

SECTION 6 APPLICABLE REGULATORY REQUIREMENTS

The purpose of this section is to review the regulatory framework that applies to the Proposed Action, evaluate the applicability of various regulations, and identify the required level of USIBWC coordination. This framework would also apply to similar future actions by USIBWC involving dredging or excavation in waters of the United States. Table 6.1 provides a summary of the various regulatory permitting requirements as well as coordination of the applicable agencies for the Proposed Action.

Table 6.1 Regulatory/Permitting Requirements Potentially Applicable to the Proposed Action and Required Level of USIBWC/Agency Coordination

Agency	Regulation	Level of USIBWC Coordination with Agency
USACE	Section 10 of the Rivers and Harbors Act of 1899 Section 404 of the Clean Water Act (33 U.S.C 1344: known as section 404)	Individual Section 10/404 USACE will be required Modification of the mitigation plan could be requested by commenting resource agencies. Approximate 6-month review time. Duration of permit for maintenance dredging may not exceed 10 years (33 CFR 325.6(e)). The permit will require a sediment analyses, wetlands delineation, wetlands mitigation plan and assessment of potential impacts to listed species.
USIBWC	National Environmental Policy Act of 1969 (as amended) (42 U.S.C 4321 <i>et seq.</i>) Regulations for implementing the Procedural provision of NEPA) 40 CFR 1500-1508, November 1978) (CEQ) CEQ information memorandum to Agencies (46 FR 18026-38, March 23, 981)	Requires preparation of an EA, FONSI, or EIS for federally funded projects. Review of the USIBWC NEPA procedures indicates that an EA is required. Review of detailed regulations for preparing an EA, EIS and FONSI. Review of answers to 40 most asked questions.
TCEQ	Section 401 of the Clean Water Act (33 U.S.C. 1344; known as section 401)	401 Certification, coordination is typically a function of USACE permit process. However a sediment sampling plan and DOPAA will be provided to the TCEQ preliminary to permit application. USACE will determine if project considered Tier I or Tier II (likely). May suggest 404/401 permit conditions and mitigation measures.

Table 6.1 Regulatory/Permitting Requirements Potentially Applicable to the Proposed Action and Required Level of USIBWC/Agency Coordination (...continued)

Agency	Regulation	Level of USIBWC Coordination with Agency
USEPA	Section 404 of the Clean Water Act	Coordination is a function of USACE permit process. However a DOPAA will be provided to the USEPA preliminary to permit application.
USFWS	Section 26.040 of Texas Water Code and Section 402 of the Clean Water Act Endangered Species Act of 1973 (PL 93-205) and amendments of 1988 (PL 100-478) FWS Coordination Act 916 U.S.C. 661 et seq.)	Coordinate with the U.S. dredging contractor who prepares USEPA Construction Site Stormwater NPDES permit and Stormwater Pollution Prevention Plan. The plan will be submitted by the contractor. Although coordination is a function of USACE permit process, informal consultation will be conducted to assure concurrence with potential impact assessment. Early participation will be assured by agency site visits (USFWS regulatory branch and Refuge branch) and submittal of the DOPAA for early review. Section 7 of act requires formal consultation if significant adverse impacts to federally listed species will occur due to the Proposed Action (not likely to occur based on preliminary assessment and discussions with USFWS). Coordinate with USFWS to determine if migratory birds and T&E species were affected. May suggest permit conditions and mitigation measures. Requires federal agencies to consult with USFWS regarding impact of Proposed Action.
Executive orders	EO 11990 on wetlands (42 FR 26961)	Avoid adverse impacts to wetlands
TPWD	Chapters 67 and 68 of the TPWD Code, and Section 65.171-65.184 of the Texas Administrative Code	Although coordination a function of USACE permit process, coordination recommended to assure concurrence with impacts and mitigation plan. A DOPAA will be provided to the TPWD preliminary to permit application.
State Historic Preservation Office (SHPO)	National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.)	Ensure compliance with Section 106. May suggest permit conditions and mitigation measures. A DOPAA will be provided to the SHPO preliminary to permit application.
Mexican Section of the USIBWC	Among others, the Convention of March 1, 1889 and the Treaty of February 3, 1944 Water Treaty for the "Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande"	The Mexican Section of the IBWC can facilitate compliance with Mexican regulations and notification of appropriate authorities. The USIBWC will provide a DOPAA to the MxIBWC.
Comisión Nacional de Agua, CNA (National Water Commission of Mexico)	Ley De Aguas Nacionales (National Water Law) Articles 157, 171, & 172.	Permission for river dredging and use of riverbanks. The USIBWC will provide a DOPAA to the CNA.

