

# 2015 FRA Rail Program Delivery



## Tiering: Other Laws under the NEPA Umbrella

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# Tiering: NEPA & Other Laws

- **Tiering is authorized under NEPA...**
- **But what about other statutes?**
  - Section 7 – T&E species
  - Section 106 – historic properties
  - Section 4(f) – parks, refuges, historic
  - Section 404 – wetlands/streams
  - CAA - air quality conformity

# Regulatory Context

- **Regs that address tiering**
  - NEPA (CEQ, FHWA/FTA)
  - Section 4(f)
- **Regs that do *not* address tiering:**
  - Section 106
  - Section 7
  - Section 404
  - Air quality conformity
  - Many others ...

# Tiering: NEPA & Other Laws

- **Key question:**
  - Can you defer compliance with other law entirely until Tier 2?
  - Or do they require *something* at Tier 1?
  - If so, what?
- **To find an answer, consider:**
  - What do the regulations say?
  - What have the courts said?
  - What actually happens in practice?

# Section 4(f)

- **Section 4(f) regs (FHWA/FTA):**
  - Prohibits “approval” of use unless required findings are made.
  - Regulations:
    - Tier 1 EIS “should address potential impact” on 4(f) resources and “whether those decisions have a bearing” on Tier 1 decision
    - Tier 1 ROD “may” include “preliminary approval” of use of 4(f) resources
    - If no preliminary approval is granted in Tier 1, explain why not.

# Section 106

- **Section 106 regs:**
  - Consultation required for “undertaking”
    - “undertaking” = “project, activity, or program”
    - “phasing” allowed –how does it fit with tiering?
    - “programmatically” consultation
  - Key questions:
    - Is there an undertaking at Tier 1?
    - If so, should consultation be initiated at Tier 1?
    - If initiated, what does Tier 1 consultation involve?

# Section 7

- **Section 7 regs:**
  - Consultation required for agency “action”
    - “action” = “activities or programs of any kind”
    - “framework programmatic action” (*new in 2014*)
    - “incremental step” consultation
    - “irretrievable commitment”
  - Key questions:
    - Is there an “action” at Tier 1?
    - If so, must consultation be initiated in Tier 1?
    - If so, what does Tier 1 consultation involve?

# Section 404

- **Section 404 regs:**
  - Prohibits discharge into Waters of U.S. without a permit from Corps of Engineers
    - Permit can be issued only for ‘LEDPA’
    - LEDPA determined by Corps at time of permit application
  - Key questions:
    - What level of involvement from Corps at Tier 1?
    - Does LEDPA standard have any bearing on selection of alternatives in Tier 1?



# Air Quality Conformity

- **Conformity regs:**
  - Prohibits agencies from “approving” or “supporting in any way” activities that do not conform to State plans for achieving NAAQS
    - ‘conformity determination’ required – but when? for what action?
  - Key questions:
    - Is any determination required at Tier 1?
    - Is it necessary for highway/transit elements to be included in MPO’s constrained plan, TIP?

# Case Law

- **Court cases involving ‘other laws’ in programmatic or Tier 1 EIS:**
  - Section 7 cases
  - Section 106
  - Section 404 cases
- **Takeaways:**
  - Tiering of ESA consultation is allowed
  - OK to defer LEDPA finding to Tier 2
  - But overall, law in this area is unsettled

