



U.S. Army Corps of Engineers Regulatory Program

Tribal Consultation & Coordination

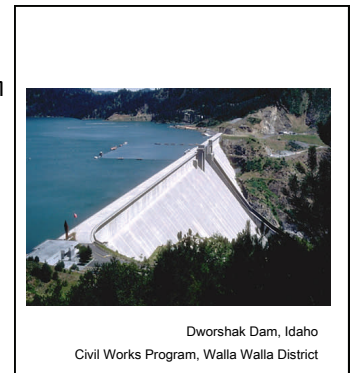
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The US Army Corps of Engineers (USACE) Works in Every State

(USACE) offers a wide range of services to its intergovernmental, military, and civilian partners through its eight divisions— Lakes and Rivers (LRD), Mississippi Valley (MVD), North Atlantic (NAD), Northwestern (NWD), Pacific Ocean (POD), South Atlantic (SAD), South Pacific (SPD) and Southwestern (SWD). Division headquarters are located in Cincinnati OH, Vicksburg MS, New York NY, Portland OR, Honolulu HI, Atlanta GA, San Francisco CA, & Fort Worth TX.

Government-to-government coordination and consultation with federally recognized Tribes is critical to Corps success in execution of our Civil Works, Military, and Regulatory program issues that have the potential to affect Tribes and tribal interests. Often, the undertaking of Corps missions coincides with the fulfillment of our Trust responsibilities.



Regulatory Program Overview

The Corps has been involved in regulating activities by others in navigable waterways through the granting of permits since passage of the Rivers & Harbors Act of 1899. Passage of the Clean Water Act in 1972 greatly broadened this role by giving the Corps authority over dredging and filling in the "waters of the United States," including many wetlands.

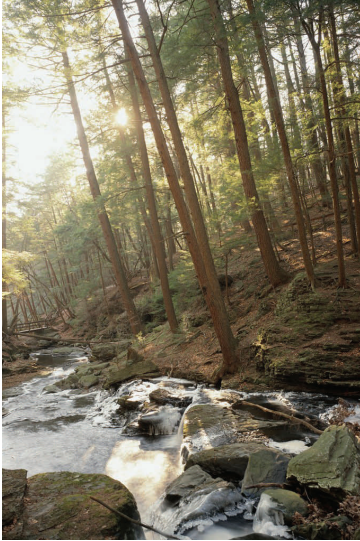
MOST COMMONLY USED LEGAL AUTHORITIES

- Section 404 of the Clean Water Act is the most commonly used authority. A permit granted under this authority is normally referred to as a "404 Action."
- Section 10 of the Rivers and Harbors Act of 1899 involves the placement of fill or structures that may affect navigation or navigable water bodies.



The Regulatory Program

Individual Permits



Individual Permits are the most complex of permits issued. They take the most time and require the most public involvement. They are most similar in their review to National Environmental Protection Act (NEPA) actions used in Civil Works Planning projects.

Although 33 CFR 325 specifies timelines for permit review and issuance, and the Office of Management & Budget has established performance measures for the Regulatory Program in this regard, the Corps must comply fully with all environmental laws, regulations and policies. The Corps relies on a professional staff of various academic and field backgrounds and has been successful in forging cooperative relationships to ease information sharing, impact assessments and implementation of mitigation activities.

General Permits & Nationwide Permits

Congress authorized the development and use of general permits (GPs) for categories of activities that are similar in nature and have no more than minimal impacts on the natural and cultural environment. GPs authorize about 80% of the almost 100,000 annual authorizations issued by the Corps.

