What You Need To Know About Section 404 Permits

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Agenda Items

• Corps of Engineers Permit Authorities
• Jurisdiction
• How is Jurisdiction Determined?
• Types of Permits
• What Goes in the Application and Why?
• What is Involved in Evaluating the Permit Application?
• Statement of Findings and Permit Decision
Corps Permit Authorities

- Rivers and Harbors Act of 1899 – “Section 10”
- Clean Water Act – “Section 404”
- Marine Protection, Research & Sanctuaries Act of 1972
  - “Section 103” [Ocean Disposal]

The National Environmental Policy Act – procedural law with which all federal agencies must comply…not a Corps permit authority, but rather a federal obligation the Corps must meet
Section 10 of the Rivers and Harbors Act of 1899

prohibits the unauthorized obstruction or alteration of any navigable water of the United States unless you receive a permit from the Corps of Engineers.

Obstruction or alteration includes:

- construction of any structure in or over any navigable water of the United States,
- excavation of dredge, or deposition of, fill material,
- the accomplishment of any other work affecting the course, location, condition, or capacity of such waters,
Navigable Waters of the United States

Navigable waters of the United States are 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 for use to transport interstate or foreign commerce.
Navigable Waters of the United States

Charleston Harbor  Atlantic Intracoastal Waterway

Inland Rivers  Atlantic Ocean
Activities regulated under Section 10 of the Rivers and Harbors Act
Rivers and Harbors Act – Section 10 Jurisdiction

Dredging

Beach Nourishment

Excavation

Private Docks
Rivers and Harbors Act – Section 10 Jurisdiction

- Shipping Terminal
- Construction of Bulkheads
- Shoreline Protection
- Marinas
Rivers and Harbors Act – Section 10 Jurisdiction

Overhead Powerlines

Why are overhead lines regulated?
Clean Water Act – Section 404

...is delegated to the Corps by USEPA, and...

authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. (See 33 CFR Part 323.)
Waters of the United States

- All **Navigable** Waters of the U.S.;
- All **interstate** waters including interstate wetlands;
- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect the integrity of interstate or foreign commerce including any such waters:
  - Which are or could be used by interstate or foreign travelers for recreational or other purposes; or from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or,
  - Which are used or could be used for industrial purpose by industries in interstate commerce.

Continued…
Waters of the United States - continued

• All impoundments of waters otherwise defined as waters of the United States under the definition;
• Tributaries of waters;
• The territorial seas;
• Wetlands adjacent to waters (other than waters that are themselves wetlands);

Exceptions:
• Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA are not waters of the United States.
• Waters of the United States do not include prior converted cropland.
Waters of the United States
All Navigable Waters
Streams are Waters of the United States
Wetlands

Clean Water Act jurisdiction over wetlands is probably the most contentious category of Waters of the U. S.

Why would this be the case??

Because this is the category of Waters that most property owners cannot clearly appreciate as potentially affecting the integrity of oceans, lakes, and rivers that are more clearly linked to navigation and commerce...

...and because this category is the most often involved with requests to place fill material related to construction.
Activities regulated under Section 404 of the Clean Water Act
Is Mechanized Landclearing a Regulated Activity??

The Corps does not regulate landclearing, however…

…when mechanized landclearing is performed in such a manner that it results in the deposition of dredge or fill material in a water of the U. S., then a permit is required…not because of the activity, but because of the dredge or fill.

Clearing in jurisdictional wetlands can be accomplished without resulting in placement of dredge or fill material.
How Does the Corps Determine Jurisdiction?

Generally, directly from the Regulation 33 CFR 328.3, which is drafted from the Clean Water Act itself.

Confidence relative to Corps jurisdiction is greatest with the category *navigable waters*.

Importantly, recent court decisions have specified the extent to which the other categories of waters are considered jurisdictional.

Corps regulators recognize waters of the United States by features and characteristics that develop due to the presence of water...
How Does the Corps Determine Jurisdiction?

Streams are recognized by bed and bank features as well as ordinary high water marks that develop in response to water and flow.

Wetlands are recognized by the combined presence of three parameters: hydrology, hydric soils, and hydrophytic vegetation.

The process of recognizing and delineating the boundary of a wetland is described in the 1987 Corps of Engineers Wetland Delineation Manual, as well as regional supplements to help identify hydric soils more accurately.

At a property owner request, the Corps will issue a letter clearly indicating the jurisdictional waters of the U. S. on the property.
The basis of Clean Water Act jurisdiction over waters that are NOT navigable is that these waters affect the downstream navigable waters in any (or all) of three ways:

Physical integrity – (sediments, flow duration, velocity, volume)
Chemical integrity – (pollutants, nutrients)
Biological integrity – (food web support, migration)
What About Waters That Do Not Affect the Integrity of Downstream Navigable Waters?

Wetlands or waters with NO physical, chemical, or biological connection to downstream navigable waters are known as “Isolated Waters”.

A 1997 decision in the Wilson Case ruled that isolated wetlands were not jurisdictional in the 4th Circuit. [4th Circuit = MD, VA, WV, NC, SC]

In 2001, the Solid Waste Agency of Northern Cook County (Illinois), known as SWANCC, ruled that isolated wetlands are not jurisdictional nationwide.
What About Waters That Do Not Affect the Integrity of Downstream Navigable Waters?

What about wetlands or waters WITH a physical, chemical, or biological connection to downstream navigable waters…

…but where the connection (or nexus) is not substantial enough to actually affect the integrity of navigable waters?

These wetlands or waters will not be jurisdictional under the Clean Water Act, per the 2006 Supreme Court decision known as the Rapanos/Carabell decision.
Jurisdictional Waters of the U.S. Affect the Integrity of Navigable Waters

The Rapanos Guidance established categories of waters and wetlands based on their relative permanence and significance of their connection (nexus) to downstream navigable waters.

- TNWs – Traditionally Navigable Waters
- RPWs – Relatively Permanent Waters
  - Perennial and Seasonal Streams
- non-RPWs – Non-Relatively Permanent Waters
  - less than seasonal streams (intermittent flow)
- wetlands adjacent to the above categories
Waters of the U.S. include:

- TNWs, including territorial seas
- Wetlands adjacent to TNWs
- RPWs that flow directly or indirectly into TNWs
- Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
- Non-RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
- Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

Jurisdictional by definition

Significant Nexus Determination required
The Permit Process

In a nutshell:

To identify and permit the least environmentally damaging project alternative that meets the project purpose.
Types of Permits

- Individual Permit (Standard Permits)
- Letters of Permission
- General Permits
  - Regional Permits
  - Nationwide Permits
  - Programmatic Permits
General Permits

- Regional Permits
- Nationwide Permits
NATIONWIDE PERMITS

These are permits issued to the General Public for specific types of activities that the Corps has determined will not result in more than minor impact to the nation’s waters…

…when designed and constructed to meet the numerous national, regional, and even specific conditions which may apply.
NATIONWIDE PERMITS

There are currently 50 Nationwide Permits issued, for activities ranging from placing culverts for road crossings to placing rip rap for shoreline protection, as well as placement of minor amounts of fill for commercial or residential construction.

Many Nationwides can be used to authorize a project without even notifying the Corps, while others require pre-construction notification and an authorization letter from the Corps.

Nationwide authorization is generally issued within 45 days.
REGIONAL GENERAL PERMITS

Are issued by individual Corps Districts to various entities to permit specific types of routine minor activities.

Like Nationwide Permits, these Regional GPs are heavily conditioned to encourage project designers to minimize impacts to Waters of the U.S…while still streamlining and speeding the permit process for the applicant and reducing the workload of the Corps.
Examples of Regional General Permits

• **2005-14-001** – SC Office of Ocean and Coastal Resource Management – certain activities in the Critical Area of the Coastal Zone

• **2005-14-002** – SC Department of Transportation – certain activities performed by SCDOT associated with replacement of existing roads.

• **2007-14-001** – SC Electric and Gas – certain activities on Lake Murray

• **2007-14-002** - SC Public Service Authority – certain activities on Lakes Marion and Moultrie

Individual Permits
The Permit Process Involves:

- Related Laws (in addition to Corps authorities)
- Public Interest Review
- 404 (b)(1) Guidelines
- National Environmental Policy Act
Related Laws

- Coastal Zone Management Act
- Section 401 of the Clean Water Act
- National Historic Preservation Act of 1966
- Endangered Species Act of 1973
- Fish & Wildlife Act of 1956
- Migratory Marine Game-Fish Act
- Fish & Wildlife Coordination Act
- Clean Air Act
- Resource Conservation & Recovery Act of 1976
- Comprehensive Environmental Response Compensation and Liability Act of 1980
- Essential Fish Habitat
PUBLIC INTEREST REVIEW FACTORS

- conservation
- economics
- aesthetics
- general environmental concerns
- wetlands
- historic properties
- fish and wildlife values
- flood hazards
- floodplain values
- land use
- navigation
- shore erosion and accretion

- recreation
- water supply
- and conservation
- water quality
- energy needs
- safety
- food and fiber production
- mineral needs
- considerations of property ownership
- and, in general, the needs and welfare of the people
404(b)(1) Guidelines

No discharge of fill material shall be permitted if ….

