Chapter 6

ARMY CORPS DECISIONS & PERMITS

CHAPTER SIX: THE ARMY CORPS OF ENGINEERS' PERMITS AND DECISIONS

A. Overview of the Corps' role in LNG permitting

1. Should I get involved in a Corps permit challenge?

If you have the resources[575] to challenge both the FERC certification process and Corps permits, then yes. Corps permits are required for basically every major LNG project: practically every new or expanded terrestrial LNG export terminal will need the Corps' 404 and section 10 permits, because the construction of these projects involve both disturbing the land around and spilling or relocating soils and other debris into wetlands and waterways, some of which are used for shipping. A Corps challenge is also a vehicle to raise wide-ranging concerns about the project. By law, the Corps must consider not just the environmental impacts of the project to wetlands and waterways, but also a whole host of other impacts, such as to the local economy, historical sites, safety—any effect that might make the project less in the public's interest. The law also requires that the Corps only grant permits that avoid, minimize, and compensate for the destruction of or impact to wetlands and waterbodies affected by the project. Finally, the Corps' current very opaque decision-making process could greatly benefit from the increased scrutiny and transparency that mounting more Corps challenges would bring.

2. What are the Corps decisions and permits that are relevant to LNG terminals?

Whenever an applicant's project might impact the Army Corps of Engineers' "jurisdictional resources," the applicant will need a Corps permit.[576] The first decision point for advocates to be aware of then is the analysis and decision as to whether a site contains the "jurisdictional resources" that triggers the need for a Corps permit at all.

The Army Corps of Engineers ("the Corps") has jurisdiction over certain—but not all—"aquatic resources"[577] (e.g., the ocean, rivers, lakes, wetlands, navigable waters, certain mudflats, certain sandflats). The threshold question of whether such jurisdictional "waters" exist is an initial question that does not arise in the same way for every project. Sometimes the Corps addresses this question on its own. Sometimes the applicant specifically requests that the Corps make an official, binding determination.[578] If neither of these scenarios is the case, the Corps treats every aquatic resource on site as a jurisdictional water that will need the protection of a permit.[579]

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[575] Resources for fighting a permit from start to finish include: funding sufficient to support a multi-year legal challenge, hiring experts, community outreach and engagement, and site visits. There are ways to bring the costs down, however: some resources spent on other challenges can also be leveraged on a Corps permit challenge without too much additional difficulty (e.g., the same experts used in a FERC challenge could potentially address similar issues in the Corps challenge) and other well-resourced organizations may potentially be willing to collaborate on certain aspects of a Corps permit challenge (e.g., Sierra Club may have funding for litigation in this area).

[576] The Corps administers four main permits, three of which are ecosystem- or waterbody-dependent (404, 10, 103), and a fourth that is required when a proposed project might impact an existing Corps project (408).

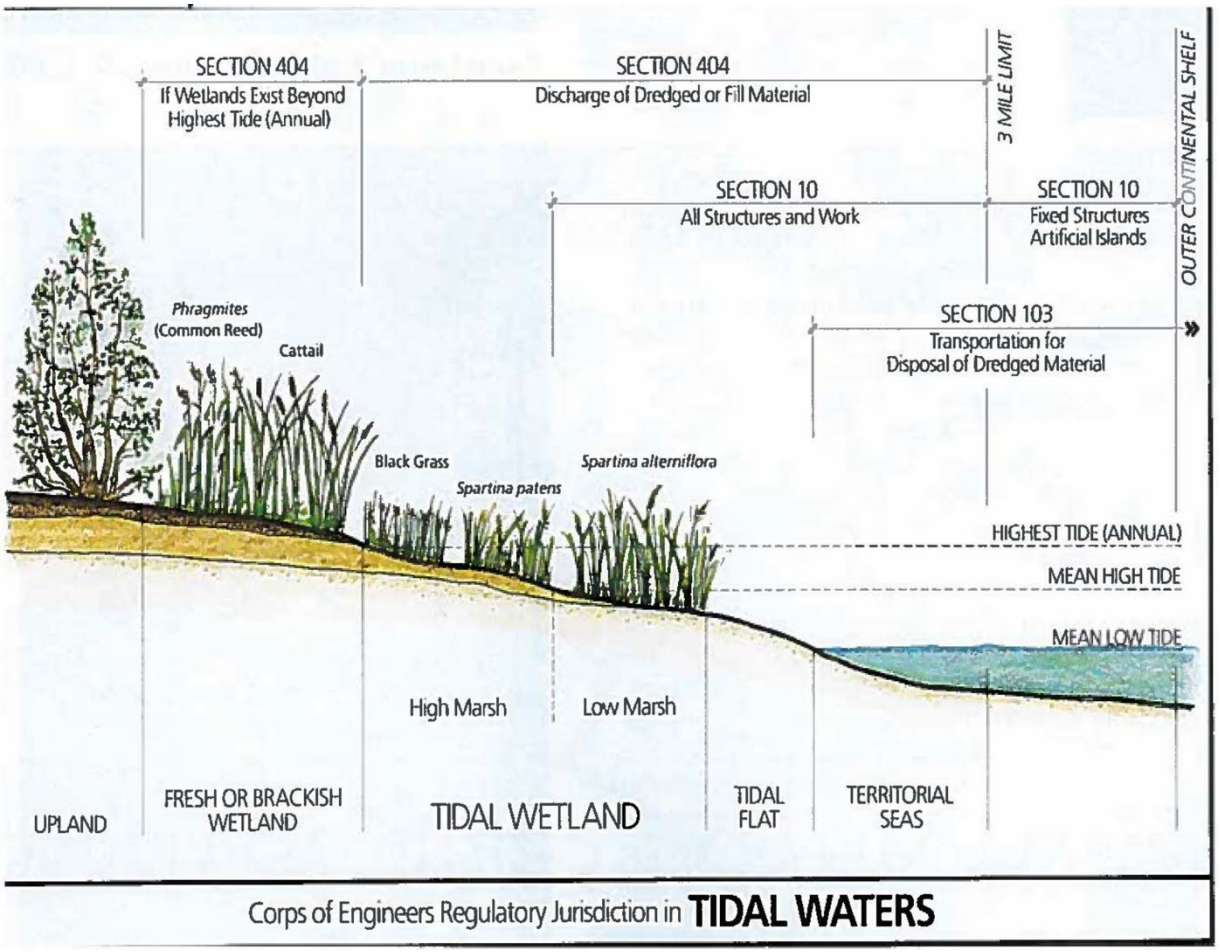
[577] "Aquatic resources" is a term that used to describe both the waters that it does have jurisdiction over and the waters that it does not. Note that the Corps' jurisdictional "waters" sometimes don't look like water at all—they may be wetlands, mudflats, sandflats, and only periodically flooded areas. The definition of what is jurisdictional is in flux, as Section 6.B.1 describes further.

[578] This is known as an "approved jurisdictional determination."

[579] U.S. Army Corps of Engineers, *Jurisdictional Determinations*, ¶ 4(a)(3), Regulatory Guidance Letter No. 16-01, Oct. 2016, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1256 (describing how a preliminary jurisdictional determination (PJD) "may be used as the basis for a permit decision; however, for purposes of computation of impacts,

Whichever the scenario, this threshold analysis is known as a "jurisdictional determination"—in other words, are there any aquatic resources on site that the Corps is responsible for protecting at all. And for LNG terminals, the answer will highly likely be yes—given that all of the proposed terminals are designed to export LNG via tanker ships, an applicant typically proposes that the terminal be built next to a waterway, and often on coastal wetlands.

Once it is clear that the Corps has jurisdiction, there are three permits that might be needed, depending on the ecosystem and waterbodies at issue: the sections 404, 10, and 103 permits. The Corps' diagram of a coastal region below shows in which areas each of the three permits are required.[580]



compensatory mitigation requirements, and other resource protection measures, a permit decision made on the basis of a PJD will treat all aquatic resources that would be affected in any way by the permitted activity on the parcel as jurisdictional").

[580] "*Simplified Jurisdiction in Tidal Waters*" at 9. https://www.coj.net/sraidrc/docs/handouts/u-s-army-corps-of-engineers.aspx; *See also* "*Pictorial Representations of Jurisdiction.*" Corps' Headquarters' Website. https://usace.contentdm.oclc.org/utils/getfile/collection/p266001coll1/id/7064. Because the fourth Corps permit (section 408) is implicated wherever an existing Corps project is located, it could come into play in any of the shown ecosystems.

Two of these ecosystem- and waterbody-based Corps permits that almost certainly all terminals will need are the section 404[581] and the section 10[582] permits. The 404 and section 10 permits are needed when there is discharge of dredged[583] or fill materials into "waters of the United States" or when "navigable waters" (waterways that are and have been used for shipping) are impacted by the project, respectively.[584] For large projects like the initial construction or major expansion of a LNG terminal, the Corps will require applicants to go through the more rigorous process of seeking an "individual permit," as opposed to getting a general permit, which is reserved for activities that will result in only minimal adverse effects. The individual permit should have conditions attached to it that limit the project's impacts to the environment.[585]

The two other permits that the Corps oversees—section 103 and section 408 permits—are less likely to be relevant for LNG terminals. A section 103 permit[586] is the third permit shown in the diagram above and is needed before dredged material can be disposed into the ocean, which begins beyond the territorial limit of 3 miles from shore. Only deepwater LNG terminals might need this permit, as any near-shore dredging and disposal for a land-based terminal should be covered by a 404 permit.

The fourth permit, the section 408 permit,[587] is ecosystem-independent. The need for a 408 permit is triggered when the new project may affect pre-existing Corps projects, such as federally

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[581] Named for the section in the statute that it is based on: the Clean Water Act § 404. The intent of § 404 is to protect the nation's waters from "the indiscriminate discharge of material capable of causing pollution and to restore and maintain their chemical, physical and biological integrity." Specifically, an applicant needs a 404 permit whenever a project involves discharging dredged or fill materials (*e.g.*, sediment or dirt) into "**waters of the United States**," ("WOTUS") which includes wetlands. In simple terms, anytime a project involves dirt mixing with a waterbody or wetland, the law requires the project to have a 404 permit. Because LNG terminals occupy a large footprint, are coastal, and need to be accessed by LNG tankers—some of the largest ships in the world—the construction of these terminals requires soils to be moved, shipping channels to be dredged, and often wetlands to be impacted; and thus 404 review is triggered. Note that as of December 7, 2021, EPA and the Corps proposed reverting the definition of WOTUS to largely align with its pre-2015 definition (based on 1986 regulations), updated to align with intervening Supreme Court precedent. *"Revising the Definition of "Waters of the United States""* EPA. https://www.epa.gov/wotus/revising-definition-waters-united-states. The proposed rule can be found here: https://www.epa.gov/system/files/documents/2021-12/revised-definition-of-wotus_nprm_december2021.pdf, 86 FR 69,372 at 69,373. (Dec. 7, 2021).

[582] Named for the section in the statute that it is based on: the Rivers & Harbors Act of 1899 § 10, which is codified at 33 U.S.C. § 403. **A section 10** permit is needed for all work or structures in or affecting the course, condition or capacity of "**navigable waters of the United States**." This includes activities such as certain modifications, excavations, or filling of these waterways. Given that most new terminals will require constructing tanker docks and dredging the navigable waterbodies adjacent to them, they'll need some sort of section 10 permit, as these activities are in and affecting these waters. (Although perhaps only a letter of permission or general permit—both which are used when only minor impacts are expected—as opposed to an individual permit.) It is possible that an existing facility that is only expanding its terrestrial footprint might not need such a permit. Section 10 reviews and Section 404 reviews are primarily the same, except for 404 projects require an alternatives analysis that is described in the 404(b)(1) Guidelines (see Sections 6.B.3 and 6.B.4 for details).

[583] Dredging is the act of removing soils and debris from the bottom of a waterbody to make the waterbody channel deeper so larger ships can transit the channel or to reshape the land around the waterbody. Dredged material is often deposited nearby as fill dirt. One environmental concern with dredging and filling is that the soil dredged and used as fill may be polluted with heavy metals, petrochemicals, and other toxins.

[584] The definition of these terms is in flux, as Section 6.B.2 describes further.

[585] These conditions might limit how an applicant can construct a project, require that construction be halted during breeding seasons, or prohibit certain activities entirely. *See* 40 C.F.R. §§ 230.70 - 230.77.

[586] Named for the section in the statute that it is based on: the Marine Protection, Resources and Sanctuaries Act (MPRSA) § 103. This permit is needed for disposing dredged material into the territorial sea and ocean. Although the Corps issues this permit, EPA also plays a significant role in this permitting process: EPA authors the rules about when and how a permit is to be issued (*i.e.*, the Corps must follow EPA's ocean dumping criteria), and must concur that the permit is proper, otherwise the Corps cannot issue the permit. For more, *see Ocean Disposal of Dredged Material.* EPA. https://www.epa.gov/ocean-dumping/ocean-disposal-dredged-material.

[587] Named for the section in the federal code that it is based on: 33 U.S.C. § 408, which is also known as the Rivers & Harbors Act of 1899 § 14. This permit is required when the proposed activity may alter, occupy, or use an existing Corps project.

constructed flood risk reduction projects and federal navigation channels. LNG terminals being planned in already industrialized areas (or brownfield sites in general) are more likely to need a 408 permit because there are more likely to be existing Corps projects at that location. LNG activities have triggered Section 408 review in the past; for example Cameron LNG's proposal to construct an intake structure for emergency water for firefighting and install shoreline protection triggered review under 408.[588] But even though 408 permits may be required—and indeed, when they are required they must be approved prior to a 404 or section 10 permit issuing—the Corps analysis for these permits doesn't provide as much leverage for advocates to influence these permits, and they do not appear to have been needed for the existing or currently proposed LNG terminals.[589] Therefore this guide does not explore section 408 permits.[590]

3. What are ways an advocate can get involved in challenges to 404 and section 10 permits?

The 404 individual permitting process poses more regulatory stumbling blocks for an applicant than the section 10 process and has the potential to impose more substantive restrictions on a project (e.g., it often requires the applicant to participate in compensatory mitigation projects), so centering a challenge on this permit is advised.[591] However, the section 10 permit should not be ignored and should be challenged at the same time as almost certainly all facilities will need and will be pursuing both at the same time. Possible points of advocate intervention for the 404 and section 10 permits are, in chronological order:

- Regularly search the Corps websites and FERC docket to have the earliest possible notice that the applicant has started approaching the Corps for a jurisdictional determination or permit
- Mobilize and listen to community groups and other advocates who might organize against the permit throughout the entire process; enlist their help in researching the project and surrounding area to understand and document the expected impacts of the project
- Identify and retain possible experts based on the site-specific features at the proposed project location
- Appeal in federal court any final approved jurisdictional determination as to which aquatic resources on site are jurisdictional

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Section 408 is a threshold approval, and a Section 10 or Section 404 permit cannot be issued until a 408 review is completed and an alteration approved.

[588] Cameron LNG Public Notice. (Oct. 27, 2016) https://www.mvn.usace.army.mil/Missions/Section-408/Public-Notices/Article/988750/02-3266-cameron-lng-llc-proposes-to-construct-an-intake-structure-to-provide-an/. Note that this 408 permission was sought after the facility received other permits.

[589] A search of 408 permits for LNG facilities in the Corps' Headquarters database returned only two 408 permits, both sought in 2020, one by the now abandoned Annova LNG project in 2020, and one by the yet-to-be-constructed Eagle LNG facility. *See* https://permits.ops.usace.army.mil/orm-public# (Searched the 408 database and filtered by "LNG"). Although this database may not be complete, it is representative of the lack of 408 public notices found on the District websites as well.

[590] The points for advocacy intervention are similar to a 404 permit (commenting on the initial application, no real ability to comment on a draft permit, opportunities to litigate the issued permit). The Corps has published a guidance document on the Section 408 process: Engineer Circular (EC) 1165-2-220 outlines the process and criteria the Corps uses to implement this section, (*see* https://www.publications.usace.army.mil/USACE-Publications/Engineer-Circulars/), and located here: https://www.publications.usace.army.mil/Portals/76/Publications/EngineerCirculars/EC_1165-2-220.pdf?ver=2018-09-07-115729-890. Note that it may be replaced in the future, so an advocate interested in learning more should confirm that other guidance has not superseded it.

[591] Although this guide focuses on terminal challenges, an advocate should keep in mind that 404 is particularly useful in challenging pipelines: the increased footprint of a pipeline likely increases the quantity of impacts to jurisdictional waters (*e.g.*, water and wetlands crossings) that would need to be reviewed under 404 or section 10.

- Advocate behind-the-scenes with both the Corps and consulting agencies (like EPA, FWS, and relevant state agencies), raising concerns about impacts to aquatic resources that the agencies could elevate to the Corps on their own
- Identify the Corps project manager (from the public notice) and other relevant regulatory personnel in case it becomes necessary to enlist their help in obtaining environmental documents, the permit, the record of decision, and other information about the permitting process that should be—but isn't—readily publicly available
- Submit public comments after an applicant files an application for a Corps permit to: raise issues directly, preserve issues for litigation,[592] and build the administrative record with all necessary information to support litigation if the permit issues
- Request the agency hold a public hearing, if one was not set during the comment period
- Participate in a public hearing on the application if a hearing is granted (rare occurrence) and the comment period that reopens after a hearing takes place
- Track the progress of permitting and any appeal by communicating with the Corps and submitting FOIA requests for permitting and environmental review documents[593]
- Litigate the issued permit in the circuit court where the project is sited (Fifth Circuit for Texas and Louisiana).[594]

4. Who in the Corps will I be dealing with?

The Corps is split into Divisions, which are further subdivided into geographic Districts[595], which often operate slightly differently from one another. Advocates challenging the Corps' treatment of LNG terminals will primarily be interfacing with the local District office during the permitting process, as normally Districts are those with the decision-making authority for jurisdictional determinations and issuing permits.[596] For Louisiana coastal projects, this will be the New Orleans District of the Mississippi Valley Division.[597] For Texas coastal projects, this will be the Galveston District of the

[592] A commentor who fails to raise an issue during the comment period may still be able to argue the point in federal court—but likely only after a protracted fight about whether that issue should have been raised earlier. An experienced litigator should be able to help advise on whether an overlooked (or unapparent) issue can be raised in court, but to avoid wasting resources, identify all possible issues during the comment period!

[593] Note that there is no official administrative appeals role for advocates prior to filing a lawsuit against the Corps; only permit applicants may appeal permits and landowners/applicants may appeal jurisdictional determinations directly to the agency, and it is highly unlikely the Corps will invite an advocate to participate in the process. See Sections 6.E.1 – 6.E.4 for more.

[594] The Natural Gas Act changes the default rule that appeals go to federal district court and instead sends appeals of Corps permits and decisions straight to the circuit court where the facility is to be located. 15 U.S.C. 717r(d)(1) ("The **United States Court of Appeals for the circuit in which a facility** subject to section 717b of this title or section 717f of this title **is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency** (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).") (emphasis added).

[595] Army Corps of Engineers, *Where We Are,* https://www.usace.army.mil/locations.aspx (last viewed April 1, 2022).

[596] Although communication will typically be with at the District level, some information can more easily be found on the Corps' Headquarters' websites. In addition, other agencies, such as EPA and FWS, play consulting roles in the permitting process. *See* Section 6.D.4. EPA even has veto authority over a 404 permit, although it is rarely exercised. *See* Section 6.D.3. Advocates may also need to be in contact with the regional staff at such consulting agencies during the Corps permitting process.

[597] New Orleans District Website, https://www.mvn.usace.army.mil/ (last viewed Mar. 31, 2022). Louisiana is unique in that applications for Corps permits for projects within Louisiana's coastal zone are also filed with the Louisiana Department of Natural Resources. Because of this requirement, it is sometimes easier to find Corps project documents for LNG terminals by searching the LDNR by project for the "Joint Permit Application," as opposed to going through the New Orleans District's website. *See* Louisiana Office of Coastal Management, "*Search for Coastal Use Permit,*"

Southwestern Division.[598] (See also Section 6.C.6, Public Notice.) Corps Headquarters will often not be involved in individual permitting decisions, but Headquarters' websites can be a useful source of regulatory guidance and some project documents are eventually pooled into a searchable database there.[599]

Note that the local District offices and Headquarters are not the most transparent about the progress of the permitting process for each terminal, as is discussed further in Section 6.C.2. Because FERC is lead agency for LNG projects and the public FERC process often begins before the public Corps process, monitor the FERC docket as well. The applicant's filings with FERC should disclose when the applicant expects to apply with the Corps for permits.[600]

5. What are some of the reasons to challenge a Corps decision or permit?

Although to-date there are no examples of an LNG export terminal being successfully stopped by a challenge to an Army Corps decision or permit for the terminal itself,[601] this is an under-challenged area ripe for advocate involvement, and one which can build on lessons from challenges to Corps decisions on LNG and oil pipelines.[602] Three main reasons to challenge the Corps' decisions and permits relating to applicant activities affecting waters and wetlands:

1. They're relevant in each case—every terminal will need at least two types of Corps permits: one for activities affecting navigable waters (section 10), and one for activities affecting waters and wetlands (section 404);

2. Unlike other purely procedural regulations that govern other permits that an LNG terminal needs, the regulations governing the Corps' permits require that the applicant actively modify its project to avoid the worst impacts to waters and wetlands; and

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http://reports.dnr.state.la.us/sonris/cmdPermit.jsp?sid=PROD (last viewed Mar. 31, 2022)(note that embedded in the Joint Permit Application can be landowner information, supplemental information, agency correspondence and more).

[598] Galveston District Website, https://www.swg.usace.army.mil/ (last viewed Mar. 31, 2022); *see also Regulatory And Policy Trends In The Galveston District*, Oct. 22, 2019, https://www.swg.usace.army.mil/Portals/26/docs/regulatory/e-library/SAME_20191022.pdf?ver=2020-08-13-154427-770.

[599] *See* https://permits.ops.usace.army.mil/orm-public. Note that this public database is not always regularly updated for the Galveston and New Orleans Division.

[600] *See* FERC's online docketing system. https://elibrary.ferc.gov/eLibrary/search. The applicant's initial filings with FERC will state when it expects to file applications for other required permits. By signing up for the eSubscription service, an advocate can automatically be sent notification of all FERC filings and in that way also keep track of when comment periods for the Corps permits are likely to occur. Sign up through: www.ferc.gov/docsfiling/esubscription.asp. Some projects are also tracked on the federal government's Permitting Dashboard, located here: https://www.permits.performance.gov/projects (*e.g.*, Commonwealth LNG, Gulf LNG, Alaska LNG, Cameron LNG, and Jordan Cove LNG). The site summarizes the Corps' progress for these projects.

[601] As of December 2021, environmental groups are in the process of litigating the 404 permit for Rio Grande LNG in Texas for the second time. Gaige Davila, *RGV environmentalists sue Army Corps of Engineers after LNG, pipeline projects receive operating permit,* Texas Public Radio, Nov. 27, 2021, https://www.tpr.org/environment/2021-11-27/rgv-environmentalists-sue-army-corps-of-engineers-after-lng-pipeline-projects-receive-operating-permit. The 404 permit for Gibbstown Logistics Center in New Jersey was also challenged and although it may not qualify as an "LNG facility" for Natural Gas Act purposes, that challenge is also instructive. *See* http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200422_docket-120-cv-04824_complaint.pdf; *see also* https://www.nrdc.org/sites/default/files/media-uploads/2021.04.27_nrdc_proposed_amicus_brief_gibbstown_dock_2_002_1.pdf.

[602] Pipelines have traditionally been the subject of Corps challenges because the increased footprint of a pipeline typically increases the quantity of impacts to jurisdictional waters (*e.g.*, water and wetlands crossings) that implicate 404 or section 10. Challenges brought against the pipelines that are instructive are those connected to Jordan Cove LNG (in Oregon), the Atlantic Coast Pipeline (in West Virginia, Virginia, and North Carolina), the Bayou Bridge Pipeline (in Louisiana) and the Mountain Valley Pipeline (in Virginia and West Virginia). For work in Louisiana and the Fifth Circuit, the Bayou Bridge oil pipeline challenge is particularly instructive on the issues of spill concern and mitigation—and how the Louisiana coastal use permitting process dovetails the 404 process.

3. the Corps does not have a history of being a strong advocate for ecosystem protection and so a lot could be gained in advocates scrutinizing these permits.

Other reasons to challenge a 404 permit:

- This permit will be relevant for virtually every facility. If 404 challenges are brought regularly against every LNG terminal, a body of comments / briefing will be developed such that each additional challenge requires less new work. It's also another chance to ensure that the applicants spend the appropriate time and resources needed to gather and present the Corps with all of the information that is required by law to evaluate whether a permit should be issued, and if so, what conditions must be placed on the project.
- The 404 regulations require substantive results. A 404 challenge could force the applicant to *substantively* change its project plans because 404 law requires that the Corps only issue permits that actively avoid impacts to protected ecosystems when practicable. This is fundamentally different from the requirements of NEPA, which are folded into FERC's certification of the project (discussed previously in Chapter 4)—NEPA only allows advocates to challenge whether FERC followed the correct *procedure* before certifying the project. In other words, FERC can comply with NEPA and still allow the worst alternative to proceed, whereas under section 404 the Corps *must* avoid impacts when practicable. The Corps' permits also can include substantive teeth because under 404, the Corps may add conditions to a permit so that impacts are avoided or minimized. In these ways, substantive changes to the permit can be forced, unlike the outcome of a NEPA challenge with FERC.
- The law requires that the Corps consider more than just environmental impacts. For all Corps permits, the Corps is required to conduct a "public interest review," which requires the weighing of at least 21 different factors of how the project could impact the "needs and welfare of the people." This includes safety, historical and cultural resources, economy, fishing, tourism, endangered species, as well as water quality. Thus a Corps challenge is a vehicle for elevating holistic concerns about a project more so than a challenge to an air permit, for example, in which by law the permitting agency can ignore damage wrought by the project if it is unrelated to air emissions. Although a court will likely defer to the Corps' ultimate conclusion on what is in the public interest, the fact that the law requires the Corps to recognize and weigh all of these public-interest factors is a powerful legal and public-opinion tool.
- The law creates an opening to leverage intra-agency differences of opinion. The Corps is required to solicit comments from other federal agencies before it issues a permit. In some cases, those agencies have more power than simply the ability to submit comments—EPA and FWS has the authority to elevate certain specific concerns with the District office's decision-making and get the Corps and the other agency's headquarters to also scrutinize a proposed permit.[603] EPA's comments can carry extra weight because it co-wrote some of the regulations (the so-called 404(b)(1) Guidelines) that the Corps must follow before issuing a 404 permit. EPA even has the ability to veto a 404 permit that it disagrees with,[604] although EPA has rarely exercised this power and it has never been used on any aspect of an LNG project. However, merely the threat of an intra-agency dispute can put the Corps and the applicant back on track.

[603] *See* Section 6.D.1, discussing CWA § 404(q).
[604] This power is codified in CWA § 404(c) and described in Section 6.D.3.

- **Much of the work will mirror the NEPA challenge with FERC.** The Corps tries to take a backseat role to FERC when it comes to permitting LNG terminals, as FERC is designated the lead authority for these projects and is thus responsible for implementing NEPA and preparing the project's administrative record. In taking this backseat role, the Corps often relies heavy on FERC's NEPA analysis (the EIS documents) to support its rationale that the project meets the regulatory requirements necessary to merit a 404 permit. Thus an advocate who is already challenging NEPA will be relying on much of the same supporting environmental analysis materials in formulating a 404 challenge.
- **There is no administrative appeals role for LNG challengers once the permit is issued.** Instead, a challenger goes straight to the federal Circuit Court presiding over the terminal's proposed location. Although advocates must wait until the administrative appeals process is concluded, advocates don't need to waste resources in an administrative appeals process.[605]
- **For LNG terminals, this is an under-contested area ripe for challenge.** Advocates have brought 404 challenges to gas pipelines, but only one terminal itself has been challenged under 404 (the Rio Grande LNG terminal) and as of December 2021 that challenge is on-going.[606]
- **Although statistically the Corps is likely to issue a 404 permit, the permit can include conditions such that the environment is better protected.** The Corps Headquarters estimates that nationwide, less than one percent of all requests for permits are denied.[607] However, advocates challenging 404 permits can argue for stricter conditions on the permit than might otherwise be added. These could restrict the applicant from using more harmful construction methods, restrict construction during wildlife nesting or spawning seasons, and require additional compensatory mitigation. So even if the facility is ultimately permitted, the environment is protected as best as possible.

