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## **I. Overview**

This sourcebook is designed as an informational guide to the U.S. Army Corps of Engineers, Baltimore District's regulatory program. If you are unsure about any of the information included here or on the website, please feel free to contact the Baltimore District regulatory office.

### **a. Introduction**

The U.S. Army Corps of Engineers regulatory program began in 1890 with the responsibility of protecting and maintaining the nation's navigable waterways. As a result of changing public needs and evolving policy via new laws and court decisions, protection has been extended to all waters of the United States, including many wetlands.

Mission Statement:

*The mission of the U.S. Army Corps of Engineers regulatory program is to protect the Nation's aquatic resources, while allowing reasonable developments through fair, flexible, and balanced permit decisions.*

### **b. Regulatory 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The legislative origins of the program are the Rivers and Harbors Acts of 1890 (superseded) and 1899 (33 U.S.C. 401, et seq.).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. 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.

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" and 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.

**c. Delegation of Regulatory Authorities**

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 applicable factors (such as the 404(b)(1) Guidelines and ocean dumping criteria) must also be met, of course. In delegating this authority, the Secretary of the Army qualified it to "[be] subject to such conditions as I or my authorized representatives may from time to time impose."

Additional clarification of this delegation is provided in the program's implementing regulations (33 Code of Federal Regulations, CFR, 320-330). Division and District Engineers are authorized to issue conditioned permits (Part 325.4) and to modify, suspend, or revoke them (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). In certain situations the delegated authority is limited (Part 325.8).

This delegation recognizes the decentralized nature and management philosophy of the Corps of Engineers organization. Regulatory program management and administration is focused at the District office level, with policy oversight at higher levels. The backbone of the program is the Department of the Army regulations (33 CFR 320-330) which 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, developing case law, and in general the concerns of the public. They are developed through formal rule making procedures.

**d. Geographic Extent of Baltimore District's Regulatory Boundary**

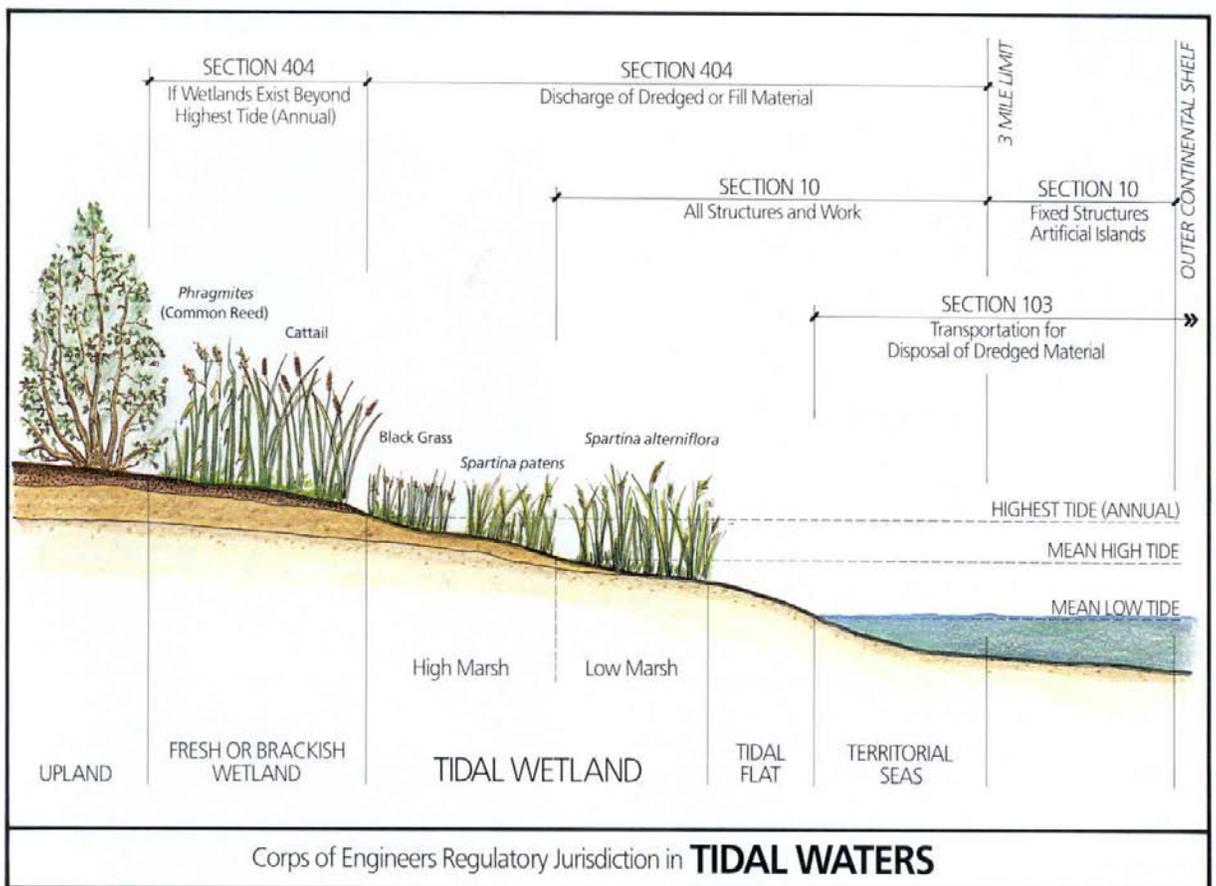
The geographic extent of the regulatory boundary for the Baltimore District includes the entire state of Maryland (including the Potomac River), the District of Columbia, a central portion of Pennsylvania within the Susquehanna River watershed, the Pentagon and several military bases in northern Virginia including Cameron Station, Ft. Belvoir and Ft. Myer. To view a map of our District's boundary and our field offices, please [click here](#).

## II. Aquatic Resources

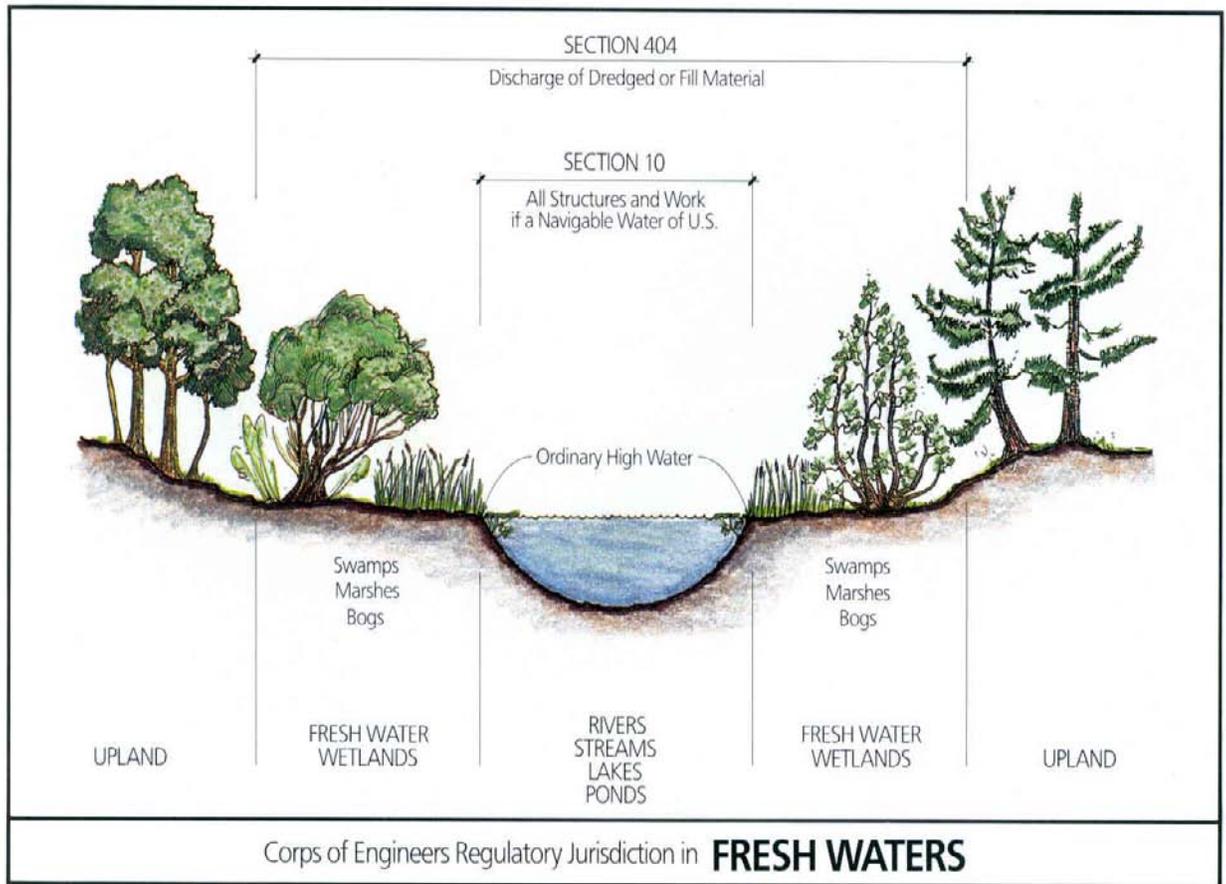
Aquatic Resources are generally divided into open water systems, e.g., oceans, lakes, ponds; watercourses, e.g., rivers, streams, creeks; and wetlands, marshes, forested wetlands, scrub-shrub wetlands, wet meadows, bogs. Please refer to the next section on Jurisdictional Determinations for elaboration on the process of identifying these aquatic resources with respect to our regulatory authorities.

