

CHAPTER 4

ENVIRONMENTAL LAWS, REGULATIONS, AND GUIDANCE (FEDERAL AND LOCAL)



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ENVIRONMENTAL LAWS, REGULATIONS, AND GUIDANCE (FEDERAL AND LOCAL)

A wide range of environmental legislation, regulations, and guidance documents (hereinafter referred to collectively as “guidance”) applies to transportation projects and provides direction about the types of studies that must be completed and documented for a project to progress. Understanding the basis for these studies is critical to ensuring that all pertinent issues are considered and documented. This understanding can be achieved only by referring to the original guidance hand in hand with the studies that are being performed to implement the guidance. All too often, examples from past projects are referenced without reviewing the guidance that drives them.

Because the District of Columbia Department of Transportation (DDOT) uses not only local but also federal funds for its projects, it has to comply with both federal and local laws. DDOT uses Federal Highway Administration (FHWA) funding on most of its projects, which makes the role of FHWA very important in DDOT projects and processes. FHWA is the lead federal agency for most DDOT projects. FHWA provides oversight and approvals of not only the funding and technical details but also for National Environmental Policy Act (NEPA) actions and other related environmental laws.

For DDOT projects, these laws and regulations fall generally into one of two categories, federal guidance and local (District of Columbia) guidance. This chapter highlights much of the guidance that DDOT and consultant staff working on a project should be aware of and provides a quick look into the range of issues that should be considered when a project is undertaken. This is not to say that all guidance applies in all cases; rather, understanding when guidance is triggered and when it is not is the exact reason for referring to the original materials instead of merely an example document. The implementation of this guidance is explained further in the other chapters of this manual, which cover specific topics (NEPA documents, resource studies, and other environmental requirements) in greater detail.

To be most effective as a quick reference, this chapter is organized around resource or document topics. The subsections refer to key guidance, particularly FHWA Technical Advisory T6640.8A, 23 Code of Federal Regulations (CFR) Part 771, 40 CFR Parts 1501–1508, and the Council on Environmental Quality’s (CEQ’s) Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (40 Questions). The backgrounds of these documents are discussed below. To assist the users of this manual in researching specific topics, specific subsections of these

regulations and guidance documents are referenced within the various topical chapters of the manual. Topics that are not applicable to DDOT and are not discussed in this manual include farmland impacts, wild and scenic rivers, coastal barriers, and coastal zone impacts.

4.1 Federal Regulations and Guidance

4.1.1 The National Environmental Policy Act

NEPA is a broad law requiring the federal government to consider the effects of its major actions on the environment. NEPA established a framework within which these considerations are coordinated, documented, and communicated to the public and agencies with jurisdiction. NEPA is sometimes considered to be an “umbrella” law because it requires that other federal environmental legislation be considered in the evaluation of a proposed action.

For transportation projects, the implementation of NEPA most obviously manifests itself in the preparation of impact studies and NEPA documents, which include Environmental Assessments (EAs) and Environmental Impact Statements (EISs). The goal of the NEPA process is to make better decisions about major federal actions. While important to the development of a project, studies and documents are merely the physical output of a philosophy for project development—namely, the consideration of the individual and cumulative impacts of the implementation of transportation projects and programs when the options to avoid and minimize those impacts are greatest.

The full text of the first section of NEPA is included on the following pages. Subsequent sections of this chapter focus on guidance developed by the FHWA and others to help implement NEPA.

The National Environmental Policy Act of 1969, as amended

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “National Environmental Policy Act of 1969.”

Purpose

Sec. 2 [42 USC § 4321].

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331].

(a) The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population

growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102 [42 USC § 4332].

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently

unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

- (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
- (ii) the responsible Federal official furnishes guidance and participates in such preparation,
- (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
- (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103 [42 USC § 4333].

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104 [42 USC § 4334].

Nothing in section 102 [42 USC § 4332] or 103 [42 USC § 4333] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105 [42 USC § 4335].

The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

4.1.2 Implementation of NEPA

NEPA requires each federal agency to develop means and methods for implementing its provisions. This section describes guidance documents that apply broadly to transportation studies. Although these documents may contain information about specific resource issues (such as land use), in the interest of brevity, they will not be repeated in the individual resource sections of this chapter. Included in this group is fundamental guidance such as the FHWA Technical Advisory that provides direction on the

preparation of NEPA and Section 4(f) documents and wide-reaching legislation such as NEPA itself.

