

Summary of History

- navigation only 1899 to 1933
- added public interest factors 1933 through 1967
- environmental focus 1980s
- management focus 1980s
- now dual focus, environmental and management

- 1215 Magna Carta. The first of the Nottingham Charters (Circa 1155) required to burgesses to keep the River Trent clear for navigation for a width of one perch on each side of midstream as far as the Trent Bridge. This is a time when it was quite popular in England to place weirs across the rivers to raise water levels for fishing improvement. The Magna Carta required that "All fish-weirs shall be removed from the Thames, the Medway and throughout the whole of England, except on the seacoast," Since then, many laws have been enacted to protect the right of free public navigation. To this day, questions still arise in England, as well as in this country, on what the upstream limit of that right, known as the "navigational servitude," should be.
- 1607 English Colonization. As the colonies were formed they followed the common law of England, including the public right to free navigation. As territories to the west were ceded to Great Britain, the treaties invariably included the provision that fluvial navigation would remain "forever free." Indeed, the western settlers might have been willing to accept the allegiance of another country rather than lose their right to free navigation.
- 1787 U.S. Constitution. The thirteen states gave to the United States Congress the power "to regulate commerce with foreign nations, among the several states, and with Indian tribes" (The "**Commerce Clause**").
- 1824 Gibbons vs. Ogden. The Supreme Court clearly arms the principle that commerce" for purposes of the Commerce Clause includes navigation.
- 1888 Rivers and Harbors Act. Corps authorized to require owners of obstructive bridges to modify the bridge, at their own expense and effort, so as to provide for reasonably free and unobstructed navigation.
- 1890 Rivers and Harbors Act. The first general legislation giving the Corps jurisdiction and authority over the protection of navigable waters. Though the Corps issued permits under Section 7 of the 1890 act, amended in 1892, the law was soon found to be crude and clumsy.
- 1899 Rivers and Harbors Act. A rewrite of the 1890 act and a compilation of all laws for protection of navigable waters.

- 1909 Attorney General Opinion. In connection with a permit for a beach dolphin at Santa Barbara, California, that would block pedestrian access along the beach, the AG ruled that the Corps could not look beyond navigation to deny a permit.
- 1920 Attorney General Opinion. The 1909 AG opinion was confirmed in connection with a permit to place fill in Biscayne Bay, Florida.
- 1933 U.S. ex rel. Greathouse et al vs Dem.. The Supreme Court ruled that the Corps could refuse a permit for a commercial wharf in the Potomac River that would not harm navigation, but that would be inimical to the construction of the George Washington Memorial Parkway. Interesting words from the Corps' old Washington District on this case in a 1931 letter: "Such construction of docks and subsequent buildings would present an unattractive front and a further destruction of great natural beauty. That the Georgetown front is ugly cannot be used as a argument for creating another similar condition on the Virginia side." Aesthetics in 1931!
- 1946 Corps publishes its permit regulations in the Federal Register (33 CFR 209) for the first time.
- 1960 Chief Counsel Opinion. In a 2 June 1960 memorandum, the chief counsel for the Corps advised that the Fish and Wildlife Coordination Act can be used as basis for denying a permit under the 1899 act solely for fish and wildlife reasons.
- 1963 Consideration of fish and wildlife impacts in making permit decisions added to Corps regulations but the decision whether a permit would be issued "must rest primarily upon the effect of the proposed work on navigation."
- 1966 The DOT Act transfers bridge authorities from the Corps to the Coast Guard. Program transfer occurred in 1967 after being vested in the Corps for 79 years.
- 1967 Zabel permit (11 acre fill in Boca Ceiga Bay, Florida) denied by Col. Tabb, Jacksonville District Engineer, due to adverse impacts on fish and wildlife. (March 13, 1967)
- 1967 Corps changes its regulations (33 CFR 209.330) to provide that permit decisions will be based on "the effects of permitted activities on the public interest, including effects upon water quality, recreation, fish and wildlife, pollution, our national [resources](#). as well as the effects on navigation." The public interest review was born (December 7, 1967)
- 1967 Secretaries of Army and Interior sign MOU precluding Corps from issuing a permit over the objections of the Fish and Wildlife Service (had to be referred to the Secretary of Army for decision).
- 1970 Federal Water Pollution Control Act (FWPCA) amended ("Water Quality Improvement Act of 1970") to require state certification before Corps could issue a permit involving a discharge (Section 21 b).

