

GUIDELINES

DIVISION OF SANITATION FACILITIES CONSTRUCTION

Office of Environmental Health & Engineering
Navajo Area Indian Health Service
Window Rock, Arizona

CHAPTER 7--Right-of-Way

Section 3: Environmental Review for Public Law 86-121 Projects
Guideline No. 7.3 (06-02)
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Supersedes: G 7.3 (94-1), G 79-4
G 3.3 Environmental Assessment Statements on P.L. 86-121 Projects

Distribution: Standard List
General

I. Background

In accordance with the National Environmental Policy Act (NEPA) of 1969 (Public Law 91-90) and subsequent executive orders, all federally funded projects and actions must be assessed for the impact of those projects and actions upon the environment. Hence, construction projects being proposed by the Navajo Area Indian Health Service under the authority of P.L. 86-121 (The Indian Sanitation Facilities Act) must be evaluated for their potential impact upon the environment. This evaluation must necessarily incorporate consideration of other related federal laws, including the Endangered Species Act (ESA) and the National Historic Preservation Act (NHPA) of 1966 (Public Law 89-665) and acts related to it, such as the Archeological Resources Protection Act, the American Indian Religious Freedom Act, and the Native American Graves Repatriation Act. Guideline 7.2 covers in detail the procedures that follow for conducting archaeological inventories for compliance with the National Historic Preservation Act and related acts.

This guideline covers the procedure that will be followed within the Navajo Area Indian Health Service (NAIHS), Division of Sanitation Facilities Construction (DSFC), in complying with NEPA for P.L. 86-121 sanitation facilities construction projects.

II. Definitions

- a. **Wetlands:** Areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated soil conditions for growth and reproduction. Wetlands include swamps, marshes, bogs, and similar

areas such as sloughs, prairie, potholes, wet meadows, river overflows, mud flats, natural ponds and mangrove swamps.

- b. **Water Resources:** The "Waters of the United States" as defined by the following:
 - 1. Navigable waters and their tributaries, including up to their headwaters and land-ward to their ordinary high water mark and all tidal waters up to the high tide line.
 - 2. All interstate waters, including interstate wetlands;
 - 3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), prairie potholes, mudflats, playa lakes, wet meadows, wetlands, and natural ponds, etc.;
 - 4. All impoundments of the above referenced waters;
 - 5. Tributaries of the above listed waters;
 - 6. Wetlands adjacent to the above listed waters.

- c. **Navigable Waters:** Waters that have been used in the past, are now used or are susceptible to use as a means to transport interstate or foreign commerce up to the head of navigation.

- d. **Section 404 Permit:** Permit Program established by Section 404 of the Clean Water Act and administered by the US Army Corps of Engineers (COE) which regulates the discharge of dredged or fill material in waters or navigable waters (including wetlands) of the United States. Nearly all IHS construction in wetlands and navigable waters within the jurisdiction of the COE will be covered by a Nationwide Permit as administered by the local COE (See Attachment N).

- e. **Floodplains:** Lowland and relatively flat areas adjoining inland and coastal waters including flood-prone areas of offshore islands. Floodplains are categorized in two ways:
 - 1. 100-year floodplain: area subject to a 1.0 % chance of flooding in any given year, and
 - 2. 500-year floodplain: area subject to a 0.2 % chance of flooding in any given year.

- f. **Endangered Species:** Any species of fish, wildlife, and plants which is in danger of extinction throughout all or a significant portion of its range and is listed as such under the provisions of the United States Endangered Species Act (USES A).

- g. **Threatened Species:** Any species that is likely to become an endangered species within the foreseeable future and is listed as such under the provisions of the United States Endangered Species Act (USES A).

- h. **Historic Property:** Any prehistoric or historic district, site, building structure, or object included in, or eligible for inclusion in, the National Register of Historic Places (NRHP). The term includes artifacts, records, and remains that are related

to and located in such properties. Properties eligible for inclusion in the NRHP are those formally determined as such by the Secretary of the Interior and all other properties that meet National Register criteria.

