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IV. Dredge and Fill/ Wetlands (Section 404) Permit Requirements for Construction Projects

If your construction project requires you to perform work in waters of the United States or wetlands, most likely you will need to obtain a Clean Water Act (CWA) Section 404 permit. The regulatory text discussing this program (40 CFR Parts 230-233) can be found at <http://ecfr.gpoaccess.gov> under "Title 40 - Protection of the Environment." The U.S. Army Corps of Engineers (COE) and EPA regulate the discharge of dredged or fill material into waters of the United States under Section 404 of the CWA. You need a Section 404 permit if your construction project will result in the discharge of dredged material (i.e., material excavated from waters) or fill material (i.e., material placed in waters such that dry land replaces water—or a portion thereof—or the water's bottom elevation changes) into a water of the United States. You must obtain a permit (or permit coverage) prior to starting construction. Approval of individual permits might take approximately three months, although general permit authorizations typically take far less time.

Definitions and Acronyms

Dredged Material—Material that is excavated or dredged from waters in the United States.

Fill Material—Material placed in waters of the United States where the material has the effect of either replacing any portion of water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States. Examples include rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in waters of the United States.

Definitions and Acronyms

Waters of the United States—All waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to ebb and flow of the tide. Waters of the United States generally include all interstate waters as well as lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds. See 40 CFR Part 232.3 for the complete definition.

Wetlands—Areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

CFR—Code of Federal Regulations

COE—Army Corps of Engineers

CWA—Clean Water Act

Waters of the United States include wetlands. You must determine whether any wetlands or other waters are present in your construction area. COE and EPA define wetlands as “areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” Wetlands are covered by water or have waterlogged soils for parts of the growing season. Some wetlands are easy to recognize (e.g., swamps and marshes); however, others may be dry during part of the year and difficult to recognize (e.g., bottomland forests, pocosins, pine savannahs, wet meadows, and wet tundra). Contact your COE district office or state environmental department for further information.

Use the following web site to locate your COE district office:
<http://www.usace.army.mil/where.html>

A. Is a Section 404 Permit Required for Your Construction Project?

Answering the following questions will help you determine whether a Section 404 permit is required for your construction project.

Does your construction project (or any part thereof) occur in or impact a water of the United States?

The COE Wetlands Delineation Manual contains information that you can use to help identify a wetland. However, you should consult trained personnel to help you identify jurisdictional waters of the United

States, and to identify and delineate (i.e., identify and mark its boundaries) wetlands. Some basic questions you can ask when determining if your site contains a wetland include the following:

- Is your area in a flood plain or otherwise has low spots in which water stands at or above the soil surface during the growing season?
- Does your area have plant communities that commonly occur in areas having standing water for part of the growing season (e.g., cypress-gum swamps, cordgrass marshes, cattail marshes, bulrush and tule marshes, and sphagnum bogs)?
- Does your area have peat or muck soils?
- Is your area periodically flooded by tides, even if only by strong, wind-driven, or spring tides?
- Are one or more of the wetland indicators (vegetation, soil, and hydrology) present in your area? See the Wetlands Delineation Manual for specific details.

Find the COE Wetlands Delineation Manual online at <http://www.saj.usace.army.mil/permit/documents/87manual.pdf>

Will your project involve the discharge of dredged or fill material?

COE defines discharges of dredged material at 33 CFR Part 323. These discharges, which require permits under Section 404 of the CWA, include:

- The addition of dredged material to a specified discharge site located in waters of the United States;
- The runoff or overflow from a contained land or water disposal area; and
- Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States that is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation.

COE also defines discharges of fill material at 33 CFR Part 323. These discharges, which require permits under Section 404 of the CWA, include:

- Placement of fill necessary for the construction of any structure or infrastructure in a water of the United States;
- Building of any structure, infrastructure, or impoundment in waters of the United States requiring rock, sand, dirt, or other material for its construction;
- Site-development fills in waters of the United States for recreational, industrial, commercial, residential, or other uses;
- Causeways or road fills, dams and dikes, artificial islands, beach nourishment, levees, and artificial reefs;
- Property protection and/or reclamation devices such as rip rap, groins, seawalls, breakwaters, and revetments;
- Fill for structures such as sewage treatment facilities;

- Intake and outfall pipes associated with power plants and subaqueous utility lines;
- Placement of fill material in waters of the United States for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; and
- Placement of overburden, slurry, or tailings or similar mining-related materials in waters of the United States.

Are your activities exempt from a Section 404 permit?