# CEQ Guidance

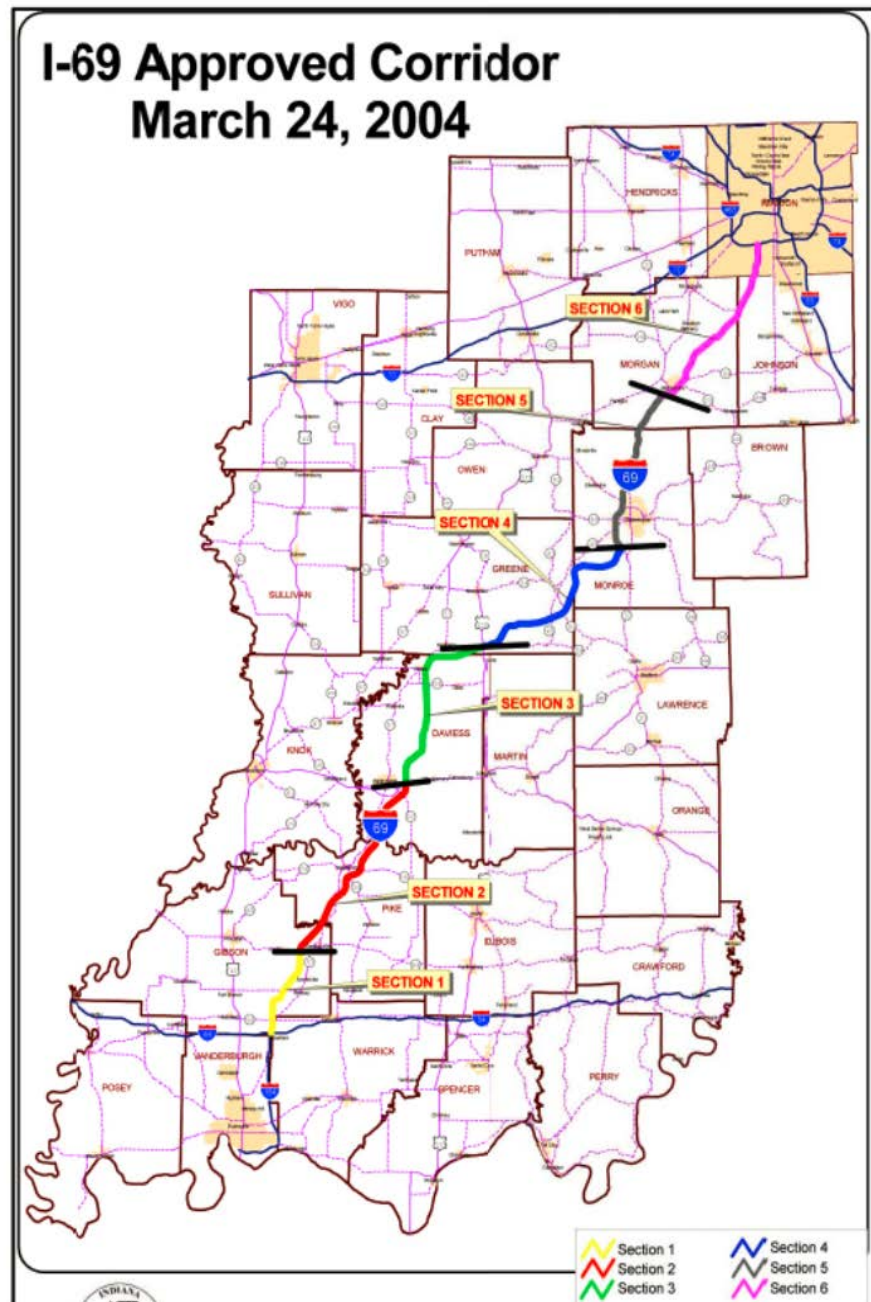
- **2014 Guidance on Programmatic EISs**
  - Agencies should
    - “clearly and concisely articulate their intentions to defer particular environmental review and consultation requirements”
  - Compliance obligations at Tier 2 depend on:
    - nature of the decision at each phase” and
    - “the extent to which [Tier 1 decision] may constrain the subsequent consideration of alternative”

# Agency Practices

- **USDOT experience with tiering:**
  - Primarily FHWA and FRA
    - Existing corridors (upgrades)
      - e.g., I-70 Colorado, Chicago-St. Louis HSR
    - New-corridor projects
      - e.g., I-69 Indiana, Illiana Corridor, CA HSR
  - Large variations in approach to other laws
    - Max: Sec. 106 and Sec. 7 consultation in Tier 1
    - Min: Defer all compliance to Tier 2

# I-69 Indiana

Law	Approach
Sec. 106	Consulted with SHPO Executed Tier 1 MOA
Sec. 7	Consulted with USFWS Prepared Tier 1 BA Received Tier 1 BO
Sec. 404	LEDPA analysis Corps Coordination Commitment re Tier 2 approach
Sec. 4(f)	'Preliminary approval' in Tier 1
Conform.	Analysis but no finding



# Agency Practices

- **Summary of current practice, based on review of recent USDOT Tier 1 documents:**
  - “typically done”
  - “sometimes”
  - “rarely/never”

