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# *Army Corps of Engineers Permitting 101 For Airports*



**Antal Szijj – Army Corps of Engineers**  
**Doug Pomeroy – Federal Aviation Administration**

*Presented at FAA Western-Pacific Airports  
4<sup>th</sup> Annual Conference May 2008*



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# *Corps Regulatory Program Purposes*



- Protect Navigation-Rivers & Harbors Act
- Maintain the physical, chemical and biological integrity of the Nation's waters (Clean Water Act)
- Regulate Ocean Dumping (MPRSA)
- Issue permits for regulated actions within the geographic jurisdiction of RHA & CWA in a way that protects navigation & the nation's waters

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4<sup>th</sup> Annual Conference May 2008*



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# *Army Corps of Engineers Regulatory Program Goals*



- Protect the Nation's overall aquatic environment
- Make fair and reasonable decisions for the regulated public
- Continually enhance the efficiency of the program



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# ***Today's Presentation To Help You Understand***



- When is a Corps permit required?
- What information and documentation is needed to obtain a Corps permit?
- What Corps permit options are available?
- Some tips on making the Corps permitting process go smoothly

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# *Army Corps of Engineers Permitting Programs*



- Rivers and Harbors Act of 1899
  - Permits for structures and work in waters covered by the Rivers and Harbors Act (generally major waterways)
- Clean Water Act of 1972
  - Discharges of dredged or fill material into waters within Clean Water Act jurisdiction
- Marine Protection, Research and Sanctuaries Act of 1972
  - Ocean dumping of dredged material (not covering today)

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# *When do I need a Corps permit?*



## Part 1

Am I within a  
jurisdictional area?

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# *Caution*



Many words used in the Corps Regulatory Program have specific regulatory definitions that are different from everyday use

This is especially true for the words "navigable waters" and "traditional navigable waters"

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# *Rivers and Harbors Act*

## *Section 10*

### *Geographic Jurisdiction*



- all navigable waters of the U.S.
  - subject to ebb and flow of tide, or
  - presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce, or
  - extends seaward three nautical miles from the coast line (the "territorial seas")
- Lateral RHA jurisdiction generally extends to ordinary high water mark and/or regularly inundated adjacent wetlands

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# *Rivers and Harbors Act*

## *Section 10*

### *Geographic Jurisdiction*



- Airports generally don't have many actions in RHA Section 10 jurisdiction
  - Exceptions: airports near coastal bays, estuaries or along major rivers

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*Clean Water Act*  
*Section 404*  
*Geographic Jurisdiction*  
*33 CFR 328.3(a)*



- Waters of the United States
- Includes wetlands **and** many other kinds of waters as well

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# *Clean Water Act* *Section 404*

## *Geographic Jurisdiction*

### *33 CFR 328.3(a)*



- Waters of the United States
  - Traditional navigable waters
  - Interstate waters including interstate wetlands
  - Other waters including intrastate, non-navigable waters with interstate/foreign commerce connections
  - Impoundments of waters otherwise defined as waters of the U.S.
  - Tributaries of the above
  - Territorial seas
  - Adjacent wetlands

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*Identifying  
Clean Water Act  
Section 404  
Geographic Jurisdictional Areas  
Overview*

- Jurisdiction generally extends to ordinary high water mark, or
- Boundary of adjacent wetlands

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## *What Makes A Wetland?*



- Water
- Plants
- Soils



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## *Definition of "Wetlands"*



Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances, do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

- Jointly defined by USACE (Federal Register 1982) and EPA (Federal Register 1980)

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## *Identifying Wetlands*



- The Corps uses the 1987 Corps Wetland Delineation Manual and/or regional supplements
- Corps regional supplements to the Corps 1987 Manual in FAA Western-Pacific area
  - Interim Arid West Supplement (December 2006)
  - Draft Western Mountains, Valleys, and Coast Region (peer review and field testing version April 2007)

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# *Notes on CWA Jurisdictional Determinations*



- Two US Supreme Court cases in past 7 years on CWA geographic jurisdiction
- New Corps guidance and jurisdictional documentation forms developed for documentation of CWA jurisdiction
- Regional supplements to Corps Wetland Delineation Manual being developed
- Corps and EPA HQs in ongoing policy and guidance discussions
- See Corps HQ site [www.usace.army.mil/cw/cecwo/req](http://www.usace.army.mil/cw/cecwo/req) for details on these issues

