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A Guide to the Dredge or Fill Permit Program



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I.A. Purpose of This Guide

This guide describes the Dredge or Fill Program under Section 404 of the Clean Water Act (Federal Water Pollution Control Act, as amended, 33 U.S.C. §1344). Section 404 regulates the discharge of dredged or fill materials into the waters of the United States, including wetlands adjacent to such waters (see Chapter II, Definitions). The program is administered by both the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE), which has primary responsibility for the permit program. Under amendments contained in the Clean Water Act of 1977 (CWA), EPA is authorized to oversee transfer of specified parts of the program to interested States with eligible State-level programs. (Authority not transferred to the States in this way remains with the COE.)

The purpose of this guide is to present an overview of the program. A description of the history, scope, and general requirements of Section 404, of the operation of the COE permit program, and of the mechanisms for transfer and operations of State-level programs are followed by a guide to effective citizen involvement in the entire process.

Whether you are seeking a permit under Section 404, attempting to establish a 404 program in your State, or merely interested in learning more about the program, this guide can provide you with most of the basic information you'll need to achieve your goal.

I.B. Functions and Values of Wetlands and Aquatic Ecosystems

The purpose of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the waters of the United States. These waters are valuable for navigation, commerce, recreation, habitat, and breeding and spawning areas for many species of fish and wildlife, and, of course, as a source of water and food for much of the Nation's population. Wetlands form a particularly sensitive and important segment of these ecosystems, and therefore merit special attention.

Until recently, wetlands had generally been thought of as wastelands, inhabited primarily by mosquitoes and other pests. As a result, about one-third of our Nation's wetlands have been destroyed in the last 70 years, and in many States the loss exceeds 50 percent. Agriculture, residential and commercial development, landfills and garbage dumps have commonly replaced the Nation's wetlands.

Over the past two decades, the valuable functions of wetlands and aquatic ecosystems have come to be recognized by the public. Wetlands, estuaries, and open waters provide habitat and breeding, spawning, and nursery grounds for various aquatic and terrestrial organisms, most notably waterfowl, shellfish, and fish. Wetlands are highly productive of nutrients, certain agricultural and silvicultural products, and gravel, peat, and other mineral products. The ability of wetlands to store and gradually release water can abate much erosion and flood damage. Water purification and, in some cases, groundwater recharge are other services wetlands perform. In addition, aesthetic, recreational, scientific, and educational values are furthered by these natural aquatic areas.

While general public concern for wetland preservation has grown, private development pressures have also increased. Property adjacent to open space or water is desirable for residential and recreational development. Wetlands are often cheap, flat, and available even in largely developed population centers. They may provide developers the opportunity to build higher priced waterfront residences.

In addition to residential and commercial development pressures, wetlands are often subjected to: (1) drainage for silviculture, mosquito control, or by farmers seeking to expand their agricultural production; (2) destruction for flood and erosion control; (3) dredging to maintain navigation; (4) excavation of sand, gravel, and other mineral resources; and (5) use as landfills, junk yards, and dumps for industrial and residential wastes. Upland activities may also affect wetlands and aquatic ecosystems, by reducing water quantity and quality, increasing runoff and sediment load, affecting the chemical content of the water, and altering temperature regimes.

Although different types of activities will affect different types of ecosystems to varying degrees, very often the loss of an aquatic ecosystem means the loss of a free service provided by that ecosystem to the public. Thus, for example, development of a wetland which stored flood waters may result in the need for structural flood control, at significant public expense. Wise use of wetlands and water bodies can provide the public with necessary and valuable services at minimal cost.

I.C. Section 404 as a Mechanism for Wetland and Aquatic Ecosystem Management

The direct disposal of dredged or fill material in wetlands or aquatic ecosystems may destroy or modify habitats, increase suspended

sediment loads and bottom sedimentation, and alter hydrologic regimes. The general ecosystem also may suffer reduction in species diversity, standing crop, and productivity. Effects vary according to the type of wetland as well as the project characteristics -- the activities and the volume and type of material involved.

The Section 404 program requires that such adverse impacts be evaluated before discharging dredged or fill material into waters of the United States. In addition to the COE's public interest review conducted prior to issuing 404 permits, environmental and social factors, necessity, and the existence of alternative sites must be considered. In this way the loss to the public resulting from damage to an aquatic ecosystem must be considered along with the public benefits of a project.

Similarly, a State 404 program would screen projects involving discharges of dredged or fill material according to environmental and other, State-specific standards. Besides protecting wetlands and aquatic ecosystems within their borders, these States could include regulation of wetlands use in their general planning for growth and development.

II. OVERVIEW OF THE DREDGE OR FILL PROGRAM

II.A. Historical Overview

The Army Corps of Engineers has been responsible for protecting the navigable waters of the United States since enactment of the River and Harbor Act in 1899. Under that Act many activities, including dredging, required COE permits if they were to be conducted in waters usable for interstate or foreign commerce. While maintenance and enhancement of navigation were the focus of the River and Harbor Act, in 1968 the COE expanded its permit review criteria to include fish and wildlife, conservation, pollution, aesthetics, ecology, and other public interest factors.

This public interest review reflected growing national awareness of the need to protect the aquatic environment and the enactment of related Federal legislation, such as the Fish and Wildlife Coordination Act. At the same time, the COE was expanding its definition of navigable waters to include all presently, historically, and reasonably potential navigable waters and all waters subject to the ebb and flow of the tide, up to mean high water (mean higher high water on the Pacific Coast) in tidal waters and up to ordinary high water in freshwater areas.

