

CHAPTER 12

AGENCY COORDINATION PROCESS



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AGENCY COORDINATION PROCESS

The recognition of the need for early coordination and cooperation with federal, state, and local agencies in the development of federal-aid highways predates the National Environmental Policy Act of 1969 (NEPA). As early as 1963, the Federal Highway Administration (FHWA) established a unit at its headquarters to improve interagency coordination and public involvement for highway projects. Following the passage of NEPA, some of the notable milestones in the evolution of agency coordination as part of the NEPA process include:

- The 1978 Council on Environmental Quality (CEQ) regulations introduced the concepts of “lead agency” and “cooperating agency.”
- In late 1987, FHWA prepared guidance on how to identify and work with cooperating agencies. That guidance was superseded by the 1992 FHWA memorandum “Guidance on Cooperating Agencies” that, among other issues, discussed lead agency and cooperating agency responsibilities, agency responsibilities with the Clean Water Act (CWA) Section 404 Permit,

and included a question-and-answer section regarding cooperating agencies.

- In March 1994, FHWA, the United States Environmental Protection Agency (USEPA), the United States Fish and Wildlife Service (USFWS), and the United States Army Corps of Engineers (USACE) developed the Concurrent NEPA/Section 404 Processes for Transportation Projects, which specifies three concurrence points in the NEPA process: purpose and need, alternatives to be carried forward for detailed study, and selection of a recommended alternative.
- Under the Safe Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) Section 6002 (23 United States Code [USC] Section 139), the United States Department of Transportation (USDOT) established a process for involving “participating” agencies. Participating agencies are more broadly defined than cooperating agencies; they are agencies with “an interest” in the project. The process requires inviting participating agencies and providing

them and the public with the opportunity to participate in defining the proposed project’s purpose and need and determine the range of alternatives. The process also provides participating agencies the opportunity to work in collaboration with the lead agencies to determine the methodologies and level of detail to be used in analyzing the alternatives.

The unifying understanding among the above-mentioned documents/regulations is that effective agency coordination is not only an essential element of the transportation planning process, but also the project development process leading to construction. In the NEPA phase, the agencies’ scientific and technical input results in more comprehensive resource discussions that address the regulatory issues in the manner that meet agencies’ requirements. By participating in the development and approval of critical steps of the environmental document development (purpose and need, range of alternatives, and preferred alternative), the document is less likely to meet agency opposition during public/agency review periods and the likelihood for backtracking during the process to revisit past decisions is greatly reduced. Finally, effective agency involvement during the NEPA process yields the type of information required by agencies in permit applications, thereby minimizing the potential for construction delays.

12.1 Regulations and Guidance

This section provides the legislation, regulations, and guidance most likely to be applicable to and associated with typical agency coordination for transportation projects.

Federal Legislation and Regulations

- 40 CFR 1500–1508, the Council of Environmental Quality (CEQ), Regulations for Implementing NEPA
- 23 CFR Highways Chapter 1, Federal Highway Administration, Department of Transportation, Subchapter H, Right of Way and Environment, Part 771, Environmental Impact and Related Procedures
- The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU Section 6002)

Local Legislation and Regulations

- District Environmental Policy Act of 1989, Chapter 72, Section 7203 (Designation and Responsibilities of Lead Review Agencies)

12.2 Agency Responsibilities

Listed below are federal and local agencies that could be involved in DDOT projects. For a complete list of federal agencies with jurisdiction by law or special expertise, see Appendix II of the CEQ regulations (49 Code of Federal Regulations [CFR] 49750). The number of federal and local agencies that need to be involved in each project and the level of their involvement will vary by project. The most intensive agency involvement would likely occur on Environmental Impact Statement (EIS) projects because of the range and potential significance of project impacts. Section 12.3 includes information about the roles federal agencies (and other agencies) perform in DDOT transportation projects.

