

U.S. Army Corps of Engineers

Regulatory Division Permit Process Basics
Association of Pacific Ports
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Presented By:
Theresa Stevens, Ph.D.
Senior Project Manager
U.S. Army Corps of Engineers
Los Angeles District
Regulatory Division



Topics

- Statutory authorities and regulations
- Jurisdiction
- Related laws and regulations
- Permit process overview & time lines
- Consultations
- Links



Statutory Authorities

- Section 10 Rivers and Harbors Act 1899 (33 U.S.C. 403): codified federal authority to regulate structures (docks, bulkheads, piles, wharves, cranes, revetments, etc.) and work (dredging, work from a barge) in or affecting navigable waters of the United States (case law dates to 1824).
- Section 404 Clean Water Act 1972 (33 U.S.C. 1344): codified federal authority to regulate discharges of dredged or fill material to waters of the United States.
- Section 103 Marine Protection, Research and Sanctuaries Act 1972 (33 U.S.C. 1413) (MPRSA): codified federal authority to regulate the transport of dredged material for ocean disposal.

Sections 9 - Rivers and Harbors Act

- Section 9- Delegated permit authority for bridges over navigable waters to the U.S. Coast Guard in 1966 under the General Bridge Act of 1946, as amended.
- The Corps uses NWP 15 and/or other NWPs to authorize discharges of fill for USCG approved bridges.



Section 408 - Rivers and Harbors Act

- Applies to Corps-built property and facilities (e.g., federal breakwaters, federal navigation channels).
- Ports/local sponsors initiate 408 review with engineering/civil works divisions. Engineering division approval is required prior to issuance of a regulatory division permit
- <https://www.usace.army.mil/Missions/Civil-Works/Section408/>
- Engineering Circular 1165-2-220



Implementing Regulations

- 33 CFR 320-332 (Corps Regulatory Program)
- 40 CFR 230 (EPAs' Section 404(b)(1) Guidelines)
- 40 CFR 227-228 (EPAs' ocean disposal regulations)

Waters of the United States (WOUS)

- All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide (33 CFR 328.3(a)(1))
- Navigable WOUS are those waters 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 for use to transport interstate or foreign commerce (33 CFR 329.4)

Jurisdiction

- Rivers and lakes: The Corps Regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark (33 CFR 329.11).
- Oceanic and tidal waters: The Corps Regulatory jurisdiction includes all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (i.e., territorial seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf (33 CFR 329.12).

Related Laws & Regulations

- 36 CFR 800 and 33 CFR 325 Appendix C (National Historic Preservation Act)*
- 50 CFR 402(Endangered Species Act)*
- 50 CFR 600 (Magnuson-Stevens Fishery Conservation and Management Act)*
- Marine Mammal Protection Act*
- Clean Air Act*
- Clean Water Act Sections 401 and 402
- Coastal Zone Management Act



***Corps initiates agency consultation/coordination using information (studies, plans, etc.) supplied by the applicant.**



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How Do I: Start the Corps permit process?

- Conduct a pre-application meeting (optional).
- Review 33 CFR 325 (required application items).
- Submit a signed permit application (ENG Form 4345 for LOP & SIP; Preconstruction Notification Form for NWP & RGP) and include a detailed narrative project description and drawings (e.g., maps, exhibits, typical plans).
- Additional information will be required to facilitate public notices, agency consultation/coordination (e.g., BA, EFH Assessment, sediment sampling/analysis plan, HSPR, etc).

What is the Corps doing after I apply?

- Determines if work or activity is under our authority (Section 404, 10, and/or 103).
- If an IP: issue a public notice (LOP, SIP).
- Coordinates with agencies, tribes, the public.
- Makes “effect determinations” and initiates ESA, EFH, MMPA, 106 consultations, and tribal coordination, as warranted.
- Coordinates sediment testing evaluation with EPA and other agencies.
- Tracks Section 401 certification process.



And...

- Determines type of permit (IP or GP) and need for alternatives.
- Completes a Public Interest Review (PIR). PIR balances project benefits against detriments (33 CFR 320.4)
- Public notices are used to assess public interest, need for EIS, disclose potential environmental issues, etc.

****Corps is not a resource agency and neither a proponent nor opponent.**

And...

- Completes a Section 404(b)(1) alternatives analysis including pass-fail tests, and factual determinations on dredged material, and makes a LEDPA* determination.
- Considers all appropriate and practicable mitigation, and makes significant degradation* determination.
- Documents findings in ROD or EA (SIP), or memoranda for the record (MFR) (LOP, NWP, RGP).

*For SIP projects with Section 404 components.

Can the Corps deny or withdraw my permit application?

- Yes. Denial may result if the project does not comply with the Section 404(b)(1) Guidelines, is determined to be contrary to the public interest, or presents national security conflicts.
- Yes. Applications will be withdrawn due to lack of timely response.
- Permit denial can be appealed (33 CFR 331).
- EPA can veto a Section 404 or 103 permit decision under its 404(c) authority (this can occur after the Corps issues a permit).
- EPA has no authority to veto a Section 10 permit.



Dredged Material Disposal

- Dredged material may require testing (chemistry, grain size, sometimes bioassay) and disposal site suitability determination (interagency review).
- Section 404 applies when material is placed as fill, subtidal habitat creation, or beach nourishment.
- Section 103 applies when material is transported for the purpose of ocean disposal (as waste).
- EPA requires “site use conditions” to be added to Corps permits for disposal at an ODMDS.



Piles/pilings

- Policy: Piles are evaluated under Section 10 as structures.
- **BUT-** if piles are very close together and have the effect of fill, may require a Section 404 permit.
- Pile installation method (hydrojet) may trigger Section 404 discharge (recommend using a sleeve).
- Most California agencies define piles as fill.



Section 401 Water Quality Certification

- Required for most Section 10 and all Section 404 permits in California.
- Corps **Regulatory** sets the Reasonable Period of Time (RPT) and waives certification requirement when the RPT has elapsed (40 CFR 121.9(a)(2)(i)).
- Corps **Regulatory is required to waive 401 requirement after one year** (33 CFR 325.2(b)(1)(ii)), case law, and the EPA 401 rule (FR Vol. 85 No. 134, July 13, 2020)).



Coastal Zone Management Act (CZMA)

- CZMA requires a determination that the federal action (a Corps permit) is “consistent” with the state’s coastal zone management program.
- Send the Corps a copy of the final CZMA concurrence once completed.
- Corps Regulatory has authority to presume CZMA concurrence 6 months after the state receives a certification statement (33 CFR 325.2(b)(2)).



Essential Fish Habitat Consultation (EFH)

- EFH definition: “...waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity.” EFH can be saline or freshwater.
- Consultation with NMFS addresses adverse effects on EFH and federally managed fisheries.
- Corps can accept or reject NMFS conservation recommendations. Corps must explain in writing if we reject, prior to issuing a permit.



Endangered Species Act

- The Corps is lead federal agency for many port projects.
- As lead agency, the Corps determines effects on endangered species and critical habitats.
- Corps must obtain “concurrence” or a Biological Opinion (BO) depending on the effect determinations.
- Conditions in a BO may become part of the Corps Regulatory permit and are then enforceable by the Corps.

Links

- USACE Regulatory maps (<http://regulatory-ops.s3-website-us-east-1.amazonaws.com>)
- <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Regulatory-Contacts/>



QUESTIONS?

Standard Individual Permit (SIP)

- Used for projects exceeding 0.5 acre permanent loss of WOUS, for which there is no NWP, RGP, or LOP, or which may cause more than minimal adverse impacts.
- 30-day general public notice; possible public hearing (longer public notice if associated with an EIS).
- 404 (b)(1) Guidelines applied in detail, including analysis of “practicable” alternatives (cost, logistics, technology).
- Public interest evaluated in detail.
- Corps only authorizes the LEDPA (a Section 404 requirement).
- 120 day processing time (can be exceeded due to consultations; will be exceeded with EIS).

Letter of Permission (LOP)

- For non-controversial projects in navigable waters that DO NOT involve discharge of dredged or fill material; can be used for Section 10 (only) and Section 10/103 actions.
- 15-day agency-only public notice; wider distribution sometimes occurs (e.g., Harbor Masters, commercial fishing reps, stakeholders).
- If “appreciable opposition” is identified during the public notice, then SIP process occurs.
- Up to 120 day processing time (can be exceeded due to consultations).

Nationwide Permit (NWP)

- Apply nationally to categories of activities with minimal individual and cumulative impacts.
- Must not exceed the 0.5-acre permanent loss (of WOUS) threshold; temporary impacts can go over 0.5 acre.
- Used for “single and complete” projects with “independent utility.”
- 60 day processing time (can be exceeded due to consultations).

Regional General Permit (RGP)

- Can authorize programmatic activities and those not covered by NWP; can authorize more than 0.5 acres of permanent loss if impacts are determined to be minimal (e.g., POLA RGPs 65 & 29).
- Process to develop an RGP same as SIP; maximum 5-year term; can be reissued.
- 401 certification/CZMA/ESA/NHPA/EFH/SAP/tribal not required to develop an RGP...but will expedite future “Notice to Proceed” decisions.