Reasons to challenge the other Corps permits:

- **The analysis may be taking place at the same time.** The Corps typically analyzes all of a terminal's requested permits together,[608] the exception being section 408, which if needed must be sought first, but often is added once additional activities are added to existing facilities.[609]
- **Section 10 and 408 permits are subject to a public interest review, like the section 404 permit.** Because a similar test, the "public interest review," is used for a 404 and a section 10 permit, an advocate that is already mounting a section 404 challenge can capitalize on their knowledge of 404 permitting to structure the section 10 arguments.

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[605] *See* 15 U.S.C. 717r(d)(1) (stating that judicial review of Corps actions shall be in the federal circuit court where the project is located).
[606] In 2020, the Corps suspended the first 404 permit it granted to the applicant after advocates sued the agency in the Fifth Circuit. The Corp reissued the 404 permit in September 2021, which as of December 2021, advocates are in the process of challenging again. Texas Public Radio, *RGV environmentalists sue Army Corps of Engineers after LNG, pipeline projects receive operating permit*, Nov. 27, 2021, https://www.tpr.org/environment/2021-11-27/rgv-environmentalists-sue-army-corps-of-engineers-after-lng-pipeline-projects-receive-operating-permit.
[607] Army Corps of Engineers, *Frequently Asked Questions*, https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Frequently-Asked-Questions/ (last viewed Mar. 31, 2022).
[608] *See e.g.*, Rio Grande LNG Public Notice, Sept. 19, 2019, 1 (indicating the Corps' intent to review the project "pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act")
[609] Cameron LNG Public Notice, Oct. 27, 2016, https://www.mvn.usace.army.mil/Missions/Section-408/Public-Notices/Article/988750/02-3266-cameron-lng-llc-proposes-to-construct-an-intake-structure-to-provide-an/. This 408 permission was sought after the facility received other permits.

- These permits are under-contested. The lack of scrutiny on Corps permits means there is the potential for low-hanging improvements that advocates could help the Corps make in following all of the necessary regulations correctly.

6. How is this chapter organized?

There are six sections in this chapter. Section A is this introductory section. Section 6.B describes the legal framework that the Corps must follow in issuing a 404 permit, from an overview of what aquatic resources are jurisdictional to a summary of the Corps and EPA regulations that govern the analysis the Corps must conduct before issuing a permit (covering what is known as the 404(b)(1) Guidelines as well as the Corps' public interest review and its procedural regulations). This Section also describes typical arguments that an advocate could make based on the regulations that restrict the issuance of 404 permits. An advocate unfamiliar with 404 law should start here.

Section 6.C explains how an advocate actually participates in the 404 permitting process from any approved jurisdictional determination that is made to notice of the permit application and up until the issuance of a permit. Section 6.D explains how other agencies like the EPA and FWS can participate in the permitting process and how an advocate might slow the permitting process down by capitalizing on the fact that EPA or FWS might disagree with the Corps' analysis that a permit is warranted. Section 6.E explains what happens after a 404 permit is issued and how to litigate the issued permit. Both Sections 6.D and 6.E provide links to comments/briefing filled in LNG challenges. Because there have not been a lot of 404 challenges to LNG terminals themselves, some of the links are to comments and briefing filed challenging fossil fuel pipelines as some of the arguments may overlap. Section 6.F briefly provides more information on Section 10 permits.

B. What laws govern the Corps' decisions on a 404 permit?

Whether a section 404 permit is granted depends on a variety of laws and regulations and what types of aquatic resources are impacted. There are three main steps the Corps must conduct before issuing a permit, with different corresponding regulations and legal review requirements for each:

1. The Corps must determine which aquatic resources will be considered jurisdictional, and whether there are any "special aquatic sites" on location; this is governed by Supreme Court case law and the Corps and EPA's regulations. (See Section 6.B.1 and 6.B.2, below.)

2. In considering a permit application, the Corps must follow EPA's regulations that protect certain aquatic resources—the 404(b)(1) Guidelines. (See Section 6.B.3 and 6.B.4, below.)

3. The Corps must conduct a "public interest review" before issuing the permit.[610] (See Section 6.B.5)

[610] 33 C.F.R. § 320.4(a)(1) (pursuant to the Corps' CWA and Rivers and Harbors Act Section 10 implementing regulations, the "decision whether to issue a permit will be based upon an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.").

Other laws that the Corps must comply with (or check that the project complies with) are addressed in Sections 6.B.6 and 6.B.7 (*e.g.*, the Endangered Species Act, Section 106 of the National Historical Preservation Act[611], NEPA, the Coastal Zone Management Act, and Section 401 of the Clean Water Act. Sections 6.B.8, 6.B.9, and 6.B.10 provide practical tips as to what an advocate might include in comments and experts to retain.

QUICK REVIEW: DID THE CORPS FOLLOW THE LAW?

1. Has it made the correct jurisdictional determinations for the site?
2. Did it fully follow the 404(b)(1) Guidelines?
3. Did it consider all factors in the public-interest balancing test?
4. Did it confirm compliance with the ESA, NHPA, section 401 of the CWA, NEPA, and the CZMA?

If not, the Corps' failures are grounds for a 404 challenge.

1. What activities and aquatic resources will trigger the need for a 404 permit?

The intent of section 404 is to protect the nation's waters from the indiscriminate discharge of material capable of causing pollution and to restore and maintain their chemical, physical and biological integrity.[612] Specifically, an applicant needs a 404 permit whenever a project involves discharging dredged or fill materials (*e.g.*, sediment or dirt) into "waters of the United States," which includes wetlands.[613] Given that all of the proposed terminals are designed to export LNG via tanker ships, an applicant typically proposes that the terminal be built next to a waterway, and often on coastal wetlands. An applicant therefore likely will need a 404 permit for at least two reasons: (1) the applicant will be using fill material (*e.g.*, dirt) to fill in wetlands that currently exist where the terminal and supporting infrastructure is to be built; and (2) during construction and operation, the neighboring waterway will need to be dredged so that the huge tankers can dock with the facility—and that dredged material will need to be disposed of, potentially in adjacent wetlands.

[611] This requires that each federal agency identify and assess the effects its actions may have on historic buildings. *See* U.S. GSA, *Section 106: National Historic Preservation Act of 1966*, https://www.gsa.gov/real-estate/historic-preservation/historic-preservation-policy-tools/legislation-policy-and-reports/section-106-national-historic-preservation-act-of-1966 (last viewed Apr. 1, 2022).
[612] *See* 33 U.S.C § 1344.
[613] EPA, *Current Implementation of Waters of the United States*, https://www.epa.gov/wotus/current-implementation-waters-united-states (last viewed Mar. 31, 2022). The EPA and the Corps work together to define "waters of the United States," but this definition is also constrained by Supreme Court law.

2. How does the Corps determine which aquatic resources are jurisdictional and important?

Whether a water or wetlands is jurisdictional depends on the fact-intensive definition of "waters of the United States" ("WOTUS"), which for decades has been and still continues to be in flux.[614]

However, some aquatic resources that are relevant to LNG terminals have been well within the definition of WOTUS despite the definitional changes. These waterbodies include perennial (always-flowing) streams, rivers, lakes, and ponds. Wetlands adjacent to these waterbodies have also always been jurisdictional, although what a wetland is has shifted and is a fact-intensive question. Land may be a wetland even if it only is periodically flooded or it may be a wetland because it has soil and vegetation known to be typical of wetlands. Because a wetland can be fact-intensive to delineate and thus open to interpretation, an advocate should focus on the site's potential for overlooked wetlands when deciding whether to challenge a jurisdictional determination. (Consultation with a wetlands delineation expert is highly encouraged.) In addition, certain mudflats and sandflats are jurisdictional under the pre-2015 definition that is currently controlling as of January 2022.[615] And dry stream bed that only flow during rainstorms can under certain circumstances also be jurisdictional and may be overlooked by the Corps and the applicant. This issue arises more often in climates typical to the southwest United States as opposed to the east—another reason to consult with an expert and connect with community members familiar with the site itself.

For any given project the Corps either will make an official determination as to which aquatic resources are indeed jurisdictional (an "approved jurisdictional determination"), or will assume all such resources fall into its jurisdiction (by making no official determination, or simply a "preliminary jurisdictional determination."). The Corps typically relies on the applicant and the applicant's consultants to propose which aquatic resources on site are jurisdictional and may conduct a site visit or review aerial photos or historical data to aid in its determination. The quantity and type of jurisdictional aquatic resources on site is important because it affects whether the

MORE ABOUT THE LEGAL DEFINITION OF WOTUS.

The changes to WOTUS have been on the margins, as Supreme Court precedent has evolved, Administrations have changed, and federal courts have blocked the Administrations' changes. The definition of WOTUS expanded under the Obama Administration, shrunk during the Trump Administration,[1] and is currently being revised under the Biden Administration. Until the Biden Administration issues a new final rule, the Corps is interpreting WOTUS consistent with its pre-2015 definition. Because of this flux, an exact definition is beyond the scope of this guide, but can be found at: https://www.epa.gov/wotus/current-implementation-waters-united-states.

[1] The Navigable Waters Protection Rule: Definition of "Waters of the United States" 85 FR 22250. June 22, 2020. https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states.

[2] Jurisdictional Information: 3 September 2021 – Current Implementation of Waters of the United States. https://www.usace.army.mil/missions/civil-works/regulatory-program-and-permits/juris_info/.

[614] Army Corps of Engineers, *Jurisdictional Information,* https://www.usace.army.mil/missions/civil-works/regulatory-program-and-permits/juris_info/ (last viewed Mar. 31, 2022).
[615] EPA, *Current Implementation, supra* note 613.

project should be moved, what conditions need to be imposed on any issued permit, and what mitigation might be necessary.[616] For more information on judicial determinations and the role for advocates, see Section 6.C.3.

In addition, if certain specific aquatic resources ("Special Aquatic Sites") are present, the Corps is forced to take a harder look at impacts and whether the applicant must do more to avoid impacts in those areas before receiving a 404 permit.[617] "Special Aquatic Sites" are a subset of waters of the United States that are large or small areas possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. Special aquatic sites include wetlands, sanctuaries and refuges, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes. These sites are generally recognized as significantly influencing or positively contributing to the overall environmental health of the entire ecosystem and receive special attention under EPA's Section 404(b)(1) guidelines, described below.[618] Given that many of these planned projects are coastal, there are likely many special aquatic sites impacted by the terminal, pipeline, and compressor locations.

Advocates are encouraged to research the footprint of the proposed LNG terminal to identify jurisdictional waters and special aquatic sites—some information may be in the public notice documents (see Sections 6.C.6 – 6.C.8) but the majority of useful information will likely be in FERC's

JURISDICTIONAL CHECKLIST (FOR THE ADVOCATE & ADVOCATE'S EXPERT)

Are there any aquatic resources on site? (Answer for all LNG terminals should be yes)

- WOTUS? – Non-WOTUS? (e.g., groundwater, isolated irrigation ditches)

Are any of those aquatic resources jurisdictional, i.e., WOTUS?

- The ocean? - Lakes and rivers? - Wetlands? - Mudflats / sandflats? (non-exhaustive list)

Are any of these WOTUS areas also "special aquatic sites," i.e., those with special ecological characteristics of productivity, habitat, or wildlife protection?

- Wetlands? - Sanctuaries? - Mudflats? - Vegetated shallows? (non-exhaustive list)

Practice tip: When thinking about the project and drafting comments, keep in mind that a WOTUS that is also a "special aquatic site" will get more protections than just a WOTUS.

[616] In particular, the *type* of jurisdictional aquatic resources on site may warrant special consideration by the agency and advocacy, including what type of replacement function should be approved for compensatory mitigation for unavoidable losses of that resource: *e.g.*, should the Corps allow mitigation bank credits for bottomland hardwood wetland forests to replace lost coastal marshes, even though the two resources may not provide equivalent ecosystem functions? Unfortunately, the Corps has a record of not taken these nuances into consideration when approving mitigation plans.

[617] For example, if a project is not "water-dependent" (*e.g.*, a terminal's compressor stations or pipeline) yet affects special aquatic sites, then the Corps is directed to presume that alternative locations are available for that component of the project, and the applicant will more likely be required to change its project design. And for the special aquatic site category of wetlands, the Corps recognizes that their destruction can have broader cascading effects on the surrounding ecosystem that must be considered. 33 C.F.R. § 320.4(b)(3) ("Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area.").

[618] Specifically, Subpart E of the Guidelines (§§ 230.40 - 230.45) details Potential Impacts on Special Aquatic Sites.

environmental documents (the draft or final EIS, depending on which is available at the time public comments are solicited[619]), which the Corps will likely rely on to support its ultimate permitting decision.[620] Advocates should strongly consider contracting with a wetlands delineation expert if funds allow.

3. What are the 404(b)(1) Guidelines?

When assessing an application for a permit to impact jurisdictional aquatic resources, the Corps must follow binding guidelines established by the Corps and the EPA, which are codified at 40 C.F.R. § 230 (the so-called 404(b)(1) Guidelines.[621] EPA summarizes part of the Corps' responsibilities under the 404(b)(1) Guidelines as a three-step analytical process, shown here.[622]

> Step 1. Avoid - Adverse impacts to aquatic resources are to be avoided and no discharge shall be permitted if there is a practicable alternative with less adverse impact.
>
> Step 2. Minimize - If impacts cannot be avoided, appropriate and practicable steps to minimize adverse impacts must be taken.
>
> Step 3. Compensate - Appropriate and practicable ***compensatory mitigation*** is required for unavoidable adverse impacts which remain. The amount and quality of compensatory mitigation may not substitute for avoiding and minimizing impacts.

These three steps are three of the four conditions listed in Subpart B of the Guidelines that must be satisfied for a permit to issue, and at the simplest level these steps are as follows: First, adverse impacts to jurisdictional resources should be avoided. If adverse impacts cannot be avoided, impacts should be minimized.[623] Remaining impacts should spur the need for compensatory mitigation—for example, the restoration or preservation of a nearby wetlands to compensate for the impacts of the

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[619] The public notice should clearly indicate if the DEIS or FEIS is available and identify the FERC docket number needed to retrieve this information.

[620] Recall that for large projects like LNG terminals that must seek permits and permissions from multiple federal agencies, one agency is designated as lead, in part to reduce paperwork and duplicative work—and for LNG projects, it is FERC. (See Chapter 4 for more information about FERC's role.) FERC as lead agency thus has the responsibility for preparing the administrative record, which in effect means it prepares the environmental impact documents (EIS) that are to support the permitting decisions of all agencies, including the Corps. (The Corps has discretion to prepare its own EIS documents.)

[621] EPA issues these guidelines in consultation with the Corps, and the Corps incorporates them into its own regulations as well. *See* 33 C.F.R. §§ 320.4(b)(4), 325.2(a)(6). The Corps, on its own and jointly with EPA, has also issued other applicable guidance. *See, e.g.*, 33 C.F.R. § 332.1(f) (explaining continuing validity of various guidance documents). *See also* EPA, *Policy and Guidance Documents under CWA Section 404*, https://www.epa.gov/cwa-404/policy-and-guidance-documents-under-cwa-section-404. *See also* 33 U.S.C. § 1344(b).

[622] EPA, *Wetlands Compensatory Mitigation,* August 2015, https://www.epa.gov/sites/default/files/2015-08/documents/compensatory_mitigation_factsheet.pdf.

[623] 40 C.F.R. Part 230 Subpart H lists examples of minimization measures. These can include, *inter alia*, "selecting sites … to prevent or avoid creating habitat conducive to the development of undesirable predators," "avoiding sites having unique habitat or other value," or "habitat development and restoration." 40 C.F.R. § 230.75(d).

project.[624] This three-step analytical process is required whenever there is a discharge of dredge or fill material into the waters of the United States and aquatic ecosystem. As part of this three-part analysis, the Corps is also required to make certain factual determinations in writing describing the potential short-term and long-term effects of the proposed discharges,[625] including the cumulative and secondary effects on the aquatic ecosystem.[626]

Each of these steps has several caveats—the Corps will not require that the applicant avoid all adverse impacts—only those with no "practicable alternatives."[627] To be "practicable," an alternative must be "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[628] Unavoidable impacts need not be minimized to zero, and the Corps limits the required mitigation (e.g., restoration of other wetlands) to what is "appropriate and practicable." In practice, this means that the Corps routinely issues 404 permits that cause wetland destruction—to stop a Corps permit, an advocate must show that the Corps failed to follow the law, *e.g.*, by failing to apply the nuances of the 404(b)(1) Guidelines.

Some of these nuances are described in a 1990 Memorandum of Agreement between the EPA and the Department of the Army as follows:

> *Avoidance. Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative. The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a) requires that no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).*[629]

It's important to note that this requirement that the Corps select the least environmentally damaging practicable alternative (or "LEDPA") at the initial step is a substantive duty put on the Corps permits that is missing from the NEPA requirements, which are only procedural. This difference is particularly useful in pipeline challenges because the siting of a pipeline may be more flexible than the siting of

[624] "The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by [Corps] permits." 33 C.F.R. § 332.3(a)(1). This offset is intended to achieve the "federal government['s] … longstanding national goal of 'no net loss' of wetland acreage and function." EPA and Corps, Compensatory Mitigation for Losses of Aquatic Resources, Final Rule, 73 Fed. Reg. 19594-01 (Apr. 10, 2008). The applicant typically prepares an initial compensatory mitigation plan; the Corps is responsible for approving it, and other agencies, like the EPA, may also weigh in on whether it is sufficient.
[625] 40 C.F.R. 230.11.
[626] 40 C.F.R. 230.11(g)&(f).
[627] 40 C.F.R. § 230.10(a).
[628] 40 C.F.R. § 230.10(a)(2). At least one court has held that the applicant has the burden of clearly demonstrating there are no practicable alternatives, *see Northwest Environmental Defense Center v. Wood*, 947 F. Supp. 1371, 1374 (D. Or. 1996) (arguing for this proposition)—a burden the Corps has tended to let slide.
[629] Memorandum of Agreement between the U.S. Department of the Army and EPA (1990) (emphasis added).

the LNG terminal itself, which will need to be accessible by tanker ship and therefore likely limited to the coast. This distinction between the 404 permit and NEPA process should not be overlooked.[630]

As the 1990 MOU excerpt above points out, the Guidelines (at 40 C.F.R. 230.10(a)(3)) also describe two rebuttable presumptions that may be triggered as to the availability of alternatives to the proposed project. Both presumptions are triggered when special aquatic sites might be impacted. The first rebuttable presumption is triggered when the "basic purpose" of the project is not "water-dependent."[631] For example, a residential housing development's basic purpose is to provide housing and would therefore not be water-dependent, whereas the Corps has considered that water-dependent projects might include dams and docks.[632] And when the basic purpose of the activity is not water-dependent, the Corps must presume that there are alternatives to the project available that avoid impacts to special aquatic sites, unless the applicant clearly demonstrated otherwise.[633]

Whether an entire LNG project must be considered "water-dependent" even if certain of its components (like pipelines, compressor stations, pre-treatment liquefaction and storage) have been shown to not require direct access to water[634] does not appear to be clearly settled and may be an issue to raise in comments as some advocates have done in challenging: Annova LNG (most fully

[630] *See Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1262 n.12 (10th Cir. 2003) (explaining how error is committed if agencies don't comply with the CWA's and NEPA's different analytical requirements).
[631] "Water-dependent" isn't defined in the Clean Water Act or in its implementing regulations, but the Corps' guidance and court cases have helped shed light on this term. The lack of a fixed definition means that there may be room to argue that LNG projects (or at least the majority of the component parts) are not water-dependent. "Basic purpose" is also not defined in the statute or regulations; rather, only guidance and court cases explain this concept. Corps' guidance shows that "basic purpose" is not the same thing as "overall purpose" or the "purpose" defined by NEPA (the latter two are more alike); it is a separate analysis required specifically for the Corps to meet its 404 permitting obligations under the Guidelines. *See* Army Corps of Engineers, *Updated Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program,"* July 1, 2009, 15-16, https://www.spd.usace.army.mil/Portals/13/docs/regulatory/qmsref/eis/Regulatory%20SOP%20July%202009.pdf (outlining the Corps' and the NEPA-lead agency responsibilities when it comes to defining "basic project purpose and water dependency," "overall project purpose and alternatives analysis," and NEPA's "purpose and need"); *see also City Club of N.Y. v. U.S. Army Corps of Eng'rs*, 246 F. Supp. 3d 860, 872 (S.D.N.Y. 2017) (one district court explaining the difference between overall purpose and basic purpose, and vacating the permit for the Corps' failure to accurately define the project's basic purpose).
[632] *See* Army Corps, *Updated SOP*, *supra* note 631, 15 (explaining that "the basic project purpose of any residential development is to provide housing for people. Houses do not require access or proximity to a special aquatic site and they do not have to be located in a special aquatic site to fulfill their basic purpose of housing people. Therefore, a residential development is not water dependent."); *See also Sierra Club v. Antwerp*, 709 F. Supp. 2d 1254, 1261 (S.D. Fla. 2009) (citing a previous Corps SOP (from Oct. 15, 1999), as cited in *Fla. Clean Water Network, Inc. v. Grosskruger*, 2008 U.S. Dist. LEXIS 91937 (M.D. Fla. Oct. 30, 2008)).
[633] 40 C.F.R. Part 230.10(a)(3).
[634] For example, storage and liquefaction facilities at LNG terminals have been successfully located at least a mile from the vessel loading area. *See* App. 46 (Annova 404 Comments, Jan. 29, 2019) https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/DOW%20et%20al%20Annova%20LNG%20404%20application%20comments%20FINAL.pdf. Under logic applied by one district court, this would mean that the storage and liquefaction activities are not water-dependent. *See Sierra Club v. Antwerp*, 709 F. Supp. 2d 1254, 1261 (S.D. Fla. 2009) (reasoning that "If limestone excavation is not inherently water dependent in one situation, then it is not inherently water dependent in another," collecting cases and ultimately finding the Corps' dependency analysis arbitrary and capricious).

cited),[635] Cameron LNG, [636] and Jordan Cove LNG.[637] Historically the Corps and FERC has not well-documented its analysis of water-dependency for LNG projects or articulated the project's basic purpose (much less distinguished it from the overall purpose).[638] Depending on the particular project proposed, it might be possible to argue that the supporting equipment (such as pre-treatment or liquefaction trains) could be relocated inland to a location devoid of special aquatic sites. For instance, at the Freeport LNG operations in Texas, the pre-treatment facility is located more than three miles from the export terminal.

The second rebuttable presumption is that alternatives that do not involve special aquatic sites have less adverse impacts on the aquatic environment. Examined alternatives must be congruent with the projects "overall purpose," which is generally narrower than a project's basic purpose.[639] Applications for projects that have more than one purpose may require a separate alternatives analysis;[640] arguably this would apply to at least the pipeline and terminal portion of a project. The possible triggering of this presumption is another reason for advocates to research and be familiar with the special aquatic sites in the project area, as well as the pre-existing infrastructure.[641] Finally, even if these presumptions do not apply, the Corps still must conduct an alternatives analysis.

On top of requiring that the three avoid/minimize/mitigate conditions are correctly analyzed and fully satisfied, a fourth, catch-all condition must be satisfied. Specifically, the Guidelines also prohibit discharges that (1) cause or contribute violations to the state water quality standards; (2) cause or contribute violations to the toxic effluent standards under section 307 of the CWA; (3) jeopardize Endangered Species; (4) violate requirements to protect marine sanctuaries;[642] and (5) cause or contribute to significant degradation of waters of the United States.[643] Of these five additional conditions, advocates may find persuasive arguments that on-shore LNG terminals impact water

[635] *See* App. 46 (Annova 404 Comments, Jan. 29, 2019). Advocates argued that the layout of other LNG projects demonstrate that gas pre-treatment facilities and liquefaction equipment can be at least a mile from the marine loading area, yet the DEIS failed to explore alternatives that would avoid siting liquefaction, pretreatment, and other non-water-dependent facilities outside of wetlands.
[636] *Sierra Club & GRN Comments on Draft EIS for Cameron LNG, LLC's and Cameron Interstate Pipeline, LLC's Liquefaction Project, FERC Docket Nos. CP13-25 & CP13-27* at 12-14, Mar. 3, 2014, https://environmentalnewsstand.com/sites/environmentalnewsstand.com/files/documents/apr2014/epa2014_0622b.pdf (arguing in a challenge to Cameron LNG that gas liquefaction is not wetlands-dependent, yet FERC's DEIS failed to analyze non-wetlands alternatives, making it unlawful, and pointing out that neither FERC nor the applicant claimed that the liquefaction or storage are water-dependent activities).
[637] WELC, *Comments on the Jordan Cove DEIS dated Nov. 2014, Dockets CP13-483 & CP13-492,* Feb. 2015, 128-29, https://law.lclark.edu/live/files/19245-2015-03-group-comments-on-deis-for-jordan-cove-lng (arguing that a worker's camp proposed as part of the Jordan Cove terminal should not benefit from "water-dependent" treatment; FERC ignored this comment in its 2019 FEIS under the argument that these components were removed from the 2019 proposal, *see* FERC, *Appendix R: Comments on the Draft EIS and Responses,* Jordan Cove FEIS App. R Part 12, Nov. 15, 2019, 47 https://www.ferc.gov/sites/default/files/2020-05/11-15-19-FEIS_Appendix_R-Part_12.pdf).
[638] Based on a review of the Rio Grande LNG and 2019 Jordan Cove FEIS documents.
[639] *See* Army Corps, *Updated SOP, supra* note 631, 15; *see also* Consensus Building Institute, *Navigating the Clean Water Act §404 Application Process: Information to Assist Permit Applicants,* Feb. 2018, 19-21 https://www.cbi.org/assets/news/EPA_TSD_Final.pdf (not Corps guidance, but a document created under contract with EPA to describe the 404 application process).
[640] *See also* Consensus Building Institute, *supra* note 639, 19-21 (not Corps guidance, but a document created for EPA to describe the 404 application process).
[641] Advocates that have studied the project area and are familiar with the pre-existing infrastructure will be better prepared to proactively address potential arguments that "one more pipeline" will not harm the special aquatic site it has been proposed to traverse, making the co-location site better than alternatives. (E.g., consider cumulative impacts.)
[642] 40 C.F.R. § 230.10(b)(1)-(4).
[643] 40 C.F.R. § 230.10(c).

quality ((1), (2), and (5)) and endangered species (3). Deepwater ports are more likely to implicate marine sanctuaries (4). All viable arguments should be included in comments.

The structure of the 404(b)(1) Guidelines is further described below.[644]

4. How are the 404(b)(1) guidelines structured?

The 404(b)(1) regulatory guidelines provide the substantive environmental review criteria for CWA Section 404 permit applications—in other words, the guidelines describe part of what the Corp must do before issuing a 404 permit.[645] The first step of drafting comments or a legal brief should be to read through these Guidelines. As codified in EPA's regulations at 40 C.F.R. § 230 et seq., the Guidelines are divided into eight Subparts.[646]

Specifically, the subparts are (with callouts to sections that are particularly relevant for LNG terminal challengers):

- Subpart A - General (§§ 230.1 - 230.7): includes provisions of general applicability, such as purpose and definitions; § 230.2 clarifies the applicability of the guidelines and other guidance documents; § 230.5 is particularly valuable in that it outlines the general procedures the Corp should follow, in sequence; § 230.6(b) explains that the level of documentation and effort that the Corps puts into assessing a permit should be commensurate with the significance and complexity of the proposed project;
- Subpart B - Compliance With the Guidelines (§§ 230.10 - 230.12): establishes the four conditions which must be satisfied in order to make a finding that a proposed discharge of dredged or fill material complies with the Guidelines;[647] § 230.11 describes some of the factual determinations the Corp is required to make in determining whether these conditions are satisfied.
- Subpart C - Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem (§§ 230.20 - 230.25): Like Subparts D-F, a very useful springboard to highlighting potential impacts from the project. Recall that this is a non-exhaustive list. Advocates should do outside research on potential impacts based on the LNG terminal's location itself. Outside research could be in the form of academic articles, other agency literature about the area (e.g. Park service literature about the nearby ecosystem, community knowledge, expert opinion, etc).
- Subpart D - Potential Impacts on Biological Characteristics of the Aquatic Ecosystem (§§ 230.30 - 230.32): Like Subparts C, E-F, a very useful springboard to highlighting potential impacts from the project.
- Subpart E - Potential Impacts on Special Aquatic Sites (§§ 230.40 - 230.45): Like Subparts C, D, F, a very useful springboard to highlighting potential impacts from the project. When an LNG

[644] See 40 C.F.R. § 230.10 (describing the first step, identifying adverse impacts to be avoided based on an assessment of practicable alternatives); 40 C.F.R. Part 230 Subpart H (describing the second step, minimizing adverse effects); 40 C.F.R. Subpart J (describing the third step, compensatory mitigation).
[645] *See* 33 U.S.C. § 1344(b)(1) (requiring that the Corps create guidelines for issuing permits).
[646] 40 C.F.R. § 230.4.
[647] These four conditions are to avoid, minimize, and compensate for impacts, as well as the laundry list of prohibitions mostly related to water quality: no discharges that (1) cause or contribute violations to the state water quality standards; (2) cause or contribute violations to the toxic effluent standards under section 307 of the CWA; (3) jeopardize Endangered Species; (4) violate requirements from the Marine Protection, Research, and Sanctuaries Act of 1972; and (5) cause or contribute to significant degradation of waters of the United States.

terminal has the potential to impact a "special aquatic site" under this subpart, enhanced scrutiny of the project is warranted, as "[f]rom a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines."[648]

- Subpart F - Potential Effects on Human Use Characteristics (§§ 230.50 - 230.54): Like Subparts C-E, a very useful springboard to highlighting potential impacts from the project.
- Subpart G - Evaluation and Testing (§§ 230.60 - 230.61): Note that the testing guidelines may be updated soon.
- Subpart H - Actions to Minimize Adverse Effects (§§ 230.70 - 230.77): A very useful subpart for brainstorming ways that the Corps could require the applicant to minimize impacts—and a de facto checklist for things the Corps probably should have considered, but didn't.
- Subpart I - Planning to Shorten Permit Processing Time (§ 230.80): concerns advanced identification of disposal areas.
- Subpart J - Compensatory Mitigation for Losses of Aquatic Resources (§§ 230.91 - 230.98): A primer on the Corps' views of compensatory mitigation. Again, a de facto checklist for things the Corps probably should have considered, but didn't.