In 1972, amendments to the Federal Water Pollution Control Act of 1948 were enacted. Section 404 of the Amendments established a permit program regulating the discharge of dredged or fill material into waters of the United States. Permit approval must comply with guidelines developed under Section 404(b)(1) by the EPA in conjunction with the COE. These guidelines, 40 Code of Federal Regulations Part 230, were published in 40 Federal Register 41291 (September 5, 1975) and are currently being revised.

The COE may override the guidelines if navigation or anchorage requires. Nevertheless, EPA may prohibit or restrict any discharges of dredged or fill material after public notice, opportunity for public hearing, and consultation with the COE, if such discharges might have an unacceptable adverse effect on a municipal water supply, wildlife, recreation areas, or shellfish beds and fishery areas, including spawning and breeding grounds.

It was not until 1975, that the full extent of the Section 404 program was realized. In that year, the COE's already expanded definition of navigable waters was held by a court to be inconsistent with the definition contained in the 1972 Amendments (NRDC v. Callaway). The court ordered the COE to regulate all of the waters of the United

States, in compliance with the perceived legislative intent to protect the integrity of the entire aquatic system.

The COE issued regulations fully covering its new jurisdiction in three phases. Phase I included all waters previously regulated by the COE plus all wetlands adjacent to those waters. Phase II included primary tributaries to Phase I waters and lakes with a surface area greater than five acres, plus adjacent wetlands. Phase III included all waters of the United States (see Chapter II, Definitions). These regulations, 33 CFR Part 323, were published in 42 FR 37121 (July 19, 1977).

This expansion of Section 404's jurisdiction gave rise to issues of much concern in Congress. Some States feared this apparent intrusion by the Federal Government into the traditional province of State and local authority regarding land use; others felt that the Federal program would duplicate State activities. As a result, several amendments to Section 404 were included in the December 1977 Amendments to the Federal Water Pollution Control Act, now known as the Clean Water Act.

II.B. Current Scope of the Program

Section 404 currently provides for the regulation of discharges of dredged or fill material into all waters of the United States. Standards for environmental protection, found in the guidelines, govern both the COE and State permit programs. Under the 1977 Amendments to the Clean Water Act EPA must approve and oversee the operation of State Section 404 programs. The COE retains jurisdiction of Phase I waters, and regulates all waters of the United States in the absence of an approved State program.

Major roles are also played by the U.S. Fish and Wildlife Service and by the National Marine Fisheries Service. Both agencies review and comment on permit applications and provide technical assistance to protect fish and wildlife resources and mitigate project impacts. The 1977 Amendments particularly emphasized review and comment and technical assistance to the States by the Fish and Wildlife Service, primarily through the National Wetlands Inventory.

Under Section 404(f), certain discharges are exempt from regulation as not being major sources of water pollution. These activities include:

1. Normal farming, silviculture, and ranching practices;

2. Maintenance of existing serviceable structures, such as dikes, dams, riprap, bridge abutments, and transportation structures;
3. Construction or maintenance of farm or stock ponds and irrigation ditches, and maintenance of drainage ditches;
4. Temporary sedimentation basins or construction sites, if no fill material will be placed into navigable waters;
5. Construction or maintenance of farm or forest or temporary mining roads, where best management practices are applied; and
6. Activities conducted under an approved State Section 208(b) (4) (B) program.

The last of these exemptions, activities under an approved 208(b) (4) program, requires EPA approval and oversight. The 1977 Amendments provide that certain classes of activities or discharges may be excluded from regulation under Section 404, provided:

1. The State is administering an approved Section 404 permit program;
2. EPA has approved a Statewide program under Section 208(b) (4) (B); and
3. EPA has approved the best management practices applicable to these activities, and they comply with the Section 404 environmental guidelines.

These exemptions do not alter responsibility to comply with effluent standards or prohibitions under Section 307. Nor do they apply when the proposed activity will develop a new use for a water body, either impairing its flow or reducing its reach.

Another limitation to the scope of Section 404 is the 404(r) exemption for discharges associated with the construction of certain Federal projects. For the exemption to apply, an environmental impact statement discussing the effects of the discharge and considering the Section 404 guidelines must be prepared and submitted to Congress prior to both the discharge and Congressional authorization of funds for the project. Again, standards regarding toxic pollutants under Section 307 still must be met.

While some types of discharges are exempt from regulation under the statute, others may be exempted by the COE under Section 404(b) (2).

This provision allows the COE, on a case by case basis, to permit activities which would not be acceptable under the guidelines, on a case by case basis, if the interests of navigation so require. This exemption and all other permitting activities are nevertheless subject to EPA's authority to prohibit or restrict the use of any aquatic system as a disposal site. Areas where discharges are restricted may be predesignated, even before such a discharge is proposed, or may be designated in response to a permit application. Regulations under Section 404(c) are in 40 CFR Part 231, proposed in 44 FR 14578 (March 13, 1979).

Procedures for approving State programs and operating the COE and State permit programs will be discussed at greater length in Chapters III and IV of this guide.

II.C. Definitions

Adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by manmade dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."

Approved program means a State program approved by EPA. An "approved State" is one administering an "approved program."

Best Management Practices (BMP's) means methods, measures, practices, or design and performance standards to prevent or reduce the pollution of waters of the United States. BMP's include but are not limited to schedules of activities, prohibitions of practices, and maintenance procedures. BMP's developed by State Section 404 agencies must insure compliance with (1) the Section 404 environmental guidelines; (2) effluent limitations and prohibitions under Section 307(a); and (3) water quality standards.

