

SECTION 2.5

PERMITS/CODES ADMINISTERED BY COE

2.51 Introduction and Definitions

The U.S. Army Corps of Engineers (COE) was granted regulatory authority in accordance with two federal laws, Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344). The following material is based upon a review of current available information regarding these regulations and their associated rules, guidelines, and policy documents pertaining to drainage improvement activities. Further information regarding this subject may be found by directly contacting the COE. One good source of information regarding this subject is the "South Carolina's Developer's Handbook for Freshwater Wetlands", dated July 1995. Pertinent material and text from the latter source has been extensively utilized in the preparation of the material presented in this section.

COE has been involved in the regulation of the nation's water resources since the 1890's. Until 1968, the primary thrust of the COE regulatory program was the protection of navigation. As a result of several laws and judicial decisions, the regulatory program has been broadened to include the regulation of dredged or discharged materials into all "Waters of the United States." Through Section 404 of the Clean Water Act, consultation with other federal agencies and the public at large, the COE takes into account many factors in determining whether or not to approve projects which impact either navigation or waters of the United States. The goal in implementing this program has been to make authorizing decisions in the shortest time possible that recognize the rights of property owners while protecting the interests of the public at large.

The following terms and definitions are used throughout this particular Section of the Handbook. These terms may be defined differently in another section describing a separate state or federal regulatory program. Thus, care should be taken to utilize these specific terms only for COE-related purposes.

Activities: structures and/or work within a navigable water of the United States.

Headwaters: non-tidal rivers, streams, lakes and their impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point of the river or stream at which the average annual flow is less than five (5) cubic feet per second.

Discharge of Dredged Material: any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

- (1) The addition of dredged material to a specified discharge site located in waters of the United States.
- (2) The runoff or overflow from a contained land or water disposal area.
- (3) Any addition, including any redeposit of dredged material, including excavated material, into waters of the United States that is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation.

Navigable Waters of the United States: those waters subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past or may be susceptible to use to transfer interstate or foreign commerce. A listing of COE-recognized Navigable Waters of the United States in Indiana is provided in Appendix "G.3".

Ordinary High Water Mark: that 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.

Waters of the United States: the term "Waters of the United States" means:

- (1) All waters which are currently used or were used in the past or may be susceptible to use to transfer interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
- (2) All interstate waters including interstate wetlands.
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams) mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (a) Which are or could be used by interstate or foreign travelers for recreational or other purposes.
 - (b) From which fish or shell fish are or could be taken and sold in interstate or foreign commerce.
 - (c) Which are used or could be used for industrial purpose by industries in interstate commerce.
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition.
- (5) Tributaries of waters identified in items (1) through (4) of this definition.
- (6) The territorial seas.
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1) through (6) noted above.

Wetlands: 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.

2.52 Description

There are two main federal laws from which the COE derives its regulatory powers and authority: the Clean Water Act and the Rivers and Harbors Act. The specific regulatory sections of these laws, their associated federal rules and other related information is described below.

Section 404 of the Clean Water Act (33 U.S.C. 1344) and Regulatory Program Rules (33 CFR 320-330)

Section 404 of the Clean Water Act authorizes the COE to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into waters of the United States at specified disposal sites. The selection of the disposal sites will be in accordance with guidelines developed by the Administrator of the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army. Furthermore, the Administrator of the EPA can deny, prohibit, restrict or withdraw the use of any defined area as a disposal site whenever the Administrator determines, after notice and opportunity for public hearing and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

Section 10 of the Rivers and Harbors Act (33 U.S.C. 403) and Regulatory Program Rules (33 CFR 320-330)

Section 10 of the Rivers and Harbors Act prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of materials in such waters, or the accomplishment of any other work affecting the course, location condition, or capacity of such waters must receive the prior approval of the COE.

Activities Requiring COE Approval

The following activities specified in 33 CFR Parts 320 - 330, that may be associated with drainage improvement projects, normally require a Department of the Army (DA) permit:

- Dikes and/or dams in navigable waters of the United States.
- Structures and/or work in or affecting navigable waters of the United States.
- The discharge of dredged or fill material into waters of the United States.
- Structures or work outside the limits of navigable waters of the United States, if these activities affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity.
- A canal or other artificial waterway is subject to regulation if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, location, condition, or capacity, or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States.
- The connection to navigable waters of the United States.
- If any discharge of dredged or fill material resulting from the exempted activities listed in 33 CFR Part 323.4 paragraphs (a)(1) through (6) contains any toxic pollutant listed under

Section 307 of the Clean Water Act such discharge shall be subject to any applicable toxic effluent standard or prohibition, and requires a Department of the Army permit.