This is just a brief summary of the Guidelines; there is no substitute for reading the Guidelines in their entirety!

But compliance with the 404(b)(1) Guidelines is not all that is required for a 404 permit to issue. The Corps' regulations, at 33 C.F.R. Parts 320, 323 and 325, also must be followed, which among other things, outline the Corps' public interest review process, which is also part-and-parcel of the 404 permitting process.

5. What is involved in the Corps' public interest review, and how does it make a 404 challenge a particularly useful challenge?

In addition to the Guidelines, and pursuant to the Corps' CWA and Rivers and Harbors Act Section 10 implementing regulations, the Corps states that the "decision whether to issue a permit will be based upon an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest."[649] This "public interest" review lies at the heart of the Corps' analysis and must guide the agency's review of the applicant's project. The public interest review is intended to be broad, capturing all relevant issues that could impact the environment, human health and well-being, and natural resources. The Corps states:

> *Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonable may be expected to accrue from the proposal must be balanced against its reasonable foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources.*[650]

[648] 40 C.F.R. § 230.1(d) (emphasis added); see also 40 C.F.R. §§ 230.3(q-1) (defining "special aquatic sites").
[649] 33 C.F.R. § 320.4(a)(1).
[650] 33 C.F.R. § 320.4(a)(1).

The Corps' regulations include a non-exhaustive list of 21 factors that may be relevant the public interest review for each individual project. 33 C.F.R. § 320.4(a)(1) states in part:

> *All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are* ***conservation, economics, aesthetics, general environmental concerns, wetlands,***[651] ***historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.***[652]

It is important to notice a few things about this language. First, wetlands are highly valued in the public interest analysis, similar to how the 404(b)(1) Guidelines identify wetlands as special sites meriting additional protection. This is another reason to both scrutinize whether the Corps accurately identified all wetlands on site and in drafting comments specifically call out impacts to wetland. Second, the factors that must be considered extends beyond impacts to waters.

Third, this is only a starting point for factors that might be relevant; these regulations specifically require that that "[a]ll factors which may be relevant to the proposal must be considered." (emphasis added). Climate change, for example, is not listed, but is undoubtedly something that impacts the public interest (it also falls under "energy needs" and "general environmental concerns"). LNG terminals have an especially large impact in this arena, from the annual greenhouse emissions to the decades of service life of the terminal to the destruction of wetlands that protect from increased flooding. Environmental justice is also not listed but is part of at least the category of "needs and welfare of the people."

Fourth, by requiring an analysis of "cumulative impacts" and by including a non-exhaustive, but far-reaching, list of factors, the Corps' regulations show that before a permit may issue, the Corps must first conduct a broad analysis of the public interest that captures all impacts associated with the project and not just those that result directly from the permitted activities.

In other words, with the public-interest-review mandate, the Corps should be analyzing not just the impacts of the terminal construction itself, but broadly the impacts of the project as a whole. This is a unique and valuable facet of a 404 permit—the fact that by law the Corps' review must look beyond the project itself to far reaching effects.[653] Note that despite the language of the law, the Corps takes a much narrower view of its responsibilities—a perspective that may only be able to be changed through litigating issued permits, but nonetheless one that should be challenged in comments during the permitting process itself. An advocate should push the Corps to correctly analyze in-depth the above listed factors, along with any others that appear relevant given the unique

[651] Note that wetlands receive special scrutiny under the Guidelines and the public interest review: the Corps' regulations explain that wetlands "perform functions important to the public interest," including: "significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;" . . . protecting "natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;" . . . shielding other areas from wave action, erosion, or storm damage." . . . providing "water purification functions" . . . serving "as sanctuaries or refuges;" "as valuable storage areas for storm and flood waters;" and "ground water discharge areas that maintain minimum baseflows important to aquatic resources." 33 C.F.R. § 320.4(b)(2).
[652] 33 C.F.R. § 320.4(a)(1) (emphasis added).
[653] Contrast for example, a challenge to a state air permit, in which only narrow impacts in the form of emissions can be raised.

siting of each project. An advocate can point out that the Corps would be acting contrary to its own regulations if it only considered the effects of the construction and other permitted activities.

6. Does the Corps also have to comply with NEPA?

Yes. However, it may rely on FERC's NEPA analysis. For example, FERC's NEPA documents should include an analysis of alternatives for the project; if detailed enough, the Corps may rely upon that analysis to support its own analysis as to the least environmentally damaging practicable alternatives—the first "avoid" step in the 404(b)(1) Guidelines.[654] If, however, the NEPA documents do not consider the alternatives in sufficient detail to make every analysis legally required by the Guidelines, the Corps must supplement the NEPA documents with additional information.[655] The Corps will make this decision on a case-by-case basis, so an advocate should keep abreast of public notices to determine if there will be an additional EIS beyond those issued by FERC. Ideally, FERC's EIS documents will have issued before the Corps posts public notice of the application for Corps permits—the public notice should make this clear, but an advocate can always check FERC's docket as well.

The Corps has a choice of adopting FERC's NEPA analysis or preparing its own NEPA documents. In the Rio Grande LNG review process, for example, the Corps both prepared its own Environmental Assessment and incorporated FERC's final EIS by reference and relied on that document's analysis.[656]

For more information about NEPA, see Chapter 4, which describes NEPA in the context of FERC's responsibilities.

7. What other laws must be followed or permits that are needed before a 404 permit issues?

Regardless of the type of permit, the Corps must also comply with Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act, and its Tribal Trust Responsibilities. It is required to consult with state and federal wildlife agencies,[657] and receive and consider comments submitted by the EPA. Section 404 or section 10 permits also require a water quality certification (or a waiver of that certification) under Section 401 of the Clean Water Act, a task that has largely been assigned to the states.[658] For more information on 401 permits see Chapter 7. In addition, the applicant must also apply for and receive Coastal Zone Management Act consistency determinations from the State, if applicable, prior to the Corps rendering a 404 permit decision. For more information, see Chapter 10 Section A. A large LNG project will also require that the Corps has complied with NEPA; for this the Corps typically relies on FERC's NEPA analysis, since FERC is the lead agency on LNG projects.[659]

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[654] *See Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1526 n.17 (10th Cir. 1992).
[655] 40 C.F.R. § 230.10(a)(4)
[656] Pet.'s Br. at 20. http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200723_docket-20-60281-_brief.pdf.
[657] 33 C.F.R. § 320.4(c).
[658] EPA, *Overview of CWA Section 401 Certification*, https://www.epa.gov/cwa-401/overview-cwa-section-401-certification (last viewed Apr. 1, 2022). In rare occasions not typical to LNG export facility permitting, EPA or tribes have the responsibility for 401 certifications.
[659] Note that final NEPA documents may not be available during the public comment period, so advocates will need to couch their comments in terms of what such an analysis should include and anticipate what arguments the agency may use to justify granting the permit. For more information on the NEPA process, see Section B of Chapter 4 (FERC Certification).

8. What are some ways that I can use the Guidelines and public interest review as a basis for a Section 404 permit challenge?

A successful challenge will be one in which an advocate can show that the Corps failed to take an action or conduct an analysis that the 401(b)(1) Guidelines require. This may be difficult at the comment stage because the Corps will not have completed its analysis (the public's comments are solicited on the project application, not the draft Corps permit) and not all background supporting documents (like FERC's DEIS or FEIS) may have issued.

One possible structure for comments that an advocate could use are:

1. Describe the aquatic resources impacted, including any that should be jurisdictional but aren't, highlighting the wetlands and other "special aquatic sites" that will receive more scrutiny;

2. Overview the Corps responsibilities to both comply with the 404 Guidelines (avoid / minimize / compensate for impacts), plus its responsibilities to avoid water quality impacts and protect endangered species. (Recall that the 404(b)(1) Guidelines are a discrete set of independent tests that must be satisfied for a project to proceed in the permit review process);

3. Walk point-by-point through the public interest factors (and any related issues) and explain how the project and project application are on balance not in the public interest. (Recall that the public interest review involves a weighing and balancing of a wide range of at least 21 considerations);

4. Point out any missing information that the Corps does not yet have from the applicant that is necessary before a decision can be made, and any other responsibilities it must comply with, e.g., other laws or its obligation to consult with other agencies.[660]

5. Analyze whether the conditions that might be attached to any issued permit will accomplish the intended outcome. This would include investigating the compensatory mitigation measures that are likely to be approved; advocates are encouraged to be familiar with their district's mitigation methodology to best do so[661]

Note that an argument that the Corps simply made the wrong decision while conducting an analysis under the 401(b)(1) Guidelines will likely fail; advocates have found that courts will defer to the Corps' analysis of its assessment of the impacts and will give the Corps the benefit of the doubt about whether its analysis complied with the law. The Corps should not receive as much deference when it is interpretating and applying regulations that the Corps did not author (such as the 404(b)(1) Guidelines, which EPA authored).[662]

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[660] The Corps also has responsibilities under Section 106 of the National Historic Preservation Act, and its Tribal Trust Responsibilities; if the application does not address this, an advocate should point this out.
[661] For example, the New Orleans District uses the Louisiana Wetlands Rapid Assessment Method (LRAM), accessible here: https://www.mvn.usace.army.mil/Missions/Regulatory/Mitigation/Assessment_Method/ (last viewed Apr. 1, 2022).
[662] *E.g.*, *City Club of NY v. Corps*, 246 F. Supp. 3d 860, 869 (S.D.N.Y. 2017) (in refusing to defer to the Corps' interpretation of the 404(b)(1) Guidelines, noting that "*Auer* deference applies only 'when an agency interprets its own regulation.'"); *see also Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 708 n.3 (6th Cir. 2014) (stating that "*Auer* deference applies only to disputes over the meaning of an agency's own regulation" and going on to defer to the Corps' interpretations of its own NEPA implementing regulations).

In addition, it cannot be overstated how important it is to read the Guidelines in their entirety when bringing such a challenge. To show a clear violation of the guidelines, an advocate will want to quote the Guidelines back to the agency and to the reviewing Circuit Court.

For more detailed examples of how to structure 404 comments, see Appendix 45 (Outline) and Appendix 46 (Annova LNG comments filed Jan. 29, 2019) and Appendix 36 (Rio Grande supplemental comments filed Oct. 21, 2019).

9. What are some specific things I could point out as violations of the Guidelines?

As with any other challenge, advocates must familiarize themselves with FERC's DEIS and FEIS—and any environmental supporting documents the Corps prepares as well—because the facts therein will be used to judge whether the Corps has complied with the 404(b)(1) Guidelines and the public interest review. Note that not all of these documents may be available during the public comment period, and so it may only be at the litigation stage that an advocate can fully brief an argument on how the permit was improperly issued. Note that advocates in Louisiana should have easier access to underlying Corps documents during the comment period; Corps applications for Louisiana projects in the state's coastal zone (i.e., all LNG terminals) must be cross-filed with the Louisiana Department of Natural Resources.[663] LDNR makes these documents publicly available, whereas they otherwise would be difficult to obtain from the Corps.

Keeping in mind that each terminal's unique facts will raise unique issues, advocates can begin by addressing the existence of wetlands and other special aquatic sites, and then use the Guidelines' three-step process to identify the issues relevant to their terminal (recall that Subparts C through F (§§ 230.20 – 230.54) highlight the possible negative effects of a project that the Corps itself is required to consider[664]):

- Have the jurisdictional waters/wetlands or other special aquatic sites been identified correctly? The 404 and section 10 permitting process does not apply until there are impacts to jurisdictional waters, and it matters if those have been quantified correctly. Review the available material to determine if it appears the jurisdictional waters have been identified. The Guidelines also direct the Corps to be particularly scrutinizing of a subset of jurisdictional waters known as "special aquatic sites,"[665] which include sanctuaries and refuges designated under state, federal,

[663] Because of this cross-filing requirement, it is sometimes easier to find Corps project documents for LNG terminals by searching the LDNR by project for the "Joint Permit Application," as opposed to going through the New Orleans District's website. *See* Louisiana Office of Coastal Management, *Search for Coastal Use Permit,* http://reports.dnr.state.la.us/sonris/cmdPermit.jsp?sid=PROD (last visited Mar. 31, 2022) (note that embedded in the Joint Permit Application can be landowner information, supplemental information, agency correspondence and more). For example, documents available from LDNR for Driftwood LNG include the Joint Permit Application (*see "CUP Number: P20170501"),* https://sonlite.dnr.state.la.us/sundown/cart_prod/pkg_crm00100_forms.cart_menu?pcup_num=P20170501, which has to-date gone through 13 revisions; *see "Joint Permit Applications History."* CUP Number: P20170501. https://sonlite.dnr.state.la.us/sundown/cart_prod/cart_crm_application_his?pcup_num=P20170501&pshow_appl_email=N. The original application contains more embedded information such as the original application form, adjacent landowner lists, supplemental information, agency correspondence, and section 408 materials: *see "Joint Permit Application."* Permit Number: P20170501. (Received: 5/26/17) https://sonlite.dnr.state.la.us/sundown/cart_prod/cart_crm_application?pcup_num=P20170501&pline_id=1&pshow_appl_email=N (found in Step 13 of 15).

[664] Namely, each section in Parts C-F has a subsection b describing "Possible loss of environmental characteristics and values" or "Possible loss of values" for each vulnerability. *See* Subpart C - Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem (§§ 230.20 - 230.25); Subpart D - Potential Impacts on Biological Characteristics of the Aquatic Ecosystem (§§ 230.30 - 230.32); Subpart E - Potential Impacts on Special Aquatic Sites (§§ 230.40 - 230.45); Subpart F - Potential Effects on Human Use Characteristics (§§ 230.50 - 230.54).

[665] 40 C.F.R. § 230.1(d) (emphasis added); see also 40 C.F.R. § § 230.3(q-1) (defining "special aquatic sites").

or local laws; wetlands; mud flats; vegetated shallows; coral reefs; and riffle and pool complexes. Recall that practicable alternatives are presumed when special aquatic sites are implicated—and it is anticipated that LNG projects will impact at least wetlands, and possibly mud flats, vegetated shallows, and sanctuaries or refuges. Don't rely on the Corps to make this determination correctly. Review the EIS, public notice documents, any jurisdictional determinations and compare to what community members, aerial photographs, and even other state and federal agencies have said, know, or shown about the aquatic resources located in the project area. Recall that the Corps' public interest regulations also specifically identify wetlands for additional scrutiny, recognizing that the wetland site impacted may be part of a complete and interrelated wetland area, and so the cumulative effects should be addressed.[666] If there are discrepancies, or simply missing information, point it out.

- Failure to define the basic purpose of the project correctly, leading to an incorrect water-dependency analysis. Recall that when an activity is not water-dependent, practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. (40 C.F.R. § 230.10(a)(3); *see also* Section 6.B.3) For many LNG projects, the Corps and applicants have failed to define or distinguish a project's basic purpose (which is broad and used in the water-dependency analysis) from the overall purpose (which is narrower and used to identify alternatives). If the Corps or NEPA documents fail to identify the basic purpose correctly, point that out. If the Corps treats the entire LNG project as "water-dependent," that also might be error. For example, some advocates have argued that at a minimum, some components of an LNG project are not water-dependent (e.g., pipelines, work camps, liquefaction trains, LNG storage, compressors), and so alternative sites for these components that don't hurt special aquatic sites should be assumed. If the Corps treats part of the project as not water dependent (e.g., the pipeline portion), consider whether the applicant has met its burden to clearly demonstrate that routes that avoid special aquatic sites are not available. If not, point that out. Consult with an attorney with experience in 404 challenges to see if the project you are challenging is vulnerable on any of these grounds.
- Failure to avoid adverse impacts because of an insufficient alternatives analysis. Recall that the Guidelines prohibit the Corps from issuing a permit when there is a practicable alternative to the proposed discharge that would have a less adverse effect on jurisdictional waters and the aquatic ecosystem.[667] And "an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[668] In addition, the Guidelines state that "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise."[669] Thus, if the EIS documents and public notice do not indicate that the applicant and Corps have seriously assessed alternative locations or footprints for the project, highlight that. Or if an EIS mentions alternative sites but does little to quantify the relative ecosystem impacts (*e.g.*, how many wetlands, species are impacted), highlight that. An advocate could argue simply that the Corps has failed to make these analyses, or an advocate could propose alternative sites, after looking at nearby geography for sites that would not impact as many aquatic ecosystems (even sites that the applicant does not own may be considered[670]). This can be particularly

[666] 33 C.F.R. § 320.4(b) (describing the Army's general policies for evaluating permit applications that impact wetlands).
[667] 40 C.F.R. § 230.12(a)(3)(i).
[668] 40 C.F.R. § 320.10(a)(2).
[669] 40 C.F.R. § 230.10(a)(3).
[670] 40 C.F.R. § 230.10(a)(3).

persuasive for components of the project that are not water-dependent, which the Guidelines presumes can be located elsewhere. For example, advocates challenging the first permit issued to Rio Grande LNG argued that the Corps failed to adequately consider alternatives to the compressor site; that it could be moved inland without affecting the project's purpose. Alternatives do not need to be limited to moving the project—it may become apparent from the applicant's own words that a viable alternative could be shrinking the size of the terminal's footprint, because of known improvements in equipment efficiency.[671] (See also Section 6.B.3.)

- As part of a review of the alternatives analysis, examine the overall project definition. An applicant may not define a project in such a way that precludes the existence of any alternative sites[672]—typically the application will specify a project purpose—if it is too narrow, this is a ground to challenge. (For example, a project's overall purpose that is to build a 5 MTPA LNG export facility in Port Fourchon is too narrow.) An advocate might also argue that the applicant's definition of a project shows that other alternatives for the project are clearly available, yet were still ignored. This issue came up in the Rio Grande LNG project in Brownsville, TX. The applicant insisted that a six-liquefaction-train design was necessary to achieve what it stated was the project's purpose: to process 27 MTPA of gas. Advocates for community groups argued that the applicant's own materials and contracts showed that the same purpose could be achieved with a smaller five-train footprint, an alternative that would necessarily impact less wetlands. Yet despite this clear alternative built into the project definition, the Corps had failed to consider it as an alternative. Whether this argument will be successful is still unknown—the Corps voluntarily reissued the permit and as of December 2021 litigation over this new permit is on-going—but this demonstrates the type of project-definition problem an advocate might be able to identify.
- Failure to minimize adverse impacts. It may be that the documents available to review during the public comment period do not show that the applicant has sufficiently minimized the adverse effects of the project. Subpart H of the Guidelines (40 C.F.R. § 230.70-230.77) lists a non-exclusive set of ways that an applicant could minimize adverse of effects and is a helpful starting place for crafting an argument on minimizing effects. For example, certain technologies for dredging and driving the structural piles needed to create the LNG tanker docks create varying degrees of underwater disturbances and noise that can harm aquatic life and unleash contaminants from the seafloor, especially if used during breeding season.[673] The Corps has the authority to condition the permit and require the applicant to take such actions to minimize adverse impacts (*e.g.*, no construction during breeding season for specific marine species), and advocates are encouraged to push the Corps to do this.
- Failure to require adequate compensatory mitigation. Although an advocate's goal often is to stop a project entirely, it is important to not overlook challenging the sufficiency of the Corps' analysis and mitigation requirement, as it may be that the project is eventually constructed. The public is entitled to comment on the mitigation proposals,[674] so even though during the public comment period the public may not have access to the Corps' full analysis of alternatives and impacts, the mitigation plan itself should be available.[675] The Corps' regulations state that "[t]he

[671] *See* App. 53 (Pet. Br. in *Shrimpers v. Corps*, Case No. 20-60281 (5th Cir. (filed July 23, 2020)) at 46-55).
[672] *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989).
[673] This would fall under 40 C.F.R. §§ 230.74 and 230.75, for example.
[674] 40 C.F.R. § 230.94(b)(2).
[675] Yes, this is counter-intuitive that the third step of the avoid / minimize / mitigate process is sometimes available for comment before the first two steps are solidified. This is one reason that Corps permits can be more fully challenged only once they issue.

fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by [Corps] permits"[676]—mitigation is not an excuse to allow otherwise avoidable impacts from happening. This offset is intended to achieve the "federal government['s] … longstanding national goal of 'no net loss' of wetland acreage and function."[677] Subpart J of the Guidelines (40 C.F.R. §§ 230.91 – 230.98) describe the regulatory requirements compensatory mitigation proposals must meet; EPA and the Corps have published a number of additional guidance documents, handbooks, and training that advocates should review when scrutinizing the proposed compensatory mitigation plan.[678] Acceptable methods of compensatory mitigation include (1) restoration, (2) establishment (creation of aquatic resources), (3) enhancement and (4) preservation. Applicants can buy mitigation credits through a mitigation bank or what is known as an in-lieu fee program[679] or be responsible for its own mitigation projects.[680] When reviewing a compensatory mitigation plan, check whether its proposal conforms to what EPA's and the Corps' guidance suggests.[681] Research and review third-party literature about the mitigation banks, programs, and projects that the applicant proposes, and see if any problems have arisen that may make this mitigation not as effective. If there is insufficient public information for the plan to be fully assessed (*i.e.*, the quantity of impacted wetlands has not been delineated, or the alternatives assessment is flawed), add that to the comments.[682] Also check to see if some impacts that have been classified as temporary actually will be permanent (e.g., cutting cypress-tupelo forests is a permanent impact because the likelihood of regeneration is quite low), requiring additional mitigation. Consider whether the mitigation approved is commensurate with the aquatic function lost, and whether it is as close as possible to the area impacted, and not already protected. An expert in mitigation plans would be helpful in assessing the plan.

- Failure to make certain factual determinations needed to support the avoid / minimize / mitigate framework. 40 C.F.R. § 230.11 directs the Corps to make specific findings as to the cumulative, individual, and secondary effects of the proposed project in order to support its permitting decision. Compare what this section of the rules requires to what the Corps and the NEPA documents say. Advocates are encouraged to use their own resources to make these

[676] 33 C.F.R. § 332.3(a)(1).
[677] EPA and Corps, *Compensatory Mitigation for Losses of Aquatic Resources*, Final Rule, 73 Fed. Reg. 19594-01 (Apr. 10, 2008).
[678] These resources are summarized on EPA's website: https://www.epa.gov/cwa-404/background-about-compensatory-mitigation-requirements-under-cwa-section-404 and include several training courses (*see id.*, section *Compensatory Mitigation Training Resources*) and *Compensatory Mitigation Site Protection Instrument Handbook for the Corps Regulatory Program,* July 2016, https://www.epa.gov/sites/default/files/2017-01/documents/site_protection_instrument_handbook_august_2016.pdf. Each District may have its own guidance and tools for assessing mitigation: *see e.g., Why Assess Function?* https://www.swg.usace.army.mil/Missions/Regulatory/Functional-Assessments/ (last visited Mar. 31, 2022)(Galveston District's link to tools to assess the whether the proposed mitigation will adequately compensate for the impacts expected); *see also Mitigation,* https://www.mvn.usace.army.mil/Missions/Regulatory/Mitigation/ (last visited Mar. 31, 2022). The New Orleans District uses the Louisiana Wetlands Rapid Assessment Method (LRAM), which advocates have challenged as flawed but is still used by the District: https://www.mvn.usace.army.mil/Missions/Regulatory/Mitigation/Assessment_Method/ (last visited Mar. 31, 2022).
[679] The Corps has developed an online tracking system for mitigation banks and in-lieu fee programs called "RIBITS," which is filled with information about mitigation banks, both in general and searchable by geography; it is an excellent resource for advocates looking to understand the compensatory mitigation plan proposed. Army Corps of Engineers, *RIBITS,* https://ribits.ops.usace.army.mil/ords/f?p=107:2 (last visited Mar. 31, 2022).
[680] EPA, *Mechanisms for Providing Compensatory Mitigation under CWA Section 404,* https://www.epa.gov/cwa-404/mechanisms-providing-compensatory-mitigation-under-cwa-section-404 (last visited Mar. 31, 2022).
[681] *Supra.*
[682] This principal applies to commenting on the FERC process as well—sometimes a FERC EIS may rely on a compensation plan that the Corps hasn't issued yet. If so, point out that the fact that the agency's analysis is built on hypothetical or missing data.

determinations, and also to confirm that the Corps has made these findings. Recall that the more persuasive argument will be that the Corps failed to make a determination here, not that the determination was wrong.

- Will the permit's conditions be enforced? Some districts have a poor track record of enforcing the conditions on their permits. For example, in 2017 the New Orleans District reported not having a single boat that it could use to investigate violations of permit conditions in the Atchafalaya Basin, rendering enforcement of many conditions impossible during most of the year.[683] If a situation like that exists in your district, point that out in comments. If possible, suggest how the conditions might be made more enforceable—could automatic monitoring be installed or regular site visits documenting conditions required? The results of monitoring and enforcement activities should be easily publicly available online.

Don't forget to comment on the other Guideline conditions that the Corps must confirm are met:

[683] App. 47 at 4-5 (Cmts on Bayou Bridge Pipeline, MVN-2015-02295-WII, WQC 160921-03, filed Jan. 31, 2017).

- Will there be a violation of State Water Quality Standards? 40 C.F.R. § 230.10(b)(1) prohibits the Corps from permitting activities that will end up violating state water quality standards. However, 33 C.F.R. § 320.4(d) allows the Corps to rely on the state's Clean Water Act section 401 certification to demonstrate that there are no water quality impacts *unless* EPA's regional administrator (*i.e.*, Region 6 EPA) identifies "other water quality aspects to be taken into consideration."[684] Relying on section 320.4(d) the Corps will often simply defer to the state's certification instead of conducting its own water quality analysis, something several courts have allowed if EPA hasn't raised this issue in comments.[685] Therefore, if an advocate wants the Corps to independently address water quality impacts from the project, it is important to also get EPA

OTHER THINGS TO CONSIDER WHEN RAISING WATER QUALITY IMPACTS WITH THE CORPS

Water quality standards vary state by state. EPA has compiled lists online of the standards that it has approved for all states.[1] Note that water quality standards depend on the designated use of each impacted body of water. For example, LNG terminals and associated dredge and fill activities likely will affect waters used for recreation and aquatic life, more so than drinking—credible advocate comments will recognize the uses of the affected waters. Many waterbodies have explicit standards set for them; advocates should be able to find this information by searching EPA's lists for specific water bodies or conducting a web search.[2] Water quality standards are set for parameters like dissolved oxygen, temperature, pH, turbidity, toxics, and pathogens, and often have different acceptable values for acute and chronic levels. The dredging activities at an LNG terminal will likely affect dissolved oxygen and turbidity when underwater soils are disturbed. Especially if the channel has a history of heavy industrial use, toxins may be dislodged from the soil when dredging takes place. Consider whether the project application and any environmental documents relied on conduct an analysis of the water quality standards—including whether a 401 certification has issued, and if not, point any failures out. Note that challenging a 404 permit on this ground will likely require an advocate to consult with an expert in this field for the state in question and research the current water quality in the proposed project area. Remember that all outside information relied upon must be submitted to the Corps during the public comment period so that you may rely upon it in subsequent litigation of the permit.

