

AASHTO PRACTITIONER'S HANDBOOK

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APPLYING THE SECTION 404(B)(1) GUIDELINES IN TRANSPORTATION PROJECT DECISION-MAKING

This Handbook is intended to assist practitioners in applying the Section 404(b)(1) Guidelines in the environmental review process for surface transportation projects. The Handbook focuses on highway and transit projects that require an individual Section 404(b)(1) Guidelines permit under the Clean Water Act and involve preparation of an environmental impact statement (EIS) or environmental assessment (EA) under the National Environmental Policy Act (NEPA).

This Handbook outlines steps that can be taken at each stage of the environmental review process to lay the foundation for compliance with the guidelines. Issues covered in this Handbook include:

- Linking the transportation planning process to project-level studies and decisions
- Initiating an environmental review process that includes NEPA and Section 404(b)(1) Guidelines requirements (as well as Rivers and Harbors Act requirements, where applicable)
- Identifying and evaluating aquatic resources, including waters of the United States
- Defining “purpose and need” under NEPA and “overall project purposes” under Section 404(b)(1) Guidelines
- Developing, screening, and evaluating alternatives under both NEPA and Section 404(b)(1) Guidelines
- Selecting a preferred alternative that complies with the guidelines and with the requirement for a public-interest determination
- Developing mitigation measures that comply with the guidelines
- Resolving inter-agency disputes involving the guidelines

The Practitioner's Handbooks are produced by the Center for Environmental Excellence by AASHTO. The Handbooks provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

The Handbooks are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each Handbook includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance; and
- a list of reference materials.

In addition, key regulations, guidance materials, and sample documents for each Handbook are posted on the Center's web site at <http://environment.transportation.org>.



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Documents

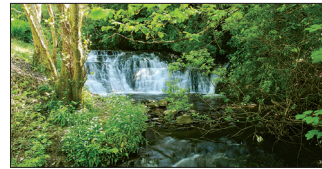
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Overview



This Handbook provides advice on compliance with the Section 404(b)(1) Guidelines as part of the environmental review process for a transportation project.

Section 404(b)(1) Guidelines of the Clean Water Act prohibits the discharge of dredged or fill materials into waters of the United States, except when authorized by a permit issued by the U.S. Army Corps of Engineers (Corps). Waters of the United States—also called jurisdictional waters—include many wetlands, streams, lakes, and rivers, as well as oceans.

When issuing permits under Section 404, the Corps must comply with the Section 404(b)(1) Guidelines. The guidelines define the criteria that must be met in order for the Corps to issue a Section 404 permit. The guidelines were issued by the U.S. Environmental Protection Agency (EPA) and are included in EPA's regulations at 40 CFR Part 230.

Federal agencies typically consider the guidelines as one part of an environmental review process that includes compliance with many other laws, such as the National Environmental Policy Act (NEPA). Therefore, rather than addressing the Guidelines in isolation, this Handbook considers the guidelines in the context of the environmental review process as a whole. The Handbook uses a step-by-step approach to illustrate the actions that can be taken throughout the process to lay the groundwork for compliance with the guidelines.

It is important to note several points regarding the scope and emphasis of this Handbook:

- The Handbook focuses on actions that transportation agencies can take in their capacity as project sponsors, joint lead agencies, and/or Section 404(b)(1) Guidelines permit applicants.
- The Handbook focuses on projects that require an individual Section 404(b)(1) Guidelines permit under the Clean Water Act and that involve preparation of an Environmental Impact Statement (EIS) or Environmental Assessment (EA) under NEPA—in other words, relatively large and complex projects. These projects are the focus of the Handbook because they are the ones that are most likely to involve challenges regarding the application of the guidelines. The Handbook does not address projects that qualify for nationwide or regional general permits.
- The Handbook focuses on Section 404(b)(1) Guidelines permitting, rather than covering all forms of Corps permitting equally. The Handbook briefly discusses permits issued by the Corps under Sections 9 and 10 of the Rivers and Harbors Act.
- The Handbook focuses on the guidelines specifically, rather than covering all aspects of Section 404(b)(1) Guidelines permitting. The Handbook focuses on the guidelines because of their important role in decision-making for complex transportation projects. As context for the discussion of the guidelines, the Handbook includes background information on other important aspects of Section 404(b)(1) Guidelines permitting, such as jurisdictional determinations.

