Chapter Six:
CWA § 404 Dredge and Fill Permits and Wetlands

I. Introduction

Section 404 of the CWA requires permits for the discharge of "dredge or fill material" into "waters of the United States."[1] This component of the CWA has evolved through judicial interpretation and regulatory change to become one of the principal Federal tools used to protect wetlands.[2] Although § 404 is often discussed in connection with wetlands, it applies broadly to all waters of the United States.

A. Agency Jurisdiction

Unlike the rest of the CWA, the permit aspects of § 404 are administered by the U.S. Army Corps of Engineers (the COE), using the Environmental Protection Agency (EPA) for environmental guidance. The COE issues § 404 permits, but the COE must abide by EPA guidelines and the EPA has the power to veto a permit the COE issues.[3] The EPA also must provide copies of each permit application to the Fish and Wildlife Service (FWS) for comment.[4] States can apply to the EPA for the authority to administer the 404 permit program in their state.[5] Once a state has been delegated authority over this program, the EPA still retains an oversight role. If the EPA, taking into account comments of the FWS, objects to a proposed state permit,

[1] 33 U.S.C. § 1344(a).
[2] Copeland, Claudia. Clean Water Issues in the 107th Congress. Congressional Research Services. Jan. 9, 2003.
[3] 33 U.S.C. § 1344(c).
[4] 33 U.S.C. § 1344(g)(3).
[5] 33 U.S.C. § 1344(g).

the state must revise the permit to account for those objections or the state's authority is transferred to the COE.[6]

B. BLM and 404 Permits

The Federal government has dedicated significant resources to acquiring and protecting wetlands. The scope of the CWA's dredge and fill permit program, and the manner of its application, could determine whether projects threatening wetlands on Federal lands may proceed. The BLM can be involved in the 404 permit program in three different ways. First, the BLM may be a permit applicant as it is required to obtain permits for the discharge of dredge or fill materials the same as any other entity. Second, the BLM may be a permit sponsor or objector. The BLM may want to provide letters to the COE about a particular permitting activity it is interested in supporting or opposing. Finally, the BLM can provide comment. Where another party is seeking a 404 permit that could affect Federal holdings, BLM can review permits as they are advertised and make comments where appropriate.

II. Definition of Wetlands

There is no universal definition of a wetland because wetlands can vary greatly in characteristics and function. The wetlands definition used by both the COE and EPA states that the "term wetlands means those areas that are inundated or saturated by surface or groundwater 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.

[6] 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(j); also see *Friends of Crystal River v. EPA*, 794 F. Supp. 674 (W.D. Mich. 1992).

Wetlands generally include swamps, marshes, bogs, and similar areas."[7] In 1987 the COE, the EPA, and the FWS issued guidance manuals for identifying wetlands within the § 404 program.[8] These manuals do not attempt to identify every area that might be technically classified as a wetland; rather they seek to define wetlands subject to the CWA by three parameters: 1) the presence of wetland hydrology; 2) the presence of hydrophilic vegetation; and 3) the presence of hydric soil. Therefore, there are three basic components to consider in evaluating whether an area is a wetland. First, consider the hydrology and determine if water is present at or near the surface for a period of time. Second, evaluate the type of vegetation present. Vegetation that grows in wetlands can be quite varied, but it must be capable of growth in very wet conditions. Third, the type of soil present should be hydric soils, which are periodically saturated with water, creating anaerobic conditions. The precise way to determine the extent of a wetland is to perform a wetland delineation. This delineation should be based on the techniques outlined in the COE's Wetland Delineation Manual.[9] Other good sources for determining if a particular area is a wetland are the FWS National Wetland Inventory (NWI)[10] and EPA's Wetland Program.[11]

III. Wetlands Covered by the CWA

The hydrological extent of the CWA has often been tested and resolved within the context of CWA § 404 regulation of wetlands. In enacting the CWA, Congress's primary intent was to regulate waters of the United States used in interstate commerce. Therefore, the COE and the EPA have jurisdiction over a wetland only if destruction or degradation of that wetland could

