

USACE Permitting Program, Mitigation Banking & Things Developers Need to Know

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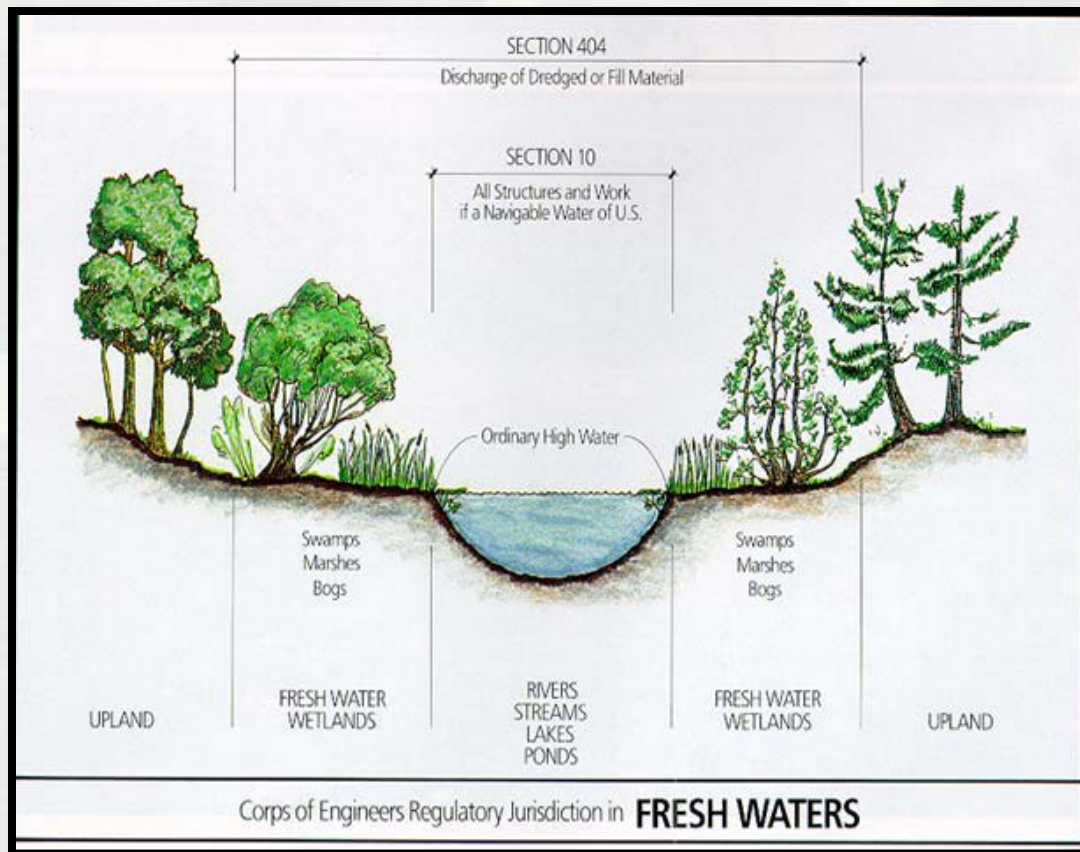


