**INSTRUCTIONS FOR USE**

This form provides the process for FHWA’s preliminary determination to make an exception under 23 U.S.C. § 144(c)(2) to Coast Guard bridge permitting authorities. It is recommended that State DOT and/or FHWA division offices complete this form.

Section V of the 2014 USCG-FHWA Memorandum of Agreement (MOA) provides that FHWA makes the preliminary exception determination, followed by Coast Guard review to identify issues or concerns with FHWA’s preliminary determination. The preliminary determination shall be made at an early stage of project development (as soon as the information is available to the applicant) so that coordination with the local Coast Guard District Bridge Office (DBO) can be accomplished before or during environmental processing (23 CFR Part 650.805(a)).

If the DBO identifies issues or concerns with the determination of the FHWA Division Office, he/she will identify the area of concern by marking the appropriate answer in the “**DBO Concerns**” areas included in this checklist. The DBO will also include written comments **“DBO Comments”** and supporting documentation with this form and return it to the FHWA Division Office. Any disputes resulting from this exception determination process will be resolved in accordance with the Dispute Resolution Section of the 2014 USCG-FHWA MOA.

When both the DBO and FHWA Division Office agree that a 23 U.S.C. 144(c)(2) exception applies to a project, the DBO will provide written concurrence to the FHWA division office. In addition, the DBO will identify if the proposed bridge will require the establishment, maintenance, and operation of lights and signals as required by 14 U.S.C. § 85 and 33 CFR Part 118 at that time.

The use of 23 U.S.C. § 144(c)(2) exceptions cannot be delegated to state transportation agencies as part of a NEPA assignment agreement.

1. Name of waterway:

1. Has the waterway at the project location determined to be navigable waters of the United States per 33 CFR Part 2.36?

Yes  No  Do Not Know

(If “**No”**, then no USCG jurisdiction. If you do not know, contact DBO for confirmation of waterway status.)

1. At proposed site, mileage along waterway measured from mouth or confluence:

1. Waterway is a tributary of at mile (if applicable).

Geographical location (city, state, county):

1. Lat-Long coordinates (if known, as precise as possible):
   1. Latitude: (N) (Example: 40° 48’ 3.49” N)
   2. Longitude: (W) (Example: -73° 47’ 16.19” W)
2. Is there an existing bridge at, or near the above location?

Yes  No (if **“Yes”** please answer questions 7a-7b)

* 1. Does this bridge have a USCG or Army Corps of Engineers permit?

Yes  No  Do Not Know

* 1. Please provide vertical and horizontal clearances at:

Normal Pool  Mean High Water  Ordinary High Water

Vertical: (feet)

Horizontal: (feet) Datum:

1. Is the waterway tidal (As defined by the process outlined on pages 7-8)?

Yes  No **DBO Concerns**  **Yes**  **No**

**DBO Comments:**

1. Is the waterway used by recreational, fishing or other vessels greater than 21 feet in length?

Yes  No **DBO Concerns**  **Yes**  **No**

**DBO Comments:**

1. Is the waterway used to transport interstate or foreign commerce? (If **Yes**, permit might be required)

Yes  No  Do Not Know **DBO Concerns**  **Yes**  **No**

**DBO Comments:**

1. Is the waterway susceptible for use in its natural condition or by reasonable improvement as a means to transport interstate or foreign commerce? (If **Yes,** permit might be required)

Yes  No **DBO Concerns**  **Yes**  **No**

**DBO Comments:**

1. Are there any Army Corps of Engineers permitted structures (piers, docks, dams, powerlines) on the waterway? [[1]](#footnote-1)  (contact USCG and/or Army Corps of Engineers to verify] (if **yes**, please attach document with names + locations (mile #))

Yes  No  Do Not Know **DBO Concerns**  **Yes**  **No**

**DBO Comments:**

**Waterway information at proposed bridge site (if available/applicable)**

1. Water depth at high tide (ft):

1. Water depth at normal pool (ft):

1. Water depth at MLW or MLLW (ft):

1. Tidal range MHW to MLW or MHHW to MLLW (ft):

1. Datum used for depths:

**Additional Documentation**

Please include the following information when submitting to the DBO:

Location Map (8 ½” x 11”)

Photo of existing bridge (if any) or proposed bridge location taken from the prospective of the waterway

**NEXT STEP:**

When both the DBO and FHWA Division Office agree that the 144(c)(2) exception applies to a project, the DBO will write a letter to that effect to the FHWA Division Office, attaching the completed checklist. In addition, in that letter the DBO will identify if the proposed bridge will require the establishment, maintenance, and operation of lights and signals as required by 14 U.S.C. § 85 and 33 CFR Part 118.