12.2.1 Federal Agencies

Federal Highway Administration (FHWA) – It is very important to understand the role of FHWA because FHWA is the lead federal agency for most DDOT projects. Most of the DDOT projects use FHWA funding. FHWA provides oversight and approvals for not only the funding and technical details but is also responsible for NEPA actions and

other related environmental laws. DDOT always prepares all the environmental documents for FHWA; however, these documents have to be approved by FHWA, and the official determination of NEPA action, Section 106 effects, Section 4(f) evaluation, and other environmental laws has to be made by FHWA. Details of environmental regulations for FHWA can be obtained from 23 CFR 771. Whenever a project is using FHWA funds, it is very important to work closely with FHWA to make sure all FHWA regulations and procedures are followed.

Federal Transit Administration (FTA) – DDOT also uses FTA funds in some of its projects. When FTA funds are used, FTA becomes the lead federal agency and is responsible for NEPA actions and other related environmental laws. Official determination of NEPA action, Section 106 effects, Section 4(f) evaluation, and other environmental laws has to be made by FTA.

United States Army Corps of Engineers (USACE) – USACE is the primary federal agency that regulates direct impacts to rivers, streams, and wetlands under Section 10 of the Rivers and Harbors Act and Section 404 of the CWA. Both Section 10 and Section 404 apply to all activities, public or private. Section 10 regulates activities in navigable waters, and Section 404 regulates the discharge of fill material into “waters of the United States,” including navigable waters but also extending along tributaries and adjacent wetlands. In general, USACE exercises its authority under both laws as a single permitting process.

The regulatory branch of the USACE Baltimore District leads project regulatory compliance in the District of Columbia.

United States Environmental Protection Agency (USEPA) – Under the Clean Air Act Section 309, USEPA has the authority to review and comment on the proposed actions

of other federal agencies under NEPA. This means that USEPA can review NEPA documents. USEPA, however, usually reviews other agency EISs and provides comments in addition to ranking the Draft EIS based on environmental issues. All Draft EISs must be submitted to USEPA for review. These copies should be submitted to the NEPA team at USEPA Region 3 office in Philadelphia. These copies are in addition to the copies submitted to USEPA for Federal Register Notice. USEPA generally does not review Environmental Assessments (EAs); however, for complex and controversial projects USEPA may want to be involved.

In addition, USEPA has broad authority over air, water, and land pollution. USEPA has oversight of USACE execution of Section 404. Generally, USEPA is invisible in the Section 404 permitting process; however, USEPA has approval authority for some USACE Jurisdictional Determinations.

In the District of Columbia, USEPA is also the permitting authority for Section 402, the National Pollutant Discharge Elimination System (NPDES) program. For highways, NPDES permitting relates to stormwater discharges.

USEPA Region 3 (Mid-Atlantic) office in Philadelphia and its field office in Annapolis are responsible for programs in the District of Columbia.

Federal Emergency Management Agency (FEMA) – As it relates to highway projects and natural resources, FEMA has primary responsibility for the protection of floodplains in accordance with Executive Order 11988, Floodplain Management. Generally, FEMA regulates projects within the limits of the 100-year floodplain, as shown on the Flood Insurance Rate Maps, which are issued by FEMA. Floodplain regulation has been delegated in the District of Columbia to the District Department of the Environment (DDOE) and Watershed Protection Division (discussed below).

United States Fish and Wildlife Service (USFWS) – (Department of the Interior and National Marine Fisheries Service (NMFS, National Oceanographic and Atmospheric Administration, Department of Commerce) – USFWS and NMFS share responsibilities regarding overall evaluation of a project on natural habitats, fish and wildlife, and threatened and endangered species. The Fish and Wildlife Coordination Act requires proponents to coordinate the impacts of federally funded projects with these agencies. These agencies maintain records of species that are protected under the Endangered Species Act and oversee compliance with the Act. Through a cooperative agreement with the Virginia Institute of Marine Sciences, NMFS also monitors the annual extent of submerged aquatic vegetation (SAV), a type of plant community that occurs in permanent waters and is an important habitat feature for fish and water quality. SAV beds are protected as a special aquatic habitat (as with wetlands) under Section 404, as well as under District regulations, as noted above (and in Chapter 14 of DCMR Title 21).

