US Army Corps of Engineers ®

Detroit District

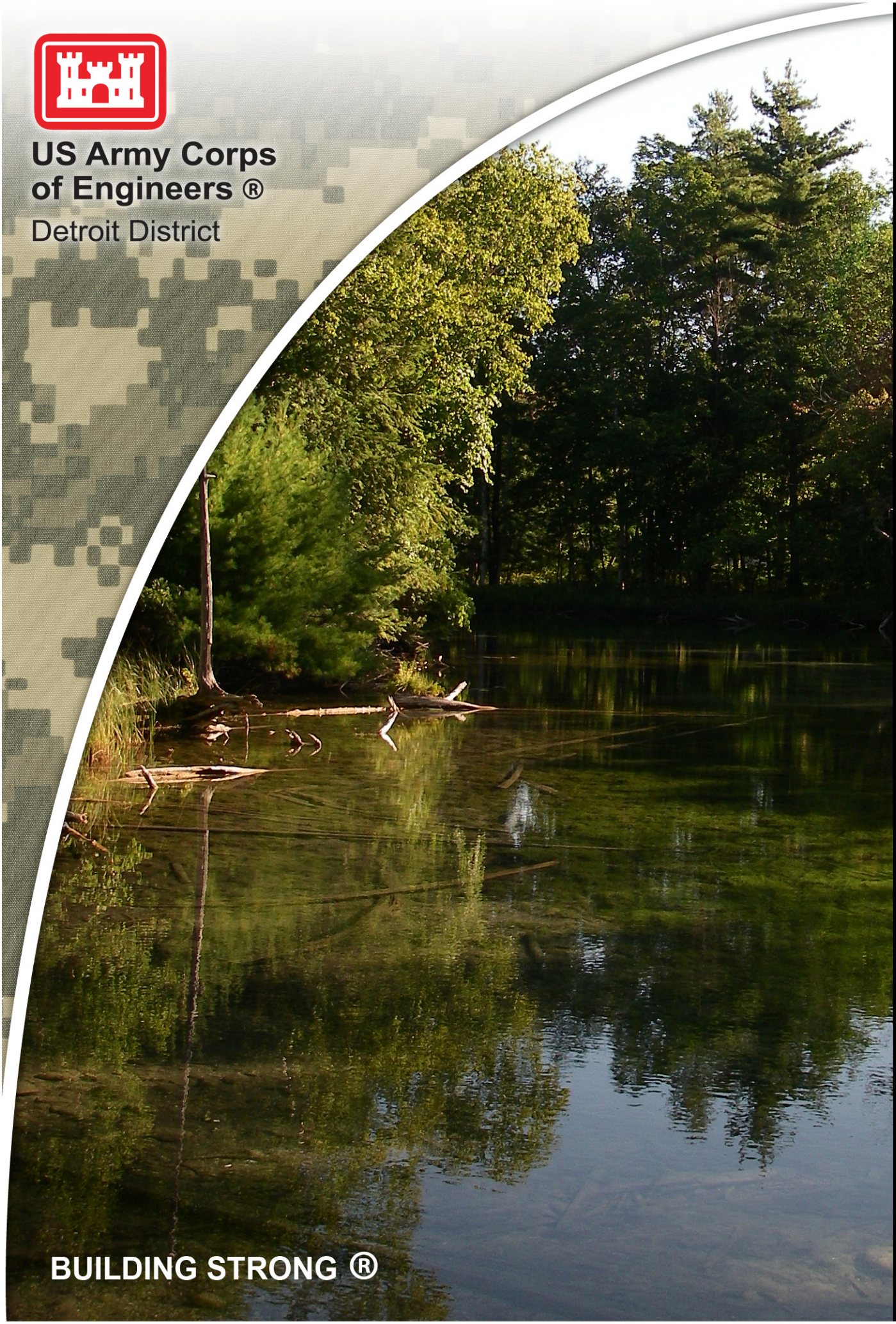

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TABLE OF CONTENTS

Sourcebook Preface

Mission Statement

Regulatory Program and Regulations
- Legislative Authorities
- Delegation of Authority
- Jurisdictional Extent

Wetland Identification
- What is a wetland?
- Why is it necessary to consider whether an area is a wetland?
- How can wetlands be recognized?
  - Vegetation Indicators
  - Soil Indicators
  - Hydrology Indicators
- What to do if your area has wetlands you propose to alter?

Permitting
- Types of Permits
  - General Permit (GP)
    - Nationwide Permit (NWP)
    - Regional/General Permits (RGP)
    - State Programmatic General Permits (PGP)
  - Individual Permit (IP)
    - Letter of Permission (LOP)
    - Standard Permit (SP)
  - No Permit Required
- Permit Processing
  - Before you apply
  - Potential Permit Delays
  - Permit Decision
    - Internal Decision Safeguards
    - External Decision Safeguards
    - External Coordination
      - Endangered Species
      - Tribal and Cultural Resources

Mitigation
- Compensatory Mitigation
  - Compensatory Mitigation Rule
  - Detroit District Mitigation Guidelines
- Mitigation Banking
- Functional Assessment

Appeals

Enforcement

LIST OF APPENDICES

Appendix A	Corps Regulations, Administrative, and Policy Materials
Appendix B	Helpful Hints for Submitting a Permit Application
Appendix C	Useful Web Links

Sourcebook Preface

This Sourcebook provides information on the Regulatory Program of the US Army Corps of Engineers, Detroit District. Its purpose is to provide the public access to all aspects of the Regulatory Program in an organized and easy to follow manner. If you cannot find the information, please call the Detroit District Regulatory Office at (800) 493-6838, and we will assist you.

The Department of the Army 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.

Mission Statement

To provide strong protection of the Nations aquatic environment. This will be accomplished through: coordination with agencies and the public; fair, reasonable, and timely decisions; accurate and timely jurisdiction determinations; monitoring, compliance and enforcement of permit laws, regulations and policies.

Regulatory Program and Regulations

The US Army Corps of Engineers' Regulatory Program encompasses many regulations, laws, and policies. Web links to specific information regarding these regulations, policies, and related laws may be found here.

