



Jacksonville District Regulatory Transformation Workshop

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ALTERNATIVES ANALYSIS

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*The views and opinions contained in this presentation are those of the author and should not be construed as an official Department of the Army position, policy or decision, unless so designated by other official documentation.



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Nepa vs. 404(b)(1) Guidelines

NEPA

- The **National Environmental Policy Act (NEPA)** is a procedural regulation – it lays out the things that a federal agency must consider when making a decision. It does not require that a specific decision be made.
- 40 C.F.R. §230.10(a)(4) states:
- “For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. **On occasion, these NEPA documents** may address a broader range of alternatives than required to be considered under this paragraph or **may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines.** In the latter case, it may be necessary to supplement these NEPA documents with this additional information.”

404(b)1 Guidelines ★

- The **404(b)(1) Guidelines** is a substantive regulation – it forces the decision to be the **least environmentally damaging practicable alternative (LEDPA)**.
- 40 C.F.R. §230.10(a)(1) states:
- “Except as provided under section 404(b)(2)*, **no discharge of dredged or fill material shall be permitted** if there is a 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.”
- *404(b)(2) contains additional consideration for navigation and anchorage.



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When is an Alternatives Analysis Required?

- Individual Permits under Section 404 of the Clean Water Act
 - Standard Permit (SP)
 - Letter of Permission (LOP)
- Commensurate with scope of project
 - Large or complex projects = more complex review
 - Small or simple projects = less complex review
 - Regulatory Guidance Letter (RGL) 95-01
 - Also see RGL 05-06, Re: Expired RGLs

Regulatory Guidance Letter 95-01

SUBJECT: Guidance on Individual Permit Flexibility for Small Landowners

DATE: 31 March 1995 EXPIRES: 31 December 2000

1. Enclosed is a memorandum for the field signed by the Acting Assistant Secretary of the Army (Civil Works) and the Environmental Protection Agency dated 6 March 1995. This memorandum provides guidance on flexibility that the U.S. Army Corps of Engineers should apply when making determinations of compliance with the Section 404(b)(1) Guidelines with regard to the alternatives analysis.

2. This memorandum should be implemented immediately. It constitutes an important aspect of the President's Plan for protecting the Nation's wetlands, "[Protecting America's Wetlands: A Fair, Flexible, and Effective Approach](#)" (published 24 August 1993.).

3. This guidance expires on 31 December 2000 unless sooner revised or rescinded.

FOR THE DIRECTOR OF CIVIL WORKS:

DANIEL R. BURNS, P.E.
Chief, Operations, Construction, and Readiness Division
Directorate of Civil Works

Memorandum for the Field

In order to clearly affirm the flexibility afforded to small landowners under [Section 404 of the Clean Water Act](#), this policy clarifies that for discharges of dredged or fill material affecting up to two acres of non-tidal wetlands for the construction or expansion of a home or farm building, or expansion of a small business, it is presumed that alternatives located on property not currently owned by the applicant are not practicable under the Section 404(b)(1) Guidelines.

Specifically, for those activities involving discharges of dredged or fill material affecting up to two acres into jurisdictional wetlands for:

1. the construction or expansion of a single family home and attendant features, such as a driveway, garage, storage shed, or septic field;
2. the construction or expansion of a barn or other farm building; or
3. the expansion of a small business facility;



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Purpose and Need

NEED

What is the problem?

- Addressed in Corps public interest review (33 C.F.R. §320.4)
- Not part of the 404(b)(1) analysis

PURPOSE

What action is proposed to solve the problem?

- Key to determining compliance with the 404(b)(1) Guidelines

Both addressed under NEPA.



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Scope of Analysis

Purpose and Need - Think Goldilocks!



- **Too small** – Not so restrictive as to preclude other alternatives.
Example: Stating that the need has to be met with a very specific project at a very specific location (a 20-pump gas station needs to be built at this particular intersection).
- **Too big** – Not so wide-ranging as to eliminate consideration of the applicant's needs.
Example: If Boom Town is in need of a gas station to adequately serve residents of the town, looking outside of the town for alternatives would probably be too wide-ranging.
- **Just right** – Compare several different locations for the gas station within Boom Town and choose the location/configuration with the least impact to aquatic resources that also meets the project purpose.



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Example: Purpose and Need

- **Need:** Residents of Boom Town do not have adequate access to fuel for their vehicles. They need to be able to fuel their vehicles within a reasonable distance of their homes and businesses, in a reasonable amount of time.
- **Purpose:** To provide residents and visitors of Boom Town with adequate fueling for vehicles.
- **Overall Project Purpose:** To provide residents and visitors of Boom Town with adequate fueling for their vehicles within the limits of Boom Town.



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Types of Alternatives

The Corps reviews three types of alternatives for each project:

1. No-Action Alternatives
2. Off-Site Alternatives
 - Except as provided in RGL 95-01
3. On-Site Alternatives

Alternatives should be reasonable.

5.2 Description of alternatives

5.2.1 No action alternative

Description of No Action alternative.

5.2.2 Off-site alternatives

Off-site alternative 1: *Description of off-site alternative 1.*

Off-site alternative 2: *Description of off-site alternative 2.*

5.2.3 On-site alternatives

On-site alternative 1 (applicant's preferred alternative): *Description of on-site alternative 1.*

On-site alternative 2: *Description of on-site alternative 2.*

Screen shot of Corps Individual Permit Decision Document Template



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No-action Alternatives

- No-action means no federal action taken under Section 404 of the Clean Water Act.
- No-action alternatives can include:
 - No project (the applicant chooses not to do a project).
 - Design the project to avoid regulated resources.



