U.S. ARMY CORPS OF ENGINEERS REGULATORY PROGRAM

U.S. Army Corps of Engineers
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TMACOG
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Buffalo District Field Office Locations:
Oak Harbor (Ottawa County) and Stow (Summit County)
Regulatory Program Goals
(33 CFR 320 General Regulatory Policies)

- To provide strong protection of the Nation’s aquatic environment, including wetlands.

- To enhance the efficiency of the Corps administration of its regulatory program.

- To ensure that the Corps provides the regulated public with fair and reasonable decisions.
OUTLINE OF TOPICS

- USACE Regulatory Authorities
- Waters of the US (WOUS)
- Wetlands
- Jurisdictional Determinations
- Regulatory Actions
- Types of Permits
- Permit/Monitoring Compliance
- Unauthorized Activities Enforcement
- Information for the State of Ohio
SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899

- Applies to Navigable Waters - waters that are currently, historically and in the future could represent opportunity for interstate commerce (33 CFR 329.4)

- All activities and structures within, above, or beneath navigable waters are regulated
Limits of jurisdiction for navigable waters

- Upstream limit of interstate commerce
- Ordinary high water mark, in the absence of adjacent wetlands (i.e. Lake Erie 573.4 IGLD)
- Extents to the ordinary high water mark of the adjacent wetlands
SECTION 404 OF THE CLEAN WATER ACT OF 1977

- Applicable to ‘waters of the United States’ (33 CFR 328.3)
- What is Regulated?
  - Discharges of dredged or fill material into waters of the U.S.
- Goal - to preserve the physical, chemical and biological integrity of waters of the U.S.
WATERS OF THE UNITED STATES

Lakes, wetlands, and some ponds, rivers, streams, canals, some ditches
EXAMPLES OF ORDINARY HIGH WATER MARK
PERENNIAL STREAM

Water in channel

Ordinary High Water Mark
EXAMPLES OF ORDINARY HIGH WATER MARK
INTERMITTENT STREAM

Ordinary High Water Mark

Water in channel
WETLAND DEFINITION

“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.”

33CFR 328.3 and 1987
WETLAND DELINEATION

The physical surveying of a wetland boundary and data collection.

- **Performed in accordance with**
  - Associated Regional Supplement
  - USDA/NRCS Field Indicators of Hydric Soils in the United States
  - National Wetland Plant List

**Three Wetland criteria:**
- hydrophytic vegetation
- hydric soils
- hydrology
REGIONAL SUPPLEMENTS IN OHIO

- Supplements to 1987 Corps of Engineers Wetland Delineation Manual
- 3 Supplements in Ohio
  - Midwest
  - Northcentral and Northeast
  - Eastern Mountains and Piedmont
- All individuals required to use Supplement for their region

Vegetation that is “typically adapted for life in saturated soils” is referred to as hydrophytic vegetation or those plants that have adapted so they can live under saturated conditions.

http://plants.usda.gov/java/profile?symbol=CAGR5&photoID=cagr5_003_avp.tif
INDICATORS OF WETLAND HYDROLOGY

- Inundated or soil saturation within 12 inches of the soil surface for about two weeks during the growing season.

  **Caution:** Most wetlands lack both standing water and waterlogged soils during at least part of the growing season.
A1 – SURFACE WATER
B1 – WATER MARKS
Figure 27. Silt deposit left after a recent high-water event forms a tan coating on these tree trunks (upper edge indicated by the arrow).
B9 - WATER-STAINED LEAVES
HYDRIC SOILS

- Those soils that are sufficiently wet in the upper part to develop anaerobic conditions during the growing season.
- Soils that formed under conditions of saturation, flooding, or ponding.
- The color of the soil components are often the most diagnostic indicator of hydric soils.

USDA-NRCS, Field Indicators of Hydric Soils
Field Indicators of Hydric Soils in the United States

Errata
April 17, 2017

Field Indicators of Hydric Soils in the United States
Version 8.0

Page 21
F3.—Depleted Matrix
Change
- “a. 5 cm (2 inches) if the 5 cm starts at a depth ≤10 cm (4 inches) of the soil”
- “a. 5 cm (2 inches) if the 5 cm starts at a depth ≤10 cm (4 inches) from the soil surface”

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F18.—Reduced Vertic
Change
- “a. Is the dominant (30 percent or more) condition of a layer at least 10 cm (4 inches) thick starting at a depth ≤20 cm (8 inches), or at least 5 cm (2 inches) thick starting at ≤10 cm (4 inches) from the mineral or muck soil surface”
- “a. Is the dominant (30 percent or more) condition of a layer at least 10 cm (4 inches) thick starting at a depth ≤30 cm (12 inches), or at least 5 cm (2 inches) thick starting at a depth of 15 cm (6 inches) from the mineral or muck soil surface”

USDA is an equal opportunity provider, employer, and lender.
WETLAND DETERMINATION

- Wetland determinations involve: rapid walk through of a site in which one or more indicators wetland vegetation, hydric soil, and wetland hydrology are present.
- If you observe definite indicators of any of the three characteristics, you should seek assistance from an expert at making wetland determinations.
- If your project proposes to impact these areas you are required to conduct a full Wetland Delineation.
These are All Forested Wetlands!
These are All Scrub/Shrub Wetlands!
These are all Emergent Wetlands!
JURISDICTIONAL DETERMINATIONS

- Identification of Potential Jurisdictional Waters
  - Wetland Delineation
  - Identification of Streams and other waters
  - Floodplains that contain a water of the U.S.