The Chesapeake Bay Field Office of USFWS in Annapolis and the northeast regional office of the NMFS in Gloucester, Massachusetts, oversee activities in the District of Columbia.

National Park Service (NPS) – NPS owns a number of parks as well parkways within the District of Columbia. NPS also owns the bottom of the Potomac River and Anacostia River within the District of Columbia. In addition, NPS National Capital Region Center for Urban ecology has particular interest in designated national parks but also maintains records and provides protection for federally listed and state-listed rare species.

United States Coast Guard (USCG), Office of Bridge Administration – USCG has authority to regulate projects in or over navigable waterways that may impede navigation under Section 9 of the Rivers and Harbors Act. While the

impact to natural resources and water quality is not its primary focus, the USCG also must ensure that projects under its purview are in compliance with environmental regulations that apply to federally funded projects or projects that require a federal license or permit.

The Fifth Coast Guard District, in Portsmouth, Virginia, has jurisdiction over projects in the District of Columbia.

National Capital Planning Commission (NCPC) – NCPC has review and approval authority over certain projects within the District of Columbia. NCPC authority is usually limited to federal interests (federal buildings, parks).

United States Commission of Fine Arts (CFA) – Established in 1910 by Act of Congress, CFA is a federal entity, charged with giving expert advice to the departments and agencies of the federal and District of Columbia governments on matters of design and aesthetics, as they affect the federal interest and preserve the dignity of the nation's capital.

Other Federal Agencies – There are several other federal agencies within the District of Columbia that may have to be coordinated depending upon the nature and location of a project. These agencies include Architect of the Capitol (AOC), Department of Defense (DoD), General Services Administration (GSA), and others.

12.2.2 Local Agencies

The District of Columbia Department of the Environment (DDOE) is the District government's equivalent of USEPA.

- Fisheries and Wildlife Division provides fish and wildlife research and management, aquatic education, and fishing license administration. The Fisheries and Wildlife Division conducts annual surveys, maintains a database of fish and ichthyoplankton populations in

the waters of the District of Columbia, and monitors and evaluates aquatic habitat. The Fisheries and Wildlife Division has also developed the District of Columbia Comprehensive Wildlife Conservation Strategy, a plan for conserving wildlife and their habitats, with particular emphasis on preserving wildlife and habitats in the urban environment. Coordination with the District of Columbia Fisheries and Wildlife Division could provide existing conditions information, rare species data, and impact assessment for projects.

- Water Quality Division is an important regulatory agency to contact for any impacts to waterways or wetlands. The Water Quality Division provides drinking water testing, source water assessment, and water quality certification under Section 401 of the CWA. The Water Quality Division monitors water quality and designates appropriate uses of the various water bodies.

As required under Section 401 of the CWA, the Water Quality Division provides Water Quality Certification (WQC) for draft NPDES permits (issued by USEPA) and Section 404 permits (issued by USACE). The 401 WQC process provides the District with the opportunity to review the federal permits for consistency with District water quality standards and SAV regulations. The limits of jurisdiction of the Water Quality Division may extend beyond the limits determined by USACE for waters of the United States; that is, the Water Quality Division may also regulate isolated waters.

In accordance with Section 303(d) of the CWA, the Water Quality Division also provides total maximum daily load (TMDL) assessment for each of the watersheds (Potomac, Anacostia, and Rock Creek) in the District.

- Watershed Protection Division, Sediment and Storm Water Technical Services Branch is responsible for

stormwater management, sediment and erosion control, and floodplain management for all land-disturbing activities. The Sediment and Storm Water Technical Services Branch is responsible for reviewing project plans for consistency in these areas with the District of Columbia Municipal Regulations (DCMR) zoning regulations.

