

VII. Preliminary Engineering - NEPA and Other Environmental Requirements

A. Overview. TTP projects, like all federally-funded projects, must comply with applicable Federal, Tribal, state, and local environmental laws, regulations, and policies. Preliminary Engineering for a project, including completion of environmental documentation and review, begins after the project has been identified in the Tribe's Long Range Transportation Plan (LRTP) and the FHWA-approved Tribal Transportation Improvement Program (TTIP) (see [Chapter VI - Transportation Planning](#)).

B. Authority for Environmental Requirements of TTP. As outlined in [25 CFR § 170.450](#), all BIA, FHWA, and Tribal work for the TTP must comply with cultural resource and environmental requirements under applicable Federal laws and regulations, including, but not limited to the following:

- 16 U.S.C. § 1531, Endangered Species Act.
- 16 U.S.C. § 4601, Land and Water Conservation Fund Act (Section 6(f)).
- 16 U.S.C. §§ 661-667d, Fish and Wildlife Coordination Act.
- 23 U.S.C. § 138, Preservation of Parklands, commonly referred to as 4(f).
- 25 U.S.C. §§ 3001-3013, Native American Graves Protection and Repatriation Act.
- 33 U.S.C. § 1251, Federal Water Pollution Control Act and Clean Water Act.
- 42 U.S.C. § 7401, Clean Air Act.
- 42 U.S.C. § 4321, National Environmental Policy Act.
- 49 U.S.C. § 303, Preservation of Parklands.
- 7 U.S.C. § 4201, Farmland Protection Policy Act.
- 50 CFR § 402, Endangered Species Act regulations.
- 7 CFR § 658, Farmland Protection Policy Act regulations.
- 40 CFR § 93, Air Quality Conformity and Priority Procedures for use in Federal-aid Highway and Federally-Funded Transit Programs.
- 23 CFR § 771, Environmental Impact and Related Procedures.
- 23 CFR § 772, Procedures for Abatement of Highway Traffic Noises and Construction Noises.
- 23 CFR § 777, Mitigation of Impacts To Wetlands and Natural Habitat.
- 36 CFR § 800, Protection of Historic Properties.
- 40 CFR §§ 260-271, Resource Conservation and Recovery Act.
- Applicable tribal/State laws.
- Other applicable Federal laws and regulations.

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

- Use of a systematic and interdisciplinary approach.
- Appropriate consideration given to environmental, economic, and technical issues.
- For major Federal actions significantly affecting the environment, inclusion of a detailed statement on:
 - Environmental impacts of the proposed action.
 - Adverse impacts that cannot be avoided.

- Alternatives to the proposed action.
- Consequences of taking the proposed action.
- Consultation with other Federal, state, and local agencies.
- Public involvement.

To fulfill NEPA responsibilities established by the Council on Environmental Quality (CEQ), FHWA and the Department of the Interior (DOI) issued regulations ([23 CFR § 771](#) and [43 CFR § 46](#), respectively) prescribing the policies and procedures for implementing NEPA. Additional NEPA requirements and guidance established by FHWA and BIA can be accessed at the FHWA [Environment webpage](#), the DOI's [Departmental Manual Part 516 Chapter 10](#), and BIA's [NEPA Guidebook](#). These requirements/guidance help to ensure possible adverse economic, social, and environmental effects are fully considered during project development. All TTP projects must adhere to environmental regulations prescribed in [25 CFR § 170.450](#). However, Tribes will be further directed by the applicable regulations/guidance of the Agency with which they are working.

Each TTP project requires a NEPA document that must be completed and approved before the Plans, Specifications, and Estimates (PS&E) can be approved, before ROW acquisition can occur, and before project construction can start. The NEPA document should ideally be completed and approved at approximately 30% - 50% completion of a project's design (see [Chapter VIII - Preliminary Engineering – Project Package](#)). This is a guideline only and is intended to help ensure appropriate environmental commitments are incorporated into a project's final design.

- C. Development of the NEPA Document and Approval Authority.** The development of the NEPA document is undertaken by the Tribe, unless otherwise arranged with the BIA or FHWA.