1. Legislative Authorities

    a. The legislative origins of the program are the Rivers and Harbors Act of 1899 (33 U.S.C. 401, et seq.). 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 contained in Section 10 (33 U.S.C. 403) which covers construction, excavation, or deposition of materials in, over, or under such waters, or any work which would affect the course, location, condition, or capacity of those waters. The authority is granted to the Secretary of the Army. Other permit authorities in the Act are Section 9 for bridges, dams and dikes, Section 13 for refuse disposal, and Section 14 for temporary occupation of work built by the United States. Various pieces of legislation have modified these authorities, but not removed them.

    b. In 1972, amendments to the Federal Water Pollution Control Act (Clean Water Act) added what is commonly called 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 which supersedes the Section 13 of the Rivers and Harbors Act permitting authority mentioned above. 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.

2. Delegation of Authority

   a. Most of these permit authorities (with specific exception of Section 9) have been delegated by the Secretary of the Army to the Chief of Engineers and his authorized representatives. Section 10 authority was formally delegated on May 24, 1971, with Section 404 authority delegated on March 12, 1973. Those exercising these authorities are directed to evaluate the impact of the proposed work on the public interest. Other applicable factors (such as the 404(b)(1) Guidelines) must also be met. In delegating this authority, the Secretary of the Army qualified it to "...[be] subject to such conditions as I or my authorized representatives may from time to time impose."

   b. Additional clarification of this delegation is provided in the program's implementing regulations (33 CFR 320-330). Division and district engineers are authorized to issue conditioned permits (Part 325.4) and to modify, suspend, or revoke them (Part 325.7). Division and district engineers also have authority to issue alternate types of permits such as letters of permission and regional general permits (Part 325.2). In certain situations the delegated authority is limited (Part 325.8).

   c. 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.

3. Jurisdictional Extent

   a. The geographic jurisdiction of the Rivers and Harbors Act of 1899 includes all navigable waters of the United States which are defined (33 CFR Part 329) 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." Activities requiring Section 10 permits include structures (e.g., piers, 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.

b. 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.

c. Activities, requiring Section 404 permits are limited to discharges of dredged or fill materials into the waters of the United States. These discharges include return water from dredged material disposed of on the upland and generally any fill material (e.g., rock, sand, dirt) used to construct land for site development, roadways, erosion protection, etc.

Wetland Identification

1. What is a wetland?

    a. The U.S. Army Corps of Engineers (Corps) and the US Environmental Protection Agency define wetlands as follows: Those areas that are 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 are areas that generally include swamps, marshes, bogs, and similar areas. For more information please see the 1987 Wetlands Delineation Manual.

    b. Wetlands are areas that are covered by water or have waterlogged soils for long periods (14-21 days) during the growing season. Plants growing in wetlands are capable of living in saturated soil conditions for at least part of the growing season. Wetlands such as swamps and marshes are often obvious, but some wetlands are not easily recognized, often because they are dry during part of the year or "they just don't look very wet" from the roadside.

    c. Some of these wetland types include, but are not limited to, many bottomland forests, bogs, wet meadows, and potholes. Information is given here to help you determine if you have a wetland. If you intend to place dredged or fill material in a wetland or in an area that might be a wetland, contact the local Corps District Office to see if a permit is required.

2. Why is it necessary to consider whether an area is a wetland?

    a. Section 404 of the Clean Water Act requires that anyone interested in depositing dredged or fill material into "waters of the United States, including wetlands," must receive authorization for such activities. The Corps has been assigned responsibility for administering the Section 404 permitting process. Activities in wetlands for which permits may be required include, but are not limited to:
        i. Placement of fill material
        ii. Ditching activities when the excavated material is sidecast
        iii. Levee and dike construction
        iv. Mechanized land clearing
        v. Land leveling
        vi. Most road construction
        vii. Dam construction

The final determination of whether an area is a wetland and whether the activity requires a permit must be made by the Corps.

3. How can wetlands be recognized?

    a. The Corps uses three characteristics of wetlands when making wetland determinations: vegetation, soil, and hydrology. (Each characteristic will be discussed below.) Unless an area has been altered or is in a rare natural undisturbed state, wetland indicators of all three characteristics must be present during some portion of the growing season for an area to be a wetland.

    b. There are some general situations in which an area has a strong probability of being a wetland. If any of the following situations occur, you should ask the local Corps office to determine whether the area is a wetland:

        i. Area occurs in a floodplain or otherwise has low spots in which water stands at or above the soil surface during the growing season. Caution: Most wetlands lack both standing water and waterlogged soils during at least part of the growing season.

        ii. Area has plant communities that commonly occur in areas having standing water for part of the growing season (e.g., cattail marshes, bulrush, and sphagnum bogs).

        iii. Area has soils that are called peats or mucks.

    c. Many wetlands can be readily identified by the general situation stated above. For the boundary of these areas and numerous other wetlands, however, it is unclear whether these situations occur.

        i. In such cases, it is necessary to carefully examine the area for wetland indicators of the three major characteristics of wetlands: vegetation, soil, and hydrology. Wetland indicators of these characteristics, which may indicate that the area is a wetland, are described below.

        ii. Vegetation Indicators

            1. Nearly 5,000 plant types in the United States may occur in wetlands. These plants, known as hydrophytic vegetation, are listed in the National Wetland Plant List.

            2. However, you can usually determine if wetland vegetation is present by knowing a relatively few plant types that commonly occur in your area. For example, cattails, bulrushes, sphagnum moss, willows, sedges, rushes, and arrowheads, usually occur in wetlands.

            3. Other indicators of plants growing in wetlands include trees having shallow root systems, swollen trunks, or roots found

growing from the plant stem or trunk above the soil surface. Several Corps offices have published pictorial guides of representative wetland plant types.

4. For assistance determining whether the plant types in your area are those that commonly occur in wetlands, ask the local Corps District Office, a local botanist, or contact a wetland consultant for assistance.

iii. Soil Indicators

1. There are approximately 2,000 named soils in the United States that may occur in wetlands. Such soils, called hydric soils, have characteristics that indicate they were developed in conditions where soil oxygen is limited by the presence of saturated soil for long periods during the growing season. If the soil in your area is listed as hydric by the Natural Resources Conservation Service (NRCS), the area might be a wetland.

