

GUIDANCE FOR APPLICANTS

Suggested Staffing Procedural Implementation of Section 404 of the Clean Water Act U.S. Army Corps of Engineers, Savannah District

Many of the following recommendations are discretionary while some are mandatory. These recommendations are not intended to be directives to the applicant. The intent of these recommendations is to provide information to assist the applicant in determining the level of professional staff, expertise and funding needed to carry out the statutory requirements of the permit application process.

1. APPLICABLE STATUTES AND REGULATIONS

The Department of the Army, Corps of Engineers, Savannah District ("USACE") is charged with implementation of Section 404 of the Clean Water Act ("CWA") (33 U.S.C. § 1344) and Section 10 of the Rivers & Harbors Act of 1899 (33 U.S.C. § 401 et.seq.) The issuance or denial of a permit by the Corps of Engineers pursuant to these statutes is a federal action and as such requires compliance with the National Environmental Policy Act of 1969 ("NEPA") (42 U.S.C. § 4321-4347), the National Historic Preservation Act of 1966, as amended (16 U.S.C. § 470 et seq.), ("NHPA"), the Endangered Species Act (16 U.S.C. 1531 et seq.) and other relevant statutes and executive orders.

The general regulatory policies in the regulation of certain activities in the nation's waters are set forth in 33 Code of Federal Regulations, Part 320-330, and 40 Code of Federal Regulations, Part 230. The regulations addressing NEPA are set forth in 40 Code of Federal Regulations, Part 1500-1508, 33 Code of Federal Regulations, Part 230, and 33 Code of Federal Regulations Part 325, Appendix B. The regulations addressing the NHPA are set forth at 36 Code of Federal Regulations, Part 800 and 33 Code of Federal Regulations Part 325, Appendix C.

2. BASIC PROJECT PURPOSE

The first step in reviewing a permit application is to determine the basic project purpose. A project's basic purpose is a critical element in our evaluation for compliance with the 404 (b)(1) Guidelines of the CWA, and acts to guide the scope of review pursuant to these guidelines.

3. SECTION 404 (B) (1) GUIDELINES OF THE CWA

These guidelines are sequential and require that the applicant: avoid unnecessary environmental impacts by preparing an analysis of alternatives that would potentially result in less adverse impact than the proposed project; to the maximum extent practicable, minimize unavoidable adverse impacts of the preferred alternative; and prepare a compensatory mitigation plan necessary to replace the wetland functions that would be lost as a result of unavoidable adverse impacts.

The USACE can only issue a permit for the least environmentally damaging practicable alternative that meets the project's basic purpose.

4. DETAILED COMPENSATORY MITIGATION PLAN

Although a detailed compensatory mitigation plan is not required to begin processing of a permit application, adequate compensatory mitigation would be required prior to a final permit decision. The detailed plan must provide adequate in-kind functional replacement for wetland and stream functions that would be lost as a result of unavoidable adverse impacts associated with the project. A functional assessment may be necessary to quantify impacts, as well as the adequacy of any proposed mitigation plan. Mitigation can be accomplished by creating, restoring, enhancing or preserving wetlands and/or streams on or near the project site. Once all on-site or nearby mitigation alternatives have been exhausted, you may consider purchase of mitigation credits from an approved mitigation bank or consider preservation options through payment to the Georgia Land Trust Service Center. All mitigation plans must be approved by USACE prior to implementation.

5. SINGLE POINT OF CONTACT

The applicant must identify a single point of contact for purposes of coordinating with the USACE project manager. A single point of contact will alleviate miscommunication and facilitate the orderly processing of the permit action. The USACE project manager will also serve as a single point of contact, and will coordinate consultant contacts and meetings with USACE staff as needed.

6. RECOMMENDED STAFF

The applicant should consider forming a team of environmental consultants including a certified project manager, various environmental consultants, meetings coordinator and attorney for the purposes of compliance with the above referenced statutes. The team should be relative to the size of the project, the interest of the public and governmental agencies, and the complexity of the scope of the issues. A piecemeal and/or uncoordinated approach to the permit process may cause delays and additional expenditures due to failure of the applicant to provide

the USACE with a legally sufficient and complete document. The applicant's team members should submit statements, if requested by the Corps, as to the fact that they have no conflict of interest in representing the applicant on the permit action.