Discharge of dredged material means any addition of dredged material into waters of the United States. The term includes, without limitation, the addition of dredged material into waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the subsequent onshore processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term. They are subject to Section 402 of the Clean Water Act even though the extraction and deposit of such material may also require a permit from the Corps of Engineers.

Discharge of fill material means the addition of fill material into waters of the United States. The term generally includes the following activities: (1) placement of fill that is necessary for the construction of any structure; (2) the building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction; (3) site-development fills for recreational, industrial, commercial, residential, and other uses; (4) causeways or road fills; (5) dams and dikes; (6) artificial islands; (7) property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; (8) beach nourishment; (9) levees; (10) fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and (11) artificial reefs.

Disposal site means that portion of U.S. waters enclosed within fixed boundaries and consisting of a water surface area (when present), a volume of water (when present), and a substrate area. In the case of wetlands on which water is not present, the disposal site consists of the wetlands surface area. Fixed boundaries may consist of fixed geographic point(s) and associated dimensions, or of a discharge point and specific associated dimensions.

Dredged material means material that is excavated or dredged from waters of the United States.

Fill material means any material used primarily either to replace water with dry land or to change the bottom elevation of a water body. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of CWA. The Director, in consultation with the Section 402 permitting authority, will determine the primary purpose of proposed activities.

General permit means either a State or a Corps of Engineers Section 404 permit authorizing discharges of dredged or fill material from clearly described categories of activities that are similar in nature, will cause only minimal adverse environmental effects when performed separately, and result in minimal cumulative adverse effects on the environment. These Section 404 permits are issued on a local, State, regional, or nationwide basis.

Nationwide permit means a Department of the Army authorization for certain discharges of dredged or fill material into waters throughout the Nation.

Navigable waters means waters of the United States, including the territorial seas. This term includes (together with their tributaries and adjacent wetlands):

1. All waters which are currently used, were used in the past, or may be used in interstate or foreign commerce, including those subject to the tide;
2. Interstate waters, including interstate wetlands;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds whose use could affect interstate or foreign commerce. These include waters used by interstate or foreign travelers for recreational or other purposes; waters fished for interstate or foreign commerce; and waters used for industrial purposes in interstate commerce.
4. All impoundments of waters otherwise defined as navigable waters.

Treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds meeting the criteria of this definition) are not waters of the United States.

(For purposes of clarity the term "waters of the United States" is primarily used through the regulations rather than "navigable water.")

Permit means a control document issued by EPA, COE, or an approved State that complies with all legal requirements and procedures.

Phase I waters means navigable waters of the United States and adjacent wetlands.

Phase II waters means navigable waters of the United States and their primary tributaries, including adjacent wetlands and natural lakes greater than five acres in surface area.

Phase III waters means all waters of the United States.

Regional Administrator means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or his delegated representative.

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, or the Trust Territory of the Pacific Islands.

State regulated waters means those waters over which the Corps of Engineers relinquishes permitting authority to State's approved Section 404 permit program. These waters shall be identified in the Memorandum of Agreement between the State and the Secretary of the Army.

Section 404(g) (1) requires that the Secretary retain jurisdiction over the following waters:

1. Waters subject to the ebb and flow of the tide;
2. Waters which may be used transport interstate or foreign commerce shoreward to their ordinary high water mark; and
3. Wetlands adjacent to waters in 1 and 2.

Waters of the United States means:

1. The territorial seas with respect to the discharge of dredged or fill material.
2. Coastal and inland waters, lakes, rivers, and streams that are navigable waters including adjacent wetlands;
3. Tributaries to navigable waters including adjacent wetlands;
4. Interstate waters and their tributaries, including adjacent wetlands; and
5. All other waters of the United States not identified in paragraphs 1-4, which could affect interstate commerce. The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction of all other waters, in the absence of adjacent wetlands, shall be the ordinary high water mark.

Wetlands means 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 generally include swamps, marshes, bogs and similar areas.

II.D. The Section 404(b)(1) Guidelines

The Section 404 environmental guidelines are intended to be the basis of decisionmaking under Section 404. Established by EPA in conjunction with the COE, they were issued in interim final form, 40 CFR Part 230, in 40 FR 41291 (September 5, 1975). The guidelines are currently undergoing substantial review, and should be proposed in revised form in the near future.

The guidelines govern the determination of the environmental effects of discharging dredged and fill material into waters of the United States for (1) analysis of State and COE permit applications, (2) Federal project environmental impact statements, and (3) activities conducted under best management practices, must conform to the guidelines. The guidelines require consideration of adverse environmental impacts of a proposed discharge, as well as alternatives to the project. Specific guidance is provided on steps to minimize adverse impacts and tests needed to make a determination of environmental effects.

II.E. Relationships with Other Programs

The Section 404 program may affect, and be affected by, a variety of other programs. These include the Fish and Wildlife Coordination Act, the National Environmental Policy Act, the Endangered Species Act, the Wild and Scenic Rivers Act, the Migratory Bird Conservation Act, and a number of others. Two programs in particular are significantly enmeshed with Section 404. These are Sections 9 and 10 of the River and Harbor Act of 1899 and Section 208 of the Clean Water Act.

Sections 9 and 10 of the River and Harbor Act require a COE permit to construct any dam or dike or other structures, or perform other work in a navigable water of the United States. Under Section 9, Congressional or State consent is also required. Section 10 requires a permit for dredging, stream channelization, excavation, filling, and also for work performed outside a navigable water but which affects the navigable capacity of the water.