- Any discharge of dredged or fill material into waters of the United States incidental to any of the exempted activities identified in 33 CFR Part 323.4 paragraphs (a)(1) through (6) must have a Department of the Army permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of a Section 404 wetland to a nonwetland is a change in use of an area of waters of the United States. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach, but may alter the flow or circulation of waters of the United States.

2.53 Processing Methods

This section addresses the various procedures involved in obtaining approval for work that impacts waters of the United States, which includes wetlands. The procedures involved depend on where the project is located, the type of work proposed, and the size of the area affected by the work. There are basically three processes that may be used, the Individual Permit process, the General Permit process, and Letters of Permission process. These three processes are described in detail below.

Individual Permits

An Individual Permit is a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project in accordance with the procedures of the applicable regulations and 33 CFR Part 325, and a determination that the proposed structure or work is in the public interest pursuant to 33 CFR Part 320. In general, if a project involves one or more of the activities which require permits (e.g. fill in U.S. waters) and, one or more of those activities is not exempted and does not qualify for authorization under a General Permit, then an Individual Permit will be required.

General Permits (Nationwide and/or Regional)

A General Permit (GP) means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities. This refers to both those permits issued by District or Division Engineers on a regional basis and to Nationwide Permits which are issued by the Chief of Engineers through publication in the Federal Register.

Regional Permits are a type of General Permit. They may be issued by a Division or District Engineer. The issuing authority will determine and add appropriate conditions to protect the public interest. When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, the authority may exercise discretionary authority to override the Regional Permit and require an individual application and review. No Regional Permit can be issued for a period of more than five years.

Nationwide Permits are a type of General Permit issued by COE Headquarters on a nationwide basis. If certain terms and conditions are met, the specified activities can take place without the need for an individual or regional permit. NWP's must be certified by certain agencies in each state before they take effect in the state (see previous Section 2.43 of this Handbook for those NWP's which IDEM has not waived 401 WQC). As stated in 33 CFR 330.6(d)(2), NWP's do not apply, even if a portion of the project is not dependent on the rest of the project, when any portion of the project is subject to an enforcement action by the COE or Environmental Protection Agency.

Several NWP's require advance notification to the COE before commencement of the proposed activity may begin (see Section 2.57 of this Handbook for a listing of these NWP's). The permittee may presume that the project qualifies for the NWP unless the COE responds within 30 calendar days of the receipt of the notification. The prospective permittee may not proceed with the proposed activity before expiration of the 30-day period unless otherwise notified by the COE. The COE may add conditions to ensure compliance with the terms and conditions of the NWP. For some NWP's, the required notification must also contain a wetland delineation.

The NWP's are periodically reviewed, modified, or reissued by COE Headquarters. The current schedule calls for such reconsideration every five years. However, this schedule is subject to change at any time. Persons pursuing activities under the authority of a NWP should make themselves informed of the current status and conditions of the NWP. Activities affecting waters of the United States which do not qualify for one or more GPs may require an Individual Permit. A list of the issued Nationwide Permits and their conditions is provided in Appendix "G.2" (33 CFR 330).

Letters of Permission

Letters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with federal and state fish and wildlife agencies and a public interest evaluation, but without publishing of an individual public notice. Those activities subject to Section 10 of the Rivers and Harbors Act or Section 404 of the Clean Water Act may be authorized using this process provided the procedures in 33 C.P.R. 325.2(e) I and ii are completed.

2.54 Exempt Projects

When Congress approved the Clean Water Act, it included in the law exemptions for certain activities. Exemptions were written into the law to allow discharges associated with those specific activities to proceed without having to obtain a federal permit pursuant to Section 404. Exemptions have also been determined for projects that might ordinarily be subject to review under Section 10 of the rivers and Harbors Act. The authority for determining whether an activity is exempt rests with both the COE and the EPA. Anyone that believes that an activity they are proposing to undertake is exempt should contact the COE to confirm that the work meets the terms of the relevant exemption before proceeding. Although such verification is not required, it is strongly recommended for all activities with more than minimal impacts to waters of the United States.