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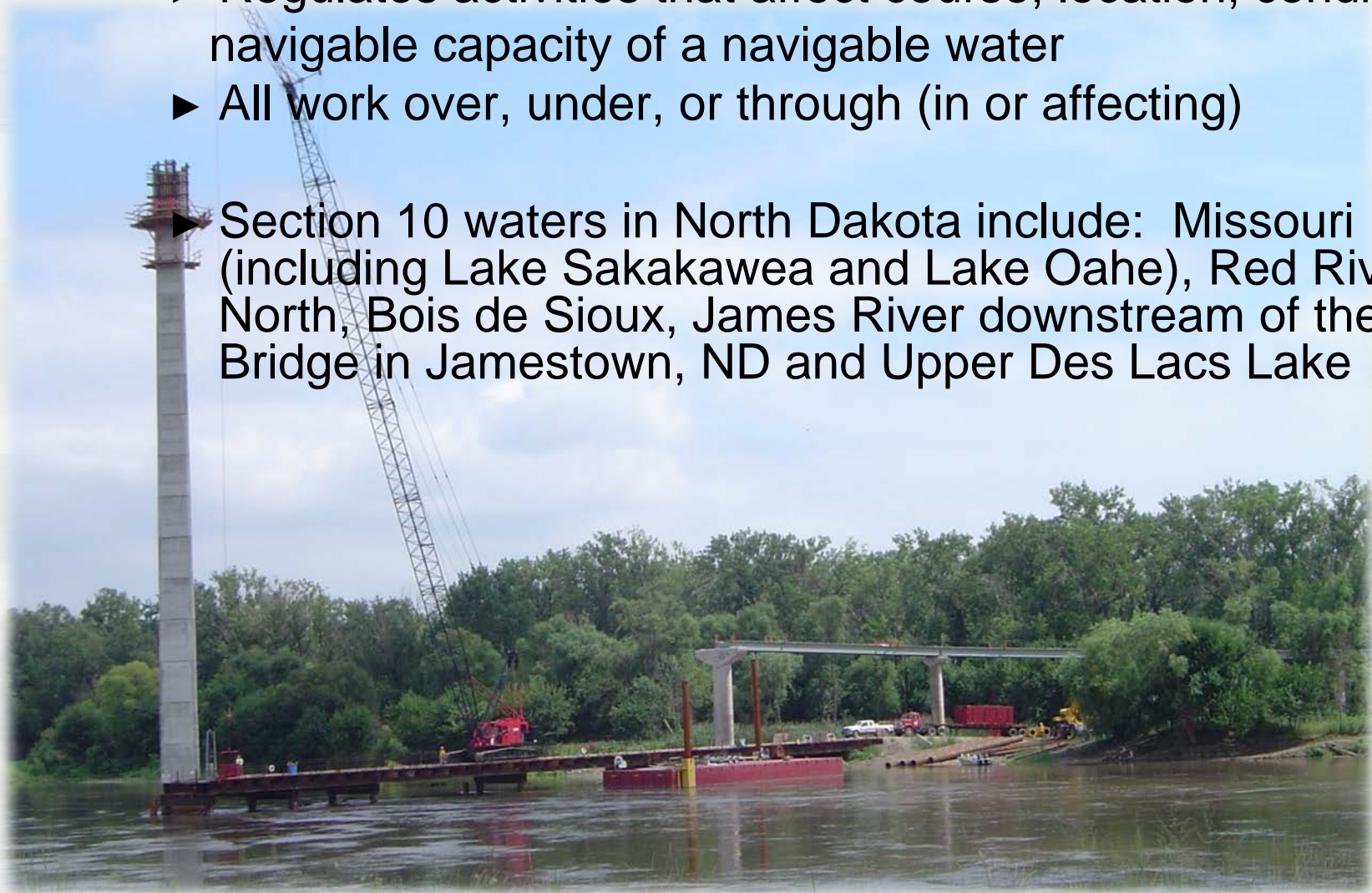
Authorities

- Section 10 Rivers and Harbors Act of 1899 [33 USC 401]
- Section 404 Clean Water Act (1972) [33 USC 1344]



Section 10

- ▶ Regulates activities that affect course, location, condition or navigable capacity of a navigable water
- ▶ All work over, under, or through (in or affecting)
- ▶ Section 10 waters in North Dakota include: Missouri River (including Lake Sakakawea and Lake Oahe), Red River of the North, Bois de Sioux, James River downstream of the RR Bridge in Jamestown, ND and Upper Des Lacs Lake