Because the TTP is jointly administered by BIA and FHWA, either BIA or FHWA must be the lead (or at least a co-lead) Federal agency for the NEPA process on all TTP-funded projects. Therefore, all TTP NEPA documents must be reviewed and approved by the appropriate BIA or FHWA authority. Even when a Tribe develops a NEPA document, it does not have approval authority for the document, only the lead or co-lead federal agency(ies) have approval authority.

When a Tribe with an FHWA TTPA is developing a NEPA document, it is recommended that the Tribe prepare and submit to the FHWA TC the **TTP Environmental Checklist** (see Appendix C – [Exhibit 7.1](#)).

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

There are three classes of actions under NEPA, which determine how compliance with NEPA is carried out and documented depending on the significance of the environmental impacts of the project under study. The CEQ regulation at [40 CFR § 1508.27](#) states that “significantly” requires consideration of both context and intensity. Context means that the significance must be analyzed in several contexts such as society as a whole, national, affected region, affected interests, and the locality. Significance varies with the setting of the proposed action. Both short- and long-term effects are relevant.

Intensity refers to the severity of the impact. Impacts may be both beneficial and adverse. Among other considerations, the following should be considered in evaluating intensity:

- proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas,
- if effects on the quality of the human environment are likely to be highly controversial
- whether the action is related to other actions with individually insignificant but cumulatively significant impacts
- degree to which the action may adversely affect historical resources or endangered or threatened species

The three classes of actions under NEPA are categorical exclusions, environmental assessments, and environmental impact statements. Below is a flow chart for the NEPA process (Figure 9-1) followed by a description of each class of NEPA action.