### a. Aquatic Resource Identification

The figures and subsequent definitions below are to be considered guides to assist with clarifying the limits of the Corps' jurisdiction on the ground and in the field.



**Figure 1: Limits of the Corps' jurisdiction in tidal waters. Typically for marine systems, however, in other Corps Districts tidal waters may be present in fresh water systems.**



**Figure 2: Limits of the Corps' jurisdiction in fresh waters.**

The definitions for terms used in Figures 1 and 2 and other terms frequently used in the regulatory program may be found below:

**Adjacent** — Bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”

**Impoundment** — Body of water formed by collecting water, as at a dam.

**Interstate or Foreign Commerce** — a) Nature of commerce: type, means, and extent of use. The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. It is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been

a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time. b) Nature of commerce: interstate and intrastate. Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

Intrastate (within a state) or interstate (crossing state lines) Nature of Waterway — A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

Mean High Tide (High Tide Line or Mean High Water Mark) — The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Mud Flat – A level area of fine silt and clay along a shore alternately covered or uncovered by the tide or by shallow water.

Ordinary High Water Mark – The line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Prairie Pothole – Depressional wetlands found in the grasslands of North America (usually in the upper Midwest) and formed by glacial scarring in the landscape. Water ponds in these areas in the spring, due to snow melt and rain, typically drying up during the summer months.

Sandflat — A flat sandy tidal area, devoid of vegetation.

Slough — A small muddy marshland or tidal waterway which usually connects other tidal areas.

Tidal Waters — Waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

Tributary— A tributary is a stream, regardless of size or water volume, that flows into or joins another stream. The point where two tributaries meet is called a confluence.

Upland — Any area that does not meet the definition of a wetland is considered an upland. Uplands have well-drained soils that generally do not collect standing water and therefore do not develop wetland soil characteristics or support plants specially adapted to living wet conditions.

Wetland — 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.

Wet Meadow — A wetland area which is typically formed due to poorly drained soil. These areas lack standing water all year round, but soils remain sufficiently saturated to develop hydric soils and support a prevalence of vegetation typically adapted for life in saturated soil conditions. Plants typically found in these areas are soft-stemmed vegetation, such as grasses, flowers, sedges, and rushes.

## **b. Jurisdictional Waters (Waters of the U.S.)**

Waters of the United States essentially include 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. Other jurisdictional waters include intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, where the use, degradation, or destruction of which could affect interstate or foreign commerce.

Navigable waters can be further described as those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark. They are also presently used and have been used in the past or may be susceptible to use to transport interstate or foreign commerce.

The landward regulatory limit for non-tidal waters (in the absence of adjacent wetlands) is the ordinary high water mark. The ordinary high water mark can be a line on the shore, an eroded bank of a stream, or the high flow line in a swale established by the fluctuations of water and indicated by physical characteristics such as:

- a clear natural line impressed on the bank;
- shelving;
- changes in the character of the soil;
- destruction of terrestrial vegetation;
- the presence of litter and debris;
- or other appropriate means that consider the characteristics of the surrounding areas.

The "waters of the United States" are defined in [33 CFR Part 328](#).

### **c. Jurisdictional Wetlands**

A wetland is an area that is 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.

Jurisdictional wetlands include:

- Wetlands adjacent to traditional navigable waters
- Wetlands that directly abut non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- And also these wetlands when the agencies make a determination, based on a fact-specific analysis, that they have a significant nexus with a traditional navigable water:
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

Typical wetland categories:

**Forested Wetland** - Includes all tidal and nontidal wetlands dominated by woody vegetation greater than or equal to 5 meters in height, and all such wetlands that occur in tidal areas in which salinity due to ocean-derived salts is below 0.5 percent. Total vegetation coverage is greater than 20 percent. (Cowardin et al.1979).

**Emergent Wetland (Persistent)** - Includes all tidal and nontidal wetlands dominated by persistent emergent vascular plants, emergent mosses or lichens, and all such wetlands that occur in tidal areas in which salinity due to ocean-derived salts is below 0.5 percent.

Plants generally remain standing until the next growing season. Total vegetation cover is greater than 80 percent. (Cowardin et al.1979).

Scrub-Shrub Wetland - Includes all tidal and nontidal wetlands dominated by woody vegetation less than 5 meters in height, and all such wetlands that occur in tidal areas in which salinity due to ocean-derived salts is below 0.5 percent. Total vegetation coverage is greater than 20 percent. The species present could be true shrubs, young trees and shrubs, or trees that are small or stunted due to environmental conditions (Cowardin et al. 1979).

### **III. Jurisdictional Determinations**

This section provides guidance on how to identify aquatic resources and the areas regulated by the U.S. Army Corps of Engineers. The final determination of whether an area is waters of the United States, including jurisdictional wetlands, and whether the activity requires a permit must be made by a Corps District Office. Two resources, the Wetland Delineation Manual along with the appropriate Regional Supplement, are used in making the final determination.

#### **a. 1987 Wetland Delineation Manual**

This document presents approaches and methods for identifying and delineating wetlands for purposes of Section 404 of the Clean Water Act. It is designed to assist users in making wetland determinations using a multi-parameter approach. Except where noted in the manual, this approach requires positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology for a determination that an area is a wetland. A copy of the 1987 Wetland Delineation Manual and related information can be found [here](#).

Please note, the following regional supplements have been developed for areas within the Baltimore District. To identify which regional supplement corresponds to your project location, please refer to the [Map of the Regions](#).

#### **b. Regional Supplements**

Regional Supplements to the Corps of Engineers Wetland Delineation Manual provide technical guidance and procedures for identifying and delineating wetlands that may be subject to regulatory jurisdiction under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act. The development of Regional Supplements is part of a nationwide effort to address regional wetland characteristics and improve the accuracy and efficiency of wetland delineation procedures. These supplements were developed by wetland delineation experts from state and Federal agencies and academia with experience within this area.

