

How to NEPA the TTP Way

FHWA Tribal
Transportation Program

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35 Tribes

Regions (7): Rocky Mountain, Great Plains,
Western, Southwest, Southern
Plains, Navajo and E.
Oklahoma and Eastern

States (11): North and South Carolina,
North and South Dakota, New
Mexico, Arizona, Oklahoma,
Texas, Massachusetts, Connecticut and
New York

The Environmental Process for the Tribal Transportation Program

(FHWA OTT)

What is NEPA??

National Environmental Policy Act (NEPA) (1969)

- It is the “National Charter” for protection of the environment, and it applies to all federal actions.
- Requires that a Federal agency consider **the impacts** of its activities on the natural and human environment.
- NEPA provides a comparative process that allows the decision maker (Federal Agency) to make an informed decision.



NEPA Umbrella

- National Historic Preservation Act
- Endangered Species Act
- Coastal Zone Management Act
- Clean Air Act
- Clean Water Act
- Section 4(f) - Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites
- Section 6(f) - Land and Water Conservation Fund Act
- Fish and Wildlife Coordination Act
- Farmland Protection Policy Act
- Native American Graves Protection and Repatriation Act
- Protection of Wetlands Executive Order
- Floodplain Management Executive Order
- Procedures for Abatement of Highway Traffic Noises and Construction Noises
- Applicable Tribal/State laws
- Other applicable Federal laws and regulations

Great, But What IS NEPA?

- NEPA is a CONSULTATION PROCESS (not regulatory)
- It is “Procedural” not “Substantive”
- About the process, not necessarily about the resulting decision.
- Did we follow the process? Did we do our “due diligence”?
Did we attempt to discern all impacts and take them into account? Did we include all affected parties?
- The regulations that the NEPA process covers may be regulatory.

When does NEPA officially start and why?

What is the difference between NEPA and the Environmental Process?

When should “NEPA” really start?

NEPA and the Environmental Process

- “NEPA” officially begins with a clear purpose and need, scope of work, range of alternatives, and initiation of the consultation process.
- The Environmental Process should begin much earlier, during planning.
- Need to have starting dates to understand timelines and deadlines.

Whose NEPA Process?

