



# COMMERCIAL INVESTMENT

Real Estate

## Legal issues

# Obtaining Permission

### Developers can streamline the permitting process by following these tips.

by Shane A. Farolino

When commercial real estate projects affect streams, wetlands, or other bodies of water that fall under the Clean Water Act's jurisdiction, generally developers cannot discharge dredged or fill material into the waters until they obtain a CWA Section 404 permit from the U.S. Army Corps of Engineers. They also must have Section 401 water quality certification from the state environmental agency with jurisdiction over the project.

Waters that "are or had been navigable" clearly fall under CWA's authority. However, the act excludes isolated wetlands that have no contact with navigable waters as defined by the U.S. Supreme Court ruling in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*.

But in three different Circuit Court of Appeals rulings since the *SWANCC* judgment, waters that did not fit neatly into either category were determined to fall under CWA jurisdiction. These rulings clarify that various CWA permits may be necessary for developments that occur near both natural and man-made roadside ditches as well as wetlands that flow into navigable waters.

Commercial real estate professionals should be aware that permits for developments near such water sources may be necessary. In addition, understanding the permitting process in advance may allow developers to save time and money.

## Permitting Strategies

When projects fall under CWA regulations, developers must obtain one of two Section 404 permits: nationwide permits, which are for projects whose impact will not exceed certain defined thresholds; and individual permits, which are for projects whose impact exceeds these thresholds. The permit type a developer chooses and the manner in which the permitting process is handled may have a direct bearing on projects' success or failure. By following the tips and strategies discussed below, developers can help to ensure their projects become a reality.

**Start Early**. Due to the complicated nature of the permitting process, developers should factor additional time into project schedules to account for unanticipated delays. A project-specific permitting strategy should be developed after careful evaluation with a legal adviser.

**Work Closely With the Permitting Agencies**. Meet with the Army Corps and the pertinent state agency before submitting permit applications and continue to work with these agencies throughout the entire permitting process. Applicants should request written agency feedback on all submitted permits. If negative responses are received, developers should promptly and effectively address agency concerns. As soon as such issues have been resolved between the parties, the applicant should obtain written confirmation of the resolution from the pertinent regulatory agency.

**Note Differences in the Various Permitting Processes**. In some respects, the Section 404 and 401 permitting processes differ both procedurally and substantively. For instance, each permitting process requires slightly different alternatives analysis and demands distinct mitigation approaches.

**Don't Forget Commenting Agencies**. When a Section 404 permit application is submitted to the Army Corps, the agency typically routes the application to numerous other agencies for review and comment. For example, in Ohio, Section 404 permit applications are routed to the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the Ohio Department of Natural Resources, and the Ohio Historic Preservation Office. Applicants must address these agencies' various concerns.

**Shorten the Permitting Process**. Usually, when Section 404 and 401 applications are submitted, the agencies accept public comment regarding the applications for at least 30 days. If, during the initial comment period, a public hearing regarding the application is requested, another public notice scheduling a public hearing must be issued. If a developer is attempting to complete a very controversial project or if it is likely that someone will request a public hearing regarding the permit applications, applicants can save time by requesting that the agencies schedule a public hearing at the same time they issue the public notices regarding the applications' receipt. In addition, an entity may want to request that the Army Corps and the pertinent state agency hold joint-agency public hearings regarding the applications. By taking such steps, applicants often can shorten the permitting time line.



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**Develop Mitigation Plans Early.** To avoid costly permitting delays, applicants should prepare and submit detailed mitigation plans with their initial transmittals to the agencies. In addition, applicants should request written agency concurrence of the mitigation plans' acceptability promptly upon completion of the agency's review.

**Build an Appeal Record.** Applicants should stockpile favorable comment letters or public hearing testimony from project supporters. Applicants also should carefully categorize and respond to all adverse comments concerning the project. If these precautionary steps are taken during the permitting process, the odds of successfully defending a permit in the event of an appeal increase.

**Be Prepared to Negotiate.** In almost every instance, applicants must negotiate to adeptly navigate the permitting process. To ensure successful negotiations, applicants should make strategic proposals, take positions that are technically sound, and treat regulators in a professional manner. In addition, applicants should document all negotiations in writing. Yet even if such steps are taken, applicants still should be prepared to compromise on certain issues to expedite and streamline the permitting process.

**Comply Fully With Permit Terms and Conditions.** After obtaining permits for a project, applicants should develop a checklist of the various permit terms and conditions that apply. Thereafter, applicants should ensure that compliance is achieved with all such permit terms and conditions in a timely manner. Clearly, failure to comply can result in not only agency enforcement, but permit revocation as well.

While each Section 404 and 401 permitting process is unique, they often have several common elements. By following the tips outlined above, applicants can increase the likelihood that their various permitting endeavors will be successful.