

# Overview of the Regulatory Program

## INTRODUCTION

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.

## LEGISLATIVE AUTHORITIES

The legislative origins of the program are the Rivers and Harbors Acts of 1890 (superseded) and 1899 (33 U.S.C. 401, et seq.).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 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.

In 1972, amendments to the Federal Water Pollution Control 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 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.

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 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." 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 (see 43 U.S.C. 333 (e)). Activities requiring Section 10 permits include structures (e.g., 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 (Section 502(7)) 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 return water from dredged material disposed of on the upland and generally any fill material (e.g., rock, sand, dirt) used 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 (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 and 103 authorities 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 and ocean dumping criteria) must also be met, of course. 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."

Additional clarification of this delegation is provided in the program's implementing regulations (33 CFR 320-331). 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).

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 320-331) 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.

If a district engineer has the authority under Part 325.8 to make a final decision on a permit application and he makes that decision in accordance with the procedures and authorities contained in the regulations, there is no formal administrative appeal of that decision.

## **PROCESSING STEPS**

The basic form of authorization used by Corps districts is the individual permit. Processing such permits involves evaluation of individual, project specific applications in what can be considered 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 basic purpose of such meetings is to provide for informal discussions about the pros and cons of a proposal before an applicant makes irreversible 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.

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 such as compliance determinations with the [Section 404\(b\)\(1\) Guidelines](#) or the ocean dumping criteria.

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.

## **PERMIT DECISION**

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
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**

There are alternate forms of authorization 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. The public interest balancing process is again central to the decision making process on letters of permission. Another form of authorization is the general permit. General permits are not normally developed for an individual applicant, but 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 of the county (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 through the Federal Register rulemaking process. Nationwide general permits are found at 33 CFR Part 330, Appendix A.

## **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 and information necessary to evaluate the probable beneficial and detrimental impacts on 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. Public notices are used to announce hearings. The public is also informed by notice on a monthly basis of permit decisions.

Any project on which an Environmental Impact Statement (EIS) will be prepared is subject to additional public involvement. The preparation of EISs is governed by regulations implementing the [National Environmental Policy Act](#) (NEPA). The first stage of EIS development is the scoping process which is the means by which substantive issues are identified for further study in the EIS. The NEPA scoping process begins with the publication of a Notice of Intent to prepare an EIS. The scoping process itself often involves actual face-to-face participation of the interested public. The availability of the draft EIS is announced through public notice. It is the notice which is intended to solicit comments not only on the NEPA

document but substantive comments on the proposal itself. Again, with these complex projects, the public may request a public hearing. Sometimes the Corps decision maker will independently decide to hold a public hearing and announcement of it will be incorporated into the notice of availability of the NEPA document. The public is also informed through notice of the availability of the final EIS, any EIS supplement, and the availability of the decision maker's record of decision. Thus, a permit application requiring preparation of an EIS can involve five or more notices to the public during the review process.

## **INTERNAL DECISION SAFEGUARDS**

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. Probably the single biggest safeguard of the program is the Corps public interest review, which also forms the main framework for overall evaluation 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.

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. Likewise, ocean dumping permits (Section 103) are evaluated using special criteria developed by EPA in consultation with Army. These criteria are also primarily aimed at preventing environmental degradation and set up some very stringent tests which must be passed before a Section 103 permit can be granted. 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.

## **EXTERNAL DECISION SAFEGUARDS**

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.

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.

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.

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.

In addition to these requirements, the Corps' implementing regulations require that district engineers conduct additional evaluations on applications with potential for having an effect on a variety of special interests (e.g., Indian reservation lands, historic properties, endangered species, and wild and scenic rivers).

Another form of external safeguard, of course, is legal challenge of a permit decision. As mentioned earlier, there is no mechanism in the program's regulations for formal administrative appeal nor is there a legal requirement to conduct a formal adjudicatory hearing. However, any member of the public, may challenge, in court, a Corps decision to issue or deny a permit. Generally, such a challenge alleges failure to comply with procedural requirements, such as NEPA documentation, the 404(b)(1) Guidelines, or the procedures in the Corps permit regulations.

## **PROCESSING TIMES**

On average, individual permit decisions are made within 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.

## **ENFORCEMENT**

Procedures for enforcing Corps permitting authorities are found at [33 CFR Part 326](#). The following paragraphs briefly summarize those procedures.

Inspection and surveillance activities are carried out by all means at the district engineer 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.

When the district engineer becomes aware of any unauthorized activity still in progress, he must 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 will advise the responsible party of his discovery and begin an investigation. Following his evaluation, the district engineers may formulate recommendations on the appropriate administrative course or legal action to be taken.

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 is not required for restoration or other remedial action.

For those cases that do not require legal action and for which complete restoration has not been ordered, the Department of the Army will accept applications for after-the-fact 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 after-the-fact permit.

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 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.

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.

Presently about 5,500 alleged violations are processed in Corps district offices each year. The approximate breakdown by authority is: Section 10, 10 percent; Section 404, 75 percent; and Section 10/404, 15 percent.

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