Projects Exempt From Section 404 of the Clean Water Act

The following listed activities given in 33 CFR Parts 320 - 330 are exempted from Department of the Army permit requirements under Section 404 of the Clean Water Act. However, if the activity involves a structure or work in or affecting navigable waters of the United States, a permit may be required under Section 10 of the Rivers and Harbors Act of 1899.

1. Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. To fall under this exemption, the activity must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation and must be in accordance with the definitions given in 33 CFR Part 323.4. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.
2. Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.
3. Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption. A drainage ditch is considered to be an entirely man-made channel. As interpreted by COE, **a rechannelized or modified natural channel or a constructed channel that replaces a natural channel are not considered drainage ditches.**
4. Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the United States. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.
5. Any activity with respect to which a State has an approved program under Section 208(b)(4) of the Clean Water Act which meets the requirements of Sections 208(b)(4)(B) and (C).
6. Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These best management practices which must be applied to satisfy this provision shall include those detailed best management practices described in the State's approved program description pursuant to the requirements of 40 CFR Part 233.22(I), and shall also include the baseline provisions given in 33 CFR Part 323.4.

7. Federal projects which qualify under the criteria contained in Section 404(r) of the Clean Water Act are exempt from Section 404 permit requirements, but may be subject to other state or federal requirements.

Exceptions To Exemptions Under The Clean Water Act

Any discharge of dredged or fill material resulting from the activities listed above in paragraphs (1) through (6) containing any toxic pollutant listed under Section 307 of the Clean Water Act requires a Section 404 permit.

In addition, any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified above in paragraphs (1) through (6) must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. For example, a permit will be required for the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion.

Projects Exempt From Section 10 of the Rivers and Harbors Act

The following listed activities given in 33 CFR Parts 320 - 330 are exempted from Department of the Army permit requirements under Section 10 of the Rivers and Harbors Act of 1899. However, if the activity involves the discharge of dredged or fill material into waters of the United States, a Department of the Army permit may be required under Section 404 of the Clean Water Act.

1. Activities commenced or completed shoreward of established federal harbor lines before May 27, 1970.
2. Construction of wharves and piers in any waterbody, located entirely within one state, that is a navigable water of the United States solely on the basis of its historical use to transport interstate commerce.

Grandfathered Nationwide Permits

The following activities were permitted by NWP's issued on July 19, 1977, and unless modified, do not require further permitting:

1. Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which began July 25, 1975, and extended section 404 jurisdiction to all waters of the United States. (These phase-in dates are: After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; -after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than five acres in surface area; and after July 1, 1977, discharges into all waters of the United States). (Section 404)
2. Structures or work completed before December 18, 1968, or in waterbodies over which the District Engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation (Section 10).

2.55 Pre-Application Consultation/Early Coordination Process

For projects with potentially significant or controversial impacts, it may be advisable to present your project to the permitting and certifying agencies prior to submittal of an application for an Individual Permit. The COE district offices have established local procedures and policies including appropriate publicity programs which will allow potential applicants to contact the COE office to request pre-application consultation. Upon receipt of such request, the office will assure an orderly process which may involve other staff elements and affected agencies and the public. This early coordination process is brief but thorough so that the potential applicant may begin to assess the viability of some of the more obvious potential alternatives in the application. The office will endeavor, at this stage, to provide the potential applicant with all helpful information necessary in pursuing the application, including factors the office must consider in its permit decision making process. Applicants are strongly encouraged to request pre-application meetings as early and as often as needed by calling the district office having jurisdiction over the proposed site by contacting either the Louisville or the Detroit District offices at the phone numbers/addresses listed in Appendix "G.4".

2.56 Application Requirements

The processing of permit applications may vary depending on whether or not the project will be considered for Individual or General Permit. Therefore, the information necessary to review a project and its potential impacts also varies. The information requirements for Individual and Nationwide Permits is described below. A COE application package is contained in Appendix "G.1".

Individual Permits

For Individual Permit applications, the following items, at a minimum, are required:

- (1) A completed application form.
- (2) The name and address of the applicant.
- (3) The location, purpose, intended use and need for the proposed activity.
- (4) The names and addresses of adjoining property owners.
- (5) The location and dimensions of adjacent structures.
- (6) Scheduling of the activity.