A. A professional project manager could coordinate the permit application process and oversee the specific studies required under the NEPA, NHPA and CWA. The USACE recommends that the applicant's project manager be familiar with, and have experience in coordinating substantive, procedural and technical studies, with reviewing reports and with drafting integrated summary documents. In addition, the project manager should be experienced with the preparation of Environmental Assessments (EA) and Environmental Impact Statements (EIS).

B. The applicant utilize qualified environmental, economic, hydrological, historical, cultural, archeological, geological, wetlands, fisheries, wildlife, transportation and other needed consulting firms necessary to carry out the required studies and determination of impacts. The regulations require the applicant to list the names together with their qualifications (expertise, experience, professional disciplines) of the persons who were primarily responsible for preparing the significant background papers, studies, analysis and application of the necessary statutes and regulations.

C. The applicant should consider a system of record keeping for purposes of subject matter breakout and reference. The record may include:

- (1) The permit application and supporting documentation including jurisdictional wetland determinations
- (2) Notice of Intent to prepare EIS for purposes of the Federal Register, or
- (3) Public Notice
- (4) Correspondence
- (5) Written comments during the public interest process
- (6) Responses by the applicant to public interest issues
- (7) Alternatives analysis incorporating the CWA 404 (b)(1), NEPA and NHPA regulations using a scientific and analytical basis for findings
- (8) Agency written comments and reports
- (9) Environmental impact analysis reports addressing the direct, secondary and cumulative impacts by subject matter
- (10) NHPA documentation including Memorandum of Agreements, if required
- (11) Meetings and public hearing reports or transcripts
- (12) Zoning and land use documents
- (13) Letters of certification and permitting issued by other agencies or governmental departments including the Section 401 Water Quality certification
- (14) Mitigation Plan and restrictive covenants if required
- (15) EA and/or EIS
- (16) Technical reports, studies, drawings and computer modeling data
- (17) Other topics as needed

An organized, complete and indexed file will facilitate reference by the consultants and the Corps during the application process.

D. The Corps recommends that the meetings coordinator be skilled in holding public and informal meetings with Federal and State agency representatives, citizens, business and industry groups, planning departments and councils, Congressional representatives, state legislators and other interested parties. The coordinator should have experience in identification and articulation of facts and issues relevant to the applicable permitting statutes. In consultation with the Corps, meetings with relevant Federal, State and local agency representatives should be held early in the process. This should include the Environmental Protection Agency, the United States Fish & Wildlife Service, NOAA National Marine Fisheries Service, Georgia State Historical Preservation Office, Department of Natural Resources, and such other entities and citizen groups as may be needed. The meetings coordinator should prepare written reports of the meetings, its attendees, the topics and information pertinent to the application process.

E. The Corps recommends that the applicant consider retaining an attorney or firm experienced with the NEPA, CWA and NHPA procedural and substantive statutes and regulations. An attorney could apply the facts in the substantive and technical reports, to the applicable law, for purposes of providing advice to the applicant as to compliance with the law. Applicant's attorney could address legal issues that arise during the course of the application process, advise the applicant of its relevance and suggest to the applicant the manner in which it should be addressed.

In addition, the Corps recommends that the applicant consider retaining an attorney experienced in property law. The attorney would provide draft wetland restrictive covenants generally required as a result of mitigation. The attorney would be required to utilize the USACE's guidance on restrictive covenants, legal descriptions and survey methodology. In addition the attorney would provide the Savannah District with required copies of the applicant's proof of ownership of mitigation real property, through deed conveyances or condemnation authority. Implementation of mitigation may include the preparation and recording of certain legal documents in the Office of the Clerk of the Superior Court of the county in which the lands are located. Failure to address the real property issues early in the process could result in delays in that permit conditions generally require that mitigation be completed prior to beginning operation.

7. PUBLIC ACCESS TO INFORMATION

NEPA procedures provide that environmental information be made available to public officials and citizens before decisions are made and before actions are taken. The applicant should designate a point of contact and a location for purposes of providing information to the public about the project and establish procedures for public viewing of studies and reports upon request. The applicant may want to consider establishing an Internet web site if project interest is sufficiently large. This may reduce the time required by the Corps in processing Freedom of Information Act requests and allow more time for processing the permit.

8. INDEPENDENT REVIEW

The USACE will independently review the documents, determine the sufficiency of the studies, determine compliance with the CWA and NEPA, NHPA and other relevant statutes. If the USACE finds reports insufficient, it will notify the applicant as to additional information and follow up reports needed. The USACE will prepare an EA with a Statement of Findings and/or an EIS with a Record of Decision.