

# INSTRUCTIONAL MEMORANDUMS

## To Local Public Agencies



To: Counties and Cities	Date: May 20, 2019
From: Local Systems Bureau	I.M. No. 4.130
Subject: 404 Permit Process	

**Contents:** This Instructional Memorandum (I.M.) includes guidelines and procedures for a Local Public Agency (LPA) to understand and comply with the requirements of Section 404 of the Clean Water Act, as it applies to all transportation projects. This I.M. also includes the following attachments:

- [Attachment A](#) - 404 Permit Determination Process Flowchart
- [Attachment B](#) - 404 Permit Checklist
- [Attachment C](#) - Commonly Used NWP's for Transportation Projects

### Acronyms

- EPA – Environmental Protection Agency
- Iowa DNR - Iowa Department of Natural Resources
- IP - Individual Permit
- NPDES - National Pollutant Discharge Elimination System
- NRCS – Natural Resources Conservation Service
- NWP - Nationwide Permit
- OHWM - Ordinary High Water Mark
- OIW - Outstanding Iowa Waters
- PCN – Pre-Construction Notification
- WUS - Waters of the United States

### Definitions

**Discharges of Dredged or Fill Material** – Generally, this includes, but is not limited to: placement of dredge or fill that is necessary for the construction of any structure or infrastructure (including formed or pre-formed cast culverts and aprons); the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, concrete, flowable mortar, or other material for its construction; causeways or road fills; dams and dikes; artificial islands; riprap, groins, weirs, spur-dikes, breakwaters, and revetments; and levees. These terms are defined more precisely in Title 33 of the Code of Federal Regulations (CFR), Part 323, Section 323.2 (33 CFR 323.2).

***Navigable Waters*** – Generally, those waters that 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 laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity. This term is defined more precisely at 33 CFR Part 329. In Iowa, the following rivers are considered navigable waters: Mississippi River (throughout Iowa), Missouri River (throughout Iowa), Des Moines River (from its confluence with the Mississippi River in Lee County to mile 315.0 at Fort Dodge), and Iowa River (from its confluence with the Mississippi River in Louisa County, to mile 3.0 near Toolesboro).

***Ordinary High-Water Mark*** - That line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. This term is defined in 33 CFR 328.3.

***Special Aquatic Sites*** – These are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. Special aquatic sites include wetlands, sanctuaries and refuges, mud flats, vegetated shallows, and riffle and pool complexes. These sites are defined more precisely in Title 40 CFR, Part 230, Subpart E.

*Waters of the United States* – Generally, this includes all waters, impoundments of waters, or tributaries of waters, such as lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, or natural ponds. This term is defined in 33 CFR 328.3.

*Wetlands* – Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas as defined in 33 CFR 328.3(b).

## Introduction

Discharges of dredged or fill material into waters of the United States are regulated under the Clean Water Act, now codified at Title 33, United States Code, Section 1344 (33 U.S.C. 1344). This law and its associated regulations are administered by the United States Army Corps of Engineers (Corps), the United States Environmental Protection Agency (EPA), and the Iowa Department of Natural Resources (Iowa DNR).

The goal of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. While there are many different sections of this law pertaining to clean water, there are two sections that significantly affect transportation projects. Section 404 and Section 401 require the Corps and the Iowa DNR, respectively, to issue permits for certain activities that affect the waters of the United States. In Iowa, the permitting required under both Section 404 and Section 401 has been merged into one process, allowing for joint application and approval of these permits. The joint application is also used to obtain Iowa DNR Flood Plain and Sovereign Lands permits. In general, a [Joint Application Form](#) does not need to be sent to the Iowa DNR if a PCN is not needed. However, a [Joint Application Form](#) must still be submitted to the Iowa DNR when the project is impacting an [Outstanding Iowa Waters](#), or if a Floodplain or Sovereign Lands permit is needed. Refer to [I.M. 4.150](#), Iowa DNR Floodplain Permits and Regulations or [I.M. 3.500](#), Bridge or Culvert Plans, for more information regarding these two types of permits.

