



**US Army Corps
of Engineers**®
Headquarters

Corps Facts

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SUBJECT: Regulatory Program Overview

Introduction

The Department of the Army regulatory program, one of the oldest in the Federal Government, initially served only to protect and maintain the navigable capacity of the nation's waters. Changing public needs, evolving policy, and new statutory mandates have added to the program's breadth, complexity, and authority.

Program goals

The following goals were established at the Corps of Engineers 1991 national regulatory conference. The goals guide policy development, as well as daily regulatory business in the Corps' districts and divisions. Each is equally important and there is no meaning to the order in which they are listed.

- To provide strong protection of the Nation's aquatic environment, including wetlands.
- To enhance the efficiency of the Corps administration of its regulatory program.
- To ensure that the Corps provides the regulated public with fair and reasonable decisions.

Legislative Authorities

Section 10

The legislative origins of the program are the Rivers and Harbors Acts of 1890 and 1899. Various sections establish permit requirements to prevent unauthorized obstruction or alteration of any navigable water of the United States. The most frequently exercised authority is Section 10 (33 U.S.C. 403) that covers construction, excavation, or deposit of materials in, over, or under navigable waters.

Section 404

In 1972, amendments to the Federal Water Pollution Control Act added the Section 404 authority (33 U.S.C. 1344) to the program. The Secretary of the Army, acting through the Chief of Engineers, is authorized to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into waters of the United States at specified disposal sites. Selection of such sites must be in accordance with guidelines

developed by the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army. These guidelines are known as the 404(b)(1) Guidelines.

The discharge of all other pollutants into waters of the U. S. is regulated under Section 402 of the Act. The Federal Water Pollution Control Act was further amended in 1977 and given the common name of "Clean Water Act" and was again amended in 1987 to modify criminal and civil penalty provisions and to add an administrative penalty provision.

Also in 1972, with enactment of the Marine Protection, Research, and Sanctuaries Act, the Secretary of the Army, acting through the Chief of Engineers, was authorized to issue permits for the transportation of dredged material to be dumped in the ocean. This authority also carries with it the requirement of notice and opportunity for public hearing. Disposal sites for such discharges are selected in accordance with criteria developed by EPA in consultation with the Secretary of the Army.

Geographic Extent

The geographic jurisdiction of the Rivers and Harbors Act of 1899 includes all navigable waters of the United States, defined as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce." This jurisdiction extends seaward to include all ocean waters within a zone three nautical miles from the coast line (the "territorial seas"). Limited authorities extend across the outer continental shelf for artificial islands, installations and other devices. Activities requiring Section 10 permits include structures (piers, wharfs, breakwaters, bulkheads, jetties, weirs, transmission lines) and work such as dredging or disposal of dredged material, or excavation, filling, or other modifications to the navigable waters of the United States.

The Clean Water Act uses the term "navigable waters" which is defined as "waters of the United States, including the territorial seas." Thus, Section 404 jurisdiction is defined as encompassing Section 10 waters plus their tributaries and adjacent wetlands and isolated waters where the use, degradation or destruction of such waters could affect interstate or foreign commerce.

Activities requiring Section 404 permits are limited to discharges of dredged or fill materials into the waters of the United States. These discharges include disposal of dredged material in waters and fill material (e.g., rock, sand, dirt) used to change the bottom elevation of waters or to construct fast land for site development, roadways, erosion protection, etc.

The geographic scope of Section 103 of the Marine Protection Research and Sanctuaries Act of 1972 is those waters of the open seas lying seaward of the baseline from which the territorial sea is measured. Along coast lines this baseline is generally taken to be the low water line. Thus, there is jurisdiction overlap with the Clean Water Act. By interagency

agreement with EPA, the discharge of dredged material in the territorial seas is regulated under the Section 103 criteria rather than those developed for Section 404.

Delegation of Authority

Most of these permit authorities have been delegated by the Secretary of the Army to the Chief of Engineers and his authorized representatives. Those exercising these authorities are directed to evaluate the impact of the proposed work on the public interest. This delegation recognizes the decentralized nature and management philosophy of the Corps of Engineers organization. Regulatory program management and administration is focused at the district office level, with policy oversight at higher levels

The backbone of the program is the Department of the Army regulations (33 CFR 320-330) which provide the district engineer the broad policy guidance needed to administer day-to-day operation of the program. These regulations have evolved over time, changing to reflect added authorities, developing case law, and in general the concerns of the public. They are developed through formal rule making procedures.

