Mediators and Facilitators*. Washington, DC: RESOLVE, Inc, U.S. Institute for Environmental Conflict Resolution, Western Justice Center Foundation.

Rovers, Frank A. (2000). *The Use of Technical Experts and High Tech Tools in Alternative Dispute Resolution. (The Technical Experts Perspective)*. Waterloo, Ontario Canada. Conestoga-Rovers & Associates.

Titerle, Jim, and Hughes, Nicholas R. (2000). *What we learned in Atlanta: The Use of Experts and High Tech Tools in Mediations*. Vancouver, British Columbia: McCarthy Tetrault.

Appendix K

<u>Federal Agency Roles and Responsibilities Under NEPA and Environmental Streamlining</u>				
<u>AGENCY</u>	<u>1a) What is your agency's mission?</u>	<u>1b) What is your agency's responsibility under NEPA?</u>	<u>2a) What is your agency's role in NEPA?</u>	<u>2b) What is your agency's role in carrying out environmental streamlining?</u>
<u>ACHP</u>	<ul style="list-style-type: none"> Promote protection and enhancement of resources. Ensure that preservation values are factored into Federal agency planning and decisions through the Section 106 process. 	<ul style="list-style-type: none"> The Council establishes standards for Agency use of the NEPA process for Section 106 purposes and reviews environmental documents when NEPA/NHPA 106 review are coordinated per 36CFR 800.8. 	<ul style="list-style-type: none"> Oversees the Section 106 review process, facilitates program agreements for expediting routine projects. Facilitates programmatic agreements for expediting routine projects. Provides guidance on planning involvement under Section 106. 	<ul style="list-style-type: none"> Advocate for agencies to advance unresolved controversial issues up through the appropriate channels. Serve an educational role, giving all parties involved a greater understanding of the Section 106 process and the need to initiate the process early.
<u>FHWA</u>	<ul style="list-style-type: none"> Continually improve the quality of our nation's highway system and its intermodal connections. Protect and enhance the environment. 	<ul style="list-style-type: none"> Ensure compliance. Abide by the law to ensuring that proper documentation exists. Use NEPA as a forum for decision making. Act as the steward for the environment. 	<ul style="list-style-type: none"> Be an effective Federal lead agency – this role also applies to the Federal Transit Administration (FTA). Bring together legal constructs and stakeholders (especially Federal agencies), in order to meet all the various, sometimes conflicting, needs. Manage the process so transportation projects can be implemented. 	<ul style="list-style-type: none"> Establish the regulatory framework for establishing a coordinated review process as called for in TEA-21. Find tools for everyone involved to work better together.
<u>EPA</u>	<ul style="list-style-type: none"> Safeguard the natural environment. Protect human life. 	<ul style="list-style-type: none"> Review all Environmental Impact Statements (EISs); comment on EISs in writing; make EIS comments available to the public (Section 309 Clean Air Act). Identify problems and refer unsatisfactory projects to CEQ. 	<ul style="list-style-type: none"> Work with the project's lead agency to ensure that environmental statutes are met (per Section 309 of Clean Air Act and Section 404 of Clean Water Act). Take broad look at issues – ecosystem management, environmental justice, biodiversity, and aquatic habitats. 	<ul style="list-style-type: none"> Establish multi-disciplinary teams to get the right people to the right meeting at the right time. Promote cooperative agreements for the Section 404 process.
<u>USACE</u>	<ul style="list-style-type: none"> Protect the nation's aquatic resources. Provide for fair 	<ul style="list-style-type: none"> Identify, evaluate, and permit projects that affect aquatic 	<ul style="list-style-type: none"> Serve as a regulatory and cooperating agency. 	<ul style="list-style-type: none"> Advocate early involvement in the scoping of projects.

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	decisions. <ul style="list-style-type: none"> • Provide timely decisions. 	resources.	<ul style="list-style-type: none"> • Participate in the review process for the nation's aquatic resources. 	<ul style="list-style-type: none"> • Shorten decision making times.
<u>FS</u>	<ul style="list-style-type: none"> • Care for the 191 million acres of land under FS jurisdiction. 	<ul style="list-style-type: none"> • Participate early and often in an integrated way with other agencies' planning processes. • Serve dual role of land manager and transportation manager, which involves collaborative relationships in order to protect the National Forests for the purposes for which they were created. 	<ul style="list-style-type: none"> • Create roads that provide sustainable access to the nation's forests and are managed within the environmental capability of the land. • Provide safe, convenient, and efficient travel on 380,000 plus miles of National Forest roads. 	<ul style="list-style-type: none"> • Identify transportation needs. • Envisions the creation of state level MOUs that have provisions for dispute resolution and specifics on how agencies should work together. • Coordinate state activity.
<u>FWS</u>	<ul style="list-style-type: none"> • Conserve, protect, and enhance fish and wildlife and their habitats for the benefit of the American people. 	<ul style="list-style-type: none"> • Provide technical assistance to other agencies. 	<ul style="list-style-type: none"> • Ensure sustainability. • Keep the NEPA process moving. 	<ul style="list-style-type: none"> • Implement Reimbursable Agreements between USDOT and FWS. • Appoint regional transportation coordinators to provide technical assistance on environmental streamlining.