## **1. Atlantic and Gulf Coastal Plain Supplement**

Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)

[Field Testing Protocol](#)

[Administrative Record for Atlantic and Gulf Coastal Plain Supplement](#)

[Atlantic and Gulf Coastal Plain Supplement Public Comments and Responses](#)

[Atlantic and Gulf Coastal Plain Peer Review Comments and Responses](#)

## **2. Eastern Mountains and Piedmont Supplement**

[Interim Regional Supplement to the COE Wetland Delineation Manual: Eastern Mountains and Piedmont](#)

[Eastern Mountains and Piedmont Supplement Peer-Review Comments](#)

[Eastern Mountains and Piedmont Supplement Public Comments and Responses](#)

## **3. Northcentral and Northeast Supplement**

[Administrative Record for Northcentral and Northeast Region Supplement](#)

[Northcentral and Northeast Peer Review Comments and Responses](#)

[Northcentral and Northeast Public Comments and Responses](#)

Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region

### **c. Preliminary Jurisdictional Determinations**

These jurisdictional determination are non-binding “. . . written indications that there may be waters of the United States, including wetlands, on a parcel or indications of the approximate location(s) of waters of the United States or wetlands on a parcel. Preliminary JDs are advisory in nature and may not be appealed.” A copy of the Preliminary Jurisdictional Determination form may be found [here](#).

### **d. Approved Jurisdictional Determinations**

These jurisdictional determinations are official Corps determinations that jurisdictional waters of the United States are either present or absent on a particular site. An approved JD is valid for five years and can be appealed through the Corps' administrative appeal process set out at 33 CFR Part 331. The information on the [Baltimore District Approved JD Information Checklist](#) is recommended for all approved JD requests and

will assist Corps staff in delineating waters of the U.S. and completing accurate JDs. This documentation must allow for a reasonably accurate replication of the delineation or determination at a future date. The approved JD Form is available by clicking [here](#).

## IV. Permitting

The Corps regulatory program permit evaluation process results in permit decisions that balance the need for proposed development with protection of the nation's aquatic environment. The level of the Corps evaluation is commensurate with the level of the environmental impacts and the aquatic functions and values involved in the particular area being impacted. Impacts to higher ecological value areas will be subject to a much more detailed evaluation and a strong focus on avoidance of impacts to the aquatic environment.

All permit decisions made by the Corps follow an evaluation process that involves avoiding, minimizing and compensating for unavoidable losses of aquatic functions and values. Impacts to the aquatic environment are first avoided to the maximum extent practicable by evaluating alternative sites and alternative project configurations onsite. Once avoidance has been maximized, direct and indirect impacts on the aquatic environment are minimized to the extent practicable by actions such as seeding new fill with vegetation, providing vegetative buffers and minimizing shading impacts to aquatic resources. Finally, unavoidable adverse effects on the aquatic environment are fully offset by compensatory mitigation on a functional basis. The Corps evaluates and mitigates direct, indirect and cumulative impacts through its decision process. This evaluation process that is involved in every permit decision is a result of implementation of the Corps public interest review and compliance with requirements of the National Environmental Policy Act (NEPA) necessary to take a Federal action using an environmental assessment followed by a finding of no significant impact, rather than an Environmental Impact Statement.

All permit decisions are also subject to various other Federal laws that are involved when there is a Federal action. The Federal action in the case of the Corps regulatory program is the evaluation and decision on a permit application. Important among those other Federal laws for the Corps regulatory program are compliance with the Endangered Species Act, the National Historic Preservation Act and the Magnuson-Stevens Fisheries Conservation and Management Act involving protection of Essential Fish Habitat. Compliance with each of these authorities often results in additional restrictions on the proposed work and compensatory mitigation for impacts to the resources protected by these Federal laws.

Many of the permits issued by the Corps are subject to [Section 404 of the Clean Water Act](#). The Corps evaluation, in addition to that described above involves a determination by the Corps that the proposed discharge of dredged or fill material complies with the Section 404(b)(1) Guidelines. These technical guidelines focus on evaluation of alternatives to the action, compliance with other Federal laws, significant degradation of the aquatic environment and ensuring that all appropriate and practicable compensatory mit-

igation is required for unavoidable impacts to the aquatic environment. The Corps ensures there will be no significant degradation of the aquatic environment by offsetting all unavoidable impacts to the aquatic environment, on a functional basis by requiring compensatory mitigation.

A small but important number of permits issued by the Corps involve ocean disposal of dredged material. Such permit decisions are subject to the Corps public interest review and NEPA compliance as discussed above, but they are also subject to compliance with specific technical criteria established under the Marine Protection, Research and Sanctuaries Act. These criteria are established to identify and approve ocean disposal sites for the discharge of dredged material and to test and evaluate the dredged material that would be disposed of at the designated disposal site and the methods used to transport and dispose of the dredged material at the site.

## **a. Types of Permits**

### **1. Regional General Permits**

#### **i) Maryland State Programmatic General Permit-4**

The MDSPGP-4 authorizes work in waters of the United States within the state of Maryland for activities that would cause no more than minimal adverse environmental effects, individually and cumulatively, subject to the terms, conditions, and limitations contained herein. This programmatic general permit has been developed in a cooperative effort with the MDE, which has regulatory authority over waters of the State of Maryland. This MDSPGP-4 builds upon the existing Wetland and Waterway regulatory program of the Maryland Department of the Environment (MDE) and is designed to improve the regulatory process for applicants, reduce unnecessary duplicative project evaluations, and promote more effective and efficient use of Corps resources while providing equivalent environmental protection for aquatic resources. This programmatic general permit applies to the discharge of dredged or fill material and/or the placement of structures, that are components of a single and complete project, including all attendant features both temporary and/or permanent, which individually and/or cumulatively result in direct or indirect impacts not to exceed 1.0 acre of waters of the United States, including jurisdictional wetlands and navigable waters, for specific categories of activities as regulated by Section 404 of the CWA or Section 10 of the River and Harbors Act of 1899. Discharges of dredged or fill material or the placement of structures, as described in Category A of the MDSPGP-4 Category List, that comply with the terms and conditions contained in the MDSPGP-4 and have only minimal individual and cumulative adverse effects on the environment are authorized by the MDE. Discharges of dredged or fill material or the placement of structures, as described in Category B of the MDSPGP-4 Category List, that comply with the terms and conditions contained in the MDSPGP-4 and have only minimal individual and cumulative adverse effects on the environment are authorized by the Corps.

View [MDSPGP-4](#).

ii) Pennsylvania State Programmatic General Permit-4

The Pennsylvania State Programmatic General Permit-4 (PASPGP-4) applies to the discharge of dredged or fill materials and/or the placement of structures that are components of a single and complete project, including all attendant features both temporary and/or permanent that individually or cumulatively result in direct or indirect impacts to 1.0 acre or less of waters of the United States, including jurisdictional wetlands, for specific categories of activities as regulated by Section 404 of the CWA and/or Section 10 of the River and Harbor Act of 1899. Discharges of dredged or fill materials and/or the placement of structures that comply with all terms, conditions, and processing procedures contained in the PASPGP-4, and have only minimal individual or cumulative environmental impacts, are authorized. PASPGP-4 is issued pursuant to Section 404(e) and is based on and consistent with the requirements of the CWA 404(b)(1) Guidelines. Section 404(e) of the Clean Water Act (CWA) (33 United States Code [U.S.C.] Section [§] 1344) allows for the issuance of general permits on a statewide basis, which operate in conjunction with a State regulatory program that protects the aquatic environment in a manner equivalent to the Department of the Army regulatory program, provided that the activities permitted under each category of such general permits are similar in nature and result in no more than minimal individual or cumulative adverse effects on the aquatic environment.