In greater detail, the following information is generally required for the processing of an Individual Permit. Information relating to all of the items listed below may not be available or pertinent to a specific project. However, a more complete and organized application package will facilitate the review of the submitted material.

Authorizations: A list of other government authorizations obtained, requested, or required from other federal, interstate, state, or local agencies, including all approvals received or denials already made.

Signature: The application must be signed by the person who desires to undertake the proposed activity (i.e. the applicant) or by a duly authorized agent. When the applicant is represented by an agent, that information must be included on the application or by a separate written statement. An application may include the activity of more than one owner provided the character of the activity of each owner is similar, in the same general area, and each owner submits a statement designating the same agent.

Maps: A location map showing the site of the proposed activity must be furnished. The site must be clearly marked and shown relative to the nearest major waterways, roads, and cities in the area. The source and date of the map used must be written on the map. Maps are considered drawings and must conform to the general requirements given for drawings (i.e., 8 ½" x 11" paper, no coloring, title block, etc.). Maps must have a title block similar to other drawings and must be included in the drawing numbering scheme (i.e., sheet _ of _). Do not provide large size maps. A copy of a portion of a large map is acceptable. Acceptable map sources include United States Coast and Geodetic Survey Charts, United States Geological Survey Maps, other federal, state or county maps or charts available to the public.

General Drawing Requirements: A complete description of the proposed activity is required, including drawings sufficient for public notice. Detailed engineering plans and specs are not required. Drawings must meet the following requirements:

- (1) Plans must be drawn with dark pencil or black ink on 8 ½" x 11" paper. Leave at least a ½" unused border area on each sheet. All drawings and writings must be clear, readable, and reproducible using standard (non-color) office copy machines. Do not duplex drawings.
- (2) Drawings must be in black and white only. Do not use colored inks or pencils. Instead use shading, hatching, or other annotated graphic symbology.
- (3) Drawings should not show the approval, comments, or action of any government agency.
- (4) A title block is required for each drawing sheet (including maps). The title block must include the applicant's name, project name, project location, drawing date, drawing number (i.e., sheet _ of _), and sufficient unused space for future revision dates and a 12 digit file number.
- (5) Drawings must have all relevant dimensions shown for each view. In addition, it is desirable that a graphic drawing scale be shown. Do not use ratio scales (i.e., 1" = 80') on reduced plans because ratio scaling will give inaccurate information on the reduced copy.

Plan View and Cross-Section View Drawing Requirements: Plan and elevation drawings are required showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waters and depth of water in the area. The drawings must include the following information:

- (1) Plan and cross section views for each work, structure, fill, and excavation proposed.
- (2) Existing and proposed ground contours must be shown on each cross-section view.
- (3) Any existing marsh or wetland areas within the project boundaries or impacted by the work must be delineated on the plans.

- (4) Each proposed structure, work, fill, or excavation must be clearly shown and located with respect to either a plat line or some fixed immovable object.
- (5) Disposal areas for all dredged or fill material must be shown. Cross hatching or shading and appropriate notes must clearly show these areas.
- (6) Any proposed or existing retaining structures (e.g. embankments, bulkheads) for dredged or fill material must be shown.
- (7) Property boundaries and names of adjacent property owners must be shown on the plans.
- (8) The existing and proposed water depths and land elevations must be shown relative to the nearby mean low water contour or elevation.
- (9) The mean low water and mean high water contours must be shown on all views.
- (10) In non-tidal waters, contour and datum elevation references must be shown as follows:
 - (a) In federally navigable waters, existing and proposed water depths and land elevations must be shown relative to mean sea level.
 - (b) In federally non-navigable waters, existing and proposed water depths and land elevations may be shown relative to the nearby ordinary high water contour, or to mean sea level.
 - (c) In rivers and streams, the ordinary high water contour must be shown on all views. Also, the direction of flow must be shown.
 - (d) In lakes, the normal high water level of the lake must be shown on the plans.
- (11) For projects which encroach upon or lie adjacent to a site on which the federal government has an easement to either deposit dredged material or excavate to improve channel operations, the drawings must clearly show the extent of encroachment or indicate if none is intended.

Dredging: For dredging in navigable waters of the United States, the application must include the method of dredging, the site and plans for disposal of the dredged material and a description of the type, composition and quantity of the material to be dredged.

Fills and Platforms: For construction of a filled area or platform supported by piles or floats, the project description must include the use of the fill or platform and specific structures to be erected on the fill or platform.

Discharges: For the discharge of dredged or fill material into waters of the United States the application must include:

- (1) The source of the material.
- (2) The purpose of the discharge.
- (3) A description of the type, composition and quantity of the material.

(4) The method of transportation and disposal of the material.

(5) The location of the disposal site.

Impoundment Structures: For activities involving the construction of an impoundment structure, the applicant must demonstrate that the structure complies with established State dam safety criteria or that the structure has been designed by qualified persons and independently reviewed (and modified as the review indicates) by similarly qualified persons. No specific design criteria will be prescribed nor will an independent detailed engineering review be made by the District Engineer.

General Permits (Nationwide and/or Regional)

Before doing any work requiring authorization under a NWP for which notification is required (see Sub-section 2.53 under "General Permits"), the prospective permittee must submit written notification to the Army Corps District Engineer in accordance with the notification procedures. For projects which qualify under one or more NWPs, and which do not require notification, other authorizations, or other permits may proceed without notification as long as the project is conducted in complete accordance with the terms and conditions of the NWPs. All notifications must be in writing and must be clear, readable, and reproducible using standard, non-color, office copy machines. All necessary signatures must be originals. Copied or faxed signatures may not be accepted except in unusual or emergency situations and if allowed must be followed up by submittal of originals.

2.57 Overview of the Application Review Process by the Agency

As with the information required to be submitted, the review process varies according to the permit type, either Individual or General.

Individual Permits

The permit process starts with the submittal of an application form and drawings which clearly depict the work being proposed. When an application is received by the COE, it is assigned to a project manager and is given a number for identification purposes. The project manager will be responsible for all actions associated with its processing and will ultimately recommend the final action to the District Engineer or his designee. All questions regarding the application should be directed to the project manager. For questions related exclusively to the State permit or Water Quality Certification process, the applicant should contact the appropriate State agency directly.

One of the important parts of a submittal is a complete written description of the project, the work to be performed, and a concise and accurate statement defining the project's primary purpose. In addition, the dimensions (i.e., length, width, depth) and quantities (i.e., acres, cubic yards) of all impacts to aquatic areas should be provided. For non-water dependent projects and projects with more than minimal impacts, the applicant may help reduce processing time by submitting a written alternatives analysis and a compensatory mitigation proposal along with the application.

The drawings depicting the project must be clear, accurate, and contain all necessary information. The informational requirements for application drawings have been given in the previous section. In addition to the drawings submitted with your application, large scale total development plans with the wetland boundary annotated thereon may also be provided if necessary to adequately review the project.

An application will be determined to be complete when sufficient information is received to issue a public notice. The public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.

Initial Review: The project manager, upon receipt of an application, will check to see if all necessary information has been provided. If the project manager determines that the application is incomplete, the project manager will notify the applicant what additional information is required to complete the application.

Public Notice: When the application is determined to be complete, a public notice will be prepared. This notice will be mailed to local, State, and federal agencies, adjacent property owners, and other interested persons or groups that have requested to be placed on the public notice mailing list. The public notice will specify a fixed number of days during which comments may be provided to the permitting and certifying agencies identified in the notice. Because of differences in State and federal review procedures, the comment period may not be the same length of time for each permitting or certifying agency.

Comment Review: When the comment period has ended, an assessment of all comments received will be made by the project manager. If substantive objections have been received, the applicant will be provided copies of these objections. The applicant will then be given an opportunity to attempt to resolve the concerns of the objecting parties or to submit a rebuttal. However, this is not required and the applicant may request that the District Engineer make a decision based on the application as submitted in light of the unresolved objections and with no rebuttal statement from the applicant.

Decision Making: After all the required State permits and certifications are issued, the project manager will begin the decision making process on the federal permit. (Please note that if any of the required State or local permits or certifications are denied, the COE cannot issue the federal permit.)

The decision making process involves an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest and, if appropriate, includes application of the guidelines given at Section 404(b)(1) of the Clean Water Act as promulgated by the Administrator of the Environmental Protection Agency. The benefits which reasonably may be expected to accrue from a proposal are balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal are considered, including their cumulative effects. The factors considered by the COE include conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production and, in general, the needs and welfare of the people.

