

NEPA 101 Part 2 CBT Transcript

Welcome

Welcome to the National Environmental Policy Act 101 course - also known as NEPA 101 course. This is Part 2.

Introduction

This series of two courses is provided by the Florida Department of Transportation's or FDOT's Office of Environmental Management, or OEM. The environmental review, consultation, and other actions required by applicable federal environmental laws described in this training are carried out by FDOT pursuant to 23 U.S.C. § 327 and a Memorandum of Understanding dated December 14, 2016, executed by the Federal Highway Administration, or FHWA, and FDOT.

Learning Objectives

This Part 2 course is a continuation of the NEPA 101 module, and intends to educate the listener to:

- Develop an appreciation of NEPA study schedules,
- Develop an awareness of common permit types, and how NEPA precedes them,
- Learn about constraints when dealing with Federal Lands,
- Learn about major laws and Executive Orders,
- Understand which laws can stop a project, and
- Learn the difference between Law, Regulations, and Guidelines.

Outline and Overview

If you have not yet taken the NEPA Part 1 training, we highly suggest that you take that course first, as the foundations learned there will greatly enhance your Part 2 learning experience.

Part 2 of the course examines the composition of NEPA project schedules. Commonly-encountered requirements are discussed – such as environmental permits and federal land acquisition. We will cover some of the major environmental laws and Presidential Executive Orders, while pausing to take a look at potential project show-stoppers. Finally, we will examine the difference between a law, a regulation, and a guideline. This module titled Historical Context, NEPA Components and FDOT Compliance will cover Part 1.

Lesson 4: Understanding NEPA Schedules

The National Environmental Policy Act itself is a simple concept; however tasks to comply with many independent and intricate environmental laws must be incorporated into a study approach that progresses the project in an efficient manner.

The NEPA document sets a foundation for future activities such as environmental permits and right of way acquisition. Understanding and addressing the requirements of these activities during PD&E will generate an Environmental Document that creates a seamless transition to the next project delivery phase.

A major challenge of “NEPA Practitioners” involves identifying pertinent state and federal environmental requirements that will come to bear on a specific project, and then link them in such a manner that a coherent and clear project progression is scheduled... and maintained. A thorough and regularly-updated project schedule is the **key** to success.

Before the creation of NEPA, in 1969, and a host of other environmental laws: transportation projects moved quickly. After a quick project initiation and coordination with local governments and agencies, engineers could move rapidly into traffic studies, alternative development, and then select an alternative.

Design proceeded without delay, moving directly into property acquisition. Environmental laws required little consideration of human and environmental features, nor did laws require the rights, minimum notices, and other protections that are afforded to relocated homes and businesses today.

The result was fast-moving projects – often moving from inception to construction in less than 3 years. As presented in the Part 1 course, however, there were consequences that resulted in the creation of NEPA and the many protective laws of today.

Current Day Project Schedule (with EIS)

Contrasted against those simple schedules of old, here is an example of a typical project schedule from the start of an Environmental Impact Statement, or EIS, to the start of construction that occurred before NEPA Assignment. Progressing from inception to construction can take up to ten years. How can that be? Let's take a look at the components.

Typical Schedule (EIS: Current Day)

Here is the same EIS project schedule, with a breakdown of major components which are displayed in various colors.

Purple - represents the necessary time to satisfy federal requirements for NEPA information-gathering and document-writing activities.

Pink Nodes - Denote necessary time for federal and state agency coordination, plus coordination with tribes.

Orange Nodes - Identify typical check-in and coordination milestones with city and county local governments, as well as various Metropolitan Planning Organizations.

Yellow Points - Denotes timely and transparent public involvement activities, which often provide public and agency comment periods. Taken as a whole, these coordination meetings require considerable preparation, ample lead-time to schedule meeting dates and provide sufficient public notice, plus they involve back-end time periods to accept comments and coordinate further.

Brown Bars - Provide realistic schedule considerations for additional studies, design, and analysis that commonly occur after a Draft EIS or Final EIS is published.

And finally, we have red which denotes various times when Federal Highway Administration, or FHWA, reviewed and approve certain engineering documents and project milestones. Again, we should mention that this is a typical EIS schedule before NEPA Assignment was approved in Florida.

Let's take a look at NEPA Document Structure itself: Both a Draft EIS and a Final EIS are large and comprehensive documents which takes many months (or years) to prepare, and then progresses through multiple, iterative reviews.

