

Clean Water Act – Section 404

J. Steven Gardner, PE, PS

Philip R. Elswick, PE

November 19, 2013

Authority for Regulation

*Rivers and Harbors Act (1899) provides the **Army Corps of Engineers** with authority to regulate discharges and dredging in “Waters of the U.S.”*

*Clean Water Act (CWA, 1972 ,1977, 1987), administered by the **Environmental Protection Agency**, established the goals of eliminating releases to water of high amounts of toxic substances, eliminating additional water pollution, and ensuring that surface waters would meet standards necessary for human sports and recreation.*

Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands.

§404: the ACOE and EPA

from http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf

U.S. Army Corps of Engineers: U.S. Environmental Protection Agency:

- Administers day-to-day program, including individual and general permit decisions;
 - Conducts or verifies jurisdictional determinations;
 - Develops policy and guidance; and
 - Enforces Section 404 provisions.
- Develops and interprets policy, guidance and environmental criteria used in evaluating permit applications;
 - Determines scope of geographic jurisdiction and applicability of exemptions;
 - Approves and oversees State and Tribal assumption;
 - Reviews and comments on individual permit applications;
 - Has authority to prohibit, deny, or restrict the use of any defined area as a disposal site (Section 404(c));
 - Can elevate specific cases (Section 404(q));
 - Enforces Section 404 provisions.

- Under sections 301 and 502 of the Clean Water Act (CWA), any discharge of dredged or fill material into "waters of the United States" is forbidden unless authorized by a permit issued by the US Army Corps of Engineers pursuant to section 404
- There has been much controversy and litigation surrounding what the definition of “waters of the United States” includes

CLEAN WATER ACT

- Oil and natural gas exploration and production operations are subject to regulation under the Clean Water Act
- Discharges of wastewaters, such as produced waters from wells, into “navigable waters” or their tributaries, are subject to National Pollutant Discharge Elimination System (NPDES) requirements
- Under the Energy Policy Act of 2005, oil and gas well sites are exempt from CWA storm water discharge permitting requirements

CLEAN WATER ACT

JURISDICTIONAL WATERS

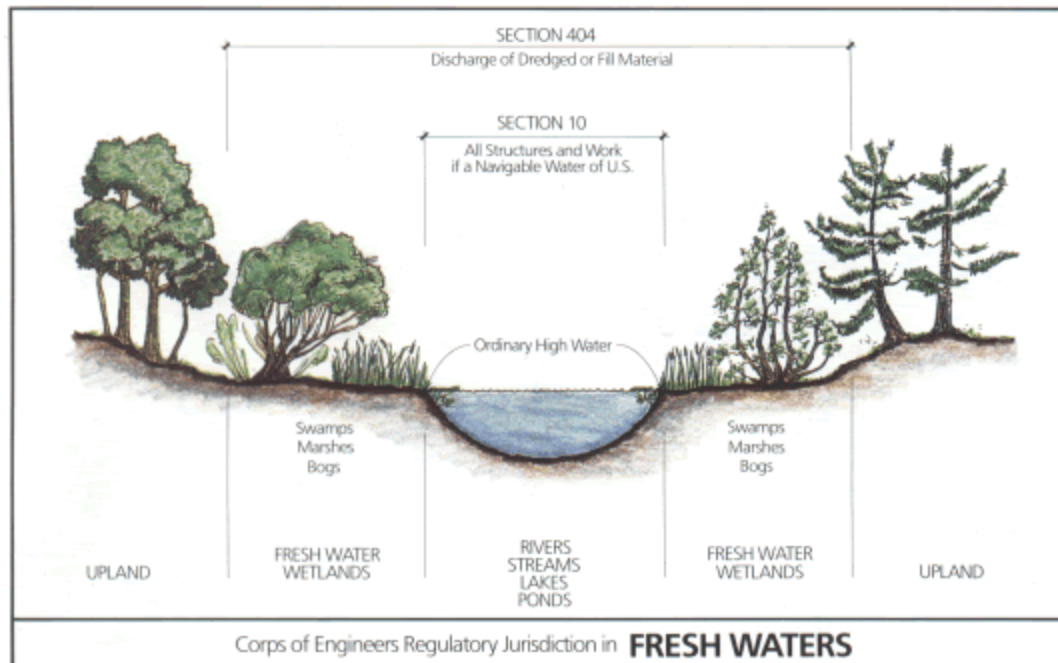
Definition – 40 CFR 230.3(s)

- Currently used or used in the past for interstate or foreign commerce including those subject to the ebb and flow of tide
- Interstate waters including interstate wetlands
- All other waters such as intrastate lakes, rivers, **streams**, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds
 - The use, degradation, destruction of which could affect interstate or foreign commerce
- All impoundments of waters
- **Tributaries of waters identified above**
- Territorial seas
- Wetlands adjacent to waters

Stream Types – FR Vol. 77, No. 34

- Perennial
 - Flowing water year-round
 - Water table is located above the stream bed for most of the year
 - Groundwater is the primary source of water
 - Runoff from rainfall is a supplemental source
- Intermittent
 - Flow during certain times of the year – groundwater provides water
 - May have no flow during dry periods
 - Runoff from rainfall is a supplemental source
- Ephemeral
 - Flows only during and shortly after precipitation events
 - Located above the water table year-round
 - Groundwater is not a source of water
 - Runoff from rainfall is the primary source of water

Ordinary High Water Mark



Perennial Streams



Perennial Streams



Perennial Streams



Intermittent Streams



Intermittent Streams



Intermittent Streams



Ephemeral Streams



Ephemeral Streams



Ephemeral Streams



Ephemeral Streams



Ephemeral Streams



Ephemeral Streams



Ephemeral Streams



SECTION 404 PERMITTING

Is a Permit Required?

