

REGULATORY PROGRAM OVERVIEW

INTRODUCTION

The Department of the Army regulatory program is one of the oldest in the Federal Government. Initially it served a fairly simple, straightforward purpose: to protect and maintain the navigable capacity of the nation's waters. Time, changing public needs, evolving policy, case law, and new statutory mandates have changed the complexion of the program, adding to its breadth, complexity, and authority.

LEGISLATIVE AUTHORITIES

The legislative origins of the program are the Rivers and Harbors Acts of 1890 (superseded) and 1899 (33 U.S.C. 401, et seq.). Various sections of the Act establish permit requirements to prevent unauthorized obstruction or alteration of any navigable water of the United States. The most frequently exercised authority is contained in Section 10 (33 U.S.C. 403), which covers construction, excavation, or deposition of materials in, over, or under such waters, or any work which would affect the course, location, condition, or capacity of those waters. This authority is granted to the Secretary of the Army. Other permit authorities in the Act include Section 9 for dams and dikes, Section 13 for refuse disposal, and Section 14 for temporary occupation of work built by the United States. Subsequent legislation has modified these authorities, but not removed them.

In 1972, amendments to the Federal Water Pollution Control Act added what is commonly called Section 404 authority (33 U.S.C. 1344) to the program. The Secretary of the Army, acting through the Chief of Engineers, is authorized to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into waters of the United States at specified disposal sites. Selection of such sites must be in accordance with guidelines developed by the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army; these guidelines are known as the 404(b)(1) Guidelines. The discharge of all other pollutants into waters of the U.S. is regulated under Section 402 of the Act, which supersedes the Section 13 permitting authority mentioned above. The Federal Water Pollution Control Act was further amended in 1977 and given the common name of "Clean Water Act." It was again amended in 1987 to modify criminal and civil penalty provisions and to add an administrative penalty provision.

In 1972, with enactment of the Marine Protection, Research, and Sanctuaries Act, the Secretary of the Army, acting through the Chief of Engineers, was authorized by Section 103 of the Act to issue permits for the transportation of dredged material for ocean disposal. This authority also carries with it the requirement of notice and opportunity for public hearing. Disposal sites for such discharges are selected in accordance with criteria developed by EPA in consultation with the Secretary of the Army.

DELEGATION OF AUTHORITY

Most of these permit authorities (with specific exception of Section 9) have been delegated by the Secretary of the Army to the Chief of Engineers and his authorized representatives. Section 10 authority was formally delegated on May 24, 1971, with Section 404 and 103 authorities delegated on March 12, 1973. Those exercising these authorities are directed to evaluate the impact of the proposed work on the public interest. Other requirements, including the 404(b)(1) Guidelines and ocean dumping criteria, must also be met, as applicable.

Additional clarification of this delegation is provided in the regulatory program's implementing regulations (33 CFR 320-332). Division and district engineers are authorized to condition permits (Part 325.4) and, if necessary, to modify, suspend, or revoke issued permits (Part 325.7). Division and district engineers also have authority to issue alternate types of permits such as letters of permission and regional general permits (Part 325.2).

This delegation of authority recognizes the decentralized nature and management philosophy of the Corps of Engineers. Regulatory program management and administration is focused at the district level, with policy oversight at higher levels. Federal regulations at 33 CFR 320-332 form the backbone of the program and provide the district engineer the broad policy guidance needed to administer day-to-day operation of the program. These regulations have evolved over time, changing to reflect added authorities, case law, and, in general, the concerns of the public. They are developed through formal rule making procedures.

GEOGRAPHIC EXTENT OF JURISDICTIONAL AUTHORITY

The geographic jurisdiction of the Rivers and Harbors Act of 1899 includes all navigable waters of the United States, which are defined at 33 CFR Part 329 as, "those waters that are 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 to use to transport interstate or foreign commerce." This jurisdiction extends seaward to include all ocean waters within a zone extending three nautical miles from the coast line (the "territorial seas"). Limited authorities extend across the outer continental shelf for artificial islands, installations and other devices (see 43 U.S.C. 333 (e)). Activities requiring Section 10 permits include structures (e.g., piers, wharfs, breakwaters, bulkheads, jetties, weirs, transmission lines) and work such as dredging or disposal of dredged material, excavation, filling, and other modifications to the navigable waters of the United States.

Waterbodies subject to Clean Water Act jurisdiction are defined as "waters of the United States." Waters of the U.S. are defined for the Corps regulatory program at 33 CFR 328. This overview provides an abridged listing of waters of the U.S., which include:

- (1) All waters which are currently used, 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;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters otherwise identified as waters of the United States;
- (5) All tributaries of waters in (1) through (3), above;
- (6) All waters adjacent to a water identified in (1) through (5), including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
- (7) All waters in paragraphs (i) through (v), below, where they are determined, on a case-specific basis, to have a significant nexus to a water identified in (1) through (3).
 - (i) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
 - (ii) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
 - (iii) *Pocosins*. Pocosins are evergreen shrub- and tree-dominated wetlands found predominantly along the Central Atlantic coastal plain.
 - (iv) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters, and hot, dry summers.
 - (v) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
- (8) All waters located within the 100-year floodplain of a water identified in (1) through (3) and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in (1) through (5), where they are determined on a case-specific basis to have a significant nexus to a water identified in (1) through (3).

The Clean Water Act uses the term “navigable waters” which is defined in law as “waters of the United States, including the territorial seas.” Thus, Section 404 jurisdiction is defined as encompassing all Section 10 waters.

Activities, requiring Department of the Army permits under Section 404 are limited to discharges of dredged or fill material into waters of the United States. Regulated discharges include return water from dredged material disposed of on dry land and generally any fill material (e.g., rock, sand, dirt) used to convert waters of the U.S. to dry land for purposes of site development, roadways, erosion protection, etc.

Graphics generally depicting the extent of Section 10 and Section 404 jurisdiction can be [viewed here](#).

The geographic scope of Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 consists of those waters of the open seas lying seaward of the baseline from which the territorial sea is measured. Along coast lines this baseline is generally taken to be the low water line. Thus, there is overlap in jurisdiction between this Act and the Clean Water Act. By interagency agreement with EPA, the discharge of dredged material into the territorial seas is regulated under Section 103 criteria rather than the criteria developed for Section 404.