6.1 USACE COORDINATION AND PERMIT REQUIREMENTS

The USACE (Department of the Army) is the primary agency regulating activity in navigable waters of the United States under the Rivers and Harbors Act and the CWA. To receive USACE authorization, applicants must also comply with applicable federal and state regulations. USACE permits are reviewed by other agencies to assure compliance. Under typical USACE permitting procedures, most of these regulatory issues would be addressed as part of the Section 404 permitting process.

This type of activity (Proposed Action) would normally be authorized under an individual USACE permit. The individual permit would include such information as likely scenarios for ongoing maintenance, type of equipment to be used, methods of operation, disposal of dredged material, BMPs, and environmental protections.

The major environmental issues normally addressed for an individual USACE permit are:

- Threatened/endangered species;
- 401(c) certification under the CWA;
- Protection of cultural resources; and
- BMPs.

The USACE would likely defer to the TPWD and the USFWS on wildlife issues such as preferred location for disposal of dredged material.

6.1.1 USACE Regulatory Framework

Dredging of the sandbar would be subject to Section 10 and Section 404 regulation, since the Rio Grande is a navigable water of the United States. The USIBWC is not currently permitted to perform dredging in the LRGFCP.

6.1.2 USACE Individual Permit Requirements

To obtain an individual USACE permit, the applicant submits a DA application.

The USACE permit application is reviewed by federal and state natural resources protection agencies, which may provide comments and suggestions for mitigation measures. There is also opportunity for public input through a public notice process and possible public hearing.

6.1.2.1 Section 401 Water Quality Certification

The TCEQ performs a Section 401 water quality certification for USACE permits to ensure the permitted action is in compliance with state water quality standards. For projects disturbing 3 acres or less, or 1,500 linear feet or less of streams, the applicant must complete a Tier I checklist and incorporate the list's BMPs into the project. Incorporation of BMPs allows the permit application to proceed without further review by TCEQ. Any project that

does not qualify for a Tier I review or for which the applicant elects not to incorporate Tier I criteria or prefers to use alternatives, will be considered a Tier II project. Tier II projects are subject to an individual certification review by TCEQ. Failure to implement BMPs may result in enforcement action by TCEQ.

6.1.2.2 Texas Parks and Wildlife Regulations

TPWD regulations prohibit taking, possessing, transporting, or selling any animal species designated by state law as endangered or threatened without the issuance of a permit. USACE permits are reviewed by the TPWD for potential impact on state-listed threatened or endangered species. TPWD will determine if the Proposed Action triggers the need for a state permit and may suggest mitigation measures to minimize impacts on threatened and endangered species and other fish and wildlife.

6.1.3 Regulatory Review

Additional federal regulations applicable to the Proposed Action are discussed in the following section.

6.1.4 NEPA

The NEPA of 1969 (amended) (Title I Section 102 [42 USC §4332](C)) is the federal regulation requiring assessment of environmental impacts for “major federal actions significantly affecting the quality of the human environment.” To comply with NEPA and CEQ regulations, federal agencies generally prepare an EIS for major federal actions, and EA for actions that have no significant impact on the environment. Agencies may also identify actions that meet requirements for a Categorical Exclusion.

