

APPENDIX

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FEMA ENVIRONMENTAL DESK REFERENCE

FEMA GUIDELINES FOR:  
WETLANDS REGULATIONS:  
REQUIREMENTS OF DEPARTMENT OF THE ARMY  
REGULATORY PROGRAM

**A. BACKGROUND**

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The legislative origins of the Department of the Army regulatory program are the Rivers and Harbors Act of 1890 and 1899. 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. The 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. 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, or excavation, filling or other modifications to the navigable waters of the United States.

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 regulatory 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 these 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 404 (b)(1) Guidelines. The Federal Water Pollution Control Act was further amended in 1977 and given the common name of the "Clean Water Act" and in 1987, to modify criminal and civil penalty provisions and to add an administrative penalty provision.

A 404(b) (1) water quality evaluation must be prepared for all projects in which dredged or fill material will be discharged into waters of the United States. The term "waters of the United States" is defined in the Environmental Protection Agency Guidelines for Specification of Disposal Sites for Dredged or Fill Material, Federal Register, December 24, 1980, and includes the following:

All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

All interstate waters including interstate wetlands;

All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce;

All impoundments of waters otherwise defined as waters of the United States under this definition;

Tributaries of waters identified of waters in this Section;

The territorial sea; and

Wetlands adjacent to waters identified above.

The term wetlands means 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. Wetlands generally include swamps, marshes, bogs, and similar areas.

## **B. COMPLIANCE WITH THE REGULATORY PROGRAM**

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The applicant potentially affecting a Water of the U.S. must take the initiative in applying for the Section 404 and/or Section 10 permit. Applicants should be encouraged to contact the local U.S. Army Corps of Engineers (USACE) District Regulatory Office to discuss the appropriate procedures. Since two to three months are normally required to process a routine permit application, early coordination can be very important. The USACE permit process also requires a public notice period and environmental analysis. These can be combined with the environmental / floodplain management requirements whenever possible to limit the duplication of effort and reduce the time needed to process the application. Applicants for FEMA funding should be given copies of all FEMA generated environmental analysis for possible use when USACE does its permit environmental analysis.

The Department of the Army and the Environmental Protection Agency have signed a Memorandum of Agreement (MOA) that clarifies the procedures to be used in determining the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act Section 404 (b)(1) Guidelines. The MOA is consistent with the President's goal of no overall net loss of wetlands. This may affect Hazard Mitigation Grant Program (HMGP) projects, DSRs, or other FEMA activities located in or near wetlands or waters of the United States. Alternatives to the proposed project or mitigation to limit the effects on wetlands may be required by the USACE in approving the permit.

Certain categories of projects may be covered under the USACE nationwide permit program. This program is a form of general permit which may authorize activities throughout the nation. The projects covered by the nationwide permits are not required to go through the detail permit application procedures discussed above. If it appears that a project may fit one of these categories, the local USACE office should be contacted. Types of projects that may be covered by this program include:

The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, provide such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure.

Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures; and

Bank stabilization activities provided; the activity is less than 500 feet in length, the activity is necessary for erosion prevention; it is limited to less than an average of one cubic yard per running foot placed along the bank within waters of the United States; no material is placed in excess of the minimum needed for erosion protection; no material is placed in any wetland area, no material is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area; only clean material free of waste metal products, organize material, unsightly debris, etc. is used; and any activity is a single and complete project.

## **C. RESPONSIBILITIES**

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Applicants for FEMA funding have a responsibility to comply with these regulatory programs. They should submit a request for a Section 10/Section 404 determination to local USACE office. USACE's initial responsibility when requested to undertake a determination is limited to reviewing available information to determine if jurisdictional waters are likely to be present, and not to delineate wetlands. This is the permit applicant's responsibility. In some cases, if jurisdictional waters are likely to be present USACE may voluntarily assist in making a field visit, provide further advice, or recommend mitigation measures. In some cases, during the initial consultation for a jurisdictional determination USACE may be able to recommend nationwide permits and/or mitigation measures without requesting a detailed field delineation.

All correspondence regarding this determination should be coordinated with and forwarded to FEMA. It is the FEMA funding applicant's responsibility to comply with these requirements, but FEMA also must review this information that the applicant obtains for two reasons:

- 1) The preliminary information obtained from the Section 10/404 consultation is necessary to conducting environmental review under the National Environmental Policy Act (NEPA) and Executive Order 11990. Information regarding the presence of wetlands in the project area and potential impacts to these wetlands is required to conduct these reviews.
- 2) FEMA cannot fund an activity that is in violation of these regulatory programs. There must be evidence that these regulations have been complied with or are expected to be fully complied with during project implementation, before funding can be released. Development of wetland impact mitigation measures should be coordinated with FEMA, because these may affect project design and funding approval.

## **D. INCORPORATION WITH NEPA**

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When an action is Categorically Excluded from NEPA analysis, the Section 404/10 process must still be followed. The information obtained during this process may trigger the need for an Environmental Assessment (EA) or Environmental Impact Statement (EIS).

When conducting NEPA review in an EA or EIS the proposed project and alternatives must be treated in substantially the same manner for evaluation of impacts. Therefore, it is important that

the EA or EIS not treat alternatives differently by indicating that one alternative has already received a permit or undergone a detailed field delineation if the other alternatives have not. USACE should be consulted about potential for impacts to wetlands resulting from the proposed action and alternatives. At a minimum, the Finding of No Significant Impact should indicate the need for permits for the selected action and compliance with permit conditions.

The FEMA staff person responsible for NEPA review should exercise caution when using initial USACE consultation because often these responses do not reflect site specific field information for the proposed project or information specific to alternatives. It is suggested that in addition to USACE, state agencies or other resources be consulted about potential effects or proposed actions and alternatives being evaluated in an EA or EIS.