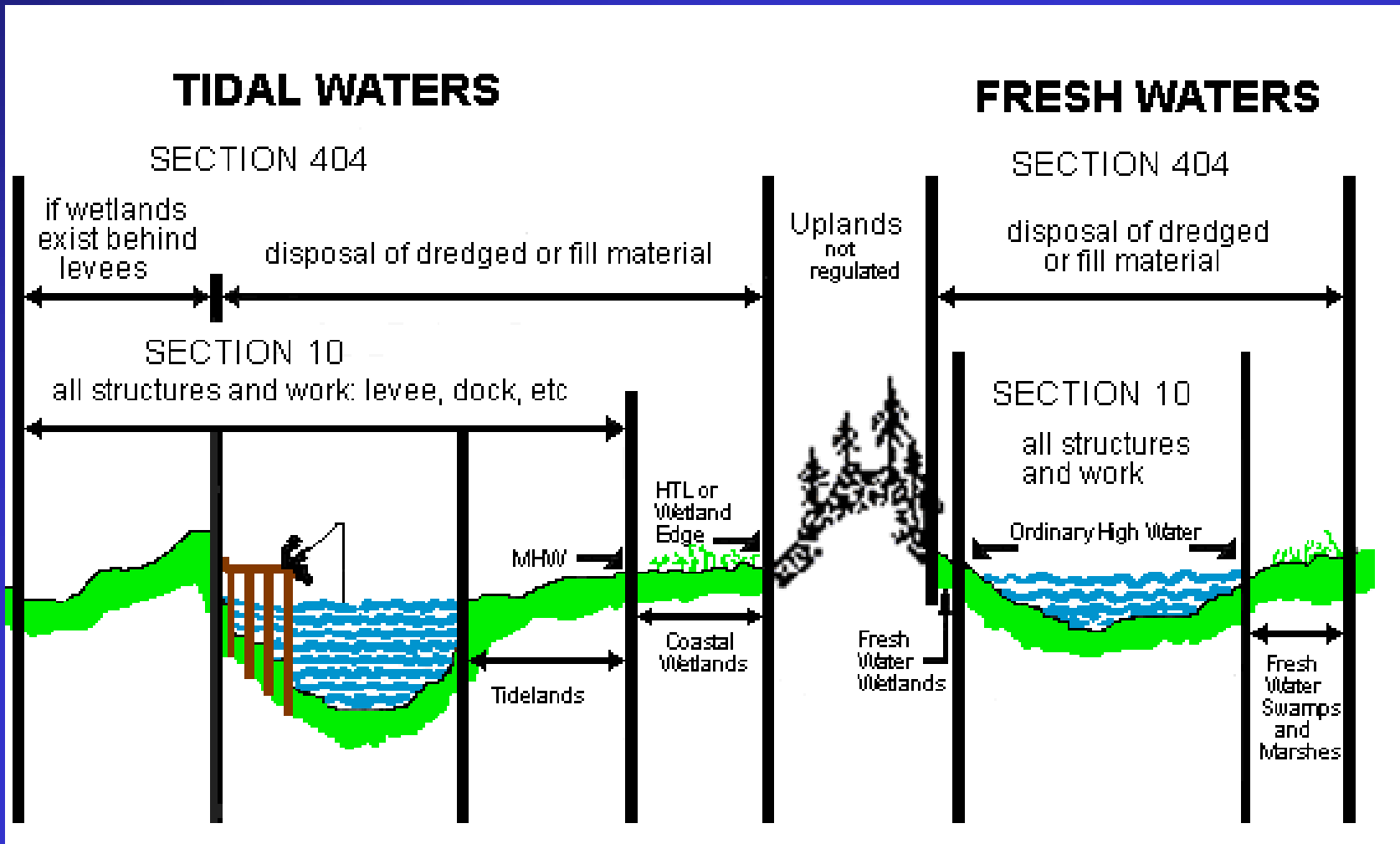
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# *Geographic Jurisdiction Clean Water Act and Rivers and Harbors Act*



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# ***Geographic Jurisdiction Clean Water Act Examples***



Pacific Ocean



Yellowstone River



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# ***Geographic Jurisdiction Clean Water Act Examples***



## ***Relatively Permanent Waters***

Wolf Trap Creek, Vienna, VA



Grindstone Creek, MO



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# ***Geographic Jurisdiction Clean Water Act Non-Relatively Permanent Waters***



Desert ephemeral tributary, CA



Unnamed ephemeral tributary, ID



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# ***Geographic Jurisdiction of Clean Water Act Wetlands Adjacent to Traditional Navigable Waters***