View [PASPGP-4](#).

iii) Nationwide Permits

Nationwide Permits (NWP) authorize a category of activities throughout the entire nation, and are valid only if the national and regional conditions applicable to the permits are met. If not, then a regional, general or individual permit will be required. Because the Maryland State Programmatic General Permit-4 (MDSPGP-4) and Pennsylvania State Programmatic General Permit-4 (PASPGP-4) are designed to continue to authorize certain activities previously covered by the Nationwide Permit (NWP) program and institute a streamlined Corps regulatory process that has been integrated with state processes, the Corps of Engineers has suspended many of the NWPs which are applicable to activities qualifying for MDSPGP-4 or PASPGP-4 authorization. Suspension of various NWPs will avoid confusion over SPGP use and eliminate redundancy since State and Federal regulatory programs are administered jointly in these states. If the SPGPs become void, enjoined, revoked, or removed from effect for any reason, the Corps will consider reissuance of some or all of the suspended NWPs.

[Baltimore District Special Public Notice #07-37 announcing the Final Regional Conditions and Suspension for the 2007 Nationwide Permits](#)

[Baltimore District NWP Regional Conditions](#)

[Section 401 Water Quality Certification and Coastal Zone Management Act consistency determinations by the State of Maryland, the Commonwealth of Pennsylvania, and the District of Columbia](#)

[Standard Operating Procedure for processing Nationwide Permit 21 applications](#)

## **2. Letter of Permission**

The term "letter of permission" means a type of individual permit issued in accordance with the abbreviated procedures of [33 CFR 325.2\(e\)](#). The Letter of Permission (LOP) evaluation includes a 15-day comment period with State and Federal agencies and the adjacent property owners. A final decision on the permit application is usually reached within 120 days from the date a complete application is received by the Corps' office. LOP's can be issued pursuant to Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, or both.

## **3. Standard Permit**

A Standard Permit, also referred to as an Individual Permit, is required when a proposed project does not meet the criteria to qualify for a General Permit, Nationwide Permit, or Letter of Permission. A Standard Permit usually has a 21-day comment period under public noticing, though it can be as short as 15 days or up to 30 days. A copy of the permit drawings and a description of the project are mailed out to the adjacent property owners and the applicant and their consultant. All other interested parties have to access the [public notices](#) from our website. Processing time for these types of permits is usually 60 to 120 days from the receipt of a complete application in non-controversial projects. Controversial or larger projects may take longer.

## **4. No Permit Required**

You should contact your local Corps regulatory office for assistance in determining whether or not a permit is required.

A No Permit Required determination by the Corps:

- Does not obviate the requirement to obtain any other Federal, State, or local permits which may be necessary for your project.
- Does not constitute a Federal evaluation of possible impacts to species protected under the Endangered Species Act. Projects that have the potential to impact federally listed species should contact the U.S. Fish and Wildlife Service.
- Does not constitute a Federal evaluation of possible impacts to historic resources protected under Section 106 of the National Historic Preservation Act. Projects that have the potential to impact historic sites should contact the State Historic Preservation Office (SHPO).
- Does not determine if your project may be subject to local building restrictions mandated by the National Flood Insurance Program. You should contact your lo-

cal office that issues building permits to determine if your site is located in a flood-prone or floodway area, and if you must comply with the local building requirements mandated by the National Flood Insurance Program.

- May not be valid for the wetland conservation provisions of the Food Security Act of 1985, as amended. If you or your tenant are U.S. Department of Agriculture (USDA) program participants, or anticipate participation in USDA programs, you should request a certified wetland determination from the local office of the Natural Resources Conservation Service (NRCS) prior to starting work.
- Reflect current policy and regulations and are usually valid for a period of no longer than 5 years from the date of the letter unless new information warrants a revision of the determination before the expiration date. If after the 5-year period, the Corps has not specifically revalidated the determination, it will automatically expire. Any reliance upon a determination beyond the expiration date may lead to possible violation of current Federal laws and/or regulation.

## **b. Permitting Process**

Processing such permits involves evaluation of individual, project specific applications in what can be considered three steps: pre-application consultation (for major projects), formal project review, and decision making.

You are encouraged to contact your local District office prior to submitting a permit application. Pre-application consultation usually involves one or several meetings between an applicant, Corps District staff, interested resource agencies (Federal, state, or local), and sometimes the interested public. The basic purpose of such meetings is to provide for informal discussions about the pros and cons of a proposal before an applicant makes irreversible commitments of resources (funds, detailed designs, etc.). The process is designed to provide the applicant with an assessment of the viability of some of the more obvious alternatives available to accomplish the project purpose, to discuss measures for reducing the impacts of the project, and to inform the applicant of the factors the Corps must consider in its decision making process.

Hopefully, this information will minimize not only the time, effort, and expense needed to accomplish projects, but will also help to lessen any adverse impact a project may have on the aquatic environment.

As mentioned previously, pre-application meetings are strongly encouraged in the Baltimore District, especially for large projects proposing significant impacts to waters of the U.S., including jurisdictional wetlands. Meeting in the early phases of project design allows the applicant to plan their projects to identify what factors might need to be taken into consideration during the project design and how to avoid and minimize impacts, where possible. By discussing the work prior to submitting an application, your application can be processed more efficiently.

It is very important that you provide complete information and details of the project. The following information is required for review by the Corps:

- Name, address, and phone number of applicant.
- Complete description of the proposed project, including the purpose, type and quantity of material to be discharged.
- All related activities to include potential impacts to waters of the U.S. resulting from temporary construction access, stream diversion techniques, etc. Is this a multiphase project? Have additional permits been applied for or received?
- A list of all adjacent property owners and their addresses.
- The project location. This should be clearly marked on a road map and a description of the directions should be included. In addition to the map and directions, you should submit the Section, Township and Range or County and the latitude and longitude of the site.
- Has the application been signed?
- Be sure to include a full set of drawings on 8.5 inch by 11 inch format. These should include plan view, section view, elevation view, profile, and grade drawings. Please use match lines where necessary.
- Clear drawings. Do not clutter the drawings with extraneous information. A simple drawing which clearly shows the project is easier to copy and will be more readable by the time a permit decision is finally reached. Remember, these drawings may be copied for publication if a public notice is required.

Survey Information that may be required:

- X and Y Coordinates
- Hydrographic/Bathymetric Survey

After the application is received in the District office, it will be assigned an identification number and be reviewed for completeness. A request for additional information may be sent to notify you of any additional information which may be necessary for the Corps to review your proposed project. Then within 15 days of receiving all the required information, a decision will be made as to which permit the impacts would qualify for. If the impacts qualify for a regional general permit or Nationwide permit and the work is not contrary to the public interest, then an agency notice may be issued. If the proposed work does not qualify for a regional general permit or a Nationwide permit, then a public notice will likely be issued with a 15 to 30 day comment period. The proposal is then reviewed by the Corps, local, state and federal agencies, special interest groups and the general public.

After the comment period, the Corps will review all of the comments and consult with the other federal agencies where appropriate. The Corps may ask for additional information at this time and a public hearing may be conducted if one has been specifically requested and a decision has been made that there is a need.

Once the project manager evaluates the impacts of the project and all comments received, negotiates necessary modifications of the project if required, he or she may draft

the appropriate documentation to support a recommended permit decision. The permit decision document may include special conditions, a discussion of the environmental impacts of the project, the findings of the public interest review process, and any special evaluation required by the type of activity such as compliance determinations with the Section 404(b)(1) guidelines or the ocean dumping criteria.

When all considerations are satisfied, the District Engineer will make a decision to either issue or deny the permit application. If a denial is warranted, you will receive a written explanation of the reason for denial.