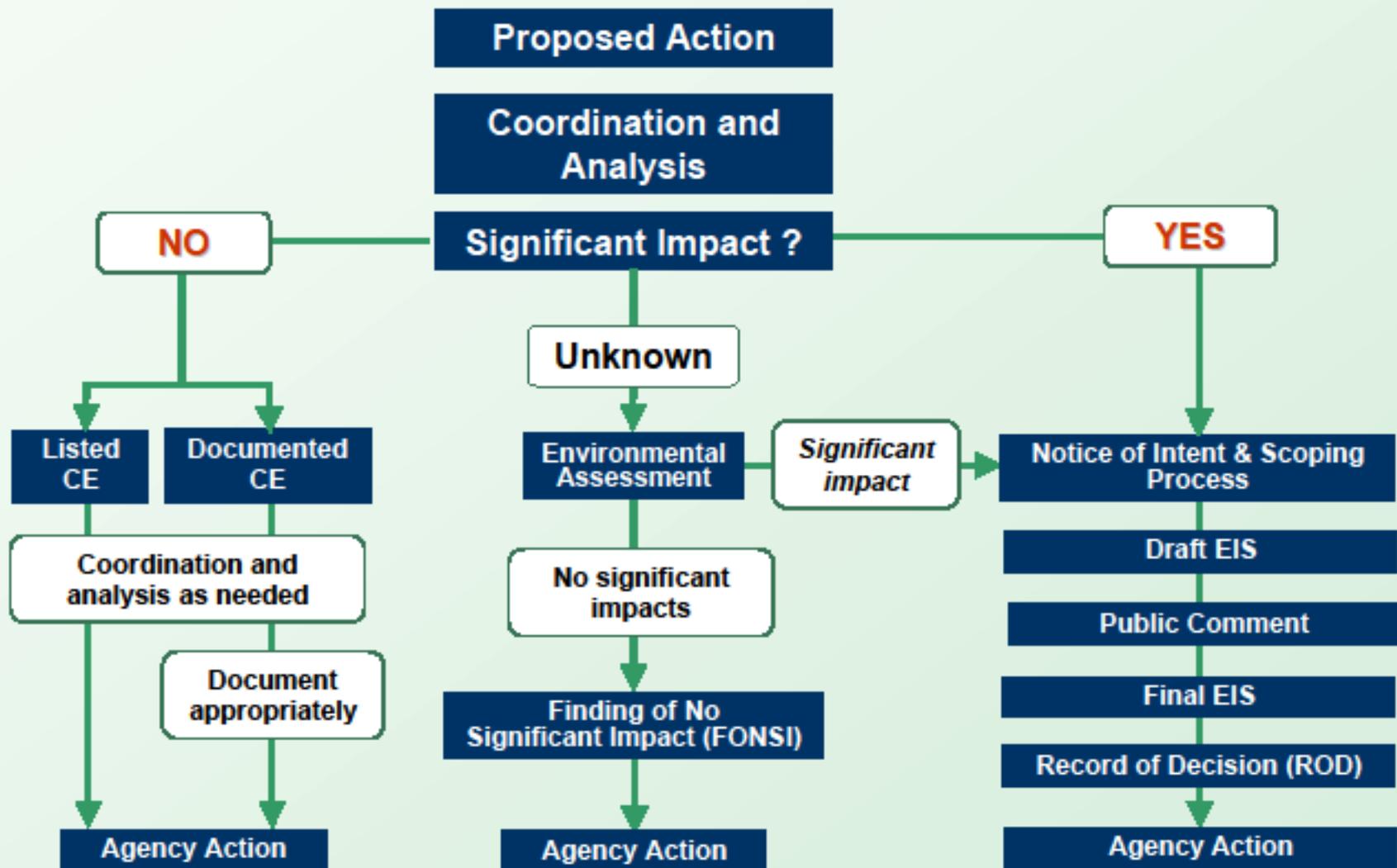
NEPA is a Federal Function, but the process used to document and “clear” an action is determined by specific guidance from agency to agency.

Which process is used to document an action or a project will be determined by who is the LEAD AGENCY (who is funding)

3 Types of NEPA Documents

- Environmental Impact Statement
 - Used when a project will or is likely to result in significant environmental impacts
- Categorical Exclusion
 - Used for certain types of projects that normally will not result in significant environmental impacts
- Environmental Assessment
 - Used when it is uncertain if a project will result in significant environmental impacts

NEPA Process Options (Classes of Action)



Categorical Exclusions

- Around 90% of the Projects funded by the TTP are Documented or “Environmentally Cleared” using Categorical Exclusions (Cat Ex, Cat X, CX, etc.)

Categorical Exclusions

- Cat Ex does not mean that a project is excluded from the NEPA process and can automatically proceed.
- Though a project may be documented as a Cat Ex for NEPA, Lead Agencies still needs to fulfill requirements and obligations of ALL regulations (Example: Section 106)

Tribal Transportation Program (TTP)

Largest Federal Lands Highway Program

Began in 1983 – as the Indian Reservation Roads (IRR) Program.

Jointly managed and administered by BIA and FHWA

Serves 573* Federally recognized Tribes.

Implementing Regulations

- Tribal Transportation Program
 - FHWA, BIA and OSG
 - 25 CFR 170.450

- Federal Highway Administration
 - 23 CFR 771

Implementing Regulations

- 25 CFR 170.450
 - Basically states that this program will abide by all applicable environmental laws and FHWA regs in 23 CFR 771
 - Appendix A to Subpart D of 25 CFR 170.450.