2. If the name of the soil in your area is not known, an examination of the soil can determine the presence of any hydric soil indicators, including:

    a. Soil consists predominantly of decomposed plant material (peats or mucks).

    b. Soil has a thick layer of decomposing plant material on the surface.

    c. Soil has a bluish gray or gray color below the surface, or the major color of the soil at this depth is dark (brownish black or black) and dull.

    d. Soil has the odor of rotten eggs.

    e. Soil is sandy and has a layer of decomposing plant material at the soil surface.

    f. Soil is sandy and has dark stains or dark streaks of organic material in the upper layer below the soil surface. These streaks are decomposed plant material attached to the soil particles. When soil from these streaks is rubbed between the fingers, a dark stain is left on the fingers.

iv. Hydrology Indicators

1. Wetland hydrology refers to the presence of water at or above the soil surface for a sufficient period of the year to significantly influence the plant types and soils that occur in the area. Although the most reliable evidence of wetland hydrology may be provided by gauging station or groundwater well data, such information is limited for most areas and, when available, requires analysis by trained individuals. Thus, most hydrologic indicators are those that can be observed during field inspection. Most do not reveal either the frequency, timing, or duration of flooding or the soil saturation.

2. The following indicators provide evidence of the periodic presence of flooding or soil saturation:

    a. Standing or flowing water is observed on the area during the growing season.

    b. Soil is waterlogged during the growing season.

    c. Water marks are present on trees or other erect object. Such marks indicate that water periodically covers the area to the depth shown on the objects.

    d. Drift lines, which are small piles of debris oriented in the direction of water movement through an area, are present. These often occur along contours and represent the approximate extent of flooding in an area.

    e. Debris is lodged in trees or piled against other object by water.

    f. Thin layers of sediments are deposited on leaves or other objects. Sometimes these become consolidated with small plant parts to form discernible crust on the soil surface.

4. What to do if your area has wetlands that you propose to alter?

    a. Contact the Corps Office nearest your project location. They will assist you in defining the boundary of any wetlands on your property and will provide instructions for applying for a Section 404 permit if necessary.

    b. The following PDF documents provide more information about requesting a wetland determination and conducting a wetland delineation. The amount and type of information requested by each individual Corps District may vary somewhat from that presented here. Please check with

the Corps Office nearest your project location to determine their respective requirements.

i. Request for a Jurisdictional Determination
ii. 1987 Wetland Delineation Manual (On-line Edition)
iii. Detroit District Regional Supplement Map
iv. Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Midwest Region
v. Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region

Permitting

The Corps regulatory program permit evaluation process results in permit decisions that balance the need for proposed development with protection of the nation's aquatic environment. The level of the Corps evaluation is commensurate with the level of the environmental impacts and the aquatic functions and values involved in the particular area being impacted. Impacts to higher ecological value areas will be subject to a much more detailed evaluation and a strong focus on avoidance of impacts to the aquatic environment.

All permit decisions made by the Corps follow an evaluation process that involves avoiding, minimizing and compensating for unavoidable losses of aquatic functions and values. Impacts to the aquatic environment are first avoided to the maximum extent practicable by evaluating alternative sites and alternative project configurations onsite. Once avoidance has been maximized, direct and indirect impacts on the aquatic environment are minimized to the extent practicable by actions such as seeding new fill with vegetation, providing vegetative buffers and minimizing shading impacts to aquatic resources. Finally, unavoidable adverse effects on the aquatic environment are fully offset by compensatory mitigation on a functional basis. The Corps evaluates and mitigates direct, indirect and cumulative impacts through its decision process. This evaluation process that is involved in every permit decision is a result of implementation of the Corps public interest review and compliance with requirements of the National Environmental Policy Act (NEPA) necessary to take a Federal action using an environmental assessment followed by a finding of no significant impact, rather than an Environmental Impact Statement.

All permit decisions are also subject to various other Federal laws that are involved when there is a Federal action. The Federal action in the case of the Corps regulatory program is the evaluation and decision on a permit application. Important among those other Federal laws for the Corps regulatory program are compliance with the Endangered Species Act and the National Historic Preservation Act. Compliance with each of these authorities often results in additional restrictions on the proposed work and compensatory mitigation for impacts to the resources protected by these Federal laws.

Many of the permits issued by the Corps are subject to Section 404 of the Clean Water Act. The Corps evaluation, in addition to that described above involves a determination by the Corps that the proposed discharge of dredged or fill material complies with the Section 404(b)(1) Guidelines. These technical guidelines focus on evaluation of alternatives to the action, compliance with other Federal laws, significant degradation of the aquatic environment and ensuring that all appropriate and practicable compensatory mitigation is required for unavoidable impacts to the aquatic environment. The Corps ensures there will be no significant degradation of the aquatic environment by offsetting all unavoidable impacts to the aquatic environment, on a functional basis by requiring compensatory mitigation.

1. Types of Permits

   a. General Permit (GP)

      The General Permit program broadly refers to the Nationwide Permit (NWP), Regional General Permit (RGP) and Programmatic General Permit (PGP). The term "general permit" means a Department of the Army authorization that is issued on a nationwide or regional (District-wide or more limited geographic scope) basis for a category of activities when: those activities are substantially similar in nature and cause only minimal individual and cumulative impacts. General permits are a way to reduce the burden of the regulatory program on the public and ensure timely issuance of permits while effectively administering the laws and regulations which establish and govern the program. Processing time usually takes 30 to 60 days.

