

THE BASICS OF SECTION 404 OF THE CLEAN WATER ACT

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The U.S. Army Corps of Engineers (USACE), as designated by Section 404 of the Clean Water Act (CWA), regulates the discharge of dredged or fill materials into “waters of the United States” (WOUS). This includes disposal of material, including stream crossings, in wetlands, streams (ephemeral, intermittent, perennial), rivers, and even lakes. Potential regulated activities associated with Oil and Gas (O&G) operations include (but are not limited to): well pads, pipelines, utility line crossings, road construction, impoundments, and various other activities that require surface disturbances. USACE does not regulate subsurface activities unless they are beneath “navigable waters.” For Kentucky, the two primary USACE districts are Louisville and Nashville.

To determine if USACE authorization is required, prior to commencing a project, a jurisdictional determination is needed. This is conducted through a background data and map search, and an on-site reconnaissance of the proposed or potential operational areas. The background data and map search of the receiving streams is important to determine the state or federal stream classification, as the presence or absence of a federally listed aquatic species may require USACE consultation with the United States Fish and Wildlife Service (USFWS). The search also aids in determining any known existing wetlands and the nearest downstream “navigable” water. During the site reconnaissance, data is obtained to create a preliminary jurisdictional determination (JD) report which includes affected stream delineations, wetland locations and, at this time, the potential for impact isolation or disconnect. The JD report is then submitted to the U.S. Army Corps of Engineers district office that holds jurisdiction over WOUS in that region.

Once this report is received the district will assign a file number and a project manager who will then coordinate a site visit to verify and discuss the findings of the JD report. A final “preliminary” or “approved” jurisdictional determination will then be signed by the USACE and submitted to the company or their agent. If a company disagrees with the findings, an approved JD may be requested. These JDs can be appealed if there is a disagreement with the findings of the USACE. A preliminary JD cannot be appealed.

Based on the results of the final jurisdictional determination if there are no WOUS within the project footprint, the project may proceed with no permitting requirements. It is best to receive written verification from USACE specifically stating that your project would not require a Section 404 permit. If there are WOUS within or near your project site, it may be necessary to submit revised maps or final plans illustrating the avoidance of all WOUS.

If there are WOUS found within the project area, and the plans cannot be adjusted to avoid impacts, the company or operator would need to apply for an authorization (i.e. submit a pre-construction notification) from the USACE prior to initiating the work. Various nationwide permits (NWP) exist for these authorizations. These permits apply to projects that will cause only “minimal” impacts to “waters of the U.S.” O&G activities would typically fall under NWP3 (maintenance), NWP12 (utility line activities), NWP14 (linear transportation projects), NWP18 (minor discharges), or NWP39 (commercial and institutional developments). Nationwide 14 permits apply to linear road crossings of WOUS. This NWP (as with all NWPs) has conditions that must be met prior to verification by the USACE. One NWP14 condition for non-tidal waters includes a limit of 0.5 acres of impacts to WOUS. If the project will impact more than 0.5 acres of WOUS, this NWP would not apply. NWP39 authorizes discharges up to 0.5 acres of non-tidal waters or less than 300 linear feet of streambed. The district engineer can, however, waive the 300 linear feet condition if it can be proven that “minimal” impacts would occur. It should also be noted that different USACE districts can place their own conditions on permits they issue, so it is best to consult with them directly to get a better understanding of what will be needed to process the permit, and it should not be assumed that each district will do things the exact same way.

Additionally, if WOUS impacts are proposed to occur through a NWP, interagency consultation or review may be necessary. Section 106 (Nation Historic Preservation Act) may require an archaeological survey; Section 7 of the Endangered Species Act could require consultation with the USFWS; or, a Section 401 Water Quality Certification may be needed from a state agency. These items must be addressed during the permitting process. If permitting within or adjacent to an Outstanding State Resource Water (OSRW) or an Exceptional Water, additional protection measures may be requested by USFWS or other state agencies. Three sided culverts or bridges, additional Best Management Practices (BMPs), or species specific surveys may be requested by the USFWS or another agency to protect the high quality resources within the watershed.

Overall, avoidance of WOUS eliminates the regulatory burden and may expedite the permitting process. But, if avoidance of an area is not necessary, the JD and any subsequent permits should be pursued expeditiously as it can take a significant amount of time to receive official verification, especially if the watershed or site has special conditions that may delay the process. Also, the guidelines for jurisdictional determinations are in a continuous evolving state and may become stricter with the Environmental Protection Agency's (EPA) new connectivity guidelines.

Please feel free to contact me for additional information on Section 404 guidelines and permitting.

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