Obviously, there is a large degree of overlap between Sections 9 and 10 and Section 404. Activities which involve the discharge of dredged or fill material (jurisdiction under Section 404) will nearly always be activities regulated under Sections 9 or 10. Conversely, construction of structures and other work in navigable waters will generally result in a discharge of dredged or fill material. Section 404 does have

broader geographical jurisdiction, as it applies to all waters of the United States, and not merely the navigable waters which are regulated under the River and Harbor Act. Evaluation of permit applications under Sections 9 and 10 is not limited to factors of navigation and commerce, however, so that the same public interest review is conducted by the COE under both statutes. Thus, permit review is conducted jointly when more than one Section applies, which is often the case.

Section 208 of the Clean Water Act, provides an alternative to the Section 404 program. In a State having an approved Section 404 permit program, and a Statewide approved Section 208(b) (4) program dealing with the discharge of dredged or fill material, no Section 404 permit will be required for any activity for which there is an approved best management practice.

Directed primarily at nonpoint sources of discharges, this provision could allow flexibility in eliminating and preventing generally minor yet pervasive discharges of dredged or fill material. Coordination between the State Section 404 and the Section 208(b) (4) program administrators is required by the regulations. An agreement must be reached specifying the division of jurisdiction, providing opportunity for comment, and incorporating the best management practices into the Section 404 program. Thus, these two programs are interconnected, and one may greatly affect the other's effectiveness and success.

III. THE CORPS OF ENGINEERS' PROGRAM

The COE administers several permit programs, among them Section 404. COE authority under Section 404 extends to discharges of dredged or fill material in the waters of the United States, or only in navigable waters and their adjacent wetlands, e.g., Phase I waters where there is an approved State program regulating the other waters. Program exemptions apply to the COE program as well as to the States' programs. The Section 404 environmental guidelines also apply to the COE as well as to the States. Although in the interest of navigation the COE may issue a permit for an activity which would be inconsistent with the environmental guidelines, even this authority is subject to EPA's right to prohibit discharges in areas EPA determines to be environmentally sensitive.

The COE generally issues individual permits under Section 404, evaluated on a case by case basis in compliance with the guidelines. This evaluation takes into consideration environmental, economic, health, and welfare concerns, natural resources and hazards, aesthetics and recreation, land and water use, energy needs, and similar factors. An environmental assessment must be prepared for each application in compliance with the guidelines.

General permits may be issued by both the COE and the States for certain types of activities in specific, relatively small geographic areas within their jurisdiction. The activities must cause only minimal environmental harm, both individually and cumulatively. The permit must terminate within 5 years, and may be modified or revoked earlier should the adverse environmental impacts become greater.

The COE may also issue nationwide permits, either for discharges into smaller, minor waters or for certain types of activities. These permit categories are designed to make the Section 404 program more manageable, efficient, and effective.

If an individual permit is required, an application form must be submitted, along with drawings of the proposed project. The application must include the following information:

1. A detailed description of the project, including its purpose and use, types of structures, and type and quantity of dredged or fill material;
2. Names and addresses of adjoining or affected property owners;

3. Site information, including address, tax assessor's description, name of the waterway, and other details permitting easy identification of the property;
4. Status of all necessary approvals and certifications;
5. Explanations of denials of any necessary approvals or certifications; and
6. Signature of applicant or authorized agent.

Public notice of the application must be issued within 15 days of receipt by the COE of all required information. Notice is sent to all parties, adjacent property owners, and appropriate Government officials. Others may request copies of public notices, and they should be posted in the neighborhood. The notice contains adequate information for interested parties to evaluate the project's potential environmental impact.

Public comments are generally accepted for a 30-day period (or up to 75 days under special circumstances), during which anyone may request that a public hearing be held. After all objections to the project are taken, the applicant is afforded an opportunity to rebut the opposition.

The final decision on an application is to be made by the District Engineer as soon as possible after public notice. In certain cases, most notably when another Federal agency objects, the decision may be referred from the District Engineer to the Division Engineer. If unresolved issues or objections remain, the application may be referred from the Division Engineer to the Chief of Engineers in these instances:

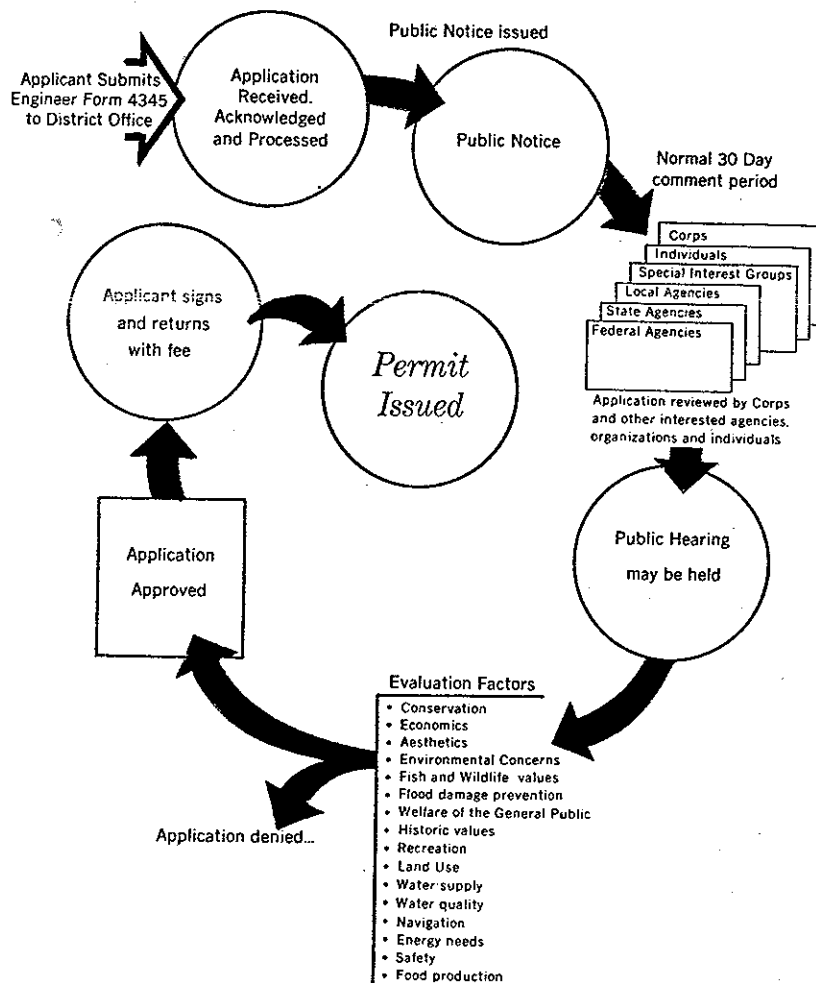
1. Statutes or Memoranda of Understanding prescribe procedures for resolving objections from another Federal agency which preclude a final determination at the Division level;
2. The COE position is contrary to the Stated position of the Governor;
3. Relevant laws, regulations, and policies are in substantial doubt;
4. The Chief of Engineers requests the case be forwarded for decision;
5. The baseline used to determine the limits of the territorial sea would be affected; or

