

insights

TYPES NOT MAPPED YET September 12, 2016 | TTR not mapped yet | Peter Stark Strassner, Paul T. Sonderegger, Sara L. Chamberlain

Do you need a Section 404 permit for your real estate development?

Real estate developers recognize the importance of obtaining a Phase I environmental site assessment to review existing environmental site conditions. However, other conditions – creeks, streams, ditches or other water features – can too often be overlooked. Absent proper planning, such features may lead to major delays and cost overruns, not to mention civil and criminal penalties.

Under the Clean Water Act, a party must obtain a Section 404 permit from the Army Corps of Engineers before discharging any dredged or fill material into “waters of the United States.” This typically means that a permit must be obtained before construction or other work is performed in those areas, together with a water quality certification.

The term “waters of the United States” has been broadly interpreted to include traditional waters such as tributaries, lakes, rivers, streams, creeks, and wetlands, and more minor features such as prairie potholes, natural ponds, wet meadows and even ditches. In fact, an area can be classified as a water of the United States even if it does not hold water during most periods of the year. The rule defining “waters of the United States” has been repeatedly challenged, and the EPA and appellate courts have struggled to recognize and uphold a bright line rule.

When deciding whether to purchase or develop property, it is important to examine whether a water of the United States may be present in the project area. An assessment should be undertaken to determine whether a Section 404 permit will be needed and can be obtained.

Is a Section 404 permit required?

A Section 404 permit is required if the proposed activity will involve a jurisdictional act (dredging or filling) in a jurisdictional area (a water of the United States). Examples of dredging activities include excavation, clearing of vegetation and the removal of trash. Fill activities may include the placement of fill material to build structures, roads or causeways, the construction of levees, or the installation of shore protection such as riprap or seawalls.

Signs that ‘waters of the United States’ may be present in the project area

Although far from exhaustive, a “water of the United States” is generally present when:

- The area is prone to standing water
- The area is located in a low-lying area that holds water for several days after a heavy rain
- The water table is not far below the surface
- There is a thick layer of organic matter in the upper part of the soil column
- The area is located near or adjacent to a river, stream, creek, swamp or bayou
- Plants in the area are different from those in higher-elevation areas nearby
- Aquatic plants are present
- Water marks are visible on trees or other objects

A jurisdictional determination (JD) indicating whether waters of the United States are present – and their approximate locations/boundaries – can be obtained from the Corps. A nonbinding preliminary JD will indicate whether waters of the U.S. are present on the parcel and may indicate the approximate locations of any such waters. An approved JD is an official Corps determination that jurisdictional waters are either present or absent in the specified review area and these JDs are valid for a five (5) year period.

Section 404 permitting

Two types of Section 404 permits are available – general permits and individual permits. General permits, also known as Nationwide or Regional permits, are more simplistic. These permits are designed to cover categories of similar activities that are generally minor in scope. In many cases, no permit application or other notification to the Corps is required. If a project is covered by a Nationwide or Regional permit, work may begin without having to contact the local Corps office in some instances (depending on the terms of that permit). ([Additional information on the pre-construction notification process.](#))

If the proposed activity is not covered by a Nationwide or Regional permit, an application for an individual permit must be submitted. To be eligible, the proposed activity must be feasible and the least environmentally damaging alternative; impacts must be avoided, minimized, or compensated for (often through the use of compensatory programs such as mitigation banks or in-lieu fee programs); and the activity must not be contrary to the public interest. The process for obtaining an individual permit may take 60-180 days or more and is costly.

Failure to obtain or comply with a Section 404 permit

A party that proceeds with construction without a required Section 404 permit or violates the terms of a permit may face civil and criminal penalties. The Corps and EPA also may seek an injunction to halt the project or make the developer restore the real estate to its natural condition.

Pre-acquisition considerations

Prior to acquiring a property, the physical and environmental conditions of the site, including the potential presence of waters of the United States, should be considered. During due diligence, a prospective purchaser may consider conducting a wetlands study and should request from the seller documentation regarding any jurisdictional determinations issued for the site. The proposed purchaser also should consider making the closing conditional on regulatory approval of the project or upon the issuance of a Section 404 permit.

Recognizing the potential obstacles for developing a property that contains a water of the United States can help to inform the design and scope of the project, the estimated timeline for and cost of the project, and an appropriate purchase price. Perhaps most importantly, an evaluation allows the purchaser the opportunity to design alternatives that avoid impacting jurisdictional waters.

If you have questions concerning regarding Section 404 permitting, please contact [Peter Strassner](#), [Paul Sonderegger](#) or [Sara Chamberlain](#) in Thompson Coburn's [Environmental practice area](#).

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