Background Briefing

The Clean Water Act prohibits the discharge of dredged or fill material into waters of the United States, except as authorized in a permit issued pursuant to Section 404(b)(1) Guidelines of the Act. The agency with direct responsibility for issuing Section 404(b)(1) Guidelines permits is the Corps. In carrying out this responsibility, the Corps must follow criteria established by the EPA. These criteria are known as the Guidelines. Although they are called “guidelines,” these criteria are established in regulations (40 CFR Part 230) and are legally binding. The guidelines establish important requirements that must be met before a permit can be issued.

Corps Permitting—The Basics

Origins of Permitting Authority. The Corps' role as a permitting agency originates in the Rivers and Harbors Act of 1890. In general terms, that law prohibited the construction of barriers to navigation—piers, bridges, abutments, etc.—in navigable waters unless approved by the Secretary of War. The Corps' permitting role was expanded in the Rivers and Harbors Act of 1899, which prohibited discharges into navigable waters without a Corps permit. In 1972, Congress further expanded and redefined the Corps' permitting function with the enactment of Section 404(b)(1) Guidelines of the Clean Water Act. Section 404(b)(1) Guidelines gave the Corps broader permitting jurisdiction and more of an environmental protection mission. Today, the Corps continues to exercise permitting authority under the Rivers and Harbors Act, as well as the Clean Water Act.

Scope of Corps' Jurisdiction. The scope of the Corps' permitting jurisdiction is defined more broadly under the Clean Water Act than under the Rivers and Harbors Act. Section 404(b)(1) Guidelines of the Clean Water Act gives the Corps permitting authority over the “waters of the United States.” This term has been interpreted to include traditionally navigable waters as well as a wide range of non-navigable aquatic resources, including many wetlands. By contrast, the Rivers and Harbors Act gives the Corps permitting authority over “navigable waters of the United States.”¹

Standards for Determining Jurisdiction. The extent of the Corps' jurisdiction over “waters of the United States” has been the subject of extensive litigation. This issue was addressed by the Supreme Court in *Rapanos v. United States*. There was no single majority opinion in *Rapanos*, which left substantial confusion about the legal standard to be applied for determining jurisdiction. Based on that case, the Corps now defines its jurisdiction to include traditional navigable waters and their tributaries, as well as other aquatic resources with a “significant nexus” to those waters. Under this standard, wetlands are considered jurisdictional “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity” of traditional navigable waters.²

Process for Making Jurisdictional Determinations. Following the *Rapanos* decision, the Corps and EPA issued joint guidance (the *Rapanos* guidance) clarifying the standards and process for making jurisdictional determinations.³ In addition, the Corps issued Regulatory Guidance Letter 08-02, which further clarified the procedures for making jurisdictional determinations, and also allowed applicants to request a “preliminary jurisdictional determination.”⁴ With a preliminary determination, the applicant can concede jurisdiction and proceed with the permit application process, thereby avoiding a potentially time-consuming effort to determine jurisdiction.

Individual vs. General Permits. The Corps issues two types of permits under Section 404(b)(1) Guidelines: “individual permits” and “general permits.” Individual permits are issued for specific projects. An individual permit can be issued as a standard permit or as a “letter of permission,” which involves a more limited review for a project with minor impacts. General permits are issued for categories of projects that are presumed to have similar effects and not more than minimal impacts on the aquatic environment. General permits can be issued on a nationwide or regional basis.⁵ As noted in the Overview section, this Handbook focuses on individual permits.