The NEPA and Environmental Clearance Process

Currently, NEPA Guidance comes from 2 Sources:

FHWA= 23 CFR 771

BIA= Department of the Interior's
516 Department Manual

BIA NEPA Process Will Soon Use FHWA REGs

- § 170.453: Do the Categorical Exclusions under the National Environmental Policy Act (NEPA) and the regulations at 23 CFR 771 apply to TTP activities?
 - Yes. Regardless of whether BIA or FHWA is responsible for the oversight of a Tribe's TTP activities, the Categorical Exclusions under NEPA at 23 CFR 771.117 governing the use of funds made available through title 23 shall apply to all qualifying TTP projects involving the construction or maintenance of roads.

The BIA Environmental Process

Categorical Exclusions

- A. Categorical Exclusions (CX) (1508.4).
 - (1) The following criteria will be used to determine actions to be categorically excluded from the NEPA process: (a) The **action or group of actions would have no significant effect on the quality of the human environment**; and (b) The action or group of actions would not involve unresolved conflicts concerning alternative uses of available resources.

The BIA Environmental Process

Categorical Exclusions

- (2) Based on the above criteria, the classes of actions listed (in Appendix 1 to this Chapter) are categorically excluded, Department-wide, from the NEPA process. A list of CX specific to Bureau programs will be included in each Bureau Appendix to Chapter 6.
- (3) The exceptions (listed in Appendix 2 to this Chapter) apply to individual actions within CX. Environmental documents must be prepared for any actions involving these exceptions.

The BIA Environmental Process

Categorical Exclusions

- (4) Notwithstanding the criteria, exclusions and exceptions above, **extraordinary circumstances may dictate or a responsible Departmental or Bureau official may decide to prepare an environmental document.**

The BIA Environmental Process

Categorical Exclusions

- Actions (Projects Types) listed in 516 DM 2, Appendix 1 and 516 DM 10.5
 - These have been determined not to individually or cumulatively affect the quality of the human environment
- However, exceptions do exist for exclusions
 - If the normally excluded action could result in significant effects upon the environment

BIA Categorical Exclusions: 516

DM 10.5

- A. Operations, Maintenance, and Replacement of Existing Facilities
- B. Transfer of Existing Federal Facilities to Other Entities
- C. Human Resources Programs
- D. Administrative Actions and Other Activities Related to Trust Resources
- E. Self Determination and Self-Governance
- F. Rights-of-Way
- G. Minerals
- H. Forestry
- I. Land Conveyance and Other Transfers

BIA Categorical Exclusions: 516

DM 10.5

- J. Reservation Proclamations
- K. Waste Management
- L. Roads and Transportation

BIA Categorical Exclusions that typically Apply to Transportation Projects

- 516 DM 10.5 (A)
 - Operation, Maintenance, and Replacement of Existing Facilities. Examples-Renovation of buildings, road maintenance and limited rehabilitation of irrigation structures.
- 516 DM 10.5 (F)(1)
 - **Rights-of-Way** inside another **ROW**, or amendments to ROW where no deviation from or additions to the original ROW are involved and where there is **existing NEPA analysis** covering the same or similar impacts in the ROW area

BIA Categorical Exclusions that typically Apply to Transportation Projects

- 516 DM 10.5 (F)(2)
 - Service line agreements to an individual residence, building or well from an existing facility where installation will involve no clearance of vegetation from the ROW other than for placement of poles, signs (including highway signs), or buried power/cable lines.

- 516 DM 10.5 (F)(3)
 - Renewals, assignments and conversions of existing ROW where there would be essentially no change in use and continuation would not lead to environmental degradation.

BIA Categorical Exclusions that typically Apply to Transportation Projects

- 516 DM 10.5 (G)(1)
 - Approval of permits for geologic mapping, inventory, reconnaissance and surface sampling collecting.
- 516 DM 10.5 (L)(1)
 - Approval of utility installations along or across a transportation facility located within the limits of the roadway ROW
- 516 DM 10.5 (L)(2)
 - **Construction of bicycle and pedestrian lanes and paths** adjacent to existing highways and within the existing ROW
- 516 DM 10.5 (L)(3)
 - Activities included in a “highway safety plan” under 23 CFR 402.