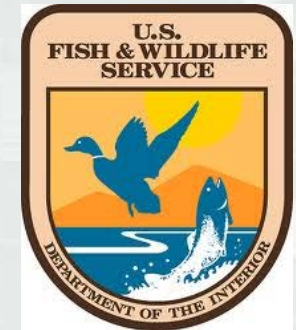
Section 404

- ▶ Regulates the discharge of dredged or fill material into waters of the United States, including wetlands



OTHER LAWS

- ❖ Section 401 (Water Quality Certification)
- ❖ Section 402 (NPDES Permit and BMP's)
- ❖ National Environmental Policy Act (NEPA)
- ❖ Fish and Wildlife Coordination Act
- ❖ Endangered Species Act (ESA)
- ❖ Wild and Scenic Rivers Act (WSRA)
- ❖ National Historic Preservation Act (NHPA)
- ❖ Migratory Bird Treaty Act (MBTA)
- ❖ Bald and Golden Eagle Protection Act



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The Section 404 Program

- *What is the purpose of Section 404 Program?*
 - ▶ “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”
- *What work requires a Section 404 Permit?*
 - ▶ Discharge of dredged or fill material into waters of the United States.
- *Who needs a permit?*
 - ▶ Any person, firm, or agency (Federal, state and local government) planning to work in waters of the United States.
- *Do the regulations apply only on Corps or Federal lands?*
 - ▶ No. The regulations apply on all lands regardless of ownership.



Types of Permits

- Nationwide Permits (10/404)
 - ▶ Issued by HQUSACE
 - ▶ DE authorized through regulation (33 CFR Part 330)
- Regional (10/404)
 - ▶ Districts issue and use
 - ▶ Tailor program to District's aquatic environment
- Programmatic (10/404)
 - ▶ Districts issue and use
 - ▶ Best way to take advantage of other agency programs
- Individual Permits (10/404)
 - ▶ Public notice on specific project
 - ▶ Activities with more than minimal impact
- Letters of Permission (10/404)
 - ▶ Individual authorization
 - ▶ Minor impacts, coordinate with agencies/neighbors



Nationwide Permits

- The primary goal of the NWP is to authorize, with limited delay and paperwork, certain activities that have minimal adverse effects on the aquatic environment.
- 50 NWPs & 31 General Conditions
 - ▶ for minimal impacts
 - ▶ are activity based
- Regional Conditions
 - ▶ Address regional differences in aquatic resources and environmental concerns
- Impact Thresholds
 - ▶ acreage and linear footage limits
 - ▶ If thresholds are exceeded, **OR** general **OR** regional conditions are not met, the project is evaluated as an Individual Permit (IP)
- NWPs have shorter processing times and coordination with other resource agencies is limited



Nationwide Permits

- Examples of commonly used Nationwide Permits to authorize minimal impact projects impacting wetlands and waters of the U.S. for transportation related projects.
 - ▶ NWP 3 – Maintenance
 - ▶ NWP 12 – Utility Line Activities
 - ▶ NWP 13 – Bank Stabilization
 - ▶ NWP 14 – Linear Transportation Projects
 - ▶ NWP 20 – Response Operations for Oil and Hazardous Substances
 - ▶ NWP 29 – Residential Developments
 - ▶ NWP 33 – Temporary Construction, Access, and Dewatering
 - ▶ NWP 39 – Commercial and Institutional Developments



2012 General Conditions for Nationwide Permits

- Currently, there are 31 General Conditions for Nationwide Permits, including:
 - ▶ GC #2 – Aquatic Life Movements
 - ▶ GC #6 – Suitable Material
 - ▶ GC #9 – Management of Water Flows
 - ▶ GC #12 – Soil Erosion and Sediment Controls
 - ▶ GC #13 – Removal of Temporary Fills
 - ▶ GC #17 – Tribal Rights
 - ▶ GC #18 – Endangered Species
 - ▶ GC #20 – Historic Properties
 - ▶ GC #23 – Mitigation
 - ▶ GC #25 – Water Quality
 - ▶ GC #31 – Pre-Construction Notification