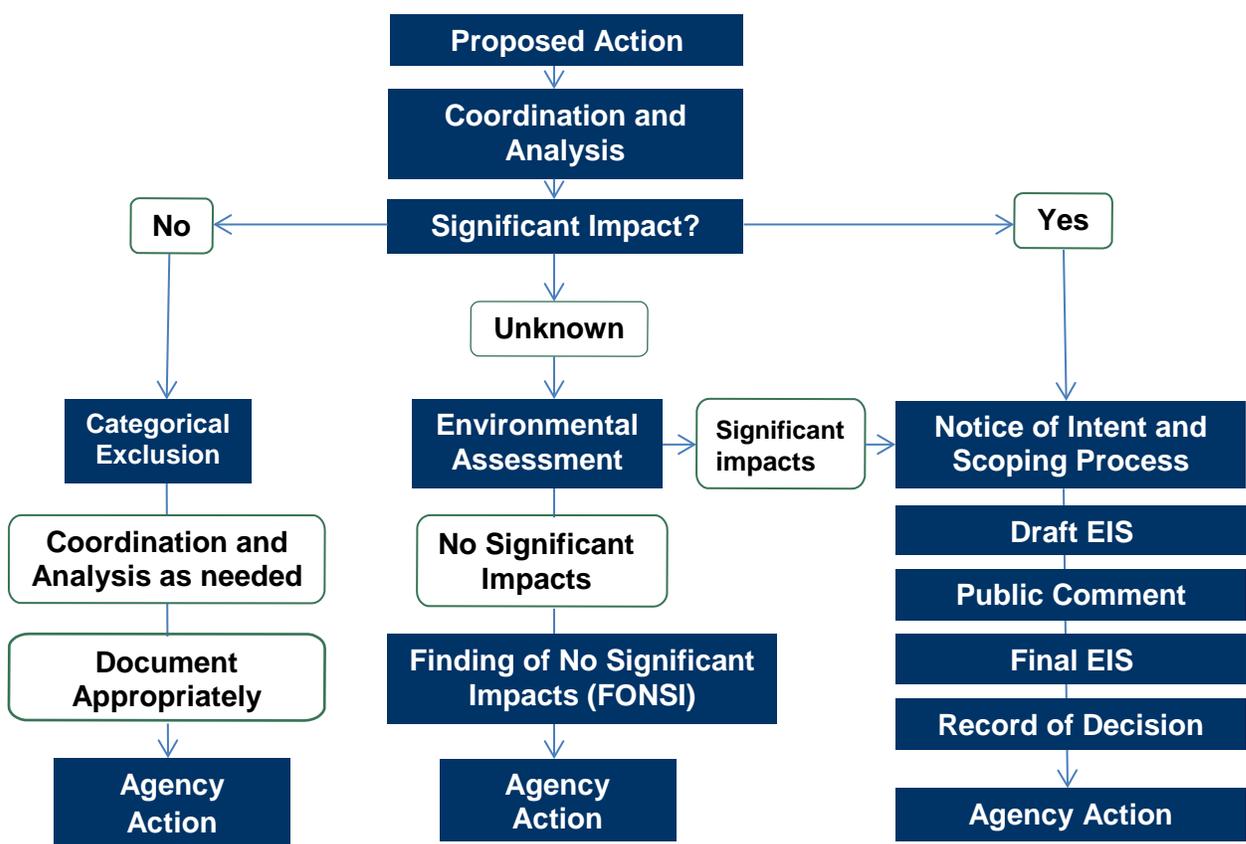


Figure 9-1: NEPA process flowchart

- 1. Categorical Exclusions.** Categorical exclusions are actions which meet the definition contained in [40 CFR § 1508.4](#). These actions are “excluded” from the requirements to prepare either an environmental assessment or an environmental impact statement based on experience that the actions do not normally individually or cumulatively result in significant impacts. The vast majority of TTP funded projects fall under this class of action; however, it is not an exemption of NEPA or other environmental requirements.

The BIA and FHWA each have their own lists of CEs that may apply to a particular proposed project. The BIA's lists are available at [43 CFR § 46.210](#) and at [516 DM 10.5](#). FHWA's lists are available at [23 CFR § 771.117\(c\) and \(d\)](#). Based on past experience, these actions have normally been shown to result in no significant impacts, however, a record must be established that demonstrates that the action has no unusual circumstances as set forth in [43 CFR § 46.215](#) for BIA and in [23 CFR § 771.117\(b\)](#) for FHWA.

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. See 25 CFR § 170.453.

Resources:

- CEQ - Regulations for Implementing NEPA:
http://www.whitehouse.gov/files/ceq/epa_comments_-_ceq_draft_nepa_efficiencies_guidance.pdf
- Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations: <http://energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act>

2. **Environmental Assessments.** When the significance of the environmental, social, and economic impacts of an action is not clearly established, an EA should be undertaken ([40 CFR § 1508.9](#)). Some larger and more complicated TTP funded projects may require an EA. Based on the results of the EA, either a finding of no significant impacts (FONSI) is issued by the lead federal agency(ies) if it is determined that the preferred alternative will not result in significant impacts ([40 CFR § 1508.13](#)). If it is determined that the preferred alternative will result in significant impacts, then an EIS would be developed. The BIA's procedures for EAs/FONSIs are described in [43 CFR § 46 Subpart D](#) and the [BIA NEPA Guidebook](#). FHWA's procedures are in [23 CFR §§ 771.119](#) and [121](#), and [Chapter 3](#) of the Federal Lands Highway (FLH) Project Development and Design Manual (PDDM).

The general EA procedures between the two agencies are very similar. However, one substantial difference is the timing of presenting an EA and/or FONSI for public review. The BIA issues a notice of availability of the EA and FONSI simultaneously for a 30 day public review before moving forward with the project. Conversely, the FHWA releases the EA for a 30 day public review, and if appropriate, subsequently releases the FONSI. In instances where the BIA and the FHWA both have an approval decision for an EA/FONSI, the BIA and FHWA environmental specialists will coordinate to ensure the public review period meets both agencies' requirements while eliminating/minimizing any extensions of the approval timeline.