FHWA Technical Advisory T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents

T6640.8A, issued October 30, 1987, contains a wealth of information about the content and format of environmental documentation for FHWA projects, including Section 4(f) Statements. T6640.8A is not a regulatory document, but

it is a critical guidance document for all projects developed under FHWA jurisdiction. It includes information on the applicability of Categorical Exclusions (CEs), EAs, and EISs. It also includes information on the formats and processing requirements for EAs, EISs, and Section 4(f) Evaluations.

T6640.8A also includes guidance on the information to be included in environmental documents for impacts to various resources and potential action (such as permits) required by those impacts. Although many of these resources are covered elsewhere in this chapter, see T6640.8A for further information on the following topics:

- Joint development
- Permits
- Energy
- Relationship of local short-term uses vs. long-term productivity
- Irreversible and irretrievable commitment of resources

40 CFR Parts 1500–1508, Regulations for Implementing NEPA

These regulations were reissued by the CEQ in 1978 and amended once in 1986. This section sets forth requirements for the implementation of NEPA, with the directive that individual federal agencies must develop regulations for implementing NEPA that are specific to the mission of the particular agency.

23 CFR Part 771, FHWA Environmental Impact and Related Procedures

As noted above, each federal agency is directed to develop regulations to implement NEPA within the context of the agency's mission. This section of Title 23 establishes the requirements for FHWA projects.

CEQ's Forty Most Asked Questions Concerning CEQ's NEPA Regulations

Forty Questions was issued by the CEQ as a means to address the most frequently asked questions regarding 40 CFR 1500–1508. Although 40 Questions does not have the same legal standing as CEQ's NEPA regulations, it is perhaps the next best source of information regarding NEPA implementation.

4.1.3 Sections 4(f) and 6(f)

49 United States Code (USC) 303, 29 CFR Part 771, Section 4(f) of the Department of Transportation Act

Section 4(f) of the United States Department of Transportation (USDOT) Act protects publicly owned parks, recreation areas, wildlife or waterfowl refuges, and historic sites.

16 USC 460L-4 to 460L-11, Section 6(f) of the Land and Water Conservation Fund Act of 1965

This legislation requires that property acquired with funds from this Act be replaced.

FHWA TA T6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents

See description above.

Section 4(f) Policy Paper (Revised March 2005), FHWA

This document answers many frequently asked Section 4(f) questions.

16 USC 1241–1249, 43 CFR 8350, National Trails Systems Act

These codes provide for outdoor recreation needs and encourages outdoor recreation.

4.2 Environmental Regulations of the District of Columbia

4.2.1 District of Columbia Environmental Policy Act of 1989

The District of Columbia Environmental Policy Act (DCEPA) establishes guidance for the District to ensure that the environmental effects of District and privately initiated actions be considered prior to their being permitted and implemented. Part of the DCEPA is given below.

4.2.2 Implementation of DCEPA

All projects within the District of Columbia that involve its agencies must comply with DCEPA. The regulations to implement DCEPA are provided in Chapter 72, Environment, of the District of Columbia Municipal Regulations (DCMR).

4.2.3 District of Columbia Department of Transportation

All DDOT projects comply with NEPA, DCEPA, and other environmental laws and regulations. DDOT’s Project Development and Environment Branch (PDE) is responsible for implementing NEPA and DCEPA requirements within DDOT.

District of Columbia Environmental Policy Act of 1989

In the Council of the District of Columbia
July 27, 1989

To require the Mayor or any District of Columbia board, commission, authority, or person to prepare an environmental impact statement if the Mayor, board, commission, authority, or person proposes or approves an action that, if implemented, is likely to have a significant effect on the quality of the environment; to ensure the residents of the District of Columbia safe, healthful, productive, and aesthetically pleasing surroundings; and to develop a policy to ensure that economic, technical, and population growth occurs in an environmentally sound manner.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this Act may be cited as the “District of Columbia Environmental Policy Act of 1989”.

Sec. 2. Purpose.