- i. **National Register Criteria:** The criteria established by the Secretary of the Interior for use in evaluating whether properties qualify for listing in the NRHP. Properties are generally eligible if they possess integrity of location, design, setting, materials, workmanship, feeling, and association, and if they:
 - a) are associated with events that have made a significant contribution to the broad patterns of our history; or
 - b) are associated with lives of persons significant in our past; or
 - c) embody the distinctive characteristics of a type, period, or method of construction, or that represent the works of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
 - d) yield, or may be likely to yield, information important in prehistory or history.
- j. **Wild and Scenic Rivers:** Selected rivers in the United States, which with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values. Rivers are designated either by an Act of Congress or by the Secretary of the Interior upon application of a Governor. To date, Congress has not designated any rivers in the Navajo Nation to be "Wild and Scenic Rivers".
- k. **Coastal Zones:** The coastal waters (including the lands therein and thereunder) and the adjacent shore-lands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and inter-tidal areas, salt marshes, wetlands, and beaches. There are no designated "Coastal Waters" in the Navajo Nation.
- l. **Wilderness Area:** An area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation which is protected and managed so as to preserve its natural conditions. Wilderness areas (1) are substantially unaffected by human activities, (2) have outstanding opportunities for solitude, (3) generally are at least 5,000 acres in area, and (4) generally have features of ecological, geological, scientific, educational, scenic, or historic value. "Wilderness Areas" are designated by The President of the United States per recommendations made by the Departments of Agriculture (USDA) and Interior (DOI). To date, no such areas have been designated on the Navajo Nation.
- m. **Significant Agricultural Lands:** Land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops, and is also available for these uses (the land could be cropland,

pastureland, range-land, forest land, or other land, but not developed land or land under water). Such land has the soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops when treated and managed. The land need not be actively farmed to be considered significant agricultural lands.

- n. **Sole-Source Aquifer:** Aquifers that serve as the sole source of groundwater supplying a public water supply system that serves at least 50 percent of the population in that area.

III. Environmental Review

All P.L. 86-121 projects shall be reviewed for their potential effects upon the environment. Project managers shall document the results of the review and related surveys by completing an Environmental Review and Documentation Form (ERDF), Attachment I. The completed ERDF, including all related surveys, etc. shall be forwarded by the project manager, through their District Engineer, to the Director, DSFC.

The Area Office, DSFC, shall assist the project manager in obtaining pertinent information regarding threatened and endangered species (T & E) listed in the ESA. Copies of the project area maps, taken from the Project Summary, and a brief description of the project will be forwarded, upon request by the Project Manager using the request form, Attachment J, by the Area Office DSFC to the Navajo Nation Heritage Program (NNHP) of the Navajo Nation Department of Fish and Wildlife (NNDFW). The NNHP has the best database for threatened and endangered species (T&E) listed in the ESA. If appropriate, similar state offices and the U.S. Fish and Wildlife Service (USFWS) may be contacted for their advice on T&E that might possibly be affected by the proposed project. These agencies will be requested to respond within 30 days (see Attachment E). If these agencies advise that there is a potential for the existence of a T&E specie(s) within the project, the Area Office DSFC shall determine if the project may effect the T&E (See Attachment K for an example of this determination.). That is, the project may not adversely effect the T&E habitat, through such policies as avoiding disturbing prairie dog colonies of greater than 10 acres, which is potentially the habitat for the Black Footed Ferret. Other determinations such as this include the avoidance of building along cliffs, the nesting habitat of the Golden Eagle and Ferruginous Hawk. If it is determined that a project may have a potential for affecting a T&E, then the Area Office DSFC will advise the Project Manager, through his District Engineer, to arrange for a survey of proposed project rights-of-way by a qualified wildlife biologist and/or botanist who is capable of identifying the particular T&E specie(s) of concern.

Attachment J is also used to request archeological surveys and a survey of Navajo Nation timber/forest resources by the Tribe's Forestry Program.

Responses from the above agencies, reports, and other NAIHS, DSFC comments will be made attachments to the project's ERDF.

Since the Bureau of Indian Affairs (BIA) will eventually grant all easements and rights-of-way across lands held in trust, for the Navajo Tribe and individual Indians, a copy of the project's ERDF will be forwarded to the BIA's Environmental Quality Officer for BIA's information. See Attachment M for a discussion of BIA's agreement with this procedure.

IV. Categorical Exclusions

On December 29, 1992, the Indian Health Service (IHS) published in the Federal Register (58 FR 569) its "list of IHS program actions that are categorically excluded from the requirement to conduct further evaluation under NEPA", Attachment L. This list became effective January 6, 1993.

This was done in compliance with regulations of the Council on Environmental Quality (CEQ), which was established through NEPA and is charged with making regulations to implement NEPA and with overseeing federal agencies' compliance with NEPA. In 1980, CEQ approved the Department of Health and Human Services (HHS) procedures for complying with NEPA. As provided for in CEQ regulations, categories of actions that do not individually or cumulatively have a significant effect on the human environment may be defined. The HHS General Administrative Manual established the procedure for defining these categories in 1980. The IHS, an agency of HHS, took action to define its particular categories in 1992.