Some TTP projects require a NEPA decision by both FHWA and BIA, and there are instances where the project would meet one or more of the requirements of FHWA's CEs yet not meet any of the requirements of BIA's CEs. This case usually arises when there is a right-of-way action involving small amounts of trust lands. Under this scenario, an EA would have to be developed to satisfy BIA's NEPA requirements. Normally this would add substantial additional time, funding, and effort. To help streamline the NEPA process in a case such as this, the BIA will write a "short form" EA that would incorporate FHWA's CE, which will include sufficient assessment of the trust land right-of-way action.

Resources:

- CEQ - Regulations for Implementing NEPA:
http://www.whitehouse.gov/files/ceq/epa_comments_-_ceq_draft_nepa_efficiencies_guidance.pdf
- Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations: <http://energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act>
- Outline for an Environmental Assessment (EA): see Appendix C - [Exhibit 7.2](#)
- Example Notice of Availability & Solicitation of Public Comment: see Appendix C - [Exhibit 7.3](#)

- 3. Environmental Impact Statements.** NEPA requires Federal agencies to prepare an EIS for major Federal actions that significantly affect the quality of the human environment ([40 CFR § 1502](#)). An EIS is a full-disclosure document and includes consideration of a range of reasonable alternatives (one of which must be the no-build alternative), analyzes the potential impacts resulting from the alternatives, and demonstrates compliance with other applicable environmental laws and Executive Orders. Few TTP funded projects are anticipated to require an EIS. However, the BIA's procedures for EISs is at [43 CFR § 46 Subpart E](#) and [BIA's NEPA Guidebook](#), and FHWA's are at [23 CFR §§ 123-130](#) and [Chapter 3](#) of FLH's PDDM.

Resources:

- CEQ - Regulations for Implementing NEPA:
http://www.whitehouse.gov/files/ceq/epa_comments_-_ceq_draft_nepa_efficiencies_guidance.pdf
- Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations: <http://energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act>

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

The Tribe shall retain project records and design documents for a minimum of 3 years following completion of the project construction (25 CFR § 900.130).

Resources:

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

- E. Other Environmental Laws and Requirements.** The Tribe, in coordination with FHWA/BIA, manages the NEPA project-development and decisionmaking process as an "umbrella" under which

all applicable environmental laws, Executive Orders, and regulations are considered and addressed prior to the final project decision and document approval. The cultural resource and environmental requirements for the TTP are listed in 25 CFR § 170.450 and depicted below in Figure 9-2. These are environmental laws that are commonly applicable during the NEPA process, but others may be applicable as well. Depending on the nature of the action, it is best to plan all levels of NEPA documentation to run parallel with requirements of other applicable environmental laws, regulations, and requirements. To the extent possible, these other compliance actions should be completed by the end of the NEPA process (CE, FONSI, or ROD). Information, conclusions and commitments of the agency related to these compliance actions will be discussed in the NEPA document.

