

National Environmental Policy Act (NEPA) - West Hayden Island

A) Potential Programmatic/Tiered Approach

The tiering process involves developing a tier 1 high-level EIS (program or planning level) and then covering subsequent project-level proposals happening within the program or planning area with subsequent tier 2 project-level EISs, EAs, or Categorical Exclusions (depending on level of impact). Federal agencies can use programmatic analyses to cover sequenced actions. This can be a useful approach when the specifics of future actions and proposals within an overall program are not fully understood.

NEPA Trigger action – proposed filling of wetlands and waters of the United States in development footprint; requires a Clean Water Act (CWA) Section 404 permit, which is a federal action.

Lead Agency – US Army Corps of Engineers (USACE)

EA or EIS – Programmatic EIS with subsequent project-specific NEPA documents (EIS, EAs, or Categorical Exclusion, depending on level of impact) to cover the phases of development.

Description – The initial EIS would describe, to the extent known, the full project: the fill that will be needed, the general type and locations of industrial development, the estimated number of docks, the concept of a rail loop, and the impacts to the natural and human environment. Under the CWA 404 permit, the USACE only has jurisdiction over impacts to wetlands and waters of the US; however, the EIS must disclose all the impacts including what is understood about impacts to forests, woodlands, grassland, floodplain, wildlife species and public health.

The major EIS decision-making milestones for the USACE are generally:

- Purpose and need
- Range of alternatives consistent with practicability analysis for 404(b)(1)
- Environmental impacts of alternatives
- Least Environmentally Damaging Alternatives (LEDPA)
- Mitigation (avoid, minimize, conserve, then compensate)

A Record of Decision (ROD) would be issued that includes conditions, such as required wetland mitigation. The ROD could state that no construction activities resulting in irretrievable commitment of resources or irreversible impacts would commence until a tenant is known. The ROD may be challenged. Once challenges are settled and the ROD is final, the USACE will issue the CWA 404 permit.

When the Port or a future tenant is proposing a specific project the appropriate NEPA document would be prepared and issued. That document would include differences between what was known at time the Programmatic EIS was prepared and new information based on construction designs. The project-level NEPA document would have to fit under the larger ROD. If anything changed substantially, like a new listed wildlife species, a supplemental document amending the programmatic EIS might be needed.

City's Role – For an EIS, “cooperating agencies” would be identified by the USACE. The cooperating agencies, while not having decision making powers, would be heavily involved in review of the EIS and recommending conditions for the ROD. For example, National Marine Fisheries Service may be included. The City can request an invitation to the table as a cooperating agency. Based on input from the agencies, the USACE could include conditions in the ROD (and the 404 permit) that meet local requirements (i.e., City zoning code).

For example, although information needs to be provided in the EIS regarding the impacts to wildlife species using the wetlands, the USACE doesn't review mitigation adequacy pertaining to wildlife expect for Endangered Species Act (ESA) listed species. The City does evaluate impacts to non-ESA wildlife species during a typical local environmental review and as a cooperating agency could provide conditions for the ROD that specifies mitigation for those impacts in order to meet local zoning requirements.