With regard to P.L. 86-121 projects, the following activities are categorically excluded from the preparation of an environmental impact statement (EIS) or an environmental assessment (EA):

"Actions associated with construction of sanitation facilities to serve Indian homes and communities, except that the following actions are not excluded:

- (1) Construction of a sanitary landfill at a new solid waste disposal site, and
- (2) Construction of a new wastewater treatment facility with direct discharge of treated sewage to surface waters."

Please note (1) and (2) above. These are the exceptions to the categorical exclusions. Actions including these activities must include, at a minimum, the preparation of an EA. Depending on the findings of the EA, it may be necessary to prepare an EIS. Please see the section, Environmental Assessment, below, for information on the preparation of an EA.

There may also be extraordinary circumstances under which the normally excluded categories may have a significant environmental effect. In that case, then, the normally excluded actions are not categorically excluded. Following are examples of actions that are not categorically excluded:

1. Those with potential to change the existing environment where such change violates directives or other controls that are imposed by any governmental body having jurisdiction for the purpose of protecting or otherwise affecting that environment.

2. Those with potential or real threat of violation, or continued violation, of an applicable Federal, State, or local law or requirement imposed for protection of the environment or to ensure public health and safety.
3. Those likely to cause controversy with respect to the types or extent of the resulting environmental effects where such controversy is based on pertinent and substantial issues.
4. Those involving the use of technology where the possible effects are highly uncertain or involve unique or unknown risks and where such technology has not been assessed previously for environmental impact.
5. Those which have adverse effects on unique geographic characteristics (e.g., historic, archeological, or cultural resources; park, recreation or refuge lands; wilderness areas, wild or scenic rivers; sole or principal drinking water aquifers; prime farmlands; wetlands; floodplains; coastal management zones; or ecological or critical areas including those listed on the Department of Interior's National Register of National Landmarks).
6. Those which establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.
7. Those which have adverse effects on properties listed or eligible for listing on the National Register of Historic Places.
8. Those which have adverse effects on species listed by the Federal Government as endangered or Threatened Species, or which have adverse effects of any designated critical habitat for these species.
9. Those which require assessment in accordance with Executive Order 11988 (Floodplains Management), or Executive Order 11990 (Protection of Wetlands), or the Fish and Wildlife Coordination Act.
10. Those which involve the use, transfer, or lease of real property which has been determined, after investigation in accordance with the provisions of CERCLA 120(h) to have been used as a storage facility for hazardous waste for more than 1 year.
11. Construction projects which are significantly greater in scope or size than normally experienced for a particular category of action.

In 1993, when the above exceptional circumstances were written, the Navajo Area IHS considered typical P.L. 86-121 projects to be about \$1 million, and those “significantly greater in scope or size” and requiring an Environmental Assessment to be about \$2 million. Since that time, inflation has risen at an estimated annual inflationary rate of 4.5%, making this “exceptional” amount nearer to \$3.5 million. Therefore, for the purpose of updating this guideline; particularly, as it pertains to the 11th extraordinary

circumstance, all projects over \$3.5 million will not be considered as “categorically excluded,” and will require, at a minimum, the preparation of an EA.

Please note the above 11 extraordinary or exceptional circumstances.

It is the responsibility of the Project Manager to advise the Assistant Director, DSFC, when a particular P.L. 86-121 project for which he is responsible may include at least one of the two activities not excluded or may include at least one of the eleven extraordinary circumstances. It is the Project Manager's responsibility to determine if his project may not be categorically excluded, when he first begins working with the project.

V. Environmental Assessment

An EA is prepared if it is determined that a project is not or may not be categorically excluded from the preparation of an EA or EIS.

If the project is determined to have no significant impact upon the environment, this determination and the reasons for this determination will be documented in a "Finding of No Significant Impact" (FONSI). If the Assessment results in a determination other than a FONSI, the Director, DSFC, in consultation with the NAIHS, OEHE, shall decide whether the scope of the project shall be changed to lessen the impact or to expand the evaluation/assessment process for the preparation of an environmental impact statement (EIS).

The environmental assessment process shall begin at the field office level by the Project Engineer's Officer's review of Environmental Assessments (EA) for previously approved P.L. 86-121 projects within or near the vicinity of the proposed project and review of the list of threatened and endangered species. The Project Engineer/Officer shall then complete an "Impact Assessment Worksheet" and a draft EA for the proposed project. The sample EA contained in Attachment B should be used as a guide for the format of the EA.