6. Section 9 is involved in the application.

The District Engineer is responsible for seeing that permittees comply with all permit conditions. If a violation occurs, either the COE or EPA may issue an administrative order requiring compliance within a specific time period or take civil action. A violation may lead to a civil action, such as a permanent or temporary injunction. If the violation is willful or negligent, the permittee can be fined between \$2,500 and \$25,000 per day of violation, or imprisoned for up to 1 year, or both. A second violation, shall be punishable by a fine of no more than \$50,000 per day or up to 2 years imprisonment, or both. Similar penalties apply to discharges for which no permit has been obtained.

For more detailed information on the COE Section 404 regulatory program, see 33 CFR Parts 320-329, especially Parts 320, 323, 325, 326, 327, 329, 42 FR 37121 (July 19, 1977); the U.S. Army Corps of Engineers Permit Program, A Guide for Applicants (EP 1145-2-1, November 1977); or contact the District Engineer in your area.

typical corps permit review process



IV. STATE PROGRAMS

IV.A. General Requirements

The 1977 Amendments established a system whereby the State could assume a significant part of the Dredge or Fill Program. The object was to return responsibility for certain decisions affecting land use to the States and to limit duplication of effort. Congress did not intend to alter the nature of the permit program, however. The State programs are, essentially, to mirror the Federal program, and must comply with the Section 404 guidelines. EPA's role both in approving State programs and overseeing decisions made under them emphasizes the importance Congress placed on maintaining Federal standards and insuring that water quality and wetlands be protected. EPA's responsibility in the transfer of Dredge or Fill programs to the States is an integrated system of ministerial and substantive duties.

The statute itself sets requirements for State authority, Federal review criteria and time schedules, and State program withdrawal procedures. EPA regulations may be found in the Proposed Consolidated Permit Regulations, 40 CFR Parts 122A, 123A, 123E, and 124, published in 44 FR 34243 (June 14, 1979). The statutory requirements for contents of State programs are in brief:

1. "Full and complete" program description;
2. Statement by the Attorney General, or State agency attorney, that the State has adequate authority for the program;
3. Authority to issue permits which comply with (but are not limited to): Section 404 guidelines, Section 307 standards and prohibitions, Section 403 criteria, and Section 308 inspections;
4. Authority to issue permits for fixed terms not to exceed 5 years;
5. Authority to issue permits which can be terminated or modified for cause, such as violation of a permit condition, misrepresentation or failure to disclose all relevant facts in obtaining a permit, and changed conditions;
6. Authority to insure notice of applications to EPA, the public, and to other affected States and to provide opportunity for public hearing;

7. Authority to guarantee opportunity for potentially affected States to make recommendations and to insure when such recommendations are not accepted that a justification is given the commenting State;
8. Authority to insure that no permitted activity would, in the judgment of the COE, in consultation with the Coast Guard, substantially impair anchorage or navigation;
9. Authority to enforce compliance with permits and the program, through civil and criminal penalties and other means;
10. Authority to assure continued coordination with Federal and Federal-State water-related planning processes; and
11. Minimum funding, personnel qualifications, and manpower requirements.

IV.B. Program Transfer to the States

The requirements a State must satisfy to have its program approved, and the procedures EPA must follow in approving State programs, are contained in both the Clean Water Act and the regulations. The following discussion highlights the standards for Section 404 program transfer, found primarily in 40 CFR Parts 123A and 123E. For more detailed information, refer directly to the regulations, or contact Frances Peterson, Aquatic Protection Branch (WH-585), 401 M Street, S.W., Washington, D.C. 20460, (202) 472-3400.

A State seeking to administer a Section 404 permit must submit the following to EPA:

1. A letter from the Governor requesting program approval;
2. A Statement from the Attorney General, or independent State agency counsel, asserting adequate authority to administer the program. This includes adequate legislation and regulations already in effect, an analysis of State law on what constitutes a taking of private property without just compensation, and assurances that the State will be able to prohibit or terminate discharges as required both by the Section 404 guidelines and the need to protect sensitive areas.
3. A complete program description, including the agency organization, application procedures, categories of discharges, and permit issuance and enforcement priorities and procedures. The program

description must designate a State agency responsible for issuing the permits and explain its relationship to other State and local agencies. Available resources, estimated costs, and anticipated types and numbers of activities to be regulated must also be included;

4. Copies of the application forms, standard reporting forms, and manifest form to be used;

5. Copies of all applicable State laws and regulations;

6. A Memorandum of Agreement (MOA) with the Regional Administrator of EPA; which describes classes and categories of applications and permits subject to Federal review, reporting requirements, enforcement program and capability, and the scope of waiver of Federal review. This MOA must be consistent with the State/EPA Agreement, and must be subject to modification.

7. A Memorandum of Agreement with the COE which identifies which waters in the State will come under State jurisdiction and which are to remain under the COE. This MOA should also identify the individual and general permit processing procedures, provide (if agreed to) for transfer of pending permit applications to the State, prohibit discharges the COE believes would substantially impair anchorage and navigation, and delineate the classes or categories of permits for which Federal review has been waived.

Within 10 days of submission of these State program elements, EPA must send copies of the program to the COE, the Fish and Wildlife Service, and the National Marine Fisheries Service. Within 30 days of submission, EPA must notify the State as to whether or not the submission is complete. The time period for program review then begins. Material changes in the program during the review period will terminate adherence to the schedule, and the review period will recommence. At the start of the review period, notice must be published in the FR and newspapers in the State, announcing a public comment period of at least 45 days and a public hearing at least 30 days after publication. Comments on the program submission by the Fish and Wildlife Service must be made to EPA within 90 days of submission and the determination of authority must be made by EPA within that time period, or the State program shall be deemed approved. If the submission is disapproved, EPA must notify the State as to the reasons for disapproval and suggest revisions that would lead to approval.

After a State Section 404 program has been approved, it may be modified at the request of either EPA or the State. The State must provide EPA with a full modified program submission. If the modification is

substantial, public notice and at least a 30-day comment period are required, and approval by EPA must be published in the Federal Register.

If a State no longer wishes to administer the program, the program may be withdrawn. Voluntary transfer from the State to the COE requires 180 days notice by the State, accompanied by a plan for transfer. Within 60 days notification, the plan must be evaluated by EPA and the COE; at least 30 days before transfer, notice must be published in the Federal Register and in newspapers in the State.

Should an approved State program cease to meet the statutory and regulatory requirements, and the State fail to take corrective action, the program may be withdrawn by EPA. Criteria for withdrawal include inadequacies in legal authority, program operation, or enforcement, noncompliance with the Memorandum of Agreement with EPA, and any other failures to comply with the law. If the criteria for withdrawal are met, the Administrator of EPA may issue an order for withdrawal, specifying the allegations and setting a hearing date. Response to the order must be within 30 days.

At the hearing, of which a record must be kept, non-parties may be permitted a limited appearance and parties may be represented by counsel or others. The presiding officer at the hearing must prepare recommendations and certify the entire record to the Administrator within 30 days of filing proposed findings and conclusions. Within 20 days of certification, all parties may file exceptions or other documents with the Administrator. The Administrator must issue a decision within 60 days.

If the decision upholds the State program, it is reviewable as a "final agency action." If the State program is found to violate the law, the State must be given a reasonable time, up to 90 days, to correct the deficiencies. Such corrective action would result in the issuance of a supplemental order of no withdrawal. Failure to correct the program inadequacies will lead to a supplemental order of withdrawal, and return of the State's part of the Section 404 program to the COE. Withdrawal of the State program will not relieve any persons from compliance with State law.

IV.C. State Program Operations

The statute and the regulations set standards for the operation, transfer, and Federal oversight of the State permit program. The most

basic operational requirement is that a State permit be mandatory for regulated activities.

There are several exemptions from the State permit program. The following activities are not regulated, provided they do not involve discharges of toxic pollutants:

1. Normal farming, silviculture, and ranching activities. This includes crop management or rotation, plowing, cultivation, harvesting, soil and water conservation practices on uplands, and similar activities.
2. Maintenance, including emergency reconstruction of currently serviceable structures, such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures.
3. Construction or maintenance of farm or stock ponds or irrigation ditches or maintenance of drainage ditches.
4. Construction of temporary sedimentation basins on construction sites.
5. Construction or maintenance of forest and farm roads, or temporary roads for moving mining equipment, in accordance with best management practices in the approved State program and those necessary to protect water quality, aquatic life, wildlife, endangered species, and migratory, breeding, nesting, and feeding areas.
6. Activities regulated under an approved State Section 208 program.
7. Federal projects specifically authorized by Congress if an environmental impact statement for the project considers the effects of the discharge, and the requirements of the Section 404 guidelines, and is submitted to Congress prior to authorization of, or appropriation for, the project.

All other discharges of dredged or fill material which are within the State's jurisdiction require a permit, usually an individual permit. In such cases the project is reviewed on its own merits, and a permit applying solely to that particular project is granted or denied. For some relatively minor projects, however, the State is authorized to issue general permits for activities which are similar, will result in minimal environmental disturbance for any project, and cumulatively will have only minimal adverse effects on the environment. All general

permits require compliance with the Section 404 guidelines and toxic pollutant standards, and must specify the activities permitted, geographic areas covered, type of material which may be discharged, and maximum quantity and extent of activity. In addition, the permit requires best management practices and may include other conditions.

Before any activity is conducted under a general permit, advance notice must be given to the State. If a proposed discharge is covered by a general permit, no individual permit is required unless the State determines that under the guidelines, an individual permit is necessary to protect the aquatic environment. The State may modify, revoke and reissue, or terminate any general permit after first giving public notice.

If an individual permit is required, the State is encouraged to familiarize potential applicants with the standards and procedures and consult with them before they submit an official application. the application must:

1. Contain a complete project description;
2. Identify the source and type of material to be discharged and the method of dredging to be used;
3. Specify the use of structures to be erected on fill;
4. Provide information about the area for evaluation under the Section 404 guidelines, including possible alternatives, physical and chemical characteristics of the area, life which may be dependent on water quality and quantity, special characteristics of the site and adjacent areas which require protection, and uses of the area which might affect human health and welfare;
5. Describe technologies or management practices which could minimize adverse environmental effects;
6. List necessary approvals and any decisions already made; and
7. Contain a drawing and maps.

Generally public, Federal, and State agency review and comment will be on the basis of the permit application. In some cases the State must reach a tentative decision on the permit. If it decides to issue the permit, the State must prepare a draft permit. A fact sheet or a statement of basis must also accompany the draft permit briefly explaining the terms and conditions of the permit. This outlines the

significant factual, legal, methodological, and policy questions considered when drafting the permit.

The draft permit must contain all the requirements found in a final permit. At a minimum, these will include the following:

1. The permittee must comply with all terms of an existing permit;
2. The permit shall be reviewable, and may be modified, revoked and reissued, or terminated;
3. The permittee must report any activity which would constitute cause for modification or revocation;
4. The permittee must allow the State access to records and regulated operations, and the right to sample any substances which the permittee is required to monitor;
5. The permittee shall furnish records to the State upon request;
6. The permittee shall maintain in good working order all facilities and treatment or control systems used to achieve compliance with the permit;
7. In the event of noncompliance, the permittee shall provide the State with a description of and reasons for noncompliance, and action taken or planned to reduce, eliminate, or prevent the noncompliance. This information may be required within 24 hours or 5 days of the time the permittee becomes aware of the situation;
8. The permittee shall take all reasonable steps to minimize adverse environmental impacts from noncompliance;
9. The permittee shall cease or lessen its business activities if necessary to comply with the permit;
10. The permittee shall not falsify or knowingly tamper with any monitoring, reporting, or other required device or information;
11. The permitted discharge shall comply with the Section 404 guidelines, and shall be conducted so as to minimize adverse environmental impact;
12. Standards for toxic pollutants shall be at least as stringent as those in Section 307(a);

13. Approved best management practices must be incorporated into the permit;

14. A detailed sketch with the location and boundaries and the type of material to be discharged must be provided.

Notice of a permit application or a draft permit shall be given by the State, to the applicant; State agencies responsible for plan development under Sections 208(b)(2) and 303(c), or water quality, fish, and wildlife resources; any adjacent property owners; the Section 404 program in another, potentially affected State; and the Regional Director of the Federal Aviation Administration, if the activity may affect aircraft operations. In addition, notice shall be given to anyone requesting notification, as well as to a list of likely participants. The notice must identify the applicant, and a contact for further information; include statutory authority and regulation; and describe the activity, the draft permit, and the comment and hearing procedures.

A public hearing may be requested by any interested person. The written request must State the issues to be raised. If there is significant public interest, a hearing shall be held. Written comments may be submitted on the draft permit or, on the permit application. At the time of issuance of a final permit, the State must respond to the public comments and explain all changes made to the draft permit.

The State is prohibited from issuing a permit when:

1. The permit would not comply with the statute, regulations, or guidelines, including the Section 404 guidelines;
2. The Regional Administrator objected and the issue has not been resolved;
3. The COE has determined that anchorage or navigation would be substantially impaired;
4. The discharge would be into an area in which disposal is prohibited by EPA.

Once a permit is issued, the State program monitors and enforces the permit conditions, with specific authority to:

1. Abate unauthorized activity by order or suit in State court;
2. Sue or enjoin a threatened or continuing violation;

3. Assess, or sue to recover, civil penalties for violations of statutory, regulatory, or permit conditions;
4. Seek criminal remedies for program requirement violations;
5. To seek criminal remedies for false Statements and the like in monitoring, reporting, notification, etc.;
6. Obtain a cease and desist order or an interim protective order;
7. Notify the Regional Administrator by phone of a situation dangerous or threatening to the public health and welfare.

Complementary to enforcement is monitoring and evaluation of the program. The State must establish procedures for the receipt, evaluation, and investigation of notices and reports from permittees. In addition, the State must conduct its own independent inspections, including comprehensive surveys of the waters and activities regulated, periodic inspection of the permittee's activities, and investigation of possible violations. The State must submit quarterly and annual reports to the Regional Administrator, who must analyze the cumulative impacts of activities on the integrity of the waters of the United States.

These actions by the State in administering the permit program are subject to Federal review under terms defined in the MOA between the State and EPA Regional Administrator. Although this agreement includes any waiver of Federal review of certain or categories of activities it cannot waive review of discharges which may affect another State, major dischargers, discharges into critical areas, proposed general permits, and discharges of toxic or hazardous substances. In addition, the waiver is always terminable.

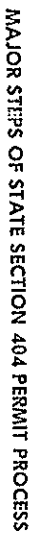
Where Federal review has not been waived, the MOA identifies the forms and information which the State must forward to the Regional Administrator, the COE, the Fish and Wildlife Service, and the National Marine Fisheries Service. The MOA shall require prompt transmission of a copy of every complete permit application received, any environmental impact Statement prepared under State law, and notice of every related action, including copies of the proposed and final permit.

The Regional Administrator may comment on any application or proposed permit. If he has objections, the Regional Administrator must notify the State of his reasons, Sections of the Clean Water Act relied upon, and the necessary corrective actions. Grounds for objection include:

1. Insufficient information to determine compliance with the Section 404 guidelines;
2. Failure to assure compliance with the statutory and regulatory requirements;
3. Inadequate justification for the rejection of recommendations by another affected State;
4. Procedural inadequacies or errors;
5. Misinterpretation or misapplication of the statutory or regulatory requirements;
6. Inadequate procedures for reporting, monitoring, and the like;
7. Failure to carry out the statutory or regulatory requirements where EPA standards governing the activity have not been promulgated;
8. Issuance of the permit would be outside the statutory or regulatory requirements.

The MOA between the State and the COE must further assure that the State will not approve an application transferred to the State by the COE and previously identified by the COE as incomplete or deficient, until the applicant has taken corrective action.

The regulations assure coordination with other Federal, Federal-State, and State programs. State actions under the Section 404 program must be consistent with the Wild and Scenic Rivers Act and with Water Quality Management planning under Sections 208 and 303. The State must reach an agreement with the Section 208(b) (4) regulatory program administrator, and consult with State fish and wildlife agencies, use of information available from the Fish and Wildlife Service, particularly the National Wetlands Inventory, and affected States.



- OPPORTUNITIES FOR PUBLIC INPUT
- * MAY INCLUDE A DRAFT PERMIT

V. PUBLIC PARTICIPATION

The preceding chapters have briefly described the regulatory program under Section 404 of the Clean Water Act. At several stages public hearings and comment periods are either required or offered. Yet without active concern and participation on the part of the public, these attempts to incorporate public opinion cannot succeed. The intent of Congress and the policies of EPA and COE are to involve the public in Section 404 decisionmaking. It is up to you to make it work.

One form of public participation which takes place in the early policy formulation stages of the program, comments on proposed regulations, can have lasting impact on the direction the program takes. Watch the Federal Register for relevant proposed regulations, or contact EPA and the COE and ask to have the regulations mailed to you as they are issued. The comment period may vary, but it is normally at least 30 days. Although the regulations may appear to be complex and confusing, a careful reading should enable you to State whether they are too weak, too strong, or in need of clarification, on one or several points. Public hearings are often held, at which explanations may be offered. Remember that this is your program, and that you may find yourself subject to it someday. Don't hesitate to ask questions, and to make any constructive comments you feel could improve the policies and administration of the program.

Other routes for affecting basic policies are present in the State transfer procedures. If your State is interested in submitting a program to EPA, you can contact your State legislators and the State lead agency to determine: (1) compliance with the State program requirements; (2) potential problems the program faces; and (3) the underlying policy of the State authority. The State program requirements set minimal criteria only; your State's program should reflect your attitudes toward protection of wetlands wherever leeway is permissible.

On the other hand, your State may not have taken any action regarding transfer of the Section 404 program. If you'd like to see more action in this respect, again contact your legislators or the State wetland or water resource agency. Perhaps your State has a strong wetlands regulation program which would not be readily compatible with the Section 404 requirements. Or perhaps a lack of public interest has led to neglect of this program. Once you know the reasons for inaction, you can best decide how to proceed. Consequently, your State officials will be able to act more responsibly and confidently.

Submission of a State's proposed program should not mark the end of public participation in the transfer process. Review by EPA includes public comment and hearings. If you know of reasons why the submission should be either approved or disapproved, be sure to inform EPA, as well as the State and any other interested agencies. This is a major decision, and must be based on all available information.

Even after the basic policy decisions have been made, the public plays a vital role in the evaluation of permit applications. Both the COE and State programs encourage public comment and hearing. To receive notice of all permit applications made to the COE in your area, write the COE District in which you are located and ask to receive such notice. Often you may find the proposed projects insignificant. Yet by keeping informed you will be certain to know about any projects you do find controversial or objectionable. If you have reason to believe the project will adversely affect the environment, request a public hearing. In this way, a variety of points of view and sources of information will become available and enhance the quality of the decision made on the application.

Finally, vigilance after the decision is an important contribution the public can make towards the Section 404 program. If the State does not comply with its own program, or with the requirements for that program, EPA is authorized to withdraw approval. Individuals within the State are in a very good position to monitor the State's compliance with the law. If the State fails to comply, a petition to EPA may succeed in forcing compliance or termination of the State program. Similarly, the public can aid in enforcing the permits issued by both the COE and the States. Known or suspected violations should be reported to the responsible agency, which often has inadequate staff to discover them. Thus, public "watch-dogging" may provide the strength to support the substantive requirements of Section 404.

This discussion provides some general ideas on how you can become involved in the Section 404 program. Involvement requires thought, time, and effort on your part. Without it, the loss of wetlands and other valuable aquatic resources will be more difficult to prevent. With it, the Section 404 program may prove an effective tool serving all of us well.

ABOUT THIS GUIDE

This Guide is one in a series of pamphlets which describe various EPA permit programs. The full series includes:

- A Guide to New Regulations for NPDES (C-1)
- A Guide to the Underground Injection Control Program (C-2)
- A Guide to Proposed Consolidated Permit Regulations (C-3)
- A Guide for States on Proposed Consolidated Permit Regulations (C-4)
- A Guide to the Hazardous Waste Management Program (C-5)
- A Guide to the Dredge or Fill Permit Program (C-6)
- A Guide to the Consolidated Application Form (C-7)

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If you have suggestions, questions or requests for further information, they may be directed to your nearest EPA Regional public information office.

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