

**APPENDIX K**  
**WETLANDS REGULATORY PROGRAM**

## INTRODUCTION

The U.S. Army Corps of Engineers (USACE), with oversight by the U.S. Environmental Protection Agency (USEPA), regulates most wetlands and waterways in the United States. Many states also have wetland and waterway protection statutes, and in those states, the USACE has generally tailored its permit program, insofar as it is legal and reasonable, to complement the state programs and streamline the permit application process for the public. This appendix provides a brief summary of how the wetlands and waterways are regulated in each of the applicable states.

The USACE regulates through three primary statutory authorities:

- Section 404 of the Clean Water Act (CWA) (1977) (33 USC 1344) authorizes the USACE to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the “navigable waters of the United States” at specified sites.
- Section 10 of the Rivers and Harbors Act (RHA) (1899) (33 USC 403) authorizes the USACE, after notice and opportunity for public hearing, to prohibit the unauthorized obstruction or alteration of any “navigable water of the United States.”
- Section 103 of the Marine Protection, Research, and Sanctuaries Act (1972) (33 USC 1413) authorizes the USACE to issue permits, after notice and opportunity for public hearing, for the transportation of dredged material for ocean disposal, where it is determined that the disposal will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

Of these authorities, Section 404 of the CWA and Section 10 of the RHA are most likely to regulate CPB activities.

The term “navigable waters” has different meanings under the two statutes. For Section 10, the term refers to those waters that have been, are being, or could be used for the transport of goods in interstate commerce. These waters include waters subject to the ebb and flow of tide, certain rivers, canals, and lakes, etc., that the USACE has formally declared to be navigable under Section 10. For Section 404 of the CWA, the term is generally shortened to “waters of the U.S.,” and includes any waterways with a surface water connection to those waters traditionally considered “navigable” under Section 10 of the RHA, plus their adjacent wetlands. It would also include isolated lakes and wetlands that straddle the border between two or more states. Isolated, intrastate waters, or wetlands are generally not considered waters of the U.S., nor are the extreme headwaters of streams (33 Code of Federal Regulations [CFR] Parts 320 – 330).

Projects permitted under Section 404 of the CWA must, under Section 401 of the CWA, first obtain a certification from the state agency with authority over water quality issues within the state that the proposed discharge will meet the state’s water use standards. This is called the water quality certification or certificate. Projects permitted by the USACE under any of its authorities also require a Coastal Consistency Determination (CCD) if the project is proposed in the coastal zone of a state with an approved Coastal Zone Management (CZM) Program. CZM requirements for Federal agencies are addressed in Section 3.5, Water Resources, in the

Programmatic Environmental Impact Statement (PEIS). Because it is a Federal agency, U.S. Customs and Border Protection (CBP) would be required to obtain a CCD for projects within approved coastal zones even for those projects for which a USACE permit is not required.

Canada and many of its provinces also have wetland regulatory programs and requirements. However, with the exception of limited boat or ground vehicle patrol operations conducted in association with the Canadian Border Services Agency and the Canadian Royal Mounted Police, the activities being conducted or proposed by CBP have little or no potential to impact Canadian wetlands and waterways. Any facility construction would occur on the United States side of border, not on the Canadian side of the border.

Another potential wetland or waterway permit could result if the proposed activity were to impact a formally designated “Wild and Scenic River” (WSR). Any proposed, federally assisted project within the bed or banks of a WSR requires a formal consultation with the Federal WSR managing agency, unless it is very minor maintenance of an existing project. This review, required under Section 7 of the Wild and Scenic Rivers Act (WSRA), determines whether the project is likely to have a “direct and adverse” effect on the river’s free-flowing character, water quality, or “outstandingly remarkable values.” If the WSR managing agency finds that the project is likely to have a direct and adverse effect, the agency may suggest changes to the project’s design in order to avoid the adverse impacts to these values and a revised proposal can be resubmitted for review. If the project cannot be revised to avoid direct and adverse effects on the WSR, Federal participation in the project cannot continue (National Wild and Scenic Rivers, 2010).