The purpose of this Act is to promote the health, safety and welfare of District of Columbia (“District”) residents, to afford the fullest possible preservation and protection of the environment through a requirement that the environmental impact of proposed District government and privately initiated actions be examined before implementation and to require the Mayor, board, commission, or authority to substitute or require an applicant to substitute an alternative action or mitigating measures for a proposed action, if the alternative action or mitigating measures will accomplish the same purposes as the proposed action with minimized or no adverse environmental effects.

4.2.4 District of Columbia Department of Consumer and Regulatory Affairs

Environmental Impact Screening Form

The District of Columbia Department of Consumer and Regulatory Affairs (DCRA) designed the Environmental Impact Screening Form (EISF) to help evaluate the environmental effects of governmental or private major action. The form helps to determine if the proposed action would result in significant adverse environmental impacts during the project's construction or operation.

The resources that the EISF evaluates include:

- Land use
- Zoning
- Size of project area
- Dominant soil type
- Contaminated soils
- Federal Emergency Management Agency (FEMA) flood designation
- Slope percentages
- Properties on the National Register of Historic Places (NRHP)
- Depth of water table
- Threatened and endangered species
- Streams/water bodies
- Utilities
- Noise issues
- Regulated materials

A copy of the EISF is included in Appendix C.

4.2.5 District of Columbia Department of Environment

The District of Columbia Department of Environment (DDOE) provides environmental and energy services. The programs under DDOE include:

- Air quality
- Fisheries and wildlife
- Watershed protection
- Water quality
- Stormwater management
- Toxic substances

4.2.6 District of Columbia Code

Title 43, Cemeteries and Crematories

Chapter 1, Section 43-103, Burial Ground to Be Platted and Surveyed, includes information concerning working on the site of a burial ground.

Title 8, Environmental Control and Protection

Chapter 1, Environmental Controls:

- Subchapter I – Air Pollution Controls
- Subchapter II – Water Pollution Control
- Subchapter III – Wastewater Control
- Subchapter IV – Restrictions on Phosphate Cleaners
- Subchapter V – Environmental Impact Statements 8-109.01

The purpose of this subchapter is to:

- Promote the health, safety, and welfare of District of Columbia residents
- Afford the fullest possible preservation and protection of the environment through a requirement that the environmental impact

of proposed District of Columbia and privately initiated actions be examined before implementation

- Require the mayor, board, commission, or authority to substitute or require an applicant to substitute an alternative action or mitigating measures for a proposed action if the alternative action or mitigating measures will accomplish the same purposes as the proposed action with minimized or no adverse environmental effects

This subchapter covers the following topics:

- EIS requirements
 - Adverse impact findings
 - Supplemental EIS
 - Exemptions
 - Lead agencies, files
 - Judicial review
 - Rules
 - Construction
 - Required EISs
- Subchapter VI – Asbestos Licensing and Control
 - Subchapter VII – Underground Storage Tank Management
 - Subchapter VIII – Lead-Based Paint Abatement and Control

4.3 Air Quality

23 CFR 450, Planning Assistance and Standards (Metropolitan Planning)

This regulation discusses conformity requirements in statewide and metropolitan transportation planning.

40 CFR 61, Clean Air Act, National Emissions Standard for Hazardous Air Pollutants (Asbestos Abatement and Demolition Sites)

This regulation provides standards for handling asbestos during demolition activities.

40 CFR 93, Determining Conformity of Federal Actions to State or Federal Implementation Plans

This regulation provides guidance on air quality conformity with state or federal implementation plans of transportation plans, programs, and projects developed, funded, or approved under Title 23 USC.

40 CFR 70, Clean Air Act Amendments of 1990

This regulation encourages the use of market-based principles and other approaches; provides a framework for using alternative clean fuels; promotes the use of clean, low-sulfur coal and natural gas and innovative technologies to clean high-sulfur coal through the acid rain program; reduces energy waste and creates a market for clean fuels; and promotes energy conservation. The permitting process requires a monitoring plan to be created and sets limits on the amounts and types of releases allowed. The permits are required as part of Title V in the 1990 Clean Air Act.

23 USC 109 (j), 42 USC 7401 et seq., 23 CFR 770, 40 CFR 50-52, 49 CFR 623, Clean Air Act, as amended

These regulations protect and enhance the quality of national air resources and establish air quality standards.

District of Columbia Air Quality Regulations

The Air Quality Division of DDOE manages air resources in accordance with Title 20 of the DCMR Air Pollution Control Act of 1984. The Air Quality Division has three

branches: Compliance and Enforcement, Engineering and Planning, and Technical Services.

