

the Cooperating Agency has special expertise. In addition, pursuant to CEQ Regulations (40 C.F.R. Section 1506.3), a Cooperating Agency may adopt without recirculation the environmental impact statement of a lead agency when, after an independent review of the statement, the Cooperating Agency concludes that its comments and suggestions have been satisfied.” Additional information on the roles of the EPA and the FRA as Cooperating Agencies can be found in Section 1.3.4.

1.3 AGENCY INVOLVEMENT (ROLES AND RESPONSIBILITIES)

1.3.1 What is the role of the U.S. Army Corps of Engineers?

The Department of the Army regulatory program is one of the oldest in the Federal Government. Initially, it served a fairly simple, straightforward purpose: to protect and maintain the navigable capacity of the nation’s waters. Time, changing public needs, evolving policy, case law, and new statutory mandates have changed the complexion of the program, adding to its breadth, complexity, and authority.

The Corps has direct permit authority to evaluate applications for certain activities in our nation’s waters pursuant to three separate laws:

- Section 10 of the Rivers and Harbors Act regulates the construction, excavation, or deposition of materials in, over, or under “navigable waters of the U.S.,” or any work which would affect the course, location, condition, or capacity of those waters;
- Section 404 of the CWA regulates the discharge of dredged or fill material into “waters of the U.S., including wetlands”; and
- Section 103 of the Marine Protection, Research and Sanctuaries Act regulates the transportation of dredged material for the purpose of disposal in the ocean²⁴.

The regulations found at 33 C.F.R. Part 320–332 govern the regulatory program of the U.S. Army Corps of Engineers. These regulations outline the laws and procedures utilized by the Corps in assessing applications for permits.

²⁴ The project will not result in discharges of dredged material proposed to be transported to the ocean; therefore, Section 103 of the Marine Protection, Research and Sanctuaries Act is not applicable.

Waters of the U.S.:

- All Navigable Waters of the U.S.;
- All interstate waters including interstate wetlands;
- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - Which are or could be used by interstate or foreign travelers for recreational or other purposes; or from which fish or shellfish could be taken and sold in interstate or foreign commerce; or,
 - Which are used or could be used for industrial purposes by industries in interstate commerce.
- All impoundments of waters otherwise defined as waters of the United States under the definition;
- Tributaries of waters;
- The territorial seas; and
- Wetlands adjacent to waters (other than waters that are themselves wetlands).

1.3.2 Public Interest Review

One of the major aspects of the Corps' evaluation process is the "public interest review." The decision whether to issue a DA permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity on public interest. 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 reasonably may be expected to accrue from the proposal must be balanced against its reasonably 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. All factors that may be relevant to the proposal must be considered, including the cumulative effects thereof, as shown below.

PUBLIC INTEREST FACTORS	
Conservation	Shore erosion and accretion
Economics	Recreation
Aesthetics	Water supply and conservation
General environmental concerns	Water quality
Wetlands	Energy needs
Historic properties	Safety
Fish and wildlife values	Food and fiber production
Flood hazards	Mineral needs
Floodplain values	Considerations of property ownership
Land use	Needs and welfare of the people
Navigation	

For activities that are also subject to Section 404 of the CWA, a permit will be denied if the project would not comply with the Environmental Protection Agency's Section 404(b)(1) Guidelines (discussed below). Subject to the preceding sentence and any other applicable laws and regulations, a DA permit will be granted unless the District Engineer determines that it would be contrary to the public interest. In accordance with NEPA, the final decision on the DA permit will be documented in the ROD. The ROD will also include analysis on the public interest review, as a basis for the decision.

Section 404 (b)(1) Guidelines

Under Section 404(b)(1) of the CWA, the EPA, in conjunction with the Corps, developed guidelines to ensure compliance with Section 404 of the CWA when evaluating permit applications. These guidelines are specifically referred to as the "404(b)(1) Guidelines." 404(b)(1) Guidelines provide regulations outlining measures to avoid unnecessary aquatic impacts, aquatic impact minimization measures, and compensatory mitigation. The Draft 404(b)(1) Guidelines Evaluation (Subparts C-G) for the proposed Navy Base ICTF Project is included in Appendix A. These guidelines are heavily weighted towards preventing environmental degradation of waters of the U.S., including wetlands and therefore place additional constraints on Section 404 discharges. The 404(b)(1) Guidelines specifically outline four conditions that must be satisfied in order to make a determination that a proposed discharge complies with these Guidelines. These conditions are referred to as "restrictions on discharge." In general, these four restrictions on discharge do not allow the Corps to issue a permit if a discharge would:

1. have a "practicable" alternative which would have less adverse impact on the aquatic ecosystem as long as the alternative does not have other significant adverse environmental consequences;

2. cause or contribute to violations of any applicable State water quality standard; violate toxic effluent standards; jeopardize the continued existence of an endangered or threatened species; or violate any marine sanctuary;
3. cause or contribute to significant degradation of the waters of the U.S., including wetlands; and
4. not minimize potential adverse impacts of the discharge on the aquatic ecosystem.

Per 40 C.F.R. 230.10, each of these “restrictions” has specific requirements in order to determine compliance. The direct excerpt for the 404(b)(1) Guidelines that outlines these “restrictions” is provided below.

“(A) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) 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. If it is otherwise a practicable alternative, an area not presently owned by the applicant, which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not “water dependent”), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge, which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.

(B) No discharge of dredged or fill material shall be permitted if it:

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;

(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;

(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply, in lieu of this subparagraph;

(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under Title III of the Marine Protection, Research, and Sanctuaries Act of 1972.

(C) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include:

(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.

(2) Significantly adverse effects of the discharge of pollutants 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) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or

(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

(D) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.”

1.3.3 What Other Environmental Regulations must the Corps Consider?

As discussed in 33 C.F.R. 320.3, the Corps must review projects for compliance with numerous other Federal, state, and local laws, regulations, memoranda of agreement, and EOs, such as the Fish and Wildlife Coordination Act, the Endangered Species Act (ESA)²⁵, the National Historic Preservation Act (NHPA)²⁶, and the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA). Relevant laws and regulations that the Corps considered for the Navy Base ICTF EIS are identified in Chapter 8 (Regulatory Environment Overview).

1.3.4 Who are the Cooperating Agencies for this project?

1.3.4.1 U.S. Environmental Protection Agency

The U.S. Environmental Protection Agency (EPA) mission is to protect human health and the environment. Through a suite of environmental laws and Executive Orders (EOs) (e.g., Clean Air Act [CAA]²⁷, CWA²⁸, EO 12898 Federal Actions to Address Environmental

The U.S. Environmental Protection Agency and the Federal Railroad Administration are cooperating agencies for the Navy Base ICTF EIS.

Justice in Minority Populations and Low-Income Populations, and EO 13045 Protection of Children from Environmental Health Risks and Safety Risks), EPA has jurisdiction over/interest in multiple topics relevant to the project. These topics include air quality, climate change, wetlands, socioeconomics, Environmental Justice, and health and safety. Additionally, under Section 309 of the CAA, EPA reviews and comments on EISs prepared by other federal agencies, including (but not limited to): (1) the adequacy of the analysis and the environmental impacts of the proposed action, (2) issues related to its duties and responsibilities, and (3) potential violation of or inconsistency with national environmental standards, and determines whether the scopes of the impacts analyses are adequate. Due to their interest in the potential air quality, socioeconomic/Environmental Justice, and human health and safety impacts from the project, EPA is a Cooperating Agency on this EIS. As a Cooperating Agency, EPA is afforded the opportunity to participate in NEPA coordination meetings, discuss technical studies, and provide information on alternatives/mitigation.

²⁵ 16 U.S.C. 1536

²⁶ 16 U.S.C. § 470 et seq.

²⁷ 42 U.S.C. § 1857 et seq., as amended and recodified in 42 U.S.C. § 7401 et seq.

²⁸ 33 U.S.C. § 1251 et seq.

1.3.4.2 Federal Railroad Administration

The Federal Railroad Administration (FRA) was created by the Department of Transportation Act of 1966, and is one of ten agencies within the U.S. Department of Transportation (USDOT) concerned with intermodal transportation. The FRA mission is to enable the safe, reliable, and efficient movement of people and goods now and in the future. Regarding this project, FRA understands the ICTF would provide increased opportunity for CSX Transportation and NS Railway, both Class I railroads, to service intermodal traffic handled by the South Carolina Ports Authority (SCPA) at the CNC.

