Permit Reviews

Clean Water Act – 404 Program

John Moeschen

Nebraska State Program Manager
Wehrspann Office, Omaha NE
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Omaha District Regulatory Boundary
compared to Eastern States
Omaha District - Regulatory Offices
Nebraska’s Field Office Personnel

- Wehrspann
  - John Moeschen, State Program Manager
  - Laura Banker
  - Kathy Iske
  - Phil Rezac
  - John Snowdon
  - Bernie Taylor
  - Matt Wray

- Kearney
  - Barb Friskopp
  - Sue Gardner
Authorities

- Section 10 Rivers and Harbors Act of 1899 (Navigable waters)

- Section 404 Clean Water Act (1972) (integrity of the Nation’s waters)
OTHER LAWS

- Section 401 (Water Quality Certification)
- Section 402 (NPDES Permit and BMP’s)
- National Environmental Policy Act (NEPA)
- Fish and Wildlife Coordination Act
- Endangered Species Act (ESA)
- Wild and Scenic Rivers Act
- National Historic Preservation Act (NHPA)
- Migratory Bird Treaty Act (MBTA)
- Bald and Golden Eagle Protection Act
Section 10 Rivers and Harbors Act of 1899

- Activities that affect location and navigable capacity
- All work over, under, or through
Section 404 Clean Water Act (1972)

Wetlands and Waters of the United States

- Discharge of dredged or fill material
I. The 404 Program
II. Types of Permits
III. General, Regional, and Special Conditions
IV. Permit Application/Pre-Construction Notification
V. Wetland Identification
VI. Project Construction and Compliance Issues
VII. Summary
I. The 404 Program

- **Purpose of 404 Program:** Insure physical, biological, and chemical quality to our nations water...

- **What Work Requires a 404 Permit:** Prior approval for discharge of dredged or fill material into waters of the United States.

- **Who needs a permit:** Any person, firm, or agency (Federal, state and local government) planning to work in waters of the United States.
What are Waters of the United States (WOUS): “…includes essentially all surface waters such as all navigable waters and their tributaries, all interstate waters and their tributaries, all wetlands adjacent to these waters, and all impoundments of these waters.”
- **Wetlands**: Areas with wetland vegetation, hydric soil, hydrology present during a portion of the growing season.

- **Channel Ordinary High Water Mark**: Line on the bank or shore established by the fluctuation of water and physical characteristics such as a clear line on the bank, shelving, soil changes, destruction of vegetation, litter and debris.
The Corps Regulates:

- Rivers, creeks, channels up to OHWM.
- Adjacent wetlands.
- Lakes
“Waters of United States” (WOUS)
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Types of Permits

- Individual Permits (4%)
  - Public notice on specific project
  - Activities with more than minimal impact
- Nationwide Permits (85%)
  - Issued by HQUSACE
  - DE authorized through regulation (33 CFR Part 330)
- Regional (11%)
  - Districts issue and use
  - Tailor program to District’s aquatic environment
- Programmatic
  - Districts issue and use
  - Best way to take advantage of other agency programs
- Letters of Permission
  - Individual authorization
  - Minor impacts, coordinate with agencies/neighbors
Permit Decisions
(Typical Distribution)

- Nationwide: 85%
- Regional: 11%
- Individual Permits: 4%
- Denial: <1%
- Letters of Permission: 0%
Nationwide Permits

- Covers minimal impacts/Activity Based (50 NW’S & 28 General Conditions)
- Shorter processing/streamlined evaluation with agencies
- Impact Thresholds: acreage and linear footage limits
- If thresholds exceeded or general or regional conditions not met, evaluate project as Individual Permit (IP)

Benefits: Minimal impacts = faster processing times but still may involve agency coordination
NWP 14 Linear Transportation Projects

- “Activities required for the construction, expansion, modification, or improvements of linear transportation projects (e.g. roads, highways, trails)…”

- Pre-construction Notification (PCN or application) prior to commencing the activity if: 1) The loss of WOUS exceeds 1/10th acre; or 2) there is a discharge in a special aquatic site, including wetlands.

- Calculation of wetland impacts includes filling, excavation, flooding, and draining.

- Delineation of special aquatic sites (wetlands) and other waters of the US required.

- Wetland impact for NW limited to < 0.5 acre, minor channel adjustments. Mitigation plan required for wetland impacts > 0.1 acre.
Individual Permits

- Projects that exceed NWP thresholds:
  - Impacts to WOUS, including wetlands, exceed 0.5 acre;
  - WOUS channel relocation;
  - More rigorous evaluation;
  - Public Notice;
- Section 404(b)(1) Evaluation (Alternative Analysis);
- Avoidance, minimization, then mitigation;
- State Water Quality Certification;
- Mitigation Plan generally required.
Individual Permits Continued:

- Basic Project Purpose—Used to determine water dependency
- Overall Project Purpose—Used to screen alternatives—Must define applicant’s need, but not preclude discussion of alternatives
- COE determines both Basic and Overall Project Purpose
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General Conditions for Nationwide Permits

- Currently 28 General Conditions for Nationwide Permits
- GC #2—Aquatic Life Movement
- GC #9—Management of Water Flows
  - Maintain pre-construction course, condition, capacity, and location of open water
  - Must withstand expected high flows
  - Must not restrict or impede the passage of normal or high flows
- GC #11—Equipment: Heavy equipment work in wetland or mudflats on mats
- GC #12 – Soil erosion and sediment controls
- GC #13—Removal of Temporary Fills
- GC #17 – Endangered Species
- GC #20—Mitigation
Aquatic Life Movement Considerations
General Condition 27
Preconstruction Notification (PCN)

- PCN – Prospective permittee must notify the Corps by submitting information required under General Condition 27
- When a PCN is required varies according to the Nationwide permit
- NW 14—Linear Transportation Project—Loss of waters of the US greater 1/10th acre or Discharge into Special Aquatic Sites (including Wetlands) – PCN required which includes a delineation of special aquatic sites and other waters of the US
- NW 33—Temporary Construction, Access, and Dewatering—PCN required which includes a delineation of special aquatic sites and other waters of the US for all activities
Pre-Construction Notification continued...