[7] 40 C.F.R. § 230.3(t); 33 C.F.R. § 328.3(b).
[8] Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1987); also see U.S. Army Corps of Engineers Waterways Experiment Station, Corps of Engineers Wetlands Delineation Manual, Wetlands Research Program Technical Report Y-87-1 (January 1987). Available at: http://www.wes.army.mil/el/wetlands/pdfs/wlman87.pdf.
[9] *Id*.
[10] Available at: http://www.nwi.fws.gov/.
[11] See EPA's wetlands webpage at: http://www.epa.gov/owow/wetlands/.

affect interstate commerce. The term "wetland" is not used in § 404, but the legislative history of the act indicates that wetlands should be protected. As we saw in Chapter One, the CWA defines "navigable water" broadly to include waters of the United States and the territorial seas. The COE originally interpreted the act as extending Federal jurisdiction only to waters that were actually, potentially, or historically navigable in-fact. This interpretation covered very few wetlands, and environmental groups challenged the interpretation as being too narrow. In 1975, the Washington, D.C. district court found in *NRDC* v. *Calloway* that Congress had not intended the term "navigable waters" to be limited to the traditional tests of navigability.[12] Congress, instead, had intended to extend Federal regulatory authority to the limits of its commerce clause powers. Based on the *Calloway* decision, the COE expanded its regulations to specifically include navigable waters, their tributaries, and wetlands.

A. Adjacent Wetlands

The extent of the CWA's jurisdiction was further expanded in a 1985 unanimous decision of the Supreme Court. In *United States v. Riverside Bayview Homes, Inc*.,[13] an owner of eighty acres of marsh land near Lake St. Claire in Michigan began filling the area in preparation for a housing development. The COE considered this property to be an adjacent wetland included in the definition of "waters of the United States."[14] The COE filed suit seeking to enjoin the land owner from filling without a § 404 permit. The Supreme Court held that the land in question fell within the COE's jurisdiction and a § 404 dredge and fill permit was therefore necessary. The

[12] *Natural Resources Defense Council v. Calloway*, 392 F. Supp. 685 (D. D.C. 1975).
[13] *United States v. Riverside Bayview Homes, Inc*. 474 U.S. 121 (1985).
[14] 33 C.F.R. § 328.3(a)(7). The Corp's definition of "waters of the United States" includes wetlands adjacent to such waters.

impact of the case affected the definition of navigable waters and extended the reach of the CWA. The COE is able to regulate wetlands that are adjacent to waters of the United States.

The COE's regulations define "adjacent" to mean "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by manmade dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands."[15] Courts have also further defined what will be considered adjacent wetlands for the purpose of the § 404 program. In *United States v. Buday*, the court held that CWA jurisdiction extends to wetlands adjacent to a non-navigable tributary of a navigable-in-fact body of water.[16] In *United States* v. *Banks*, the court concluded that a wetland is adjacent to navigable waters where a hydrological connection existed primarily through groundwater.[17] However, if the adjacency is too far removed geographically, some courts have not considered the wetlands to be "adjacent."[18]

B. Isolated Wetlands

The Supreme Court in *Riverside Bayview Homes* addressed adjacent wetlands; however, the Court left open the issue of whether isolated wetlands were within the jurisdiction of § 404. Isolated wetlands are those not hydraulically connected to "waters of the United States." In 2001, the Supreme Court in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers (SWANCC)* limited the scope of the CWA, holding that "navigable waters"

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[15] 33 C.F.R. § 328.3(c).
[16] *United States v. Buday* 138 F. Supp. 2d 1282 (D. Mont. 2001).
[17] *United States v. Banks* 115 F.3d 916 (11th Cir. 1997).
[18] In United *States v. Sargent County Water*, 876 F. Supp. 1090 (D.N.D, 1992) the seven-mile distance between sloughs and the Wild Rice River was too great for the court to find adjacency even though there was a surface water connection. In *United States v. Wilson*, 133 F.3d 251 (4th Cir.. 1997) with the wetlands ten miles from the Chesapeake Bay and more than six miles from the Potomac River, the court held that the distance rendered the wetlands beyond the scope of the COE's jurisdiction. But see *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) (jurisdiction over wetland adjacent to a roadside ditch that eventually connects to navigable-in-fact water 25 miles away), cert. denied, 158 L.Ed.2d 466 (2004); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003)(jurisdiction over wetlands 20 miles from navigable-in-fact waters), cert. denied, 158 L.Ed.2d 467 (2004).

