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Research Brief

TO: Representative Scott Kawasaki
FROM: Susan Haymes, Legislative Analyst
DATE: March 25, 2013
RE: Clean Water Act Section 404 Permits
LRS Report 13.328

You asked about Section 404 permits issued under the Clean Water Act by the U.S. Army of Corps of Engineers. Specifically, you wished to know how many Section 404 permit applications are pending in Alaska. Additionally, you wanted to know how Alaska's average permit processing time compares with the nationwide average.

Section 404 of the Clean Water Act (CWA) requires that, unless exempted, anyone discharging dredged or fill material in navigable waters of the United States must obtain a permit from the U.S. Army Corps of Engineers (Corps).¹ Under the Section 404 program, the Corps issues three types of permits—*general*, *individual (standard)*, and *letters of permission*. Briefly, *general* permits cover projects that will have a minimal impact on the environment, *individual* permits are issued for projects that are likely to have more than a minimal impact, and *letters of permission* are a type of individual permit that can be granted on an expedited timeline under certain conditions.

According to Corps Field Office Manager Dave Casey, the Alaska District Corps office processed 1,100 Section 404 permits in Fiscal Year (FY) 2012. Of those applications, 62 percent were for general permits and 37 percent were for individual permits. Only two permits were denied in FY 2012. The Alaska District Corps processed 84 percent of the general applications in less than 60 days, which meets the national standard for processing general permits. For individual applications received, the Corps processed 67 percent in less than 120 days, which exceeds the national standard of 50 percent.

Currently, 44 applications, including 37 individual permit applications and seven letters of permission are pending before the Alaska District Corps. Thirty of the 44 applications (24 individual applications and six letters of permission) were submitted to the Alaska District Corp office during the last six months, with 16 submitted during the last three months.² More complex projects that require multiple permits from federal, state, and local agencies often require longer processing times. For example, processing individual applications that require Environmental Impact Statements (EIS) under the National Environmental Policy Act (NEPA) can take up to three years.

Types of Section 404 Permits

Generally, Section 404 permit applicants must demonstrate that the discharge of dredged or fill material will not significantly degrade the affected waters and that there are no practicable alternatives less damaging to the environment. If wetlands are impacted, the applicant must describe how the project will mitigate any adverse impacts on wetlands by first avoiding and

¹ The Clean Water Act prohibits the discharge of "any pollutant" into waters of the United States unless it is authorized by a permit. The Section 404 program issues permits for the discharge of dredged and fill materials; other sections address the discharge of other pollutants and water quality certification. Under Section 404(b)(1), the Environmental Protection Agency and the Corps have developed guidelines the Corps uses in the Section 404 permit process. "Waters of the U.S." includes essentially all surface waters such as all navigable waters and their tributaries, all interstate waters and their tributaries, all wetlands adjacent to these waters, and all impoundments of these waters (Public Law 95-217; 33 U.S.C. 1344 et seq.).

² A list of pending permits can be accessed at http://geo.usace.army.mil/egis/f?p=340:6:549017154732601:pg_R_55421424929599712:NO&pg_min_row=1&pg_max_rows=30&pg_rows_fetched=14.

then minimizing such impacts. In the event that adverse impacts are unavoidable, the applicant must include a statement explaining the mechanism that will be used to compensate for the impact.

General Permits

The Corps may issue *general* permits to authorize categories of very similar activities that are minor in scope with minimal projected impacts (Section 404[e]). General permits are meant to reduce the paperwork and time required to start projects that will have minimal adverse impacts on the environment. The Corps issues three types of general permits: *regional*, *nationwide*, and *programmatic*. The Alaska District Corps issues only *regional* and *nationwide* permits.³

The Alaska District Corps has authorized approximately 16 *regional general permits* that allow specific activities either statewide or for certain regions in Alaska.⁴ For example, one regional permit authorizes the placement of dredged and/or fill material into a total of 7.55 acres of wetlands associated with wetland development in the Wrangell Industrial Park Subdivision, while another permit authorizes the placement of dredged or fill materials by placer mining operators throughout the state, when the disturbance area is ten acres or less and the stream diversion is less than 2,000 feet. Each regional permit has certain terms and conditions that must be followed and most require written verification from the Corps before work can begin on the project. Regional general permits are issued for five years but can be reissued by the Alaska District office.