      General permits are reviewed every five years. An assessment of the cumulative impacts of work authorized under the general permit is performed at that time if it is in the public interest to do so. In most instances, anyone complying with the conditions of the general permit can receive project specific authorization. Anyone not complying with the terms and conditions of a general permit may still receive authorization via an individual permit letter of permission or standard permit. Detailed information regarding the requirements and process for obtaining an individual permit is documented in the appropriate sections below.

      i. Nationwide Permit – (NWP)

         An integral part of the Corps' regulatory program is the concept of nationwide permits for minor activities. Nationwide permits (NWPs) are activity specific, and are designed to relieve some of the administrative burdens associated with permit processing for both the applicant and the Federal government. In the Detroit District, (LRE) all activities authorized by NWPs require pre-construction notification to the District Engineer before commencing with the work. This notification requirement to the District Engineer is necessary to ensure that activities authorized by these NWPs have minimal individual and cumulative adverse impacts on the aquatic environment. Nationwide permits authorize a category of activities throughout the United States and are valid for an individual project only if the conditions of the appropriate permit type are met. In addition to the NWP general conditions, Division Engineers are authorized to add regional conditions specific to the needs and/or requirements of a particular region or State. Regional conditions are an important mechanism to ensure that impacts to the aquatic environment authorized by the NWPs are minimal, both individually and cumulatively. After a review of the project, the Corps issues a verification letter pursuant to the applicable Nationwide Permit(s). NWPs can only be authorized for a five-year period, at which time

they must be re-evaluated for their impacts on the aquatic environment. The current NWPs became effective on March 19, 2012. The 2012 Final Documents for 2012 Nationwide Permits are located on the Nationwide Permit Information page of USACE Regulatory Program Site. You may access the Federal Register Web Site for the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents.

The following is a list of the Nationwide Permits

1. Aids to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys
11. Temporary Recreational Structures
12. Utility Line Activities
13. Bank Stabilization
14. Linear Transportation Projects
15. U.S. Coast Guard Approved Bridges
16. Return Water From Upland Contained Disposal Areas
17. Hydropower Projects
18. Minor Discharges
19. Minor Dredging
20. Oil Spill Cleanup
21. Surface Coal Mining Operations
22. Removal of Vessels
23. Approved Categorical Exclusions
24. Indian Tribe or State Administered Section 404 Programs
25. Structural Discharges
26. [Reserved]
27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
28. Modifications of Existing Marinas
29. Residential Developments
30. Moist Soil Management for Wildlife
31. Maintenance of Existing Flood Control Facilities
32. Completed Enforcement Actions
33. Temporary Construction, Access, and Dewatering
34. Cranberry Production Activities
35. Maintenance Dredging of Existing Basins
36. Boat Ramps

37. Emergency Watershed Protection and Rehabilitation
38. Cleanup of Hazardous and Toxic Waste
39. Commercial and Institutional Developments
40. Agricultural Activities
41. Reshaping Existing Drainage Ditches
42. Recreational Facilities
43. Stormwater Management Facilities
44. Mining Activities
45. Repair of Uplands Damaged by Discrete Events
46. Discharges in Ditches
47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs
48. Existing Commercial Shellfish Aquaculture Activities
49. Coal Remining Activities
50. Underground Coal Mining Activities

The following Nationwide Permits have been suspended in Indiana and replaced by the Regional General Permit (RGP)

1. Outfall Structures and Associated Intake Structures
2. Temporary Recreational Structures
3. Bank Stabilization
4. Linear Transportation Projects
5. U.S. Coast Guard Approved Bridges
6. Minor Discharges
7. Minor Dredging
8. Structural Discharges
9. Residential Developments
10. Boat Ramps
11. Commercial and Institutional Developments
12. Agricultural Activities
13. Reshaping Existing Drainage Ditches
14. Recreational Facilities
15. Stormwater Management Facilities
16. Mining Activities

The links below provide additional information relative to Nationwide Permits in the State of Michigan and Indiana.

Michigan

- Public Notice and Regional Conditions Applicable to all NWPs in Michigan
- 2012 Nationwide Permit - Regional Conditions Decision Documents

Indiana

- Public Notice and Regional Conditions Applicable to all NWPs in Indiana
- IDEM Section 401 decision for the Nationwide Permits
- IDEM notification form for certain activities under the Nationwide Permits

ii. Regional General Permit (RGP)

Regional General Permits are specific to the Detroit District for waters and wetlands of Michigan and Indiana, and the associated conditions are established by the District. RGPs are issued by the Detroit District Engineer for a general category of activities when the activities are similar in nature and cause minimal environmental impact, both individually and cumulatively. All activities authorized by RGPs require pre-construction notification to the District Engineer before commencing with the work, except under limited circumstances in Indiana. This notification requirement allows the District to review the proposed work and verify that it involves minimal individual and cumulative adverse impacts, and that it qualifies for authorization under the RGP. After a review of the project, the Corps issues a verification letter pursuant to the applicable Regional Permit(s). RGPs can only be authorized for a five-year period, at which time they must be re-evaluated for their impacts on the aquatic environment. The current Michigan and Indiana RGPs became effective on May 25, 2012 and December 15, 2009 respectively.

The following is a list of the Michigan Regional Permits

A. Docks – Permanent and Seasonal
B. Spring Piles/Pile Clusters
C. Marine Railways
D. Seawalls and Backfill
E. Public Beach Grooming
F. Individual Dredging
G. Boat Hoists
H. Boat Wells
I. Maintenance and/or Expansion of Existing Boat Ramps
J. Groins
K. Submerged Utility Line Crossings
L. Water Intake for Single Family Residences
M. Temporary Cofferdams and Caissons
N. Mechanical Control of Aquatic Plants and Removal of Floating Mats of Aquatic Vegetation for Navigation Access
O. Removal of Structures

P. Boat Well Fill
Q. Aeration Systems
R. Mooring Whips
S. Leveling of Sand
T. Grooming of Sand
U. Sand Paths
V. Boardwalks
W. Annual Dredging
X. Riprap/Revetment

The following is a list of the Indiana Regional Permits

1. New Construction Activities
2. Agriculture and Mining Activities

The links below provide additional information relative to Regional Permits in the State of Michigan and Indiana.

Michigan
Michigan Regional Permits

Indiana
Indiana Regional Permits
IDEM Section 401 decision for the Regional Permit
IDEM notification form for certain activities under the Regional Permit

iii. State Programmatic General Permits (PGP)

In Indiana, the Detroit District, U.S. Army Corps of Engineers (Corps) has issued a State Programmatic General Permit (PGP) for certain construction activities in waters of the United States. The PGP affords the District with a means to authorize activities of a minor nature through an abbreviated review process that relies on existing permit review procedures by the Indiana Department of Natural Resources (IDNR). When performed under the limitations and conditions provided in the link below, these activities will cause only a minimal adverse environmental impact when performed separately, and will only have a minimal adverse cumulative effect on the environment. These activities are similar in nature, as they will conform to the specific categories identified in the link below, and to the glossary of terms provided in the link.