## What types of projects may require a Permit?

A Section 404 permit will be required before placing any dredged or fill material into waters of the United States. Therefore, projects that involve placement of dredged or fill materials in or near any waters of the United States should be reviewed to determine if a permit will be required or what type of permit will be required. Projects that should be reviewed typically involve activities such as the following:

- Grading
- Borrow areas
- Culvert extensions
- Bridge or culvert replacements
- Temporary fills or crossings
- Cofferdams and work pads
- Bank stabilization or channel realignment

Any project that requires additional property rights or involves any work in or near an aquatic resource, such as a lake, river/stream, or wetland, shall be reviewed for compliance with Section 404.

## Wetland Considerations

Since wetlands are, by definition, part of the of waters of the United States and therefore protected under the Section 404 laws and regulations, it is critical to understand what wetlands are, how they are identified, and how impacts to wetlands must be addressed. Each of these topics are briefly addressed below.

### What are Wetlands?

The regulatory definition of wetlands is provided in the Definitions section above. A key consideration is whether or not saturated (hydric) soils are present at some point during the growing season. Examples of wetland areas include, but are not limited to:

1. Timbered or non-timbered floodplain
2. Potholes/depressed areas
3. Grassed waterways

4. Farmed wetlands
5. Fringe wetlands (associated with streams, rivers, lakes, hillside seeps, etc.)
6. Wet meadows

Note: Certain water bodies or features may be excluded under the definition of “waters of the U.S.” Refer to 40 CFR Part 230, Section 230.3, paragraph (o) (2) for a list and description of these excluded areas.

#### How are Wetlands Identified?

Wetland determinations in areas of where vegetation, soils, and hydrology are relatively undisturbed and/or identifiable shall be done in accordance with the methodology outlined in the [1987 Corps of Engineers Wetlands Delineation Manual and its Midwest Regional Supplement](#).

Wetland determinations in agricultural lands where natural vegetation has been removed shall be done in accordance with the Food Security Act of 1985 (FSA) wetland mapping conventions. These mapping conventions rely on the interpretation of aerial photography and weather data, in conjunction with other inventories like county soil surveys and the National Wetland Inventory (NWI).

Trained wetland professionals should be utilized to conduct wetland investigations. Assistance may be available from Corps regulatory staff or through environmental consultants. A list of environmental consultants that may be able to provide these services may be obtained from the Corps (see Contact Information section below). However, inclusion on this list is neither an endorsement nor a recommendation by either the Corps or the Iowa DOT.

Note: The Corps will make the final determination of which wetlands are regulated and what type of permit is required. When in doubt, contact the Corps as early as possible to avoid delays later.

#### How are Jurisdictional Streams Identified?

Generally, jurisdictional streams include rivers, streams, creeks, drainage ditches, and ravines that exhibit a defined streambed and stream banks, an ordinary high water mark (OHWM), and deposited sediment (i.e. sand or mud bars). The most reliable way to determine if a stream will be regulated by the Corps is to establish whether or not the stream has an OHWM. To make an OHWM determination, one should generally rely on physical indicators to ascertain whether a OHWM exists, such as the presence of a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. In addition, one can use other methods for estimating the line on the shore established by the fluctuations of water, including, but not limited to, lake and stream gage data, flood predictions, historic records of water flow, and statistical evidence. Guidance for identifying an OHWM can be found in the [Corps Regulatory Guidance Letter No. 05-05](#) (RGL No. 05-05).

#### How Should Impacts to Wetlands and Streams be Mitigated?

Since protecting waters of the U.S. is one of the primary purposes of Section 404, mitigation of impacts to wetlands and streams is a key consideration in the Section 404 permit process. A wetland or stream is “impacted” if there is a temporary or permanent adverse effect by filling, flooding, excavating, or draining the wetland and/or stream. If permanent impacts to waters of the U.S. exceed 0.1 acres, mitigation will be required. Impacts of 0.1 acres or less may or may not require mitigation.