## **Maine**

Maine’s Natural Resources Protection Act (NRPA) requires a permit from the Maine Department of Environmental Protection when a project impacts 4,300 square feet or more of freshwater wetland; when a project is within 75 feet of a river, stream, or brook; or when a project is within 250 feet of a coastal wetland, great pond, or state-defined wetlands of special significance. There are three levels of permitting under this statute:

- Tier 1 applies to disturbances to up to 15,000 square feet of impact, so long as the wetland to be impacted is not a state-defined wetland of special significance.
- Tier 2 applies to disturbances between 15,000 and 43,560 square feet (one acre) of wetland so long as the wetland to be impacted is not a state-defined wetland of special significance.
- Tier 3 or individual permit –the project would impact more than one acre of wetland or waterway.

An additional permit, the “Site Location of Development Act” permit, is required for projects with a footprint larger than 20 acres. In unorganized townships, project proponents apply for a “Land Use Regulating Commission Development Permit” with thresholds similar to the NRPA permit. Compliance with the Coastal Zone Management Act and a Section 401 Water Quality Certification is required to obtain an NRPA permit.

The New England District of USACE has issued the Maine State Program General Permit (SPGP). Piggybacking on the state's own program, the USACE general permit categorizes projects with less than 15,000 square feet of wetland impact as Category 1, non-reporting (i.e., the project proponent can proceed without notifying the USACE, provided he or she obtains any necessary authorizations from the state). Category 2 projects are those projects that would cause between 15,000 square feet and 3 acres of impact (including secondary impacts) to inland waterways or wetlands; these require an application to the USACE, which can be filed concurrently with the Maine state permit application. Projects with over three acres of wetland impacts are required to file an application for an individual permit directly with the USACE.

### **New Hampshire**

New Hampshire's Department of Environmental Services Wetlands Bureau requires a Dredge and Fill permit for projects impacting wetlands, and a Shoreland permit for construction, earthwork, and clearing of vegetation within 250 feet of public waters (lakes and ponds over ten acres, rivers, and fourth-order or larger streams). There are three categories of projects: projects in nontidal wetlands impacting less than 3,000 square feet of wetland or 50 feet of shoreline are considered minimum-impact projects; as long as no municipally defined Prime Wetlands are involved, these impacts may be permitted under an expedited review process. Projects impacting between 3,000 and 20,000 square feet of wetland are defined as minor-impact projects; these projects are also subject to a less intensive permitting process. Projects impacting more than 20,000 square feet of wetlands are considered major-impact projects; major projects require a standard Dredge and Fill permit. Any project with a footprint larger than 100,000 square feet (or 50,000 square feet if shoreland is included) also requires an Alteration of Terrain permit.

The USACE New England District New Hampshire SPGP parallels the state's thresholds for minor and minimum-impact projects, with a joint permitting process. The USACE defines major-impact projects as those between 20,000 square feet and 3 acres of impact. Individual permits are required for projects with more than three acres of impact.

### **Vermont**

Vermont Wetland Rules and the associated permitting process were updated in 2010 to provide new guidance and revised permit application forms. The Vermont Wetland Rules identify and protect 10 functions and values of "significant" wetlands and establish a 3-tier wetland classification system to identify such wetlands. The applicant submits delineation and functional assessment information to the Agency of Natural Resources (ANR), which then determines the wetland class. The first two classes of wetlands (Class I and Class II) are considered significant and protected under the wetland rules, along with their buffer zones (generally 100-foot for Class I and 50-foot for Class II). Any projects impacting these wetlands would require a General or Individual permit, depending on the level of impact. The revised permit rules are still under development, so thresholds have not been finalized. Class III wetlands are not protected by the Vermont Wetland Rules and a Vermont Wetland permit is not required for projects in Class III wetlands.

The USACE New England District Vermont SPGP regulates all federally jurisdictional wetlands, regardless of Vermont classification. Category 1 projects are for wetland impacts on less than 3,000 square feet and are generally non-reporting provided they meet the other general terms and conditions of the SPGP. Certain activities are not eligible for coverage under Category 1 and are

therefore subject to the Category 2 requirements. Category 2 projects require reporting; these projects have between 3,000 square feet and 1 acre of wetland impact or do not meet the Category 1 requirements for some other reason. Category 2 projects must meet the general requirements of the SPGP, require written authorization from the Corps, and are reviewed by the interagency review team which includes the USEPA and the U.S. Fish and Wildlife Service (USFWS). Projects with over one acre of wetland impacts are required to file an application for an Individual permit with the USACE.