Indiana Programmatic General Permit
IDEM Section 401 Decision for the PGP

b. Individual Permit (IP)

i. Letter of Permission (LOP)

The term "letter of permission" means a type of individual permit issued in accordance with the abbreviated procedures of 33 CFR 325.2(e).

33 CFR 325.2(e)(1) reads as follows:

e. Alternative procedures. Division and district engineers are authorized to use alternative procedures as follows:

1. Letters of permission. Letters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation, but without the publishing of an individual public notice. Letters of permission may be used:

v. In those cases subject to Section 10 of the Rivers and Harbors Act of 1899 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition.

vi. In those cases subject to section 404 of the Clean Water Act after:

1. The district engineer, through consultation with Federal and state fish and wildlife agencies, the Regional Administrator, Environmental Protection Agency, the state water quality certifying agency, and, if appropriate, the state Coastal Zone Management Agency, develops a list of categories of activities proposed for authorization under LOP procedures;

2. The district engineer issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public hearing; and

3. *A 401 certification has been issued or waived and, if appropriate, CZM consistency concurrence obtained or presumed either on a generic or individual basis.*

The Letter of Permission (LOP) evaluation includes a 15-day comment period with State and Federal agencies and the adjacent property owners. A final decision on the permit application is usually reached within 120 days from the date a complete application is received by the Corps' office. The criteria for Section 10 LOPs in the Detroit District and the various addenda to the criteria are linked below. At this time the Detroit District does not implement a section 404 LOP.

ii. Standard Permit (SP)

A standard permit is required if the proposed project does not meet the criteria of a general permit or letter of permission (LOP), normally due to more than minimal impacts associated with the proposed work. Standard permits typically have a 21-day public notice comment period, though it can be as short as 15 days or up to 30 days. This notice is used to solicit the views of a variety of individuals, agencies and organizations. An Environmental Assessment (EA) is also required, ensuring each application is analyzed using a thorough, consistent and unbiased method. The EA assists the project manager in balancing the public interest factors and the benefits and detriments of the project. Both the public notice and EA facilitate minimization of the project's impact on the environment by identifying the least damaging practicable alternative for the proposed work. Processing time for a standard permit is usually 60 to 120 days from the receipt of a complete application in non-controversial projects. Controversial or larger projects may take longer. A $10 fee for private ownership projects and $100 fee for commercial projects is required prior to final action on standard permits.

c. No Permit Required

Department of the Army permit applications reviewed and determined by the U.S. Army Corps of Engineers that no permit is required are subject to the following:

i. The project as proposed will not require a Department of the Army permit in accordance with Section 10 of the Rivers and Harbors Act of 1899 as it is not located within navigable waters of the United States. Furthermore, a permit will not be required in accordance with Section 404 of the Clean Water Act as it will not involve the discharge of dredged or fill material into waters of the United

States. Providing the work is done in accordance with the drawings provided to this office, Department of the Army authorization is not required.

ii. This determination does not obviate the requirement to obtain any other Federal, State, or local permits which may be necessary for your project.

iii. This review does not constitute a Federal evaluation of possible impacts to species protected under the Endangered Species Act. Projects that have the potential to impact Federally listed species should contact the U.S. Fish and Wildlife Service.

iv. This review does not constitute a Federal evaluation of possible impacts to historic resources protected under Section 106 of the Natural Historic Preservation Act. Projects that have the potential to impact historic sites should contact the State Historic Preservation Officer in their respective states.

v. The proposed work may be subject to local building restrictions mandated by the National Flood Insurance Program. You should contact your local office that issues building permits to determine if your site is located in a flood-prone or floodway area, and if you must comply with the local building requirements mandated by the National Flood Insurance Program.

vi. This determination is valid for a period of 5 years from the date of this letter unless new information warrants a revision of the determination before the expiration date. Any reliance upon this determination beyond the expiration date may lead to possible violation of current Federal laws and/or regulations.

1. Permit Processing

a. Before you apply

i. You are encouraged to contact the local Corps of Engineers field office in your area prior to submitting a permit application. In certain cases a pre-application consultation (meeting) is beneficial. A pre-application consultation usually involves one or more meetings between an applicant, Corps district staff, interested resource agencies (Federal, state, or local), and sometimes the interested public. The purpose of these meetings is to facilitate informal discussions about the proposal before an applicant makes commitments of resources (funds, detailed designs, etc.). The process is designed to provide the applicant with an assessment of the viability 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 him of the factors the Corps must consider in its decision making process.

ii. By discussing the work prior to submitting an application, your application can be processed more efficiently.

b. Complete Permit Application (see link in comment)
   i. See Appendix A
   ii. Link to Avatar
c. Potential Permit Delays

   i. Once a permit application is deemed to be complete common delays include: endangered species consultation, tribal consultation, cultural resource or historic property consultation, changes in the proposed project, and/or substantial public opposition.

d. Permit Decision ***<u>No permit is granted if the proposal is found to be contrary to the public interest.</u>***

   i. Of great importance to the project evaluation is the Corps public interest balancing process. 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

   ii. 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.

   iii. Internal Decision Safeguards

      1. The permit evaluation process contains many safeguards designed to ensure objectivity in the evaluation process. Even before an application is formally submitted, such safeguards come into play, for example, in the pre-application consultation stage. *<u>Probably the single biggest safeguard of the program is the Corps public interest review, which also forms the main framework for overall evaluation</u>*

of the project. This review requires the careful weighing of all public interest factors relevant to each particular case. Thus, one specific factor (e.g., economic benefits) cannot by itself force a specific decision, but rather the decision represents the net effect of balancing all factors, many of which are frequently in conflict.