Environmental Review Requirements. The Corps must comply with environmental review requirements under various Federal laws before issuing Section 404(b)(1) Guidelines permits. These laws include NEPA, the Endangered Species Act, the National Historic Preservation Act, the Coastal Zone Management Act, and many others. The level of review required under these laws varies greatly from case to case, depending on the nature of the project and its impacts. Each law has different requirements, and the Corps must ensure that all applicable requirements are satisfied before a permit is issued. The Corps' regulations include procedures for NEPA compliance (33 CFR Part 325, App. B) and for Section 106 compliance (33 CFR Part 325 App. C). As reflected in those regulations, the Corps has an independent obligation to comply with those laws. The

- 1 For purposes of the Rivers and Harbors Act, the Corps defines “navigable waters of the United States” as those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity. 33 CFR 328.3(a)
- 2 On June 29, 2015, the Corps and EPA published a final rule defining the term “waters of the United States.” The final rule took effect on August 28, 2015. However, a Federal court subsequently issued an injunction that prevented the rule from taking effect. As of the date of publication of this Handbook, the injunction remains in place, and therefore the June 2015 final rule is not in effect.
- 3 The joint EPA/Corps guidance documents are available on the Center's web site at <http://environment.transportation.org> and are listed in the Reference Materials section for this Practitioner's Handbook.
- 4 Regulatory Guidance Letter 08-02 is available on the Center's website at <http://environment.transportation.org> and are listed in the Reference Materials section for this Practitioner's Handbook.
- 5 33 CFR 320.1(c).

2 Applying the Section 404(b)(1) Guidelines in Transportation Project Decision-Making

Corps may adopt, incorporate by reference, or otherwise use or rely upon the NEPA and Section 106 documents prepared by other agencies.

Public Interest Review. The Corps conducts a public interest review as part of its decision-making process under Section 404(b)(1) Guidelines and under Section 10 of the Rivers and Harbors Act. The public interest review is based on a range of factors, weighing the proposed impacts against the potential benefits of the proposed activity. The Corps issues a permit only if it concludes that the project is in the public interest. The public interest finding is required by the Corps' regulations, not by the guidelines.⁶ The Corps' regulations include a list of 21 criteria that the Corps must consider when making a public interest determination. One required element is a finding that the proposed activity complies with the guidelines.

Overview of Section 404(b)(1) Guidelines Permitting

Agency Roles. The Clean Water Act creates a system of checks and balances in which several agencies have a significant role in the Section 404(b)(1) Guidelines permit application process. The Corps is assigned the lead role as the permitting agency, with direct responsibility for issuing and denying permits. The EPA, the U.S. Fish and Wildlife Service, and state water quality agencies all have important roles as well. The agencies' roles are based on specific provisions in the statute itself.

Corps as Permitting Agency. Section 404(b)(1) Guidelines(a) gives the Corps its authority to issue permits under the program. It also requires the Corps to issue a public notice and provide an opportunity for a public hearing before issuing a permit.

EPA Role in Setting Guidelines. Section 404(b)(1) Guidelines(b) requires the Corps to exercise its permitting authority "through the application of guidelines developed by [EPA], in conjunction with [the Corps]." EPA implemented this requirement by issuing the guidelines, which are codified as regulations in 40 CFR Part 230.

EPA "Veto" Authority. Section 404(b)(1) Guidelines(c) authorizes EPA to prohibit or overturn the issuance of a permit by the Corps under the Section 404(b)(1) Guidelines program. In effect, this section gives EPA a veto power over Section 404(b)(1) Guidelines permits. While the veto is rarely exercised, the existence of this authority gives EPA substantial influence in the permitting process.

USFWS Commenting Role. Section 404(b)(1) Guidelines(m) directs the U.S. Fish and Wildlife Service to submit comments on a Section 404(b)(1) Guidelines permit application within 90 days after receiving notice from the Corps. This commenting role is defined by Section 404(b)(1) Guidelines itself, and is separate from the Service's roles under the Endangered Species Act and other laws.

Agency Coordination and Elevation. Section 404(b)(1) Guidelines(q) directs the Corps to enter into agreements with EPA and other agencies to minimize delays in permitting under Section 404(b)(1) Guidelines. As directed by this section, the Department of the Army has entered Memoranda of Agreement (MOAs) with EPA, the U.S. Department of the Interior, and the U.S. Department of Commerce. The MOAs establish policies and procedures governing the Corps' coordination with EPA, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service. The procedures include a framework for elevating inter-agency disputes regarding Section 404(b)(1) Guidelines permit decisions. This elevation process is known as "Section 404(b)(1) Guidelines(q) elevation."⁷

State Water Quality Certification. Section 401 of the Act requires permit applicants to obtain a certification from the state that a proposed project meets the state's water quality standards; this certification must be obtained before the Corps issues an individual Section 404(b)(1) Guidelines permit.