A Self-Certification Form is included with each type of authorization issued. When the authorized activity and/or mitigation is completed, the permittee is required to complete the entire form and return it to the District office for recording and compliance purposes.

The Baltimore District supports a strong partnership with our state agency counterparts in regulating water resource developments. This is achieved with joint permit processing procedures (e.g., joint public notices and hearings), programmatic general permits founded on effective state programs and regional conditioning of nationwide permits.

If you need additional information concerning the permit process, please contact your local District office.

### **c. Processing Time**

The Corps makes every effort possible to process Individual Permit applications within 120 days and General Permit applications within 60 days of the date a complete application is submitted.

On average, standard permit decisions are made within six months from receipt of a complete application. In emergencies, decisions can be made in a matter of hours. Applications requiring review of endangered species, completion of EISs or those experiencing other complication will have a longer processing time. Other complications may include incomplete permit applications, changes in the proposed project, substantial public opposition, or court decisions which alter current case law.

### **d. Permit Decision**

Of great importance to the project evaluation is the Corps public interest balancing process. The public benefits and detriments of all factors relevant to each case are carefully evaluated and balanced. Relevant factors may include conservation, economics, aesthetics, wetlands, cultural values, navigation, fish and wildlife values, water supply, water quality, and any other factors judged important to the needs and welfare of the people. The following general criteria are considered in evaluating all applications:

1. The relevant extent of public and private needs;

2. Where unresolved conflicts of resource use exist, the practicability of using reasonable alternative locations and methods to accomplish project purposes; and
3. The extent and permanence of the beneficial and/or detrimental effects the proposed project may have on public and private uses to which the area is suited.

No permit is granted if the proposal is found to be contrary to the public interest.

#### Internal Decision Safeguards:

The permit evaluation process contains many safeguards designed to ensure objectivity in the evaluation process. Even before an application is formally submitted, such safeguards come into play, for example, in the pre-application consultation stage. Probably the single biggest safeguard of the program is the Corps public interest review, which also forms the main framework for overall evaluation of the project. This review requires the careful weighing of all public interest factors relevant to each particular case. Thus, one specific factor (e.g., economic benefits) cannot by itself force a specific decision, but rather the decision represents the net effect of balancing all factors, many of which are frequently in conflict.

The public interest review is used to evaluate applications under all authorities administered by the Corps. There are additional evaluation criteria used for specific authorities. For example, applications for the discharge of dredged or fill material into waters of the U.S. are also evaluated using the Section 404(b)(1) Guidelines developed by EPA in conjunction with the Department of the Army. These guidelines are heavily weighted towards preventing environmental degradation of waters of the U.S. and so place additional constraints on Section 404 discharges. Likewise, ocean dumping permits (Section 103) are evaluated using special criteria developed by EPA in consultation with the Department of the Army. These criteria are also primarily aimed at preventing environmental degradation and set up some very stringent tests which must be passed before a Section 103 permit can be granted. Although required for permit issuance, compliance with these authority specific criteria is only a part of the public interest review. Therefore, projects which comply with the criteria may still be denied a permit if they are found to be contrary to the overall public interest.

#### External Decision Safeguards:

The above safeguards are basically internal standards or procedures with which projects are evaluated. There are also a series of external safeguards which work to maintain objectivity. One is EPA's Section 404 or so called "veto" authority. EPA may prohibit or withdraw the specifications of any disposal site if the EPA Administrator determines that discharges into the site will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. This authority also carries with it the requirement for notice and opportunity for public hearing. EPA may invoke this authority at any time. An application need not be pending.

Section 404(q) of the Clean Water Act requires the Department of the Army to enter into interagency agreements to minimize duplication, needless paperwork, and delays in the Section 404 permit process. Current agreements allow EPA and the Department of Commerce and the Interior to request higher level review within the Department of the Army when they disagree with a permit decision which is about to be made by the District Engineer. Higher level review can only be requested when certain criteria are met and must be conducted within time limits specified in the agreements. These criteria are insufficient coordination at the District level, development of significant new information, or the need for policy level review of nationally important issues. Honoring such requests is at the discretion of the Assistant Secretary of the Army for Civil Works.

Individual state permitting and water quality certification requirements provide an additional form of objective safeguard to the Corps regulatory program. Section 401 of the Clean Water Act requires state certification or waiver of certification prior to issuance of a Section 404 permit.

Section 307 of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1458(c)), requires the applicant certify that the project is in compliance with an approved State Coastal Zone Management Program and that the State concur with the applicant's certification prior to the issuance of a Corps permit. The Corps' standard permit form contains a statement notifying the permittee that the Federal permit does not remove any requirement for state or local permits. This has the effect of making the Corps' permit unusable without these additional authorizations. If the state or local permit is denied before the Corps has made its decision, the Corps permit is also denied.

In addition to these requirements, the Corps' implementing regulations require that District Engineers conduct additional evaluations on applications with potential for having an effect on a variety of special interests (e.g., Indian reservation lands, historic properties, endangered species, and wild and scenic rivers).

## **V. Compensatory Mitigation**

When designing a project which proposes impacts to aquatic resources, the applicant must explore all possible project alternatives and take all appropriate steps to avoid and minimize the adverse impacts to waters of the United States, including jurisdictional wetlands, to the maximum extent practicable. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose. When preparing a DA permit application, the applicant must demonstrate that he/she has investigated the project alternatives and available options to avoid and minimize impacts to waters of the United States by including information related to the alternatives evaluated and the findings of the alternatives with the DA permit application. After all available and practicable project alternatives have been investigated, and impacts to waters of the United States are deemed to be unavoidable, compensatory mitigation for the unavoidable impacts will likely be required. The conditions of the required mitigation will be included in the DA permit as special conditions.

Mitigating the environmental impacts of necessary development actions on the Nation's wetlands and other aquatic resources is a central premise of Federal wetlands programs, and the Clean Water Act (CWA) Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable impacts to aquatic resources. Additionally, a Memorandum of Agreement (MOA) between the Department of the Army (Army) and the U.S. Environmental Protection Agency (EPA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical and biological integrity of the Nation's waters, including wetlands.

The methods of compensatory mitigation include the restoration, establishment, enhancement or in certain circumstances preservation of wetlands, streams or other aquatic resources for the purpose of offsetting unavoidable adverse impacts. The hierarchy of the forms and locations of compensatory mitigation include (1) Mitigation Bank Credits, (2) In-Lieu Fee Program Credits, (3) Permittee-Responsible Mitigation under a Watershed Approach, (4) Permittee-Responsible Mitigation through On-Site and In-Kind Mitigation, and (5) Permittee-Responsible Mitigation Through Off-Site and/or Out-of-Kind Mitigation.

#### Corps/EPA Mitigation Rule

The Corps and the U.S. Environmental Protection Agency have issued regulations governing compensatory mitigation for activities authorized by permits issued by the Department of the Army. The regulations establish performance standards and criteria for the use of permittee-responsible compensatory mitigation, mitigation banks, and in-lieu programs to improve the quality and success of compensatory mitigation projects for activities authorized by Department of the Army permits. This rule improves the planning, implementation and management of compensatory mitigation projects by emphasizing a watershed approach in selecting compensatory mitigation project locations, requiring measureable, enforceable ecological performance standards and regular monitoring for all types of compensation and specifying the components of a complete compensatory mitigation plan, including assurances of long-term protection of compensation sites, financial assurances, and identification of the parties responsible for specific project tasks. This rule applies equivalent standards to permittee-responsible compensatory mitigation, mitigation banks and in-lieu fee mitigation to the maximum extent practicable. Since a mitigation bank must have an approved mitigation plan and other assurances in place before any of its credits can be used to offset permitted impacts, this rule establishes a preference for the use of mitigation bank credits, which reduces some of the risks and uncertainties associated with compensatory mitigation. This rule also significantly revises the requirements for in-lieu fee programs to address concerns regarding their past performance and equivalency with the standards for mitigation banks and permittee-responsible compensatory mitigation.