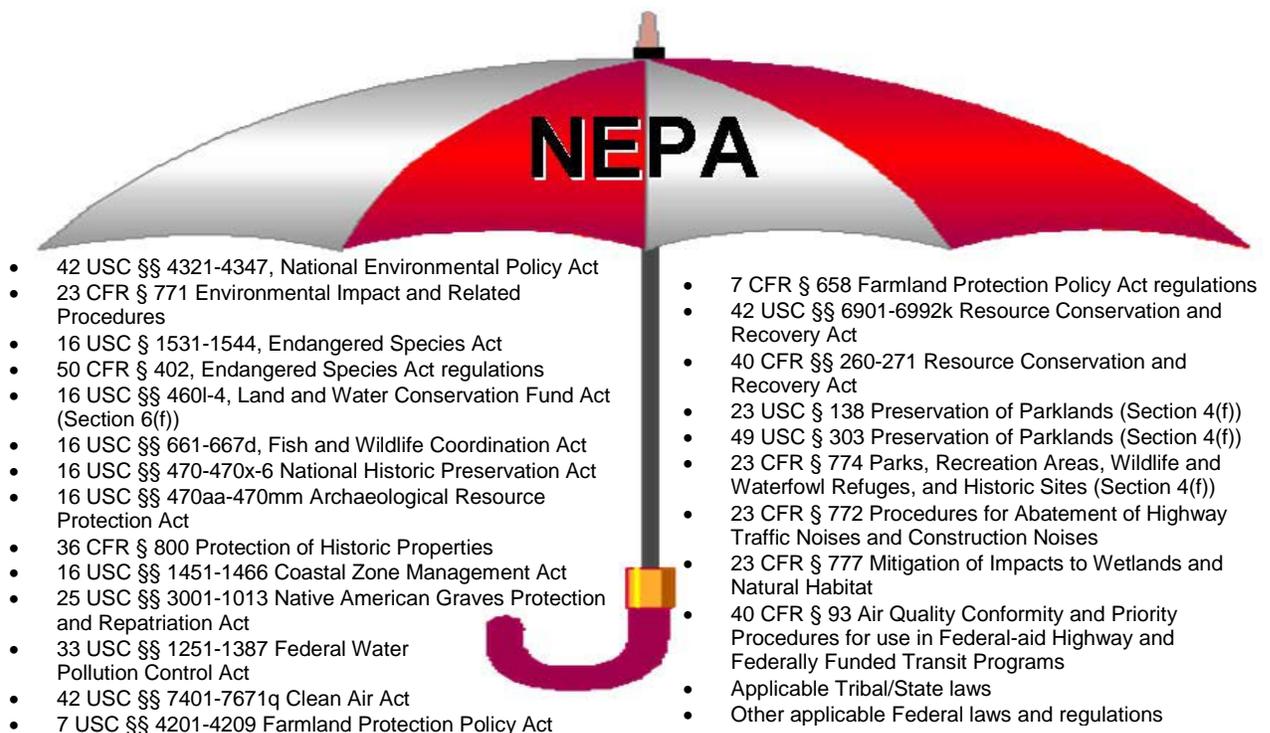


Figure 9-2: Applicable environmental laws for TTP-funded actions.

As noted above, the NEPA process involves compliance with a number of additional environmental laws, regulations, and requirements. The following highlights some of the environmental laws and requirements that regularly come into play in transportation projects. For a more detailed discussion on other additional environmental laws and requirements, see the PDDM Chapter 3: <http://flh.fhwa.dot.gov/resources/manuals/pddm/archives/2008.htm>

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

If a project proposes to use a property protected by Section 4(f), FHWA must either determine that impacts are *de minimis* or prepare a Programmatic or Individual Section 4(f) evaluation to

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

Currently, the BIA cannot make Section 4(f) determinations for their TTP projects, only an agency of the U.S. Department of Transportation can. However, in an effort to streamline compliance with Section 4(f) within BIA's TTP projects, both agencies are working together to identify possible avenues for the BIA to independently make Section 4(f) determinations.

Resources:

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

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

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

Resources:

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

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

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

The Tribe is responsible for ensuring appropriate surveys and reports (a Biological Assessment is required for informal and formal consultation) are completed in compliance with the ESA. Early coordination with the FHWA/BIA Environmental Specialist is recommended to ensure the appropriate level of study and any appropriate consultation by the lead federal agency is undertaken. Also, any reports should be reviewed by the lead federal agency prior to being finalized. The lead federal agency is typically responsible for consultation with the Services on “may affect...” determinations.

Resources:

- FHWA ESA Webtool: <http://www.environment.fhwa.dot.gov/esawebtool>
- Endangered Species Section 7 Handbook: http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf

4. Permits.

Acquisition of a number of potential federal, tribal, state, and local permits may be needed before construction of a proposed project can be initiated. Examples include Section 401, 402, and 404 permits of the Clean Water Act, floodplain permit, fish habitat permits, Coastal Zone Management Act permit, US Coast Guard Section 9 permit, etc. The Tribe is responsible for ensuring permit acquisition.

Resources:

- Wetlands and Section 401 Certification Fact Sheet: <http://www.epa.gov/owow/wetlands/facts/fact24.html>
- NPDES Website: <http://cfpub.epa.gov/npdes>
- Overview of Section 404 Permitting: <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis>