

Ohio River Foundation

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Ohio River Summit

August 2, 2008

Barge Fleeting and
CWA 404 permit applications

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CWA 404 Permit Program

- Section 404 regulates the discharge of dredged or fill material into the nation's waters, and establishes requirements that must be met before the Corps can issue permits to private parties and governmental agencies for construction in wetlands, streams, rivers and other aquatic habitats. The Corps shares responsibility for managing the § 404 program with the U.S. Environmental Protection Agency (EPA).

Program Oversight

- The Corps and EPA share responsibility including enforcement and developing regulatory policy and guidance.
- The Corps is responsible for the day-to-day management of the program, while EPA sets standards and is ultimately responsible for permit compliance with the CWA.

Permit Review Requirements

- The Corps must comply with two sets of Clean Water Act regulations before it can issue a § 404 permit or approve a Corps civil works project – the EPA 404(b)(1) Guidelines and the Corps' own § 404 regulations.

EPA Oversight

- Discretionary
 - organization cannot sue EPA to compel a veto
- Significant groundwork must be laid with EPA before it will consider a veto, which is ultimately a very political decision.
- Only 11 vetoes have ever been issued by EPA (since 1972)

CWA 401 – State Certification

- Similar to Corps regulations (i.e., public notice, comment period, etc.)
- Additional permit conditions and requirements can be assessed
- 401 certification is condition precedent to grant of 404 permit

No Net Loss

- Of Employees?
- In 1998, 7,202 acres of wetland impacts from the nationwide permit program
- In 2000 -- 19,407 acres of nationwide permit wetland impacts
- No systematic method for tracking impacts and there has been no tracking at all of many losses allowed under general permits.
- In 2001 and 2002, the Corps denied fewer than 1% of the permits requested.

CWA 404 Permit Types

- Individual
- General – similar projects, similar impacts

Permit Steps

- Before issuing an individual permit, the Corps must:
 - (1) initial determination;
 - (2) issue a public notice and provide an opportunity for public, federal agency, and state comment on the permit application;
 - (3) comment period;
 - (4) public hearing – **discretionary**
 - (5) conduct a two-tiered Clean Water Act evaluation (EPA & Corps regs);
 - (6) sequencing;
 - (7) NEPA evaluation (EA, EIS, or categorical exclusion); and
 - (8) state and tribal review
 - (9) permit decision
 - (10) optional reopener due to incomplete, inaccurate, false information
 - (11) EPA veto.

Sequencing

- Decisions under the regulatory program are also supposed to comply with the “sequencing” and mitigation policies established by EPA and the Corps.
 - Avoidance
 - Minimization
 - Mitigation

Two-tier CWA Evaluation

- Tier One -EPA 404(b)1 Guidelines
 - Permit denial
 - Practical alternative with less impact on aquatic ecosystem
 - Alternative location – even if not owned by applicant if reasonably obtained, utilized, managed, or expanded to satisfy purpose.
 - ESA endangerment
 - 401 violation
 - Degradation of water quality
 - Human welfare
 - Recreation, esthetic and economic values
 - Aquatic life
 - Aquatic ecosystem
 - Failure to minimize harm to protected waters
 - Location of discharge
 - Controlling, limiting, treating discharge

Two-tier CWA Evaluation

- Tier Two - Corps Guidelines
 - Permit denial
 - Contrary to the public interest
 - Probable impacts
 - Cumulative impacts
 - Environmental
 - Cultural and economic
 - Public and private need for project
 - Reasonableness of alternative locations and methods
 - Permanence of beneficial and/or detrimental effects

Mitigation

- While many of the requirements discussed below specifically address wetlands, it is also very important to remember that damage to rivers, streams, and other waters also must be mitigated.

Project Mitigation

- National Research Council has noted that there is “a considerable controversy over whether or not wetlands can actually be restored. The arguments are particularly important when wetland restoration is undertaken within the mitigation context, and the promise of full restoration of a degraded site allows a natural wetland to be destroyed.”

Mitigation Requirements

- State (1.5:1, 2:1, etc.)
- Federal – no net loss...but
 - Achieve equal or greater efficacy with less than 1:1 by creation of superior wetlands or project!

Mitigation Choices

- Impacts identified
 - Plan filing with permit application
- Creation
- Restoration
- Enhancement
- Preservation (i.e., conservation easement)
- Compensatory (i.e., mitigation banks, in-lieu fees, etc.)

Mitigation Plan

- Details
- Maintenance
- Monitoring
- Contingency plan

Permit Appeal

■ Administrative

- One-sided administrative appeals process for permit decisions.
 - Available only to
 - permit applicants,
 - Owners of the property at issue,
 - or lease, easement or option holders on the property at issue.

■ Federal.

- An administrative appeal cannot be filed by individuals or organizations that oppose issuance of a Corps permit or a decision that no permit is required because the water body is not jurisdictional. Instead, any such challenges must be filed in federal court.

Case studies

- Lone Star
- Huntington Marine

Contact and information

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- www.corpsreform.org (tools and resources)
- www.ohioriverfdn.org