When the Record of Decision document is not prepared with the FEIS, this also has to be considered in the project schedule as a separate component. The combined time to prepare and iteratively review these three required documents can exceed two or three years in-and-of themselves.

After the DEIS and the FEIS are published, statutory review periods are then required. A minimum of 45 days is required for public review and comment of the Draft EIS. If a Final EIS is published without a Record of Decision, a minimum 30 day “wait period” is required before agencies can make a final decision on the proposed action. Often these review timeframes coexist with comment periods from a concurrent public hearing or workshop, which might require consideration and further extend the end of a document review period.

NEPA itself requires substantive Purpose and Need that is supported by traffic analysis – or other justifications. NEPA requires studying the full suite of potential impacts – both to the natural and the human environment. These studies take considerable time at a study’s onset.

NEPA requires studying a “range of alternatives,” which takes time. As alternatives are developed, more environmental analysis is required to then quantify and compare impacts – and satisfy the mitigation sequence required for permits and other laws or executive orders. Statutory requirements on right of way acquisition afford protections and notice periods to relocated residents and businesses – thereby establishing certain minimum periods for this project phase.

Beyond NEPA... A host of independent laws may require additional studies – and time. For example: the Endangered Species Act requires special studies, reports, and coordination with the US Fish and Wildlife Service or NOAA’s National Marine Fisheries Service, or NMFS (say nymphs). Seasonal survey constraints and study components can cause supporting studies to last over a year, which may then be followed by a formal, 135-day consultation period with either Service. And this is only one law.

Projects with any alternatives that impact certain archaeological sites or historic structures may require additional studies and coordination. Federal lands acquisition is yet another time-consuming coordination task that requires special studies and coordination to satisfy regulatory requirements of the agency whose land is impacted.

Transportation projects are a natural extension of long-range state **and** local planning efforts. In fact, for federal projects: FHWA will not fund right-of-way or construction unless a project’s proposed improvements are consistent with the local Long-Range Transportation Plan.

Therefore - early and continued coordination with local governments is essential. This includes cities and counties, as well as Florida’s three types of regional planning entities: Metropolitan Planning Organizations, or MPOs, Transportation Planning Organizations, or TPOs, and Transportation Planning Agencies, or TPAs. Partnering with local governments is critical - but takes time and is interspersed at key coordination and decision milestones throughout the project.

Following the Eisenhower Interstate Program and other government initiatives in the mid-19th century: NEPA responded to public demands for improved project transparency, public notice, and an opportunity to comment and influence project decisions. As a result, NEPA clearly requires certain notices and minimum thresholds of Public Involvement – including comment periods. These important activities generally occur at project initiation, upon alternative development, prior to key decision points, and to announce project decisions.

NEPA requires consideration of public, agency, tribal, and other stakeholder input **PRIOR** to making key decisions. Therefore, project schedules must allocate sufficient time to ensure that public involvement activities, and their resulting input, are conducted and considered - before decisions are made.

NEPA structures Environmental Documents to clearly and transparently provide information to outsider reviewers for their use to provide meaningful comments. Naturally then, as a Draft EIS document is produced and reviewed by the public, state and federal agencies, and other stakeholders: a large number of comments might be received.

Comments may point out aspects that the DEIS did not study, or critics might indicate which aspects may have been inadequately studied. Agency study suggestions – or even criticisms - are a frequent occurrence.

Thus, after the document review and public comment period for a DEIS, additional studies are quite common. As well as possible design refinements to existing alternatives. Impacts must again be quantified and compared – with further coordination to satisfy environmental laws.

A similar dynamic typically occurs after publishing a Final EIS, although resulting studies are generally less extensive than for the DEIS. As well, additional studies may not appear in the NEPA document. New studies may accompany design modifications or occur as part of the re-evaluation process.

Additional studies also add time to project schedules, which can make the accurate forecasting of project phases and activities challenging.

Revisiting our overall schedule – hopefully one can appreciate the complexity of combining many study requirements into one EIS project schedule. A **real** EIS schedule is several hundred rows, using today's scheduling software. Not shown here are the specific and additional studies required to satisfy many environmental laws.

Some common examples are:

- Endangered Species Act;
- Historic Preservation;
- Special Permit Requirements;
- Environmental Justice;
- Federal land use authorizations; and
- State of Florida land use authorizations, such as the Acquisition and Restoration Council.