2. The public interest review is used to evaluate applications under all authorities administered by the Corps. There are additional evaluation criteria used for specific authorities. For example, applications for fill in waters of the United States are also evaluated using, the Section 404(b)(1) Guidelines developed by EPA in conjunction with the Department of the Army. These guidelines are heavily weighted towards preventing environmental degradation of waters of the United States and so place additional constraints on Section 404 discharges. Although required for permit issuance, compliance with these authority specific criteria is only a part of the public interest review. Therefore, projects which comply with the criteria may still be denied a permit if they are found to be contrary to the overall public interest.

iv. External Decision Safeguards

2. The above safeguards are basically internal standards or procedures with which projects are evaluated. There are also a series of external safeguards which work to maintain objectivity. One is EPA's Section 404 or so called "veto" authority. EPA may prohibit or withdraw the specifications of any disposal site if the EPA Administrator determines that discharges into the site will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. This authority also carries with it the requirement for notice and opportunity for public hearing. EPA may invoke this authority at any time. An application need not be pending.

3. Section 404(q) of the Clean Water Act requires the Department of the Army to enter into interagency agreements to minimize duplication, needless paperwork, and delays in the Section 404 permit process. Current agreements allow EPA and the Department of Commerce and the Interior to request higher level review within the Department of the Army when they disagree with a permit decision which is about to be made by the district engineer. Higher level review can only be requested when certain criteria are met and must be conducted within time limits specified in the agreements. These criteria are insufficient

coordination at the district level, development of significant new information, or the need for policy level review of nationally important issues. Honoring such requests is at the discretion of the Assistant Secretary of the Army for Civil Works.

4. Individual state permitting and water quality certification requirements provide an additional form of objective safeguard to the Corps regulatory program. Section 401 of the Clean Water Act requires state certification or waiver of certification prior to issuance of a Section 404 permit.

5. Section 307 of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1458(c)), requires the applicant certify that the project is in compliance with an approved State Coastal Zone Management Program and that the state concur with the applicants certification prior to the issuance of a Corps permit. The Corps' standard permit form contains a statement notifying the permittee that the Federal permit does not remove any requirement for state or local permits. This has the effect of making the Corps' permit unusable without these additional authorizations. If the state or local permit is denied before the Corps has made its decision, the Corps permit is also denied.

v. External Coordination

1. Endangered Species

i. The Corps is required to evaluate the potential impacts of a proposed action on any Federally listed threatened or endangered species or its designated critical habitat. These evaluations often require coordination with US Fish and Wildlife Service and/or NOAA Fisheries pursuant to Section 7 of the Endangered Species Act.

ii. Additional Information for Endangered Species
   1. US Fish and Wildlife Service (FWS)
   2. FWS Endangered Species Program

2. Tribal and Cultural Resources

iii. Michigan State Historic Preservation Office
iv. Indiana Division of Historic Preservation and Archaeology
v. National Register of Historic Places
vi. Tribal Affairs and Initiatives

vii. National Parks Service Cultural Resource Information
viii. Center for Cultural Site Preservation Technology
ix. 2005 Interim Section 106 Guidance
x. 2007 Interim Section 106 Guidance
xi. Policy Guidance Letter #57, Indian Sovereignty and Government-to-Government Relations with Indian Tribes
xii. Department of Defense Indian and Alaskan Native Policy

Mitigation

Mitigating the environmental impacts of development actions on the Nation's wetlands and other aquatic resources is a central premise of Federal wetlands programs. The Clean Water Act (CWA) Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable damage to wetlands and other aquatic resources through, for example, the restoration or creation of wetlands. Mitigation for wetland impacts may take place on-site, off-site, in mitigation banks, or be funded by in-lieu fees. Mitigation may include creation, enhancement or restoration of wetlands and their functions or, in some cases, may include preservation of wetlands and associated upland buffers.

Under the "Swampbuster" provisions of the Food Security Act (FSA), farmers are required to provide mitigation to offset certain conversions of wetlands for agricultural purposes in order to maintain their program eligibility.

1. Compensatory Mitigation

    a. Compensatory Mitigation Rule

        i. Final Compensatory Mitigation Rule

        ii. Regulatory Guidance Letter 08-03 Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Restoration, Establishment, and/or Enhancement of Aquatic Resources

        iii. Questions & Answers

    b. Detroit District Mitigation Guidelines: District Mitigation Guidelines - December 2008

    c. The Corps of Engineers permit regulations, at 33 CFR 325.4, stipulate that special conditions may be added to permits in order to satisfy public

interest concerns and/or legal requirements, such as compliance with the Clean Water Act 404(b)(1) Guidelines. If a proposed permit action would result in impacts to wetlands, these special conditions often include provisions requiring the permittee to compensate for the expected impact. This compensation is commonly referred to as compensatory mitigation. It may also be referred to simply as mitigation, although strictly speaking, it is only one of three forms of mitigation. The first two forms, avoidance and minimization are typically addressed through alternative siting and/or modifications to the project design. For most standard permits (i.e., those that require issuance of a public notice), and in particular those subject to regulation under the Clean Water Act, avoidance and minimization of impacts to aquatic resources, including wetlands, must be addressed prior to considering compensatory mitigation. Compensatory mitigation, therefore, is only utilized to offset impacts which are otherwise unavoidable. The process of incorporating all appropriate and practicable measures to avoid, minimize, and finally compensate for impacts to aquatic resources caused by permit actions is referred to as sequencing.

d. The Corps of Engineers' mitigation policy relative to projects authorized under Section 404 of the Clean Water Act is explained in a Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army, which was signed on February 6, 1990. The memorandum establishes that: "The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions." Compensatory mitigation for wetland impacts may be accomplished in several ways. The most common forms of mitigation are projects which result in the restoration, enhancement or creation of wetlands. In exceptional circumstances, compensatory mitigation may also be accomplished through the preservation of unique and valuable wetlands which are under demonstrable threat of destruction. In general, the memorandum establishes a preference for onsite mitigation at or in the immediate vicinity of the wetland impact site and for in-kind replacement using wetlands which are similar to those which would be impacted. These preferences may be overridden, however, if onsite and in-kind mitigation is not available, not practicable or if another mitigation option is environmentally preferable. Compensatory mitigation for wetland impacts should, to the extent practicable, result in a minimum of one-to-one functional

2. Mitigation Banking

a. Mitigation banking has been defined as wetland restoration, creation, enhancement, and in exceptional circumstances, preservation undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when such compensation cannot be achieved at the development site or would not be as environmentally beneficial. It typically involves the consolidation of small, fragmented,

wetland mitigation projects into one large contiguous site. Units of restored, created, enhanced or preserved wetlands are expressed as "credits" which may subsequently be withdrawn to offset "debits" incurred at a project development site.

