Corps of Engineers Clean Water Act and Rivers and Harbor Act Permitting Requirements

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US Army Corps of Engineers

BUILDING STRONG®

South Dakota Regulatory Office

- State Program Manager
  - Administrative Assistant
  - Six Project Managers
    - Biologists and Engineers

Section 10 of the Rivers & Harbors Act of 1899

- Department of the Army authorization (i.e., permit) required for work or structures in, over, or under navigable waters of the United States.

Section 10 Waters

- Missouri River
- James River
- Bois de Sioux River
- Lake Traverse
- Big Stone Lake
- Big Sioux River
  - Lower five miles

Clean Water Act of 1972 (Section 404)

Goal: Restore and maintain the chemical, physical and biological integrity of the nations waters

Section 404 of the CWA of 1972

- Department of the Army authorization (i.e., permit) required for the discharge of dredged or fill material into Waters of the United States.

CWA Section 404

- Administered jointly by:
  - The US Army Corps of Engineers
  - US Environmental Protection Agency Region 8 Denver, CO.

Corps' Role

- Administer day-to-day program
  - ►permit decisions, process permits (400 to 500 per year)
  - ►jurisdictional determinations
- Develop policy and guidance
- Public education/outreach
- Enforce provisions of Section 404 of CWA

EPA's Role

- General Oversight
- Approve/oversee State and Tribal assumption
- Have authority to veto Corps' permit decisions
- Review/comment on IP applications
- Enforce provisions of Section 404 of CWA

Enforcement

- Section 10
  - Unauthorized activity – COE
  - Permit noncompliance – COE
- Section 404
  - Unauthorized activity – EPA
  - Permit noncompliance – COE

Types of Authorization

- **Regional General Permits** - Established by Corps Districts to expedite the review and approval of minor work. General permits are initially authorized through the same procedure as individual permits (6 RG permits).
- **Nationwide General Permits** - Authorize a variety of minor activities with only minimal impact to the aquatic environment. The majority of applications fall under nationwide permit authority (51 NW permits).
- **Individual Permits** - Case-by-case, project specific evaluation procedure. 60 days to over 1 year.
- **Letter of Permission** - Issued for Section 10 only work, where the activity is minor and non-controversial.

Regulatory Program

Regional General Permits - SD

- Boat Ramps
- Intakes
- Flood Protection and Flood Damage Repair / Reconstruction
- Fisheries Enhancement Structures

Regulatory Program

Nationwide Permits

- NW3: Maintenance
- NW12: Utility Line Activities
- NW 13: Bank Stabilization
- NW 14: Linear Transportation Crossings
- NW 27: Stream and Wetland Restoration
- NW 29: Residential Developments
- NW 39: Commercial/Institutional Developments
- NW 40: Agricultural Activities

Section 404 of the CWA of 1972

- Department of the Army authorization (i.e., permit) required for the discharge of **dredged** or **fill** material into **Waters of the United States**.

Fill Material

- Fill Material: Any material placed in waters of US that has the ***effect*** of replacing any portion of water with dry land or changing the bottom elevation (33 CFR 323.2).
  - Temporary or permanent
  - Does not include trash or garbage

Discharge of Dredged Material

- Any addition of dredged material into Waters of the US, including redeposit of dredged material within waters, other than **incidental fallback** (33 CFR 323.2).
- Temporary or permanent.
- Incidental fallback: Small volumes of dredged material that falls back to substantially the same place as initial removal.
- Scoop vs. Push

Waters of the United States (33 CFR 323.2)

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce (Section 10)
2. Interstate waters including interstate wetlands
3. Intrastate waters (where the use, degradation or destruction could affect interstate or foreign commerce)
4. Impoundments

Waters of the United States

5. Tributaries (of 1 thru 4 above)
6. Territorial seas
7. Adjacent wetlands (1 thru 6 above)
8. Water of the US do not include prior converted cropland (PC)

What Are Waters of the U.S.?

- All surface waters such as lakes, ponds, rivers, streams, creeks and wetlands
- All wetlands adjacent to these waters
- All impoundments of these waters
- Notable Exceptions
  - US Supreme Court Cases

US Supreme Court Cases

- SWANCC – 2001
  - Isolated Waters
- Rapanos/Carabel – 2006
  - Tributary Waters

Isolated Waters

- Solid Waste Agency of Northern Cook County Supreme Court Case (SWANCC)
- January 9, 2001, opinion (5-4) held that Corps does not have authority to regulate the discharge of dredged or fill material in isolated waters, if the sole nexus to interstate commerce is use of the migratory bird rule

Tributaries/Significant Nexus

- Rapanos/Carabel US Supreme Court Case
  - ►June 19, 2006, Opinion (4-4-1)
- Relatively Permanent Waters (RPW) = Waters of the US
  - ►Flows at least three months/yr

Tributaries/Significant Nexus

- Significant Nexus to Traditional Navigable Water (TNW)
  - **TNW** = Section 10 Waters, major rivers and lakes/reservoirs with public boat ramp.
  - **Significant Nexus** = physical, chemical, biological influence on TNW (more than speculative).
- Sig. Nexus is generally applicable to headwaters (top of watershed).

Tributaries vs Isolated Waters

- Streams, creeks (perennial, intermittent, ephemeral) = regulated (Rapanos/Carabel)
  - ►Exception: tributaries w/o significant nexus
- Isolated Waters = not regulated (SWANCC)
  - ►Includes tributaries to isolated waters
  - ►Exception: Isolated natural lakes that are TNWs (e.g., Bitter Lake)

Limits of Jurisdiction

- Lateral
  - Lakes, Rivers, Streams: Ordinary High Water Mark - Line on the shore or bank established by fluctuations of water indicated by physical characteristics (line impressed on the bank, shelving, soils, destruction of terrestrial vegetation, presence of litter and debris, etc.).
  - Wetlands: Boundary

Drainage and 404

- Section 404 CWA permits **are not** drainage permits!
- Section 404 CWA permits **are** authorizations to discharge dredged or fill material into Federally regulated waters
- Impacts from drainage activities is sometimes **indirectly** regulated
- Many ways to manipulate drainage without triggering need for 404 permit

Drainage and 404

- Activity occurs on uplands
- Activity occurs in non-jurisdictional waters
  - ►Isolated (e.g., prairie potholes)
  - ►Non-significant nexus (e.g., tributaries)
- Activity occurs in jurisdictional waters but does not involve a discharge of dredged or fill material

Drainage and 404

- Examples
  - Drain ditches: uplands/non-wus/regulated waters w/o discharge (i.e., upland disposal)
  - Drain tile installation: (Same as above)
  - Modify streams via excavation – deepen, widen, relocate (with upland disposal)
  - Clean out/maintenance w/ upland disposal
  - Levees constructed in floodplains

Summary

- Organization/Personnel
- Administration of two Federal Laws
- Permit Process and Permit Types
- What activities and waters trigger the need for 404 permits
- How COE Regulatory program interacts w/ drainage issues in SD

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