NEPA Assignment

By now you have likely heard of the Florida's NEPA Assignment. Let's quickly cover the main tenets and examine the impact to a project schedule.

Responsibilities Assigned

With certain exceptions, FDOT has replaced the Federal Highway Administration as the Lead Federal Agency for highway projects in Florida. On December 14, 2016, FDOT and FHWA executed a Memorandum of Understanding that assigned NEPA responsibilities to the FDOT for all NEPA Classes of Action – and for Local Agency Program projects.

FDOT will also administer certain Federal environmental laws and Executive Orders. Specific project-level responsibilities are cited in Chapter 23 of United States Code.

Environmental Responsibilities: Before and After NEPA Assignment

This table compares the Environmental Responsibilities, Before and After NEPA Assignment. All Environmental Review responsibilities are transferred from FHWA to FDOT, with the exception of Government to Government Tribal Consultation, Project Level Air Conformity, and Projects that cross state lines.

Otherwise, FDOT now has the assigned responsibility to administer NEPA -associated actions including:

- Determine a project's Class of Action;
- Approve a project's Purpose and Need;
- Transmit technical reports and directly-consult with pertinent federal agencies;
- Prepare and approve the NEPA document, re-evaluations, and other supplemental documentation; and
- Defend the NEPA document in court.

For certain laws that are independent of NEPA, FDOT is specifically assigned responsibility to administer:

- Section 7 of the Endangered Species Act;
- Section 106 of the National Historic Preservation Act;
- Section 4(f) of the USDOT Act – with constructive use exception; and
- The Environmental Justice Executive Order.

NEPA Assignment Time Savings

NEPA Assignment in other states, such as California, Texas, and Ohio all resulted in a 25 to 30% time savings by assuming NEPA environmental responsibilities. Thus, FDOT similarly anticipates a 25% time savings for the development and approval of NEPA studies.

Lesson 5: Common Environmental Permits, Plus Federal Land Authorizations

In lesson 5, let's take a look at some of the more common Environmental permits. In addition, we will introduce authorization measures for the USE of Federal Lands.

Managing permit processes is a special skill and a technical discipline unto itself. Each District maintains dedicated staff for this reason, with support provided by the Office of Environmental Management. As a reminder: The Office of Environmental Management provides references and training materials for these subjects.

Permit Issuance and Federal Land Authorizations May Depend on the NEPA

In many cases, the later-stage issuance of permits and Federal Land Use will build on information gathered and consultation completed during the NEPA study.

Several factors that could impact permit issuance include: NEPA compliant (and potentially permit-compliant) decision-making, interagency coordination, suitable public involvement, appropriate federal findings, and proper mitigation sequencing (avoid, minimize, and mitigate). All of these must be included as components of the NEPA study. Similarly, authorizations to **use** Federal Lands are dependent on following the laws and regulations of the managing federal agency.

Federal Permits

Now, let's take a look at Federal Permits. Earlier we reviewed certain permit considerations and decision requirements for a transportation project's NEPA study.

After FDOT has completed a NEPA study, federal permitting agencies may accept, adopt, or incorporate certain components of FDOT Environmental Documents - OR they may generate their own NEPA document that supports a permit issuance.

For example, on Section 404 Clean Water Act permits: The US Army Corps of Engineers will typically (but not always) accept or adopt an FDOT federal DEIS and FEIS, but then develop a separate Record of Decision under USACE signature authority.

Section 404 Permit

Section 404 of the Clean Water Act establishes a permit program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. A permit can still be granted to a preferred alternative that causes more impacts to waters and wetlands – but only when consideration of significant adverse impacts to other resources presents a “balanced” decision that yields the least overall impacts.

Section 404 is administered by the US Army Corps of Engineers, under a Memorandum of Agreement with the Environmental Protection Agency. Three main permit types exist under Section 404. We will discuss each briefly.

Section 404: Nationwide Permits

Nationwide Permits were developed to streamline the issuance of permits for the more common types of activities that do not exceed pre-established impact thresholds. This level of activity generally does not have an associated NEPA document. In many cases, efforts to obtain a Nationwide Permit may be started and completed during the design phase.