The Vermont ANR has granted water quality certification for USACE SPGP Category 1 activities and has conditionally granted the Section 401 water quality certification for Category 2 activities, as long as the activity is reasonably likely to have minimal or no impact on water quality. The Vermont ANR retains the right to require an individual water quality certification for any Category 2 activity over which they have concern.

### **New York**

Under the New York Freshwater Wetlands Act, either the New York Department of Environmental Conservation (NYDEC) or the Adirondack Park Agency regulates freshwater wetlands. The Adirondack Park Agency regulates wetlands within the boundaries of Adirondack Park, which includes a significant portion of the northeastern part of the state.

The NYDEC regulates wetlands 12.4 acres or larger, although smaller wetlands are protected if they have unusual local importance in providing valuable functions such as water quality maintenance or floodwater storage. The Adirondack Park Agency does not have a size threshold, and regulates certain activities within 100 feet of a wetland if they have the potential to adversely affect the wetland (NYDEC, 2010; Adirondack Park Agency Website, 2010).

The USACE New York and Buffalo Districts share implementation of the USACE wetland regulatory Program in New York State. There is no SPGP or other general permit keyed to the state wetlands permitting programs, although the state agencies and USACE do share a joint permit application form (USDOD, 2010a; USDOD, 2010b).

### **Pennsylvania**

Wetlands in Pennsylvania are regulated by both the USACE and the Pennsylvania Department of Environmental Protection (DEP). (Federal wetland permits in the project area would be processed by the Pittsburgh District of the USACE.) Pennsylvania has a number of laws regulating wetlands. The Pennsylvania Dam Safety and Encroachments Act gives the Pennsylvania DEP the authority over wetlands of the state and authority over section 401 Water Quality Certifications. For exceptional wetlands, permits will only be granted when the project will not have an adverse impact, is water-dependent, there is no practicable alternative, will not cause or contribute to a violation of an applicable state water quality standard, will not contribute to ground and surface water pollution, will have no impairment of wetland's exceptional value, and the applicants will replace the affected wetlands. Permits will be issued for other wetlands based on the areal extent of the wetland impacts, the wetland's values and functions, the unique values to the area or region, and comments from other state and Federal agencies.

The Pittsburgh District of USACE has issued the Pennsylvania SPGP, which authorizes projects that result in less than 1 acre of impact to wetlands and 250 linear feet or less of stream. There

are three categories based on the type of project and the level of review received through the Pennsylvania DEP. Category 1 projects can generally proceed without review by the USACE provided the permittee receives state authorization for the project. Category II projects require notification in the Pennsylvania Bulletin as required by the Pennsylvania Dam Safety and Encroachment Act. The publication of the notice will provide the USACE and the state and Federal resource agencies (USEPA, USFWS, and National Oceanic and Atmospheric Administration-Fisheries) the opportunity to review these projects. The third category of projects includes those activities the USACE wants to review and coordinate with the natural resources agencies, and determine on a case-by-case basis whether or not to authorize the impact under the SPGP or as an individual permit (Commonwealth of Pennsylvania, 2010; PDEP, 2003).

## **Ohio**

Wetlands in Ohio are regulated by several USACE districts (Buffalo, Huntington, and Pittsburgh Districts) and the Ohio Environmental Protection Agency (OEPA). Ohio regulates and requires permits for those wetland and water areas beyond the reach of Federal jurisdiction, namely isolated wetlands. It has also strengthened its role in the USACE permit process by strengthening its Section 401 certification process.