**IF** there are **any** wetland filling impacts (filling, excavation, flooding, draining)

**THEN** you **must** submit a **Wetland Delineation** using Corps of Engineers 1987 Wetland Delineation Manual & Supplements. **Generally speaking** … May 1 to Nov. 1
NE Regional Conditions (RC)  
(More Restrictive than General Conditions)

- Under General Condition #23, the Corps is authorized to develop Regional Conditions and project specific conditions.

- Fens, Springs, Rainwater Basin Wetlands, Eastern Saline Wetlands, Platte River (from the confluence of the North Platte and the South Platte, to the mouth), Missouri River, Nationwide Permit 13, Re-vegetation of Disturbed Areas, Historic Properties, Channelization (Straightening, Relocation, Shifting, or Filling (Tubing)).

Special Conditions (SC)  
(Project Specific)

- Quarry Rock Rip-Rap
- Erosion Control Blankets until vegetation re-established
- Wetland & channel mitigation annual monitoring reports
Regional Condition for Nationwide 13 - Riprap size and placement non-compliance.
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Pre-Application

- Design Phase
  - ID issues & coordinate project with the Corps Regulatory Office (jurisdiction), resource agencies
  - ID all areas within project scope (borrow and mobilization)
  - ID permanent and temporary impacts
  - Discuss possible alternatives
  - Avoidance, minimization, & mitigation strategies
  - Site visit

Benefits of Pre-Application process
- More info upfront = more streamlined/time saving permit process
Key Points Transportation Projects

- Pre-Application Issues
- Nationwide vs. Individual Permits
- Elements of a complete application
- Construction Issues
- Compliance Issues
Elements of Complete Application

- Plans, specs, wetland delineation, temporary/permanent impacts
- Mitigation strategy
- Adjacent property owners, ID borrow sites, temporary access
- Useful information to include: photos; project identified on aerial photograph.

Benefit: complete application = less time to process permit
Application Form #4345
(helps fulfill PCN required information)

- Name, address, and telephone of the permittee and/or agent;
- Project Location - Site map, Project limits, Limits of Construction;
- Nature of Activity; (Bridge Replacement)
- Project Purpose – use NEPA document Purpose; (Replace structurally deficient bridge for public safety);
- Reason for Discharge; (bridge construction);
- Types of Material Being Discharged and Amounts (culvert, clean fill, rock riprap);
- Surface Area in Acres of Wetlands and Other Waters Filled;
- List of Adjacent Landowners;
- Other Certifications or Approvals/Denials received from other Federal, State, or Local Agencies;
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Wetland Identification

- Verify presence or absence of wetlands and other waters and document it in your permit application.
- Use available resources as possible indicators of wetlands (USDA orthophotos, FSA aerial photos, FWS NWI, Quad maps, Soil Surveys).
- Send photos to Corps Project Manager.
- Wetland delineation must be prepared in accordance with the current method required by the Corps.
Wetland Identification Continued:

Wetland Delineation using Corps of Engineers 1987 Wetland Delineation Manual & Supplements during the growing season. Generally speaking … May 1 to Nov. 1
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Permit Construction /Compliance Issues

- READ the permit and fact sheets
  - Establish Construction methods and phasing
  - Verify construction plan with the permit conditions
  - Identify areas of concern or possible conflict and request amendments if needed prior to construction
  - Additional work not authorized by the permit

End State: Failure to adhere = project delays, work stoppages, and potential enforcement actions. CALL FIRST
Contractor
Points of Awareness Continued

- Little “Changes” to a contractor could be BIG change to regulatory agencies
- The Contractor should request a copy of permit and know the conditions
- Follow sedimentation/erosion control measures
- If additional work is proposed, coordinate through the permittee
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Summary

I. The 404 Program - Help insure health of nation’s waters, regulate impacts

II. Types of Permits – Nationwide (NW) and Individual Permits (IP)

III. General, Regional, and Special Conditions - National, State, Project-Specific

IV. Permit Application/Pre-Construction Notification - When is a PCN required and information needed

V. Wetland Identification – Delineation, on-line sources helpful, historic data

VI. Project Construction and Compliance Issues – Read the permit, call with questions
2012 NWP Reauthorization Schedule

- Comment period on NWPs and General Conditions expired April 18, 2011
- National team of regulators is currently reviewing comments received on NWPs and GCs September 2011 – OASA(CW) review of draft NWPs
- Districts and field offices are currently reviewing comments received on Regional Conditions
- If new Regional Conditions are proposed, field offices will issue a new public notice for comments in June
- HQ proposes to send final NWPs to OMB for review in October
- HQ proposes to issue final NWPs in Federal Register in December
- NWPs would become effective March 15, 2012
Clean Water Act Draft Guidance

• Joint EPA/Corps draft guidance will be published in the Federal Register this week for comments, 60 day public comment period
• Guidance is intended to improve consistency, predictability, and transparency of jurisdictional determinations
• Guidance will clarify where the CWA applies nationwide
• Agencies believe the number of protected waters will increase compared to current practice
THANK YOU!

Wehrspann Field Office  
8901 South 154th Street  
Omaha, NE 68138  
(402) 896-0896  
Fax (402) 896-0997  

Kearney Field Office  
2214 Second Avenue  
Kearney, NE 68847  
(308) 234-1403  
Fax (308) 234-3342