The term “mitigation” means more than simply “compensation” in the Federal regulations and it is more specific than the dictionary definition, “to make less severe.” Rather, the Section 404 regulations require an analysis of alternatives (referred to as 404(b)(1) guidelines) and mitigation actions must be considered in a specific sequence of steps:

1. Avoidance: Before the Corps will issue a 404 permit, the LPA must demonstrate that every effort has been made to first avoid any impacts, both temporary and permanent, to the maximum extent practicable.

2. **Minimization:** If impacts are unavoidable, the LPA must demonstrate that impacts will be minimized as much as possible. Typically, impacts can be minimized by keeping channel shaping and road relocation to an absolute minimum.
3. **Compensation:** Finally, compensation at a minimum ratio of 1:1 (wetlands compensated to wetlands lost) may be required. The Iowa DOT recommends providing compensatory mitigation for emergent wetlands at a 1.5:1 ratio, and for forested wetlands at a 2:1 ratio. Compensation consists of creating or restoring wetlands to replace those that were lost because of the transportation project. Mitigation can include enhancement or preservation of existing wetlands; however, the ratios will be significantly greater and should be coordinated closely with the Corps beforehand. Compensation options include purchasing credits from a mitigation bank, contributing funds to a separate wetland project in-lieu of mitigation, permittee-responsible off-site mitigation within the watershed, or permittee-responsible on-site mitigation, or Stream mitigation may also be required.

Compensatory mitigation must be performed in accordance with the regulations published in the Federal Register dated April 10, 2008 under 33 CFR Parts 325 and 332 and 40 CFR Part 230 entitled "[Compensatory Mitigation for Losses of Aquatic Resources; Final Rule](#)". Please note that compensatory mitigation for streams must be performed in accordance with the [Iowa Stream Mitigation Method](#). The LPA may seek input from the resource and regulatory agencies before submitting their permit application to determine if their compensatory mitigation is adequate. The Corps and the Iowa DNR have the final authority to approve or disallow any proposed mitigation plan offered by the LPA.

### What Type of Permit is Required?

There are three basic types of Section 404 permits that may be used: Nationwide Permits, Regional Permits, and Individual Permits. The proposed project activities and their impacts to the waters of the United States will determine which type may be used. [Attachment A](#) to this I.M. illustrates a generalized process that may be used to determine which type of permit might be appropriate. Each type of permit is further described below.

**Note:** [Attachment A](#) to this I.M. should be used as a guide only. The Corps District Engineer will make the final determination regarding which type of permit is required on a case-by-case basis. Controversial projects, in particular, should be examined carefully. These should be submitted to the Corps regardless of the amount of impacts to waters of the United States.

#### Nationwide Permits

A Nationwide Permit (NWP) is a general type of permit and is intended to apply throughout the United States and its territories. There are many different types of NWPs, and each one allows a certain type of activity, subject to certain conditions and / or limits. To use one of the NWPs, there are also a number of other general and regional conditions which may also apply. The General Conditions for Nationwide Permits can be found in the [Fact Sheet No. 8\(IA\)](#) or in the Federal Register [82 Federal Register 4 (6 January 2017), pp. 1,860 – 2,008]. The Rock Island District of the U.S. Army Corps of Engineers has developed 13 [Iowa Regional Conditions for Nationwide Permits](#) for projects proposed within the state of Iowa. This is shown in [Attachment C](#) to this I.M. Therefore, if an NWP will be used, the LPA should thoroughly review the [Nationwide Permit General Conditions](#) and the Iowa Regional Conditions. Finally, in addition to the General and Regional Conditions, the Corps also has the authority to impose case-specific conditions on any project approved under an NWP.

In general, NWPs may be used for projects with relatively minor impacts to waters of the United States. Most NWPs limit the loss waters of the United States to less than 0.5 acres.

[Attachment C](#) to this I.M. summarizes the NWPs commonly used for transportation projects. This attachment also includes a description of the type of activity that may be approved, the applicable conditions and / or limits, and if a Pre-Construction Notification (PCN) is required.