- 1970 Executive Order 11574 initiated the Section 13 (R&H Act of 1899) permit program known as the Refuse Act Permit Program (RAPP) for controlling all discharges into navigable waters and their tributaries. RAPP administered by Corps with oversight and decision authority by EPA.
- 1972 FWPCA Amendments. Section 402 replaces RAPP. Section 404 enacted.
- 1975 Court orders expansion of Section 404 program (NRDC v. Calloway).
- 1975 Corps issues first general permit - private piers, Pinellas County, Florida.
- 1976 Corps denies Marco Island permits.
- 1977 Corps issues first Nationwide permits.
- 1977 FWPCA, renamed Clean Water Act, amended to provide 404 exemptions, transfer and other changes.
- 1977 Executive Order 11990. Applies to minimizing the destruction, loss or degradation of wetlands. In addition, preserve and/or enhance the natural and beneficial values of wetlands when federal agency's are carrying out responsibilities for managing, undertaking of construction or improvements, conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating and licensing activities. This Order does not apply to the issuance by Federal agencies of permits, licenses, or allocations to private parties for activities involving wetlands on non-Federal property.
- 1979 Attorney General Civiletti rules that EPA, not Army, has the authority to determine the limits and exemptions of the 404 program.
- 1982 President's Task Force on Regulatory Relief directs many changes to reform the Corps regulatory program.
- 1984 NWF V. Marsh lawsuit settled. More control placed on discharges above the headwater and into isolated waters (Nationwide Permit 26).
- 1986 Reform measures consolidated into final regulations.
- 1988 Corps NEPA compliance Final Rule published, key issue for the Regulatory Program is Scope of analysis. For regulatory actions scope of analysis, particularly for alternatives, is limited to portion of project Corps regulates plus any additional area where there is "Federal control and responsibility", typically not whole project.

- 1989 Corps signs MOAs with EPA on geographic jurisdiction (limit of wetlands) and 404(f)(1) exemptions for agriculture; and on enforcement. Corps does virtually all wetland delineations and exemption determinations under MCA but EPA can - intervene if Corps has not put in writing to applicant. Corps does all enforcement of permit conditions (permit compliance) and about 90% of unauthorized enforcement (e.g., filling a wetland without a permit).
- 1990 Corps and EPA sign MCA on the mitigation requirements of the Section 404(b) (1) Guidelines. MOA established the "sequence" of avoiding and minimizing impacts first, then compensating (restoring wetlands, constructing wetlands, enhancing existing wetlands, or preserving existing high quality wetlands to offset wetland loss) for wetland losses caused by permit issuance.
- 1992 Bush Administration wetlands plan issued. The plan would increase protection of wetlands, and enhance management of Corps regulatory program. Proposed rule issued to regulate virtually all excavation activities in wetlands and other Section 404 waters, & some activities constructed on pilings, Section 404 waters.
- 1992 Corps and other agencies revise Section 404(q) MOAs to streamline the agency appeals process and reduce the number of cases where the Federal resource agencies "threaten" delays using the Section 404(q) process.
- 1992 Corps issues RGL 92-1, agency roles in the Section 404 program. Clearly states that Corps is project manager and decision-maker on all Section 404 permits. Identified the other Federal agencies' roles as commentators in process.
- 1993 Clinton Administration wetlands initiatives issued. Largely based on the Bush Administration plan to enhance protection of wetland resources and to enhance management of program. Confirmed that both RGL 92-1 and the 1992 revised Section 404(q) MOAs were the way to conduct the program. Finalized the proposed rule on excavation and pilings. Proposes adding an administrative appeals process for permit applicants who are denied permits, a 90 day permit decision deadline, and revising the Corps nationwide permits to cover some activities regulated under new excavation rule.
- 1993 Corps issues RGL 93-2 on mitigation banking and flexibility in the Section 404 (b) (1) Guidelines. The guidance establishes that mitigation banking can be used whenever the Corps believes that use of mitigation bank credits provides acceptable compensatory mitigation. The flexibility guidance is intended to ensure that districts recognize the flexibility that exists in the Section (b) (1) guidelines. The flexibility guidance is particularly focused on ensuring that the alternative analysis will be commensurate with the impacts to the aquatic environment. Extensive alternatives analyses should not be conducted where the impacted wetlands are low value or where there is little difference between the environmental impacts of the proposed project and potential alternatives.
- 1993 Tulloch Rule issued confirming regulation of virtually all excavation and pilings projects under Section 404