As mentioned above, every application involving the discharge of dredged or fill material into waters of the United States must be evaluated for compliance with the "404(b)(1) Guidelines" which are published at 40 CFR Part 230. This review involves an assessment of the project's impacts on the aquatic environment to determine if it is or is not in compliance with the Guidelines. The Guidelines are prejudiced against discharges of dredged or fill material into waters of the United States, including wetlands, for nonwater-dependent activities. For nonwater-dependent projects, the Guidelines compel the COE to place the burden of proof on applicants

to conclusively demonstrate that their projects will not cause an unacceptable adverse impact to our nation's aquatic resources and that lesser damaging alternatives are not available. Even if a project is "water-dependent", the Guidelines are designed to hold encroachments into aquatic areas to a minimum.

In keeping with the Guidelines and the National Environmental Policy Act (NEPA), the COE and EPA entered into a Memorandum of Agreement on mitigation. This Memorandum of Agreement requires that the COE use a sequenced approach to evaluating project alternatives. The Memorandum of Agreement specifies that, when assessing a project's impacts, the COE must first ensure that the impacts cannot be avoided (e.g., constructing the proposed facility on an upland, non-aquatic site). If the project must be located in an aquatic area to fulfill its basic purpose, and less damaging sites are not available, the COE must ensure that the project's impacts are minimized to the extent practicable taking into consideration cost, logistics, and existing technologies. Once it is determined that avoidance is not practicable and all efforts have been made to minimize the project impacts to the environment, then, and only then, compensatory mitigation may be considered to compensate for the project's unavoidable impacts. Further discussion on this subject is provided in Section 3.4 of Handbook.

In addition to the 404(b)(1) evaluation, an Environmental Assessment is prepared to determine if an Environmental Impact Statement is required. This is a requirement of the National Environmental Policy Act. If the project manager determines that additional information is required to complete the 404(b)(1) evaluation, the Environmental Assessment, or the public interest review, then the project manager will notify the applicant what additional information is required. Until all necessary information is available to complete these evaluations, the COE cannot reach a decision on the permit application.

If the project has been found to be in compliance with the 404(b)(1) guidelines and the Environmental Assessment has concluded with a Finding of No Significant Impact on the human environment, then a decision document is prepared. This document is the decision maker's written evaluation of all comments and concerns expressed, how these comments were considered in the decision, and why they were either rejected or accepted.

General Permits (Nationwide and/or Regional)

Upon receipt of a notification, the COE will review the notification and determine which of the following actions is appropriate.

Incomplete Notifications: For notifications with incomplete information, the applicant will be instructed what additional items are required to make the notification complete.

No Distribution: For requests for verification involving NWP's 1-4, 6, 8-10, 15, 20, 24, 25, or 36, no public notice or other distribution is required. The COE will review the notification and will notify the prospective permittee whether or not the proposed work appears to meet the terms and conditions of the NWP's.

Distribution: For notifications involving NWP's 5, 7, 12-14, 16-19, 21-23, 26-35, and 37-40, the COE must forward copies of the notification to USFWS, IDNR, IDEM and EPA. For notifications of work under these NWP's, the COE must be provided with:

- (1) Name, address and telephone number of the prospective permittee.
- (2) Location of the proposed project.

- (3) Brief description of the proposed project, the project's purpose, direct and indirect adverse environmental impacts the project would cause, any other NWP's or IP's used or intended to be used to authorize any part of the proposed project or any related activity.
- (4) Delineation of special aquatic sites, including wetlands, if required by terms of the NWP.
- (5) Information regarding presence of any federally listed endangered or threatened species or historic properties that may be affected by the proposed project.

The Decision Period: Except as explained below, for NWP's which require notification, an applicant may presume that his project qualifies for the NWP unless otherwise notified by the COE within a 30 day period following receipt of the notification by the District Engineer. However, the 30 day period allowed for the District Engineers review does not begin until receipt by the District Engineer of a complete notification. The applicant may contact the project manager at any time to determine the status of the notification review.

If the COE notifies the applicant that the notification is incomplete, a new 30 day period will commence upon receipt of the revised notification. If a wetland delineation is required, the 30 day period will not start until the wetland delineation has been completed. The prospective permittee may not proceed with the proposed activity before expiration of the 30 day period unless otherwise notified by the District Engineer. If the COE fails to act within the 30 day period, the District Engineer may use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the NWP authorization.