4.4 Noise

23 CFR Part 772, Procedures for Abatement of Highway Traffic Noise and Construction Noise, July 8, 1982; August 5, 1982; and August 26, 1996

This regulation contains FHWA procedures for analyzing traffic and construction-related noise. As mandated by 23 USC 109(i), all federal-aid highway projects are to be developed in conformance with this directive. It should be noted that, whereas FHWA has procedures for addressing highway-related noise, states are granted the ability to set standards in conformance with FHWA procedures.

FHWA noise procedures are the steps that must be taken in the preparation of traffic noise studies for highway construction projects. The guide defines when noise impacts occur and when noise abatement must be considered. It also requires that information be given to local officials for their land use planning. Noise projects are designated as either Type I or Type II, as defined in the guidance.

USC 109 (i), Noise Control Act of 1972

This Act establishes noise standards, procedures, and criteria.

District of Columbia Municipal Regulations, Chapter 27, Noise Control

This regulation declares that it is public policy of the District of Columbia to reduce the ambient noise level in the District to promote public health, safety, and welfare. This policy indicates maximum noise levels for commercial, industrial, and residential land uses. Title 20, Section 2803, of the policy covers noise as a result of construction in residential zones.

4.5 Water Quality

33 USC 1251 et seq., Clean Water Act (CWA) (Sites Potentially Affecting Surface Water Bodies)

The objective of this statute is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

Federal Water Pollution Act of 1972 as amended by the CWA (1977 and 1987), Sections 303(d), 305(b), 401, 402, and 404

The purpose of CWA is not only to protect the existing quality of water bodies but also to prevent their degradation. A description of each of the applicable sections of the law follows.

- Section 303(d) provides for the establishment of water-quality standards and identification of waters that cannot meet these standards. States develop Total Maximum Daily Load standards to help such “impaired waters” attain water-quality standards.
- Section 305(b) delegates to the states the control over the determination of “designated uses” for water bodies within their boundaries.
- Section 401 addresses state water-quality certification and is an agreement that water-quality standards will be achieved by preventing, reducing, and eliminating pollution. Certification is required when impacts to waters of the United States cannot be avoided.
- Section 402, National Pollutant Discharge Elimination System (NPDES), is a pollution-prevention program that requires development projects to have plans that limit the amount of pollution that enters the existing water resources. Both point and nonpoint sources of pollution are regulated under this program, according to the size of the construction area and population within it.

- Section 404 applies if a discharge of dredge and fill material into waters of the United States is anticipated. DDOE applies for a Section 404 permit if impacts to waters of the United States cannot be avoided and manages mitigation plans when mitigation is required.

Rivers and Harbors Act of 1899

Section 10 of the Act prohibits work in navigable waters without a permit from the United States Army Corps of Engineers (USACE).

Section 9 specifically addresses the need for approval from the Coast Guard and USACE for construction of any bridge or causeway over navigable waters of the United States.

Safe Drinking Water Act, Section 1424(e)

This section of the Act prohibits federally funded projects from adversely affecting principal or sole-source aquifers; 1986 amendments introduced wellhead protection areas and relegated their designation to the states.

Fish and Wildlife Coordination Act of 1958

This Act ensures that agencies such as DDOE indicate the fish and wildlife impacts associated with a project that involves stream or water body modification, such as channel relocation, excavation, culvert installation or extension, bridge pier work, or any other activity changing the course, current, or cross-section of a stream or water body and not including centerline or ditch culverts primarily conveying stormwater within highway right-of-way. Although the Act is not binding, the Secretary of the Interior created it to ensure that fish and wildlife are given ample consideration in projects that affect water resources.

District of Columbia Water Quality Regulations

DDOE has a Water Quality Division whose aim is to restore and protect surface waters in the District of Columbia. The Water Quality Division established a program, the District of Columbia Water Pollution Control Act. The Water Quality program has three principal components: Water Quality Control, Water Quality Monitoring, and Environmental Laboratory.