- Corps has ultimate authority for Section 404 determinations
  - Corps will determine if waters are or are not Federally jurisdictional (i.e. isolated)
JURISDICTIONAL DETERMINATIONS

- **Approved Jurisdictional Determination**
  - Can be appealed
  - Valid for 5-years – "unless new information warrants revision before the expiration date."

- **Preliminary JD**
  - Can not be appealed
  - Can only be used if there are no isolated waters on site

- **No JD**
  - Regulatory Guidance Letter (RGL 16-01)
    - Applicant does not request a JD or request that no JD be completed
    - Non-reporting Nationwide Permits
    - No question concerning Corps jurisdiction (Section 10 or other obvious waters on site)
ISOLATED WATERS

- Waters determined by the Corps
- Potentially Regulated by OEPA
- Cannot use a pre-JD to determine waters are isolated
QUESTIONS
WHAT REQUIRES A PERMIT?

Any project involving waters of the U.S., including but not limited to:

- Filling to Create Dry Land
- Mechanized Land Clearing
- Re-grading/Landscaping
- Excavation – Ponds

Examples of Projects

- Residential, Commercial, Institutional and Industrial
- Power plants (scrubber upgrades, loading & unloading)
- Landfills
- Transportation
- Pipelines (including Interstate lines)
- Stormwater management facilities
- Environmental restoration
TYPES OF PERMITS
STANDARD INDIVIDUAL PERMIT

- Formal application
- Alternative Analysis (LEDPA)
- Delineation
- Mitigation
- Public Notice with opportunity for Public Hearing
- 404(b)(1) Guideline Analysis
- EA/EIS and Decision Document (NEPA)
- Public Interest Review
- Permit Decision
GENERAL PERMITS

- Nationwide Permits (NWP)
  - Type of General Permit which authorizes activities on a nationwide basis unless specifically limited. (33CFR 330.2 Definitions)
    - NWP’s are revised and renewed every 5-years
    - NWP’s and general conditions became effective on March 19, 2017
    - Verification of use of NWP’s are valid until the expiration of the NWP
    - District Engineer can elevate to a Standard Permit if the proposed project’s impacts do not seem minimal
NATIONWIDE PERMITS

- Specific conditions
  - ex. NWP 13 - Limits of bank stabilization
- General conditions
- Regional Conditions
- Special Conditions
- 401 certification
  - Individual 401 may be required
NATIONWIDE PERMIT CONDITIONS

- Impact Limitations
  - Still requires applicant to avoid and minimize impacts to Waters of the US

- Pre-Construction Notification
  - Written Notification to the USACE for many of the NWPs
  - Use the standard individual permit application form (Form ENG 4345)
PERMIT APPLICATIONS

What information are we looking for?
- Completed ENG Form 4345
- Delineation of Aquatic Resources
- Photographs of Aquatic Resource
- Site Location Map
- Drawing of proposed project
- Compensatory Mitigation Proposal
- Endangered Species
- Historic Properties
PROJECT PURPOSE

- Pertinent to review
  - Required to determine type of permit.
  - Assists in Public Interest Review.
Possibly Eligible

**Category Definitions:**

**Ineligible Areas (Shaded Purple):** an individual 401 water quality certification is required.

**Possibly Eligible Areas (Shaded Yellow):** may require an individual water quality certification if the streams which are proposed to be impacted exhibit habitat features indicative of high quality waters, or if other Ohio general and special limitations and conditions for the nationwide permits are not met.

**Eligible Areas (No Shading):** may require an individual 401 water quality certification if Ohio general and special limitations and conditions for the nationwide permits are not met.
OHIO EPA 401 ELIGIBILITY MAP FOR LUCAS AND WOOD COUNTIES
REQUIRED INFORMATION

Required submittal of the following **DETAILED** information with each application:

- Any Agency Coordination – ODNR, Scenic Rivers….
- USFWS - Sufficient information must be provided to determine the proposed activity's compliance with the Endangered Species Act.
- Cultural Resources – Compile a basic preliminary review information that includes the following:
Due to USFWS concerns about Federally listed species PCNs are required in all Townships within the following NW Ohio Counties:
Lucas, Ottawa and Sandusky

Within 3 miles of the Lakeshore for all Counties bordering Lake Erie

Many counties have specific waterways and/or townships were PCNs are required.
CULTURAL RESOURCES

Sufficient information must be provided in the PCN to determine the proposed activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Place (Section 106 of the National Historic Preservation Act (NHPA).