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# ***Geographic Jurisdiction Clean Water Act Wetlands Directly Abutting Relatively Permanent Waters***

Unnamed water and wetlands, AK



Unnamed water and wetlands, ND



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# *Geographic Jurisdiction Clean Water Act*



## *Wetlands Not-Directly Abutting Relatively Permanent Waters*

Unnamed water and wetlands IL



WOUS = Water of US

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# ***Geographic Jurisdiction Clean Clean Water Act Wetlands Directly Abutting Non-Relatively Permanent Waters***

Adjacent wetlands, AR



Adjacent wetlands, SE United States



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# *Geographic Jurisdiction Clean Clean Water Act Isolated Waters and Wetlands*



Isolated Waters and Wetlands



**Specific Corps review needed to  
establish CWA status**

Isolated wetland, IA



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# *Clean Water Act* *Section 404*

## *Geographic Jurisdiction*



- Certain geographic features generally are not jurisdictional waters:
  - Swales, erosional features (e.g. gullies) and small washes characterized by low volume, infrequent, and short duration flow
  - Ditches (including roadside ditches) excavated wholly in and draining only uplands that do not carry a relatively permanent flow of water
  - Uplands transporting over land (no discernable channel) flows generated from precipitation (i.e. rain events and snowmelt)
- There are **EXCEPTIONS** to the above, best to contact your local Corps office

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# Ditches, Swales, & Erosional Features





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# *How do I figure this out?*



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# CWA

## *Jurisdictional Determinations Recommendations*



- Use consultants with specific expertise in CWA jurisdiction in the region covered by your airport
- Have consultants confirm they are using most current forms and materials
  - New documentation forms on Corps websites
  - Regional Supplements to the Corps national 1987 Wetland Delineation Manual
    - Arid West supplement and others
- See Corps national regulatory website at [www.usace.army.mil/cw/cecwo/reg/](http://www.usace.army.mil/cw/cecwo/reg/) for more information on these issues
- Can also check with FAA Airports District Offices environmental staff regarding recent experiences with Corps

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## *In doubt?*



- If in doubt, **ASK.**
  - The Corps will make determination of whether permit is required and verify extent of jurisdictional areas, including jurisdictional wetlands



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# *When do I need a Corps permit?*



## Part 2

Do I need a permit for my project?

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# *When do I need a Corps permit?*



- The two part test:
- You need a Corps permit when:
  1. You are in an area that is within the geographic jurisdiction of an Army Corps of Engineers regulatory program

**AND**

2. You are undertaking an action for which an Army Corps of Engineers permit is required

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# *Rivers and Harbors Acts*

## *Section 10*



### *Examples - Permit Required*

- Structures in Navigable Waters
  - Such as piers, docks, boathouses, pilings, oil rigs, pipelines, jetties, power transmission line, permanently moored vessel
  - Airport examples: Approach lights or navigation aids in bay or ocean
- Work in Navigable Waters
  - Dredging or disposal of dredged material, excavations and fills
  - Airport example - Filling coastal area to expand an airport

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# *NAVAID Structure in RHA Section 10 jurisdiction*



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# *Clean Water Act* *Section 404*



- Regulates the discharge of dredged or fill material into waters of the U.S., including wetlands

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# **Fill Material**



- Any material (rock, debris, dirt, etc.) which is used to replace an aquatic area with dry land or change the bottom contours of a waterbody

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# ***Clean Water Act Section 404 Permit Required***



- CWA Section 404 permit needed when placing fill within an area in Clean Water Act jurisdiction

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# *Clean Water Act*

## *Section 404*



### *Examples - Permit Required*

- Discharge of Dredged or Fill Material into waters of the U.S.
  - Such as road fills, poured concrete, backfill, beach nourishment, levees, breakwaters, rip-rap, dams, dikes, artificial islands, certain piling-supported structures, bulkheads, boat ramps, and > incidental fallback

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# I Know I Need a Permit What Now?