To view the Corps/EPA Mitigation Rule, as well as additional information related to the Rule, select the following link to the U.S. Army Corps of Engineers Headquarters website: [http://www.usace.army.mil/CECW/Pages/final\\_cmr.aspx](http://www.usace.army.mil/CECW/Pages/final_cmr.aspx)

## **a. Types of Compensatory Mitigation**

The methods of compensatory mitigation are through the restoration, establishment, enhancement or in certain circumstances preservation of wetlands, streams or other aquatic resources for the purpose of offsetting unavoidable adverse impacts. In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. When compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in coastal watersheds (watersheds that include a tidal water body) should also be located in a coastal watershed where practicable. Compensatory mitigation projects should not be located where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports).

The hierarchy of the forms and locations of compensatory mitigation include (i) Mitigation Bank Credits, (ii) In-Lieu Fee Program Credits, (iii) Permittee-Responsible Mitigation under a Watershed Approach, (iv) Permittee-Responsible Mitigation through On-Site and In-Kind Mitigation, and (v) Permittee-Responsible Mitigation Through Off-Site and/or Out-of-Kind Mitigation.

### **1. Third Party Mitigation**

#### **i) Mitigation Bank Credits**

A mitigation bank is a wetland, stream, or other aquatic resource area that has been restored, established, enhanced, or (in certain circumstances) preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under Section 404 or a similar state or local wetland regulation. Mitigation banks are a form of "third-party" compensatory mitigation, in which the responsibility for compensatory mitigation implementation and success is assumed by a party other than the permittee. This transfer of liability has been a very attractive feature for Section 404 permit-holders, who would otherwise be responsible for the design, construction, monitoring, ecological success, and long-term protection of the site. A mitigation bank may be created when a government agency, corporation, nonprofit organization, or other entity undertakes these activities under a formal agreement with a regulatory agency.

When permitted impacts are located within the service area of an approved mitigation bank and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Since an approved instrument (including an approved mitiga-

tion plan and appropriate real estate and financial assurances) for a mitigation bank is required to be in place before its credits can begin to be used to compensate for authorized impacts, use of a mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource functions and services. Mitigation bank credits are not released for debiting until specific milestones associated with the mitigation bank site's protection and development are achieved, thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully successful. Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs. For these reasons, the District Engineer should give preference to the use of mitigation bank credits when these considerations are applicable. However, these same considerations may also be used to override this preference, where appropriate, as, for example, where an in-lieu fee program has released credits available from a specific approved in-lieu fee project, or a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis.

The value of a bank is defined in "compensatory mitigation credits." A bank's instrument identifies the number of credits available for sale and requires the use of ecological assessment techniques to certify that those credits provide the required ecological functions. Although most mitigation banks are designed to compensate only for impacts to various wetland types, some banks have been developed to compensate specifically for impacts to streams (i.e., stream mitigation banks).

Mitigation banks have four distinct components:

- The bank site: the physical acreage restored, established, enhanced, or preserved;
- The bank instrument: the formal agreement between the bank owners and regulators establishing liability, performance standards, management and monitoring requirements, and the terms of bank credit approval;
- The Interagency Review Team (IRT): the interagency team that provides regulatory review, approval, and oversight of the bank; and
- The service area: the geographic area in which permitted impacts can be compensated for at a given bank.

To learn more about mitigation banking, select the following link to the EPA Mitigation Banking Factsheet: <http://www.epa.gov/wetlands/facts/fact16.html>

## ii) In-Lieu Fee Program Credits

Where permitted impacts are located within the service area of an approved in-lieu fee program and the sponsor has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing

those credits from the sponsor, the third-party. Where permitted impacts are not located in the service area of an approved mitigation bank, or the approved mitigation bank does not have the appropriate number and resource type of credits available to offset those impacts, in-lieu fee mitigation, if available, is generally preferable to permittee-responsible mitigation. In-lieu fee projects typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. They also devote significant resources to identifying and addressing high-priority resource needs on a watershed scale, as reflected in their compensation planning framework. For these reasons, the District Engineer should give preference to in-lieu fee program credits over permittee-responsible mitigation, where these considerations are applicable. However, as with the preference for mitigation bank credits, these same considerations may be used to override this preference where appropriate. Additionally, in cases where permittee-responsible mitigation is likely to successfully meet performance standards before advance credits secured from an in-lieu fee program are fulfilled, the District Engineer should also give consideration to this factor in deciding between in-lieu fee mitigation and permittee-responsible mitigation.

The Baltimore District Corps does not currently have any available active In-Lieu Fee Programs which may be used for the purchase of In-Lieu Fee credits.

### iii) Establishing a Mitigation Bank or In-Lieu Fee Program

All mitigation banks and in-lieu fee programs must have an approved instrument signed by the sponsor and the District Engineer prior to being used to provide compensatory mitigation for DA permits. To the maximum extent practicable, mitigation banks and in-lieu fee project sites must be planned and designed to be self-sustaining over time, but some active management and maintenance may be required to ensure their long-term viability and sustainability. An example of an acceptable management activity is the control of invasive exotic plant species. Additionally, all mitigation banks and in-lieu fee programs must comply with the standards identified in the Corps/EPA Mitigation Rule if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

If you are interested in establishing a mitigation bank or in-lieu fee program, the following links provide detailed lists of the required information when submitting the mitigation bank and in-lieu fee program instruments for review and approval to the Corps.

[Requirements for Mitigation Bank and In-Lieu Fee Program Instruments](#)

[Information for a Complete Mitigation Bank Prospectus](#)

## 2. Permittee-Responsible Mitigation

### i) Permittee-Responsible under a Watershed Approach

Where permitted impacts are not in the service area of an approved mitigation bank or in-lieu fee program that has the appropriate number and resource type of credits available, permittee-responsible mitigation is the only option. In this case, the resource type and location for the required permittee-responsible compensatory mitigation should be determined using the principles of a watershed approach, where practicable and likely to be successful and sustainable,

In cases where the District Engineer determines that an appropriate watershed plan is available, the watershed approach should be based on that plan. Where no such plan is available, the watershed approach should be based on information provided by the project sponsor or available from other sources. The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.

A watershed approach to compensatory mitigation considers the importance of landscape position and resource type of compensatory mitigation projects for the sustainability of aquatic resource functions within the watershed. Such an approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs. It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed. Compensatory mitigation requirements determined through the watershed approach should not focus exclusively on specific functions (e.g., water quality or habitat for certain species), but should provide, where practicable, the suite of functions typically provided by the affected aquatic resource.

Locational factors (e.g., hydrology, surrounding land use) are important to the success of compensatory mitigation for impacted habitat functions and may lead to siting of such mitigation away from the project area. However, consideration should also be given to functions and services (e.g., water quality, flood control, shoreline protection) that will likely need to be addressed at or near the areas impacted by the permitted impacts.

A watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation (including mitigation banks or in-lieu fee programs), or a combination of on-site and off-site compensatory mitigation.

A watershed approach to compensatory mitigation should include, to the extent practicable, inventories of historic and existing aquatic resources, including identification of degraded aquatic resources, and identification of immediate and long-term aquatic resource needs within watersheds that can be met through permittee-responsible mitigation projects, mitigation banks, or in-lieu fee programs. Planning efforts should identify and prioritize aquatic resource restoration, establishment, and enhancement activities, and preservation of existing aquatic resources that are important for maintaining or improving ecological functions of the watershed. The identification and prioritization of resource needs should be as specific as possible, to enhance the usefulness of the approach in determining compensatory mitigation requirements.