- Is there a jurisdictional act?
 - Is fill material being discharged?
- Is there a jurisdictional area?
 - Are there waters of the United States (jurisdictional waters) present?

Nationwide Permits

- Issued nationwide for categories of activities that cause minimal adverse impacts
- NWP can be obtained if the project will be within established thresholds
- Much faster to obtain compared to IP
- Preconstruction notification to Corps required
- Require reauthorization every 5 years

- NWP 39 covers “Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures.”
- Revised NWP 39 (effective on March 19, 2012) provides coverage for oil and gas well pads impacting wetlands which do not exceed 1/2-acre.

CLEAN WATER ACT - NWP 39

- NWP 39 prohibits the loss of greater than 300 linear feet of intermittent and ephemeral stream bed. The Corps' District Engineer may determine that activities will result in minimal adverse effects and waive the 300 linear foot limit.
- District Engineers may require permittees to remove the pads and restore the site once extraction activities have ceased

CLEAN WATER ACT - NWP 39

- Utility Line Backfill and Bedding (i.e. pipelines)
- Utility lines within 50 feet of stream bank and crossings
- Also requires 401 Water Quality Certification
- Sediment and Erosion Control Plans
- Sites 1 acre or more require Stormwater Pollution Prevention Plan (SWPP)

CLEAN WATER ACT - NWP 12

Individual Permits

- Required if the project does not comply with the terms or limits of a NWP
- USACE conducts a thorough review of potential environmental and socioeconomic impacts
- Public Notice Period – 30 days
 - Public and governmental agencies can submit comments
 - USACE is required to address all comments

Individual Permit Application

- Application form
- Project Description and Drawings
- Project Purpose and Need
 - Basic Project Purpose
 - Overall Project Purpose
- Environmental impacts
 - Qualitative & quantitative data
- Threatened & Endangered species assessment

Individual Permit Application

- Cultural & historic resources assessment
- Alternatives Analysis
 - On-site, off-site, and No Action alternatives
 - Section 404(b)(1) Guidelines
 - Least Environmentally Damaging Practicable Alternative
 - Cost, existing technology, and logistics
- Cumulative Impacts Assessment
 - Past, present, and reasonably foreseeable future impacts
- Mitigation Plan

Individual Permits - Considerations

- Seek every opportunity to avoid impacts to jurisdictional waters
- Hire a strong, technically competent consultant
- Engage in close (and early) coordination with USACE
 - Take the regulatory agencies' "advice"
 - Provide the necessary documentation to establish a strong administrative record

MITIGATION

Mitigation

- Unavoidable impacts must be compensated for to the extent appropriate and practicable
- Third party mitigation (preferred)
 - Places success of the mitigation with an entity other than the permittee
 - Mitigation banks
 - In-lieu fee credits

Mitigation

- Permittee responsible mitigation
 - Permittee is ultimately responsible for success of the mitigation project
- On-site/in-kind mitigation
 - Replaces wetlands or natural habitat area lost as a result of a project with the same or similar wetland or habitat adjacent or contiguous to the site of the impact
- Off-site/out-of-kind mitigation
 - Replaces wetlands or habitat with one that is not similar, and which may or may not be in close proximity to the site of the project

ENFORCEMENT

Violations of CWA Section 404

- Types
 - Failure to comply with the terms and conditions of an issued permit
 - Discharging fill material without a Section 404 permit
- Both EPA and USACE have the responsibility to enforce
 - 1989 MOA
 - USACE – lead agency on violations associated with an issued permit
 - EPA and USACE decide which agency will take lead on violations for unpermitted discharges

Enforcement Tools

- Compliance orders – stop the discharge, remove the fill, restore the site (CWA Section 309(a))
 - \$16,000/day up to max of \$177,500/enforcement action
 - After the fact permit
- Judicial actions (CWA Sections 309(b), (d) and 404(s))
 - Restoration, injunctive relief, other civil penalties
- Criminal (CWA Section 309(c))
 - Knowingly or negligently violating Section 404
- Delegate enforcement to state 401 WQC program for minor impacts

ENVIRONMENTAL CONSULTANTS

How We Help

- Project Design
 - Identify the location and extent of jurisdictional waters
 - Explore alternatives to avoid impacts
- Permitting
 - Collect necessary data
 - Prepare the applications
 - Mitigation design
 - Navigate the permitting process
- Compliance
 - Permit conditions
 - Required reporting

Questions

J. Steven Gardner, PE, PS

ECSI, LLC

859-233-2103

jsgardner@engrservices.com

www.engrservices.com

Philip R. Elswick, PE

Summit Engineering, Inc.

606-432-1447

pelswick@summit-engr.com

www.summit-engr.com