The Ohio Revised Code 6111.02 through 6111.028 gives the OEPA authority to regulate discharges of fill into isolated wetlands. Isolated wetlands are not connected to other surface waters and the USACE has determined that most are not “waters of the US.” For any projects involving the placement of fill into an isolated wetland, a permit from OEPA is needed. Under Ohio’s antidegradation rule, isolated wetlands are categorized as follows (USEPA, 2009; OEPA 2010):

- Category 1 are wetlands with minimal wetland function and/or integrity..
- Category 2 wetlands have moderate wetland function and/or integrity.
- Category 3 wetlands have superior wetland function and/or integrity.

Wetland categories are determined using the draft Ohio Rapid Assessment Method.

The USACE has not issued an SPGP in Ohio but has issued several regional activity-specific general permits for activities with minor impacts.

## **Indiana**

Wetlands in Indiana are regulated by the USACE (Chicago, Detroit, and Louisville Districts), the Indiana Department of Environmental Management (IDEM), and the Indiana Department of Natural Resources (IDNR). Title 13 of the Indiana Code gives IDEM the authority to issue Section 401 Water Quality Certificates and gives the Indiana Water Pollution Control Board authority to adopt rules to protect water quality. The Indiana Isolated Wetlands Law gives the IDEM authority to regulate isolated wetlands not regulated by the USACE. It requires individuals to obtain a permit for any project that will result in a discharge to an isolated wetland.

The Indiana Lake Preservation Act gives the IDNR authority to regulate activities over, along, or lakeward of the shoreline of a public freshwater lake’s legal or average normal shoreline.

Certain activities within 10 feet landward of a lake's legal or average normal shoreline are also under IDNR regulation.

The Indiana Navigable Waterways Act gives the IDNR jurisdiction over any waterway that is considered a "navigable water" under Section 10 of the RHA. These waterways have formally been declared by the Indiana General Assembly as a "public highway." Other authorities give the IDNR control over specific activities or aspects (e.g., construction of artificial channels) in Indiana's navigable waterways.

The Chicago, Detroit, and Louisville Districts of the USACE have jointly issued a Regional General Permit for just about any activity limited to one acre or less impact to wetlands (or other "special aquatic sites") and less than 1,500 linear feet of stream channel (not to exceed 1 acre), provided the project proponent obtains a Section 401 Water Quality Certification from IDEM (IDEM, 2008; USDOD, 2009a).

### **Illinois**

Wetlands in Illinois are regulated by the USACE, Illinois Environmental Protection Agency (IEPA), Illinois Department of Natural Resources, and local governments. The Illinois Rivers, Lakes, and Streams Act gives the Illinois Department of Natural Resources the authority to grant permits for any project dealing with dams, construction within a public body of water, and construction within floodways. In addition, Chapter 92, Part 704 of the Illinois Administrative Code (Regulation of Public Rules) establishes that any project in or along Lake Michigan requires a joint application to the Illinois Department of Natural Resources and the IEPA. The IEPA is also responsible for granting the CWA Section 401 water quality certification. Finally, many local governments have passed ordinances that feature wetland and wetland setback protection standards. These standards do not replace the Illinois Department of Natural Resources or the USACE authority; however, they may be more restrictive (FindLaw, 2010; IDNR et al., 2010).

### **Michigan**

Michigan wetlands are regulated by the USACE, the USEPA, the State of Michigan, and local governments. Under Section 404(g) of the CWA the USEPA has transferred the authority to administer the Section 404 CWA program to the State of Michigan Department of Environmental Quality (DEQ) Water Resources Division, for those waters and wetlands the state regulates. The USACE retains Federal jurisdiction over traditionally navigable waters including the Great Lakes, connecting channels, other waters connected to the Great Lakes where navigational conditions are maintained, and to wetlands directly adjacent to these waters. The DEQ and USACE have a joint state and Federal permit process in waterways where both state and Federal jurisdiction apply, to streamline the application process for applicants. The DEQ Land and Water Management Division (LWMD) acts as a clearinghouse to determine if joint review is needed on a permit.

Under Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, the state regulates wetlands:

- Connected to one of the Great Lakes or Lake St. Clair;

- Located within 1,000 feet of one of the Great Lakes or Lake St. Clair;
- Connected to an inland lake, pond, river, or stream;
- Located within 500 feet of an inland lake, pond, river or stream;
- Not connected to one of the Great Lakes or Lake St. Clair, or an inland lake, pond, stream, or river, but more than five acres in size; and,
- Not connected to one of the Great Lakes or Lake St. Clair, or an inland lake, pond, stream, or river, and less than five acres in size, but the DEQ has determined that these wetlands are essential to the preservation of the state's natural resources and has notified the property owner.