A watershed approach is not appropriate in areas where watershed boundaries do not exist, such as marine areas. In such cases, an appropriate spatial scale should be used to replace lost functions and services within the same ecological system (e.g., littoral drift cell).

#### ii) Permittee-Responsible through On-Site and In-Kind Mitigation

In cases where a watershed approach is not practicable, the District Engineer should consider opportunities to offset anticipated aquatic resource impacts by requiring on-site and in-kind compensatory mitigation. The District Engineer must also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project.

#### iii) Permittee-Responsible through Off-Site and Out-of-Kind Mitigation

If, after considering opportunities for on-site, in-kind compensatory mitigation, the District Engineer determines that these compensatory mitigation opportunities are not practicable, are unlikely to compensate for the permitted impacts, or will be incompatible with the proposed project, and an alternative, practicable off-site and/or out-of-kind mitigation opportunity is identified that has a greater likelihood of offsetting the permitted impacts or is environmentally preferable to on-site or in-kind mitigation, the District Engineer should require that this alternative compensatory mitigation be provided.

### **b. Calculating Mitigation**

If the District Engineer determines that compensatory mitigation is necessary to offset unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used.

The District Engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site.

If an in-lieu fee program will be used to provide the required compensatory mitigation, and the appropriate number and resource type of released credits are not available, the District Engineer must require sufficient compensation to account for the risk and uncertainty associated with in-lieu fee projects that have not been implemented before the permitted impacts have occurred.

Additional information may be found at the following by selecting the following link:

Regulatory Guidance Letter 08-03: [Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Restoration, Establishment, and/or Enhancement of Aquatic Resources](#)

[33 CFR Part 332: Compensatory Mitigation for Losses of Aquatic Resources](#)

[Regulatory Guidance Letter 05-01: Guidance on the Use of Financial Assurances, and Suggested Language for Special Conditions for Department of the Army Permits Requiring Performance Bonds:](#)

[U.S. Environmental Protection Agency River Corridor and Wetlands Restoration Information](#)

## VI. Endangered Species

The responsibility for implementing the [Endangered Species Act of 1973](#) (ESA) is shared between the U.S. Fish and Wildlife Service (USFWS) and National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS). Generally, USFWS manages land and freshwater species, while NMFS manages marine and [anadromous](#) species.

As prescribed under Section 7(a) (2) of the ESA and 50 CFR Section 402, for every activity in which a Federal action is involved, the Federal agency carrying out the action (e.g., a permit action, etc.), in our case the Corps, is required to make an "effect determination" by evaluating the potential impacts of a proposed action on any federally listed threatened or endangered species or its designated critical habitat through coordination with USFWS and/or NMFS.

Under the ESA regulations and the Services' (USFWS & NMFS) March 1998, [Section 7 Consultation Handbook](#), for those projects where the Corps makes a finding of "no effect" nothing more will need to be done regarding consultation with the appropriate Service. For those where the Corps makes a finding of "not likely to adversely affect," the Corps will request the appropriate Service's written concurrence with its determination under the procedures governing informal consultation, and for those where the Corps makes a finding of "may affect," the Corps will initiate Section 7 formal consultation with USFWS and/or NMFS.

US Fish & Wildlife Service Office's listings and occurrences of federally endangered and/or threatened species within the Baltimore District may be found at the links specified below:

[Listings and Occurrences for the District of Columbia](#)

[Listings and Occurrences for Maryland](#)

[Listings and Occurrences for Pennsylvania](#)

[Listings and Occurrences for Virginia](#)

Federally endangered and/or threatened species under National Marine Fisheries Service jurisdiction for the entire Baltimore District may be found at the following link:

[NMFS Species List](#)

NOTE: Under the ESA, a species that is deemed "endangered" refers to an animal or plant species in danger of extinction throughout all or a significant portion of its range. A species deemed "threatened" refers to an animal or plant species likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

## **VII. Other Permitting Factors**

### **a. Cultural Resources**

As a federal agency, the Corps of Engineers must take into account the effects of the undertakings as a result of the Federally authorized action on historic properties and archeological resources as mandated by Section 106 of the [National Historic Preservation Act of 1966 \(NHPA\)](#). The following link provides further details.

[Advisory Council on Historic Preservation \(ACHP\)](#)

[Maryland Historical Trust, State Historic Preservation Office \(SHPO\)](#)

[Pennsylvania Historical & Museum Commission, State Historic Preservation Office \(SHPO\)](#)

[Tribal Affairs and Initiatives](#)

[National Register Information System](#)

[Center for Cultural Site Preservation Technology](#)

[Interim Section 106 Guidance](#)

[Interim Guidance, 2007](#)

[Policy Guidance Letter #57](#), Indian Sovereignty and Government-to-Government Relations with Indian Tribes

[Department of Defense Indian and Alaskan Native Policy](#)

## **b. Federal Channel Setback Requirements**

In accordance with Section 10 of the Rivers and Harbors Act of 1899, the Corps has the authority to regulate any obstruction not authorized by Congress to the navigable capacity of waters of the United States. All activities must comply with the Baltimore District's Minimum Channel Setback Guidance for structures along Federally authorized channels. The purpose of this public notice is to advise interested parties of the minimum setbacks for structures along federally authorized navigation channels within the Baltimore District Civil Works Boundary.

[Federal Navigation Channels](#)

[Federal Channel Setback Guidance](#) from Public Notice 11-97

## **c. Essential Fish Habitat**

Upon receipt of a complete application, the Corps will coordinate/consult with National Marine Fisheries Service (NMFS). Essential Fish Habitat (EFH) consultation with NMFS shall be fully implemented in accordance with required legal procedures under Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended by the Sustainable Fisheries Act of 1996 (Public Law 104-297; 11 October 1996). The MSA requires Federal agencies such as the Corps to consult with the Secretary of Commerce, through NMFS, regarding any action or proposed action authorized, funded, or undertaken by the Federal agency that may adversely affect EFH identified under the MSA. The EFH regulations, 50 CFR Section 600.920, outline that consultation procedure. The EFH Designations within the Northeast Region (Maine to Virginia), dated March 1, 1999, has identified EFH for a number of species and their life stages within Maryland waters. If further EFH consultation is needed based on evaluation and consultation with NMFS, the applicant shall not begin work until the Corps has provided notification that the EFH consultation has concluded. The EFH final rule published in the Federal Register on January 17, 2002 defines an adverse effect as; "any impact which reduces the quality and/or quantity of EFH". The rule further states that: An adverse ef-

fect may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat and other ecosystem components, if such modifications reduce the quality and/or quantity of EFH. Adverse effects to EFH may result from action occurring within EFH or outside EFH and may include site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions.

## **VIII. Enforcement**

Procedures for enforcing Corps permitting authorities are found at [33 CFR Part 326](#). The following paragraphs briefly summarize those procedures.

Inspection and surveillance activities are carried out by all means at the District Engineer's disposal. Corps of Engineers employees are instructed on the observation and reporting of suspected unauthorized activities in waters of the United States and of violations of issued permits. The assistance of members of the public and other interested Federal, State and local agencies is encouraged.

When the District Engineer becomes aware of any unauthorized activity still in progress, he/she must first issue a cease and desist order and then begin an investigation of the activity to ascertain facts concerning alleged violations. If the unauthorized activity has been completed he/she will advise the responsible party of his/her discovery and begin an investigation. Following his/her evaluation, the District Engineer may formulate recommendations on the appropriate administrative course or legal action to be taken.

