



Clean Water Act Section 404/401 Permitting

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Residential, commercial and industrial development projects, plant expansions, utility and infrastructure projects, and other such development activities often involve impacts to streams and/or wetlands. Generally speaking, however, before discharging dredged or fill material into waters of the United States, including streams and wetlands, one must first obtain a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers. In addition, when a Section 404 permit is required, a Section 401 water quality certification typically must also be obtained from the state environmental agency with jurisdiction over the project.

There are essentially two types of Section 404 permits: Nationwide Permits (“NWP”), which are basically general permits that can be used for projects with impacts that will not exceed certain defined thresholds, and Individual Permits, which must be utilized for all projects with impacts that exceed such thresholds. Notably, the type of permit that an entity chooses to pursue, and the manner in which the permitting process is handled, can have a direct bearing on whether the project succeeds or fails. By following the tips and strategies discussed below, an entity can help ensure that its project becomes a reality.

- 1. Start Early.** Due to the complicated and time-consuming nature of the permitting process, it is wise to retain experienced technical and legal advisors at the outset of a project. A project-specific permitting strategy should be developed after a careful evaluation of all pertinent scheduling issues. Even so, entities should be sure to build additional time into the project schedule in order to account for unanticipated delays.
- 2. Avoid The Permitting Process Entirely If Possible.** If it is feasible to do so, entities should consider designing projects so that stream and wetland impacts, and the associated permitting, can be avoided. If it is not possible to complete the given project without impacting streams and/or wetlands, entities should attempt to design the project so that NWP requirements can be met.
- 3. Evaluate The Available Permitting Options Carefully.** When developing a permitting strategy for a project, it is often important to determine how the agencies have permitted similar projects in the past. In some situations, the Army Corps will require applicants to pursue an Individual Permit even though the project would appear to meet the applicable NWP criteria. When faced with such a permitting track record, an entity may want to apply for an Individual Permit right from the start in order to avoid lengthy delays in the permitting of the project.
- 4. Work Closely With The Permitting Agencies.** In order to help ensure the success of a project and streamline the permitting process as much as possible, an entity should meet with the Army Corps and the pertinent state agency (i.e., the Ohio EPA) well before the necessary permit applications are submitted. From that point forward, an entity should coordinate closely with the agencies throughout the entire permitting process.

- 5. 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 a slightly different type of alternatives analysis, and demands a somewhat distinct mitigation approach. In order to ensure that a project succeeds, an entity must thoroughly understand and address all of the differences in the Section 404 and 401 permitting processes as thoroughly as possible.
- 6. Don't Forget The 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. In Ohio, for example, Section 404 permit applications are often routed to U.S. EPA, the U.S. Fish & Wildlife Service, the Ohio Department of Natural Resources, and the Ohio Historic Preservation Office. Many times, the commenting agencies have vast and varied concerns that must be addressed by the applicant. If the concerns of the commenting agencies are not adequately addressed, one or more of the commenting agencies may recommend against issuance of the requested permit.
- 7. Find Ways To Shorten The Permitting Process.** Usually, when Section 404/401 applications are submitted, the agencies accept public comments regarding the applications for at least thirty days. If, during the initial comment period, someone requests a public hearing regarding the applications, the agencies must issue another public notice scheduling a public hearing at least thirty or forty-five days into the future. If an entity is attempting to complete a very controversial project, or it is highly likely that someone will request a public hearing regarding the permit applications, the entity may want to request that the agencies notice a public hearing at the same time that they issue the public notices regarding the receipt of the applications for the project. In addition, an entity may want to request that the Army Corps and the pertinent state agency (i.e., the Ohio EPA) hold joint agency public hearings regarding the applications. By taking such steps, applicants can often shorten the permitting process substantially.
- 8. Develop Mitigation Plans Early.** In order to avoid costly permitting delays, applicants should prepare and submit detailed mitigation plans with their initial transmittals to the agencies. Applicants should ensure that all mitigation plans meet applicable regulatory requirements. In addition, applicants should request written agency concurrence of the acceptability of the mitigation plans promptly upon completion of the agency's review of the same.
- 9. Build The Record In Anticipation Of An Appeal.** Whether during the public comment period or a public hearing that is held regarding the applications, it is always wise for applicants to make sure that supporters of the project submit favorable comment letters or public hearing testimony to the agencies. In addition, applicants should carefully categorize and respond to all adverse comments concerning the project. If these types of precautionary steps are taken during the permitting process, the odds of successfully defending a permit in the event of an appeal increase dramatically.
- 10. Be Persistent.** During the course of the permitting process, it is common for applicants to make numerous submittals to each of the regulatory agencies. In order to ensure that the applicant understands the agency's position regarding all of the issues of concern, the applicant should request written agency feedback regarding all permit submittals. To the extent that adverse responses are received, agency concerns should be promptly and effectively addressed. Of course, as soon as an issue has been resolved between the parties, the applicant should obtain written confirmation of such resolution from the pertinent regulatory agency.

- 11. Comply Fully With Permit Terms And Conditions.** After permits are obtained for a given project, an applicant should develop a checklist of the various permit terms and conditions applicable to the project. Thereafter, an applicant should ensure that compliance is achieved with all such permit terms and conditions in a timely manner. Clearly, the failure to comply with applicable permit terms and conditions could result in not only agency enforcement, but permit revocation as well.

- 12. Be Prepared To Negotiate.** In almost every instance, an applicant will need to engage in a substantial amount of negotiation in order to successfully navigate through the permitting process. In order to ensure the success of the negotiations, an applicant 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. Even if such steps are taken, however, applicants should still be prepared to compromise regarding certain issues in order to expedite and streamline the permitting process.

While each and every Section 404/401 permitting project is unique, they often have several common issues. Though not exhaustive, by following the tips outlined above, applicants can greatly increase the odds that their various permitting endeavors will end in success.

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