[1] https://www.epa.gov/wqs-tech/state-specific-water-quality-standards-effective-under-clean-water-act-cwa (last visited Mar. 31, 2022).

[2] For example, the waters near the Rio Grande LNG and Texas LNG sites have standards set for it. *See* 2018 Texas Surface Water Quality Standards (Updated Mar. 18, 2021)(Lower Laguna Madre and Brownsville Ship Channel), 97, https://www.epa.gov/sites/default/files/2020-01/documents/txwqs-2018.pdf.

[684] *See* 33 C.F.R. 320.4(d)(1). *See also Ohio Valley Envtl Coalition, Inc. v. U.S. Army Corps of Eng'rs*, 883 F. Supp. 2d 627, 639, 641 (2012) (holding that "the Corps can, in appropriate circumstances, rely on a State § 401 certification when assessing the cumulative impacts of a proposed permit" but finding that EPA's comment letters "detailing the EPA's concerns were sufficient to remove the conclusive effect of the State § 401 certification with regard to water quality concerns raised by those letters").

[685] *E.g., Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 949-50 (9th Cir. 2008).

on board with comments filed explicitly citing 33 C.F.R. § 320.4(d) and raising its water quality concerns. If EPA has already filed comments, review those to determine if EPA has raised water quality concerns that an advocate can amplify. But if EPA hasn't raised the issue or the state has not issued a 401 certification, and water quality is a concern for the project, it's still worthwhile to include those concerns in comments. Although the Corps and a reviewing court might ignore an advocate's concerns about water quality, laws can change and courts may change their interpretation of the law.[686]

- Will the Project violate applicable toxic effluent standards or prohibitions under the CWA § 307? This is prohibited under 40 C.F.R. § 230.10(b)(2) and refers to point-source discharges from the project, like discharges of chemicals or polluted water from a sewer pipe.[687] As with raising water quality issues under 40 C.F.R. § 230.10(b)(1) (see previous bullet), the Corps may attempt to defer to a state's section 401 water quality certification if EPA does not independently raise concerns. However, this should not dissuade an advocate from raising concerns in comments if the project may violate effluent standards. Mounting a detailed challenge to a 404 permit on this ground will likely require an advocate to consult with an expert in this field and research the effluent expected from the facility given its design. If it does not appear that the Corps has addressed this requirement or lacks additional information, point this out. Remember that all outside information relied upon must be submitted to the Corps during the comment period so that you may rely upon it when litigating the permit.
- Endangered species impacts. Check if there may be impacts to endangered or threatened species[688] because of the dredging and filling and fully support any arguments that this is an issue when submitting comments to the Corps.[689] Recall that impacts could be to land and aquatic species (e.g., turtles, birds, marine mammals, protected cats), from critical habitat destruction, vessel strikes, dredging activities, etc. Recall also that many LNG terminals are processing such a large quantity of gas such that LNG tankers may use the nearby shipping channels multiple times a week, if not daily, creating on-going chronic hazards for aquatic species (not to mention hazards for other users of the waterway, like fishers or recreational boaters). Compare the estimated number of vessel transits in the proposed project with other LNG facilities to fact-check the Corps' and applicant's claims.[690] If the Fish and Wildlife Service and the National Marine Fisheries Services have not yet submitted public comments opining on the impacts of the project, consider whether approaching these agencies with concerns about endangered species impacts would encourage them to include those concerns in their own comments to the Corps. If these agencies have already submitted comments expressing concerns about impacts, echo and amplify those concerns.

[686] For example, the Biden Administration is currently changing the section 401 certification regulations, which may affect whether the 401 certification is sufficient. Other nuances of the 401 process may make the Corps reliance on a 401 certification less defensible—for example if a state *waives* its right to certify. For more information, see Chapter 7 on section 401 water quality certifications.
[687] EPA, *Learn about Effluent Guidelines,* https://www.epa.gov/eg/learn-about-effluent-guidelines (last visited Mar. 31, 2022).
[688] FWS provides a quick search tool for species by county here: U.S. Fish & Wildlife Service, *Find Endangered Species,* https://www.fws.gov/endangered/. For more a more detailed tool that the Service uses for project planning, try U.S. Fish & Wildlife Service, *IPaC: Information for Planning and Consultation,* https://ecos.fws.gov/ipac/.
[689] *See* 40 C.F.R. § 230.10(b)(3). If there are endangered-species concerns, an advocate should also raise them with the relevant agencies (*e.g.*, U.S. Fish and Wildlife Service).
[690] One way to find this information would be searching the web for the EIS documents on other LNG terminals, calculating the number of vessel transits expected per unit of LNG exported, and then extrapolating to the proposed terminal size. Keyword searches for "vessel transit" can identify this information in large EIS documents.

- Will the Project cause or contribute to significant degradation of the waters of the United States? Consider whether the Corps has correctly addressed: (1) whether the Project will have significant adverse effects on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites; (2) whether the Project will have significant adverse effects on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes; (3) whether the Project will have significant adverse effects on aquatic ecosystem diversity, productivity, and stability; and (4) whether the Project will have significant adverse effects on recreational, aesthetic, and economic values. EPA's list of state-specific water quality standards also includes state-specific antidegradation policies, which makes it a potentially useful reference.[691] Recall again that the Corps' complete failure to do a required analysis will be more persuasive than an argument that the Corps performed this assessment incorrectly. The latter argument can be bolstered by packing the record with evidence contradicting the Corps' assessment and advocating with the consulting agencies (EPA and FWS, for example) to submit comments that supports your interpretation of the impacts. Note that in the past, the Corps has taken a very narrow view of the activities it must look at in considering the environmental effects of the proposed activities. If an advocate is planning on raising this issue in litigation, it is highly advisable to consult with more experienced 404 practitioners so that your arguments are properly framed at the litigation stage.

Comments should also address the public-interest review factors:

- General failure to conduct a public interest review. Recall that the Corps has a list of 21 non-exclusive factors that it must consider when weighing the public interest, including the cumulative effects thereof:[692] conservation, economics (*are there impacts to other economic areas, such as tourism, fisheries, etc?*), aesthetics, general environmental concerns (*think about air pollution, light, noise, vibration, earthquake, tsunami, new roads*), wetlands, historic properties, fish and wildlife values (Imperiled Species, Marine Mammals (*including ship strike and underwater noise issues*), Non-imperiled Fish species, Birds, Other wildlife, Habitat fragmentation (*e.g., by the pipeline, access roads, utilities*)), flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation (*potential impacts to water supply, project water consumption*), water quality (*turbidity, temperature, DO, toxics, ballast water, stormwater (both construction and operation), wastewater discharges*), energy needs, safety (*including based on nearby industries (e.g., fertilizer plants, space launch facilities)*), food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people (*tribes, environmental justice communities, human trafficking*). Advocates should scrutinize this list and be sure to raise and fully brief with supporting documentation the issues that pertain to the LNG terminal being challenged.

[691] EPA, *State-Specific Water Quality Standards Effective under the Clean Water Act (CWA)*, https://www.epa.gov/wqs-tech/state-specific-water-quality-standards-effective-under-clean-water-act-cwa (last visited Mar. 31, 2022).
[692] 33 C.F.R. § 320.4(a)(1).

- For section 10 permits, will the Project interfere with access to or use of navigable waters? 33 C.F.R. § 320.4(g)(3) states that "A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied." This issue is particularly relevant for a section 10 permit. The LNG terminal may require the construction of berths or piers that extend into nearby navigation channels, and for small channels, the increased vessel traffic may functionally prohibit others from using the channel while the LNG tankers are present (e.g., either to avoid accidental collisions, reduce security risks, or for health and safety reasons). For example, the Rio Grande LNG terminal would need to be serviced by LNG tankers multiple times a week, on a narrow channel transited by shrimpers and fishers whose use of the waterways is anticipated to be restricted. Consider whether the applicant has addressed the impacts on others' use of the waterways the LNG terminal abuts. Paying attention to this issue may also help uncover other affected individuals who may want to help with an LNG challenge.

PRACTICE TIP: OUTREACH AND COLLABORATION WITH OTHER STAKEHOLDERS CAN PAY DIVIDENDS

When reviewing a proposed project, always keep an eye out for other stakeholders, such as those mentioned in 33 C.F.R. § 320.4(g)(3). Such commercial and recreational users of the waterway might not be part of your typical client base but can offer on-the-ground insight and eyes to watch out for and document impacts as a result of construction activities if the permit is ultimately approved. They also may be interested in helping challenge the permit—and the more individuals or groups involved in litigation, the more likely a reviewing court will find that at least one will be impacted enough (i.e., has the "standing") to challenge the permit. And first-hand accounts from the users of a waterway (e.g., observations by commercial fishermen as to how a company's dredged material is actually interfering with their use of the waterway) can provide leverage with the Corps and the company to require these post-construction problems to be addressed or the permit to be suspended.

- Is there a likelihood that the project will not obtain the required state and local authorizations or certifications? The Corps is directed to process a 404 application concurrently with the permitting process of the terminal's other required permits, without delay pending action on any of the other permitting processes (e.g., state air permits and water quality certifications, coastal use consistency determinations, etc).[693] But the Corps' regulations state that if other required permits are denied in the meantime, the Corps should either immediately deny the Corps permit without prejudice or continue processing the application.[694] If the Corps continues processing the application, the Corps is directed to either deny the permit for failing the Corps' public interest review, or deny it without prejudice and indicate that except for the other missing permits, the 404 permit could, under appropriate conditions, be issued.[695] This section of the regulations is a hook for advocates that are challenging multiple permits at once; an advocate

[693] 33 C.F.R. § 320.4(j).
[694] *Supra.*
[695] 33 C.F.R. § 320.4(j).

could argue that the Corps must halt its analysis while other permits are pending / while the applicant changes its proposed project in order to obtain said permits.

- Are there historic, cultural, scenic or recreational areas that could be impacted? 33 C.F.R. § 320.4(e) states that "[f]ull evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on [historic, cultural, scenic, and recreational] values." ("Values" in this context can be understood to mean the historical, cultural, scenic and recreational *resources* that would be impacted by the project.) The law tells the Corps that when possible the permits it issues should be consistent with the protections and importance that other laws place on these resources, and avoid significant adverse impacts to them.[696] For proposed LNG sites, other federal, state, regional and local agencies or governments may have already designated (e.g., through land classifications) some of the areas and resources as containing historical, cultural, scenic, and recreational resources.[697] Community groups may be aware of many such classifications already; also consult agency and government websites (and contact their personnel) and look into federal, state, and local laws governing these resources[698] to make sure nothing is overlooked. Beyond looking at impacts to already-designated areas, other questions to consider include: Could the facility impact the viability of fish and wildlife habitat, and thus impact recreational hunters and fishers? Will the facility introduce industry into an otherwise natural and scenic area enjoyed by locals and visitors? Do local families picnic and swim in the areas nearby? Are there archeological resources, Native American religious or spiritual sites, shipwrecks or submerged aircraft in the area that would be damaged?
- Will floodplain function be impaired? In 33 C.F.R. § 320.4(l) the Corps recognizes the "significant natural values" and "numerous functions important to the public interest" that floodplains possess. The Corps is directed to "avoid to the extent practicable, long and short term significant adverse impacts associated with the occupancy and modification of floodplains, as well as the direct and indirect support of floodplain development whenever there is a practicable alternative." *Id.* (emphasis added). When there are no practicable alternatives to locating the project in the floodplain, the Corps is directed to consider alternatives within the floodplain that will lessen significant adverse impacts to the floodplain.[699] The coastal location of planned LNG terminals and projected sea level rises should make this issue very relevant in all challenges, although an advocate will need to carefully consider whether the surrounding geography makes an alternative location feasible; recall that many of the proposed terminals plan on exporting LNG via tanker, so some portion of the footprint will likely be in a floodplain. But potentially an advocate could argue that the applicant should consider modifying the terminal design to minimize impacts on floodplain function by using permeable building materials,

[696] 33 C.F.R. § 320.4(e).
[697] For example, the Atchafalaya National Heritage Area stretches across Louisiana and is Congressionally recognized as containing historical, cultural, and natural resources deserving of extra protections. See https://www.atchafalaya.org/welcome (last visited Mar. 31, 2022).
[698] For example, Section 106 of the National Historic Preservation Act of 1966. *See also, Federal Historic Preservation Laws, Regulations, and Orders,* https://www.nps.gov/subjects/historicpreservation/laws.htm (last visited Mar. 31, 2022). Also investigate if there are nearby or on-site wild and scenic rivers, historic properties and National Landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, National Heritage Areas, estuarine and marine sanctuaries, or archeological resources, including Indian religious or cultural sites. For a list of Texas laws on these issues, see https://www.thc.texas.gov/project-review/statutes-regulations-rules (last visited Mar. 31, 2022). One place to start in Louisiana is its Department of Culture, Recreation & Tourism, https://www.crt.state.la.us/ (last visited Mar. 31, 2022).
[699] 33 C.F.R. § 320.4(l)(3).

elevating structures away from the floodplain, and minimizing the overall site footprint.[700] Wetlands are well known for their ability to buffer and minimize the effects of floods; this is another reason to push for minimal and reduced impacts on wetlands, especially in coastal areas that are regularly struck by hurricanes. Even impacts to inland wetlands can exacerbate coastal flooding. For example, in Louisiana there is a disturbing trend of sediment deposition filling in inland wetlands (*e.g.*, the Atchafalaya Basin), depriving the coast of needed sediments for land building, exacerbating adverse effects of flood events and leaving these coastal areas that much more at risk of damaging impacts from severe weather events and flooding. Advocates can also cite the damages Hurricane Harvey, Hurricane Ida, and other weather events have made to other industrial facilities along the Gulf Coast in support of arguments about siting additional industrial facilities on floodplains.

- Have the economic impacts of the facility been properly considered? The Corps' regulations state that "*it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest. The economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax revenues, community cohesion, community services, and property values.*"[701] Although couched in benefits language, an advocate could use this section to argue for the Corps to conduct an independent review of the need for the project. For many LNG projects, the actual job benefits to locals are not as cheery as an applicant may paint. Construction jobs are temporary and permanent jobs often go to workers from outside the area with experience in LNG. The most direct benefits of a facility—the gas itself—are by definition exported for overseas gain, with most of the negative impacts left to be felt locally. An advocate could also bring in information about the tax exemptions a project has received that would discount actual the economic benefits of a project. See Chapter 9 on Louisiana and Texas tax abatement programs for more details and background research that could be cited.
- Does the Corps lack sufficient information to make a reasonable judgment? 40 C.F.R. § 230.12(a)(3)(iv)

PRACTICE TIP: USING EXPERTS

Experts can make your arguments more persuasive by providing "expert opinions," which the Corps and a reviewing court may give more weight to than just advocate argument. To support arguments about economic impacts, consider if there are funds to hire experts in economics to assess the impacts of a proposed project. An ecological economist—i.e., one with knowledge of the economic benefit of the natural area and the ultimate economic harm to local economies—can be very helpful, as well as a more traditional economist. Batker Consulting, LLC is one firm of ecological economists that has worked with environmental advocates on economic impacts of projects; contacting environmental attorneys may also help identify potential experts.

[700] For more information on floodplain management in Texas, see https://www.twdb.texas.gov/flood/resources/doc/Texas_Quick_Guide.pdf (last visited Mar. 31, 2022).
[701] 33 C.F.R. § 320.4(q).

prohibits a permit from issuing when the application does not contain sufficient information for the Corps to understand the potential impacts. Look at the project to determine whether there is some aspect of the project that the Corps has not considered or collected information on. For example, does the application and NEPA documents lack information about the quantity of WOTUS and wetlands present on alternative sites? That data would be necessary to adequately assess the "avoid impacts" step in the Guidelines. If it is missing, cite this regulation to argue that the Corps does not have sufficient information on the practicable alternatives and the impacts on the proposed development.

- Ballast water.[702] One issue particular to LNG terminals that is related to the named public interest factors of water quality, fish and wildlife values, and economics is the issue of invasive species and pollutants carried in ballast water. Ballast water is stored in the ship's ballast tanks (in especially large quantities when the ship is not loaded with LNG yet) to regulate the ship's stability and safety while not under full load. In the case of LNG tankers, ballast water is seawater that is pumped into the tanks after a ship has delivered LNG to a port and is departing with less LNG or no LNG. This ballast water (plus any more that it has added along the way) is discharged once the empty ship nears a port where it will be picking up more LNG, making export terminals a much bigger producer of ballast water than the import terminals that have been previously permitted in the States. And LNG export terminals will have a major effect on the amount of ballast water expelled into U.S. waters: the tankers serving these terminals are so large and predicted to be so numerous that one study estimating the potential impacts of an LNG export buildout from 2015 to 2040 predicted a ***90-fold annual increase*** in LNG-related ballast water discharge to U.S. waters.[703] The contaminants in this ballast water are chemical and biological and can decimate native fish and shrimp populations, which in turn can batter tourism and fishing economies and even cause billions of dollars in damage, as happened in the Great Lakes (by zebra mussels).[704] If the Corps has not considered ballast water effects as part of the public interest review, an advocate should highlight that failure.
- Climate change impacts. Although a climate change analysis is not directly mentioned into the Guidelines or public interest review, it squarely fits within at least the public interest factors of energy needs and general environmental concerns. In addition, climate change would need to be addressed for the Corps' NEPA responsibilities to have been met.[705] This makes a 404 or section 10 challenge a place to raise climate change concerns about the project. This can be sea level rise affecting a permitting facility directly, indirect effects from greenhouse gas emissions on the world at large or any other climate impacts that an advocate may find will resonate with the Corps or public opinion. Advocates should be aware that the Corps' treatment of any climate change analysis will be given deference, and under current conditions at the Corps, the Corps is likely to disregard these impacts as out-of-scope for a 404 review. However, this is no reason to

[702] This issue could also be raised in the 401 certification process and the coastal consistency review under the CZMA. *See also* https://www.invasivespeciesinfo.gov/subject/ballast-water (last visited Mar. 31, 2022).
[703] K. Holtzer, *et al., Potential effects of LNG trade shift on transfer of ballast water and biota by ships*, Sci. Total Environment, 580:1470-1474. 2017, https://www.sciencedirect.com/science/article/abs/pii/S0048969716328169.
[704] J. Roche, J. and H.A. Triezenberg, *Telecoupling and the spillover system: Causes and effects of Zebra Mussels in the Great Lakes* (2015), https://www.canr.msu.edu/news/telecoupling_and_the_spillover_system_and_zebra_mussels_triezen15. Examples of invasive-species impacts from ballast water are tracked by various agencies. *See e.g.,* Florida Fish and Wildlife Conservation Commission, *Ballast Water and the Transport of Harmful Algae,* https://myfwc.com/research/redtide/research/scientific-products/ballast-water/ (last visited Mar. 31, 2022) (describing impacts to Tampa Bay (Asian green mussels damaging industrial plants) and Australia (red-tide algae).
[705] This is true regardless of whether the Corps drafts its own environmental documents or relies on FERC's.

not comment on climate change impacts—to the contrary, one of the few ways to change the Corps practices will be to have courts remonstrate the Corps for not fully considering climate change—and for a court to do that, advocates must have raised climate change issues in permit challenges.

PRACTICE TIP: ATTACH ALL EVIDENCE BEFORE SUBMITTING COMMENTS!

Don't forget to include all outside information that supports your comments! If you do not attach the evidentiary sources, photos, reports, etc. supporting your arguments in comments, it may irrevocably cripple any subsequent litigation because with only a few exceptions, litigators are limited to using what was included in comments. Do not just provide a URL; it may be defunct by the time the Corps reviews your comments.

10. This all seems complicated; when should I retain an expert, and what should that expert know about?

Ideally, an expert should be found and retained as soon as it becomes apparent that a company will seek to build or expand an LNG facility. The same expert can be used in challenging multiple permits, as long as the subject matter is within that expert's field of knowledge. Credible experts should have years of experience in the subject matter on which they are opining, either academically or in the field (preferably both). Although an in-state expert may be preferable in terms of experience with the project area and reduced travel costs (which are not always an issue), be mindful that out-of-state experts may need to be retained if in-state options have conflicts of interests and/or ties to fossil fuel industry work.

For Corps permits, *a wetlands delineation expert* is useful when challenging an approved jurisdictional determination and the permit itself. The expert should have experience distinguishing between aquatic resources, WOTUS, and special aquatic sites. Another expert may be needed to support arguments about how 404(b)(1) Guidelines should be applied (*a 404(b) expert*). This expert should understand the guidelines and know how dredging and filling affects aquatic life and water quality. Ideally the expert would understand what makes an alternative "practicable" under the law and what good compensatory mitigation plans should include. An expert that has previously worked as a consultant for industry in navigating the 404 process—even if in non-LNG contexts, such as permitting renewable power infrastructure—could be an ideal candidate, as well as retired government employees with experience reviewing permits. *An expert in economics* could be helpful, especially one that is *an expert in ecological economics*, to illustrate the true economic impacts of the project. An economics expert may also be able to provide project-specific dissection of the project's purpose, the need for the project, and a more realistic projection of the costs and benefits of the project. The economics expert used to challenge a Corps permit may also be able to provide a relevant opinion in the FERC process.

EIP's Center for Applied Environmental Science is a potential resource for advocates looking for referrals and funding for experts. Information about the Center and its list of independent experts can be found here: https://caes.info/about/ (last visited Mar. 31, 2022).

C. How do I actually participate in the Corps' 404 review?

1. Has the government published a flowchart showing the Corps' process of issuing a 404 permit?

Yes! As part of the Open EI project,[706] the National Renewable Energy Laboratory developed the following flowcharts in August 2016 for the Department of Energy depicting the typical 404 permitting process for issuing individual permits (see below). [707] (Advocates new to challenging Corps permits should also review 33 C.F.R. § 325 et seq, and in particular § 325.2, which outlines the steps and general timeline in the application for an individual permit.) This remains the typical permitting process used by the Corps, however at least two major steps are not featured.

First, not shown is any threshold jurisdictional determination as to whether there exist waterbodies and wetlands that fall under the Corps' jurisdiction at all. An official jurisdictional determination (also known as an "approved jurisdictional determination") is not a prerequisite for a permit; an applicant can request either a preliminary jurisdictional determination (a non-binding opinion that cannot be used by the applicant as a shield against later enforcement actions), or none at all. However, given the size and complexity of LNG terminals, it is likely that before an applicant officially applies for a permit, the applicant will have requested and received an approved jurisdictional determination from the Corps.[708] This process, which has no opportunity for public comment or participation, may be part of the pre-application consultation that is shown as the first step in the flowchart below. The approved jurisdictional determination itself can be appealed even before the 404 permit issues—and potentially before the 404 *application* is complete. For more information on the jurisdictional designation process, see Sections 6.C.2 and 6.C.3.

The second item not shown is the participation of other agencies like EPA and FWS, which submit comments during the public comment period and can disrupt this process by elevating issues beyond the regional Corps office. For more details on how EPA and FWS can disrupt the typical 404 process, see Sections 6.D.1 – 6.D.4.

Note that there are a number of such flowcharts published by other organizations online.[709] Advocates may find them helpful to review, but when in doubt should rely on the Corps' own guidance and the governing statutes.