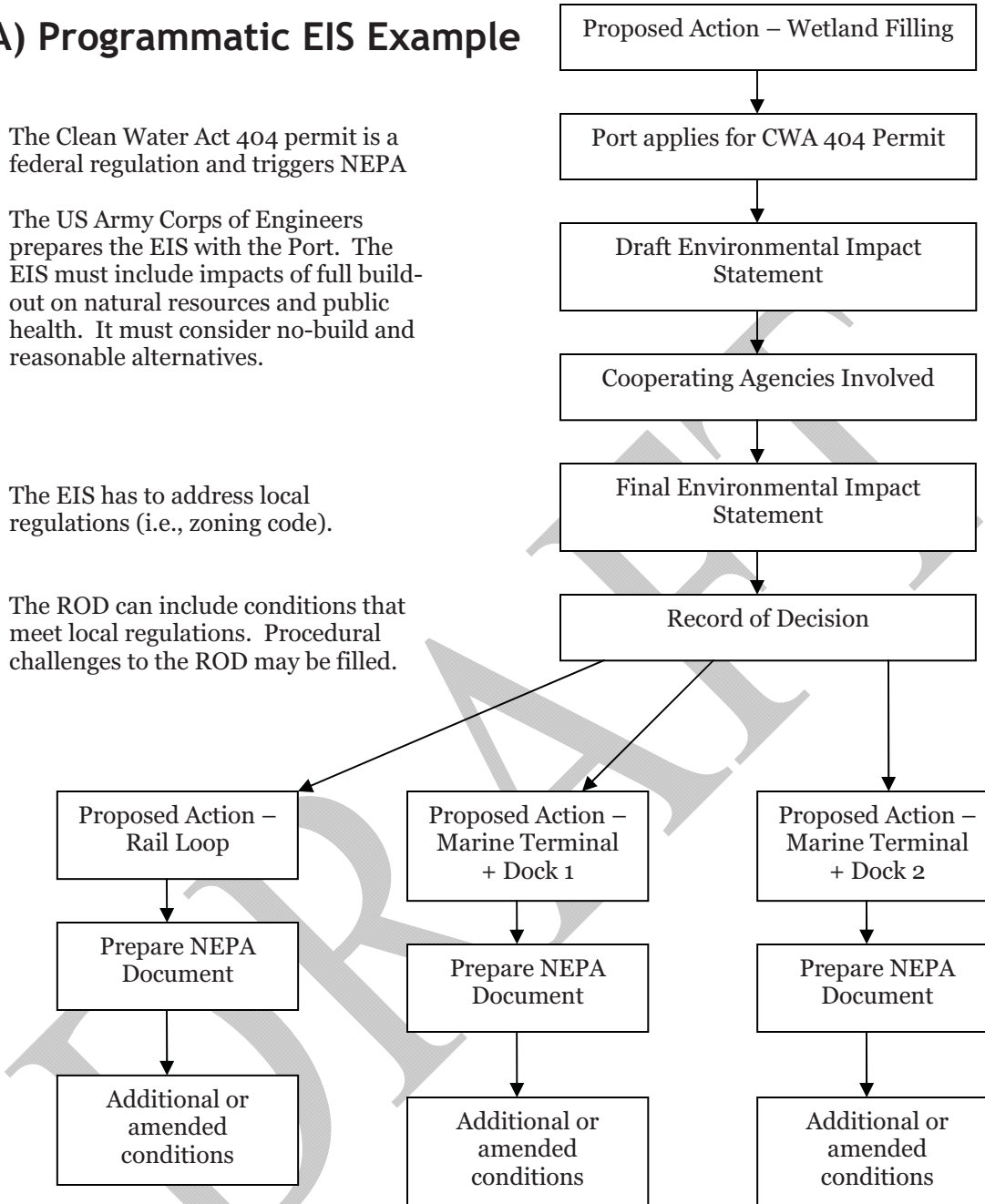
A) Programmatic EIS Example

The Clean Water Act 404 permit is a federal regulation and triggers NEPA

The US Army Corps of Engineers prepares the EIS with the Port. The EIS must include impacts of full build-out on natural resources and public health. It must consider no-build and reasonable alternatives.

The EIS has to address local regulations (i.e., zoning code).

The ROD can include conditions that meet local regulations. Procedural challenges to the ROD may be filled.



B) Potential Alternative NEPA Approach - EA First

It is possible that wetland filling would be done early to make the site more shovel-ready. In this scenario there would be very little known about the rail loop, tenants or docks. The USACE, as the lead agency, determines what kind of NEPA process is required and could decide to only require an Environmental Assessment (EA) for the wetland filling and wait to require an EIS until more information is known about the marine terminal development.

NEPA Trigger action – proposed filling of wetlands in development footprint; requires a Clean Water Act (CWA) Section 404 permit, which is a federal action.

Lead Agency – US Army Corps of Engineers (USACE)

EA or EIS – EA that covers only the wetland filling. Future EAs/EISs would be triggered by a subsequent federal action such as impacts to shallow water habitat or if federal funding is provided to the development.

Description – If the lead agency, in this case USACE, is confident that an EA will lead to a legally defensible Finding of No Significance (FONSI), an EA is the preferred route. The EA would consider a range of alternatives; however, not as much detail as would be provided as would occur through an EIS. The FONSI would include thresholds that may not be exceeded. The USACE can include conditions when issuing the 404 permit, including specifying mitigation requirements.

After the EA and wetland filling, when the Port or a future tenant is proposing a specific project that has a federal-nexus, the appropriate NEPA document would be prepared and issued. Likely this would occur then a dock is proposed. A CWA Section 404 permit would be required for impacts to waters of the United States. The lead agency, USACE, would determine the necessary NEPA track. It is likely that in this scenario, the first major marine terminal development, including rail loop, dock and terminal, would be evaluated through an EIS process.

City's Role – Cooperating agencies are not identified during an EA process. However, the EA is available for review by agencies and the public. The USACE may include local conditions in the FONSI and/or in the 404 permit. Cooperating agencies would be identified during the EIS process. The City can request an invitation to the table as a cooperating agency.

B) Alternative NEPA Process - EA First

The Clean Water Act 404 permit is a federal regulation and triggers NEPA

The US Army Corps of Engineers prepares the EA with the Port. It must consider a no-build alternative.

FONSI and the 404 permit can include thresholds and conditions.

Impacts to waters of the US requires a 404 permit. The USACE is the lead agency and prepares an EIS with the Port.

The ROD can include conditions related to future marine terminals/docks.