The District Engineer's evaluation contains an initial determination of whether any significant adverse impacts are occurring which would require expeditious corrective measures to protect life, property, or a significant public resource. Once that determination is made, such remedial measures can be administratively ordered and a decision can be made on whether legal action is necessary. In certain cases, District Engineers, following the issuance of a cease and desist order, coordinate with state and Federal resource agencies in deciding what action is appropriate. Further evaluation of the violation takes into consideration voluntary compliance with a request for remedial action. A permit is not required for restoration or other remedial action.

For those cases that do not require legal action and for which complete restoration has not been ordered, the Department of the Army will accept applications for after-the-fact permits. The full public interest review is deferred during the early stages of the enforcement process. A complete public interest review is conducted only if and when the District Engineer accepts an application for an after-the-fact permit.

The laws that serve as the basis for the Corps regulatory program contain several enforcement provisions which provide for criminal, civil, and administrative penalties. While the Corps is solely responsible for the initiation of appropriate legal actions pursuant to enforcement provisions relating to its Section 10 authority, the responsibility for imple-

menting those enforcement provisions relating to Section 404 is jointly shared by the Corps and EPA. For this reason the Army has signed a Section 404 enforcement memorandum of agreement (MOA) with EPA to ensure that the most efficient use is made of available Federal resources. Pursuant to this MOA, the Corps generally assumes responsibility for enforcement actions with the exception of those relating to certain specified violations involving unauthorized activities.

If a legal action is instituted against the person responsible for an unauthorized activity, an application for an after-the-fact permit cannot be accepted until final disposition of all judicial proceedings, including payment of all fees as well as completion of all work ordered by the court.

The Corps strives to reduce violations by effective publicity, a comprehensive general permit program, and an efficient and fair evaluation of individual permit applications.

## **IX. Appeals**

Procedures for appealing Corps permitting decisions are found at [33 CFR Part 331](#). The following paragraph briefly summarizes the permit appeal process.

The Corps of Engineers has an administrative appeal process whereby applicants and landowners may appeal denied permits, issued permits that contain requirements that are unacceptable to the applicant, or approved jurisdictional determinations. Although these decisions are made by Corps District offices, requests for appeals of such decisions are appealed to the Corps Division offices. Requests for appeal must be furnished to the Division office within 60 days of the date of the appealable decision. A site visit or an appeal conference or meeting may be conducted during the appeal process. A decision on the merits of the appeal based on the administrative record is normally made in 90 days. The Division will either uphold the District decision or send the case back to the District, with direction to make a new decision.

[Current Appeals](#) - List of Issued Individual Permits, Denials and Appeals by month

[Establishment of an Administrative Appeal Process](#) - March 9, 1999 - *Federal Register Notice*

[Final Rule Establishing an Administrative Appeal Process](#) - March 28, 2000 - *Federal Register Notice*

## **X. Regulations and Policies**

Corps Regulations, Administrative, and Policy Materials

Corps of Engineers Statutory Authorities

[Rivers and Harbors Act of 1899 - Sec. 9](#)

[Rivers and Harbors Act of 1899 - Sec.10](#)

[Clean Water Act - Section 404](#)

[Marine Protection Research and Sanctuaries Act of 1972 - Section 103](#)

U.S. Army Corps of Engineers Regulatory Program Regulations (33 CFR 320-332)

33 CFR Part 320 - [General Regulatory Policies](#)

33 CFR Part 321 - [Permits for Dams & Dikes in Navigable Waters of the U.S.](#)

33 CFR Part 322 - [Permits for Structures in or Affecting Navigable Waters of the U.S.](#)

33 CFR Part 323 - [Permits for Discharges of Dredged or Fill Material Into Waters of the U.S.](#)

33 CFR Part 324 - [Permits for Ocean Dumping of Dredged Material](#)

33 CFR Part 325 - [Processing of Department of the Army Permits](#)

33 CFR Part 326 - [Enforcement](#)

33 CFR Part 327 - [Public Hearing](#)

33 CFR Part 328 - [Definition of Waters of the United States](#)

33 CFR Part 329 - [Definition of Navigable Waters](#)

33 CFR Part 330 - [Nationwide Permit Program](#)

33 CFR Part 331 - [Administrative Appeal Process](#)

33 CFR Part 332 - [Compensatory Mitigation for Losses of Aquatic Resources](#)

Further Revisions to the [Clean Water Act Regulatory Definition of Dredged Material](#) - January 17, 2001

Final Revisions to the Clean Water Act [Definitions of Fill Material and Discharge of Fill Material](#) - May 9, 2002

Related Regulations

[40 CFR Part 230](#) - Section 404(b)(1) Guidelines

[40 CFR Part 22](#) - Administrative Assessment of Civil Penalties & the Revocation or Suspension of Permits

[40 CFR Part 233](#) - State Program Regulations

[40 CFR Part 233G](#) - Tribal Regulations

[40 CFR Part 1500](#) - Council on Environmental Quality

[36 CFR Part 800-899](#) - Advisory Council on Historic Preservation

[50 CFR Parts 400-499](#) - Endangered Species Regulations

[50 CFR Part 600](#) - Essential Fish Habitat Regulations

Related Laws

[Native American Graves Protection and Repatriation Act](#)

[Clean Water Act - Section 401](#)

[Clean Water Act - Section 402](#)

[Coastal Zone Management Act of 1972](#)

[Endangered Species Act](#)

[Marine Mammal Protection Act](#)

[National Environmental Policy Act](#)

[National Historic Preservation Act](#)

[Wild & Scenic Rivers Act](#)

[Marine Protection Research and Sanctuaries Act of 1972 - Section 302](#)

[Fish and Wildlife Coordination Act](#)

### **Selected Related Code of Federal Regulations**

[Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits](#) - EPA, 40 CFR Part 22

[Section 404\(b\)\(1\) Guidelines](#) - USEPA, 40 CFR Part 230

[USEPA, State Program Regulations](#) - 40 CFR Part 233

[Eligible Indian Tribes](#) - 40 CFR Part 233G, USEPA, State Program Regulations

[Council on Environmental Quality](#) 40 CFR Part 1500

[Advisory Council on Historic Preservation](#) 36 CFR Parts 800-899

[Endangered Species Regulations](#) 50 CFR Parts 400-499

Corps of Engineers Administrative Materials

[Memoranda of Understanding and Agreement](#) (MOU/MOAs)

[Current Regulatory Guidance Letters](#)

Presidential Directives and Executive Orders

[Executive Order 11990 - Protection of Wetlands](#)

[Executive Order 11988 - Floodplain Management](#)

[Presidential Wetland Policy 1993](#)

[Reaffirmation of the Presidential Wetland Policy 1995](#)

[Official White House link](#)

Enforcement

[MOA Regarding Applicability of Previously-Issued Corps Permits- January 1989](#)

[Modification to January 1989 MOA Letter](#) - Feb 1994

[EPA/Corps Enforcement Priorities Guidance](#) - Dec 1990

[Corps/EPA Enforcement Procedures](#) (Flowchart)

Other Guidance

[FAA Circular: Hazardous Wildlife Attractants on or near Airports](#)

[Guidance on Preparation of Taking Implication Assessments](#) (TIA)

[CEQ's Considering Cumulative Effects Under the National Environmental Policy Act](#)

[Guidance on Environmental Impact Statement Preparation, Corps Regulatory Program](#)

[Required Special Condition of Department of the Army Permits Involving Corps of Engineers Authority Under Section 10 of the Rivers and Harbors of 1899](#)

Administrative Appeals

Current Appeals

[33 CFR Part 331](#) - Administrative Appeals Process

[Establishment of an Administrative Appeal Process](#) - March 9, 1999 - *Federal Register \ Notice*

[Final Rule Establishing an Administrative Appeal Process](#) - March 28, 2000 - *Federal Register Notice*

USEPA Administrative Materials

[Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson](#)