Review of Notifications: The terms and conditions of certain NWP's require the COE to review the proposed activity before the NWP authorizes its construction. However, the COE has the authority to review any activity authorized by NWP to determine whether the activity complies with the NWP. The COE will review all notifications and determine if the individual and cumulative adverse environmental effects are minimal.

Actions for minimizing the adverse effects of discharges are given in the 404(b)(1) guidelines at 40 CFR Part 230, Subpart H. Additional guidance given in the discussion section of 33 CFR part 330 states that interpretation of what is considered minimal is left to the discretion of the District Engineer. The discussion further states that what is considered minimal can vary from state to state, county to county, and watershed to watershed. The factors used in determining what is minimal must be based on the environmental setting of the district and the project. Review of notifications includes the following steps:

- (1) Consideration of State and Local Permitting Authorities. The COE will deny without prejudice any activity which has been denied by any State or local authority.
- (2) Consideration of Comments. The COE will consider any comments received concerning the proposed activity's compliance with the terms and conditions of a Nationwide Permit or the need for mitigation to reduce the project's adverse environmental effects to the minimal level. The COE will fully consider agency comments received within the time frame specified in the local procedures, but need not provide response to the resource agency. The COE will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered.

- (3) Consideration of Discretionary Authority. As stated in 33 CFR 330.1(d) and 330.4(e), District Engineers have been delegated a discretionary authority to suspend, modify, or revoke individual authorizations under a NWP. This authority may be used to condition or restrict the applicability of a NWP for cases where the COE has concerns for the aquatic environment under the Clean Water Act Section 404(b)(1) Guidelines or for any factor of the public interest. When deciding whether to exercise discretionary authority to modify, suspend, or revoke a case specific activity's authorization under a NWP, the COE shall follow the procedures and guidelines given in 33 CFR Part 330.5.

Decision Options: The decision options following the notification review are as follows:

- (1) Authorize Without Modification. If the COE determines that the activity meets the terms and conditions of the NWP, and that the individual and cumulative adverse impacts are minimal, and that no additional conditions are necessary, then the COE will notify the permittee that he/she may proceed in accordance with the provisions of the NWP.
- (2) Modify the NWP Authorization. The COE may add activity-specific conditions to ensure that the activity complies with the terms and conditions of the NWP and that the adverse impacts on the aquatic environment and other aspects of the public interest are individually and cumulatively minimal.
- (3) Require Mitigation. If the COE determines that the adverse effects are more than minimal, the COE may notify the prospective permittee that measures may be proposed to mitigate the loss of aquatic sites, including wetlands, to reduce the adverse impacts to minimal. The prospective permittee may elect to propose mitigation with the original notification. The COE will consider any proposed mitigation when deciding if the impacts are minimal. The COE shall add activity specific conditions to ensure that the mitigation will be accomplished. If sufficient mitigation cannot be developed to reduce the adverse environmental effects to the minimal level, the COE will not allow authorization under the NWP and will instruct the prospective permittee on procedures to seek authorization under an Individual Permit.

State Approved Mitigation Plan: In determining if a proposed compensatory mitigation plan, which has been approved by the State permitting agency, is sufficient to reduce the adverse ecological effects to the minimal level, the COE will use the following guidelines.

- (a) If there were no written concerns or objections received from any resource agency, then the COE will usually consider the mitigation to be sufficient.
- (b) If written concerns or objections were received from any resource agency in response to the Public Notice, then the COE will contact that agency to determine if the State approved mitigation plan resolves the agency's concerns.

If the agency states that the concerns have been satisfied, then the COE will usually consider the mitigation to be sufficient. If the agency states that the concerns have not been satisfied then the COE will conduct an evaluation of the mitigation plan. Following this evaluation the COE will decide whether or not the concerns of the resource agency have sufficient merit to modify, condition, or deny the proposed mitigation plan. If the COE determines that the agency's concerns do not have sufficient merit then the COE may accept the mitigation plan. The COE will document the evaluation and factors considered in making this determination in the record.

- (4) Require an Individual Permit Application. If the adverse effects are more than minimal and sufficient mitigation is not provided to reduce the adverse environmental effects to the minimal level, the COE will not allow authorization under the NWP and will instruct the prospective permittee on procedures to seek authorization under an Individual Permit.