Regulations that apply to the Water Quality Division include:

- Water Pollution Control Act of 1984 (DC Law 5-188)
- Water Quality Standards for Surface Waters (21 DCMR Ch. 11)
- Ground Water Quality Standards (21 DCMR 1150-1158)
- Water Quality Research Grant Regulations (21 DCMR Ch. 13)
- Submerged Aquatic Vegetation Regulations (21 DCMR Ch. 14)
- Water Quality Monitoring Regulations (21 DCMR Ch. 19)

District of Columbia Stormwater Management Regulations

The DDOE's Stormwater Management Division aims to reduce stormwater runoff pollution through the implementation of activities that go beyond those required under the NPDES Permit.

District of Columbia Watershed Protection Regulations

DDOE's Watershed Protection Division's mission is to conserve soil and water resources in the District of Columbia and protect its watersheds from nonpoint source pollution.

4.6 Wetlands

CWA, Section 401

This section of the CWA regulations generally requires review of all dredge and fill permits issued by USACE to provide reasonable assurance that water quality standards are not being violated as a result of an action.

CWA, Section 404

This section of the CWA regulations authorizes USACE to regulate the discharge of dredged or fill materials into waters of the United States, including wetlands, and establishes the requirement for permit applicants to demonstrate and document proper sequencing of wetland impacts in the course of project development (such as wetland avoidance, wetland impact minimization, and wetland impact mitigation).

Protection of Wetlands, Executive Order 11990

This order requires federal agencies to minimize detrimental actions affecting wetlands while preserving and enhancing the natural and beneficial values that wetlands provide.

Solid Waste Agency of Northern Cook County Decision, 2001

This decision establishes that USACE does not have jurisdiction over isolated wetlands that have no surface water connections with other wetlands or waters of the United States.

33 CFR 328.3(b), Definition of Waters of the United States, 1986

This regulation defines wetlands to include the presence of hydrophytic vegetation, hydric soils, and wetland hydrology.

23 CFR 777, Mitigation of Impacts to Wetlands and Natural Habitat

This regulation provides policy and procedures for the evaluation and mitigation of adverse environmental effects to wetlands and natural habitat resulting from federal aid projects funded pursuant to provisions of 23 USC.

Rapanos Decision

The Rapanos decision, handed down by the United States Supreme Court in 2006, is the latest word on the meaning of “waters of the United States.”¹ The case presented to the Court dealt with the question as to whether CWA covers wetlands that do not contain, and are not adjacent to, traditional navigable waters. Five justices agreed to overturn the lower court decisions (which had affirmed CWA jurisdiction over the wetlands) and send the cases back for further consideration, but they could not agree on the jurisdictional test that the lower courts would now have to apply.

4.7 Water Body Modification and Wildlife

16 USC 1531-1543, 50 CFR 402, Endangered Species Act of 1973, as amended

The purpose of the Endangered Species Act (ESA) is to conserve “the ecosystems on which threatened and endangered species depend” and to also conserve and recover listed species.

16 USC 661-667d, Fish and Wildlife Coordination Act

This Act provides for the protection of wildlife and habitat and requires coordination with United States Fish and Wildlife Service (USFWS) for stream modifications.

¹ Environmental Law Institute. 2007. *The Clean Water Act Jurisdictional Handbook*. Washington, D.C. 77 pp.

50 CFR 402.12(c), Interagency Cooperation (Biological Assessments, Endangered Species Act of 1973)

This regulation requires concurrence with USFWS on presence or absence of federal threatened and endangered species in the project area. Under the law, species listed as either threatened or endangered are provided protection and are regulated by the USFWS.

16 USC 661–666, Fish and Wildlife Coordination Act

The amendments enacted in 1946 require consultation with USFWS and the fish and wildlife agencies of states where the “waters of any stream or other body of water are proposed or authorized, permitted or licensed to be impounded, diverted...or otherwise controlled or modified” by any agency under a federal permit or license. Consultation is to be undertaken for the purpose of “preventing loss of and damage to wildlife resources.”

District of Columbia Wildlife and Habitat Regulations

DDOE’s Fisheries and Wildlife Division has four major components: research and management, aquatic and wildlife education, licensing and regulations, and fishing. Activities regulated are mainly those with potential to harm species and habitat. The District’s Wildlife Action Plan covers threatened/ endangered species, common habitat, and where those species and habitats are commonly found in the District of Columbia.

4.8 Floodplains

Executive Order 11988, Floodplain Management, 1977

This regulation directs federal agencies to avoid conducting, allowing, or supporting actions in a floodplain.