In addition, local jurisdictions regulate wetlands by passing wetland ordinances. Wetlands regulated by local governments are less than five acres (MDNRE,2010).

### **Wisconsin**

Wetlands in Wisconsin are regulated by the USACE, the Wisconsin Department of Natural Resources (WDNR), and local jurisdictions through the state-mandated Shoreland Zoning ordinances. The WDNR has regulatory authority over all wetlands, including isolated wetlands, in Wisconsin. As with the State of Michigan, the EPA has transferred the authority to administer the Section 404 CWA program to the State of Wisconsin under Section 404(g) for those waters and wetlands the state regulates. The USACE retains Federal jurisdiction over traditionally navigable waters under Section 10 of the RHA.

Under the navigable waters protection, Chapters 30 and 31 of the Wisconsin Statutes, the WDNR regulates most alterations to the state's navigable waters and wetlands. Navigable waters are defined as "any waterway capable of navigation by a recreational craft on a regularly recurring basis, including spring freshets." Wetlands are defined as "an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions." Chapters NR 299 and 103 of the Wisconsin Administrative Code gives authority to the WDNR to carry out the CWA provisions, while the Isolated Wetland Protection Provisions of Wisconsin Act 6 give the WDNR the authority to regulate isolated wetlands. The USACE nationwide permits have been suspended in Wisconsin, and the state has issued its own SPGP for activities with minor impacts. Applicants need a Water Quality Certification for both federally and nonfederally regulated projects (WDNR, 2010; Cain, 2008).

The Shoreland Wetland Zoning Program (Sections 281.21, 59.692, 61.351, 62.231 of the Wisconsin Statutes) requires that counties, villages, and cities have ordinances that prohibit fill in wetlands. This program is administered by local governments, with the WDNR having oversight authority. Protection areas include 1,000 feet from lakes and 300 feet from rivers or streams. In addition, many local jurisdictions have passed ordinances that feature wetland and wetland setback protection standards. These standards do not replace WDNR or USACE authority, but they may actually be more restrictive (Cain, 2008).

## **Minnesota**

Wetlands in Minnesota are regulated by the USACE, the Minnesota Department of Natural Resources, the Minnesota Pollution Control Agency, and local governments. Laws regulating wetlands include the Public Water Work Permit Program, Minnesota's Wetland Conservation Act, and Section 401 of the CWA. The first of these laws gives the Minnesota DNR authority to regulate projects that occur within the ordinary high water levels of public waters and public waters wetlands. Any project that includes filling, excavation, shore protection, bridges and culverts, structures, docks, marinas, water-level controls, dredging, or dams are subjected to regulation.

The Minnesota Wetland Conservation Act gives local governments the authority to administer regulations on all wetland draining and filling activities not protected by the Minnesota DNR. Exemptions are available for activities impacting wetlands of 400 square feet or less. Other exemptions ranging from 2,000 to 10,000 square feet of impacts are allowed depending upon wetland type and location.

The Minnesota Pollution Control Agency has the authority to determine whether projects comply with the state's water quality standards and to issue Water Quality Certifications. The agency also reviews and comments on USACE permit applications.

Two or more of these programs often cover the same wetland. In some cases, various portions of the same wetland are regulated by different programs. Additional local laws include watershed district rules, shoreland and floodplain ordinances, and municipal wetland ordinances.

The Minnesota USACE has established general permits and a letter of permission process that replaces the USACE's nationwide permits (MBWSR, 2010; USDOD, 2010c; MDNR, 2010).

## **North Dakota**

Wetlands in North Dakota are regulated by the USACE, the North Dakota Department of Health (NDDH), the North Dakota State Water Commission, the Local County Water Resource Boards, and the local Soil and Water Conservation Districts (USDA-NRCS). North Dakota includes wetlands in the State's definition of waters.

