

Wetlands Permitting Under Federal Law

by William J. Squires III

Many of you may be familiar with your home state's requirements for wetlands permitting, but you may not be as familiar with federal requirements. Section 404 of the Clean Water Act requires a federal permit for the discharge of dredged or fill material into waters of the United States. The Army Corps of Engineers (the Corps) issues so-called Section 404 permits subject to oversight by the U.S. Environmental Protection Agency. The Corps has broadly defined the term "waters of the United States" in its regulations and, as a result, its jurisdiction under Section 404 has been quite expansive, extending from interstate waters and wetlands adjacent to such waters to virtually all isolated wetlands. In recent years, federal courts have increasingly addressed and, in some cases, limited the Corps' jurisdiction under Section 404 after a landmark decision by the U.S. Supreme Court in 2001 limited the Corps' jurisdiction over certain isolated wetlands. Nevertheless, the Corps continues to retain broad jurisdiction to regulate the discharge of dredged or fill materials under Section 404 of the Clean Water Act.

There are essentially two types of Section 404 permits: general permits and individual permits. To streamline Section 404 permitting for certain activities, the Corps has issued nationwide permits for 49 categories of activities that are deemed to have "minimal individual and cumulative adverse effects on

the aquatic environment..." (the Corps added six of these categories, effective March 19, 2007). If a proposed development that is subject to Section 404 jurisdiction falls within one of these 49 categories, the project proponent need not apply for a Section 404 permit so long as the development complies with the general conditions of the nationwide permit. In some parts of the U.S., division or district engineers of the Corps issue regional or programmatic general permits instead of nationwide permits.

If a proposed development is subject to Section 404 jurisdiction and does not fall within any of the aforementioned general permit categories, the project proponent must apply to the Corps for an individual permit. The application process for an individual permit under Section 404 can be lengthy, costly and cumbersome and, in some cases, may involve one or more public hearings. Project proponents often benefit from careful planning in the development process to determine whether modifications can be made to minimize the impact to federal wetlands and potentially avoid the need for an individual permit. If an individual permit is needed, however, the project proponent should apply early and consult its attorneys and environmental consultants to carefully evaluate the timing, risks and cost associated with the application process. <

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