USDOT Order 5650.2, Floodplain Management and Protection, 1979

This regulation prescribes policies and procedures for ensuring that proper consideration is given to avoiding and mitigating adverse floodplain impacts in agency actions, planning programs, and budget requests.

44 CFR 59–62, 64–68, 70–71, 75–77, Flood Insurance Program

This regulation enables property owners in participating communities to purchase insurance as protection against flood losses in exchange for state and community floodplain management regulations that reduce future flood damages.

23 CFR 650, Subpart A, National Flood Insurance Act

This regulation prescribes policy and procedures for encroachment on floodplains.

4.9 Parkland and Recreational Areas

49 USC 303, Department of Transportation Act of 1966, Section 4(f)

This regulation states that “special effort [is] to be made to preserve the natural beauty of the countryside, and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” Public parks and recreational areas in the District of Columbia include all parks and recreational areas owned and operated by the National Park Service (NPS), District Department of Parks and Recreation (DPR), and some of the public recreational areas (such as boathouses). Proposed use of Section 4(f) property requires evaluation early in project development when alternatives to the proposed action are under study. NPS owns many small parks near or within DDOT roadways. Alterations and use

of these parks can be considered a Section 4(f) impact and must be evaluated.

4.10 Historic and Archaeological Preservation

16 USC 470 et seq., as amended, National Historic Preservation Act of 1966

The National Historic Preservation Act (NHPA) establishes a program for the preservation of additional historic properties throughout the nation.

16 USC 470(aa)–(mm), Archaeological Resources Protection Act of 1979, as amended

This regulation preserves and protects paleontological resources, historic monuments, memorials, and antiquities from loss or destruction.

42 USC 1996 and 1996a, American Indian Religious Freedom Act of 1978

This regulation protects places of religious importance to Native Americans, Eskimos, and Native Hawaiians.

43 CFR 7, Protection of Archaeological Resources

This regulation implements provisions of the Archaeological Resources Protection Act of 1979, as amended (16 USC 470[aa]–[mm]), by establishing uniform definitions, standards, and procedures to be followed by all federal land managers to protect archaeological resources on public and Indian lands.

25 USC 3001-3013, Native American Graves Protection and Repatriation Act of 1990

The Native American Graves Protection and Repatriation Act (NAGPRA) protects human remains and cultural material of Native Americans and Native Hawaiian groups. This legislation defines who may claim ownership of human remains, defines the intentional removal of Native American

human remains and cultural objects, defines the process for their inadvertent discovery, and defines the illegal trafficking in such items. The law also provides for the repatriation of Native American human remains and cultural objects in the possession of or controlled by federal agencies and museums.

49 USC 303, Department of Transportation Act of 1966, Section 4(f)

This regulation states that “special effort [is] to be made to preserve the natural beauty of the countryside, and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” Historic sites include historic or archaeological sites on, or eligible for inclusion on, the National Register of Historic Places. Proposed use of Section 4(f) property requires evaluation early in project development when alternatives to the proposed action are under study. The Section 106 process (see below) must be substantially completed prior to processing a Section 4(f) document on the adverse effects to a historic property.

36 CFR 800, Section 106, Protection of Historic Properties, as revised and reissued effective January 11, 2001

Section 106 requires federal agencies to take into account the effects of their projects on historic properties and affords the Advisory Council a reasonable opportunity to comment on such projects. The process defined in 36 CFR 800 describes how federal agencies are to meet these statutory responsibilities.

36 CFR 60, National Register of Historic Places

The NHPA, as amended, authorizes the Secretary of the Interior to expand and maintain a National Register of Historic Places that includes districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.

36 CFR 63, Determinations of Eligibility for Inclusion in the National Register of Historic Places

This regulation describes the procedures for listing properties on the National Register of Historic Places.

16 USC 431-433, 36 CFR 251.50-64, 43 CFR 3, Act of Preservation of American Antiquities

This regulation preserves and protects paleontological resources, historic monuments, and memorials from loss or destruction.

16 USC 469a, 26 CFR 1210, Archaeological and Historic Preservation Act of 1974

This regulation preserves historical and archaeological data from loss or destruction.