A district engineer has the authority under Part 325.8 to make a final decision on a permit application. However, permit applicants and landowners may appeal permit denials, rejected permit conditions and jurisdiction determination (coming in the year 2000) for compliance with policy and procedural requirements.

Processing Steps

The basic form of authorization used by Corps districts is the standard individual permit. Processing involves evaluating project-specific applications in basically three steps: pre-application consultation (for major projects), formal project review, and decision making.

Pre-application consultation usually involves one or several meetings between an applicant, Corps district staff, interested resource agencies (Federal, state, or local), and sometimes the interested public. The meetings are used to discuss informally the pros and cons of proposals before applicants make irreversible commitments of resources (funds, detailed designs, etc.). The process is designed to give applicants an assessment of some of the more obvious alternatives available to accomplish the project purpose, to discuss measures for reducing the impacts of the project, and to inform them of the factors the Corps must consider in decision-making.

Once a complete application is received, the formal review process begins. Corps districts operate under what is called a project manager system, where one individual is responsible for handling an application from receipt to final decision. The project manager prepares a public notice, evaluates the impacts of the project and all comments received, negotiates necessary modifications of the project if required, and drafts or oversees drafting of appropriate documentation to support a recommended permit decision. The permit decision document includes a discussion of the environmental

impacts of the project, the findings of the public interest review process, and any special evaluation required by the type of activity.

The Corps supports a strong partnership with states in regulating water resource developments. This is achieved with joint permit processing procedures (e.g., joint public notices and hearings), programmatic general permits founded on effective state programs, transfer of the Section 404 program in non-navigable waters, joint environmental impact statements, special area management planning, and regional conditioning of nationwide permits.

Permit Decision

The Corps' public interest balancing process carries great importance to the project evaluation. The public benefits and detriments of all factors relevant to each case are carefully evaluated and balanced. Relevant factors may include conservation, economics, aesthetics, wetlands, cultural values, navigation, fish and wildlife values, water supply, water quality, and any other factors judged important to the needs and welfare of the people. The following general criteria are considered in evaluating all applications:

1. the relevant extent of public and private needs;
2. where unresolved conflicts of resource use exist, the practicability of using reasonable alternative locations and methods to accomplish project purposes; and
3. the extent and permanence of the beneficial and/or detrimental effects the proposed project may have on public and private uses to which the area is suited.

No permit is granted if the proposal is found to be contrary to the public interest.

Alternate Forms Department of Army Permits

Alternate forms of authorization are used in certain prescribed situations. Letters of permission may be used where, in the opinion of the district engineer, the proposed work would be minor, not have significant individual or cumulative impact on environmental values, and should encounter no appreciable opposition. In such situations, the proposal is coordinated with all concerned fish and wildlife agencies, and generally adjacent property owners who might be affected by the proposal, but the public at large is not notified.

Another form of authorization is the general permit. General permits cover activities the Corps has identified as being substantially similar in nature and causing only minimal individual and cumulative environmental impacts. These permits may cover activities in a limited geographic area (e.g., county or state), a particular region (e.g., group of contiguous states), or the nation. The Corps element developing such permits is that one which has geographic boundaries encompassing the particular permit. Processing such

permits closely parallels that for individual permits, with public notice, opportunity for hearing and detailed decision documentation.

A programmatic general permit is one founded on an existing state, local or other Federal agency program and designed to avoid duplication with that program. Nationwide general permits are issued by the Chief of Engineers and are published in the Federal Register and can be found on the Internet at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

Public Involvement

Public involvement plays a central role in the Corps' administration of its regulatory program. The major tools used to interact with the public are the public notice and public hearing. The public notice is the primary method of advising all interested parties of a proposed activity for which a permit is sought and of soliciting comments regarding the public interest. Public notices on proposed projects always contain a statement that anyone commenting may request a public hearing. Public hearings are held if comments raise substantial issues which cannot be resolved informally and the Corps decision-maker determines that information from such a hearing is needed to make a decision.

Any project on which an Environmental Impact Statement (EIS) will be prepared is subject to additional public involvement. Typically, a permit application requiring preparation of an EIS can involve five or more notices to the public during the review process.

Processing Times

Individual permit decisions are generally made two to three months from receipt of a complete application. In emergencies, decisions can be made in a matter of hours. Applications requiring EISs (far less than one percent) average about three years to process.

The Corps strives to reduce violations by effective publicity, an aggressive general permit program, and an efficient and fair evaluation of individual permit applications.

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