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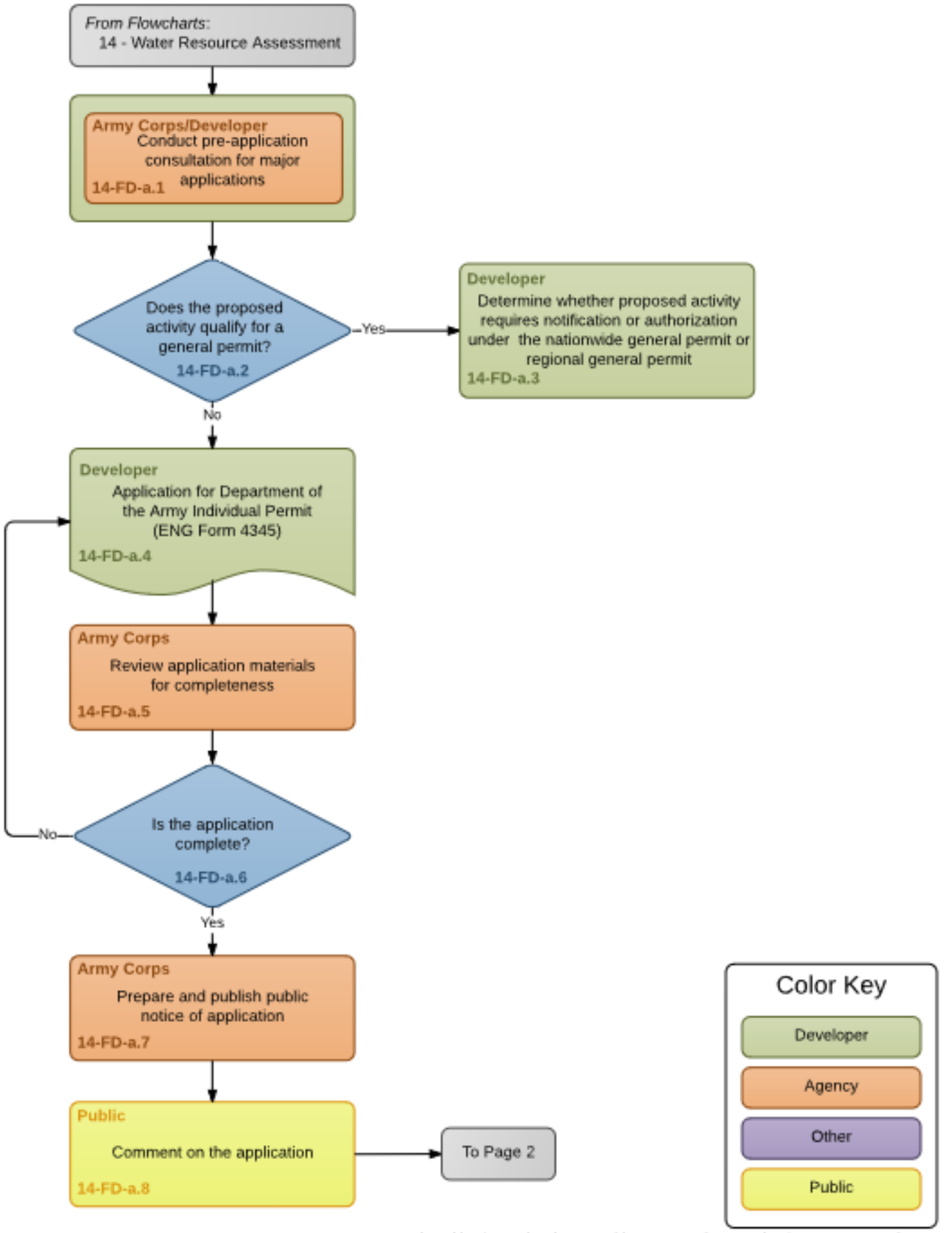
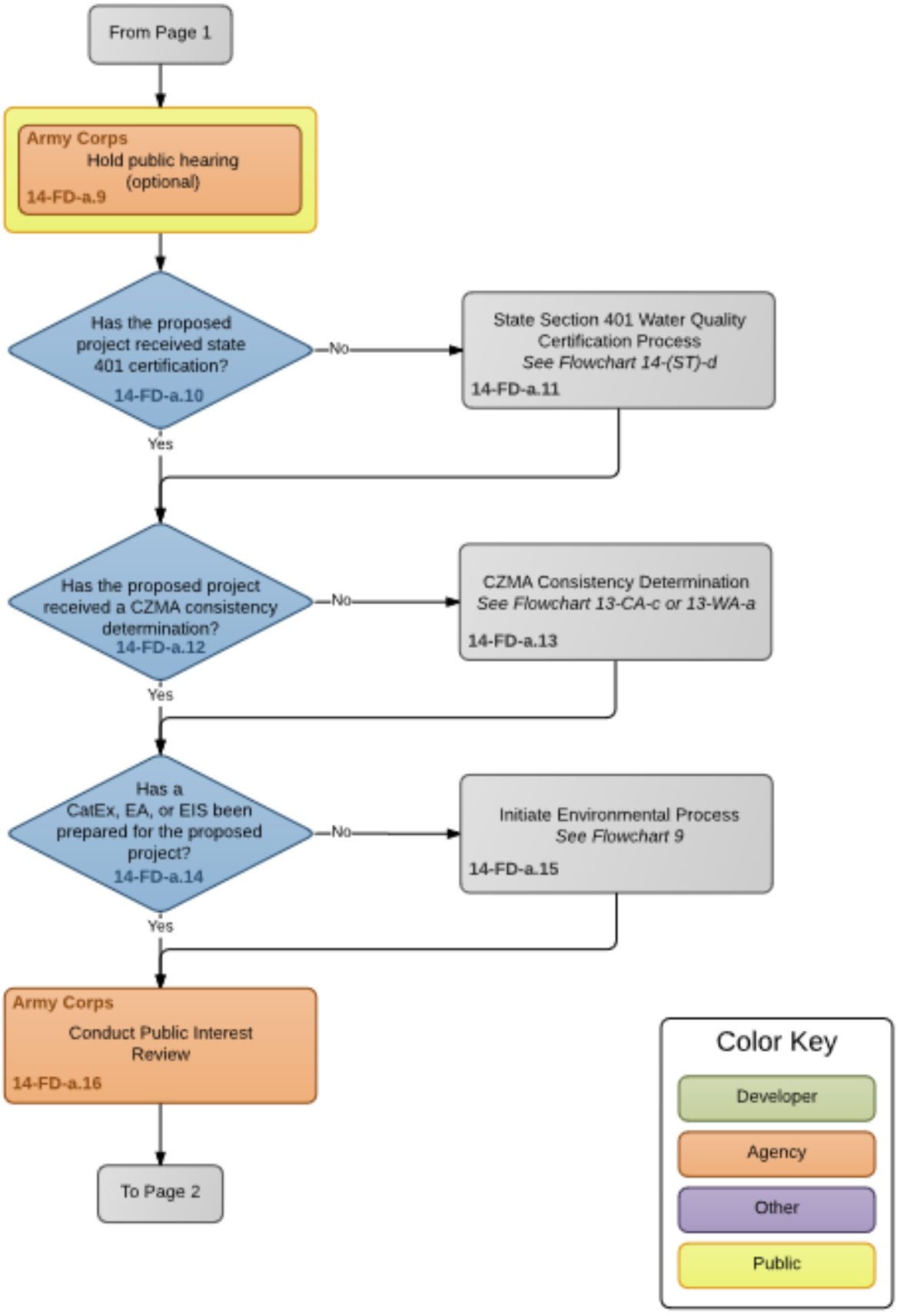
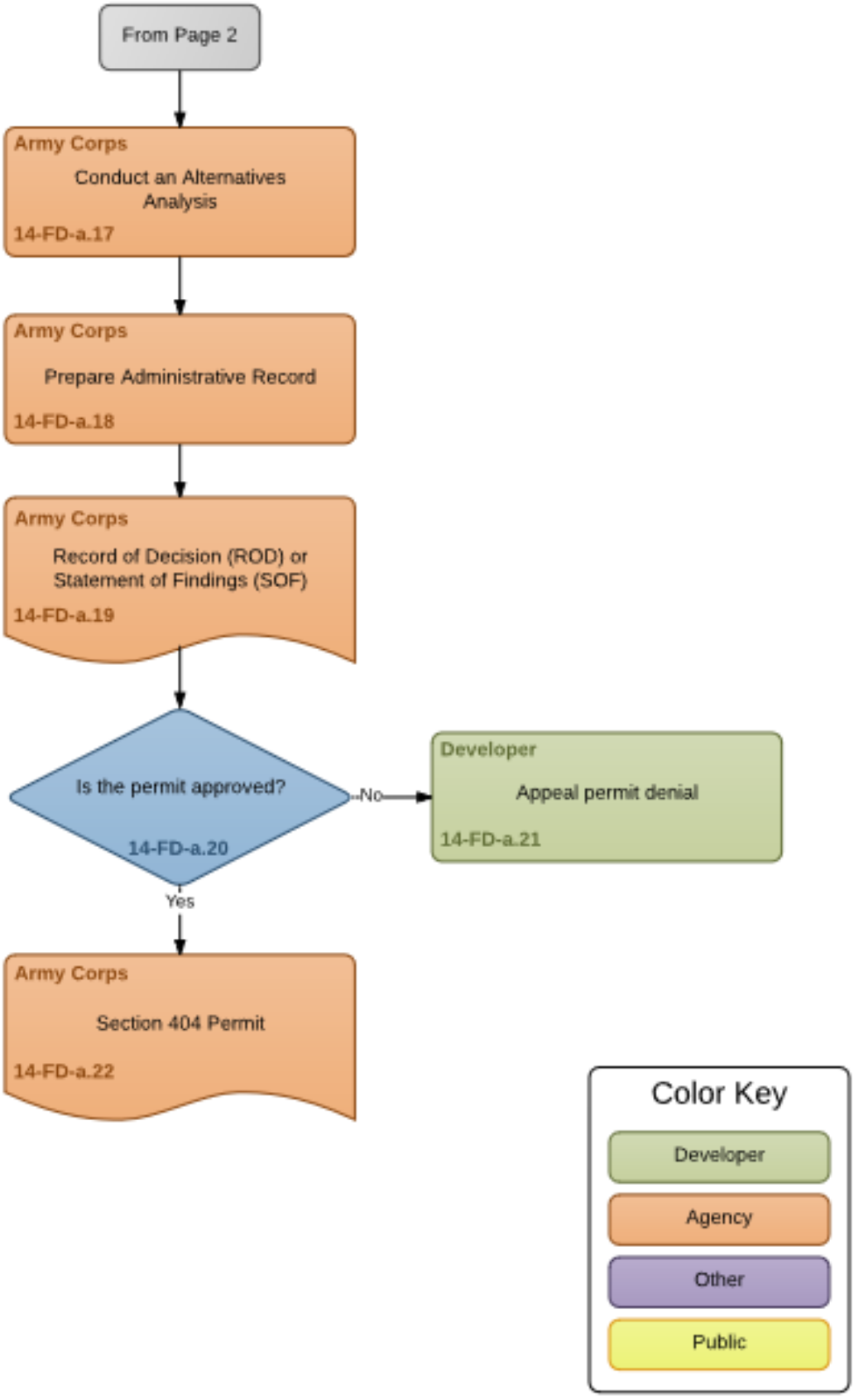
[706] https://openei.org/wiki/Information (last visited Mar. 31, 2022).
[707] Clean Water Act Section 404 Permit Application Process, Version 19, Aug. 2016, https://openei.org/w/images/2/2e/14FDADredgeFillOfWetlandsPermitting.pdf.
[708] For example, Rio Grande LNG requested and received an approved jurisdictional determination six months before the public notice of the 404 permit was issued. *Compare Rio Grande LNG AJD,* Feb. 7, 2018, https://www.swg.usace.army.mil/Portals/26/docs/regulatory/JDs/SWG201500114.pdf *with Rio Grande LNG and Rio Bravo Pipeline Section 404 and Section 10 Public Notice,* Oct. 18, 2018. https://www.swg.usace.army.mil/Media/Public-Notices/Article/1666289/swg-2015-00114-rio-grande-lng-llc-and-rio-bravo-pipeline-llc-wetlands-and-water/. The Corps' website shows that the AJD was available within a week of February 7, 2018—a full six months before the district's website posted the 404 notice.
[709] *See e.g.,* Construction Advocacy Fund, *So you want to BUILD? Good luck with that…*, https://www.agc.org/sites/default/files/Galleries/enviro_members_file/Environmental%20Permitting%20Flow%20Chart%20%2806-14-2017%29.jpg (last visited Apr. 1, 2022). *See also, Environmental Review & Permitting Process Flowchart*, June 2017, https://constructionadvocacyfund.agc.org/portfolio-items/environmental-review-permitting-process-flowchart/ (describing the "*So you want to BUILD"* flowchart).



Developed by the National Renewable Energy Laboratory for the Department of Energy



Developed by the National Renewable Energy Laboratory for the Department of Energy


From Page 2
Army Corps
Conduct an Alternatives Analysis
14-FD-a.17
Army Corps
Prepare Administrative Record
14-FD-a.18
Army Corps
Record of Decision (ROD) or Statement of Findings (SOF)
14-FD-a.19
Is the permit approved?
14-FD-a.20
No
Developer
Appeal permit denial
14-FD-a.21
Yes
Army Corps
Section 404 Permit
14-FD-a.22
Color Key
Developer
Agency
Other
Public

2. How do I know if the Corps' jurisdictional determination process and permitting process has started?

Unfortunately, there is no standard and uniform method to track the Corps' progress, especially at the initial stages. However, the following describes tips that should allow advocates to catch the processes as early as possible.

Jurisdictional determinations. It is especially hard to track when the jurisdictional determination process begins. There is no public notice and comment period for jurisdictional determinations. And only approved jurisdictional determinations are published once final; preliminary determinations need not be published. But because there is no official opportunity for public involvement in the jurisdictional determination process until after the decision is made, it is less important to know when this process begins. It is more important to know when the process is final, because then the decision can be appealed—even before the permit itself issues. Approved jurisdictional determinations are often published on the District websites. For links to websites with AJDs, see Section 6.C.3 below (bullet entitled "*Where do I find the jurisdictional determination for a specific project*"). Alternatively, the fact that a determination has been made is sometimes clear from the permit application, once it is publicly available, or from the applicant's filings with FERC.

Permits. As for knowing when the Corps' permitting process has started, the first clue may be in the applicant's filings with FERC. [710] By the time an applicant files publicly with FERC, the applicant has probably been working with the Corps at least preliminarily on jurisdictional determinations and pulling together its permit applications. However, the applicant will likely not have filed a complete application for a Corps permit at that time, so the Corps itself will not yet have filed public notice that a permit might issue because public notice is only required ***after*** the permit application is officially complete. The applicant is supposed to keep FERC informed of when it will have filed a complete application. So an advocate interested in tracking the progress of the Corps before a Corps application is filed should be able to find the applicant's predictions in the correspondence it sends to FERC, which is publicly filed in FERC's docket. [711]

Even though it is likely that the applicant's FERC filings will be first evidence of its progress in the Corps process, advocates should also closely monitor the public notices and approved jurisdictional determinations published on the District websites. Some projects are also tracked on the federal government's Permitting Dashboard, located here: https://www.permits.performance.gov/projects (e.g., at least Commonwealth LNG, Gulf LNG, Alaska LNG, Cameron LNG, and Jordan Cove LNG). The Corps' progress for these projects is summarized on this site;[712] note however that this site may not be regularly updated and may not track all LNG projects, and so should not replace a search of the Corps Districts' websites and FERC's docket. For more information see Section 6.C.6 below ("*How do I find the public notice?*").

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[710] See FERC's online docketing system, https://elibrary.ferc.gov/eLibrary/search. The applicant's initial filings with FERC will state when it expects to file applications for other required permits. By signing up for the eSubscription service, an advocate can automatically be sent notification of all FERC filings and in that way also keep track of when comment periods for the Corps permits are likely to occur. Sign up through: https://www.ferc.gov/esubscription.

[711] For example, the first public FERC filing filed by the Commonwealth LNG applicant (in August 2019) includes an appendix estimating that its application for a Corps permit will be submitted in Q3 2020. *See* https://elibrary.ferc.gov/eLibrary/search, searching Docket CP19-502, Accession No. 20190820-5125 (at 15).

[712] *See e.g., Commonwealth LNG Permitting Dashboard,* https://www.permits.performance.gov/permitting-projects/commonwealth-lng-project (scroll to the bottom to the desired permit and click "view action details" will pull up a summary page: https://www.permits.performance.gov/proj/commonwealth-lng-project/section-10-rivers-and-harbors-act-1899-and-section-404-clean-water-act.

In addition, applications for Corps projects in coastal Louisiana (i.e., all LNG terminals) are available from Louisiana Department of Natural Resources (LDNR). This is because applicants for projects in coastal Louisiana must cross-file their applications for Corps permits with the LDNR as part of Louisiana's coastal permitting process.[713] LDNR makes the applications and supporting documents publicly available, whereas they otherwise would be more difficult to obtain from the Corps (e.g., Texas applications are harder to find). Thus, advocates challenging LNG terminals in Louisiana may be able to use LDNR to track the Corps' progress in issuing its permits.

Whatever the manner of notice, just keep in mind that the applicant has already begun discussions with the Corps by the time advocates become aware of the process, either through the project's initial application with FERC or the Corps' public notice.

3. What should I know about the threshold jurisdictional determination, and is there a role for an advocate there?

A less-pursued but potential point of advocacy (if funds for litigation and an expert are available) could be scrutinizing and challenging the Corps' jurisdictional determinations for the project. Approved jurisdictional determinations (AJDs) can be challenged in federal court even before the permit itself issues.[714] Although a court will be deferential to the Corps' decision, an improper jurisdictional determination has the potential to alter the Corps' entire permitting decision, and thus a jurisdictional determination challenge could be very valuable.

The question for an advocate reviewing a jurisdictional determination would be: has the Corps properly identified all of the waters and wetlands impacted by the project that fit the definition of "waters of the United States" for 404 permits or "navigable waters" for section 10 permits? This hasn't been a large area of advocacy in prior challenges to LNG terminals, but if the Corps and applicant underestimate the jurisdictional waters and wetlands that are impacted, then the entire analysis conducted for the permit may be flawed and vulnerable to challenge.[715] This is especially relevant for 404 jurisdictional designations, which rely on the more ambiguous definition of "waters of the United States" as opposed to the more straight-forward determination of "navigable waters," which are jurisdictional under Section 10.[716] Contracting with an expert on jurisdictional

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[713] Because of this cross-filing requirement, it is sometimes easier to find Corps project documents for LNG terminals by searching the LDNR by project for the "Joint Permit Application," as opposed to going through the New Orleans District's website. *See* Louisiana Office of Coastal Management, *Search for Coastal Use Permit,* http://reports.dnr.state.la.us/sonris/cmdPermit.jsp?sid=PROD (last visited Mar. 31, 2022) (note that embedded in the Joint Permit Application can be landowner information, supplemental information, agency correspondence and more). For example, documents available from LDNR for Driftwood LNG include the Joint Permit Application (see https://sonlite.dnr.state.la.us/sundown/cart_prod/pkg_crm00100_forms.cart_menu?pcup_num=P20170501, which has to-date gone through 13 revisions; see https://sonlite.dnr.state.la.us/sundown/cart_prod/cart_crm_application_his?pcup_num=P20170501&pshow_appl_email=N. The original application contains more embedded information such as the original application form, adjacent landowner lists, supplemental information, agency correspondence, and section 408 materials: see https://sonlite.dnr.state.la.us/sundown/cart_prod/cart_crm_application?pcup_num=P20170501&pline_id=1&pshow_appl_email=N (found in Step 13 of 15) (all links last visited Mar. 31, 2022).

[714] *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016).

[715] For example, a 404 applicant must avoid impacts to jurisdictional waters and wetlands where practicable and is often required to restore the equivalent amount of impacted waters and wetlands elsewhere when impacts cannot be minimized to zero. The permitting process also requires the Corps and applicant to compare alternative sites for the project when determining if impacts to waters and wetlands can be practicably avoided. But all of these calculations and analyses will be flawed if the initial input—the amount of jurisdictional waters and wetlands—has been underestimated.

[716] Roughly "navigable waters" boils down to: have you ever been able to float a boat in it? *See* 33 C.F.R. § 329.4 (General Definition) ("Navigable waters of the United States are 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

determinations will be essential in order to make a compelling argument that the Corps has erred in making its determination.

- Who makes these determinations?

Typically the applicant hires a wetlands delineation consultant to identify any jurisdictional waters on site instead of relying on the Corps to gather the information itself.[717] The Corps then reviews and approves the jurisdictional designation, sometimes without a site visit, and sometimes many months after the initial field determination.[718] This determination is then valid for five years, unless new information warrants revision of the determination before the expiration date or a District Engineer identifies specific geographic areas that merit re-verification.[719]

- What is the difference between an approved jurisdictional determination and a preliminary jurisdictional determination?

An AJD is defined in Corps regulations at 33 C.F.R. 331.2. It is a definitive, official determination that there are, or that there are not, jurisdictional aquatic resource on a site. It will specify what aquatic resources are or are not jurisdictional on a site for purposes of computation of impacts, compensatory mitigation requirements, and other resource protection measures.[720] An AJD can be appealed as soon as it issues, and can act as a shield against later enforcement actions by the Corps.

Preliminary JDs are JDs where the question of jurisdiction is set aside voluntarily by the applicant to expedite review of their project during the permit process. A PJD is not a legally binding determination of whether the aquatic resources on site are jurisdictional. For purposes of computation of impacts, compensatory mitigation requirements, and other resource protection measures, a permit decision made on the basis of a PJD treats all aquatic resources that would be affected in any way by the permitted activity on the site as jurisdictional aquatic resources, even if they are not.

Theoretically then, a PJD should be a worst-case estimate of the area that could be impacted by a project. Because it is not appealable by itself, an advocate challenging a terminal permitted based on a PJD would have to wait to litigate the jurisdictional determination until after the 404 or section 10 permit is issued. For more information on the difference between AJDs and PJDs, see the 2016

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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.") The lack of ambiguity in this definition means challenging a Section 10 jurisdictional determination is unlikely to be productive for an LNG terminal challenge.

[717] The Corps warns applicants that outsourcing the wetlands delineation is faster. *See* Army Corps of Engineers, *Recognizing Wetlands*, Nov. 2017, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2309. ("Do I Have to Hire a Private Consultant? No. The Corps will delineate wetlands on your property if requested. However, due to limited resources that can result in a delay in the process. Hiring a private delineation professional is entirely up to you, but such professional can, in many cases, provide data necessary to delineate wetlands which generally speeds up the process.").

[718] 33 C.F.R. 320.1(a)(6) ("The Corps has authorized its district engineers to issue ***formal determinations*** concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land . . . A determination pursuant to this authorization shall constitute a Corps final agency action.") (emphasis added); 33 C.F.R. 331.2 (defining "Approved jurisdictional determination" to be "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document."); *see also*, Rio Grande LNG Designation https://www.swg.usace.army.mil/Portals/26/docs/regulatory/JDs/SWG201500114.pdf (Field Determination in August 2016, Desk Determination in February 2018).

[719] Regulatory Guidance Letter 05-02, June 14, 2005, https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl05-02.pdf.

[720] *Quick Reference Chart,* Corps Regulatory Guidance Letter No. 16-01 (RGL 16-01), Oct. 2016, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1260; *see also Questions And Answers* for RGL 16-01, Oct. 2016, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1259.

Corps' Regulatory Guidance Letter 16-01.[721] EPA also maintains a list of frequently asked questions about jurisdictional determinations here: https://watersgeo.epa.gov/cwa/CWA-JDs/FAQ/.

- What makes an aquatic resource (i.e., water or wetlands) jurisdictional?

As discussed previously in Section 6.B.2, whether a water or wetlands is jurisdictional depends on the fact-intensive definition of "waters of the United States" ("WOTUS"), which has been in flux for decades.[722] The changes to WOTUS have been on the margins of this definition, as Supreme Court precedent has evolved, Administrations have changed, and federal courts have stayed the Administrations' changes. But in a nutshell, the definition of WOTUS expanded under the Obama Administration, shrunk during the Trump Administration,[723] and is currently being revised under the Biden Administration. Until the Biden Administration issues a new final rule, the Corps is interpreting WOTUS consistent with its pre-2015 definition.[724] Because of this flux, an exact definition is beyond the scope of this guide, but can be found at: https://www.epa.gov/wotus/current-implementation-waters-united-states.

Some waterbodies that are relevant to LNG terminals that have been within the definition of WOTUS despite the definitional changes are perennial streams, rivers, lakes, and ponds. Wetlands adjacent to these waterbodies have also always been jurisdictional, although what a wetland is has shifted and is a fact-intensive question. A wetland may only periodically be flooded or may have soil and vegetation known to be typical of wetlands. Because a wetland can be fact-intensive to delineate and thus open to interpretation, an advocate should focus on the site's potential for overlooked wetlands when deciding whether to challenge a jurisdictional determination. Certain mudflats and sandflats are also jurisdictional under the pre-2015 rules.

- Where can I find information about the LNG terminal of interest to determine if there is a jurisdictional water that has been overlooked?

Even though an advocate is unlikely to have permission to access and examine the proposed site itself,[725] there are many other sources that the Corps recognizes are instructive in making jurisdictional determinations[726] such as:

1. Soil maps. Hydric soils can be indicative of a wetland. The Natural Resources Conservation Service (NRCS) has created maps of the different soil types all over the U.S. and publishes that information on the Web Soil Survey at websoilsurvey.nrcs.usda.gov.

2. Aerial photographs: Wetlands are sometimes apparent on aerial photographs at different times of the year. Options include Google Earth (www.google.com/earth), U.S. Geological Survey's EarthExplorer (earthexplorer.usgs.gov), National Oceanic and Atmospheric

[721] U.S. Army Corps of Engineers, *Jurisdictional Determinations,* Corps Regulatory Guidance Letter No. 16-01, Oct. 2016, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1256.
[722] U.S. Army Corps of Engineers, *Jurisdictional Information*, https://www.usace.army.mil/missions/civil-works/regulatory-program-and-permits/juris_info/ (last visited Mar. 31, 2022).
[723] *The Navigable Waters Protection Rule: Definition of "Waters of the United States,* 85 Fed. Reg. 22,250 (Apr. 21, 2020), https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states.
[724] U.S. Army Corps, *Jurisdictional Information, supra* note 722.
[725] If there is access to the site or the site's periphery, the presence of wetland plants, pooled water, and certain soil types can all indicate the presence of jurisdictional wetlands.
[726] U.S. Army Corps of Engineers, *Recognizing Wetlands*, Nov. 2017, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2309.

Administration's CoastWatch (coastwatch.noaa.gov), and USDA's Geospatial Data Gateway (datagateway.nrcs.usda.gov).

3. The National Wetland Inventory (NWI): https://www.fws.gov/wetlands/data/mapper.html. The NWI was established by the US Fish and Wildlife Service (FWS) to conduct a nationwide inventory of U.S. wetlands to provide biologists and others with information on the distribution and type of wetlands to aid in conservation efforts. It is not binding on the Corps and its determination of what jurisdictional waters are, but the Corps recognizes the resource as useful albeit sometimes dated.

Community groups who use the area recreationally or for fishing and shrimping may also be knowledgeable about the site and how its characteristics vary across the seasons. The Corps also publishes region-specific guidance materials on how to delineate wetlands.[727] Advocates in the Gulf Coast should consult that region's guide when deciding if a challenge to a jurisdictional determination might have merit.

- What happens if I believe that the approved jurisdictional determination is incorrect?

Jurisdictional determinations do not have a notice and comment period, so the first time an advocate will learn of the determination is likely when it issues.[728]

An advocate who disagrees with an approved jurisdictional determination can appeal that decision directly to federal court under the APA—there is no administrative appeals step.[729] The Supreme Court clarified this right to judicial review (under the Administrative Procedures Act) as it pertains to applicants and landowners in a 2016 opinion.[730] Even though the case did not discuss an outside advocate's right to judicial review, the case's logical extension is that an advocate also could challenge a jurisdictional determination in federal court, assuming the advocate can show legal standing.[731] For basic information about appealing Corps decisions and permits, see Sections 6.E.5 & 6.E.6.

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[727] Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0), Nov. 2010, https://usace.contentdm.oclc.org/utils/getfile/collection/p266001coll1/id/7594. *See also* U.S. Army Corps of Engineers, Galveston District, *Wetlands*, https://www.swg.usace.army.mil/Missions/Regulatory/Wetlands.aspx(last visited Apr. 1, 2022); *see also* U.S. Army Corps of Engineers, New Orleans District, *Overview Of Jurisdictional Determination (JD)*, https://www.mvn.usace.army.mil/Missions/Regulatory/Jurisdiction-Wetlands/.

[728] FERC's EIS may also describe how aquatic resources have been treated, but FERC does not have authority to make judicial determinations.

[729] Because this is a relatively undeveloped area of the law—and even more so in the LNG context, it is unclear whether the Natural Gas Act would trigger review to start immediately in the circuit court, or if the more traditional route (appeal in a district court first) would be proper. Advocates considering appealing an AJD should consult an experienced litigator before deciding on the proper course of action.

[730] *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815-16 (2016). In this developer-brought case, the Court first noted that an "Approved Jurisdictional Determination" ("AJD") is a final agency action that can be administratively appealed by a landowner or applicant. The Court went on to say that if the landowner or applicant continues to disagree with the Corps' determination even after the administrative appeal is concluded, they may judicially appeal the determination without waiting for any permit to issue. And even though the case did not discuss the right of an environmental advocate to judicial review of a jurisdictional determination, a logical extension of the reasoning in this case requires that advocates also could challenge a determination. Because a typical advocate does not have an administrative appeals option, an advocate would bring suit in federal court as soon as a final determination was made.

[731] Indeed, the environmental advocacy group Bayou City Waterkeeper successfully survived a motion-to-dismiss brought against it by the Corps when it challenged the Galveston District's issuance of a AJD in violation of the Administrative Procedures Act. *Bayou City Waterkeeper v. U.S. Army Corps of Eng'rs*, Case No. 3:20-cv-00255 (S.D. Tex. May. 27, 2021) (report and rec. adopted on June 14, 2021). The court found that *Hawkes* allowed an advocacy group to sue after an AJD issues, if the group can show standing (a legal concept requiring that that group suffered an injury that can be traced back to the Corps' conduct and that the injury can likely be fixed by a court).

The Corps' actions will be reviewed under a deferential standard, namely, the reviewing court will ask: did the agency act arbitrarily or capriciously in making its decision? If not, the Corps' decision will be upheld. Because of this deferential standard, it is especially important to work with a wetlands expert and attorneys experienced in waters of the United States litigation so that the challenge has the best chance of succeeding.

- Where do I find the jurisdictional determination for a specific project?

The approved jurisdictional determinations are recorded on Corps forms,[732] and should be accessible through the district websites (search applicant name and "jurisdictional determination") or the Headquarters' website. The availability of this information varies across districts, for example:

The Galveston District publishes a list of determinations, purportedly weekly: https://www.swg.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/.

These determinations are searchable through a "CTRL+F" search by project file number (e.g., SWG-2015-00175, for Texas LNG). Searching the district site is recommended for Texas projects; the Headquarters' website does not reliably include AJDs for all projects that have indeed been issued one.

Meanwhile, the New Orleans District relies on the Corps' Headquarters' website to publish AJDs: https://permits.ops.usace.army.mil/orm-public (search "All Content" or "AJD" tab). The Headquarters' site is not nearly as frequently updated—as of September 2021 no approved jurisdictional determinations were reported since July 23, 2020. However, because of Louisiana's requirement that applicants working in the state's coastal zone file a joint permit application with the Corps and the Louisiana Department of Natural Resources, advocates can use LNDR's system to access an applicant's Corps application, which will indicate whether a jurisdictional determination has been made.[733]

EPA also publishes an interactive map of unexpired AJDs that have been issued since 2015.[734] Advocates can also consult this database if they suspect a AJD has issued but cannot find record of it.

- What if there doesn't seem to be an approved jurisdictional determination for the site?

If there is no approved jurisdictional determination publicly available and it seems like there should be one already, contact the Corps office to inquire. It may be that the applicant has not requested one or is relying on the non-binding preliminary jurisdictional designation to move their project forward and avoid a potential appeal. A FOIA request may be necessary to understand how jurisdictional determinations are being handled.

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[732] For Galveston District examples, *see Texas LNG Approved Jurisdictional Designation*, https://www.swg.usace.army.mil/Portals/26/docs/regulatory/New%20Jds/SWG201500175.pdf and *Rio Grande LNG Approved Jurisdictional Designation*, https://www.swg.usace.army.mil/Portals/26/docs/regulatory/JDs/SWG201500114.pdf.
[733] Step 4 of the Joint Application solicits this information from the applicant. *See Joint Permit Application*, at 2 (Step 4) http://www.dnr.louisiana.gov/assets/OCM/permits/JPA2010Fillable.pdf. Applications for specific projects can be found by searching LDNR's website here: Louisiana Office of Coastal Management, *Search for Coastal Use Permit*, http://reports.dnr.state.la.us/sonris/cmdPermit.jsp?sid=PROD.
[734] EPA, *Clean Water Act Approved Jurisdictional Determinations*, https://watersgeo.epa.gov/cwa/CWA-JDs/.