The North Dakota Century Code Sections #61-01-22, 61-02-14, and 61-02-20 establish that a permit is required from the local county water resource board and the North Dakota State Water Commission to drain any water of the state, while Century Code #61-32-01 establishes that proponents of any project occurring in a wetland compromising 80 acres or more shall first secure a permit. The NDDH is responsible for granting Section 401 Water Quality Certifications and uses the North Dakota Water Quality Standards to determine if a project meets the standards of the state.

The USACE has not developed any SPGPs for North Dakota, but has adopted regional conditions for the nationwide permits. The USACE nationwide permits cover a variety of activities, with maximum impacts of up to 0.5 acres. Projects with impacts greater than 0.5 acres require individual permits (Crooke, 2010).

## **Montana**

In addition to the USACE Sections 404 and 10 permits, the State of Montana has regulations for the protection of streams and waters, and permits may be required for work in and near wetlands and other waters. Under the Montana Water Quality Act, the Montana Department of Environmental Quality is charged with regulating the waterways of the state and issuing or denying permits. Wetlands are included in the definition of the state's waterways. A permit is required to discharge sewage, industrial waste, or other waste into state waters. Also, under the Natural Streambed and Land Preservation Act (i.e., the "310 Law"), any individual or corporation proposing construction in a perennial stream is required to apply for and obtain a 310 permit. Permitting is administered by local Montana Conservation Districts (MDNRC, 2010).

Under the Montana Stream Protection Act, any Federal, state, or local agency conducting a project that may impact the bed or banks of a stream must acquire a permit (Stream Protection Act 124 Permit) from Montana's Department of Fish and Wildlife (MT FWP, 2010). Under the Montana Lakeshore Protection Act, Montana has authorized counties to develop permit requirements for any development along the shorelines of lakes, rivers, and streams. Although most counties in Montana have not developed these requirements, Flathead County, which abuts the northern border, has enacted a Lakeshore Protection Act.

The USACE has not developed any SPGPs for Montana, but has adopted regional conditions for the nationwide permits. Montana has also developed a joint permit application for any project requiring permitting from multiple jurisdictions (MDEQ, 2010).

## **Idaho**

In addition to meeting the USACE Federal wetland permitting requirements, Idaho Stream Channel Protection Act gives the Idaho Department of Water Resources permitting authority over any project that will obstruct, diminish, destroy, alter, modify, relocate, or change the natural shape or direction of a stream channel flow. Projects within the ordinary high water marks of a continuously flowing stream, including recreation, dredging, or mining, require a permit.

The USACE has issued regional general permits for structures such as piers and docks in Lake Pend Oreille and some of the other waterways (USDOD, 2010d; USDOD, 2009b).

## **Washington**

In addition to the USACE Sections 404 and 10 permitting requirements, the State of Washington has several laws applicable to waters and wetlands. Waters of the State of Washington are defined as those fresh and salt waters below the ordinary high water mark within the boundaries of the state. Under the "Hydraulic Code", Washington's Department of Fish and Wildlife is authorized to protect fish and fish habitats from impacts associated with "construction of any form of hydraulic project or performance of other work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or fresh waters of the state." Projects are conditioned or denied for the protection of fish life.

The Shoreline Management Act gives authority to local governments to develop a Shoreline Master Program (SMP). Activities that require permits are defined within SMP for each local jurisdiction.

Projects exceeding \$5,718 fair market value along coastal shorelines, shorelines of streams or lakes, or wetlands are required to acquire a Shoreline Substantial Development Permit from the Washington State Department of Ecology. The cost of the permit is determined by the local issuing jurisdiction. The Washington State Department of Ecology does not have authority to approve or deny permit requests. However, the Department of Ecology can require compliance with the Washington State Environmental Policy Act (i.e., the project proponent may have to prepare an environmental impact review and possibly an environmental impact statement).

Under the Growth Management Act, local governments have authority to regulate wetlands as critical areas designated by the Department of Ecology.

Permitting for the various regulations is accomplished through a joint permitting process called the Joint Aquatic Resources Permits Application (WSGORA, 2010; USDOD, 2007).

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