For example: A Nationwide 14 permit would address small wetland impacts for linear transportation projects - such as a minor shoulder widening on this section of road. Similarly, a Nationwide 3 addresses maintenance of previously authorized and currently serviceable structure or fill - provided the use is not changing. Nationwide Permit types and thresholds are updated every five years, and the applicable list is readily available.

Section 404: Regional General Permit

The term "Regional General Permit" refers to a USACE authorization that is issued on a regional basis for a category of activities that cause only minimal individual and cumulative impacts.

General permits are another means to reduce the burden of the regulatory program on the public and ensure timely issuance of permits. Each permit has its own terms and conditions which must be met for project actions to be verified.

In Florida, General Permit SAJ-92 applies to FDOT projects which meet the following criteria:

- Project is reviewed through the ETDM screening process or has an approved PD&E study
- Impacts less than 5 acres of water/wetlands per 1 mile of length, and
- A maximum of 50 acres impact to non-tidal Waters of the United States

Section 404: Standard Permit

A Section 404 Standard Permit is required for larger-impact proposals. Sometimes referred to as an "Individual Permit," these Standard Permits are used for more complex projects with wetland impacts that exceed the thresholds of Nationwide or Regional General Permits.

Standard Permits are evaluated using additional environmental criteria, and involve a comprehensive public interest review. Processing time varies for these types of permits, from 120 days to a year from the receipt of a complete application. Controversial or complex, larger projects may take longer.

Coast Guard Permit

A Coast Guard Bridge Permit is required when constructing or modifying bridges or causeways over navigable waterways of the United States. The permit provides approval of the location and engineering plans for the bridge or causeway in relation to how the project affects the public right of navigation.

During NEPA evaluation, a vessel impact study may be required, which evaluates the type and size of vessels using the waterway, and their navigation and clearance needs. Studies commonly evaluate the effects of these vessels on the proposed structure or and the proposed waterway - including an actual collision with a bridge structural component or its protective system.

Coast Guard Bridge Permits do not authorize approaches or other dredge and fill activities separate from the bridge itself. A Coast Guard approval is required for bridge navigational lighting and signals. Coast Guard approval of the bridge lighting plan is often a separate activity which typically occurs during a project's Design phase.

State of Florida Permits: The ERP Program

On a state level: The Florida Department of Environmental Protection or FDEP and the five (5) Water Management Districts administer the state Environmental Resource Permitting, or ERP program. State Permits are often driven by drainage/stormwater issues, thus the Water Management District involvement. Because of geographic resource differences, each WMD may exert its own, unique requirements. The ERP Program contains environmental review criteria that require evaluation of a project's effects to wetlands and other surface waters. Therefore - and to set the stage for an eventual permit approval - NEPA studies should identify and address pertinent ERP permitting criteria during the PD&E Phase.

The ERP Program issues three main permit types: General, Individual, and Conceptual Approval. These permits are not directly related to NEPA; therefore we will not delve into the intricacies of each permit type; however, it is useful to understand that these permits can be triggered by a variety of issues or impacts including:

- Wetland and stormwater impacts,
- Need for environmental effects review,
- Activities inside the Coastal Construction Control Line, and
- A Section 401 Water Quality Certification.
- Plus, other causes.

Federal Land Use Authorizations

A multitude of federal agencies manage lands in Florida. Some of the more commonly encountered properties might include:

- Land and Water Conservation Fund) property,
- Federal Emergency Management Agency buyout properties,
- National Park property,
- National Forest property,
- National Wildlife refuges, and
- Military Forts and Bases.

Simply stated: FDOT cannot condemn federal lands using eminent domain laws. However, FDOT can obtain permission or arrange use of federal lands through coordination with the federal landowner.

Federal Agency Coordination for “Land Use”

Each federal agency must abide by laws applicable to land use or ownership transfer - as well as its own unique agency regulations that govern.

Coordination with federal landowners can be exhaustive and time consuming. A particular agency might require independent studies of natural resources and infrastructure, and then require separate environmental assessment documents to determine the particular impacts of a proposed “use.”

These additional studies often add multiple layers of technical reports, and possibly sequential studies to first justify a use, identify resources, evaluate and quantify impacts or effects, analyze effects to the agency’s mission and function at the site, and then arrange mitigation for those impacts.

These studies are generally independent of NEPA requirements, yet they must be considered during the NEPA study. Furthermore, the chronology of independent document preparation affects the timing of alternative development and selection processes.

Typically, these “land use” studies and coordination occur during the PD&E Phase, and will continue through Design Phase and into the Right-of-Way Phase - as agency compensation and mitigation details are finalized.

Lesson 6: Substantial Environmental Laws and Presidential Executive Orders

In Lesson 6, we will cover some of the larger, more substantial environmental laws that tend to influence transportation project development. As well, certain Presidential Executive Orders apply.

National Historic Preservation Act of 1966

Section 106 of the National Historic Preservation Act of 1966 requires agencies to examine impacts of the proposed action on historic properties (including archaeological sites), and provide the national Advisory Council on Historic Preservation with an opportunity to comment.

The first step in this process is to identify historic resources. Next, FDOT works with the State Historic Preservation Officer (SHPO) to determine whether the proposed action will cause any adverse effects. Certain projects may also involve the Seminole Nation’s Tribal Historic Preservation Officer.

If adverse effects will occur, FDOT must consult with SHPO (and potentially the Seminole Nation) to resolve these adverse effects. This effort generally results in a Memorandum of Agreement which details measures FDOT took to avoid and minimize effects, and which details out a specific mitigation plan.

Section 4(f) of the USDOT Act of 1966

The US Department of Transportation Act of 1966 contains a powerful law that affects transportation projects. Most practitioners simply refer to it as: Section 4(f). Section 4(f) applies **only** to federally-funded projects, but the law places a burden of proof on state DOT's. Under NEPA Assignment, FDOT accepts FHWA's responsibilities for enforcing Section 4(f).

Essentially: Section 4(f) specifies that FHWA and other DOT agencies cannot approve the use of land from publicly owned parks or recreational areas, wildlife and waterfowl refuges, or public and private historical sites unless...

There is no feasible and prudent alternative to the use of land, and furthermore, that the action includes all possible planning to minimize harm to the property resulting from the "use." Section 4(f) considers whether impacts will be temporary or permanent.

The law also includes additional features, such as a "de minimis" (or, of minimum impact) finding. A *de minimis* impact is a conclusion that, after examining avoidance, minimization, and mitigation: no adverse effect results to the activities, features, or attributes of the 4(f) property.

Section 4(f) Constructive Use

In recent years, another Section 4(f) component was introduced: Constructive Use. Constructive use involves an indirect impact to the Section 4(f) property of such magnitude as to effectively act as a permanent incorporation. Here the project does not physically incorporate the resource but is close enough to result in substantial impairment to the property's activities, features, or attributes.

Constructive use may include impacts such as noise, access restrictions, vibration, ecological intrusions and visual impacts. A project's proximity to a Section 4(f) property is not in itself an impact that results in constructive use. Even under NEPA Assignment, FDOT requires prior concurrence from FHWA for a constructive use.

In summary, Section 4(f) does not authorize the use of a resource unless there is no feasible and prudent alternative, and the action has included all planning possible to minimize harm to the resource.

If the proposed project does not qualify for a de minimis use, Programmatic Section 4(f) evaluations can be used in place of individual evaluations for certain highway projects whose uses are still considered minor. These programmatic evaluations can save time as they do not require a separate draft and final Section 4(f) evaluation document, comment period, or document circulation. Programmatic evaluations are generally approved faster than individual evaluations.

Nationwide Programmatic Evaluations

Five Nationwide Programmatic Evaluations have been approved for use. Three of these involve resources managed by the US Department of the Interior:

- Minor Involvement with Parks, Recreation Areas, Refuges: Prepared for projects that improve existing highways and use minor amounts of publicly owned public parks, recreation areas, or wildlife and waterfowl refuges adjacent to the existing highway. Note: this programmatic cannot be used with an EIS.
- Minor Involvement with Historic Sites: Used for projects that improve existing highways and use minor amounts of land from historic sites adjacent to the existing highway. Note: this programmatic can also not be used with an EIS.

- **Use of Historic Bridges:** Prepared for projects with no feasible or prudent alternatives to the use of certain historic bridge structures to be replaced or rehabilitated with Federal funds. The project must include all possible planning to minimize harm to the structure. If the bridge can be rehabilitated without affecting the historic integrity of the structure, Section 4(f) does not apply.
- **Independent Bikeway or Walkway Construction Projects:** Used for highway construction projects that provide bicycle or pedestrian facilities for a project whose primary purpose is to serve motorized vehicles and has no significant impacts.
- **Net Benefit:** Can be used for any type of project on new or existing alignment that results in an overall enhancement to the resource. This programmatic can be used for any type of NEPA document.

Presidential Executive Orders

Our Part 1 session mentioned five Presidential Executive Orders that are pertinent to transportation projects. Of these, Environmental Justice tends to emerge as a very common NEPA study component.

Environmental Justice (Presidential Executive Order)

Executive Order 12898 was signed in 1994, directing Federal agencies to identify and then address the effects of federal actions to any minority or low-income communities. Minority is defined as a person who is: Black or African American, Hispanic or Latino, Asian American, American Indian and Alaskan Native, and Native Hawaiian or other Pacific Islander.

Low income is defined as a person whose median household income is at or below the US Department of Health and Human Services poverty guidelines, which are updated annually.

As of 2018, this income level is \$12,140 for a single person and \$25,100 total income for a family of four.

Environmental Justice: Three Fundamental Principles

Environmental Justice, or EJ, applies three fundamental equity principles to the transportation planning and decision-making process. The first is to identify, and then avoid, minimize, or mitigate any disproportionately high effects to these protected communities,

EJ then requires documented efforts which ensure the full and fair participation of all potentially affected communities. Finally, EJ seeks to prevent the denial, reduction, or significant delay of the receipt of benefits by those affected.

Endangered Species Act

The Endangered Species Act of 1973, or E-S-A, aims to protect and recover jeopardized species and the ecosystems they depend on.

The ESA is administered by the US Fish and Wildlife Service, or USFWS, for terrestrial and freshwater/aquatic species, while marine species are administered by NOAA Fisheries – or NOAA's National Oceanic and Atmospheric Administration. NOAA Fisheries is also known as the National Marine Fisheries Service. Some species share joint jurisdiction between USFWS and NMFS.

Endangered Species Act Consultation

If a project alternative potentially causes an adverse effect to a federally-listed threatened or endangered species, then Section 7 of the ESA requires consultation with the appropriate federal agency.

Informal consultations may occur at first, but may be elevated to “Formal Consultations” should the federal agencies determine that an adverse effect may occur - or that the proposed project may jeopardize the continued existence of a listed species, or result in destruction or adverse modification of designated critical habitat.

Formal consultations require a substantial technical report that presents a Biological Assessment from the project sponsor. The federal agency, either USFWS or NMFS, then writes a Biological Opinion.

This image depicts only one graphic from a Biological Assessment that located various clusters of Red Cockaded Woodpeckers within an identified habitat area. The survey required a substantial time investment, and was then followed by a lengthy Biological Opinion period, which was followed by mitigative discussions.

In short, formal consultation under Section 7 of the Endangered Species Act takes time. Run efficiently, but depending on species, seasonality, and study components: a “formal” Section 7 process can require from 6 to 15 months.

Project Consistency with Local Plans

Federal requirements for project consistency can exert considerable funding influence on a state DOT’s selection of projects within the jurisdiction of a Metropolitan Planning Organization, Transportation Planning Organization, and Transportation Planning Agency. Essentially, FDOT cannot approve a federal Environmental Document and FHWA will not provide federal funding for a project, unless that project is consistent with local transportation plans.

First, the project must be listed in FDOT’s Statewide Transportation Improvement Program, or TIP. Second, the project must also be listed and consistently described in the MPO’s own fiscally-constrained TIP. Finally: To be listed in a local TIP, the project must therefore be consistent with the Cost Feasible Plan of the local government’s Long Range Transportation Plan.

The Conclusion is: FDOT cannot approve a federally-funded project in an MPO area, unless local governments agree. Therefore, local partnership and project support is critical throughout the project study, all the way to Right-of-Way acquisition and Construction Let. Coordination with stakeholders and the local government is key for a successful NEPA project.

Lesson 7: Potential Project Show-Stoppers

At this point, we have been introduced to some of the major laws, permits, and regulations that affect NEPA studies. In lesson 7, let’s take a pause to see which of these carry enough weight to actually stop or substantially delay a project.

NEPA as a Show-Stopper?

NEPA itself... won’t stop your project progression. NEPA is a process which must be correctly followed. FDOT may encounter short-term delays should an agency or stakeholder show legitimate objection to project proceedings which do not comply with NEPA. Likewise, they may demonstrate legitimate need for additional studies.

NEPA Non-Compliance Can Be a Long-Term Threat

Following the sequential NEPA process is essential to avoid or defend against legal challenges in the future. Keeping a project Administrative Record maintains a documented trail of how the project followed the NEPA process to arrive at a decision. Later, and if a challenge arises – the Administrative Record helps to reconstruct how appropriate decisions were made, while complying with the multitude of pertinent laws and regulations.

Otherwise, FDOT may face a judicial ruling that the project recommendations are not sound. Opposition attorneys will look for that weak link where the NEPA process or other environmental laws were not followed.

Furthermore, early missteps can “reset” larger portions of a study – resulting in more lost time.

- Simple oversights can undermine legal standing.
- Was Purpose and Need credible?
- Was it shown to the public?
- Was a Federal Register notice provided?
- Were tribes appropriately consulted?

Did the team make an interim – or even final decision before considering all comments and information?

Long-Term Delays

Long-term delays to NEPA studies are more commonly related to laws and processes external to NEPA. We previously mentioned that under the Endangered Species Act, a Jeopardy determination could be reached and this can stop a project cold.

We also covered the need for local government planning consistency – which can threaten federal funding. FDOT’s inability to use or acquire unavoidable or critical lands can similarly bring projects to a halt.

An unfavorable Section 4(f) determination may rule against the recommended or preferred alternative, declaring that another prudent and feasible alternative is available. Having to study additional avoidance alternatives at later stages can substantially delay project progression while introducing new study parameters to consider. Recovering from this time setback is very difficult to overcome.

Permit denials after the NEPA study and Design phases are complete – can represent an obvious back-end concern which therefore requires diligent up-front coordination. Finally, substantial or significant public controversy can swing political winds to simply... cancel a project. Even if the project is justified and followed the NEPA process.

NEPA Considerations from Experienced Practitioners

NEPA is a process that is best followed correctly, adhering to required procedures and documenting accordingly. Successful project teams pause and spend the time to periodically look ahead and review NEPA requirements – and those of independent laws. A detailed and regularly-updated project schedule helps to identify critical items and forecast an appropriate NEPA progression.

Projects naturally bring opposition as a normal occurrence. Do not be afraid of it. Rather... Engage with it. Provide a sufficient level of public involvement using various media available. If opposition is expected, try to identify, resolve, and pre-answer opposing viewpoints as well as provide sufficient public involvement opportunities.

Successful project teams strive to find win-win solutions that meet Purpose and Need, yet achieve a balanced decision that is acceptable to FDOT. At the very least: Be transparent, honest, and respectful.

Respectfully agreeing to disagree is okay. Reflect first – or check with discipline experts - before agreeing to any commitments – then ensure that compliance is realistically-achievable. Then follow-up. Above all – act proactively to keep the highway program moving. Be judicious and rational when making decisions – while considering risk. FDOT paralysis is frequently a goal of opposition groups; therefore, be cognizant of this strategy.

Lesson 8: Laws, Regulations, and Guidelines

It is possible for professionals to work years down a career path before truly understanding the differences between a law, a regulation, and a guideline. Understanding the origins and weight of various governing products not only informs the practitioner, but empowers them when project negotiations become necessary.

Laws

A law is a rule or mode of conduct or action that is **prescribed or formally recognized as binding by a supreme controlling authority** or is made **obligatory by a sanction** (such as an edict, ordinance, statute, etcetera), that is made, recognized, or **enforced** by the controlling authority.

Federal laws passed by the U.S. Congress are recorded as United States Code or U.S.C. State of Florida laws passed by the state legislature are recorded as Florida Statutes. As examples of law such as: NEPA, SAFETEA-LU, MAP-21, and the FAST Act... are binding, obligatory laws that we must follow. So too are the Endangered Species Act, Clean Water Act, and a host of other laws that apply.

Rules/Regulations

Now let's look at Rules and Regulations as they pertain to state and federal agencies. Agencies...Are authorized by statutes to develop **rules/regulations** to apply the law. This is a form of "delegated legislation" covered by Administrative Law. Agencies... Are authorized to interpret and apply the statutory laws passed by legislators and... agencies must follow a Rulemaking Process that typically involves public notice and comment

Federal regulations are recorded as Code of Federal Regulations or CFR. Example regulations would include 40 CFR 1500-1508 which establishes the CEQ, or FHWA regulations such as 23 CFR 771-777, which regulate environmental impacts and related procedures.

