

KEY ISSUE: Clean Water Act - 404 Permitting

Section 404 of the Clean Water Act (CWA) grants the U.S. Army Corps of Engineers (USACE), in coordination with the Environmental Protection Agency (EPA), the authority to issue permits for the discharge of dredged or fill material into Waters of the United States (WOTUS) (referred to as a “404 Permit”). To obtain a 404 permit, the CWA requires extensive evaluation of the environmental impacts of the project and project alternatives, any violation of environmental laws, potential degradation of WOTUS, and an applicant’s attempts to minimize adverse project impacts. The CWA also requires compensatory mitigation to fully compensate for unavoidable adverse impacts to WOTUS. Examples of mitigation include wetland mitigation banks, in-lieu of fee programs, and permittee-responsible mitigation. EPA has veto authority to prohibit, restrict, or deny a 404 permit.

Lengthy permit timelines increase costs and delay projects. Unfortunately, the unchecked application of substantive requirements for 404 permitting, combined with EPA’s authority to veto 404 permits, often results in a permitting timeline of 10 years or more. This lengthy timeline causes unnecessary expenditures by applicants and significantly delays the timely construction of water supply projects necessary to meet community needs. The permitting process is further delayed by the inefficient and costly process of determining compensatory mitigation requirements. Mitigation requirements are frequently more punitive than necessary to compensate for impacts to WOTUS.

Broad veto authority allows for abusive and discretionary decision making. EPA has used its veto authority both before a 404 permit application has been filed (i.e., a “preemptive veto”) and after a permit has already been issued (i.e., a “retroactive veto”). A veto eliminates any possibility for the applicant, USACE, EPA, and other project partners to come to a collaborative project solution that could meet local needs and adhere to permitting standards. Issuing a veto after a project has been fully vetted is both costly and time consuming. The unchecked ability of EPA to veto a 404 permit is an overreaching authority that serves no legitimate purpose and should be repealed. The 404 permitting requirements already provide sufficient opportunities to ensure

Section 404
permitting
timelines can
exceed 10 years.

that WOTUS are adequately protected. EPA’s veto authority only serves to kill projects, often due to political opposition to the project.

Opportunities to streamline 404 permitting.

Consistent with recent efforts to improve the efficiency of the National Environmental Policy Act implementing regulations (“NEPA rulemaking”), the 404 permitting guidelines should be revised to ensure that critical infrastructure projects, like water supply reservoirs, can be permitted within a reasonable timeframe to ensure projects are available in time to meet critical water supply needs.

TWCA recommends the following strategies to streamline the 404 permitting process.

1) Reliance on applicant-provided information.

Like with the NEPA rulemaking, USACE and EPA should provide more deference to 404 permit applicants by using information prepared by applicants to comply with permitting requirements, such as information associated with project purpose, alternatives, and impact assessment. USACE and EPA would still verify the information provided.

2) Use of existing data. When existing, accurate, and reliable information is available to support a 404 permit application, it should be used to increase efficiency in the permitting process. Reputable Texas state agencies, like the Texas Water Development Board, can provide valuable information to support 404 permit applications. The use of existing information is also immensely important in reducing the expense required for and timely processing of applications. Forcing a new study that is no more accurate nor defensible than work already completed in accordance with

standards established by NEPA and CWA is an expensive and redundant waste of time. This effort is also incorporated into the NEPA rulemaking.

3) Mitigation to offset actual adverse impacts.

Existing compensatory mitigation requirements should be revised to only require mitigation necessary to offset actual unavoidable adverse impacts. Applicants should also be allowed to use the benefits of a project to offset adverse impacts. For example, the development of shoreline wetlands along a reservoir should be considered compensation for other wetland impacts. Mitigation should be viewed holistically and not focused narrowly. Moreover, given that limited options for mitigation exist in some project areas, regulations should be revised to allow the purchase of credits at a mitigation bank even if the project is outside of the mitigation bank service area.

REQUESTS:

Revise the Section 404 permitting regulations and mitigation requirements. TWCA supports revising 404 permitting regulations to be consistent with the proposed revisions to the NEPA implementing regulations. TWCA also supports revising compensatory mitigation requirements for all types of aquatic resources similar to those established in the 2018 Memorandum of Agreement between USACE and EPA concerning wetlands mitigation in Alaska.

Eliminate EPA’s “veto authority” for 404 permits associated with water supply projects.