There are currently no mitigation banks within the Detroit District, however, for additional information on mitigation banks, see the following links:

Indiana Interagency Wetland Banking Agreement

Additional information pertaining to mitigation banks may be available at the Regional Internet Bank Information Tracking System (RIBITS).

3. Functional Assessment

   a. Consistent with the Corps' regulations at 33 CFR Part 332, concerning compensatory mitigation for aquatic resource impacts, one objective is to provide a minimum one-to-one functional replacement for wetland loss. To do this, the functions of a wetland can be identified and evaluated through a numeric functional assessment methodology. While the Corps neither prescribes nor prohibits any specific numeric functional assessment, the Corps desires to be responsive to the needs of the public by accepting the same methodology required by state and local levels, when appropriate.

Appeals

Procedures for appealing Corps permitting decisions are found at 33 CFR Part 331. The following paragraph briefly summarizes the permit appeal process

The Corps of Engineers has an administrative appeal process whereby applicants and landowners may appeal denied permits, issued permits that contain requirements that are unacceptable to the applicant, or approved jurisdictional determinations. Although these decisions are made by Corps District offices, requests for appeals of such decisions are appealed to the Corps Division offices. Requests for appeal must be furnished to the Division office within 60 days of the date of the appealable decision. A site visit or an appeal conference or meeting may be conducted during the appeal process. A decision on the merits of the appeal based on the administrative record is normally made in 90 days. The Division will either uphold the District decision or send the case back to the District, with direction to re-examine the administrative record and address the reasons for appeal that were found to have merit..

Enforcement

1. Procedures for enforcing Corps permitting authorities are found at 33 CFR Part 326. The following paragraphs briefly summarize those procedures.

    a. Inspection and surveillance activities are carried out by all means at the district engineer's disposal. Corps of Engineers' employees are instructed on the observation and reporting of suspected unauthorized activities in waters of the United States and of violations of issued permits. The assistance of members of the public and other interested Federal, State, and local agencies is encouraged.

    b. When the district engineer becomes aware of any unauthorized activity still in progress, he or she may first issue a cease and desist order and then begin an investigation of the activity to ascertain facts concerning alleged violations. If the unauthorized activity has been completed he or she will advise the responsible party of this discovery and begin an investigation. Following his or her evaluation, the district engineer may formulate recommendations on the appropriate administrative course or legal action to be taken.

    c. The district engineer's evaluation contains an initial determination of whether any significant adverse impacts are occurring which would require expeditious corrective measures to protect life, property, or a significant public resource. Once that determination is made, such remedial measures can be administratively ordered and a decision can be made on whether legal action is necessary. In certain cases, district engineers, following the issuance of a cease and desist order, coordinate with state and Federal resource agencies in deciding what action is appropriate. Further evaluation of the violation takes into consideration voluntary compliance with a request for remedial action. A permit may or may not be required for restoration or other remedial action.

    d. For those cases that do not require legal action and for which complete restoration has not been ordered, the Department of the Army may accept applications for after-the-fact (ATF) permits. The full public interest review is deferred during the early stages of the enforcement process. A complete public interest review is conducted only if and when the district engineer accepts an application for an ATF permit. Part of the requirement for the acceptance of an ATF permit application is the submittal of a signed tolling agreement from the interested party or parties. The tolling agreement tolls or suspends the statute of limitations for taking action against unauthorized work during the ATF permit evaluation process and any subsequent appeals process. Under our regulations the Corps does not have to accept an ATF permit request for unauthorized activities if an applicant refuses to enter into a tolling agreement.

    e. The laws that serve as the basis for the Corps regulatory program contain several enforcement provisions which provide for criminal, civil, and

administrative penalties. While the Corps is solely responsible for the initiation of appropriate legal actions pursuant to enforcement provisions relating to its Section 10 authority, the responsibility for implementing those enforcement provisions relating to Section 404 is jointly shared by the Corps and EPA. For this reason the Army has signed a Section 404 enforcement Memorandum of Agreement (MOA) with EPA to ensure that the most efficient use is made of available Federal resources. Pursuant to this MOA, the Corps generally assumes responsibility for enforcement actions with the exception of those relating to certain specified violations involving unauthorized activities.

f. If a legal action is instituted against the person responsible for an unauthorized activity, an application for an after-the-fact permit cannot be accepted until final disposition of all judicial proceedings, including payment of all fees as well as completion of all work ordered by the court.

g. Annually, about 6,000 alleged violations are processed in Corps' District Regulatory Offices nationwide. The approximate breakdown by authority is:

Section 10 only ≈ 15%
Section 404 only ≈ 60%
Section 10 and 404 ≈ 25%

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

Appendix A

Corps Regulations, Administrative, and Policy Materials

Corps of Engineers Statutory Authorities

- Rivers and Harbors Act of 1899 - Sec. 9
- Rivers and Harbors Act of 1899 - Sec.10
- Clean Water Act - Section 404

U.S. Army Corps of Engineers Regulatory Program Regulations
(33 CFR 320-332)

- 33 CFR Part 320 - General Regulatory Policies
- 33 CFR Part 321 - Permits for Dams & Dikes in Navigable Waters of the U.S.
- 33 CFR Part 322 - Permits for Structures in or Affecting Navigable Waters of the U.S.
- 33 CFR Part 323 - Permits for Discharges of Dredged or Fill Material Into Waters of the U.S.
- 33 CFR Part 325 - Processing of Department of the Army Permits
- 33 CFR Part 326 - Enforcement
- 33 CFR Part 327 - Public Hearing
- 33 CFR Part 328 - Definition of Waters of the United States
- 33 CFR Part 329 - Definition of Navigable Waters
- 33 CFR Part 330 - Nationwide Permit Program
- 33 CFR Part 331 - Administrative Appeal Process
- 33 CFR Part 332 - Compensatory Mitigation for Losses of Aquatic Resources
- 33 CFR Part 334 - Danger Zone and Restricted Area Regulations
- Further Revisions to the Clean Water Act Regulatory Definition of Dredged Material - January 17, 2001
- Final Revisions to the Clean Water Act Definitions of Fill Material and Discharge of Fill Material - May 9, 2002