does not include isolated, intrastate waters not connected to otherwise navigable waters when the basis for jurisdiction is use of those waters by migratory birds.[19]

In *SWANCC*, the Court held that when the COE issued its Migratory Bird Rule in 1986,[20] it exceeded the scope of its regulatory power under the CWA. The Migratory Bird Rule stated that the CWA covers any isolated, nonnavigable, and wholly intrastate water or wetland which could be used by migrating birds that cross state lines. The case involved several ponds that had formed in pits that were originally part of a sand and gravel mining operation. The Court refused to interpret the CWA as extending the regulatory power to the limits of the Commerce Clause, and held that the application of the Migratory Bird Rule exceeded the authority granted to the COE under the CWA. The Court distinguished Riverside Bayview Homes on the ground that in that case the wetlands in question were adjacent to a body of open water that was actually navigable.

On January 15, 2003, the EPA and the COE published an advanced notice of proposed rulemaking to re-define "waters of the United States."[21] There was strong opposition to any rulemaking that would broadly interpret the SWANCC decision as narrowing the scope of the CWA, and the EPA and the COE ultimately decided not to propose a new rule.

IV. Definition of "Dredged and Fill Material"

the COE defines "dredged" material as "material that is excavated or dredged from the waters of the United States."[22] Dredged materials are primarily products of navigational

[19] 21 U.S. 675 (2001).
[20] 51 Fed. Reg. 41217.
[21] 68 Fed. Reg. 1991 (January 15, 2003) .
[22] 33 C.F.R. § 323.2(c).

maintenance. "Fill" material is defined as "material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody."[23]

"Dredge and fill" material has been broadly interpreted in some cases. In 1983, a Fifth Circuit ruling held that land-clearing activities with a bulldozer that resulted in redeposit of material from the wetland required a permit.[24] Further, it is important to note that the plain text of § 404 only regulates the dredging or filling of a wetland, not draining or altering it. However, a Federal district court in Texas held that draining of a wetland was regulated under § 404 even though there was no discharge because the draining altered or destroyed the wetland. [25]

VII. Permit Process and Evaluation

When determining whether to issue a § 404 permit, the COE conducts a formal review of the project by going through a "public interest review."[26] This entails balancing a project's public benefits against its reasonably foreseeable detriments, reflecting concern for both protection and utilization of resources.[27] The following general criteria are considered in evaluating all applications: 1) the public and private need for the proposed structure or work; 2) where unresolved conflicts of resource use exist, the practicability of using reasonable alternative locations and methods to accomplish project purposes; and 3) the extent and permanence of the beneficial and/or detrimental effects the proposed project may have on public and private uses to

[23] 33 C.F.R. § 323.2(e).
[24] *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F2d 897 (5th Cir. 1983).
[25] *Save Our Community v. EPA*, 741 F. Supp 605 (N.D. Texas 1990).
[26] 33 C.F.R. § 320.4(a).
[27] See *Town of Norfolk v. United States Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992); *Environmental Coalition of Broward County, Inc. v. Myers*, 831 F.2d 984 (11th Cir. 1987).

which the area is suited.[28] The full range of criteria the COE must consider in reviewing a permit application is outlined in the EPA's § 404 regulations.[29]

Criteria for the practicability of using reasonable alternative locations (number two above) are often the most important considerations. To get a permit, the applicant needs to show the COE that there is not another practicable alternative.[30] The burden of proof for practicable alternatives depends upon the proposed use. If the applicant is applying for a permit related to a "water dependent use," such as a marina, the required level of proof that there is no practical alternative is low. The COE examines if there are practicable alternatives, and if so, do the alternatives have less environmental impact. If the permit is for a "non-water dependent use,"[31] such as a shopping mall, the presumption is that practicable alternatives are available and these will have less environmental impact. The applicant has the burden of proving otherwise.

