



Regulatory – Protecting the Integrity of America’s Waters

“The Regulatory Program protects the Nation’s aquatic resources while allowing necessary economic development to proceed in an effective and efficient manner. This program affects landowners, business, and individuals across the country and the President’s budget will ensure continued protection of aquatic resources and support the nation’s economy.”

– **Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works at the National Regulatory Conference, Albuquerque, N.M.**

The U.S. Army Corps of Engineers’ Regulatory Program is one of the oldest in the Federal Government. Initially it served a fairly simple, straightforward purpose: to protect and maintain the navigable capacity of the nation’s waters. Time, changing public needs, evolving policy, case law, and new statutory mandates have changed the complexion of the program, adding to its breadth, complexity, and authority. Today, USACE regulates structures and work in navigable waters of the U.S. under Sections 9 and 10 of the Rivers and Harbors Act of 1899, discharges of dredged or fill material in waters of the U.S. (including jurisdictional wetlands) under Section 404 of the Clean Water Act, and the transportation of dredged material for the purpose of ocean disposal under Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972.

Funding

The President’s fiscal year 2013 budget of \$4.731 billion for USACE includes \$205 million for the regulatory program. This request will support approximately 1,300 regulators nationwide to review approximately over 130,000 activities annually. It is estimated that the USACE regulatory program provides approval for approximately \$220 billion in economic development, including critical transportation and energy infrastructure projects that will also create jobs. The regulatory program is committed to protecting the Nation’s aquatic resources, while allowing reasonable development through fair, flexible, and balanced permit decisions. In FY 2011, USACE achieved this goal in a timely manner, by completing review of over 90 percent of the General Permit requests within 60 days of receipt of a complete application. In addition, over 70 percent of the decisions on individual permits were made with 120 days of receipt of a complete application.

The scope of waters subject to regulatory jurisdiction under the Rivers and Harbors Act is well established by regulation and case law, with little controversy over the past 25 years. Conversely, the scope of waters subject to Clean Water Act jurisdiction has been highly controversial, and in the past 25 years, there have been three U.S. Supreme Court decisions and numerous decisions by lower Federal Courts that have attempted to clarify that jurisdiction. Two Supreme Court decisions—*Solid Waste Agency of Northern Cook County (SWANCC) v. U.S.*, *Rapanos v. U.S.* and *Carrabell v. U.S.* (Rapanos)—are still being realized and require at times for USACE to undertake substantial analysis and review of water bodies prior to asserting jurisdiction and processing a permit application. In the absence of clarification on the geographic scope of jurisdiction under this court decision through guidance and/or rulemaking, USACE regulators will need to continue an intensive additional effort nationwide in FY 2013 to maintain the current level of service provided on the approximately 57,000 jurisdictional determinations issued annually.

Section 404(e) of the Clean Water Act authorizes the Secretary of the Army to issue, after notice and opportunity for public hearing, “general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” Approximately 28,000 applications in FY 2011 included work that may be authorized under one of the Nationwide Permits, a subset of General Permits. All of the Nationwide Permits are planned for re-authorization, modification, or revocation in March 2012. FY 2013 funding will be used to implement any changes within the Nationwide Permit program and continue to issue verifications in a timely manner.

For projects determined to have unavoidable impacts to waters of the U.S. after an applicant has demonstrated that impacts have been avoided and minimized to the maximum extent practicable, the Corps may require compensatory mitigation to replace lost aquatic resource function. Mitigation is frequently provided through a federally-approved compensatory mitigation bank or in-lieu-fee program. There are currently 860 approved mitigation banks and in-lieu-fee programs nationwide. FY 2013 funding will facilitate regulators taking part in the Interagency Review Team, required for the development of a new bank or program.

Program Objective

- To protect the Nation’s aquatic resources, while authorizing development through fair and balanced decisions consistent with our laws and regulations.



Key Messages

- The Regulatory Program is committed to protecting the Nation's aquatic resources, while allowing reasonable development through fair and balanced permit decisions.
- USACE is committed to the national program goal of no net loss of aquatic resources. Compensatory mitigation may be required to offset unavoidable loss of aquatic resources to obtain this goal.
- The evolution of the Regulatory Program reflects changing public needs, policy, and case law.
- Implementation of the 2012 Nationwide Permits will require additional attention and effort by USACE regulators.
- Clarification of the geographic scope of the Clean Water Act will improve processing times of jurisdictional determinations and permit applications.

Facts & Figures

- The Regulatory Program reviews approximately 80,000 permit applications and issues approximately 57,000 jurisdictional determinations annually.
- Approximately 91% of General Permit verifications were issued within 60 days of receipt of a complete application.
- Approximately 71% of Individual Permits were issued within 120 days of receipt of a complete application.
- There are approximately 860 approved mitigation banks and in-lieu-fee programs, including single client programs, authorized for mitigation of impacts associated with regulatory permits.
- For more information about USACE's Regulatory Program, visit <http://www.usace.army.mil/>