Related Regulations

- 40 CFR Part 230 - Section 404(b)(1) Guidelines
- 40 CFR Part 22 - Administrative Assessment of Civil Penalties & the Revocation or Suspension of Permits
- 40 CFR Part 233 - State Program Regulations
- 40 CFR Part 233G - Tribal Regulations
- 40 CFR Part 1500 – National Environmental Policy Act
- 36 CFR Part 800-899 - Advisory Council on Historic Preservation
- 50 CFR Parts 400-499 - Endangered Species Regulations

Related Laws

- Native American Graves Protection and Repatriation Act
- Clean Water Act - Section 401

- Clean Water Act - Section 402
- Coastal Zone Management Act of 1972
- Endangered Species Act
- National Environmental Policy Act
- National Historic Preservation Act
- Wild & Scenic Rivers Act
- Fish and Wildlife Coordination Act

Selected Related Code of Federal Regulations

- Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits - USEPA, 40 CFR Part 22
- Section 404(b)(1) Guidelines - USEPA, 40 CFR Part 230
- USEPA, State Program Regulations - 40 CFR Part 233
- Council on Environmental Quality - 40 CFR 1500 et seq
- Advisory Council on Historic Preservation - 36 CFR 800-899
- Endangered Species Regulations 50 CFR 400-499

Corps of Engineers Administrative Materials

- Memoranda of Understanding and Agreement (MOU/MOAs)
- Current Regulatory Guidance Letters

Presidential Directives and Executive Orders

- Executive Order 11990 - Protection of Wetlands
- Executive Order 11988 - Floodplain Management
- Presidential Wetland Policy 1993
- Reaffirmation of the Presidential Wetland Policy 1995
- White House Hotlink

Enforcement

- Enforcement MOA
- Joint MOA Letter - January 1989
- Modification to January 1989 MOA Letter - Feb 1994
- EPA/Corps Enforcement Priorities Guidance - Dec 1990
- Corps/EPA Enforcement Procedures (Flowchart)

Other Guidance

- USEPA's Wetlands Silviculture Site Preparation Guidance & Resolution of Silviculture Issues
- CEQ's Considering Cumulative Effects Under the National Environmental Policy Act

Administrative Appeals

- Current Appeals
- 33 CFR Part 331 - Administrative Appeals Process
- Establishment of an Administrative Appeal Process - March 9, 1999 - *Federal Register Notice*
- Final Rule Establishing an Administrative Appeal Process - March 28, 2000 - *Federal Register Notice*

Appendix B

Helpful Hints for Submitting a Permit Application

This area is available to assist individuals in identifying and acquiring permits for projects affecting waters of The United States under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Hopefully, this information will minimize not only the time, effort, and expense needed to accomplish projects, but will also help to lessen any adverse impact a project may have on the aquatic environment.

If you have questions about the extent of wetlands on your site, please contact your local field office to arrange for a wetland jurisdictional determination or a site review. This will allow you to plan your project to avoid and minimize impacts to wetlands where possible. Pre-application meetings or a phone call to your local field office may be necessary or helpful to determine the extent of the project and what measures might need to be taken into consideration during your project design.

Please provide clear drawings. Do not clutter the drawings with extraneous information. A simple drawing which clearly shows the project is easier to copy and will be more readable by the time a permit decision is finally reached. Remember, these drawings must be copied for publication in the Public Notice.

It is very important that you provide complete information and details of the project. The following information is required for review by the Corps:

- Name, address, and phone number of applicant.
- Complete description of the proposed project, including the purpose, type and quantity of material to be discharged.
- All related activities. Is this a multiphase project? Have additional permits been applied for or received?
- A list of all adjacent property owners and their addresses.
- The project location. This should be clearly marked on a road map and a description of the directions should be included. In addition to the map and directions, you should submit the Section, Township and Range and the latitude and longitude of the site, if known.
- Has the application been signed and dated?
- And be sure to include a full set of drawings to scale on 8.5 inch by 11 inch format of existing and proposed conditions. These should include plan view and cross section view drawings.

After the application is received in the District office, it will be assigned an identification number and be reviewed for completeness. You will be notified via post card or email once a project manager is assigned to your file. A request for additional information may be sent to notify you of any additional information which may be necessary for the Corps to review your proposed project. Then within 15 days of receiving all the required information, a public notice will be issued with a 15 to 30 day comment period. The

proposal is then reviewed by the Corps, local, state and Federal agencies, special interest groups and the general public.

After the comment period, the Corps will review all of the comments and consult with the other federal agencies where appropriate. The Corps may ask for additional information at this time and a public hearing may be conducted if one has been specifically requested and a decision has been made that there is a need.

The project manager evaluates the impacts of the project and all comments received, negotiates necessary modifications of the project if required, and drafts 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 such as compliance determinations with the Section 404(b)(1) Guidelines.

When all considerations are satisfied, the District Engineer will make a decision to either issue or deny the permit application. If a denial is warranted, you will receive a written explanation of the reason for denial.

Fees are required for any issued individual permit and consist of $10.00 for individual, non-commercial projects, $100.00 for commercial projects, and no fee for government agencies.

The Corps makes every effort possible to process Individual Permit applications within 120 days of the date a complete application is submitted. In some cases, such as controversial projects or projects dealing with endangered species concerns, the processing time may be greater than 120 days.

Permits can be issued with special conditions. When a Standard Permit or Letter of Permission (LOP) is issued, a Completion Report is included. When the authorized activity and or mitigation is completed, the permittee is required to fill out the form and mail it to the Compliance and Enforcement Branch. This is a special condition attached to all IPs and LOPs and assists our Enforcement Branch with permit compliance.

If you need additional information concerning the permit process, please contact your local Regulatory field office.

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 EISs, special area management planning, and regional conditioning of nationwide permits.

Appendix C

Useful Web Links

Permit Applications

Jurisdictional Determination Request Form

Detroit District Mitigation Guidelines

Wetlands Delineation Manual
- Midwest Regional Supplement
- Northcentral and Northeast Regional Supplement

Detroit District Regulatory Boundary Map & Office Contact Information