National Park Service Bulletins

NPS is part of the United States Department of the Interior and is the primary federal agency responsible for the conservation and protection of natural and cultural resources. Some relevant bulletins include:

- The Secretary of Interior's Standards for Guidance for Archaeology and Historic Preservation
- The Secretary of Interior's Proposed Historic Preservation Professional Qualification Standards
- The Secretary of Interior's Standards for Rehabilitation
- The Secretary of Interior's Standards for Architectural and Engineering Documentation
- The Secretary of Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings

4.11 Hazardous Materials

42 USC 9601-9657, 40 CFR 300, 43 CFR 11, Comprehensive Environmental Response, Compensation, and Liability Act of 1980

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides for liability, compensation, cleanup, and emergency response related to hazardous substances.

42 USC 103, CERCLA and Superfund Amendments and Reauthorization Act of 1986 (SARA, also known as the federal Superfund program) (Superfund sites)

This legislation discusses comprehensive environmental response, compensation, and liability. Discussed are hazardous substances releases, liability, compensation, hazardous substance response revenue, and pollution insurance.

40 CFR I, Resource Conservation and Recovery Act and Office of Solid Waste and Emergency Response Directive 9902.3-2A (May 31, 1994) (RCRA sites)

This regulation provides guidance to United States Environmental Protection Agency (USEPA) regions and states on developing corrective action plans for Resource Conservation and Recovery Act (RCRA) sites.

40 CFR 761, Toxic Substances Control Act, Polychlorinated Biphenyls Manufacturing, Processing

This legislation addresses polychlorinated biphenyls (PCBs) and their manufacturing, processing, distribution in commerce, and use prohibitions.

42 USC 6901 et seq., 23 CFR 751, 40 CFR 256-268, Solid Waste Disposal Act, as amended by the RCRA of 1976

This regulation prescribes policies and procedures relating to solid wastes, the control of junkyards adjacent to highways, and the transportation of hazardous materials.

District of Columbia Hazardous Waste Regulations

The DDOE has a Toxic Substance Division that consists of two branches: the Hazardous Materials Branch and the Land Development and Remediation Branch. The mission of the Hazardous Waste Program is to enforce provisions of the District of Columbia Hazardous Waste Management Act of 1977. Congress enacted this law, which was based on RCRA. Chapter 42 of the District Hazardous Waste Management Regulations includes standards for the management of hazardous waste and used oil.

4.12 Fish and Wildlife

16 USC 1531, Endangered Species Act of 1973

The ESA was implemented to protect threatened and endangered fish and wildlife species. This law was developed to protect critically imperiled species from extinction as a consequence of economic growth and development untended by adequate concern and conservation.

4.13 Additional Regulatory Considerations for Transportation Projects

4.13.1 Land Use

49 USC 303, 29 CFR 771, Section 4(f) of the Department of Transportation Act of 1966

This regulation protects publicly owned parks, recreation areas, wildlife or waterfowl refuges, and land associated with historic sites.

16 USC 460L-4 to 460L-11, Section 6(f) of the Land and Water Conservation Fund Act of 1965

This regulation requires that property acquired with funds from this Act be replaced.

4.13.2 Socioeconomic Resources

42 USC 4601 et seq., Uniform Relocation Assistance and Real Property Acquisition Act of 1970, Public Law 100-17, 101; 23 CFR 710, 49 CFR 24, Uniform Relocation Act Amendments

This regulation provides for uniform and equitable treatment of displaced persons, businesses, and farms.

42 USC 2000d-4; 23 USC 324 (sex), as amended; 42 USC 6101 (age); 29 USC 794 (handicap); 23 CFR 710, Subpart D; 49 CFR 21; Civil Rights Act of 1964

These regulations prohibit discrimination based on race, color, national origin, sex, age, religion, and physical or mental handicap in any program receiving federal assistance.

4.13.3 Environmental Justice

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, February 11, 1994

This Executive Order (EO) seeks to promote the fair treatment of people of all races, incomes, and cultures with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies and strives to ensure greater public participation among the targeted groups.

Executive Order 12948, Amendment to Executive Order No. 12898, January 30, 1995

This EO provides modifications and clarifications to EO 12948.

USDOT Order 5610.2, Order to Address Environmental Justice in Minority Populations and Low-Income Populations, April 15, 1997

This regulation provides that the Office of the Secretary and each Operating Administration within USDOT will develop specific procedures to incorporate the goals of the USDOT Order and EO 12898 with the programs, policies, and activities that they administer or implement.