BIA Categorical Exclusions that typically Apply to Transportation Projects

- 516 DM 10.5 (L)(4)
 - Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.
- 516 DM 10.5 (L)(5)
 - Emergency repairs under 23 U.S.C 125
- 516 DM 10.5 (L) (6)
 - Acquisition of scenic easements
- 516 DM 10.5 (L) (7)
 - Alterations to facilities to make them accessible for the elderly or handicapped

BIA Categorical Exclusions that typically Apply to Transportation Projects

- 516 DM 10.5 (L) (8)
 - Resurfacing a highway without adding to the existing width
- 516 DM 10.5 (L) (9)
 - Rehabilitation, reconstruction or replacement of an existing bridge structure on essentially the same alignment or location (examples: widening, adding shoulders or safety lanes, walkways, bikeways or guardrail).
- 516 DM 10.5 (L) (10)
 - Approvals for changes in access control within the existing right-of-ways.

BIA Categorical Exclusions that typically Apply to Transportation Projects

- 516 DM 10.5 (M) (1)
 - Data gathering activities such as inventories, soil and range surveys, timber cruising, geological, geophysical, archeological, paleontological and cadastral surveys.
- 516 DM 10.5 (M) (3)
 - Actions where BIA has concurrence or co-approval with another Bureau and the action is categorically excluded for that Bureau
- 516 DM 10.5 (M) (4)
 - Approval and issuance of permits under the Archaeological Resources Protections Act (16 U.S.C. 470aa-II) when the permitted activity is being done as part of action for which a NEPA analysis has been, or is being prepared.

BIA NEPA Process Will Soon Use FHWA REGs

- § 170.453: Do the Categorical Exclusions under the National Environmental Policy Act (NEPA) and the regulations at 23 CFR 771 apply to TTP activities?
 - Yes. Regardless of whether BIA or FHWA is responsible for the oversight of a Tribe's TTP activities, the Categorical Exclusions under NEPA at 23 CFR 771.117 governing the use of funds made available through title 23 shall apply to all qualifying TTP projects involving the construction or maintenance of roads.

FHWA Categorical Exclusions

- (a) Actions which, based on past experience with similar actions, do not involve significant environmental impacts.
 - do not induce significant impacts to planned growth or land use for the area;
 - do not require the relocation of significant numbers of people;
 - do not have a significant impact on any natural, cultural, recreational, historic or other resource;
 - do not involve significant air, noise, or water quality impacts;
 - do not have significant impacts on travel patterns;
 - do not otherwise, either individually or cumulatively, have any significant environmental impacts

Unusual Circumstances

- (b) Any action which normally would be classified as a CE but could involve unusual circumstances will require appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:
 - 1) Significant environmental impacts;
 - 2) **Substantial controversy on environmental grounds;**
 - 3) Significant impact on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act; or
 - 4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

FHWA Categorical Exclusions

- FHWA has 2 groups of CEs: **c-list** and **d-list**.
 - Comes from 23 CFR 771.117 **(c)** and **(d)**
- Actions in c-list normally do not require further NEPA approval by FHWA.
- Actions in d-list require formal approval (i.e. signature) by the appropriate FHWA official.
- FHWA TTP usually provides a “clearance document” for all projects regardless of type.

“C” List CatEx(s)

- Belong to a list of specific action (project) types.
 - 3 Most Commonly Used:
 - C23
 - C26
 - C28

(c)(23): Limited Federal Funding

- If project receives $< \$5.5\text{M}$ of Federal funds; or
- Has a total estimated cost of not more than $\$30\text{M}$ and Federal funds less than 15% of total estimated project cost.

(c)(26): Modernization of a Highway...

- by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes)
- if the action meets the constraints in paragraph (e).

(c)(28): Bridges

- Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings
- if the action meets the constraints in paragraph (e).