**Note:** As [Attachment C](#) indicates, there are a few instances when a project could be authorized under a Nationwide Permit without notifying the Corps prior to construction. **The Iowa DOT strongly recommends the LPA read the terms and conditions of the Nationwide Permits as presented in the [Fact Sheet No. 8\(IA\)](#) to determine if and when a PCN is required.** In the absence of a permit that has been issued by the Corps, the [Fact Sheet No. 8\(IA\)](#) can serve as documentation of Section 404

compliance and should be kept in the project inspection files at all times during construction. If the LPA has questions about whether a PCN is needed, contact the Corps.

## Regional Permits

A Regional Permit is an intermediate type of permit between the NWP's described above and the Individual Permits described below. This type of permit is used when the conditions or limits of the NWP's are exceeded, but the level of impacts may not warrant the type of public involvement or review required for Individual Permits.

There are three different Regional Permits in Iowa. The one used for transportation projects is Regional Permit 7, Road Crossings. Typical conditions for approval under Regional Permit 7 include the following:

- Wetland impacts must be 1 acre or less.
- Compensatory wetland mitigation is required if the loss of wetland meets or exceeds 0.10 acre. The amount of mitigation required will be determined during review for authorization under this permit. Mitigation must be adequate to offset unavoidable impacts or losses to regulated waters of the United States, and should be done in accordance with the [2008 Mitigation Rule](#).
- Minor stream channel realignment and shaping is allowed within 500 feet upstream and downstream of the centerline of the roadway (measured on the centerline of the existing channel), with a maximum distance of existing channel length impacted not to exceed 500 feet.
- Banks will be stabilized with vegetation or rock, at no steeper than a 2:1 slope.
- Native grass filter strips 35 feet wide on either side of a waters of the U.S.

For more detailed information about the conditions and limitations of this permit, refer to [Regional Permit 7](#) provided by the Rock Island District of the Corps.

**Note:** The decision to approve a project under a Regional Permit is made at the discretion of the Corps District Engineer. LPAs seeking approval under a Regional Permit shall complete a Joint application and request the Corps to make this determination.

## Individual Permits

An Individual Permit (IP) is typically required for major projects with significant impacts to waters of the United States. This includes all projects that cannot be approved under a NWP or a Regional Permit.

Before granting this type of permit, the Corps will publish a public notice and subject the project to a rigorous public interest review among the resource agencies, interested parties, and the public at large. The Iowa DNR must also issue an individual 401 Water Quality Certification for the project. Like the Corps, the Iowa DNR conducts a public notice and public interest review. The public notice and review process typically requires a minimum of 30 days to complete.

Projects approved under an IP often require wetland and / or stream mitigation. A detailed mitigation plan must be submitted that includes documentation of the alternatives considered to avoid and minimize the impacts to wetlands and streams, and if they cannot be avoided, the type of compensatory mitigation that will be provided. Compensatory mitigation must follow the 2008 Mitigation Rule requirements.

## How are Permits Obtained?

[Attachment B](#) - Section 404 Permit Checklist, provides detailed instructions for preparing and submitting a PCN or IP application. Please note the Corps' review will not commence until all the requested information is received, so it is important to review this checklist carefully before submitting the PCN or IP application.

The PCN or IP application should be submitted to the Corps as soon as possible. Processing time for a NWP or Regional Permit is typically 30 to 60 calendar days from the Corps' receipt of the PCN or IP application. Processing time for an IP is typically 90-120 from the Corps' receipt of a complete IP application. Two copies of the IP application should be mailed to the Iowa DNR at the same time it is sent to the Corps.

Project activities may not begin until after verification has been received from the Corps (and for IPs, the Iowa DNR) that the proposed project has been approved under the terms and conditions of the appropriate permit.

The verification will consist of a letter that identifies the permit(s) that have been granted and any special conditions which must be met.

### **How do 404 Permits Affect the Project Plans and Letting Process?**

If a 404 permit is required, the plans shall indicate which 404 permit has been obtained. The plans shall also include the appropriate standard plans, details, specifications, and bid items to ensure the proposed construction will meet all of the terms and conditions of the applicable 404 permit, including any special conditions or restrictions specified by the Corps. For more specific information, refer to [I.M. 3.700](#), Check and Final Plans, and [Attachment B](#), Check and Final Plans Checklist.