- Air Quality Division develops and implements plans and programs to meet and maintain federal and District of Columbia air quality standards. The Air Quality Division protects and manages District air resources in accordance with 20 DCMR Air Pollution Control Act of 1984.
- Stormwater Management Division works on methods to reduce stormwater runoff pollution through the implementation of activities that go beyond the activities required in the District NPDES Permit. This division has been responsible for managing the District NPDES Permit (MS4 permit) since February 2007. This permit was previously managed by the District of Columbia Water and Sewer Authority (DCWASA).
- Toxic Substances Division includes Hazardous Material Branch, and Land Development and Remediation Branch.

District of Columbia Water and Sewer Authority (DCWASA) maintains records of water quality in the drinking and wastewater systems. This agency may be able to provide current surface water quality data in a project area where there is a combined sewer overflow or other wastewater outfall. The District Stormwater Administration, part of DCWASA, is the lead agency for controlling stormwater outfalls in the District.

District of Columbia Department of Parks and Recreation (DPR) is responsible for urban recreation and leisure

services to residents and visitors to the District of Columbia. DPR owns and maintains a number of parks, community facilities, and neighborhood recreation centers.

District of Columbia Office of Planning (DCOP) is the lead District agency for all land use, development, and neighborhood planning for the District. The State Historic Preservation Office (SHPO) for the District is called the District of Columbia Historic Preservation Office (DCHPO) and is a part of the DCOP.

Metropolitan Washington Council of Governments (MWCOG) maintains water quality and fisheries data on a regional basis. MWCOG also monitors fish habitat conditions and areas in need of restoration.

12.3 Lead, Cooperating, and Participating Agencies

The role of a local, state, or federal agency in the NEPA process depends on the agency's expertise and relationship to the proposed undertaking. The key to a successful NEPA project is to coordinate with all agencies that can provide data and information that will yield a more comprehensive environmental document. It is also good NEPA practice to coordinate with agencies who request information about the project, regardless of the information they can provide the project.

The number of agencies involved in a project and their levels of involvement will vary in response to the type and level of project impacts. While there are no firm rules on the agencies that will be involved in DDOT project, it is generally true that there will be a greater level of agency involvement in projects requiring an EIS (rather than an EA or Categorical Exclusion [CE]) simply because of the range and potential significance of project impacts.

To broaden the range of agencies that have the ability to influence the NEPA process, SAFETEA-LU created in August 2005 the designation of "participating" agencies to allow more state, local, and tribal agencies a formal role and rights in the environmental process. The category of participating agency joins the designations of lead agency and coordinating agency that have been a part of the environmental process since the inception of NEPA. Brief explanations of lead, cooperating, and participating agencies are found below. It is important to note that the agency coordination (and other) provisions of SAFETEA-LU must be implemented on highway, transit, and multimodal projects being processed with an EIS. For projects being processed as EAs or CEs, DDOT, in coordination with FHWA, will decide whether to apply SAFETEA-LU.

The lead agency, as defined in SAFETEA-LU, is the USDOT agency conducting the NEPA analysis. For DDOT projects, the lead agency would most often be FHWA, but it could also be the FTA, the Federal Railroad Administration (FRA), or other federal agencies. DDOT, as the project sponsor that is receiving SAFETEA-LU funds, would be the joint lead agency. The lead agencies must identify and involve participating agencies, develop coordination plans, provide opportunities for public and participating agency involvement in defining the purpose and need and determining the range of alternatives, and collaborate with participating agencies in determining methodologies and the level of detail for the analysis of alternatives. In addition, lead agencies must provide increased oversight in managing the process and resolving issues. In short, the lead and joint lead agencies manage the SAFETEA-LU 6002 process, oversee preparation of the EIS, and provide opportunities for public and cooperating/participating agency involvement.

Cooperating agencies are federal or local agencies other than the federal lead agency that have jurisdiction by

law over the property or area that will be affected by the transportation project or special expertise with respect to a particular environmental issue in the project area that could significantly affecting the quality of the human environment.