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## *Getting a Permit*



- ID extent of fill or other work in Corps jurisdictional areas
- Review regulations and/or work with Corps to determine type of permit required
- Submit documentation consistent with type of permit (or ID that no submittal of documentation required)

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# *Types of Permits*

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# *Types of Permit Authorizations*



- Nationwide Permits (for specific activities, developed by Corps Headquarters)
- Regional General Permits (for specific activities, developed by Corps Districts)
- Letters of Permission (generally RHA only)
- Individual Permits (RHA and CWA)

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# *Nationwide Permits*



- Apply nationally (most recent version March 2007)
- Pre-coordinated with agencies for water quality impacts, endangered species
- Some have Corps District specific requirements

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# *Nationwide Permits (NWP)*



- Currently 50 different NWPs
- Pre-coordinated with agencies for water quality impacts, endangered species
- Some require notification to the Corps (Pre-construction Notification = PCN)
- Some don't require notification - applicant can just use the permit
- Generally any project authorized by NWP must be < 0.5 acre of fill

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# ***Nationwide Permits Notes***



- Fill acreage limitations
  - Generally up to 0.5 acre of fill
  - Some NWP limitations much lower
- Generally require Corps notification if endangered species or historic properties involved
- Mitigation may be required
- Corps District-specific conditions may apply

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# *NWPs especially useful at airports*



NWP 3 Maintenance (Maintenance of existing structures or fill)

NWP 7 Outfall and Intake Structures

NWP 13 Bank Stabilization

NWP 18 Minor Discharges (<25 cubic yards & <1/10<sup>th</sup> acre of waters  
within CWA jurisdiction filled)

NWP 31 Maintenance of Existing Flood Control  
Facilities (detention basins, levees, channels etc)

NWP 39 Commercial and Institutional Developments

NWP 40 Agricultural Activities

NWP 41 Reshaping Existing Drainage Ditches

NWP 43 Stormwater Management Facilities

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# Project too large for Nationwide Permit?

## Individual Permit

## Recommend Consultant Assistance

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# ***Permit Evaluation***

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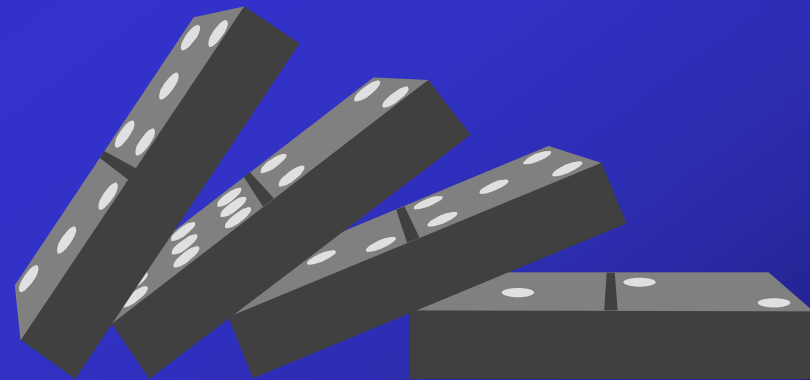


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# *Department of the Army Permit Is the Trigger That Subjects the Regulated Activity to Jurisdiction of Other Laws*



The DA permit is the action that initiates review under ESA, NHPA, NEPA and others. If no DA permit is required, these other acts may not apply to the proposed action



FAA may do consultations if FAA approval required

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# *Other Laws That Impact USACE Regulatory Process (Coordination)*



- National Environmental Policy Act
- Fish and Wildlife Coordination Act
- Endangered Species Act
- Coastal Zone Management Act
- National Historic Preservation Act
- Magnuson-Stevens Fishery Conservation and Management Act
  - Essential Fish Habitat (NMFS)

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# *Elements of Permit Evaluation (abbreviated list)*



- Overall environmental review (NEPA)
- Impacts to Aquatic Resources
- 401 Water Quality Certification
  - Section 401 CWA, issued by state
- Endangered Species Act (ESA) (50 CFR 402)
- Cultural & Historic Resources (NEPA, National Historic Preservation Act)

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# *Elements of Permit Evaluation (continued)*



- Coastal Zone Management Compliance
- Essential Fish Habitat
- Public Interest Review Factors
- Public Notice / Public input
  
- 404(B)(1) Guidelines
  - least damaging practicable alternative

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# *Elements of Permit Evaluation (continued)*



- 404(B)(1) Guidelines
  - least damaging practicable alternative
- Added evaluation requirements if project affects a “special aquatic site” (i.e.)
  - Wetlands
  - Sanctuaries and Refuges
  - Sand, Mud and Algal Flats
  - Coral Reefs
  - Riffle and Pool Complexes
  - Vegetated Shallows (Seagrass beds)

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# Corps

## ***Public Interest Review***



## ***Factors***

***33 CFR 320.4 (A)(1)***

- Conservation
- Economics
- Aesthetics
- General Environment
- Wetlands
- Cultural Values
- Fish & Wildlife Values
- Land Use
- Flood Hazards
- Property Ownership
- Flood Plain Values
- Navigation
- Recreation
- Shore Erosion & Accretion
- Water Supply / Quality
- Energy Needs
- Safety
- Mineral Needs
- Food & Fiber production
- Needs / Welfare of People