Projects that typically require a 404 permit will not be submitted for letting through the Iowa DOT if the appropriate permit has not been obtained, unless documentation is provided to establish that either a 404 permit is not required or a Public Interest Finding has been approved, as per [I.M. 3.720](#), Public Interest Findings.

Additionally, if the project will involve Contractor Furnished Borrow of 50,000 cubic yards or greater, the Corps will place a condition on the 404 Permit. The Prime Contractor, after award of a contract, will be required to work with the Corps, per Iowa DOT Standard Specifications 1106.07 and 2102.03(F)(4), to get the borrow site approved by the Corps.

### **Additional Resources**

[U.S. Army Corps of Engineers - Rock Island District Regulatory Branch](#) Links to public notices concerning nationwide permits, permit application forms and instructions, frequently asked questions (FAQs), and a posting of recent public notices for upcoming projects in Iowa.

[U.S. Fish & Wildlife Service - National Wetlands Inventory](#) Contains information on the characteristics, extent, and status of the Nation's wetlands and deep water habitats. This site contains mapping information for most of the United States.

[United States Geological Survey - Iowa Water Science Center](#) Includes current and historic hydrologic data and various other reports and publications.

[Iowa Department of Natural Resources](#) Home page for the Iowa DNR.

[Iowa Department of Natural Resources - Natural Resources Geographic Information System \(NRGIS\) Library](#) A collection of more than 1000 geographically referenced databases that are available to local agencies through a file transfer protocol (ftp) server.

[Society of Wetland Scientists](#) A non-profit organization founded in 1980 to promote wetland science and the exchange of information related to wetlands.

[National Association of State Wetland Managers](#) This nonprofit membership organization established in 1983 to promote and enhance protection and management of wetland resources, to promote application of sound science to wetland management efforts and to provide training and education for our members and the public.

[U.S. Environmental Protection Agency – Wetlands, Oceans, and Watersheds](#) Links to laws, regulations, executive orders, guidance, and scientific documents related to wetlands.

### **Contact Information**

Corps

The [Rock Island District](#) of the Corps has jurisdiction over most of the State of Iowa; however, for projects involving the Missouri River levee system or located in areas between the levees and the Missouri River, contact the [Omaha District](#) of the Corps.

U.S. Army Corps of Engineers, Rock Island District  
Attn: Regulatory Branch  
Clock Tower Building - PO Box 2004  
Rock Island, IL 61204-2004  
309-794-5370

U.S. Army Corps of Engineers, Omaha District  
Wehrspann Regulatory Office  
8901 South 154<sup>th</sup> Street  
Omaha, NE 68138-3635  
402-896-0896

#### Iowa DNR

For projects that will use an NWP without a PCN, the Iowa DNR does not need to be contacted, unless its Section 401 Water Quality Certification conditions for the NWP program are not met or impacts to waters of the United States will occur within the watershed of an [Outstanding Iowa Waters \(OIW\)](#). For projects that will use an IP, the Iowa DNR shall always be contacted regarding individual Section 401 Water Quality Certifications. In general, a [Joint Application Form](#) does not need to be sent to the Iowa DNR if a PCN is not needed. However, a [Joint Application Form](#) must still be submitted to the Iowa DNR when the project is impacting an [Outstanding Iowa Waters](#), or if a Floodplain or Sovereign Lands permit is needed. Refer to [I.M. 4.150](#), Iowa DNR Floodplain Permits and Regulations or [I.M. 3.500](#), Bridge or Culvert Plans, for more information regarding these two types of permits.

Iowa Department of Natural Resources  
Attn: Water Quality Monitoring & Assessment Section  
Wallace State Office Building  
502 E. 9th Street  
Des Moines, IA 50319-0034  
515-725-8399

#### Iowa DOT

Iowa Department of Transportation  
Water Resources Section  
800 Lincoln Way  
Ames, IA 50010  
(515) 239-1225