Through the federal rulemaking process, the U.S. Corps has adopted 50 types of *nationwide permits*, authorizing such activities as bank stabilization, residential development, commercial and industrial developments, utility lines, mining, boat ramps, and aids to navigation.⁵ Each permit has specific requirements and impact limits. In addition, each Corps district may attach special conditions to the nationwide permit. Thus, work performed under a nationwide permit must meet all applicable terms and conditions, including the regional conditions specific to Alaska.⁶ Of the 50 permits, 21 require the applicant to submit a pre-construction notification (PCN) to the District Corps Office, which provides the Corps with an opportunity to confirm whether or not the proposed activities qualify for a nationwide permit. If the proposed project qualifies, the District Engineer issues a verification letter that may contain special conditions. Seventeen of the 50 nationwide permit types do not require a PCN, while 12 require a PCN under certain conditions. The nationwide permits that do not require a PCN may be used to authorize a project without notifying the Corps.⁷

According to Mr. Casey, of the 1,100 applications received in FY 2012, 62 percent or 682 applications were general permits.⁸ The Corps processed 84 percent of these applications in fewer than 60 days from receipt of the completed application. Mr. Casey notes that this percentage meets the national standard for processing general permits.

³ Programmatic general permits can be issued to avoid duplication of permits for state, local, or other federal agency programs. For example, if a state or local government has a requirement that is at least as stringent as the Corps requirement, the applicant does not need to obtain a general permit from the Corps. The state or local standard must regulate the same activity in the same way as the federal requirement to qualify as a programmatic general permit. Currently, Alaska does not have any standards that meet these criteria.

⁴ A list of current Alaska District Regional General Permits can be accessed at www.poa.usace.army.mil/Missions/Regulatory/Permits/RegionalGeneralPermits.aspx.

⁵ The CWA requires the Corps to reissue nationwide permits every five years. The current list of nationwide permits became effective on March 19, 2012. The 50 nationwide permit types can be viewed at www.poa.usace.army.mil/Portals/34/docs/regulatory/Summary_Table_2012%20NWWPs_14%20Feb%202012.pdf.

⁶ Alaska's regional conditions can be accessed at www.poa.usace.army.mil/Portals/34/docs/regulatory/Final%202012%20NWP%20Regional%20Conditions.pdf

⁷ In this situation, the individual may still request conformation from the Corps that the activity complies with the terms and conditions of the permit. The Corps recommends that even if confirmation is not sought, the individual should document the reasons why the project is authorized under the nationwide permit.

⁸ Dave Casey, Kenai Field Office Manager for the Alaska District Corps can be reached at 907.283.3519.

Individual (Standard) Permits

If a project does not meet the requirements of a general permit, an *individual* permit is needed. *Individual* permits require public review of the proposed project. The application process for an individual permit typically includes

- optional pre-application consultation that provides the applicant the opportunity to address concerns prior to submission of the application;
- submission of the application;
- issuance of the public notice to all known interested persons, as well as to Federal, state and local agencies;
- public comment period, usually lasting 30 days;
- review of the public comments, during which the Corps may request additional information from the applicant;
- Corps application evaluation and decision; and the
- appeals process.

Some projects may require permits from other federal or state agencies, which must be secured during this time as well. The Corps will issue a permit if the proposed project is not contrary to the public interest and satisfies Section 404(b)(1) guideline requirements. Mr. Casey reports that in FY 2012, of the 407 individual applications received, 67 percent were processed in less than 120 days, which exceeds the national standard of 50 percent.

Letters of Permission (LOPs)

A *letter of permission* (LOP) is an expedited process for an individual permit that includes coordination with federal and state fish and wildlife agencies and a public interest evaluation, but does not require public notice.⁹ Letters of permission can only be issued in situations where the District Engineer has previously approved similar activities in coordination with state and federal agencies, and the project's proposed work is minor and does not have significant impacts on the environment. A decision on an LOP is usually made within 45 days. Letters of permission are issued in letter form and identify the permittee, project location, work authorized, time limits, and any project-specific limitations or special conditions.

We hope this is helpful. If you have questions or need additional information, please let us know.

⁹ Typically, adjacent property owners who might be affected are also notified.