Palmetto Railways submitted a Railroad Rehabilitation and Improvement Financing (RRIF) loan application to FRA. At the time of submittal, the loan program was under FRA; however, it has since been moved under the Build America Bureau. This new bureau was established in July 2016 and is responsible for driving transportation infrastructure development projects in the United States. Under the RRIF program, the Build America Bureau is authorized to provide direct loans and loan guarantees that may be used to acquire, improve, or rehabilitate rail equipment or facilities, or develop new intermodal or railroad facilities. Because this is a rail project, the FRA is the most appropriate agency to issue USDOT's NEPA clearance for the Proposed Project. As such, the FRA will consider the potential environmental impacts resulting from the Proposed Project, and the EIS must comply with FRA's Procedures for Considering Environmental Impacts as well as other applicable statutes and regulations, including the NHPA and Sections 4(f) of the U.S. Department of Transportation Act of 1966²⁹ and 6(f) of the Land and Water Conservation Fund (LWCF) Act³⁰. Before the Proposed Project is eligible for a RRIF, FRA must have completed the NEPA process. The FRA is participating in the EIS as a Cooperating Agency. As a Cooperating Agency, FRA is afforded the opportunity to participate in NEPA coordination meetings, discuss technical studies, review and comment on the EIS, and provide information on alternatives/mitigation, all of which would help ensure the EIS conforms to FRA's Procedures. In addition, because Palmetto Railways is considering a RRIF loan to fund the Proposed Project, FRA has an action under NEPA and will issue a separate ROD in addition to the Corps' ROD.

1.3.5 What are the Roles of the Public, Other Agencies, and Tribes in this EIS?

The opportunity for public input is one element of the Corps' overall public participation program for the Navy Base ICTF EIS. This program includes a framework for: (1) broadly distributing and providing public access to information regarding development of the Draft Environmental Impact Statement (DEIS) and the Final EIS (FEIS); (2) promoting an understanding of the NEPA process, studies, alternatives evaluation, and environmental analyses; and (3) providing a number of

²⁹49 U.S.C. 303, Section 4(f)

³⁰Public Law 88-578, 78 Stat 897

opportunities for public input. The program incorporates several means for engaging and providing information to the public, agencies, and tribes, including public meetings, community outreach meetings, mailings to interested parties, a project website (www.NavyBaseICTF.com), and newsletters.

Upon initiation of the NEPA process, a public scoping period, including a scoping meeting, was opened to solicit input from agencies and the public on issues of concern for project. As a result of a revised proposal by Palmetto Railways, the Corps opened a second public scoping period, and a second scoping meeting was held, to inform the public of the revised project. The comments received during the scoping periods and meetings assisted the Corps in determining the overall scope of the analysis for this EIS. A Public Hearing on the Draft EIS was also held and allowed comment on the project. Additional information about consultation, coordination, and public involvement is included in Chapter 9.

1.4 PROJECT PURPOSE AND NEED

In accordance with the CEQ Regulations for Implementing the Procedural Provisions of NEPA (CEQ Regulations), 40 C.F.R. Parts 1500-1508, the Corps must specify the underlying purpose and need for the project (40 C.F.R. 1502.13). Considered together, the purpose and need establish part of the framework to identify the range of alternatives for a proposed action to be evaluated in an EIS.

Corps regulations define three ways of stating the purpose of a project. As described below, one statement is provided by the Applicant, the other two are determined by the Corps:³¹

- Palmetto Railways has included a stated purpose and need in its proposal to the Corps.
- The Corps determines the “basic” purpose of the project, which in turn is used to determine whether the project is water dependent as it relates to Section 404(b)(1) of the CWA.
- The Corps determines the “overall” purpose of the project, which is used to determine the range of practicable alternatives for the proposed action.

1.4.1 What is the Applicant’s Stated Purpose and Need?

Palmetto Railways (the Applicant) is a division of the South Carolina Department of Commerce and was established in 1969. The Applicant’s mission is “to provide safe, efficient, and cost-effective rail solutions to facilitate the movement of freight and support economic development efforts; thereby, promoting the economic viability of the State of South Carolina.” Palmetto Railways operates three railroad subdivisions; Charleston, North Charleston, and Charity Church Subdivisions. The Charleston and North Charleston Subdivisions provide switching services to the terminals of the South Carolina Ports Authority and other various industries in Charleston County, interchanging with

³¹ 33 C.F.R. 325, Appendix B, “NEPA Implementation Procedures for the Regulatory Program”; 40 C.F.R. 230.10(a).