# Section 7 at Tier 1

Typically	Sometimes	Rarely/Never
<ul style="list-style-type: none"><li>• Summarize Section 7 requirements</li><li>• Identify listed species and critical habitat</li><li>• Describe potential effects on T&amp;E species/habitat</li><li>• Describe what will be done in Tier 2</li></ul>	<ul style="list-style-type: none"><li>• Initiate Section 7 consultation</li><li>• Prepare Tier 1 BA</li><li>• Issue Tier 1 BiOP (“programmatic”)</li></ul>	<ul style="list-style-type: none"><li>• Field work to assess presence of T&amp;E species</li><li>• Final determinations regarding the potential for jeopardy</li></ul>

# Section 106 at Tier 1

Typically	Sometimes	Rarely/Never
<ul style="list-style-type: none"><li>• Describe regulatory requirements</li><li>• Identify APE (preliminary)</li><li>• Identify known historic properties</li><li>• Discuss potential effects on known properties</li><li>• Discuss potential avoidance, minimization options</li><li>• Discuss what will be done in Tier 2</li></ul>	<ul style="list-style-type: none"><li>• Invite consulting parties during Tier 1</li><li>• Execute a PA or MOA in Tier 1</li><li>• Include programmatic mitigation in PA/MOA</li></ul>	<ul style="list-style-type: none"><li>• Field work to identify/evaluate historic properties</li><li>• Make final determinations of eligibility</li><li>• Make final determinations of 'adverse effect'</li><li>• Adopt specific mitigation measures</li></ul>



# Section 4(f) at Tier 1

Typically	Sometimes	Rarely/Never
<ul style="list-style-type: none"><li>• Summarize Sec. 4(f) requirements in EIS</li><li>• Identify known 4(f) resources</li><li>• Describe potential effects on 4(f) resources</li><li>• Assess 'potential' for use of 4(f) resources</li><li>• Explain how 4(f) will be addressed in Tier 2</li></ul>	<ul style="list-style-type: none"><li>• Identify 'likely' uses of 4(f) properties</li><li>• Provide 'preliminary approval' for use of 4(f) resources</li><li>• Discuss potential for constructive use and/or de minimis determination</li></ul>	<ul style="list-style-type: none"><li>• Field work</li><li>• Final determinations of prudence and feasibility</li><li>• De minimis impact determinations</li><li>• Constructive use determinations</li><li>• Final approvals of the use of 4(f) resources</li></ul>

# Section 404 at Tier 1

Typically	Sometimes	Rarely/Never
<ul style="list-style-type: none"><li>• Summarize Sec. 404 requirements in EIS</li><li>• Identify known wetlands and streams in the project area</li><li>• Identify potential impacts on known wetlands and streams</li><li>• Discuss Section 404 permitting activities and when they will occur</li></ul>	<ul style="list-style-type: none"><li>• Explain 'LEDPA' and how it was considered in Tier 1</li><li>• Identify the 'projects' for which 404 permits will be sought</li><li>• Enter into agreement with Corps/EPA regarding 404 permitting for Tier 2 projects</li></ul>	<ul style="list-style-type: none"><li>• Field work to identify wetlands</li><li>• Jurisdictional determinations by the Corps</li><li>• LEDPA analysis/determination for the Tier 1 decision</li><li>• Issuance of project-wide Section 404 permit at Tier 1</li></ul>

# Air Quality Conformity at Tier 1

Typically	Sometimes	Rarely/Never
<ul style="list-style-type: none"><li>• Summarize conformity requirements in EIS</li><li>• Describe region's current attainment status</li><li>• Conduct regional air quality analysis for Tier 1 alternatives</li><li>• Explain when conformity will be addressed in Tier 2</li></ul>	<ul style="list-style-type: none"><li>• Preliminary conclusion regarding compliance with conformity requirements</li></ul>	<ul style="list-style-type: none"><li>• Hot-spot analyses for localized pollutants (e.g., CO, PM2.5)</li><li>• Final conformity determinations</li><li>• Inclusion of individual projects in MPO plans and TIPs.</li></ul>

# Tips

- If preparing a Tier 1:
  - Identify decisions to be made in Tier 1
    - What is being taken ‘off the table’ in Tier 2?
  - Meet with key agencies about how ‘other laws’ will be addressed during Tier 1
  - Document the rationale for your regulatory compliance strategy
  - Be prepared for some twists and turns along the way!

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