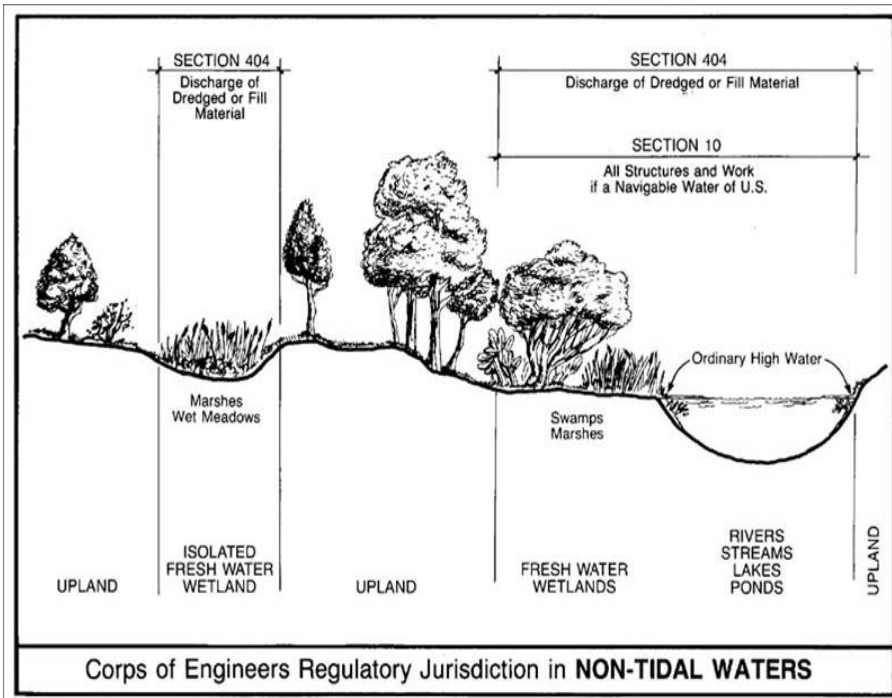
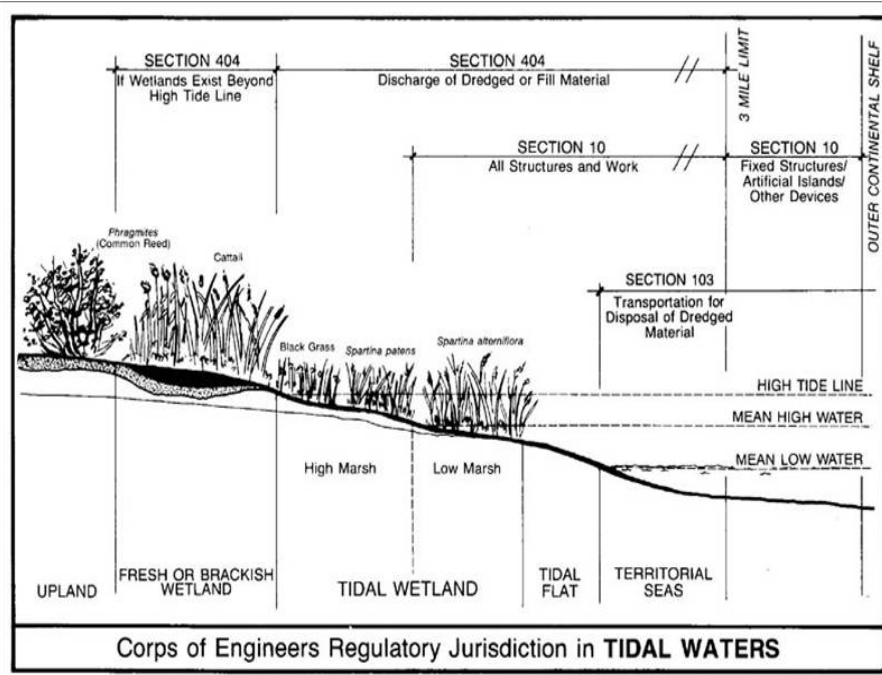
Nationwide permits (NWP) are the most common and least complex form of GP authorization. This program allows economic development activities to move forward, while meeting environmental protection requirements—conditions must be met concerning historic properties & Tribal issues before a GP can be

Key Points about the Regulatory Program

- The ca. 100,000 authorizations granted annually occur on private land or land controlled by other government agencies, providing unique environmental protection challenges since the Corps does not control the land or its resources. Projects are funded by the applicant. Regulators strive to complete permit reviews within 45 and 120 days – Program funding is based on the performance of a district's program.
- Relationships are important—Corps regulators spend up to 90% of their time interfacing with Tribal governments, stakeholders, and the general public.
- Regulatory staff can answer questions about the Program, how it interfaces with environmental statutes, and how resource protection can be achieved. Less than 1% of all permits are elevated beyond the District level due to controversy over historic properties.
- All Corps Districts have designated Tribal Liaisons, or points of contact to assist Tribal Nations. They are supported by the six USACE Tribal policy principles—sovereignty, government-to-government relationships, Trust responsibility, pre-decisional consultation, promotion of economic capacity development and protection of Trust resources whenever possible.