4. For the actual permitting process, what will the applicant and Corps have done before public notice must be issued?

The first step an applicant typically takes in seeking a 404 permit for a major project like an LNG terminal is to contact the District office for a pre-application consultation.[735] (This is usually during or just before the applicant files its pre-file application with FERC—see Chapter 4 Sections C.3–C.5 for more details about the FERC process.) This is an informal process, likely consisting of emails, phone calls, and letters to District staff. And although this process is supposed to be relatively quick, it's unclear exactly how long the pre-application stage typically lasts for an LNG project.[736] During this time, the applicant and Corps work together "so that the potential applicant may begin to assess the viability of some of the more obvious potential alternatives in the application."[737] The regulations direct the Corps "to provide the potential applicant with all helpful information necessary in pursuing the application" and to "maintain an open relationship" with potential applicants and their consultants.[738] It's also likely that the Corps (or FERC, as lead agency) will schedule the applicant for a "Joint Evaluation Meeting" with other state and federal agencies.[739] This is exactly what it sounds like—a meeting of the agencies, applicant, and its consultants to discuss and shape the proposed project in its early stages. (Note that the early and close-working relationship between the Corps, applicant, and other agencies can cause the Corps to view advocates as outsiders who are opposed to the permit issuing as proposed and ignorant of the process and work that has been conducted prior to public notice.)

As part of the pre-application stage, the Corps determines whether a letter of permission or an individual permit is needed. For initial LNG terminal applications, an individual permit should be required because of the unique nature and expected large magnitude of impacts from these projects.

After the pre-consultation process, the applicant submits a complete application to the District using Engineering Form 4345.[740] (Louisiana LNG applicants have been directed to use a modified joint state and federal permit application,[741] the contents of which are then accessible on LNDR's website.[742]) It's likely that an LNG applicant will submit additional information beyond just these forms: the content of the application is described in 33 C.F.R. § 325.1(d) and the Districts often provide additional directions online.[743] According to the Corps' regulations, the applicant must submit additional information beyond the requirements of § 325.1(d) only if the district engineer

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[735] 33 C.F.R. § 325.1(b).
[736] Indeed, it may be several years, judging from the file numbers granted to LNG projects. For example, Rio Grande LNG's file number was issued in 2015, but the application was not listed as complete until 2018.
[737] 33 C.F.R. § 325.1(b).
[738] 33 C.F.R. § 325.1(b).
[739] U.S. Army Corps of Engineers, Galveston District, *Permit Preapplication Screening,* https://www.swg.usace.army.mil/Missions/Regulatory/Permits/(last visited Apr. 1, 2022).
[740] 33 C.F.R. § 325.1(c). Check with the district responsible for the project for the latest form; the 2018 version can be found here: https://www.publications.usace.army.mil/Portals/76/Publications/EngineerForms/Eng_Form_4345_2018May.pdf?ver=2018-05-18-102142-420. Also note that this is the bare minimum; it is likely that an LNG applicant will be required to submit additional information to the Corps during the permitting process.
[741] Louisiana DNR, *Joint Permit Application,* http://www.dnr.louisiana.gov/assets/OCM/permits/JPA2010Fillable.pdf.
[742] Louisiana Office of Coastal Management, *Search for Coastal Use Permit,* http://reports.dnr.state.la.us/sonris/cmdPermit.jsp?sid=PROD (last visited Mar. 31, 2022).
[743] U.S. Army Corps of Engineers, Galveston District, *Permit Application,* https://www.swg.usace.army.mil/Missions/Regulatory/Permits/Permit-Application.aspx (describing the need for maps, bulkhead and pier sample plans, dredge sample plans, and information about coastal zone management compliance, impact mitigation, and nearby endangered species and cultural resources).

deems it "essential to make a public interest determination [e.g., for 404 and section 10 permits] including, where applicable, a determination of compliance with the section 404(b)(1) guidelines [for a 404 permit] or ocean dumping criteria [for a 103 permit]."[744] The pre-application process is not the only time in which the Corps can request additional information from the applicant—more information may be requested during the comment period and the Corps' substantive review of the permit. But the upshot of this regulation is that advocates who believe that more information should be requested from the applicant should specifically explain with legal citations and examples how that the additional information is essential for the Corps to conduct a proper public interest review and to comply with the 404(b)(1) guidelines.[745] In addition, FERC as lead agency may request information from the applicant that is relevant to the Corps' review; this is another reason to closely monitor the FERC docket while working on a Corps challenge.

Once complete, the application will be made part of the record, but it might not be attached to the public notice. The application materials should be made available for in-person inspection—although access may be more difficult during the coronavirus pandemic. And for Louisiana projects, the application should also be available through the project's joint application posted by LDNR.[746] An advocate may be able to obtain additional materials exchanged during the pre-application process through a FOIA request; indeed it is highly recommended that advocates submit a FOIA request for permit and application documents whenever a public notice issues. The Galveston District, for example, has an electronic pre-application consultation process that an applicant may utilize—this exchange may have generated documents discoverable through FOIA.[747] Note that because the comment periods are so short compared to the time it can take to receive documents through a FOIA request, advocates who anticipate that the FOIA documents will be essential to drafting comments should simultaneously send a FOIA request and ask the Corps to extend the public comment period to the full extent allowed by Corps regulations.

Note that some advocates have successfully obtained application documents by reaching out to the Corps project manager directly (the Corps personnel identified in the public notice and assigned to the project). It is good practice to also cc the project manager and any other known Corps personnel related to the project to any FOIA request (and vice versa) so all departments are made aware of the requested records. This may also speed up the Corps' response, which can be critical given the short window allowed for comments.

5. How long after the application is submitted will the public receive notice of the application?

Hypothetically, at most fifteen days will elapse between the time an application is submitted and the public receives its first public notice that the Corps is working on a permit.[748] However, if the application is incomplete in some manner, the Corps will instead give notice to the applicant within those fifteen days to remedy the application. Upon receiving an updated application, the Corps again has fifteen days to confirm that it is complete before the public must be notified.

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[744] 33 C.F.R. § 325.1(d) ("Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.")
[745] As a backup, advocates should augment the record with information that supports their points and not simply rely on the Corps to actually request additional information.
[746] Louisiana Office of Coastal Management, *Search for Coastal Use Permit*, http://reports.dnr.state.la.us/sonris/cmdPermit.jsp?sid=PROD (last visited Mar. 31, 2022).
[747] https://www.swg.usace.army.mil/Missions/Regulatory/Permits/ (describing the pre-application electronic process, including the option to submit copies of the preliminary application).
[748] 33 C.F.R. § 325.2(a)(2).

6. How do I find the public notice?

The following describes what the Corps is supposed to do for each project—in practice, advocates have found that for LNG terminal projects the Corps may rely heavily on FERC to fulfill its responsibilities for public notice and comment.[749]

Nonetheless, after an applicant files its FERC application (i.e., beginning the process of permitting a project), an advocate can start looking for the Corps' public notice of the project in at least two places: at the Corps Headquarters' website and on the website of the Corps District with geographical jurisdiction over the project. Again, advocates are warned that despite the Corps' statutory duty to facilitate public availability of permits and applications,[750] the Corps is not as transparent as other agencies in doing so, and so an advocate may need to FOIA the Corps to keep abreast of its progress (see Section 6.C.12 on FOIA and the Corps), keep tabs on the applicant's FERC filings to know when the Corps might be processing the Corps applications (This may align with when FERC releases its EIS documents), and if in Louisiana, use LNDR to track the Corps' progress.

The first location an advocate could look for a public notice is at the Corps Headquarters' website: https://permits.ops.usace.army.mil/orm-public#. This site purports to list all final and pending individual permits, which are the type an LNG terminal will need. To find pending initial permits, go to the "Pending IP" tab, and search by keyword (e.g., applicant name or "LNG") and district. By default the map view search function is displayed; toggling to Table View allows for the data to be exported to Excel. From this site an advocate can find the application number for each permit.

The second location an advocate could look for LNG terminals on the Gulf Coast of Louisiana and Texas is the websites of the responsible Districts: likely the New Orleans and Galveston Districts, respectively.[751] Public notices are available here:

- New Orleans District: https://www.mvn.usace.army.mil/Missions/Regulatory/Public-Notices/
- Galveston District: https://www.swg.usace.army.mil/Media/Public-Notices/

Note that neither District site currently has an easy way to search public notices directly; however by typing the applicant name and the words "public notice" into the upper righthand search bar, you should be able to find the relevant public notices. (E.g., "Freeport LNG public notice" without quotes returns several results). The New Orleans District RSS feed promising "Instant Notification of New Public Notices" is broken as of early 2022; none exists on the Galveston District site currently.[752]

Make sure to look at all of the documents posted, including the full public notice, project plans, environmental analysis, as well as any documents published with FERC that are available. An advocate may need to contact the District directly to review the full application; additional information as to the scope of information to request should be available in the public notice.

7. Is it possible that no public notice will be given because none is required?

All LNG terminals that are being proposed or seeking major expansions should be applying for an individual permit, which requires site-specific public notice. However, the Corps also has authority to

[749] This may be in deference to FERC as lead agency, which is directed by the Natural Gas Act to maintain the record in LNG cases.
[750] *See e.g.*, 33 U.S.C. 1344(o) ("Public availability of permits and permit applications").
[751] U.S. Army Corps of Engineers, *Where We Are*, https://www.usace.army.mil/locations.aspx (last visited Apr. 1, 2022).
[752] U.S. Army Corps of Engineers, *Public Notices Overview*, https://www.mvn.usace.army.mil/Missions/Regulatory/Public-Notices/ (last visited Apr. 1, 2022)(promising "Instant Notification of New Public Notices," but the functionality was broken).

issue general permits (nationwide and regional) and letters of notice (a subset of individual permits) that it has sought to use in the past (sometimes improperly) for the permitting of fossil fuel projects.

Individual permits (also known as a standard individual permit) are the ones LNG terminals should be requesting and are required whenever more than minimal impacts are expected. The Corps is required to issue public notice of these permits, as is described further in Section 6.C.8.

Nationwide General permits and Regional General Permits and Programmatic General Permits. A regional general permit (RGP) is a type of general permit that authorizes categories of activities in a specific geographic area that causes only minimal individual and cumulative environmental impacts.

- The Galveston District's regional permits are listed here: https://www.swg.usace.army.mil/Missions/Regulatory/Permits/Regional-General-Permits/
- The New Orleans' District's General Permits are listed here: https://www.mvn.usace.army.mil/Missions/Regulatory/Permits/General-Permits/
- A list of all regional permits across the country are listed here: https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/

None of these should be used to permit major construction related to LNG terminals. However, the Corps has in the past attempted to use a general permit to permit a fossil fuel pipeline (it since reversed course). If it appears that a project will be permitted using a general permit (this may become apparent in EIS documents available with FERC), advocates should be prepared to push back. Note also that many districts have placed regional conditions on their Nationwide Permits—i.e., additional requirements that an applicant may need to meet beyond the Guidelines or public interest review. Therefore, if permitting through a nationwide permit is proposed, an advocate should verify which district the proposed project is located in and then contact the district office to determine if the district's Nationwide Permit has any additional regional conditions. The district offices can also answer any questions regarding the terms and conditions and/or applicability of a certain general permit to a proposed activity. Some general permits do not require any notification to the Corps to use them while others may require notice to and verification from the Corps prior to use.[753]

Letters of Permission (LOP),[754] as described in 33 C.F.R. 325.2(e)(1), are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation, but without the publishing of a site-specific public notice. An LNG terminal's initial permits should not be granted via letter of permission, but subsequent activities may be permitted through a LOP.

Technically, letters of permission are a type of individual permit, but are used primarily for minor modifications to a project. For example, for projects seeking Section 10 permits, LOPs may be used when the District Engineer has concluded that the proposed work would be: 1) minor; 2) would not

[753] See https://openei.org/wiki/RAPID/Roadmap/14-FD-a.
[754] This description of letters of permission is taken from: U.S. Army Corps of Engineers, https://www.swg.usace.army.mil/Missions/Regulatory/Permits/Letter-of-Permission/ (last visited Apr. 1, 2022).

have significant individual or cumulative impacts on environmental values; and 3) should encounter no appreciable opposition.

For projects subject to section 404 of the Clean Water Act, LOPs may be used only after the District Engineer: 1) consults with federal and state fish and wildlife agencies, the Regional Administrator, Environmental Protection Agency, the state water quality certifying agency and, if appropriate, the state Coastal Zone Management Agency, to develop a list of categories of activities proposed for authorization under LOP procedures; 2) issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public hearing; and 3) the 401 certification has been issued or waived and, if appropriate, CZM consistency concurrence obtained or presumed either on a generic or individual basis. Note that this is not a public notice for the project, but for the LOP itself.

There are currently only two letters of permission that apply in Texas authorizing certain work to be conducted without public notice: 1) certain excavation activities that do not pose substantial adverse individual or cumulative impacts on the aquatic environment;[755] and 2) activities at either certain government or utility reservoirs or activities conducted, sponsored or funded by certain federal and state agencies, including bank stabilization, beach nourishment, property protection, and sediment removal (applies nationwide).[756] The New Orleans District does not publish example letters of permissions on its website, but those can be found on the Headquarters' site.[757]

8. What will the public notice say and how do I submit comments?

The public notice will specify how and when comments will be received.[758] The Corps' comment period can be very short—typically 30 but sometimes only 15 days![759] As for all permits, advocates should strive to comply with these deadlines, especially in requesting hearings. Hearings must be requested during the comment period.

If additional information comes to light about the project after the end of the comment period, advocates and their counterparts should continue to submit comments even outside the deadline, as the Corps has discretion to consider them, and timely comments "expressing objections to or raising questions about the project should be acknowledged."[760] As for all permit challenges, the more comments in opposition to a project, the better, as the Corps must address all comments raised and the more likely it is that Corps decides that a public hearing is necessary! And even if the Corps' public notice and comment period only appears to relate to the project's proposed compensatory mitigation plan, advocates are advised to address all issues that are expected to be relevant to a 404

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[755] *See* U.S. Army Corps of Engineers, Galveston District, *Public Notice, Permit No. 20204*, July 7, 1995, https://www.swg.usace.army.mil/Portals/26/docs/regulatory/LOP/Galveston%20District%20LOP_Procedure%20for%20Excavation%20Activities.pdf.
[756] *See* U.S. Army Corps of Engineers, Galveston District, *Activities at Certain Reservoirs and Federal State Sponsored Projects*, Oct. 6, 1998, https://www.swg.usace.army.mil/Portals/26/docs/regulatory/LOP/Galveston%20District%20LOP_State%20and%20Federal%20Reservoirs.pdf.
[757] https://permits.ops.usace.army.mil/orm-public (search "Final IP" and filter by permit type = "Letters of Permission").
[758] *See e.g.*, U.S. Army Corps of Engineers, *SWG-2013-00147 Freeport LNG June 2, 2020 Public Notice for Maintenance Dredging under § 10 and § 103,* June 2, 2020, https://www.swg.usace.army.mil/Media/Public-Notices/Article/2205506/swg-2013-00147-freeport-lng-development-lp-freeport-harbor-ship-channel-brazori/.
[759] 33 C.F.R. § 337.1(a)(8). Note that normally the comment period is no longer than 60 days, unless the applicant requests an extension. *CWA Section 404(q): Memorandum of Agreement between EPA and Department of the Army*, Part II(4), Aug. 11, 1992, https://www.epa.gov/cwa-404/cwa-section-404q-memorandum-agreement-between-epa-and-department-army-text.
[760] 33 C.F.R. § 337.1(d).

permit at that time, as to put the Corps on notice of issues that its final decision and analysis should consider.

In addition, an advocate should cross-file its comments about 404 issues with FERC as well, as FERC is lead agency overseeing the drafting of the EIS documents. Comments already submitted to FERC that address 404 issues could also be resubmitted during the Corps comment period. Cross-filing comments makes it clear that each relevant agency has been put on notice of the deficiencies in the application—a point that can be helpful if the permit will be litigated. As a practice pointer, note that all supporting materials should be filled in full, not just as a weblink. It may be that such supporting material can be sent via FTP, as some advocates have been directed to by their District offices. Advocates are encouraged to have these conversations with their Corps District (and other regional agency offices), as it can facilitate relationship-building in general.

Note also that federal agencies like EPA and FWS also submit comments during the Corps' public comment period. If EPA is inclined to believe that the Corps is improperly applying the 404(b)(1) Guidelines, or that there will be substantial and unacceptable impacts to "aquatic resources of national importance," EPA should be officially notifying the Corps of its opinions at this time, either as regular comments or as comments that also invoke the 404(q) process (see Sections 6.D.1 and 6.D.2, below). (It almost certainly will have been discussing this with the Corps informally as early as during the pre-application consultation).[761] Thus, advocates should be coordinating with these agencies as soon as possible if there are concerns an advocate believes that an agency should independently raise with the Corps.

Finally, advocates should be aware that the arguments that can be made during litigation of an issued permit will be limited by what has been introduced into the administrative record being built during the comment period. This is one reason why it is very important to do a deep dive into all available documents describing the project (available through the applicant, agencies, or publicly available) and research as best as possible the anticipated impacts to the aquatic resources / jurisdictional resources / special aquatic sites during the comment period; identifying and filing these additional supporting documents during the comment period ensures that they can form the basis of litigation arguments down the road.

9. Will there be a public hearing?

Probably not, unless advocates are able to demonstrate significant public and political support for one and persuasively articulate why a public hearing is necessary for the Corps to make its decision—the Corps hardly ever grants hearing requests, despite some strong language in the law showing that hearings should be granted.

For such large projects as LNG terminals, advocates can and should request a hearing if a hearing date is not already set in the public notice. Advocates must act quickly to request one. Corps regulations state that anyone may—within the public comment period—request a public hearing.[762] The reasons for a hearing must be stated in the hearing request. If the district does not resolve the issues raised informally,[763] the district is required to set a hearing time and place, and publish notice

[761] *See* Sections 6.D.1–6.D.3 (describing the 404(q) and 404(c) processes).
[762] 33 C.F.R. § 327.4(b)
[763] Exactly how this would happen is not clear from the regulations, but imaginably would involve discussions with the hearing-requester, applicant, Corps, and potentially Corps Headquarters, which has discretionary power to require hearings in any case. 33 C.F.R. 327.4(c).

of the hearing[764] at least 30 days before the hearing.[765] The regulations state that the Corps "shall" grant requests for a hearing "unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing" and "[i]n case of doubt, a public hearing shall be held."[766] (However, this facially strong language is seldom followed.) These rules on hearings apply to both 404 and 103 permits[767] and section 10 permits[768] and can be found at 33 C.F.R. § 327 et seq.

In practice, the New Orleans and Galveston Districts very rarely grant public hearings on permits.[769] One project in the New Orleans District—the Bayou Bridge Pipeline Project[770]—was granted a public hearing only after thousands of signatures were collected calling for the hearing.[771] And even this hearing was not granted solely by the Corps, but was overseen jointly with LDEQ, as part of its responsibility to issue a 401 Water Quality Certification.[772] The Bayou Bridge Project was a 162-mile proposed crude oil pipeline that stretched across 11 Louisiana parishes and the Atchafalaya Basin—in other words, a large-scale, high-impact project, yet one that was not automatically set for a hearing.[773] The take-away from this is that the Corps strongly resists holding hearings!

And the paucity of hearings suggest that advocates will need to mobilize many supporters to leverage sufficient pressure on the Corps to have a hearing granted for an LNG project. Such an effort is likely to fail without the guidance and leadership of community members and organizations, organizers, and other advocates with experience using hearings (in front of any agency) to elevate public awareness of the project and leverage political pressure on the Corps.

10. What happens at a public hearing if it is granted?

Public hearings for any permit can be excellent vehicles for elevating public awareness of the project and galvanizing opposition to a project. It is also an opportunity to highlight the substantive legal arguments already submitted in comments.

Advocates should be aware that at the public hearing, oral and written statements are accepted and made part of the record. Witnesses are allowed (although no cross-examination is permitted, making a witness similar to a general member of the public presenting comments and opinions about the

[764] 33 C.F.R. 327.4(c).
[765] 33 C.F.R. § 327.11(a). The notice of a hearing should point to the DEIS or EA as well. 33 C.F.R. § 327.11(b).
[766] 33 C.F.R. § 327.4(b)-(c).
[767] 33 C.F.R. § 327.1.
[768] 33 C.F.R. § 327.3(b).
[769] A search of the New Orleans and Galveston Division websites and Facebook pages revealed no hearings for LNG projects, and very few for any other individual project. For example, in the Galveston District News Releases, only one release was tagged as "Public Hearing." https://www.swg.usace.army.mil/Media/News-Releases/Tag/9026/public-hearing/ (for an interbasin transfer project in 2012 that would require an EIS).
[770] *See* U.S. Army Corps of Engineers, New Orleans District, *Bayou Bridge Pipeline Permit,* https://www.mvn.usace.army.mil/bayoubridge/ (last visited Apr. 1, 2022)(summarizing the Bayou Bridge Pipeline project with links to the public notices, environmental assessment, and permit issued). *See also* Live Stream of the Bayou Bridge Pipeline Public Hearing, Jan. 12, 2017, https://www.facebook.com/usacenola/videos/1293034477406490 (overseen by two hearing officers, one from LDEQ and the other from the Corps).
[771] *See* Claire Taylor, *Bayou Bridge Pipeline permit hearing Jan. 12,"* Lafayette Daily Advertiser, Dec. 6, 2016, https://www.theadvertiser.com/story/news/2016/12/06/bayou-bridge-pipeline-permit-hearing-jan-12/94995022/.
[772] Initial Live Stream of the Bayou Bridge Pipeline Public Hearing, Jan. 12, 2017, https://www.facebook.com/usacenola/videos/1293034477406490 (overseen by two hearing officers, one from LDEQ and the other from the Corps). *See also* Later Live Stream of the Bayou Bridge Pipeline Public Hearing, Jan. 12, 2017, https://www.facebook.com/usacenola/videos/1293166377393300 (a later portion of the hearing, after a break at 10 pm). There is no livestream of the other portions of the hearing that were found. Full transcript can be found here: https://edms.deq.louisiana.gov/app/doc/view?doc=10492731.
[773] *See* Taylor, *supra* note 771.

project). But the presiding Corps officer "shall afford participants a reasonable opportunity for rebuttal"—meaning applicants, their consultants, and supporters can speak in favor of the facility as well.[774] Advocates can use the opportunity to prepare and submit charts and other data that they may want to have included in the administrative record that would bolster an appeal, and which they did not have an opportunity to submit earlier in written comments.[775] All "substantial and valid" issues raised in the hearing must be addressed in the Corps decision on the permit—another reason to have as many people with a diversity of concerns testify as possible.[776]

Note that another comment period of not less than 10 days is allowed after the close of the public hearing for the submission of written comments.[777] Use this time to follow up on arguments raised by the applicant, or statements made by the Corps that can be rebutted—comments submitted in this period will be included in the administrative record.

11. What information should be publicly available that I can use on in pulling together comments?

The Corps and FERC are required to make certain information publicly available. For example, the Clean Water Act (the legal authority for the 404 permit) states that the permit application shall be made available to the public, but in practice that can be difficult to locate. However, because Louisiana requires that projects in the coastal zone file a joint application with the Louisiana Department of Natural Resources (LDNR) (which is responsible for issuing a coastal use permit), the project's Corps application and supporting documents are readily available through the LDNR website.[778] Note that if an application is truly not available to the public during the public comment period, this should be raised as a deficiency in the public comments.

In addition, Corps regulations state that the administrative record of the permit action includes:

> *the request or requests for the hearing and any data or material submitted in justification thereof, materials submitted in opposition to or in support of the proposed action, the hearing transcript, and such other material as may be relevant or pertinent to the subject matter of the hearing. The administrative record shall be available for public inspection with the exception of material exempt from disclosure under the Freedom of Information Act.*[779]

The Corps is also required to make certain factual determinations about the potential short-term and long-term effects of the proposed action (see Sections 6.B.3–6.B.4 on the 404(b)(1) Guidelines).[780] These determinations likely will not be available during the comment period, but should be made available in time for litigation in the form of a Record of Decision, which should be made part of the Administrative Record and published eventually on FERC's docket. Note that these documents may be very hard to find, even if you have requested notification of the permit decision. It is good practice to FOIA the Corps and contact the Corps project manager / other known personnel directly as soon as you hear that the permit has issued so that you can obtain the permit and any supporting

[774] 33 C.F.R. § 327.8(b).
[775] *See generally* 33 C.F.R. § 327.8 ("Conduct of Hearings").
[776] 33 C.F.R. § 327.9.
[777] 33 C.F.R. § 327.8(g).
[778] Louisiana Office of Coastal Management, *Search for Coastal Use Permit,* http://reports.dnr.state.la.us/sonris/cmdPermit.jsp?sid=PROD.
[779] 33 C.F.R. § 327.5(b).
[780] 40 C.F.R. § 230.11 (required factual determinations).

documents as soon as possible.[781] This is another reason to regularly check the Corps' permits page[782] and LDNR's website[783] for any insight and updates as to the availability of these documents.

With the permit and ROD in hand, review the Guidelines and compare these with the Corps' documentation and any EIS that has issued to ensure that the Corps has addressed each required issue. This includes, as discussed above: the three step avoid / minimize / mitigate process, individual and cumulative effects on the aquatic ecosystem and organisms; cumulative and secondary effects on the aquatic ecosystem; information about the fill disposal site and impacts to water bottoms; likelihood and effects of introduced contaminants, increased turbidity, suspended solids, water circulation, fluctuation, and salinity.[784] Many of these analyses must be made considering the effects both individually and cumulatively.

Do not rely on the Corps documents alone. The Corps will often rely on FERC's NEPA analysis instead of conducting its own, so scrutinize the DEIS and FEIS documents available on FERC's docket (and often available publicly with a simple web search). It may be that the environmental review for any other Corps approvals (e.g., section 408 permitting) may be specifically referenced or implicitly incorporated into the section 404 environmental review. If any analysis looks incomplete, cross-check which other permissions the applicant may have needed—the missing information may be in those documents. (The Corps project manager may be a good resource to help track this down.) Also look at what the applicant has said publicly to investors, local governments, other agencies, and the public at large. Advocates can start looking for this information by simply Googling industry news articles about the project,[785] going to the applicant's website about the project, Googling the applicant's corporate and shareholder presentations, and looking at the applicant's SEC filings. Inconsistencies should be brought to the Corps attention quickly by submitting the underlying material during the comment period or at a hearing. This can become fodder for litigating the permit later.[786]

FOIA should always be considered as a tool in challenging LNG terminals. Indeed, sometime a FOIA request is necessary to even find out if the permit has been issued. In theory, well-timed FOIA requests for information from the Corps should yield additional information about the permitting process, such as correspondence between the Corps and applicant.[787] But the Corps has not always been willing to cooperate with FOIA requests, and in 2019 a court found that the Corps had been

[781] And if for whatever reason the record of decision hasn't been disclosed prior to litigation, request this from the other side (e.g., the applicant and/or the Corps) as courtesy as soon as possible.
[782] U.S. Army Corps of Engineers, *USACE Jurisdictional Determinations and Permit Decisions,* https://permits.ops.usace.army.mil/orm-public# (look at both Pending IP and Final IP tabs). In some cases, permits have simply been removed from the "pending" tab without being added as "final"; this is a clue that the permit may have issued!
[783] State of Louisiana Department of Natural Resources, *Coastal Use Permit Status Report & Notice of Permit Decisions,* http://www.dnr.louisiana.gov/index.cfm/page/1153. Another source for information is LDNR's data portal "Sonris": https://www.sonris.com/.
[784] 40 C.F.R. § 230.11 (required factual determinations).
[785] Such industry websites include rigzone.com, hydrocarbons-technology.com, nsenergybusiness.com, spglobal.com, naturalgasintel.com.
[786] Sierra Club used this strategy to uncover discrepancies in what an applicant told an agency versus its shareholders about the Rio Grande LNG terminal's capacity by simply going to the applicant's website about the Rio Grande LNG facility and reading shareholder presentations. Although 404 litigation is still on-going, it is a good example of the type of research advocates should be pursuing. *See* Sierra Club, *New Disclosure Reveals Rio Grande LNG Misled Regulators About Capacity of Proposed Fracked Gas Export Terminal,* May 30, 2019, https://www.sierraclub.org/press-releases/2019/05/new-disclosure-reveals-rio-grande-lng-misled-regulators-about-capacity.
[787] For example, 33 C.F.R. § 325.2(a)(3) directs the Corps to give the applicant the opportunity to respond to public comments if necessary for the Corps to make a public interest determination. The applicant's response is likely in writing, and would not exist before the close of the comment period, so the public would not otherwise have access to it.

following an unlawful practice of improperly withholding documents related to pending Section 404 permits, including application files.[788]

But just because the Corps has failed to comply with FOIA in the past does not mean that advocates should not FOIA the Corps for information. Indeed, this is all the more reason to do so! In addition, advocates should consider renewing their FOIA requests throughout the permitting process to make sure that all relevant documents have been disclosed. A legal practitioner experienced with FOIA can help navigate this process.