- A detailed description of the project site in its current condition
- Description of past land uses in the project site
- Information regarding any past cultural resource studies or coordination pertinent to the project area.
CULTURAL RESOURCES - CONTINUED

- A preliminary resource review that encompasses a search radius of two (2) miles, centered on the project area, and consists of the following resources:
  - OSHPO USGS 7.5’ series topographic maps;
  - Ohio Archaeological Inventory (OAI) files;
  - Ohio Historic Inventory files (OHI);
  - OSHPO Cultural Resources Management contract archaeology files;
  - NRHP files including Historic Districts; and
  - County atlases, histories and historic USGS 15’ series topographic map(s).

Applicants encouraged to consult with the Ohio State Historic Preservation Office (OSHPO) staff.
PERMIT EVALUATION

404(b)(1) Guideline Analysis

► Alternatives Analysis
  ► Least Environmentally Damaging Practicable Alternative (LEDPA) – Regardless if it a NWP or IP

► Avoidance, Minimization, Compensation—Regardless if it a NWP or IP

- Public Interest Review
- Compliance with Other Statutes
  ► Clean Water Act – Sections 401 and 402
  ► Section 106 of National Historic Preservation Act
  ► Endangered Species Act
  ► Fish and Wildlife Coordination Act
  ► National Environmental Policy Act
  ► Wild and Scenic Rivers Act
  ► Coastal Zone Management
Provide dimension for the existing and proposed stream channels (length, width at top of bank, bottom of bank), include the ordinary high water make and a north arrow.
Provide dimension for the existing and proposed stream channels (length, width at top of bank, bottom of bank), include the ordinary high water make and a north arrow.

**Cross Section of Existing Stream**

**Cross Section of new stream**

Notes:
- \( W = \) Top width in feet
- \( w = \) bottom width in feet
- \( D = \) Depth from top of bank to stream bottom
- OHW – ordinary high water of the stream
Pre-Application Meetings to discuss your project are encouraged

- Gives applicant an opportunity to discuss project while in the developmental stage.
- Helps to evaluate if your project is the LEDPA
- Timeliness of obtaining a permit
QUESTIONS
PERMIT COMPLIANCE
USACE performs compliance for all types of permits, including Nationwide Permits and Mitigation

Review for adherence to all conditions (General & Special) of the permit and associated drawings

Goal – ensure compliance with permit
PERMIT/MONITORING COMPLIANCE

Compliance Review

Outcomes
• Letter stating findings: Compliance or Non-Compliance
  • Permittee is in compliance
  • Permittee is in non-compliance

Non-compliance: Options to Resolve
• Corrective Measures to get back into Compliance
• Permit Modification
• Permit Revocation
• Permit Suspension
• Administrative penalty
• DOJ
ENFORCEMENT OF UNAUTHORIZED ACTIVITIES
ELEMENTS OF AN UNAUTHORIZED ACTIVITY

- Discharge of Fill
- Jurisdictional Water (Water of the U.S.)
- Without authorization or exemption
ENFORCEMENT - UNAUTHORIZED ACTIVITIES

- Three federal agencies involved:
  - Corps of Engineers – Typically the Lead Agency
    - MOA between USACE and USEPA
  - United States Environmental Protection Agency
    - Is the lead agency when:
      - Flagrant violator
      - Repeat violator
      - EPA requests lead agency status
  - Department of Justice
    - Consent agreements
    - Referral for court ordered restoration
ENFORCEMENT OUTCOMES

- Voluntary Restoration
- After the Fact (ATF) Permit
- Referral to USEPA
- Civil Litigation (DOJ)
UNAUTHORIZED FILL IN WETLANDS
ENFORCEMENT- UNAUTHORIZED ACTIVITIES

Examples of Unauthorized fill placed below the Ordinary High Water Mark (OHWM) of a stream
Before

After
QUESTIONS
Buffalo District Field Office Locations:
Oak Harbor (Ottawa County) and Stow (Summit County)
DISTRICT CONTACTS IN OHIO

- Huntington District
  502 8th Street
  Huntington, WV 25701
  (304) 399-5210

- Buffalo District
  1776 Niagara Street
  Buffalo, New York 14207
  (716) 879-4330

- Pittsburg District
  William S. Moorhead Federal Building
  1000 Liberty Avenue, Suite 2200
  Pittsburgh, PA 15222
  (412) 395-7170
WEBSITES

- USACE Regulatory Headquarters

- Buffalo District

- Huntington District

- Pittsburg District
Thank You