



## **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The legislative origins of the program are the Rivers and Harbors Acts of 1890 (superseded) and 1899 (33 U.S.C. 401, et seq.).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 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 are Section 9 for dams and dikes, Section 13 for refuse disposal, and Section 14 for temporary occupation of work built by the United States. Various pieces of legislation have 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.

Also 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 to issue permits for the transportation of dredged material to be dumped in the ocean. 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 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**

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.

The Clean Water Act uses the term "navigable waters" which is defined as "waters of the United States, including the territorial seas." Waterbodies subject to Clean Water Act jurisdiction are defined as “waters of the United States.” Waters of the United States are defined for the Corps regulatory program at 33 CFR 328. As of June 22, 2020, the term “waters of the United States” is known as the “Navigable Waters Protection Rule” and includes:

1. The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;
2. Tributaries;
3. Lakes and ponds, and impoundments of jurisdictional waters; and
4. Adjacent wetlands.

As of June 22, 2020, 33 CFR 328 also lists features that are not “waters of the United States” including:

1. Waters or water features that are not identified in 1 – 4 (above);
2. Groundwater, including groundwater drained through subsurface drainage systems;
3. Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;
4. Diffuse stormwater run-off and directional sheet flow over upland;
5. Ditches that are not waters identified in paragraph (a)(1) or (2) of this section, and those portions of ditches constructed in waters identified in paragraph (a)(4) of this section that do not satisfy the conditions of paragraph (c)(1) of this section;

6. Prior converted cropland;
7. Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;
8. Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6) of this section;
9. Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
10. Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;
11. Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and
12. Waste treatment systems.

Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

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, any addition, including redeposit other than incidental fallback, of dredged material into waters of the United States, and generally any fill material (e.g., rock, sand, dirt) placed in waters of the United States which has the effect of replacing any portion of waters of the United States with dry land or changing the bottom elevation of any portion of waters of the United States. Such discharges may be associated with activities such as site development, roadway construction, erosion protection, etc.

Discharges associated with certain activities under the Clean Water Act are considered exempt from requiring Section 404 authorization. These are listed at Section 404(f)(1) of the Clean Water Act. Such activities include, but are not limited to, normal farming, ranching, and silviculture activities as part of an established operation, certain maintenance activities, and construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches. These discharges would require authorization if they are associated with an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced.

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. 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.