In sum, while the Corps makes the Section 404(b)(1) Guidelines permit decision, other Federal and state agencies have substantial roles in the Section 404(b)(1) Guidelines permit application process. The result is a process that requires extensive interagency coordination.

⁶ 33 CFR 320.4(a).

⁷ See, e.g., "Clean Water Act Section 404(b)(1) Guidelines(q) Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army" (Aug. 11, 1992).

The Section 404(b)(1) Guidelines

The first Section 404(b)(1) Guidelines were issued by EPA on an interim basis in 1975. Following amendments to the Act in 1977, EPA updated the guidelines and published them as final regulations in 40 CFR Part 230 on December 24, 1980. The guidelines adopted in December 1980 have remained largely unchanged since that time.

Elements of the Guidelines. Section 230.10 of guidelines establishes four requirements that must be met in order for the Corps to issue a Section 404(b)(1) Guidelines permit. If any one of them is not met, the permit cannot be issued. (For the full text of Section 230.10, refer to Appendix A to this Handbook.) The four requirements include:

- **No Practicable Alternative.** There must be no “practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequence.”⁸
- **No Violation of Other Laws.** The project cannot be permitted if it (1) “causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable state water quality standard”, (2) “violates any applicable toxic effluent standard or prohibition under section 307 of the Act”; (3) “jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act ... or results in likelihood of the destruction or adverse modification of ... critical habitat”; or (4) “violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary....”⁹
- **No Significant Degradation.** The project must not “cause or contribute to significant degradation of the waters of the United States.” This section lists criteria to be considered in making a determination of significant degradation. It requires this determination to be based on “appropriate factual determinations, evaluations, and tests.”¹⁰
- **Minimizing Adverse Impacts.** The project must include “appropriate and practicable steps to minimize potential adverse impacts of the discharge on the aquatic ecosystem.”¹¹

Compensatory Mitigation. The four-part test in Section 230.10 requires minimization, but does not explicitly require mitigation. In a 1990 Memorandum of Agreement, the Corps and EPA agreed to require appropriate and practicable mitigation in Section 404(b)(1) Guidelines permits. In March 2008, the Corps and EPA issued updated regulations addressing compensatory mitigation requirements in more detail. The regulations direct the Corps to include “appropriate and practicable” compensatory mitigation conditions in Section 404(b)(1) Guidelines permits. These regulations—known as the “2008 Mitigation Rule”—are included in Subpart J of the guidelines (40 CFR 230.91 to 230.98) and in the Corps’ own regulations at 33 CFR Part 332.

Where Is the LEDPA Requirement?

The term “least environmentally damaging practicable alternative” or “LEDPA” is not actually used in the guidelines. Moreover, it can be somewhat misleading because it implies that the Corps makes a single global assessment of which alternative is “least environmentally damaging.” No such determination is made under the guidelines. The actual requirement, as stated in Section 230.10(a), is that there must be no “practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” This requirement is referred to as the “No practicable alternative” requirement in this Handbook.¹²

Key Terms in the Guidelines. The Section 404(b)(1) Guidelines use several terms and concepts that have specific meanings in the context of these regulations. These include:

- **Practicable.** The term “practicable” means “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”¹³ As noted above, the regulations

8 40 CFR § 230.10(a).

9 40 CFR § 230.10(b).

10 40 CFR § 230.10(c).

11 40 CFR § 230.10(d).

12 40 CFR § 230.10(a).

13 40 CFR § 230.10(a)(2).

4 Applying the Section 404(b)(1) Guidelines in Transportation Project Decision-Making

establish a presumption, for non-water-dependent projects, that practicable alternatives are available to avoid aquatic resources.