Participating agencies are federal, state, or local agencies that may have an interest in the project. The roles and responsibilities of participating agencies include, but are not limited to:

- Participating in the NEPA process starting at the earliest possible time, especially with regard to the development of the purpose and need statement, range of alternatives, methodologies, and the level of detail for the analysis of alternatives.
- Identifying, as early as practicable, any issues of concern regarding the project’s potential environmental or socioeconomic impacts. Participating agencies also may participate in the issue resolution process described later in this guidance.
- Providing meaningful and timely input on unresolved issues.
- Participating in the scoping process. The scoping process should be designed so that agencies whose interest in the project comes to light as a result of initial scoping activities are invited to participate and still have an opportunity for involvement.

SAFETEA-LU specifies that federal agencies that do not decline the invitation in writing are by default considered participating agencies. It also states that nonfederal agencies that do not provide written acceptance are not considered participating agencies.

As noted, the federal, state, and local agencies that could serve as cooperating or participating agencies will vary with

each DDOT project. A list of potential cooperating and participating agencies is found below. The list is not meant to be exhaustive or all inclusive.

Federal Agencies

- Advisory Council on Historic Preservation
- Architect of the Capitol
- National Capital Planning Commission
- United States Commission of Fine Arts
- National Park Service (United States Department of the Interior)
- United States Army Corps of Engineers, Baltimore District
- United States Environmental Protection Agency
- United States Coast Guard, Fifth District
- United States Department of Housing and Urban Development
- United States Federal Railroad Administration
- United States Federal Transit Administration
- United States Fish and Wildlife Service
- National Marine Fisheries Service

State, Local, and Regional Agencies

- District of Columbia Department of the Environment
- District of Columbia Department of Health
- District of Columbia Department of Parks and Recreation
- District of Columbia Housing and Community Development
- District of Columbia Water and Sanitary Sewer Authority
- Metropolitan Washington Council of Governments

- Washington Metropolitan Area Transit Authority
- Interstate Commission on the Potomac River Basin
- Maryland Department of Transportation
- Maryland Department of the Environment
- Montgomery County Department of Environmental Protection
- Prince George’s County Department of Environmental Resources

It is important to remember that the agencies listed above and many more in the Washington, D.C. metro area can play meaningful roles in DDOT projects without being identified as either cooperating or participating agencies.

12.4 Opportunities for Agency Involvement

Agency coordination should occur as early as possible in the NEPA process and continue through the approval of the final environmental document. Regardless of the type of environmental document being prepared, DDOT should begin working with the appropriate agencies as early in the project development stage as possible. This will allow agencies the chance to identify environmental impacts and responsibilities it considers most critical and work with DDOT to ensure the environmental document addresses them.

12.4.1 SAFETEA-LU

The passage of SAFETEA-LU (23 USC Section 139) in August 2005 changed the nature of agency involvement in EIS projects. The objective of SAFETEA-LU is to involve the public and appropriate federal, state, and local agencies in the environmental review process and to move the process along expeditiously. All EISs for which the Notice of Intent (NOI) was published in the Federal Register after August 10, 2005, must follow SAFETEA-LU requirements.

As noted in Section 12.4, SAFETEA-LU created a new category of involvement in the environmental review process termed “participating agency.” The intent of the new category is to encourage governmental agencies at any level with an interest in the proposed project to be active participants in the NEPA evaluation. Designation as a participating agency does not indicate project support but does give invited agencies new opportunities to provide input at key decision points in the process.

As a joint lead agency on its transportation projects, DDOT, in cooperation with FHWA, must identify and involve participating agencies, develop a coordination plan, and collaborate with participating agencies in determining methodologies and the level of detail for the analysis of alternatives. The purposes of the coordination plan are to facilitate and document the lead agencies’ structured interaction with the public and other agencies and to inform the public and other agencies of how the coordination plan will be accomplished. The coordination plan is meant to promote an efficient and streamlined process and good project management through coordination, scheduling, and early resolution of issues. The coordination plan should be developed early in the environmental review process after project initiation and should outline the points for review and comment by the participating and cooperating agencies, as well as by the public.