General Condition #31

Pre-Construction Notification (PCN)

- PCN – Prospective permittee must notify the Corps by submitting information (a complete application) required under General Condition 31.
 - ▶ Requires the applicant to provide along with the notification a wetland delineation, ESA & 106 documentation, and other applicable data
- PCN to Agencies for certain NWP
- When a PCN is required varies according to the Nationwide permit.
 - ▶ NW 14 – Linear Transportation Project – PCN required if the loss of waters of the United States exceeds 1/10-acre or there is a discharge in a special aquatic site, including wetlands.
 - ▶ NW 33 – Temporary Construction, Access, and Dewatering – PCN required prior to commencing the activity. The PCN must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions.



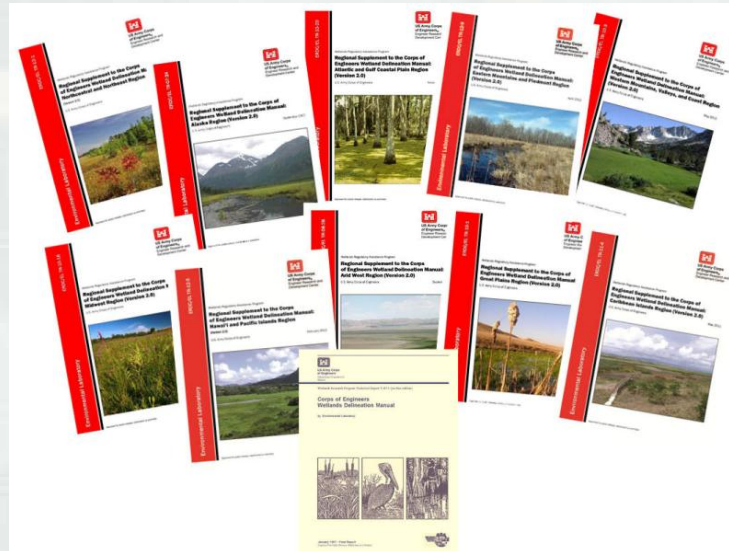
Regional Conditions

- May expand when a PCN is required
 - ▶ Typically by activity or waterway
- May expand information requirements of a PCN
- May specify Special Conditions for certain NWP's and/or activities
- Regional conditions must go through a review and justification process, and must be approved by the Division Commander



If a Pre-Construction Notification is required and...

- **IF** there are any wetlands impacts (filling, excavation, flooding, draining)
- **THEN** you must submit a **Wetland Delineation** using Corps of Engineers 1987 Wetland Delineation Manual & Regional Supplements, and done by a qualified individual preferably during the growing season. *Generally speaking ... May to November*



Special Conditions

- Under General Condition #27, the Corps is authorized to develop case specific conditions.
- Special Conditions are added to Nationwide Permits that require a Pre-Construction Notification, and are project specific.
 - ▶ Quarry Rock Rip-Rap
 - ▶ Erosion Control Blankets until vegetation re-established
 - ▶ Wetland & channel mitigation annual monitoring reports
 - ▶ Submittal of photos upon project completion
 - ▶ Temporary impact monitoring



Individual Permits

- Projects that exceed NWP thresholds
 - ▶ more than minimal impact to the aquatic environment
 - ▶ more rigorous evaluation
 - ▶ Impacts to WOUS, including wetlands, exceed 0.5 acre
 - ▶ WOUS channel relocation

- Detailed review process
 - ▶ Public Notice
 - ▶ Agency and Public Comments
 - ▶ Section 404(b)(1) Evaluation (Alternative Analysis)
 - Least Environmentally Damaging Practicable Alternative (LEDPA) to the aquatic ecosystem
 - ▷ Reasonable
 - ▷ Practicable
 - ▶ Avoidance, minimization, then mitigation
 - ▶ State Water Quality Certification
 - ▶ Mitigation Plan generally required