**23 U.S.C. § 144(c)(2)(B)(i)**

Is the bridge located over **tidal** waters? [Q. 8]

**Yes**

**No**

**23 U.S.C. § 144(c)(2)(A)**

Is the bridge located over waters that are **used or susceptible to use** in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce

[Q. 10 & 11]

**23 U.S.C. § 144(c)(2)(B)(ii)**

Is the waterway used **only** by small vessels –*recreational* boating, fishing, and other small vessels less than 21 feet in length [Q. 9]

**No**

**23 U.S.C. § 144(c)(2)**

Exception does not apply. Contact DBO. A permit may be required.

**Yes**

**Yes**

**23 U.S.C. § 144(c)(2)(A)**

Is the bridge located over waters that are **used or susceptible to use** in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce? [Q. 10 & 11]

**No**

**Yes**

No Coast Guard jurisdiction. Contact DBO for determination.

**33 CFR § 2.36(a)**

**No**

Generally, 23 U.S.C. § 144(c)(2) applies:

* When the waterway is tidal and;
  + Boats using the waterway are less than 21 feet in length; and
  + Waterway is not used or susceptible to use for interstate or foreign commerce
  + Exceptions may be warranted on case-by-case basis

**23 U.S.C. § 144(c)(2)**

Exception applies. USCG Bridge Permit *Not Required.* Contact DBO to see if bridge lighting is required.

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| **Navigable waters of the U.S. for Coast Guard Jurisdiction**  When Coast Guard navigability determinations are made in accordance with 33 CFR 2.36, they will be maintained at each Coast Guard District office and available for public review. These determinations may be modified or reversed by Congress or a federal court with jurisdiction over the waterway at issue.  **33 CFR 2.36(a)**  **(a)** Except as provided in paragraph (b) of this section, *navigable waters of the United States, navigable waters,* and *territorial waters* mean, except where Congress has designated them not to be navigable waters of the United States:   1. Territorial seas of the United States; 2. Internal waters of the United States that are subject to tidal influence; and 3. Internal waters of the United States not subject to tidal influence that:    1. Are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage, or    2. A governmental or non-governmental body, having expertise in waterway improvement, determines to be capable of improvement at a reasonable cost (a favorable balance between cost and need) to provide, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce. |

**Process for Determining “Tidal Waters” for 144(c)(2) Exceptions**

1. 23 U.S.C. § 144(c)(2) provides that a Coast Guard bridge permit is not required for projects that are over waters which are:
2. **Not used and are not susceptible to** use in the natural condition of the bridge or by reasonable improvement as a means to transport interstate or foreign commerce; **and** are
3. Not tidal; or
4. If tidal, used by only recreational boating, fishing, and other small vessels that are less than 21 feet in length.
5. If 23 U.S.C. § 144(c)(2)(a) criteria are not met, the exception does not apply. As such, the tidal status of a waterway has no impact on a 23 U.S.C. § 144(c)(2) exception determination.
6. To determine whether a waterway is “tidal” for the purposes of the above statute, the coast Guard District Bridge Office with jurisdiction over the project will accept any of the below sources of information as sufficient to establish the tidal status of the reach of waterway in question. These determinations may be done as part of a 23 U.S.C. § 144(c)(2)(b) or (c) determination in consultation and concurrence with the applicant and Federal Highway Administration Office:
   1. Data from a NOAA Tidal Datum/Buoy, U.S. Army Corps of Engineers Tide Gauge, or other Federally-maintained data collection system showing such data that quantitatively evinces tidal influence in the project area as defined in 33 CFR § 2.34, or,
   2. A report from an official “state hydrologist” or other analogous official employed by the state government wherein the project lies, or,
   3. Physically-observable and recordable visual evidence of a “high tide line” including, but limited to:
      1. A line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying in a hurricane or other intense storm. (33 CFR § 328.3)
7. Any disputes resulting from or related to the above determination process shall be resolved per the Dispute Resolution section of the 2014 USCG-FHWA Memorandum of Agreement

1. This question seeks to determine whether the Army Corps of Engineers has asserted jurisdiction over the waterway or reach thereof by the issuance of a Jurisdictional Determination, or the issuance of permits of any type including those for structures under Section 10 of the Rivers and Harbors Act (33 U.S.C. § 403), or through any other USACE permitting authority including the Clean Water Act § 404. [↑](#footnote-ref-1)