The Corps Regulatory Program and Transportation Maintenance Activities

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TRB Annual Meeting
January 2008
Corps Regulatory Authorities

- Sections 9 & 10, Rivers and Harbors Act of 1899
  - Birth of Corps regulatory program
  - Prevents unauthorized obstruction or alteration of any navigable water of the U.S.
    - Construction, excavation, or deposition of material in, over, or under such waters
    - Or any work within which would affect the course, location, condition, or capacity of such waters
Corps Regulatory Authorities

- **Section 404, Clean Water Act**
  - Enacted as an amendment to FWPCA in 1972
  - Prevents the unauthorized discharge of dredged or fill material into waters of the U.S
    - Discharge sites must meet 404(b)(1) Guidelines, established by USEPA
    - All other pollutants regulated under Section 402
    - 1979 Attorney General Civiletti opinion
      - USEPA has authority to determine limits of program
- **Section 103, Marine Protection, Research, and Sanctuaries Act**
  - Prevents the unauthorized transport of dredged material for the purpose of dumping it into ocean waters.
Geographic Extent of Jurisdiction

• Section 10, Rivers and Harbors Act of 1899
  – All navigable waters
    • Ebb/flow of tide
    • Presently used and/or have been used and/or may be susceptible to use to transport interstate or foreign commerce
    • Territorial seas (seaward 3 nautical miles of the coastline) and limited authority on the OCS

• Section 404, Clean Water Act
  – Section 10 waters, plus their tributaries and adjacent wetlands where the use, degradation, or destruction of such waters could affect interstate and foreign commerce
So, do I need a permit???
Well, it depends...

- Does the Corps have jurisdiction?
- Is the activity exempt from regulation?
- Is the activity covered by a NWP (may be non-reporting)?
- Is the activity already permitted (i.e. ongoing maintenance)?
Carabell-Rapanos Guidance

• Released 5 June, extended public comment period ends 23 January
• In response to Supreme Court cases regarding jurisdiction
• Clarified some issues
  – Swales and erosional features having low volume, infrequent, or short duration flow, as well as ditches (including roadside ditches) excavated wholly in and draining only uplands that do not carry a relatively permanent flow of water are generally NOT jurisdictional
• Increased coordination with USEPA
Is the activity exempt from regulation?
Section 404(f)(1)(b) exempts the discharge of dredge or fill material:

- “for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures”

UNLESS

- That “discharge of dredged or fill material into the navigable waters incidental to any activity as having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced…” (the recapture clause)
Ditch Guidance

- Released 4 July 2007, comment period ends mid-February
- Provides a predictable national approach for determining 404(f) exemptions for construction and maintenance of irrigation ditches and maintenance of drainage ditches
- Step 1: Determine CWA jurisdiction
  - Wetlands established in ditches solely due to the presence of drainage waters are NOT waters of the US.
- Step 2: Identify type of ditch and activity to determine eligibility for exemption
Ditch Guidance, part 2

- Drainage ditch = ditch that carries water from one place to another
- Maintenance = repair to an existing structure or feature to keep it in its existing state or proper condition, or to preserve it from failure or decline. Generally includes, but is not limited to, activities such as:
  - Excavation of accumulated sediments to orig. contours
  - Re-shaping side slopes
  - Bank stabilization to prevent erosion
  - Armoring, lining, and/or piping (only where previously armored, lined, or piped)
  - Replacement of existing control structures
- Ditch re-establishment (following an extended period of non-maintenance) is CONSTRUCTION, not maintenance
Ditch Guidance, part 3

• Step 3: Establish if the Recapture Clause applies (both parts must be satisfied to recapture)
  – Part 1: Is the discharge part of an activity whose purpose is to convert waters of the US into a use to which it was not previously subject?
  – Part 2: May the activity impair the flow or circulation of waters of the US or reduce the reach of such waters?

• It is unlikely that maintenance activities will trigger the recapture provision
Is it covered by a nationwide permit (NWP)?
NWP Changes

• **NWP 3—Maintenance**
  – Provisions to allow the maintenance dredging or excavation of intakes, outfalls, and canals was included (moved from NWP 7)
  – Added language to address temporary structures, fills, and work necessary to conduct maintenance activities
  – The majority remains non-reporting

• **NWP 18—Minor Discharges**
  – 25 cy/0.1 acre limit on all types of aquatic losses
  – PCN required if the discharge is greater than 10 cy or is in a special aquatic site
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