Avoidance and Minimization

- Sequencing: Avoidance, Minimization, and then Mitigation
- Avoidance
 - ▶ *Can impacts to wetlands and waters of the U.S. be avoided, thus not requiring an authorization from the Corps?*
 - No Permit Required
- Minimization
 - ▶ *Can impacts to wetlands and waters of the U.S. be minimized?*
 - Are there other ways to accomplish your project purpose?
 - Ex. -- reducing roadway footprint, pulling in roadway sideslopes, spanning channels, limiting channel work to amount necessary, working from uplands or roadway, is riprap placement necessary or minimizing amount needed for protection/stabilization, etc.
 - Individual Permit vs. Nationwide Permit.



Mitigation

- Mitigation may required to offset project impacts to wetlands and waters of the U.S.
- Typically require mitigation for permanent wetland impacts ≥ 0.1 acre and other waters on a case-by-case basis, but there is a 'push' from HQ to mitigate for long term temporal impacts
- Mitigation can be based on ratios or functional assessment, but can't be mixed and matched, and must be located in the same Regional Service Area.
- 2008 Mitigation Rule (40 CFR 332)
 - ▶ Joint rule with EPA
 - ▶ Established standards for compensatory mitigation
 - Permittee-responsible mitigation
 - Mitigation banks and ILF Programs
 - ▶ On-site and off-site mitigation
 - ▶ "Watershed approach"
- North Dakota Interagency Mitigation Banking Guidance Document is found on our website.



2008 Mitigation Rule

- Mitigation proposed must address the following '12 Components of Mitigation' (40 CFR 332)

- 1) Site Selection
- 2) Site Protection Instrument
- 3) Baseline Information
- 4) Determination of Credits
- 5) Mitigation Work Plan
- 6) Maintenance Plan
- 7) Performance Standards
- 8) Monitoring Requirements
- 9) Objectives
- 10) Long-Term Management Plan
- 11) Adaptive Management Plan
- 12) Financial Assurances



Pre-Application

- Prior to application submittal, a Pre-Application Meeting may be helpful, depending on the complexity of the project.
- Although not required, information provided prior to application submittal by the applicant can streamline the permit review and issuance process.
 - ❑ Identify specific issues and coordinate project with the Corps Regulatory Office and appropriate resource agencies
 - ❑ Identify all areas within project scope (borrow and mobilization)
 - ❑ Identify permanent and temporary impacts to wetlands and waters of the U.S.
 - ❑ Discuss possible alternatives
 - ❑ Avoidance, minimization, & mitigation strategies
 - ❑ T&E species / Historical Properties issues
 - ❑ Site visit



Jurisdictional Determinations (JD)

- There may be cases where the applicant is not sure whether a feature may be regulated under Section 404 of the Clean Water Act.
- The applicant can submit a request for a Jurisdictional Determination or “JD Request” to the Corps for an official determination to identify if wetlands or waters of the U.S. are present.
- There are 2 types of JD Requests: Preliminary and Approved.
 - ▶ Preliminary JD
 - Most commonly requested
 - Quicker turn-around time
 - Reviewed on in-office desktop available resources, however, may require a site visit
 - If the applicant disagrees, this determination cannot be appealed, however, the applicant can request an Approved JD
 - ▶ Approved JD
 - Site visit required
 - Longer process that may involve coordination with other agencies
 - Sent to EPA and USACE HQ for a 15-day review if there is a “significant-nexus” determination
 - Sent to EPA and USACE HQ for a 21-day review if there is an “isolated wetlands” determination
 - If the applicant disagrees with the Approved JD, the applicant can go through the appeal process



Elements of a Complete Application for a Pre-Construction Notification

- A complete application will save review time and ensure timely permit processing. A complete application is necessary in order to complete our evaluation.
- A complete application submittal includes:
 - ✓ Signed Application (Eng. Form 4345)
 - ✓ Project plans and specs
 - ✓ Wetland Delineation
 - ✓ Identify permanent and temporary impacts to wetlands and waters of the U.S. (in acres and linear feet)
 - ✓ Temporary crossing, diversion, and/or shoo-fly plans and impacts
 - ✓ Mitigation Plan (if necessary)
 - ✓ ESA, 106, and CE documents
 - ✓ Adjacent property owners
 - ✓ Useful information to include: photos, aerial photographs, Lat/Longs, borrow sites identified



DA Permit Application (Eng. Form #4345)

- Filling out the application form ensures required information (in accordance with General Condition #31, Pre-Construction Notification) has been provided by the applicant to the Corps. This includes:
 - Name, address, and telephone of the permittee and/or agent
 - Project Location – Site map, Project limits, Limits of Construction
 - Nature of Activity (ex. Bridge Replacement)
 - Project Purpose – use NEPA document Purpose (ex. Replace structurally deficient bridge for public safety)
 - Reason for Discharge (ex. Bridge Construction)
 - Types of Material Being Discharged and Amounts (culvert, clean fill, rock riprap)
 - Surface Area in Acres of Wetlands and Other Waters filled, excavated, inundated, and drained
 - List of Adjacent Landowners
 - Other Certifications or Approvals/Denials received from other Federal, State, or Local Agencies



Permit Construction and Compliance

- **READ the permit and fact sheets**
 - ▶ Verify construction plan & specs with the permit conditions
 - ▶ Identify areas of concern or possible conflict and request amendments if needed prior to construction (don't forget contractor optioned borrow sites)
 - ▶ Notify the USACE if additional work is needed, but not authorized by the permit (i.e. temporary crossings, temporary diversions)
 - ▶ If permittee doesn't adhere to permit conditions, potential enforcement actions may result. Contact us prior to proceeding with construction, if there are questions.