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Off-site Alternatives

- Project sites other than the applicant's preferred site.
- Includes properties not owned by the applicant.
- Not required for certain small landowners as provided in RGL 95-01.



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Off-site Alternatives

Design alternatives on the applicant's preferred site that avoid or minimize impacts to the aquatic environment.

Avoid wetlands

Design crossings at narrow part of resource

Design bridges or retaining walls to minimize fill

Increase density or "build up"



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Terminology

- **Special aquatic sites:** Sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes.
- They are 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.
- **Water dependent:** Requires access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose.



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Rebuttable Presumptions

1. If a project is not **water-dependent**, alternatives that do not affect **special aquatic sites** are available.
 2. If a project is proposed in a **special aquatic site**, all practicable alternatives which do not involve a discharge into a special aquatic site would have less adverse impact on the aquatic ecosystem.
- ✓ It is the **applicant's responsibility** to clearly demonstrate that both of the presumptions have been rebutted to pass the alternatives portion of the Guidelines.



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Practicability

- “**Practicable**” is defined in 40 C.F.R. §230.3(l): “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**.”
- If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order **to fulfill the basic purpose** of the proposed activity may be considered.



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Practicability Screening

All criteria should tie back to purpose and need.

- ✓ **Availability** – includes alternatives not presently owned by applicant which could be reasonably obtained, utilized, expanded, or managed.
- ✓ **Logistics** – Generally physical requirements for practicable alternative.

Examples may include:

- Minimum site size
- Minimum depth
- Maximum slope
- Ability to connect to utilities (electric, sewer, water)
- Access to type of road (connector street)
- Minimum design requirements for project type (building size, number of parking stalls, etc.)



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Practicability Screening



- ✓ **Existing technology** – alternative methods or materials to avoid/minimize impacts.

➤ **Examples** may include:

- Bridge/culvert design
- Retaining walls (reduce side slope)
- Directional drilling of utilities
- Low impact/specialized equipment

- ✓ **Cost** – comparative analysis of costs of different alternatives.

➤ The mere fact that an alternative costs more does not mean that it is not practicable.

➤ **Considerations** may include:

- Type of project
- Costs associated with comparable type projects
- Type of applicant



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Other Significant Adverse Environmental Consequences

- “...no discharge of dredged or fill material shall be permitted if there is a 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**.”
- “Other significant adverse environmental consequences” are impacts other than impacts to the aquatic ecosystem.
 - Not defined in 404(b)(1) Guidelines, but NEPA regulations in 40 C.F.R. §1502.16 – Environmental consequences, provide a list that can be used as a guide.
 - Examples: listed species, pollution



FL panther, Larry Richardson/USFWS



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LEDPA

Least Environmentally Damaging Practicable Alternative

- **404(b)(1) Guidelines** require that the final project configuration be the LEDPA. If it is not, a permit cannot be issued.



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Process Summary

1. Identify purpose and need.
2. Identify reasonable alternatives.
3. Evaluate practicability of each alternative.
 - Availability, Cost, Logistics, Existing Technology
4. Compare practicable alternatives to identify the LEDPA.

✓ **Tables help a lot!**

✓ **See guidance document:** "Information for Preparing an Alternatives Analysis Under Section 404".



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Guidance Documents

RGL 95-01 and 05-06:

- In Jacksonville District Regulatory Sourcebook:
<https://saj.usace.army.mil/Missions/Regulatory/Source-Book>, under “Regulations and Policies” > “Additional Regulatory Guidance and Policy”
- At <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/>

Guidance document: “Information for Preparing an Alternatives Analysis Under Section 404”

- In Jacksonville District Regulatory Sourcebook:
<https://saj.usace.army.mil/Missions/Regulatory/Source-Book>, under “Permitting” > “Alternatives Analysis Guidance”



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Questions?

Information for Preparing an Alternatives Analysis Under Section 404

June 2014

In its evaluation of permit applications to discharge dredged or fill material into waters of the U.S. (WOTUS), including wetlands, the U.S. Army Corps of Engineers (Corps) is required to analyze alternatives to the proposed project that could achieve its purpose and need. The Corps conducts this analysis pursuant to two main requirements - the 404(b)(1) Guidelines (Guidelines)ⁱ and the National Environmental Policy Act (NEPA)ⁱⁱ. The Corps must evaluate alternatives that accomplish the overall project purpose, and that are reasonable and practicable. A permit cannot be issued if a practicable alternative exists that would have less adverse impact on the aquatic ecosystem, provided that alternative does not have other significant adverse environmental impacts.

The Guidelines include two rebuttable presumptions. The first presumption states that if a project does not need to be in a special aquatic site, such as a wetland, to meet its basic purpose (i.e., the project is not "water-dependent"), it is presumed that alternatives that do not affect special aquatic sites are available. The second presumption states that if a project involves a discharge of dredged or fill material into a special aquatic site, a practicable alternative located in uplands is presumed to have less adverse impact on the aquatic ecosystem. **It is the applicant's responsibility to clearly demonstrate to the Corps that both of these presumptions have been rebutted in order to pass the alternatives portion of the Guidelines.** This document will assist a permit applicant in formatting this information into an "Alternatives Analysis" that includes the key items that must be addressed. The level of detail in an alternatives analysis should be commensurate with the scale of the adverse environmental effects of the project. Analysis of projects proposing greater adverse environmental effects should be more detailed and explore a wider range of alternatives than projects proposing lesser effects.

Below are suggested steps to follow in providing the necessary information for the Corps to consider in the alternatives analysis:



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