Thresholds: Projects with total adverse ecological effects which exceed five acres or 10% of the total project area, whichever is greater, will routinely be considered to cause more than minimal adverse ecological effects which cannot be reduced to a minimal level through compensatory mitigation. Therefore, notifications involving these categories of activities will have a greater likelihood than normal of being subject to the exertion of discretionary authority to require an Individual Permit. However, the COE must consider each notification on a case specific basis and these restrictions are intended to be used only as guidelines.

Compensatory Mitigation Plans: As previously stated, authorizations for projects which have more than minimal adverse effects will require mitigation. The mitigation must be sufficient to reduce the adverse effects to the minimal level.

Delineations: For some NWPs, the notification must include a complete delineation of special aquatic sites. Delineations must be in accordance with the current method required by the COE. The applicant may ask the COE to delineate the aquatic sites. There may be some delay if the COE does the delineation. Furthermore, the 30 day review period will not start until the wetland delineation has been completed. Most COE districts define a completed delineation to mean a delineation that has been verified by the COE. For small projects with minimal or near minimal impact to special aquatic sites, the project manager has the discretion to accept an approximate delineation as the verified delineation. Applicants are responsible for providing information with their submittal that evidences a delineation has been conducted and the delineation has been verified by the COE. All delineations of aquatic sites must be shown on the plans submitted for notification review. For agricultural lands, the Natural Resources Conservation Service (NRCS) may be available to perform the delineation (See Section 2.7).

Restoration Plans: When restoration plans are required (e.g. NWPs 33 or 38), they must generally conform with the guidelines and requirements for Compensatory Mitigation Plans.

Other Relevant Issues: The following topics, which are discussed in 33 CFR Parts 320-330, are considered particularly noteworthy and are thus presented here for emphasis.

- (1) **Piecemealing.** In its most elementary form, piecemealing involves the bit-by-bit alteration of a given area by a series of minor authorizations rather than by comprehensive master planning. As pointed out at 33 CFR 320.4(b)(3), while a particular alteration may constitute a minor change, the cumulative effect of a number of changes can result in a major impairment of the resource. In order to discourage piecemealing, the following policy will be used for all NWP authorizations: Once a project avails itself of a NWP authorization, additional NWP authorizations for work which is not clearly shown on the original permit plans will be viewed unfavorably. This position will stand unless a convincing argument can be presented that the additional work is totally unrelated to that which is already permitted and that it was unforeseeable at the time of the prior authorization. It is recognized that there may be an occasional unusual case where the application of this policy may be unreasonable. In those instances, the COE will coordinate with the resource agencies to obtain their views.

- (2) Combining NWP's and Individual Permits. 33 CFR 330.6(d) states that subject to the following qualifications, portions of a larger project may proceed under the authority of the NWP's while the COE evaluates an Individual Permit. 33 CFR 330.6(d) states that application for other portions of the same project, but only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project. When the functioning or usefulness of a portion of the total project qualifying for a NWP is dependent on the remainder of the project, such that its construction and use would not be fully justified even if the COE were to deny the Individual Permit, the NWP does not apply and all portions of the project must be evaluated as part of the Individual Permit process.

When a portion of a larger project is authorized to proceed under a NWP, it is with the understanding that its construction will in no way prejudice the decision on the Individual Permit for the rest of the project. Furthermore, the Individual Permit documentation must include an analysis of the impacts of the entire project, including related activities authorized by a NWP.

- (3) Multiple NWP's. As stated in 33 CFR 330.6(d), two or more different NWP's can be combined to authorize a "single and complete project". However, the same NWP cannot be used more than once for a single and complete project.

The term single and complete project is defined at 33 CFR 330.2 to mean the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. For example, if construction of a residential development affects several different areas of a headwater or isolated water, or several different headwaters or isolated waters, the cumulative total of all filled areas should be the basis for deciding whether or not the project will be covered by a NWP. For linear projects, the "single and complete project" (i.e. single and complete crossing) will apply to each crossing of a separate water of the United States (i.e. single waters at that location; except that for linear projects crossing a single waters several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies.

2.58 Procedures for Timely Access to COE Regulatory Personnel

The COE operates 3 field offices in Indiana, located in Indianapolis, Evansville, and South Bend. The main offices for the regulatory programs administered by COE in Indiana are located in Louisville, Kentucky and Detroit, Michigan. Appendix "G.4" lists the addresses of these two offices along with the names and phone numbers of the regulatory review staff.