Regulatory Jurisdiction



The NHPA states in part:

“The historical & cultural foundations of the Nation should be preserved as a living part of our community life & development in order to give a sense of orientation to the American people.”

National Historic Preservation Act (NHPA)

Implementing Regulations – 36 C.F.R. 800

Corps Regulatory has a responsibility to comply with the National Historic Preservation Act.

Regulations for Protection Of Historic Properties (incorporating amendments effective August 5, 2004)

Subpart (b) contains the Section 106 requirements for consultation on Federal actions or ‘undertakings.’

Section 106

A Federal agency “having direct or indirect jurisdiction” over a proposed Federal undertaking shall, prior to approval of the undertaking, take into account the effect of the undertaking on any historic property “in or eligible for inclusion in the National Register.”

Federal Undertaking

“Undertaking” means a project, activity, permit, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal Agency, including...

- Those carried out by or on behalf of an agency.
- Those carried out with Federal financial assistance.
- Those requiring a Federal permit, license or approval.
- Those subject to State or local regulations administered pursuant to delegation or approval by a Federal agency.

Appendix C, 33 C.F.R. 325 – Background

The Corps drafted Appendix C in 1981 (with revisions in 1990) as the historic properties review procedure for Corps permits.

The Corps is solely responsible for the extent of the undertaking, which we define as the Project Review Area. Project Review Area is delineated both in Appendix B (NEPA Regulations) and Appendix C. Project Review Area may differ from Area of Potential Effect (APE) used in 36 CFR 800.

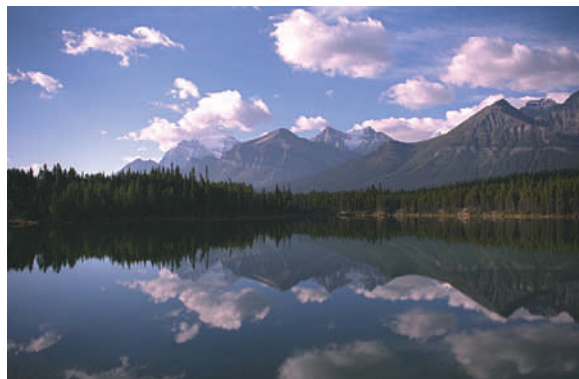


A copy of Appendix C can be found at the following website:

<http://www.usace.army.mil/cw/cecwo/reg/33cfr325.htm#appendixC>

Appendix C vs. 36 C.F.R 800

- APE vs. Project Review Area is a major point of contention & an initial step in Section 106 consultation.
- Appendix C does not have the same emphasis on consultation as 36 CFR 800. However, the Corps' Interim Guidance dated April 25, 2005 has a section on Tribal consultation to draw attention to this very important part of the process.
- Traditional Cultural Properties are included under Appendix C, but not directly.
- Appendix C does not contain all of the current definitions of 36 CFR 800.
- Appendix C does not address the issue of disposition of human remains and associated objects that may be encountered in Regulatory actions on private property.
- Appendix C does not address how to do consultation on non-reporting permits (NWPs, GPs)



The Corps clearly understands that we need to have a process that:

- Meets the intent of law under the National Historic Preservation Act.; and
- Integrates Section 106 review and Tribal issues into Regulatory actions; and
- That will accommodate about 100,000 permit applications (Federal Undertakings) per year.

The Appendix C Revision Process

1. Advance Notice of Proposed Rulemaking issued in the Federal Register September 27, 2004 with copies mailed to all Indian Tribes and Alaska Native Villages & Corporations
2. Informal coordination with ACHP was begun in 2005 and is ongoing.
3. Facilitated stakeholder meetings in November 2005 with Water Utility Users Group, National Association of Homebuilders, National Mining Association, Cultural Resource Groups (e.g. ACHP, NASHPO, NATHPO, National Trust for Historic Preservation etc.)
4. Invitation for continued Tribal involvement, Nov 2006— Present
5. Coordination & consultation meetings with Tribes, Summer—early Fall 2007
6. Public Notice of Availability of Alternative Procedures (formally known as Appendix C) late fall/early winter 2007, with comment period.
7. Publish Proposed Rule in Federal Register, 2008
8. Conduct follow-up Tribal consultation meetings, upon request.
9. Publish Final Rule – 2008, with comment period.



**Comments can
be submitted
by anyone at
anytime
throughout
this process.**



**US Army Corps
of Engineers®**

Tribal Consultation & Coordination

Points of Contact

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