- **Aquatic Environment and Aquatic Ecosystem.** The terms “aquatic environment” and “aquatic ecosystem” mean “waters of the United States, including wetlands that serve as habitat for interrelated and interacting communities and populations of plants and animals.”¹⁴
- **Special Aquatic Sites.** The term “special aquatic sites” includes “geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region.”¹⁵ The regulations specifically identify the following areas as special aquatic sites: sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes.¹⁶

Presumption of Availability for Non-Water-Dependent Projects. The guidelines create a presumption that practicable avoidance alternatives are available for non-water-dependent projects.¹⁷ A water-dependent project would include facilities such as boat docks, which need to be in or near the water to serve their intended purpose. Highway and transit projects generally are not water-dependent. This presumption places the burden on the applicant to demonstrate that there are no practicable alternatives that entirely avoid aquatic resources. The level of “proof” required will vary depending on the project and the nature of the anticipated impacts.

Flexibility in Applying the Guidelines. The guidelines acknowledge that the level of detail required to demonstrate consistency with the guidelines will vary from case to case. They state that “Although all requirements in § 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.”¹⁸ This provision makes clear that the required level of effort is not identical for all projects. The fact that more extensive analyses are done for higher-impact, more complex projects does not mean that those same analyses are required for all projects.

Relationship to Other Requirements. Projects that require an individual Section 404(b)(1) Guidelines permit typically require review under other laws as well, including NEPA. Multiple agencies have decision-making roles, and each agency has different legal constraints on its decision-making. A key challenge for practitioners is to integrate all of these requirements into a single process. The following requirements have an important relationship to Section 404(b)(1) Guidelines decision-making:

- **NEPA—Purpose and Need.** The Council on Environmental Quality (CEQ) regulations, which govern Federal agencies’ NEPA compliance, require an EIS to include a statement of the “underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”¹⁹ The guidelines require the Corps to consider the “overall project purposes” as part of the Corps’ assessment of the practicability of alternatives under Section 404(b)(1) Guidelines. The Corps also has its own independent obligation to comply with NEPA, which includes defining the purpose and need. Obviously, it is desirable to have a purpose statement that satisfies all agencies’ requirements.²⁰ Achieving a single concise purpose statement requires a collaborative effort. The Corps is not required to accept the purpose as defined by the applicant or by another Federal agency.
- **NEPA—Range of Alternatives.** The CEQ regulations require an EIS to include detailed analysis of “all reasonable alternatives.”²¹ The guidelines require the Corps to consider “practicable” alternatives for avoiding or minimizing harm to waters of the U.S. As with the purpose and need, it is desirable to have a single range of alternatives that satisfies NEPA requirements as well as Section 404(b)(1) Guidelines requirements. Developing a range of alternatives that satisfies both NEPA and Section 404(b)(1) Guidelines requires a collaborative effort. Applicants

14 40 CFR § 230.3(b).

15 40 CFR § 230.3(m).

16 40 CFR § 230.3(m) and §§ 230.40 to 230.44.

17 40 CFR § 230.10(a)(3).

18 40 CFR § 230.10.

19 40 CFR § 1502.13.

20 For additional information on how to define the project purpose, see Practitioner’s Handbook No. 7, “Defining the Purpose and Need and Determining the Range of Alternatives for Transportation Projects.”

21 40 CFR § 1502.14(a). The requirement to consider “all reasonable alternatives” applies to an EIS, not an EA. The alternatives analysis in an EA may consist of a range of alternatives, or may consist of the No Action alternative and a single action alternative.

cannot assume that screening decisions made in the NEPA process will automatically limit the range of alternatives that the Corps considers under Section 404(b)(1) Guidelines.