12. Where do I find guidance on how to FOIA the Corps?

The Corps Headquarters provides general information on how to submit a FOIA request here: https://www.usace.army.mil/FOIA.aspx.[789] Advocates must submit FOIA requests to the specific District responsible for the project.

The Corps provides a sample FOIA request online; [790] and other examples can be found with a quick web search online.[791] Advocates should add additional detail to the Corps' sample request to specifically describe the type of information requested and consider making a broad request for "all correspondence" at the same time as narrower requests for certain document, to increase the odds that the Corps will produce at least some documents quickly.

Although there are no up-front costs for to make a FOIA request, the Corps will charge certain fees (which can be hundreds or thousands of dollars) to categories of requesters or when the request is voluminous and time-consuming. An advocate should include a request for fee waiver in the FOIA request (see example FOIA requests and fee waivers in the Appendix[792]), as advocates challenging LNG terminals are requesting information to increase the public understanding of the operations of the Corps—a category of request that should qualify for a fee waiver. (The Corps states that fee waivers are limited to situations in which a requester can show that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester.)[793] But if the Corps refuses to grant a fee waiver, most advocates should expect to be charged for search time in excess of two hours, and duplication costs of pages in excess of 100 pages. A list of the Corps current fees is found here: https://www.usace.army.mil/FOIA/Fees/.

The Corps states that upon receipt of a FOIA request, the Corps "ordinarily" will send a letter to the requester acknowledging the request and advise if any additional information is required before

[788] Britain Eakin, *Federal Judge Slams Army Corps Over Permit Secrecy,* Courthouse News Service, Mar. 29, 2021, https://www.courthousenews.com/federal-judge-slams-army-corps-over-permit-secrecy/ (describing the rulings in *Missouri Coalition for the Environment v. U.S. Army Corps of Engineers*, Civ. Action No. 18-663 (TJK) (D.D.C. 2019) https://www.courthousenews.com/wp-content/uploads/2019/03/army-corps-permit.pdf).
[789] The FOIA regulations applicable to the Corps are codified at 32 C.F.R. § 286.
[790] U.S. Army Corps of Engineers*, Sample Request Letter,* https://www.usace.army.mil/FOIA/Sample-Request-Letter/
[791] *See also* Columbia Riverkeeper's FOIA Request to Corps re Morrow Pacific Coal Export, Nov. 2, 2012, https://www.columbiariverkeeper.org/sites/default/files/2013/08/2012.11.2-FOIA-to-Corps-re-Morrow-Pacific.pdf.
[792] Specifically, Atchafalaya Basinkeeper FOIA requests and correspondence made on May 30, 2017 (App. 37); April 22, 2019 (App. 38); and December 10, 2020 (App. 39).
[793] U.S. Army Corps of Engineers*, FOIA Fees,* https://www.usace.army.mil/FOIA/Fees/ (last visited Apr. 1, 2022). The Corps encourages requesters to state the maximum amount of fees they are willing to pay for the information—if no fee information is included, the Corps assumes that the requester is willing to pay all appropriate fees of up to $250.

processing the request.[794] The Corps is directed to fulfill FOIA requests within twenty days of the correct office receiving the request. But the Corps' 2014 annual FOIA report (the latest one available on the Headquarters' website[795]) shows that only what it classifies as "simple" requests are fulfilled in this time.[796] It's possible that the Corps would classify requests about LNG terminal permitting as "complex"—at which point the average turnaround time has been 47 days.[797] Note that this delay is longer than the typical comment period—another reason to monitor the FERC docket and AJDs to get early notice that the Corps has started the permitting process. Be aware that it has been the experience of some advocates that the Corps will frequently ask for or unilaterally extend the timeframe for its response—if the extension would be beyond the comment period and the FOIA documents are necessary to draft comments, also ask the Corps to extend the comment period. But be prepared to file comments even without the FOIA documents!

If a FOIA request is taking longer than twenty days, advocates should contact the local FOIA Requester Service Center for the FOIA Office to which the request was submitted.[798]

- For coastal Louisiana, that would be the New Orleans District: foia-mvn@usace.army.mil (Phone: 504-862-2264 Fax: 504-862-2827).
- For coastal Texas, that would be the Galveston District: foia-swg@usace.army.mil (409-766-3193 and 409-766-3165).

Note that the Corps can withhold certain information from disclosure if it falls within a certain FOIA exemption category; if it does so, it should cite the specific exemption to explain its decision to withhold documents.[799] The Corps has abused these exemptions in the past and has been reprimanded for withholding certain application materials under what's known as "the deliberative process privilege" to non-agency (i.e., applicant) materials.[800] The practical implication of these past abuses is that advocates who do not receive the materials they have requested should promptly ask the Corps why materials have been withheld, and under what exemption. If an advocate suspects that the Corps is improperly withholding information, the advocate should consult a lawyer versed in FOIA to determine next steps.

[794] U.S. Army Corps of Engineers, *Freedom of Information Act Page,* https://www.usace.army.mil/FOIA.aspx (last visited Mar. 31, 2022).
[795] U.S. Army Corps of Engineers, *Annual Reports,* https://www.usace.army.mil/FOIA/Annual-Reports/.
[796] Simple requests are those that the Corps anticipates will involve a small volume of material or which will be able to be processed relatively quickly. Complex requests typically seek a high volume of material or require additional steps to process such as the need to search for records in multiple locations. *See* FOIA Online, *Glossary,* https://foiaonline.gov/foiaonline/action/public/glossary (last visited Mar. 31, 2022).
[797] U.S. Army Corps of Engineers, *Annual Freedom of Information Act Report* (2014), 6, https://www.usace.army.mil/Portals/2/docs/FOIA-FY14_Annual_Report.pdf.
[798] See https://www.usace.army.mil/FOIA/Offices/ (which includes a list of FOIA office contact information for all Districts).
[799] 5 U.S.C. § 552(b) (describing categories of information that are exempted from FOIA disclosure).
[800] Eakin, *supra* note 788.

Some advocates challenging other types of industrial projects rely on a monthly FOIA request to their District to ensure that no information, project, or step in the permitting process is missed. This could be a good strategy for advocates that expect to challenge many LNG facilities in the same Corps District: to send monthly FOIA requests to the Corps for all documents relating to LNG permitting activities in the District.

PRACTICE TIP: Submitting and following up on FOIA requests

It can be helpful to submit separate FOIA requests at the same time, one broad and one (or more) narrow. The broad request could seek "all correspondence between [APPLICANT] and the Corps related to the pre-application and permitting process for [THE PROJECT, WITH THE CORPS PROJECT NUMBER], in which [APPLICANT] is seeking permits under [LIST PERMITS SOUGHT." The narrow request(s) would ask for specific documents needed (e.g., permit application documents; application modifications, if any; compensatory mitigation plan, the permit decision, etc.). The FOIA office is more likely to provide a quicker response for a narrow, specific requests, while broader more comprehensive requests may be assigned to a "complex" track which will likely translate to greater wait time while the Corps gathers and reviews responsive records.

In addition, while waiting for a FOIA response, be mindful to:

- keep track of each request;
- ensure receipt confirmation and assignment of a tracking number so you can follow up with the FOIA officers for status updates; and
- familiarize yourself with the timeframes of the FOIA office for timelines and the FOIA office's duties in corresponding with requestors regarding findings, exceptions or exemptions claimed (e.g., the deliberative process privilege exemption for pre-decisional documents), records produced, and rights to administrative appeals.

It is also good to think about what records you expect to receive in response to your requests, such that when records are produced, you can respond with specific documents that were not included that you think should have been, and why.

Examples of FOIA requests and follow-up correspondence that Atchafalaya Basinkeeper has sent the Corps' New Orleans District are attached in the Appendix. *See* May 30, 2017 (Appendix 37); April 22, 2019 (Appendix 38); and December 10, 2020 (Appendix 39).

Examples of other FOIA requests and follow-up correspondence that Atchafalaya Basinkeeper has sent to other agencies (*e.g.*, in search of correspondence the agency had with the Corps, or otherwise) are in the Appendix, namely: FOIA correspondence with EPA on May 3, 2019 (Appendix 40); March 30, 2017 (Appendix 41); April 4, 2017 (Appendix 42); FOIA correspondence with PHMSA (Appendix 43); FOIA correspondence with Louisiana Department of Wildlife and Fisheries (Appendix 44).

13. Where can I find examples of comments filed against LNG terminals?

Sierra Club and others filed Section 404 and Section 10 comments in their challenge to the proposed Annova LNG export plant to be located in Brownsville, Texas. Copies of the comments are found here:

- January 29, 2019: https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/DOW%20et%20al%20Annova%20LNG%20404%20application%20comments%20FINAL.pdf (Also in Appendix 46).

In addition, Appendix 45 includes an informal outline of issues that might arise (similar to those described in Sections 6.B.8 and 6.B.9 above), along with citations in support. Be sure to add site-specific facts that support the issues raised, and if you have the support of a legal practitioner at this stage, they should doublecheck that the legal citations to past cases and other laws are binding in the project's jurisdiction.

14. Where can I find an example of 404 comments filed in a pipeline challenge?

Although there is not perfect overlap between the issues that arise in pipeline and terminal challenges, advocates who want to stop LNG terminals should also review example comments challenging all aspects of LNG projects. Because pipelines are long and not water-dependent, they may be more vulnerable to a 404 challenge.

- Appalachian Mountain Advocates and others filed Section 10 and Section 404 comments in their fight against the Mountain Valley Pipeline project in Virginia and West Virginia (filed May 28, 2021). A copy of those comments is attached at Appendix 51.
- Atchafalaya Basinkeeper, Gulf Restoration Network and others filed Section 404 comments in their fight against the Bayou Bridge Pipeline project in the Louisiana Gulf Coast region (filed Nov. 2, 2016 (Appendix 48); Jan. 30, 2017 (Appendix 49), and Jan. 31, 2017 (Appendix 47)).

Note that these comments are illustrative and comprehensive, but they may include arguments that ultimately did not succeed in subsequent litigation. Once a challenge moves to the litigation stage, it is important to consult an experienced attorney to understand which arguments have the best chance of success and should be presented to a reviewing court.

D. What role do other agencies play in the Corps permitting process?

The Clean Water Act (CWA) provides EPA with discretionary authority to oversee the Corps' implementation of permit requirements. Two CWA sections advocates should know about are 404(q) (how EPA raises concerns with the Corps' permitting process) and 404(c) (how EPA can veto a proposed permit if the 404(q) process fails to resolve its concerns). U.S. Fish and Wildlife Service also has 404(q) powers to raise concerns with the Corps' permit. EPA's and FWS's roles should be understood by all advocates challenging LNG terminals and is discussed below.

1. How can EPA's discretionary 404(q) role be leveraged in a 404, 103 or 10 challenge?

Section 404(q) of the Clean Water Act directs the Corps to coordinate with the other federal agencies involved in 404 permits. This includes EPA. The Corps and EPA wrote down their 404(q) coordination duties in a 1992 memorandum that is still valid today.[801] Under this 404(q) memo, EPA

[801] *CWA Section 404(q) Memorandum of Agreement Between EPA and the Department of the Army*, Aug. 11, 1992, https://www.epa.gov/cwa-404/cwa-section-404q-memorandum-agreement-between-epa-and-department-army-text.

not only has the right to comment on pending Corps applications, but the EPA Administrator in each EPA Region (for Louisiana and Texas, this would be the Administrator of Region 6[802]) has the ability to "elevate" individual permits that it believes will have substantial and unacceptable impacts to "aquatic resources of national importance" (ARNI)[803] and ensure that in those cases the 404(b)(1) Guidelines have been followed.[804] "Elevation" takes decision-making away from the Corps' District office and forces additional review at the Washington headquarters of both agencies.[805] In this process, EPA can point out specific failures of the Corps to follow the regulations governing 404 permits—for example, EPA may also direct the Corps to consider specific water quality concerns that the Corps might otherwise try to skirt by relying on the state's water quality certification process.[806] And if EPA and the Corps cannot resolve their differences over the proposed permit, EPA may veto the permit once the Corps issues it.[807]

Under EPA and the Corps' 404(q) Memorandum, EPA's elevation of concerns it has about impacts to aquatic resources of national importance is highly regimented, and EPA may lose the opportunity to elevate concerns if each step in the 404(q) Memorandum is not precisely followed. For LNG projects in Texas or Louisiana (*i.e.*, those in EPA Region 6) the process is as follows (advocate tips in italics):[808]

1. The Region 6 Administrator must submit a written letter during the public's notice and comment period[809] for the Corps permit stating that in the opinion of EPA the project may result in substantial and unacceptable impacts to aquatic resources of national importance.

Advocate tip: contact EPA Region 6[810] as soon as it is clear that an applicant will need a Corps permit (e.g., when the applicant files its FERC application for a certification) to ensure that EPA plans on timely commenting on the Corps application during the comment period and begin

[802] As of December 2021, this is Regional Administrator Earthea Nance. EPA Press Office, *EPA Announces Appointments of Regional Administrators for Regions 6, 7, and 9,* Dec. 9, 2021, https://www.epa.gov/newsreleases/epa-announces-appointments-regional-administrators-regions-6-7-and-9.

[803] There is no regulatory or statutory definition of ARNI. In practice, EPA has discretion to determine what constitutes an ARNI. Little direct guidance as to the scope of this term exists beyond the EPA's factsheet on the Section 404(q) dispute resolution process (https://www.epa.gov/sites/default/files/2015-05/documents/404q.pdf), although it can be inferred that special aquatic sites generally might fall into the definition of ARNI, if of national importance:

> *An Aquatic Resource of National Importance (ARNI) is a resource based threshold used to determine whether a dispute between EPA and the Corps regarding individual permit cases are eligible for elevation under the 1992 MOA. Factors used in identifying ARNIs include: economic importance of the aquatic resource, rarity or uniqueness, and/ or importance of the aquatic resource to the protection, maintenance, or enhancement of the quality of the Nation's waters. Past 404(q) elevations have identified the Chesapeake Bay, vernal pools, bottomland hardwoods, sub-alpine fens, bogs, and coastal marshes as ARNIs.*

[804] EPA-Corps MOU, *supra* note 801, Part IV(1). In 2002 EPA reaffirmed that only individual permits that have issues implicating aquatic resources of national importance ("ARNI") may be elevated. *See Designation of Aquatic Resources of National Importance Under Clean Water Act Section 404(q) Memorandum of Agreement with the Army Corps of Engineers*, https://www.epa.gov/sites/default/files/2015-03/documents/404qarnimemo2002.pdf ("[C]ases that would meet the resource threshold would be those cases that would cause resource damage similar in magnitude to cases evaluated under Section 404(c) of the CWA. Elaboration on potential resources of concern under Section 404(c) can be found in our regulations at 40 C.F.R. 230 and 231").

[805] 404(q) EPA-Corps MOU, Part II.

[806] The Corps has a history of not thoroughly examining water quality impacts, especially in its public interest review. But if EPA objects to that behavior, the Corps must respond. And of course, EPA can point out the Corps' failures even without invoking EPA's elevation authority. That is, even if EPA decides not to use its 404(q) authorities, its direction to the Corps to consider water quality aspects must be taken seriously by the Corps. *See* 33 C.F.R. 320.4(d).

[807] *See* Section 6.D.3, describing § 404(c).

[808] Note that the EPA and Corps may try to resolve issues via meetings and informal letters each step of the way.

[809] EPA is empowered to request an extension of this comment period, up to a maximum comment period of 60 days. EPA-Corps MOU, *supra* note 801, Part II(4).

[810] EPA publishes a list of the 404 permitting liaisons at EPA here: https://www.epa.gov/cwa-404/cwa-section-404-epa-regional-contacts. Currently, the official Region 6 contact (which includes Louisiana and Texas) is Maria L. Martinez (Email: Martinez.Maria@epa.gov; Phone: 214-665-2230) in Dallas, Texas.

presenting the potential concerns that might arise during the Corps permitting process, along with supporting material to justify. If you wait until the Corps' public notice issues, there will not be enough time to work with EPA before its comments are due.

2. Within 25 calendar days after the end of the comment period, the Region 6 Administrator must submit a more detailed letter explaining why in EPA's opinion the discharge will have a substantial and unacceptable impact on aquatic resources of national importance, and why the permit must be modified, denied, or conditioned, which EPA's reasoning;

Advocate tip: Concerns sent to EPA early in the process should contain all of the details and supporting information that EPA would need to include in this letter.

3. If the Corps District Engineer believes that the permitting process should still proceed (either after modifications to the permit or as is), the Corps forwards the draft permit and a Notice of Intent to Proceed to EPA;[811]

Advocate tip: this draft permit will likely not be publicly available, so maintain contact with EPA during the Corps' internal review process to keep tabs on when EPA might receive a draft permit; it is likely that the Corps and EPA will be conducting informal discussions during this time to resolve their difference. Work with contacts at the Corps to help address concerns, if possible.

4. Within 15 calendar days of receipt of Region 6's receipt of the Corps' draft permit and notice of intent to proceed, Region 6 must notify the Corps District Engineer of its intent to elevate review of the issues to a higher level, namely the Assistant Secretary of the Army for Civil Works.

Advocate tip: Mobilize public support for the EPA's decision to elevate a permit. The Corps and EPA will likely be working together informally to resolve their differences and may be taking cues from public and political opinion.

If this step is reached, the District Engineer then elevates the matter accordingly, and the entire permit is held in abeyance (i.e., paused—no construction may begin) while review is on-going.[812] Ultimately, if EPA's concerns are not addressed, it has the power to veto the permit entirely, although this is exceedingly rare (see Section 6.D.3, discussing 404(c)). But the 404(q) process has effects, even if EPA does not veto the permit: the practical implications of encouraging EPA's involvement is that EPA provides a second pair of eyes on the permitting process and can help ensure that all appropriate regulations are followed and necessary conditions are added before a permit issues.

EPA's power here is not just theoretical[813]—for example, in 2005, EPA Region 6 requested that a project located in the Galveston District be elevated for headquarters review.[814] After EPA Headquarters became involved, it was able to resolve—apparently through informal discussions—the

[811] Note that the public does not ordinarily have access to this draft permit; it may not even be obtainable with a FOIA request.
[812] EPA-Corps MOU, *supra* note 801, Part IV(3)(e).
[813] See EPA, *Chronology of CWA Section 404(q) Actions*, https://www.epa.gov/cwa-404/chronology-cwa-section-404q-actions (last visited Mar. 31, 2022) (listing projects in which EPA Regional Administrators requested elevated review of the Corps' proposed permits).
[814] EPA, *Request for Review of Galveston District Permit #22516, Fort Bend County Levee Improvement District 15*, May 10, 2005, https://www.epa.gov/sites/default/files/2015-05/documents/lid15-elevation-request.pdf.

disagreement with the District and the issued permit contained a more robust mitigation plan than the Corps originally proposed.[815] EPA also expressed broad concerns that the Corps had a pattern of misapplying CWA section 404(b)(l) Guidelines, in particular, the Corps' "characterization of an appropriate project purpose and the evaluation of project impacts, including consideration of all indirect, secondary, and cumulative adverse effects to waters of the United States."[816] It is unclear the exact nature of these concerns, and unclear whether EPA concerns have been since assuaged—advocates challenging terminals in Texas and Louisiana may consider reaching out to Region 6 personnel to investigate.

2. What if EPA comments but doesn't follow the full 404(q) process?

Sometimes EPA comments on the Corps' process without clearly following the 404(q) steps above (e.g., without invoking concerns for "aquatic resources of national importance" or without following through on subsequent steps). Even though they may not fit into the 404(q) process, these comments still can force the Corps to take a harder look at the project it is permitting. If the Corps does not respond to EPA's comments in a persuasive way and fails to convincingly address the issues EPA raises, its failure to do so may persuade a court to reject the permit once it issues.[817]

An example of strong comments that EPA might issue can be found in the gas pipeline context, in EPA Region 3's recently issued comments critical of the Corps' analysis of the impacts of the Mountain Valley Pipeline.[818] In that letter, EPA "identified a number of substantial concerns with the project as currently proposed, including":

- "whether all feasible avoidance and minimization measures have been undertaken,
- deficient characterization of the aquatic resources to be impacted,
- insufficient assessment of secondary and cumulative impacts and potential for significant degradation, and
- the proposed mitigation"[819]

Because of these concerns (which stemmed from even just the temporary impacts to watersheds), EPA recommended modifications to the permit application and project, and recommended that the permit not be issued until its modifications and its recommended special conditions had been addressed and incorporated into the project. In the Mountain Valley Pipeline case, EPA specifically requested that the applicant be required to:

- update its alternatives analysis in light of certain changes to the project;
- explain why certain construction methods were selected;
- redo its analysis for what is practicable in avoiding or minimizing impacts to aquatic resources;

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[815] EPA, *Region 6 Request for Review of Proposed Section 404 Permit Levee Improvement District 15, Fort Bend County, Texas*, June 13, 2005, https://www.epa.gov/sites/default/files/2015-05/documents/lid15-response.pdf.
[816] *Supra.* EPA went on to explain how a mischaracterization of project purpose could contaminate the three step avoid / minimize / mitigate process: "I am particularly concerned because the characterization of project purpose is critical to an effective analysis of potential off-site alternatives and to the consideration of opportunities to minimize on-site impacts."
[817] And more so than if the same concerns were raised by an advocacy group.
[818] See App. 50 (EPA's May 27, 2021 comments to the Corps on the Mountain Valley Pipeline project (LRH-2015-00592-GBR, LRP-2015-798, NAO-2015-0898)). Even if these comments do not fit the strict requirements of the 404(q) memo's steps, they are quite valuable as the Corps must address EPA's concerns.
[819] App. 50, 1.

- conduct a baseline assessment on the aquatic resources that will be impacted;
- adopt a restoration plan with post-construction monitoring and adaptive management; and
- reassess the compensatory mitigation for the project.[820]

If the Corps fails to persuasively address each of these issues (even if not raised through the 404(q) process), it does so at its peril, and the permit is in jeopardy of being overturned by a reviewing court.

In sum, advocates are encouraged to consider whether the regional EPA administration is open to looking critically at the Corps' analysis of LNG terminals. EPA's involvement can result in conditions attached to the permit that reduce the project's overall environmental impact. To be successful in leveraging EPA's oversight of the Corps, advocates should familiarize themselves with the 404(b)(1) Guidelines and the 404(q) procedures, as the deadlines for and format of EPA's involvement is very specific if the goal is to formally elevate a permit. Advocates need a solid understanding of the Guidelines and 404(q) especially because they may need to help coach EPA to frame its critique in light of the project's "substantial and unacceptable impacts aquatic resources of national importance."[821] And although EPA's intervention in the Corps decision-making process may delay the permit's issuance and require more environmental review, it may be necessary where an applicant fails to conduct its due diligence and propose a project whose impacts are unacceptable under the 404(b)(1) Guidelines and the Corps' public interest review—and if the impacts are too great, EPA's intervention in the Corps' process may be necessary to make that clear.[822]

3. What is the 404(c) EPA veto, and is it useful for LNG terminals?

Section 404(c) specifically authorizes EPA to restrict, prohibit, deny, or withdraw the use of an area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.[823] EPA's section 404(c) veto can be used if elevation through the 404(q) process fails to resolve EPA's concerns with the Corps' proposed permit.

However, EPA's veto power under Section 404(c) has been so seldom used (only 13 times since 1972) that it is unlikely to be exercised to stop an LNG terminal.[824] Despite this, an advocate should be aware of the broad power that this section grants EPA, as the threat of a veto gives outsized weight to comments that the EPA makes on Corps permits.

EPA's flow-chart of the steps in its veto process is shown below, and summarized as follows:[825]

[820] App. 50, 4-9 (technical comments).
[821] EPA-Corps MOU, *supra* note 801, Part IV(3)(a).
[822] For an example of how EPA's intervention ultimately resulted in a project's death, *see* App. 52, EPA Region 3's March 23, 2009 comments on the proposed 404 permit for the Reylas Surface Mine. In those comments EPA even threatened to exercise its rarely used 404(c) veto power.
[823] 33 U.S.C. §1344 (Clean Water Act Section 404(c)).
[824] EPA, *Clean Water Act Section 404(c) "Veto Authority"* (2016), https://www.epa.gov/sites/default/files/2016-03/documents/404c.pdf. This number may increase to 14 in the coming months—as of December 2021, EPA has reinitiated its 404(c) veto process for the Pebble Mine project in Bristol Bay, Alaska. *See* Taryn Kiekow Heimer, *EPA Sets Schedule for Bristol Bay Protections,* NRDC, Nov. 18, 2021, https://www.nrdc.org/experts/taryn-kiekow-heimer/epa-sets-schedule-bristol-bay-protections. For the latest information, see EPA's Bristol Bay website: https://www.epa.gov/bristolbay.
[825] EPA, *Veto Authority, supra* note 824.

Section 404(c) "Veto" Process

Intent to Issue Notice of Proposed Determination

The EPA Regional Administrator notifies the Corps and the project proponent of his or her intention to issue a public notice of a Proposed Determination to withdraw, prohibit, deny, or restrict the specification of a defined area for discharge of dredged or fill material.

Notice of Proposed Determination

If the Regional Administrator is not satisfied that no unacceptable adverse effects will occur, a notice of the Proposed Determination is published in the *Federal Register*. The Proposed Determination begins the process of exploring whether unacceptable adverse effects will occur.

Public Comment Period

(generally between 30 and 60 days)

A public hearing is usually held during the comment period.

Recommended Determination or Withdrawal

(within 30 days of the public hearing or, if no public hearing is held, within 15 days of the end of the comment period)

The Regional Administrator prepares a Recommended Determination to withdraw, prohibit, deny, or restrict the specification of a defined area for disposing of dredged or fill material and forwards it along with the administrative record to the EPA Assistant Administrator for Water. Alternatively, he or she withdraws the Proposed Determination.

Corrective Action

(within 30 days of receipt of the Recommended Determination)

The EPA Assistant Administrator contacts the Corps and project proponent and provides them 15 days to take corrective action to prevent unacceptable adverse effects.

Final Determination

(within 60 days of receipt of the Recommended Determination)

The EPA Assistant Administrator affirms, modifies, or rescinds the Recommended Determination and publishes notice of the Final Determination in the *Federal Register*.

Under Section 404(c), the EPA Regional Administrator first notifies the Corps and applicant of its intent to issue a public notice of a Proposed Determination to withdraw, prohibit, deny, or restrict the specification of a defined area for discharge of dredged or fill material. Then, the notice of Proposed Determination is published in the Federal Register, and EPA begins the public process of determining whether unacceptable adverse effects indeed will occur. The public comment period typically lasts between 30 and 60 days; a public hearing is often held as well. Shortly thereafter, the Regional Administrator prepares a Recommended Determination or withdraws the Proposed Determination. If the Recommended Determination is issued (because of anticipated unacceptable adverse effects), the EPA Assistant Administrator contacts the Corps and applicant, who then have 15 days to take action to prevent such effects. Lastly, the EPA Assistant Administrator affirms, modifies, or rescinds the Recommended Determination and publishes notice of the Final Determination in the Federal Register.