- 1994 MOA signed by Corps, SCS, EPA, and FWS regarding delineation of wetlands on agricultural land. After SCS receives required training and regional mapping conventions are approved, SCS will do all delineations on agricultural land.
- 1995 Mitigation Banking Guidance. On November 28, 1995, joint Federal guidance for the establishment, use, and operation of mitigation banks was issued by the Corps, EPA, NRCS, U.S. FWS, and NMFS. This guidance addresses how mitigation banks are to be established and used to provide compensation for adverse impacts to wetlands and other aquatic resources in the context of the Section 404 permit program and the wetland conservation provisions of the Food Security Act.
- 1998 Tulloch Decision. Recant of 1993 Rule. The Corps no longer regulates excavation activities that are conducted in such a manner that no more than "incidental fallback" of dredged material occurs into waters of the United States. Deposition of dredged material during excavation activity such that it is "incidental fallback" into waters of the United States does not require a permit from the Corps.
- 2000 Proposed revisions to Definition of "Fill Material" and "Discharge of Fill Material." Proposed rule in April 2000, proposes to replace the "primary purpose" test currently in the Corps definition of fill material with an "effect-based" test. The rule also proposes to define some fill material (e.g., cars, tires, debris, etc.) as unsuitable for discharge into waters of the U.S.
- 2000 Guidance on the Use of In-Lieu-Fee arrangements for compensatory mitigation under Section 404 of CWA and Section 10 of RHA. Presents permittee the option to provide funds to an in-lieu-fee sponsor instead of either completing project-specific mitigation or purchasing credits from a mitigation bank that has been approved under the banking guidance.
- 2000 Nationwide Permits. On March 9, 2000, the Corps issued five new NWPs and modified six existing NWPs to replace NWP 26. The Corps also adopted two new general conditions to restrict the use of NWPs to authorize activities in designated critical resource waters and 100-year floodplains. The replacement of nationwide permit 26 with the new and modified nationwide permits was necessary to ensure compliance with the requirements of Section 404(e) of the Clean Water Act.
- 2001 SWANCC Ruling. Ruling restricts the Corps regulatory jurisdiction under Section 404 of the CWA to traditionally navigable waters (i.e. Section 10 of R & H Act), surface tributaries to such navigable waters, and waters and wetlands that are adjacent to the Section 10 waters and their tributaries. Renders moot the "Migratory Bird Rule" which extended jurisdiction to include "intrastate waters." Relatively small isolated waters and wetlands such as pocosins, prairie potholes, vernal pools and playa lakes that were subject to jurisdiction on basis of "Migratory Bird" rule, are excluded.

- 2001 Final Rule, "Definition of Dredge Material". Based upon the 1998 ruling, the Corps and EPA determined that the use of mechanized earth-moving equipment to conduct land-clearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States may result in a discharging of dredged material. Thus, these activities would be regulated unless project-specific evidence shows that the activity results in only "incidental fallback".
- 2002 Nationwide Permits. On January 15, 2002, the Corps reissued all of the NWPs (except NWP 26) with minor modifications. The new and modified NWPs issued in March 2000 were reissued so that they would be in the same five-year cycle as the other NWPs. The Corps adopted a new general condition that allows a district engineer to extend the approved construction period for a long-term project. The nationwide permits expire on March 18, 2007.
- 2002 Borden Ranch Partnership. The judgment by the ninth circuit court stands, because the court was equally divided.
- 2002 Final Definition of "Fill Material Rule". The definition of fill was modified so that the Corps and EPA would have the same definitions. The new definition uses an "effect-based" test to determine whether the placement of fill into waters of the U.S. has the effect of either replacing any portion of a water of the U.S. with dry land or changing the bottom elevation of any portion of a water.
- 2002 Mitigation RGL and Action Plan. The Corps developed the Mitigation RGL to improve compensatory mitigation in the Corps regulatory program and respond to the recommendation made in the 2001 National Research Council Report on wetlands mitigation.
- 2003 Advanced Notice of Proposed Rulemaking and Legal Guidance on SWANCC. On January 15, 2003, the Corps and EPA issued on the ANPR to solicit comments on issues related to "isolated waters" and whether those waters and jurisdictional under the Clean Water Act. This notice also contains a joint memorandum to clarify a U.S. Supreme Court Decision in the SWANCC case.