- **NEPA—Indirect and Cumulative Effects.** NEPA requires consideration of direct, indirect, and cumulative effects.²² The guidelines require the Corps to consider the project's "secondary effects" on waters of the United States.²³ The guidelines list several examples of secondary effects, including "surface runoff from residential or commercial developments on fill." There is significant overlap between indirect effects, as defined in NEPA, and "secondary effects" as defined in the guidelines. The guidelines themselves do not require consideration of cumulative effects, but the Corps is required under NEPA to consider indirect and cumulative effects when preparing an EIS. Therefore, indirect and cumulative effects analyses play an important role in the Corps' decision-making, both because of the Guidelines and because of the Corps' responsibilities under NEPA.
- **Section 4(f).** Section 4(f) prohibits the U.S. DOT from approving the use of certain parks, recreation areas, refuges, and historic sites, unless there is no "feasible and prudent" avoidance alternative and the project includes "all possible planning to minimize harm" to those resources. The concepts of "prudence" and "practicability" are closely related, but different. Each of these terms has a separate legal definition and related case law. The decision-makers also are different: a U.S. DOT agency determines prudence under Section 4(f), whereas the Corps determines practicability under Section 404(b)(1) Guidelines.
- **Section 7 of ESA.** Section 7 of the Endangered Species Act prohibits Federal agencies from approving an alternative that would jeopardize a Federally listed threatened or endangered species, or that would adversely modify or destroy critical habitat for those species. Section 7 does not require selection of the alternative that causes "least harm" to listed species, but its requirements are nonetheless stringent. Impacts to listed species can play a role in the alternatives analysis under the guidelines. For example, impacts to listed species could be "other significant adverse environmental consequences"—a finding that could justify rejection of an alternative that has the least impact to the aquatic ecosystem.
- **Section 106 of NHPA.** Section 106 of the National Historic Preservation Act requires Federal agencies to identify cultural resources (including resources significant to Indian tribes) and consider ways to avoid or reduce any adverse effects on those resources. An alternative that avoids a Section 106 resource may impact a Section 404(b)(1) Guidelines resource, and vice-versa. Therefore, the Corps considers information developed in the Section 106 process when making its Section 404(b)(1) Guidelines permitting decision.²⁴ At the same time, the Corps' Section 404(b)(1) Guidelines permitting requirements may influence the decisions reached in the Section 106 process.
- **Coastal Zone Management Act.** The Coastal Zone Management Act requires states to develop management plans for coastal waters, including wetlands in coastal zones. Before a Federal permit can be issued for a project in a coastal zone, the permit applicant must obtain a finding by the state that the project is consistent with the state's coastal management plan. This finding is commonly known as a "consistency determination."²⁵ The Corps' Section 404(b)(1) Guidelines regulations implement this requirement through a multi-step process.²⁶ First, the applicant must certify in its application that the project is consistent with the coastal plan. The Corps announces this proposed finding in its public notice for the permit application, and sends that notice to the state agency with responsibility for the coastal zone plan, requesting its concurrence or objection. If the state agency objects, the Corps generally does not proceed to issue the permit. The U.S. Secretary of Commerce has the authority to override a state's objection, but that authority is rarely exercised.
- **Bridge Acts.** Federal law prohibits the construction or modification of any bridge across navigable waters of the United States unless first authorized by the Coast Guard. The Coast Guard approves the location, plans and navigational clearances of bridges through the issuance of bridge permits or bridge permit amendments. The applicant for a Coast Guard bridge permit must obtain one of the following before a Coast Guard bridge permit can be issued: (1) a Corps Section 404(b)(1) Guidelines permit, (2) assurance from the Corps that a 404 permit will be issued and a statement regarding the adequacy of wetland mitigation, or (3) documentation from the Corps that a Section 404(b)(1) Guidelines permit is not required if jurisdictional wetlands are involved. Specific bridge acts

²² 40 CFR §§ 1502.16, 1508.7, and 1508.8. Direct effects are caused by the action and occur at the same time and place. Indirect effects are caused by a project but are removed in time or distance. Cumulative effects include the project's direct and indirect effects, combined with the effects of other actions that are reasonably foreseeable.

²³ See 40 CFR § 230.11(h).

²⁴ The Corps' permitting regulations include procedures for Section 106 compliance. See 33 CFR Part 325, Appendix C.

²⁵ The National Oceanographic and Atmospheric Administration (NOAA) has issued regulations governing coastal zone consistency determinations. These can be found in 15 CFR Part 930.

²⁶ See 33 CFR § 325.2(b)(2).