If a permit is required for a project on or near Federal lands, there may be additional considerations beyond the "public interest" review. As mentioned above, the COE must provide the FWS an opportunity to comment on permit applications, and must give consideration to any FWS comments. Other statutes, such as the Fish and Wildlife Coordination Act and the Endangered Species Act, may also apply to the COE's deliberations. Additionally, the National Wild and Scenic Rivers Act prohibits the issuance of a Federal permit for construction of water resource projects that would directly and adversely affect the values for which the river was designated.[32] The Federal government has successfully blocked Federal land development projects because of their adverse impact on wetlands. In *United States* v. *Schmitt*, a district court preliminarily enjoined a developer from docking or storing boats and expanding a marina located

[28] 33 C.F.R. § 320.4(a)(2).
[29] 33 C.F.R. Part 320 and 325.
[30] CWA § 404(b)(1).
[31] 40 C.F.R. § 230.10(a) covers non-water dependent activities.
[32] 16 U.S.C. §§ 1271-1287.

on private land within a national recreation area because these activities could cause irreparable harm to wildlife and wildlife habitat.[33] Also, courts have upheld the COE's denial of permits located on Federal land because the proposed activities would have adverse impacts on wetlands.[34]

VIII. Exemptions

The CWA exempts certain specific activities from § 404 regulations,[35] and several of these are of particular relevance to the BLM.[36] First, no permit is required for normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, or harvesting for the production of food, fiber, and forest product. A second exemption applies to roads. Discharges associated with the construction or maintenance of farm, forest, or mining roads are exempt, provided these activities are conducted in accordance with best management practices (BMPs). A third set of exemptions applies to activities including maintenance of serviceable structures such as dikes, dams, levees, riprap, or causeways; construction or maintenance of farm or stock ponds and irrigation ditches; maintenance of drainage ditches; and construction of temporary sediment basins at a construction site. Although the CWA exempts these activities, courts have tended to interpret exemptions narrowly.[37] The COE regulations interpreting CWA § 404 exemptions appear at 33 C.F.R. § 323.4(a)(1)-(6) and the EPA has issued additional regulations which can be found at 40 C.F.R. § 232.3(c)(1), (6).

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[33] *United States v. Schmitt*, 734 F. Supp. 1035 (E.D. N.Y. 1990).
[34] *Bayou Des Familles Dev. Corp. v. United States Army Corps of Engineers*, 541 F. Supp. 1025 (E.D. La. 1982).
[35] These exemptions can be found in CWA § 404(f)(1).
[36] See Glicksman, Robert. Pollution on the Federal Lands II: Water Pollution Law. 12 UCLA J. Envtl. L. and Pol'y 61. 1993.
[37] Exemptions apply only to activities that have little or no adverse effect on the nation's waters. Also "normal" timber harvesting does not include timber clearing for the purpose of permanently changing an area from wetlands into agricultural lands. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) and *United States v. Larkins*, 852 F.3d 189 (6th Cir. 1988), cert. denied, 489 U.S. 1016 (1989).

A. Incidental Fallback

The COE does not have the authority under CWA § 404 to regulate incidental "fallback" resulting from excavation, land clearing, channelization, and trenching operations in wetlands.[38] "Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal."[39] However, new rules create a presumption that all mechanized ditching, channelization, and excavation result in discharges greater than incidental fallback and are therefore within § 404 jurisdiction.[40]

IX. Mitigation

The § 404(b)(1) guidelines require applicants to take all practicable steps to minimize the adverse effects of dredge and fill activities. Once the amount of damage has been minimized, the remaining damage must be mitigated. In February 1990, the COE and the EPA signed a mitigation memorandum of agreement (MOA) designed to establish a uniform mitigation policy.[41] The MOA endorses a national goal of no overall net loss of the nation's remaining wetlands base. This "no net loss" policy requires unavoidable wetlands impacts to be offset by wetlands restoration or creation.

[38] *National Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998).
[39] 33 C.F.R. § 323.2(d)(2)(ii).
[40] See 66 Fed. Reg. 4550 (Jan 17, 2001); 33 C.F.R. § 323.3(d)(2)(i); 40 C.F.R. § 232.2(2)(i).
[41] Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under Clean Water Act Section 404(b)(1) Guidelines. (Feb. 6, 1990).

In order to achieve no net loss of wetlands, a one-to-one acreage replacement is usually required.[42] The MOA also states that compensatory mitigation (such as restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, on site. If this is not practicable, it should be undertaken in the same geographical area (i.e., the same watershed).