Florida regulations are codified in the Florida Administrative Code or F.A.C. For example: Florida's Environmental Resource Permitting regulations are listed in Chapter 62-330, F.A.C. The Florida Administrative Register or FAR is a daily publication containing proposed rules and notices of state agencies.

The Federal Register is a legal newspaper published every business day by the National Archives and Records Administration. The Federal Register publishes a range of documents, including: Executive Orders, Federal Agency Regulations, and Public Notices.

Policies and Guidance

Finally, let's discuss the lesser authoritative, third tier of Policies and Guidance. These documents establish interpretive guidance for carrying out responsibilities under the law, rules, and regulations. Policy and Guidance documents typically arrive in the form of Memorandums and Manuals, but may appear in other formats. They are NOT legally binding.

These products offer advice, Questions & Answers, suggested process, and hypothetical examples on the practical application of laws and regulations. Agencies typically generate these documents at staff level; however, the approval process may simply involve internal review, and is usually less stringent than a formal rulemaking process. Of interest.... Approvals may not require public involvement.

Classic federal examples of guidance documents would be the: FHWA Guidance Memorandum on Section 4(f), and the US Army Corps of Engineers' 1987 Wetlands Delineation Manual. Because FDOT has been assigned NEPA responsibilities, the Department must follow applicable federal policy and guidance documents – as appropriately applied. Even though Policies and Guidance documents do not hold the same authority as laws and regulation: FDOT staff should not depart from these documents without appropriate justification and supervisory concurrence.

Perspective on Laws, Regulations, and Policy

The NEPA process... is a law. Following FDOT procedures ensures that projects meet applicable laws and regulations. This is important, as FDOT projects may face legal challenges claiming the Department did not follow procedures or meet specific requirements.

Policy and Guidance Memorandums tend to establish the application and interpretation of existing laws/rules and must be followed by FDOT. Non-NEPA policy and guidance documents also establish the practice/interpretation of the law, but may offer a lower level of legal legitimacy than a statute or regulation.

Seasoned practitioners understand that other agencies' policies and guidelines are typically supported by laws and regulations; however, these documents may on rare occasions also contain unsupported interpretations or extrapolations. For good agency relations and operating consistency, project teams should understand the importance of following other agencies' policies and guidelines. However, if specific policy tenets or interpretations by an Agency representative convey unreasonable or obstructive requirements, then FDOT might occasionally request clarification or possibly may need to review the situation with OEM and/or the Office of General Counsel. If an agency representative attempts to characterize troublesome guidelines as an absolute requirement, request verification of the requirement as based upon law or regulation in coordination with OEM or OGC.

Laws, Regulations, and Policy are not Rigid Obstacles

Laws, regulations, and policies should be followed... but also should not be viewed as rigid obstacles. When FDOT professionals encounter unreasonable requirements that may threaten program delivery – or even an individual project – then consideration should be given to elevating the issue to the appropriate level of management hierarchy - for action.

Certain requirements are easier to modify, remove, or even add... as they move from law toward policy or guidelines. Laws: Can be changed or new laws introduced – but not easily. For example: SAFETEA-LU established a program under which the Secretary of USDOT can assign the responsibilities of the Secretary under NEPA to certain states. FDOT recognized numerous advantages in the new law, and then engaged FHWA to implement NEPA Assignment.

Rules/Regulations: Are somewhat easier to change – with interagency coordination on rulemaking.

For example: The Florida Fish and Wildlife Conservation Commission revised nine rules as part of the Imperiled Species Management Plan in January 2017. These rule changes aim to further wildlife conservation in Florida as well as restore habitat essential to long-term survival of the imperiled species.

Policies and Guidelines: Are more readily challenged and changed via coordinating with and influencing agency decision-makers. It is an easier task to modify a guidance document.

Resources

You have now completed the NEPA Assignment Course, NEPA 101 Part 2. The Office of Environmental Management maintains a central library of training materials as well as documents and publications including manuals, handbooks, guidelines and agreements. Key references pertinent to this NEPA 101 module include:

- The PD&E Manual
- The FDOT/FHWA Planning Consistency Information
- FDOT's Quality Environmental Documents guidance, and
- FHWA's Environmental Review Toolkit

These links can be found on the resources page.

Conclusion

Congratulations on completing NEPA 101 – Part 2! Thank you for your time and attention.