

214 Federal Environmental Laws

Federal laws require government approval prior to beginning any work in or over “Waters of the United States” that affects the course, location, condition, or capacity of such waters, or prior to discharging dredged or fill material into U.S. waters. Regulatory programs that implement these laws are administered through permits issued by the U.S. Army Corps of Engineers (USACE), which shares responsibility with the United States Environmental Protection Agency (U.S. EPA), under the authority of the Clean Water Act and the Rivers and Harbors Act.

The Corps’ regulatory process involves two (2) types of permits:

- Section 404 of the Clean Water Act; and
- Section 10 of the Rivers and Harbors Act of 1899.

Under Section 404, permits are required for discharges of dredged or fill material into waters of the United States. Under Section 10, permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States.

Nationwide permits, or general permits, are issued for five-year periods. They were most recently reissued in total on March 19, 2012. In March 2017 the number and reach of these permits will be reevaluated and reissued. General permits allow the agency or landowner applying for the permit to proceed with the covered activity without having to obtain an individual, site-specific permit in advance. When a project does not qualify for a nationwide permit, the permittee must apply for an individual permit which is subject to public notice, public hearing, and case-by-case evaluation. In some cases, if the city, county, state, or development district mandates more stringent regulations on development, USACE will defer to that particular agency. The 2012 Nationwide Permits, Conditions, Further Information, and Definitions are included in this section.

214.1 Section 404 of the Clean Water Act: In carrying out the functions relating to the discharge of dredged or fill material under Section 404, the Secretary (of the USACE) may, after notice and opportunity for public hearing, issue general permits on a state, regional, or nationwide base for any category of activities involving discharges of dredged or fill material if the Secretary determines:

- That the activities in such category are similar in nature,
- Will cause only minimal adverse environmental effects when performed separately, and
- Will have only minimal cumulative adverse effect of the environment.

214.2 Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403): Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403) states *“that the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommend by the Chief of Engineers and authorized by the Secretary of Army; and it shall not be lawful to excavated or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been*

recommended by the Chief of Engineers and authorized by the Secretary of Army prior to beginning the same.”

“Waters of the United States” include:

- All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters including interstate wetlands;
- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds), the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce; All impoundments of waters otherwise defined as waters of the U.S. under the definition;
- Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- The territorial seas;
- Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6).

214. 3 Jurisdictional Determination (JD) and/or Delineation: A jurisdictional determination (JD) is the process of identifying and locating jurisdictional waters of the United States (including wetlands) regulated by the Corps under Section 404 of the Clean Water Act. The JD process establishes a line that identifies the Corps-regulated wetland or stream areas from non-wetland (upland) or non-stream areas that are not regulated by the Corps. Jointly, the Corps and the U.S. Environmental Protection Agency must approve any JD in order for it to be considered valid for CWA Section 404 purposes. No other Federal, State, or local agency or private entity has this authority. It is important that an agency or a consultant working on behalf of an agency consult the Corps District Office. Kentucky is divided between three (3) Corps Districts: **Louisville** and **Nashville** of the Great Lakes and Ohio River Division; and **Memphis** of the Mississippi Valley Division.

214. 4 Section 9 of the Rivers and Harbors Act of 1899 (33 USC 401): Section 9 of the Rivers and Harbors Act of 1899 (33 USC 401) states *“that it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or any other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of Army: Provided that such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: And provided further, that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of Army;*

it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of Army.”

Navigable waters of the United States are those waters that are subject to the ebb & flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies literally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.

214. 5 Wetlands: Wetlands located on the property require proper identification and delineation of their boundaries. This will determine the extent of the mitigation and/or permitting process.

Wetlands are transitional areas between upland and deepwater aquatic systems. Wetlands come in all shapes and sizes and go by names such as marshes, swamps, scrub-shrubs, bottomlands, oxbows, or sloughs. The regulatory definition of wetlands is “land that has a predominance of hydric soils, and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions” [40 CFR 230.3(t)]. Wetlands are not limited to those shown on National Wetland Inventory mapping. All aquatic features within a project site require confirmation of their jurisdictional status by the Army Corps of Engineers. A qualified professional Geologist or Engineer should examine the site for wetlands, delineate wetland boundaries, and prepare a Jurisdictional Determination for concurrence by the USACE.

All wetlands have three things in common:

- One indicator used to identify a wetlands is a soil that is at least periodically saturated or ponded and exhibits certain water-loving plants.
- Two other indicators must be present to identify wetlands:
 - Hydric soil and
 - Hydrology.

The U.S. Army Corps of Engineers is responsible for jurisdictional wetland determinations in Kentucky. Section 404 of the Clean Water Act requires that applicants who propose projects that will result in the loss of jurisdictional wetlands must demonstrate that the project 1) avoids impact to wetlands where practical, 2) minimizes the impacts to those wetlands that cannot be avoided, and 3) mitigates for the loss of any jurisdictional wetlands.

See Section 216 Wetlands for additional information.