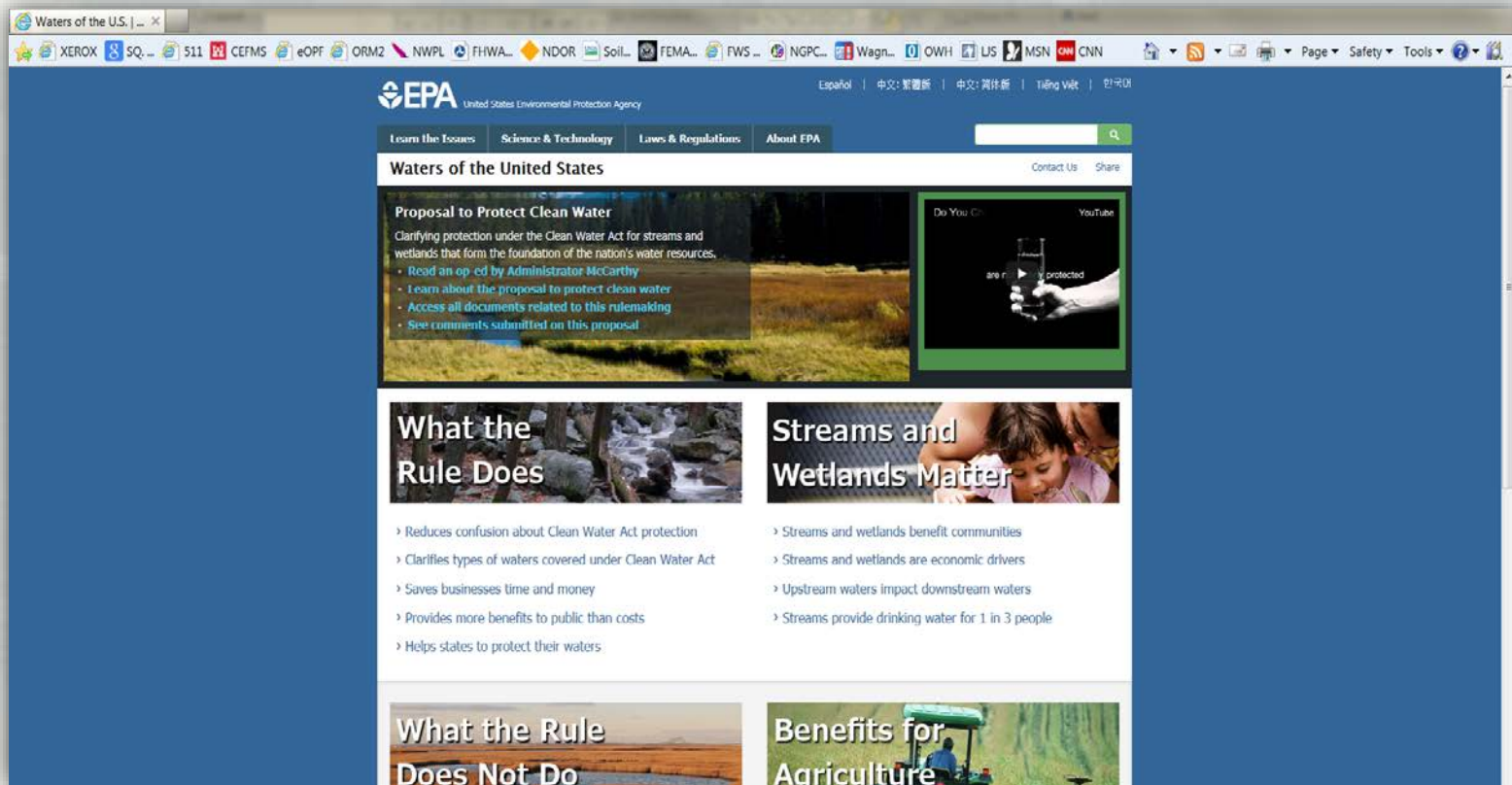
Points of Awareness for Developers

- Little “changes” to a contractor could be BIG changes to regulatory agencies.
- The Contractor should request a copy of permit and know the conditions.
- Follow sedimentation / erosion control measures.
- If additional work is proposed, coordinate through the permittee.
- If there are questions or there are items you do not understand within the authorization, please call!



CWA Proposed Rule

- Nothing finalized, no new guidance
- Visit the EPA's website: <http://www2.epa.gov/uswaters>



North Dakota Regulatory Office Personnel

- **Patricia McQueary**, ND State Program Manager
- **Nolan Baldwin**, Regulatory Program Support Assistant
- **Toni Erhardt**, Project Manager
- **Jason Renschler**, Project Manager
- **Patsy Crooke**, Project Manager
- **Ben Reile**, Project Manager
- **Garth Zimbelman**, Project Manager
- **Swade Hammond**, SAFETEA-LU Funded Project Manager



Call or email us if you need assistance with the permitting process!

(701) 255-0015

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www.nwo.usace.army.mil/Missions/RegulatoryProgram/NorthDakota.aspx

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ND Regulatory Pages

- Mitigation
- Jurisdictional Determination
- Regional General Permits
- Public Notices

ND Forms & Publications

- Pre-Construction Notification
- Nationwide Permit Definitions
- Prohibited / Restricted Materials

The US Army Corps of Engineers, North Dakota Regulatory Office, through the Regulatory Program, administers and enforces Section 404 of the Clean Water Act in North Dakota for the Omaha District. Under CWA Section 404, a permit is required for the discharge of dredged or fill material into waters of the United States. Many waterbodies and wetlands in the nation are waters of the United States and are subject to the Corps' regulatory authority.

- Nationwide Permits
- Nationwide Permit Regional Conditions for North Dakota
- Regulatory Program Overview

Permitting Application

USACE Headquarters Links

- Regulatory Program ...
- Regulatory Resources ...
- Nationwide Permits ...
- Permit Application ...
- National Notices ...
- Federal Regulations
- Waters of the US ...
- Jurisdictional Information

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THANK YOU!

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