The most recent of the 13 404(c) vetoes was issued by EPA Region 3, in 2011, regarding a proposed surface mine.[826] These vetoes have typically been reserved for very large projects with a lot of public and political opposition to them. It is unclear if the construction of LNG terminals—especially in industry-friendly Texas and Louisiana—would raise sufficient concerns at EPA for EPA to follow through on a veto. For more information about 404(c) vetoes and the strategy involved in 2011 veto, Earthjustice and Appalachian Mountain Advocates were both involved in that challenge.[827]

4. What other agencies consult on Corps permits, and what leverage can they exert?

The Corps is required to consult with Fish and Wildlife Service and the National Marine Fisheries Services when resources under their jurisdiction are impacted (e.g., when endangered species or fisheries are impacted), and with the state wildlife agency,[828] which is also invited to provide comments to the Corps on a 404 permit.[829] The Corps is required to "give full consideration to the views of those agencies on fish and wildlife matters in deciding on the issuance, denial, or conditioning of individual or general permits."[830] The U.S. Fish and Wildlife Service in particular is statutorily required to comment on 404 Army Corps permits and authorizations with regard to its opinion on expected impacts on fisheries resources, habitat, wildlife refuges, and endangered species.[831]

Like the EPA, the U.S. Fish and Wildlife Service also has the ability to elevate specific cases or policy issues as described in its 404(q) memorandum with the Corps.[832] At its core, elevation means that to

[826] This number may increase to 14 in the coming months—as of December 2021, EPA has reinitiated its 404(c) veto process for the Pebble Mine project in Bristol Bay, Alaska. *See* Heimer, *Bristol Bay Protections, supra* note 824. For the latest information, see EPA's Bristol Bay website: https://www.epa.gov/bristolbay.
[827] Liz Judge, *Federal Court Upholds EPA Veto of Spruce Mountaintop Removal Mine,* Earthjustice, Sept. 30, 2014, https://earthjustice.org/news/press/2014/federal-court-upholds-epa-veto-of-spruce-mountaintop-removal-mine.
[828] 33 C.F.R. § 320.3(e) (describing the requirements of the Fish and Wildlife Coordination Act).
[829] 16 U.S.C. § 460 *et seq.*
[830] 33 C.F.R. § 320.4(c).
[831] 33 U.S.C. § 1344(m). The duty for FWS to file comments is mandatory. Comments must be received no later than 90 days after FWS receives notice of a permit application. Note that a disagreement between FWS and the Corps will not necessarily stop the permit from issuing. It can however be evidence used in litigation to undercut the Corps' arguments. *See Shrimpers v. Army Corps of Eng'rs*, No. 20-60281 (5th Cir. July 23, 2020) Pet.'s Br. At 59-61 (noting how both EPA and FWS disagreed with the Corps' decisions to the amount of mitigation the Corps should be requiring for pipeline-caused impacts), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200723_docket-20-60281-_brief.pdf.
[832] CWA Section 404(q) Memorandum of Agreement Between the Department of the Interior and the Department of the Army, Dec. 1992, https://www.fws.gov/sites/default/files/documents/memorandum-of-agreement-on-clean-water-act-section-404q_0.pdf.

resolve disputes between the regional director of FWS and the District engineer, the agencies' headquarters become involved to resolve the dispute. The steps in the FWS's 404(q) process are basically identical to those in the EPA's 404(q) process (See Sections 6.D.1 & 6.D.2, EPA-Corps 404(q) process). And like EPA's 404(q) powers, FWS can only elevate individual permits in "cases that involve aquatic resources of national importance."[833] As discussed previously, this term is not defined in the memorandum or regulations, but generally has corresponded to special aquatic sites that the commenting agency (here, FWS) believes are of national importance. Note that unlike EPA's 404(c) veto powers, FWS has no such powers, meaning that the Corps can ultimately issue the permit even if FWS disagrees.

It is unclear whether any advocates have yet successfully leveraged FWS involvement to elevate Corps proceedings for Headquarters review[834] (much less if there have been any elevations in LNG permitting decisions), but it is a possible avenue that could be explored. Even FWS comments that do not follow the 404(q) format can be helpful in that the Corps is required to address these comments, and if it fails to adequately resolve the issues, its failure may be persuasive grounds for a court to overturn an issued permit.

Beyond its duty to consult with FWS, the Corps' regulations also encourage it to consult other agencies that may be knowledgeable in certain areas relevant to the individual permit at issue. The public notice should indicate which other agencies are involved, but an advocate should keep an eye out for other agencies that should be consulted based on expected impacts from the facility.

5. Does 404 also require a separate 401 certification?

Yes. Like any federal permit that the facility will need, impacts authorized under Section 404 of the CWA also require state water quality certification under Section 401 of the CWA. For more information on 401 permits see Chapter 7.

E. What happens after the Corps makes a permitting decision?

After the permit issues—the most likely outcome in Texas and Louisiana—the next step an advocate will likely have an active role in is litigation in a federal circuit court (namely, in the Fifth Circuit for Texas and Louisiana terminals). Note that it may be necessary to FOIA the Corps, ask the Corps project manager and any other relevant personnel directly, and even call the District's head of regulatory to know that a permit has issued![835] And at this point, it's highly advisable to get advice from experienced litigators before proceeding.

1. If a 404 permit issues, do I need to administratively appeal before going to federal court?

No. The Corps would not consider an advocate challenging the permit to be an "affected party" with a right to administratively appeal the Corps' decision on a permit.[836] "Affected parties" are narrowly

[833] 404(q) Memo Interior/Army, *supra*, 7.
[834] Unlike EPA, the FWS does not appear to publish online a list of cases that it has elevated for review.
[835] And to obtain the record of decision for the permit.
[836] The statute governing appeals allows appeals only by an "affected party," which is defined to be: "a permit applicant, landowner, a lease, easement or option holder (*i.e.*, an individual who has an identifiable and substantial legal interest in the property) who has received an approved JD, permit denial, or has declined a proffered individual permit." 33 C.F.R. § 331.2. Recently, the state of Alaska attempted to administratively appeal a denial of a 404 permit, arguing that it fit within the definition of "affected person" with a "substantial and identifiable legal interest in the property," even though it was not the party that had requested the permit. The Corps rejected this interpretation and also denied the State's request to participate in the appeals process based on any legal interest it might have in the property. Referring to its regulations, the Corps stated that other "non-affected" parties like the State would be invited to participate only if the administrative record needed

limited to those who have "received an approved JD, permit denial, or has declined a proffered individual permit."[837] Instead, advocates must wait until any administrative appeal has concluded or the time for appeal has passed (60 days after the Corps acts and issues the applicant a Notice of Appeal Process form).[838] Only after the conclusion of any administrative process would the advocate proceed to federal court. It may not be apparent whether an appeal is taking place—an advocate may need to contact the Corps District directly or submit a FOIA request.

2. Is it likely that an applicant will appeal the Corps' decision?

Probably not. First of all, the most likely outcome is that the Corps will issue a permit, so the only point of an appeal by an applicant would be if the permit had conditions attached to it that the applicant really disagreed with. A review of the appeals posted on the Galveston and New Orleans Districts' websites shows that for previous LNG terminal projects in Texas and Louisiana, only one LNG applicant has appealed a Corps decision—an approved jurisdictional determination made for Cheniere LNG.[839] It's not entirely clear why more LNG applicants have not appealed Corps decisions, but likely because these permits are not being denied, and any conditions imposed have been manageable for the applicant (particularly in light of the historical lack of enforcement of these conditions by certain Districts, including the New Orleans District).[840] However, it is possible that as more 404 challenges are successfully brought, an applicant frustrated with the Corps' proffered permit may choose to appeal (of course, a denial can be appealed, but denials are exceedingly rare).

3. What roles do advocates play in the administrative appeals process?

Participation in the appeals process is typically limited to the applicant, the applicant's agent, and Corps staff.[841] The Corps can invite "any" other appropriate parties to participate for purposes of "clarify[ing] elements of the administrative record."[842] In theory, this could include an advocate—especially if the advocate is an adjacent property owner who could help clarify the record (a category of parties expressly contemplated in the regulations as potentially helpful), but in practice this is very unlikely. So an advocate's official role in the administrative review is basically to wait it out; however, advocates might track the process with FOIA requests and contact with the district office personnel, and could use this time to continue with media campains and to exert political pressure wherever

clarification by those other parties. *See* Ltr from the Corps' Pacific Ocean Division to Alaska Assistant Atty General re Pebble Mine Request for Appeal Denial, Feb. 24, 2021, https://www.alaskajournal.com/sites/alaskajournal.com/files/state_of_alaska_rfa_-_response_letter_signed_24feb21.pdf.

[837] 33 C.F.R. § 331.2.

[838] U.S. Army Corps of Engineers, *Determining the Timeliness of Requests for Appeal (RFA),* Regulatory Guidance Letter, Jan. 25, 2006, https://www.mvd.usace.army.mil/Portals/52/docs/regulatory/app_g_rgl06-01_.pdf.

[839] U.S. Army Corps of Engineers, Southwestern Division, *Table of Appeals*, https://www.swd.usace.army.mil/Missions/Civil-Works/Regulatory/Regulatory-Appeals/Table-of-Appeals/ (last visited Mar. 31, 2022 (indicating that in February of 2004, Cheniere LNG did attempt to appeal a jurisdictional determination, but that it was not accepted).

[840] *See e.g.,* U.S. Army Corps of Engineers, Mississippi Valley Division, *MVD Table of Appeals,* https://www.mvd.usace.army.mil/Missions/Regulatory/Appealed-Decisions/ (last visited Mar. 31, 2022) (Indicating that the last time a New Orleans permit denial was appealed was in 2010 (and not from an LNG project)); *see also*, U.S. Army Corps of Engineers, Southwestern Division, *Table of Appeals*, https://www.swd.usace.army.mil/Missions/Civil-Works/Regulatory/Regulatory-Appeals/Table-of-Appeals/ (last visited Mar. 31, 2022) (indicating that in February of 2004, Cheniere LNG did attempt to appeal a jurisdictional determination, but that it was not accepted)

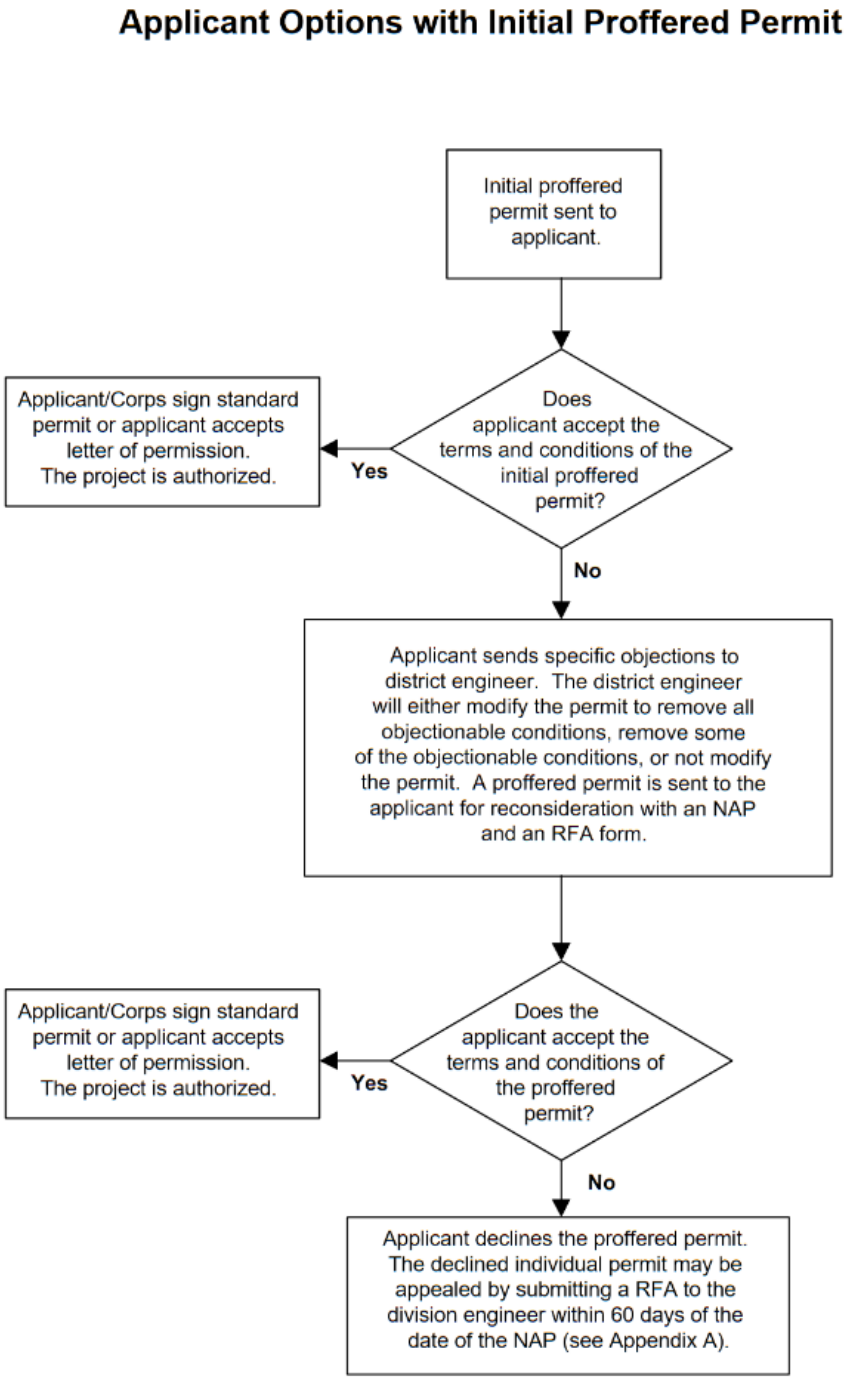
[841] 33 C.F.R. § 331.7(e)(3).

[842] 33 C.F.R. § 331.7(e)(3) (examples in the rules of other parties that the Corps may invite are: "technical experts consulted by the Corps, adjacent property owners or Federal or state agency personnel"). In 2017 in the New Orleans District in particular, the Corps reported not having a single boat that it could use to investigate violations of permit conditions in the Atchafalaya Basin, which for most of the year is necessary for the enforcement of permit conditions. App. 47 at 4-5 (Comments on Proposed Bayou Bridge Pipeline, MVN-2015-02295-WII, WQC 160921-03, filed Jan. 31, 2017).

possible. It would also be a great opportunity to request and receive the Record of Decision via FOIA to share with legal advocates to prepare a petition to challenge the permit.

4. What is the process for an applicant that chooses to appeal a proffered permit?

Below is a flowchart of an applicant's options upon being presented with a proffered permit.[843] Note that even before the official appeals process, the Corps is directed to work with the applicant to resolve the objections that an applicant has to the proffered permit.



[843] U.S. Army Corps of Engineers, *Applicant Options with Initial Proffered Permit,* https://www.mvd.usace.army.mil/Portals/52/docs/regulatory/app-b.pdf (last visited Mar. 31, 2022). The administrative appeals process is codified at 33 C.F.R. § 331 et seq. and certain Divisions summarize the appeals process on their websites in more

As mentioned previously, only someone who "received an approved JD, permit denial, or has declined a proffered individual permit" can administratively appeal a Corps decision.[844] LNG applicants conceivably might appeal the 404 or section 10 permit decisions,[845] or the underlying approved jurisdictional determination for the site.[846]

The appellant has 60 days from the Corps final decision on the initial permit application[847] to file a request for appeal (RFA).[848] If the RFA has merit, the Corps reconsiders its decision under a substantial evidence (as to facts) and arbitrary/capricious or abuse of discretion standard of review and decides whether the decision should be upheld or remanded.[849] The entire process typically takes a maximum of 150 days.[850] Appeal decisions are not precedential,[851] but some are published on Corps websites.[852]

Depending on the outcome of the appeal, only advocates who participated initially may receive notice of the altered decision, or—if the change is substantial—a new public notice should issue.[853] This is another reason to be involved in the permitting process from the beginning.

Once a decision is made on an appealed action, the Corps issues a permit as described in 33 C.F.R. § 331.10.[854] At this point, advocates may then appeal directly to the Federal Circuit where the project is located.[855] Although the statute of limitations for claims under 15 U.S.C. § 717r(d)(1) is long—four or six years—an advocate is likely going to want to bring a challenge quickly to prevent construction of the project before the permit challenge is heard.

One consideration as to timing, of course, is the process of other permit challenges being brought against the proposed facility, and the resources on hand to bring those challenges. It is best to consult with an experienced litigator to understand when to challenge an issued permit or a

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accessible (yet non-binding) language. *See e.g.*, https://www.mvd.usace.army.mil/Missions/Regulatory/Appeals-Process/. Another resource on the topic of administrative and judicial review of Corps permits is found here: http://www2.law.mercer.edu/elaw/wetlands/chapter%2010%20word.pdf.

[844] *See* 33 C.F.R. § 331.2 ("Affected party means a permit applicant, landowner, a lease, easement or option holder (*i.e.*, an individual who has an identifiable and substantial legal interest in the property) who has received an approved JD, permit denial, or has declined a proffered individual permit.").

[845] For example, applicants occasionally appeal proffered permits if they disagree with the conditions imposed or the scope of work authorized. *See e.g. Remand of Proffered Permit to New Orleans District*, MVN-2005-2099-WW, Nov. 16, 2008, https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll5/id/1331 (appeal granted because the New Orleans District failed to adequately consider the project's purpose in limiting the scope of the permit). This was not an LNG applicant.

[846] For example, if the Corps has decided via an approved jurisdictional determination that their land contains more aquatic resources that are within the Corps' jurisdiction (such as waterbodies, wetlands, or navigable waters) than the applicant believes is proper. Recall that more jurisdictional waters means the applicant will need to conduct more compensatory mitigation elsewhere.

[847] 33 C.F.R. § 331.10 (explaining what constitutes the final Corps decision for appeal purposes based on the different possible scenarios).

[848] U.S. Army Corps of Engineers, *Determining the Timeliness of Requests for Appeal (RFA)*, Regulatory Guidance Letter, Jan. 25, 2006, https://www.mvd.usace.army.mil/Portals/52/docs/regulatory/app_g_rgl06-01_.pdf.

[849] 33 C.F.R. § 331.9(b).

[850] Appendix A. https://www.mvd.usace.army.mil/Portals/52/docs/regulatory/app-a.pdf. A site visit may delay this to a maximum of twelve months from receipt of an acceptable RFA. 33 C.F.R. § 331.8.

[851] 33 C.F.R. 331.7(g).

[852] The Mississippi Valley Division, which covers the Gulf Coast of Louisiana (the New Orleans Division) publishes a list of appealed decisions and outcomes, https://www.mvd.usace.army.mil/Missions/Regulatory/Appealed-Decisions/; the Southwestern Division, which covers the Galveston District, publishes a similar table https://www.swd.usace.army.mil/Missions/Civil-Works/Regulatory/Regulatory-Appeals/Table-of-Appeals/.

[853] 33 C.F.R. § 331.10(b).

[854] 33 C.F.R. § 331.10 (explaining what constitutes the final Corps decision on an appealed permit or jurisdictional determination based on the different possible scenarios).

[855] 15 U.S.C. § 717r(d)(1).

jurisdictional determination in court. A granted 404 permit is not suspended simply because it is being judicially reviewed. The Corps may decide to *voluntarily* suspend a permit if it decides that it should reconsider the permit in light of new circumstances.[856] Federal courts have in the past granted preliminary injunctions to suspend the Corps permits during the course of litigation, however the court must conclude that there is irreparable harm and a likelihood of advocate success before it will stop progress on the project while the litigation goes forward.[857] Note that showing irreparable harm from the permit issuing is very fact-specific and can be difficult—an experienced attorney can help navigate these issues.

5. What are best practices for litigating 404 permits?

If a 404 permit issues, an advocate can sue the Corps under the Administrative Procedures Act (APA), 5 U.S.C. § 706(2). The Corps' actions are reviewed under the APA standard of review: whether the Corps' actions, findings, or conclusions were "'arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.'"[858] The Natural Gas Act, 15 U.S.C. § 717r(d)(1), gives jurisdiction to the Circuit in which the cause of action arose: in Louisiana and Texas, this is the Fifth Circuit, generally regarded to be a difficult court to litigate environmental cases in.[859]

LITIGATION TIP: READ ALL COMMENTS!

Courts have allowed parties to raise any issues that were brought to the Corps' attention, even if raised by a different party or an agency. It's a good practice to read all comments as they are filed, but especially before litigation—others may have identified problems that you overlooked!

Note that an issue may be appealable even if you didn't raise it during the permitting process.[860] For example, if an issue was brought to the Corps' attention during the comment period by another commentor or an agency, you may raise it in litigation even if you originally overlooked the issue during the administrative proceedings,[861] although best practice is to raise issues during comments yourself: both to avoid wasting funds litigating whether the issue

[856] While the first judicial challenge to Rio Grande LNG's permits was being briefed, the Corps suspended its issued permit in light of changes the applicant had proposed to the terminal and pipeline. See *Shrimpers v. Corps*, No. 20-60281 (Brief for Respondent) at 1 (5th Cir. Aug. 13, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200813_docket-20-60281-_brief.pdf. The Corps reissued the permit in September 2021 and as of December 2021 advocates have refiled their challenge in the Fifth Circuit.
[857] Sometimes even the threat of a preliminary injunction is enough for the applicant (now permittee) to agree to not move forward with construction without an official court order suspending the permit.
[858] *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 643 (4th Cir. 2018) (quoting 5 U.S.C. § 706(2)(A)).
[859] The Bayou Bridge litigation opinions can be helpful to review, even though the Fifth Circuit largely sided with the Corps: *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692 (5th Cir. 2018) https://casetext.com/case/basinkeeper-v-us-army-corps-of-engrs-5. Also keep in mind that the Fifth Circuit has held that there are no citizen suit protections for 404 permits once one has issued, making an APA challenge one of the few hooks for advocates. *See Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356, 357 (5th Cir. 2012) https://casetext.com/case/atchafalaya-basinkeeper-v-chustz.
[860] For example, if the issue did not arise until after the comment period closed, if it was obvious, or if someone else raised it. *See Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1048-51 (10th Cir. 2015) (discussing "obviousness" and "otherwise brought to the agency's attention") https://casetext.com/case/sierra-club-inc-v-bostick-1.
[861] "If an issue was brought to the attention of the Corps during the public comment period, that issue may be challenged in judicial proceedings, by the original objector or any another person." *Sierra Club, Inc. v. Bostick*, No. CIV-12-742-R, 14 (W.D. Okla. Dec. 30, 2013) (aff'd, 787 F.3d 1043 (10th Cir. 2015)) https://casetext.com/case/sierra-club-8.

was raised[862] and to ensure that all supporting documents on that topic have been entered into the administrative record! (The administrative record limits what you can raise.)

Once an advocate reaches the litigation stage, it's imperative to seek advice from legal practitioners who have brought such challenges before, who can help guide the decision of what to present. A few hours of input on the front end can help avoid otherwise unanticipated bad consequences, both for the case at hand and for future challenges to Corps decisions.

6. Where can I find examples of legal briefing on 404 permits issued to LNG terminals?

Community groups and Sierra Club are litigating the 404 permit issued to the Texas Rio Grande LNG facility and its Rio Bravo pipeline in the Fifth Circuit. After briefing began, the Court stayed the case in light of changes to the facility that caused the Corps to suspend and reconsider the issued permit, which was reissued in September 2021. Advocates have since initiated a challenge to the reissued permit, but as of December 2021, no briefing has been filed—the following is the briefing on the first permit:

- Petitioner's opening (App. 53): http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200723_docket-20-60281-_brief.pdf
- Respondent's brief (App. 54): http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200813_docket-20-60281-_brief.pdf
- Petitioner's reply brief (App. 55): http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200901_docket-20-60281-_reply.pdf

F. What should I know about the Section 10 Rivers and Harbors Permit for activities in navigable waters?

The Army Corps often combines its review of Rivers & Harbors Act Section 10 permits with the related Clean Water Act Section 404 permit. EPA and FWS can comment on both permits and is empowered by the 404(q) memoranda to weigh in on the Corps' process. The timing and method of participation is identical to the process for a 404 permit; the major difference is that the 404(b)(1) Guidelines do not apply to section 10 permits.

1. I'm new to Section 10 permits, what are these permits and the Rivers & Harbors Act in general about?

The Rivers & Harbors Act regulates the discharge of refuse into navigable waters, the excavation or filling of navigable waters, and the building of structures in navigable waters.[863] This includes any construction, excavation or deposition of materials in navigable waters, or affecting the course, condition, location or capacity of navigable waters. Construction can include, for examples, piers, wharfs, breakwaters, bulkheads, jetties, weirs or transmission lines.

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[862] For example, a court might decide that the issue raised during comments isn't the same as the one now litigated. *See e.g., St. Johns Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs,* 462 F. Supp. 3d 1256, 1297 (M.D. Fla. 2020) (rejecting advocate's argument that litigation should be allowed on an issue because although "both [third-party] comments notify the Corps of the need to consider how an increase in storm surge caused by the proposed Project could impact flooding, neither comment suggests that this analysis requires the Corps to analyze how and to what extent prior deepening projects have already increased storm surge").

[863] 33 U.S.C. § 403 (Section 10 of the Act). And if the project additionally involves the alteration, occupation or use of a Corps civil works project—such as federally-maintained navigation channels or federal levees—permission is also required under the Rivers and Harbors Act, § 14, based on a determination that the activity will not be injurious to the public interest or affect the Corps project's ability to meet its authorized purpose. 33 U.S.C. § 408.

It applies to waters that are subject to the ebb and flow of the tide or are presently used, or have been used in the past, or may be susceptible to use in the future to transport interstate or foreign commerce.[864] It's expected that most LNG terminals would need such a permit.

Navigable waters are waters that are affected by the ebb and flow of tides and/or might be used for interstate or foreign commerce (either past, present or future). As a practical matter, this includes most flowing water: the ocean, shipping channels, rivers, and streams.

Section 10 of the Rivers & Harbors Act contains three separate clauses that prohibit certain types of obstructions of navigable waters:

- The first clause of section 10 flatly prohibits the creation of "any obstruction not affirmatively authorized by Congress, to the navigable capacity of any water of the United States."
- The second clause prohibits the building of any structure in navigable waters without the Corps' permission.
- The third clause makes it unlawful to alter or modify "the course, location, condition, or capacity" of any navigable water of the United States without authorization from the Corps.[865]

The Corps has broad authority to grant or deny a permit and to determine what constitutes an "obstruction." The threshold for what is an obstruction has been low. The types of structures deemed obstructions by the Corps include docks, houseboats, sunken vessels, and riprap (material used to reinforce shorelines). Courts will generally not question the Corps' decision as long as the Corps is regulating navigable waters.

Thus, while advocates are encouraged to timely participate in a Section 10 challenge and review the site-specific facts closely with Section 10 in mind, there are likely more fruitful avenues available for challenging an LNG terminal, including challenging the 404 permit.

2. What Section 10 regulations guide the Corps' decision-making process?

Pursuant to the Corps' Clean Water Act and Rivers and Harbors Act Section 10 implementing regulations, the "decision whether to issue a permit will be based upon an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest."[866] This is the same "public interest" review framework used in 404 permitting. The public interest review is intended to be broad, capturing all relevant issues that could impact the environment, human health and natural resources. The Corps states:

> *Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonable may be expected to accrue from the proposal must be balanced against its reasonable foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources.*

[864] 33 C.F.R. § 322.2(a).
[865] 33 U.S.C. § 403.
[866] 33 C.F.R. § 320.4(a)(1).

33 C.F.R. § 320.4(a)(1). The same non-exhaustive list of 21 factors that may be relevant for each individual project must be weighed for a Section 10 permit:

> *"conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people."*

33 C.F.R. § 320.4(a)(1). Consistent with the mandate that the Corps consider "all those factors that become relevant," this non-exhaustive list of factors includes issues beyond those directly related to the impacts of in-water work. *Id.* An advocate could use this language to argue that the public interest analysis must consider all impacts from a project—not just those that result directly from permitted activities. The Corps must complete a public interest review before it can issue a section 10 permit.

3. I want to file a Section 10 challenge, where can I find example comments?

The Corps often analyzes Section 10 permits at the same time as Section 404 permits, and thus the public notice that the Corps issues will be for both permits.[867] An advocate should be able to compose and submit its comments on all Corps permits together—the public notice should state the permits on which comment is sought. For examples of comments, see Section 6.C.13 (404 comments on terminals).

[867] *See e.g.*, U.S. Army Corps of Engineers, *Public Notice on Permit Application No. SWG-2015-00114*. Galveston District, Sept. 19, 2021, https://www.swg.usace.army.mil/Portals/26/docs/regulatory/PN%20Sept/PN_201500114.pdf?ver=2019-09-19-142915-063 (public notice for the 404 and section 10 permits for the Rio Grande LNG project and associated Rio Bravo pipeline, summarizing the compensatory mitigation project, the Corps' review process, and the responsibilities of other agencies); *see also* U.S. Army Corps of Engineers, *Draft Compensatory Wetland Mitigation Plan for the Rio Grande LNG and Rio Bravo Pipeline*, Sept. 11, 2019, https://www.swg.usace.army.mil/Portals/26/docs/regulatory/PN%20Sept/DraftCMP_201500114.pdf?ver=2019-09-19-143149-297.