The purpose of the impact analysis methodology is to communicate and document the lead agency’s structured approach to analyzing impacts of the proposed transportation project and its alternatives. Collaboration on the impact analysis methodology is intended to promote an efficient and streamlined process and early resolution of concerns or issues. Consensus on the methodology is not required, but the lead agency must consider the views of the cooperating and participating agencies with relevant interests

before making a decision on a particular methodology. Well-documented, widely accepted methodologies, such as those for noise impact assessment and evaluation of impacts under Section 106 of the National Historic Preservation Act would require minimal collaboration. If a cooperating or participating agency criticizes the proposed methodology for a particular environmental factor, the agency should describe its preferred methodology and why it is recommended.

In addition to identifying participating agencies and developing coordination plans and impact analysis methodologies, DDOT is also required to provide enhanced opportunities for public and participating agency involvement in defining the purpose and need and determining the range of alternatives. DDOT will also be responsible for notifying cooperating and participating agencies of the availability of Draft and Final EIS documents and providing appropriate comment opportunities. Finally, DDOT will coordinate with agencies on completion of necessary permits following the Record of Decision (ROD).

There are numerous sources of information about SAFETEA-LU in general and its agency coordination provision. Two recommended sources are FHWA's SAFETEA-LU Environmental Review Process (Public Law 109-59), Final Guidance November 15, 2006, (<http://www.fhwa.dot.gov/hep/section6002/>) and American Association of State Highway and Transportation Officials (AASHTO) Practitioner's Handbook 09, Using the SAFETEA-LU Environmental Review Process (January 2008) (http://environment.transportation.org/pdf/practitioners_handbook09.pdf).

While EA actions are not required to follow SAFETEA-LU provisions, there may be occasions when following the process would benefit a DDOT project. DDOT should coordinate with FHWA in deciding the applicability of SAFETEA-LU to EA actions. At this time, USDOT does

not intend to exercise the authority to apply the Section 6002 process to CEs.

12.4.2 Scoping

Scoping is an early opportunity for agency involvement in EIS and EA projects. Scoping is the process of determining what should be included in the environmental analysis and discussion for the EIS, both in terms of extent and level of detail. The scoping process greatly benefits an agency preparing an EIS/EA. For DDOT projects, the scoping process should particularly seek input from federal and local agencies with jurisdiction or special expertise. These agencies can provide valuable information about:

- Known resource issues of concern related to the project area
- Agency requirements for issuing permits or approvals, where it may have an action required to implement the proposed action
- Sources of information to be obtained and considered during studies
- The level and detail of analyses to be performed (including identifying what studies may not be necessary, thus saving time and effort for DDOT)
- Other projects being planned and/or studied
- Public involvement requirements

12.4.3 Agency Comments on Environmental Documents

In addition to commenting on purpose and need and project alternatives during the course of a NEPA project, agencies also have the ability to comment on the completed Draft EIS, EA, and Final EIS. Agency comments are included

in the appendices of those documents and would receive responses by DDOT.

12.5 Additional Information

- CEQ Regulation Part 1501, NEPA and Agency Planning: <http://www.nepa.gov/nepa/regs/ceq/1501.htm>
- FHWA Environmental Guidebook, Interagency Coordination: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>
- FHWA Interagency Guidance: Transportation Funding for Federal Agency Coordination Associated with Environmental Streamlining Activities: <http://www.environment.fhwa.dot.gov/strmlng/igdocs/index.asp>
- 23 CFR Highways Chapter 1, Federal Highway Administration, Department of Transportation, Subchapter H, Right-of-Way and Environment, Part 771, Environmental Impact and Related Procedures: <http://www.fhwa.dot.gov/hep/23cfr771.htm>
- DC Environmental Policy Act of 1989, Chapter 72, Sec. 7203 (Designation and Responsibilities of Lead Review Agencies): <http://www.dcregs.dc.gov/Gateway/RuleHome.aspx?RuleNumber=20-7203>