FHWA Order on Environmental Justice, FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations, December 2, 1998

This order establishes policies and procedures for FHWA to use in complying with EO12898.

Council on Environmental Quality, Environmental Justice: Guidance under the National Environmental Policy Act, December 10, 1997

This report by CEQ discusses EO 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) and its relationship with NEPA to assist federal agencies with their NEPA procedures so that environmental justice concerns are effectively identified and addressed.

42 USC 2000d-2000d-7, Title VI of the Civil Rights Act of 1964

Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance.

4.13.4 Residential and Business Displacements

42 USC 3601–3619, Title VIII of Civil Rights Act of 1968, Fair Housing Act, 42 USC 3601–3631, Fair Housing Act Amendments of 1988

These regulations promulgate rules to implement the Uniform Relocation Assistance and Real Property

Acquisition Policies Act of 1970, as amended (42 USC 4601 et seq.).

42 USC 4601, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), as amended; 23 CFR 710, 750 and 49 CFR 24, Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (amended in 1987); 49 CFR 24, Regulations Concerning the Uniform Act, as amended

These regulations reestablish a uniform policy for fair and equitable treatment of individuals and businesses displaced as a direct result of programs or projects undertaken by a federal agency or with federal financial assistance. The primary purpose of this Act is to ensure that such persons do not suffer disproportionate injuries as a result of programs and projects that are designed for the benefit of the public as a whole and to minimize the hardship of displacement.

4.13.5 Considerations Relating to Pedestrians and Bicyclists

FHWA Memorandum, ACTION: Transmittal of Guidance on Bicycle and Pedestrian Provisions of the Federal-aid Program February 24, 1999

This memorandum explains the bicycle and pedestrian provisions of the federal-aid program in 23 USC.

FHWA Guidance, Bicycle and Pedestrian Provisions of Federal Transportation Legislation, February 24, 1999

This guidance explains the need to incorporate bicycling and walking into transportation planning, design, and operations. It provides policy statements, funding and eligibility requirements, and project selection and design information.

FHWA Guidance, Bicycle and Pedestrian Transportation Planning Guidance, November 28, 1994

This guidance considers appropriate inclusion of bicycle and pedestrian elements in statewide and metropolitan planning organization, transportation plans, and transportation improvement programs.

4.13.6 Visual Resources

23 USC 138, Preservation of Parklands; 49 USC 303, Policy on Lands, Wildlife and Waterfowl Refuges, and Historic Sites

These guidelines endeavor to preserve the natural beauty of the countryside and public parks and recreation lands, wildlife and waterfowl refuges, and historic sites.

23 USC 101(g), 133(b), and 133(g) Intermodal Surface Transportation Efficiency Act, 1991

This Act establishes a Transportation Enhancement Program that offers broad opportunities and federal dollars for unique and creative actions to integrate transportation into our communities and the natural environment.

The International Surface Transportation Efficiency Act (ISTEA) mandated the creation of a Scenic Byways Program. FHWA has set criteria for designing scenic byways based on their scenic, historic, recreational, cultural, archaeological, or natural intrinsic qualities.

23 USC 101, Public Laws 109-59

The Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) enables

funding for federally aided highways, highway safety, and transit programs. This program made it possible for the ISTEA to continue.

4.13.7 Secondary and Cumulative Impacts

FHWA Position Paper, Secondary [Indirect] and Cumulative Impact Assessment in the Highway Project Development Process, April 1992

This document suggests methodologies for conducting secondary and cumulative impact analyses.

CEQ Handbook, Considering Cumulative Effects under the National Environmental Policy Act, January 1997

This document provides background and guidance for the assessment of cumulative effects.

USEPA, Consideration of Cumulative Impacts in EPA Review of NEPA Documents (EPA 315-R-99-002), May 1999

This document provides internal EPA guidance to assist in the review of cumulative impacts discussions in NEPA documents.

FHWA Memorandum, Interim Guidance: Questions and Answers Regarding Indirect and Cumulative Impact in the NEPA Process, January 31, 2003

This 2003 guidance is structured around a “Q&A” format, with twelve questions providing the basis for a detailed discussion of the NEPA context for considering indirect and cumulative impacts, key concepts and definitions, case law, and links to more information.