Certain activities are exempt from the requirement to get a Section 404 permit. These include discharging dredged or fill material from normal and ongoing farming, forestry (silviculture), and ranching activities; maintaining currently serviceable structures such as dikes and dams, including emergency reconstruction of recently damaged parts; constructing/maintaining farm or stock ponds or irrigation ditches; maintaining drainage ditches; constructing temporary sedimentation basins on a construction site (does not include placing fill material into navigable waters); certain construction/maintenance activities for farm roads, forest roads, and temporary roads for moving mining equipment; and other activities meeting certain Section 404 requirements. The exemption applies as long as the activity purpose is NOT to bring an area of the navigable waters into a use to which it was not previously subject (i.e., the flow or circulation of navigable waters may not be impaired or the reach of such waters may not be reduced). If the activity performed results in bringing an area of the navigable waters into a new use, then a Section 404 permit is required for your construction project. See Section 404 at <http://www.epa.gov/OWOW/wetlands/regs/sec404.html> for further details on the exemptions.

Contact your state's environmental department and the COE District Office to determine whether your construction project requires a 404 permit.

If you answered "yes" to the first two questions and "no" to the third, then you will need a Section 404 permit.

B. Are You Responsible for the Permit?

All parties associated with construction projects that impact waters of the United States could be held liable. Therefore, the owner, developer, contractor, and other parties involved should ensure that any necessary permits are obtained prior to starting construction.

Are You Responsible for Getting a Permit?

Typically, either the owner, developer, contractor, or architect will get the necessary permit. Owners or developers usually determine whether any wetlands are at the site and if they will be impacted. Before receiving a permit, you also must get approval for your project from your state (Section 401 certification).

There are two types of Section 404 permits: general permits and individual permits.

General Permits. COE issues general permits on a nationwide, regional, or state basis for particular categories of activities resulting in minimal individual and cumulative impacts to aquatic resources. To determine if your construction project is covered by a Nationwide Permit, or by a regional or state general

permit, contact the COE District Office or the state environmental department. You can review the existing Nationwide Permits on the Corps web site.

Individual Permits. For projects with greater anticipated impacts, individual permits may be issued for a specific construction project. You must submit an application to the COE District Office and receive permit approval prior to beginning any construction.

Are You Responsible for Meeting Permit Requirements?

If your project is covered by a general permit, you must follow the conditions listed in that permit. The COE District Engineer also may add specific conditions to your general permit. If your project is covered by an individual permit, you must meet the requirements listed in that permit. Typically, contractors and subcontractors who perform the work on site need to follow these requirements.

While owners, contractors, and consulting engineers all may be found liable for discharging dredge or fill material without a permit, the remedy imposed on each may vary, depending on their respective degrees of control, responsibility, or involvement. For this reason, it is critical to define, before beginning a project, who will be responsible for complying with the Section 404 requirements; assuming another party is “taking care of it” does not absolve you from any liability, and more than one party may be responsible.

C. What Are the Penalties for Working Without the Proper Permit?

The goal of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”

The CWA prohibits the discharge of pollutants by any person from a point source into waters of the United States, except in compliance with various sections of the CWA. As defined by the CWA, “person” means any individual, corporation, partnership, association, state, municipality, commission, subdivision of a state, or interstate body.

EPA may impose administrative, civil, and criminal sanctions on a property owner and/or a contractor for failure to comply with the CWA. Administrative penalties can reach \$157,500 and civil penalties – imposed in a judicial proceeding – can reach \$32,500 per violation per day. Under certain circumstances, the CWA also authorizes criminal penalties. In addition, the CWA allows private citizens to bring civil

For detailed information on Nationwide Permits go to <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/nwfinal.pdf>

Case Studies

Landowners, contractors, and consultants have been found liable for discharging into U.S. waters without a permit.¹ In one case, the court found both the owner and the contractor to be liable, ruling that the contractor was responsible for the discharge activity, despite his reliance on the owner to get the necessary permits. Even where the contractor or consultant did not directly cause the violation, he or she still may be held responsible.

¹U.S. v. Florida Keys Comm. Coll., 531 F. Supp. 267 (S.D. Fla 1981); U.S. v. Weisman, 489 F. Supp. 1331 (M.S. Fla 1980)

actions against any person for any alleged violation of “an effluent standard or limitation.” In a citizen suit, a court may issue an injunction and/or impose civil penalties, litigation costs, and attorney’s fees.