(c)(26 and 28): Paragraph (e)

- (e) Actions described in (c)(26), (c)(27), and (c)(28) of this section may not be processed as CEs under paragraph (c) if they involve:
 - (1) An acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements;
 - (2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;

(c)(26 and 28): Paragraph (e)

- (3) A finding of “adverse effect” to historic properties under the [National Historic Preservation Act](#), the use of a resource protected under [23 U.S.C. 138](#) or [49 U.S.C. 303](#) (section 4(f)) except for [actions](#) resulting in de minimis impacts, or a finding of “may affect, likely to adversely affect” threatened or endangered species or critical habitat under the Endangered Species Act;
- (4) Construction of temporary access or the closure of existing road, bridge, or ramps that would result in major traffic disruptions;
- (5) Changes in access control;
- (6) A floodplain encroachment other than functionally dependent uses (e.g., bridges, wetlands) or [actions](#) that facilitate open space use (e.g., recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.

“D” List CatEx(s)

- (d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval unless otherwise authorized under an executed agreement pursuant to paragraph (g) of this section. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

“D” List CatEx(s) continued...

- Not on the “C” list but still fits as a Cat Ex
 - Fits stipulations in paragraphs (a) and (b)
- Needs approval (signature) from FHWA
- Needs adequate supporting documentation

Exercise: Which Project is a Cat Ex?

- Chip Seal Project on 58 miles of roadway.
- Creation of Bike Trails through a local park
- 23 Miles of New Asphalt Roadway
- Paving 17 miles of a previously dirt road

It's All About the Impacts

- NEPA documentation and Mitigations are about IMPACTS, not (necessarily) project type (Especially FHWA's).
- An impact can be defined as a change (that the project will produce) on the natural, cultural, historic, and human environment.

It's All About the Impacts

- What is setting of the project prior to construction and implementation?
- What will the setting be like after the project has been completed?
- How will these impacts change the environment?

Maintenance vs. Construction

- NEPA does not differentiate between Maintenance and Construction projects.
- Level of Documentation is based on potential impacts, not these two categories.

Maintenance vs. Construction

- Just because a project is “maintenance” does not mean that NEPA does not apply, or that it will automatically be documented as a Cat Ex.
 - **DON'T PANIC:** usually these projects can be quickly cleared with a Cat Ex
 - Need to discuss what types of projects a Tribe considers maintenance
 - Need to take into account the potential impacts of that project type

What Does it Lead To?

- Mitigations and Commitments:
 - If there are impacts generated by a project, can those impacts be avoided?
 - This is the best way to handle impacts.
 - Can't be avoided: Can the impacts be mitigated?
 - How can we lessen the impacts on resources?

What Does it Lead To?

- These Mitigations become Commitments.
 - Tribe must follow through on what it has agreed to do in order to avoid, minimize, and/or mitigate environmental impacts.
 - Mitigations will usually be created during consultation and coordination with cooperating agencies.

Good Planning and Decision Making



- Early Coordination and Planning
 - Lead Federal Agency (FHWA)
 - Resource and Regulatory Agencies
 - Public
- Continuous coordination throughout project development
- Changes to the SOW need to be reviewed and approved by FHWA

Good Planning and Decision Making



- It's about the project's IMPACTS
- AND...build relationships with the regulating agencies.



FHWA Environmental Coordination

- Discuss your project early with the Environmental Specialist and Tribal Coordinator.
- We will provide guidance and technical assistance regarding the type of NEPA document and resource surveys needed for the project.
- Contact information:
 - terry.schumann@dot.gov or 360-619-7607
 - david.cremer@dot.gov or 202-236-7613

An aerial photograph of a coastal landscape. The foreground and middle ground are dominated by a dense, green forest that follows the curve of a coastline. To the right, a large, calm body of water, possibly a bay or a large lake, stretches towards the horizon. In the background, several mountain ranges are visible, with the most prominent one being a large, rounded peak. The sky is bright with some light clouds. The overall scene is a mix of natural beauty and potential environmental concern, given the text overlay.

Questions?