The draft EA and the draft Project Summary for the project along with a diskette containing both documents shall be forwarded by the Project Engineer/Officer, through his/her District Engineer, to the Director, DSFC.

Following receipt of response(s) from the NNDFW, USFWS, and/or other applicable local, state, or federal agencies, and the results of any required field surveys, the Area Office DSFC will finalize the EA and present the EA to the Director, DSFC.

The Director, DSFC will make a determination of the significance of the impact of the project upon the environment. If no significant impact is determined to be the result, a FONSI will be issued by the Director, DSFC (see Attachment A).

To assist the Project Engineer/Officer in the use and completion of the sample EA, the following is provided:

1. Title Page: the information here is self-explanatory and any previously approved EA will serve as an example.
2. Purpose and Need for Action: This paragraph is an explanation of the scope of the project and can be formulated from the Project Summary. This paragraph need not be in great detail but needs to include all aspects of the project such as the length of line, any wells to be drilled or rehabilitated, tanks that are to be constructed, etc.
3. Project Description: The paragraphs in this section are all self-explanatory. Be sure to include the township and range of the location of the project.
4. Alternative Including the Proposed Action: This paragraph is self-explanatory and can be taken from the Project Summary. You need to include a minimum of two alternatives (one can be, "do nothing").
5. Existing Environment: These paragraphs will most likely require some research and coordination with other entities to complete. The topography, soils, and climate can be obtained from USGS maps or reports, some of which are available at the Area Office. The water section is mainly trying to determine the direction of flow of the runoff and any other pertinent information. The Threatened and Endangered (T&E) Species section will be taken care of in the Area Office and will not require any input from the field except maybe to accompany someone in a field survey, if it is expected that a T&E species might exist in the project area. The paragraph on the human environment is self-explanatory.
6. Environmental Consequences: Most of these sections are again self-explanatory. The information for the paragraph on wells can be obtained from the Tribe's Division of Natural Resources, which maintains a data base that we can access that details all the wells that are used on the Navajo Reservation for either livestock or human consumption. Information on the water bearing formation that the new well or existing wells will draw from should be stated in the EA since the Bureau of Indian Affairs has requested that this information be included in the past EAs.
7. The other paragraphs in the EA are self-explanatory. The bibliography will be shortened in the Area Office, depending on the location of the project.

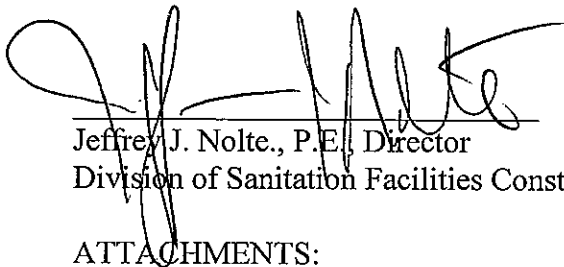
Copies of applicable references listed in the bibliography of the sample EA should be available at each NAIHS, OEHE, Field Office. If the Project Engineer/Officer needs a copy of a particular reference and cannot find one at his/her field office, contact the Technical Writer/Editor, Technical Services Section, DSFC, at the NAIHS Area Office.

The project's archaeological survey report is referenced in the EA and will be maintained on file in the project's right-of-way folder in the Area Office.

Once the draft EA has been submitted to the Area Office, the Project Engineer/Officer may check on its status by contacting the Assistant Director or the Right-of-Way Specialist, DSFC, at the Area Office.

A copy of the project's FONSI and EA will be forwarded to the BIA, Environmental Quality Officer, for review and comment (see Attachment F). The BIA's concurrence to the FONSI and EA is necessary before requests for grants-of-easement or rights-of-way can be submitted to the BIA for approval. See Attachment G for an example of a concurrence letter from the BIA.

APPROVED BY:



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ATTACHMENTS:

- A. Finding of No Significant Impact
- B. Environmental Assessment
- C. Impact Assessment Worksheet
- D. Tribal Well Record, Location File
- E. Standard Transmittal Letter to NNHP & NMHP
- F. Standard Transmittal Letter to BIA, EQO
- G. Sample EA Concurrence from BIA
- H. Example EA
- I. Environmental Review and Documentation Form (ERDF)
- J. Standard Request Letter for Archaeology Survey, Tree Cutting Permit, and T & E Inventory
- K. Sample Determination on T & E Species
- L. 58 FR 569, Publication of Categorical Exclusions
- M. Agreement between IHS and BIA for Categorical Exclusions
- N. US Army Corp of Engineers - Nationwide Permit Summary