- there is a *practicable* alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem,

- it violates *State water quality or toxic effluent standards*; jeopardizes the continued existence of an *endangered or threatened* species; or violates the protection of any *marine sanctuary*

- it will *cause or contribute to significant degradation of the waters of the United States*.

- appropriate and practicable steps have not been taken which will *minimize potential adverse impacts on the aquatic ecosystem*. 
The National Environmental Policy Act of 1969
(“NEPA” P.L. 91-190; 42 U.S.C. 4321)

Encourages and facilitates *public involvement* in decisions which affect the quality of the human environment.

Requires agencies to identify and assess the *reasonable* alternatives to proposed actions that will avoid or minimize adverse effects upon the quality of the human environment.

Requires agencies to avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.
PERMIT PROCESS FLOW CHART

(see handout)
Application Submitted to USACE

Pre-application meeting is encouraged for many projects
Determining if an Individual Permit is Required

Wouldn’t it be nice if we could help identify an applicable NWP?
Corps sends a postcard indicating the application was received
Review of Application for Completeness

Completeness includes an application form, adjacent property owners list, legible drawings...
APPLICATION COMPLETENESS

For Public Notice purposes:

• Application form
• Adjacent property owners address list
• Project description
• Legible drawings (size, color, detail)
Commence Parallel and Simultaneous State Permit/Certification Process

Public Notice Prepared and Published

(Adjacent property owners notified)

State Permit/Certification Process
Commence Public Interest Review

15 – 30 Day Comment Period
PUBLIC INTEREST REVIEW FACTORS

- conservation
- economics
- aesthetics
- general environmental concerns
- wetlands
- historic properties
- fish and wildlife values
- flood hazards
- floodplain values
- land use
- navigation
- shore erosion and accretion
- recreation
- water supply
- and conservation
- water quality
- energy needs
- safety
- food and fiber production
- mineral needs
- considerations of property ownership
- and, in general, the needs and welfare of the people
Requests for public hearing; public interest factors; ESA; Historic Properties; EFH; 404(b)(1); NEPA; 404(q); Jurisdiction; Mitigation; flood plain; navigation, etc.
Decision Making Process

- Public Interest Factors
- Cumulative Impacts
- Secondary Impacts
- Compliance with the Endangered Species Act
- Compliance with the National Historic Preservation Act
Decision Making Process - continued

- Magnuson-Stevens Fishery Conservation Management Act *(Essential Fish Habitat)*
- Compliance with all applicable Memoranda of Agreement
- Impacts to Federal Projects
- Any special requirements (artificial reefs, powerlines, etc)
- Navigation
- Clean Air Act Conformity
Decision Making Process - continued

- Compliance with the 404(b)(1) Guidelines including (but not limited to):
  - Alternatives
  - Avoidance
  - Minimization
  - Mitigation
  - Sediment Quality

- Compliance with NEPA
404(b)(1) GUIDELINES

Water Dependency must be determined by the Corps based on the applicant’s project description and plans.

Projects which do not require siting in waters of the U.S. to achieve their purpose must address the “rebuttable presumption”…

…that an upland alternative exists which will involve less wetland impacts. This is the central premise of the alternatives analysis concept– to identify the…

least environmentally damaging project alternative.
Coordination of Comments, Concerns and Objections

(sent to applicant to address)
Surveys; MOA's; Mitigation Plans; Studies; Alternatives Analysis; Resolution of Concerns, etc.

**Coordination of Meetings, Studies, Responses and Revisions**
Preparation of Decision Document

Not Contrary to Public Interest; EA (FONSI); 404(b)(1) Guidelines; Special Conditions

Permit Conditions
Decision Document

- Statement of Findings
- Environmental Assessment
- FONSI
- 404(b)(1) Compliance Documentation
- Must address all other pertinent laws and regulations
Recommendation of issuance/denial to District Engineer
WEB SITES

US Army Corps of Engineers

Headquarters - Regulatory Program:
www.usace.army.mil

Charleston District – Regulatory Program
www.sac.usace.army.mil