Mitigation may also be achieved through the use of "mitigation banking."[43] Mitigation banking is defined as "wetlands restoration, creation, enhancement, and in exceptional circumstances, preservation undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when such compensation cannot be achieved at the development site or would not be as environmentally beneficial."[44] This works by allowing developers to use mitigation bank wetlands acreage and functions – known as "credits" – to replace the anticipated loss of wetland acreage and functions at the development site.

X. Types of permits

the COE can issue a variety of permits or permission under the 404 program. These include a letter of permission, individual permits, general permits, and nationwide permits.

[42] The MOA establishes a minimum requirement of 1:1 acreage replacement of wetlands to achieve a no net loss of values, but the ratio may be higher or lower depending upon the functional values of the area subject to impact, the type of wetlands on the site, and availability of mitigation technology.
[43] Guidance on wetlands banking is available at: http://www.epa.gov/owow/wetlands/mitbankn.html.
[44] Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58,605, 58,606 (Nov. 28, 1995).

A. Letter of Permission

A letter of permission may be used where, in the opinion of the COE district engineer, the proposed work would be minor, would not have significant individual or cumulative impact on environmental values, and should encounter no appreciable opposition.[45] The proposal must be coordinated with all concerned fish and wildlife agencies, and generally adjacent property owners; but the public at large is not notified. However, a public interest balancing is still central to the COE's decision.

B. Individual Permit

This is the basic form of authorization under the § 404 dredge and fill provisions of the CWA. When issuing these permits, the COE evaluates individual, project-specific applications following the steps and procedures outlined above.

C. General Permits: Nationwide, Regional, and Programmatic

The COE can issue general permits for activities they have identified as being substantially similar in nature and causing only minimal individual and cumulative environmental impacts.[46] These permits may cover activities in a limited geographic area (e.g. county or state), in a particular region of the country (e.g. group of contiguous states), or nationwide. Nationwide permits are issued by the Office of the Chief Engineer, whereas regional permits are issued by the division or district engineer. Regional permits may modify a

[45] 33 C.F.R. § 325.2(e)(1).
[46] 33 U.S.C. § 1344(e).

nationwide permit for a particular region or authorize discharges not covered by a nationwide permit.[47]

The nationwide permit program is implemented by the COE through 33 CFR Part 300. Under these rules, the COE issued an Index of the Nationwide Permits and Conditions which outline the program.[48] This guidance identifies 40 nationwide permits and the conditions attached to them. The COE recently published in the Federal Register a final notice of changes to the § 404 Nationwide Permit (NWP) program.[49] The permits became effective on March 18, 2002. Along with revised permits, the COE also modified the list of general permit conditions. The conditions impose required actions that an applicant must fulfill to use a nationwide permit, such as mitigation measures and requirements to notify the local Army Corps of Engineers district office with project information.

Programmatic permits are another type of general permit.[50] These are designed to avoid duplication of others state, local, or other Federal agency programs.

D. Emergency Procedures

Division engineers are authorized to approve expedited processing in emergency situations, which are defined as situations that would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship.[51] Even in such situations, the COE is required to make efforts to receive comments from interested agencies.[52]

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[47] 33 C.F.R. § 325.2(e)(2).
[48] See Index of the 1996 Nationwide Permits and Conditions (available at: http://www.usace.army.mil/inet/functions/cw/cecwo/reg/nwpcond.htm#appendA).
[49] 67 Fed. Reg. 2019 (January 15, 2003).
[50] 33 C.F.R. § 325.5(c)(3).
[51] 33 C.F.R. § 325.2(e)(4).
[52] *Id.*

E. After-the-Fact Permits

If the COE finds that an unauthorized discharge occurred, it may process a permit application for that discharge.[53] However, an "after-the-fact" permit will not be processed if restoration of the waters of the United States that eliminates current and future detrimental impact is complete, the District Engineer determines legal action is appropriate or has already denied legal authorization, or where enforcement litigation has already been initiated by another agency.[54] The application process for an after-the-fact permit is the same as for an individual permit.

[53] 33 C.F.R. § 326.3(e).
[54] *Id.*