Review of the USIBWC NEPA procedures indicates the Proposed Action will not qualify as Categorical Exclusion and that an EA will be required.

Upon receiving a permit application, the USACE will immediately perform a preliminary review to determine the level of NEPA documentation. This information is included in the USACE public notice.

6.1.5 USEPA

The USEPA jointly administers Section 404 regulations with the USACE and reviews all USACE permit applications. The USEPA has the right to veto any permit application. The USEPA may also provide comments including suggestions for permit conditions and mitigation measures.

The USEPA also administers the National Pollutant Discharge Elimination System (NPDES) stormwater pollution prevention regulations. A construction stormwater pollution prevention plan (SWPPP) is required under this program for any construction site of 1 acre or more of disturbed land. The Proposed Action will disturb an area more than 2 acres; therefore, stormwater pollution prevention regulations do apply to this project. Preparation of a SWPPP is the responsibility of the dredging contractor.

6.1.5.1 Endangered Species Act

Section 7 of the Endangered Species Act directs all federal agencies to use existing authorities to conserve threatened and endangered species and, in consultation with the USFWS, ensure that their actions do not jeopardize listed species or destroy or adversely modify critical habitat. If listed species are present, the federal agency must determine if the action may affect them. If the federal agency determines that the action is likely to adversely affect listed species, then it must request initiation of formal Section 7 consultation.

USACE permits are reviewed by the USFWS for potential impact on threatened or endangered species pursuant to the Endangered Species Act. If the action may affect threatened or endangered species or critical habitat, a statement to this effect will be included in the public notice for the USACE permit. No discharge of dredged or fill material will be permitted if it jeopardizes the continued existence of threatened or endangered species.

6.1.5.2 Migratory Bird Treaty Act

The Migratory Bird Treaty Act of 1918 (16 USC 703) makes it illegal to take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such a bird except under the terms of a valid permit issued pursuant to federal regulations. Take includes destruction of nests or eggs due to construction activities. The migratory bird species protected under the Act are listed in 50 CFR 10.13. While reviewing USACE permits, the USFWS will evaluate potential impacts on migratory birds and may recommend mitigation measures to minimize any impacts.

6.1.5.3 National Historic Preservation Act

Any federal undertaking must comply with Section 106 of the National Historic Preservation Act. This Act contains treatment and protection standards that ensure preservation and/or reduction of adverse effects on significant historic sites (*e.g.* buildings, structures, archaeological sites). USACE review of permits includes a review for compliance with this Act.

To ensure compliance with Section 106, the federal agency collects information to determine if historic properties are affected, and consults with the SHPO, located at the THC. If it is determined that no historic properties are affected, documentation of this (typically a letter) is provided to the SHPO. The potential impact on significant historic sites will be considered as part of the EA process.

6.1.5.4 CNA and MxIBWC

Anyone planning to change the course of national waters (including dredging activities) must request permission from the Comisión Nacional de Agua (CNA) and demonstrate that flow and downstream parties will not be negatively affected. CNA will review projects, accept or reject projects, and recommend modifications to minimize negative impacts to hydraulic flow, personal security and well being, water quality, and the rights of third parties (Article 157). Article 171 of the National Water Law specifically states that dredging activities may only be carried out with permission from CNA. The permits to authorize these projects must include: name and contact information, timeframe for the project, technical

requirements with which the project will comply, and appropriate land use requests (Article 172).

In addition to notifying and receiving the necessary permits from the CNA and Mexican Section of the IBWC, the USIBWC should consider notifying the state environmental authority for Tamaulipas, Secretaria de Desarrollo Urbano y Ecología, (Department of Urban Development and Ecology) and the local county-equivalent authority, presumably the Municipio de Rio Bravo. Though preliminary analysis found no Mexican state or local laws requiring this communication, it may be legally required and is worth confirming with CNA and the MxIBWC.