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# *Step Wise Impact Evaluation Process:*



- Avoid aquatic impacts
- Minimize aquatic impacts
- Compensatory mitigation for aquatic impacts

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# ***Step Wise Impact Evaluation***



## ***Process:***

# **STOP the Powerpoint**

**New Corps/EPA regulations**

**Mitigation Rule issued 10 April 08**

**Fed Reg Vol 73, pgs 19594 – 19705**

**33 CFR 332 - Corps**

**40 CFR 230, Subpart J 230.91 – 230.98 EPA**

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# ***Step Wise Impact Evaluation Process:***



**Unchanged by new mitigation rule**

- Avoid aquatic impacts
- Minimize aquatic impacts
- Compensatory mitigation for aquatic impacts

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# *OLD Priorities for Mitigation*



## **Old process pre 10 April 2008 Mitigation Rule**

- On site, same kind
- Off-site or different type where it makes sense (preferred to be within the same watershed)
- Advance Compensation
- Mitigation Banks
- In-Lieu Fee

**Permit applications in process proceed under old rule – new applications under new rule**

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# *New Priorities for Mitigation*



## **New priorities in 10 April 2008 Mitigation Rule**

- Mitigation Banking
- In-Lieu Fee
- Permittee - Responsible Mitigation
- Permittee - Responsible Mitigation options
  - Permittee with watershed approach
  - Permittee on-site and in-kind
  - Permittee off-site and out-of-kind

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# *Clean Water Act Mitigation on Airports Special Considerations*



- FAA Advisory Circular 150/5200-33A:  
*Hazardous Wildlife Attractants on Airports*
  - CWA mitigation can create wildlife attractants
- Interagency MOA on Aircraft-Wildlife Strikes
  - FAA, Army (including Corps), EPA, Dept of Agriculture, U.S. Fish and Wildlife Service & Air Force
  - Agencies agreed to work to avoid siting land uses, including mitigation, in a way that increases wildlife attractants near airports
  - Many environmental agency personnel unfamiliar that wildlife strikes on aircraft are a concern & unaware of this MOA

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# *Clean Water Act Mitigation on Airports Special Considerations*



- Mitigation acreage is sometimes difficult to find and expensive
  - Costs per acre can exceed \$150,000/acre
- Recommend reserve airport land for airport uses
- Allowing third parties to use airport lands for mitigation for non-airport projects can:
  - Permanently encumber airport lands for non-airport actions, limiting airport development
  - Can be inconsistent with FAA grant assurances if fair market value for mitigation lands not received by airport

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# ***Corps regulations and FAA environmental requirements***



- ***FAA Order 1050.1E – Environmental Impacts: Policies and Procedures***
  - Paragraph 310k: Filling of areas in accordance with a Corps NWP generally qualifies with a categorical exclusion from FAA NEPA if no wetlands or other extraordinary circumstances (historic, endangered species, etc. involved)
- ***FAA Order 5050.4B – NEPA Implementing Instructions for Airport Actions***
  - Paragraph 702i : FAA NEPA Environmental Assessment required for airport projects involving fill or dredging that require a Corps Individual Permit (i.e. too much work for Corps NWP to apply)

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# ***Corps regulations and FAA environmental requirements***



- ***FAA – Environmental Desk Reference for Airport Actions***
  - Chapter 21 *Wetlands* – Paragraph 5 (d): Integrating FAA NEPA and Corps CWA 404 & NEPA requirements increases likelihood one NEPA document will contain necessary information for both agencies
  - To properly integrate essential to meet early with Corps, FAA, and others interested in action on wetlands & waters

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# *Corps Permits and Airports Recommendations*



- Understand the Nationwide permits you may use for maintenance activities
- Identify Corps jurisdictional areas prior to new development
- Use consultants
  - familiar with local conditions
  - with track record obtaining permits from local Corps office
  - use consultants especially for complex projects
- Plan ahead

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**California Map of U.S. Army  
Corps of Engineers Regulatory Boundaries**



**Corps Reg Offices:**

**Arizona – LA Dist.**

**California – LA, SF, &  
Sac Dists - See Map**

**Nevada – Sac Dist.**

**Hawaii & Pacific  
Honolulu Dist.**

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If you have areas like this on or near your airport, learn CWA issues *Presented at FAA Western-Pacific Airports 4<sup>th</sup> Annual Conference May 2008*