In addition to fines, you may need to pay legal fees and face project delays. If legal action is taken against your construction site, you may also be subject to increased scrutiny at all of your other construction sites by regulatory agencies and the public.

D. In General, What Are the Permit Requirements?

Section 404 specifies that you may not discharge dredged or fill material if a practicable alternative exists that is less damaging to the aquatic environment or if the nation’s waters would be significantly degraded. As mentioned in Section IV-B of Part I of this guide, there are two types of Section 404 permits: general permits and individual permits. For discharges that have only minimal adverse effects, COE issues general permits. General permits may be issued on a nationwide, regional, or state basis for particular categories of activities. Individual permits are usually required for activities with potentially significant impacts.

When applying for an individual permit (and certain general permits), you must demonstrate compliance with mitigation provisions by showing that you will:

- Avoid wetland and water impacts where practicable;
- Minimize potential impacts to wetlands and waters; and
- Compensate for any remaining, unavoidable impacts to wetlands or waters through activities to enhance or create wetlands and/or waters.

Demonstration of the above is referred to as wetland/water mitigation.

Prior to COE issuing a Section 404 permit, your state also must approve the project by granting certification under Section 401 of the CWA. Your state may have already granted certification for any general permits in your area, which will reduce your burden.

If your construction project requires an individual permit, you must submit an Application for Department of Army Permit to COE and/or the state where the construction project is being done. After public notice and comments, COE, EPA, the state, and any other interested federal agencies will evaluate your application. You will be either granted or denied a permit.

A Nationwide Permit (or regional or state permit) may require you to notify the COE District Engineer of the construction project in a preconstruction notification. If a preconstruction notification is required, you may not begin construction until one of the following occurs:

1. The District Engineer notifies you that the activity may proceed. This notification may include special conditions for your construction project.
2. The District Engineer notifies you that an individual permit is required (and you must apply for and be issued an individual permit).

The COE District Engineer should contact you within 45 days regarding your preconstruction notification. If you have not heard from the District Engineer within 45 days, you should follow up with the District Engineer regarding the status of the notification. Prior to issuing the Section 404 permit, the COE or EPA may require an Endangered Species Act Section 7 consultation if threatened or endangered species may be adversely impacted by your construction activity. However, the permit-issuing agency (e.g., COE) is responsible for completing the consultation. See Section XI of Part I of this guide for more information on requirements for endangered species.

E. Where Do You Get a Permit?

In most states, you must obtain a Section 404 permit or verify coverage under a general permit from your COE District Office. A list of COE district offices is available at:

<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district.htm>.

Currently, two states (Michigan and New Jersey) have assumed the role of the COE to issue Section 404 permits; however, several other states have enacted laws and regulations to protect wetlands. In many cases, these rules define the state's role in the Section 404/Section 401 permitting process. Some state laws may also have other impacts. For example, a state may define wetlands or regulated activities differently from federal regulations. This could qualify an area as a wetland on the state level even if it does not meet the federal definition. Therefore, always check with your state to determine if there are any additional requirements that you must follow.

F. What Questions Do You Need to Answer Before Starting Your Construction Project?

You can use the questions in Section II of Part I of this guide to start a discussion among all parties involved in the construction project and to assign tasks to ensure all environmental requirements are met. Each question has a space next to it to designate who will take the lead on each task. Note that designating a responsible party does not absolve you of meeting environmental requirements or liability for failing to meet these requirements.

G. Where Can You Get Additional Information?

For further information on Section 404 permits, you can check the following resources:

- The Dredge and Fill/Wetlands (Section 404) Self-Audit Checklist in Part II of this guide;
- The Construction Industry Compliance Assistance Center (<http://www.cicacenter.org/wetlands.html>) provides resources specific to Section 404 permits and wetlands including state requirements and contacts;
- The National Environmental Compliance Assistance Clearinghouse contains a search engine to help you find compliance assistance tools, contacts, and EPA-sponsored programs: <http://www.epa.gov/clearinghouse/>;
- U.S. Army Corps of Engineers (COE) web site (<http://www.usace.army.mil/>) provides a list of District Offices, including phone numbers that you can call concerning permits for construction activities impacting waters of the United States, information on Nationwide Permits, and the application for individual permits;
- U.S. EPA Office of Wetlands, Oceans, and Watersheds (OWOW): <http://www.epa.gov/owow/>;
- Wetlands Helpline: 1-800-832-7828; and
- EPA's "Where you live" page contains links to state environmental agencies: <http://www.epa.gov/epahome/wherelive.htm>.