# Section 404 Permitting/Clean Water Act: John Metrailer, P.E., (Pollution Management, Inc.) Univ. of Ark. at Little Rock Law School Environmental Law Presentation

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03/15/2022

John Metrailer, P.E., undertook a presentation for the University of Arkansas at Little Rock School of Law Environmental Law Class titled:

*Section 404 Permitting United States Army Corps of Engineers ("Presentation")*

John is a Professional Engineer at Pollution Management, Inc., and focuses a great deal of his work on Clean Water Act Section 404 permitting and wetland delineations.

The Presentation addressed a number of issues associated with Section 404 of the Clean Water Act such as:

- What constitutes a jurisdictional activity
- Wetland delineation process
- Role of United States Corps of Engineers ("Corps")
- Role of United States Fish and Wildlife Service
- Wetland inventory
- Wetland mitigation
- Wetland criteria
- Jurisdictional stream types
- Nationwide permits
- Permit application submittals

Section 404 of the Clean Water Act requires that a permit be obtained from the Corps for certain activities in jurisdictional waters that meet the regulatory definition of a wetland. The program regulates the discharge of dredged or fills into such waters of the United States.

Activities in waters of the United States regulated pursuant to Section 404 might include for example:

- Fill for development
- Water resources projects (such as dams and levees)
- Infrastructure development
- Mining Projects

Section 404 requires a permit before dredged or fill material may be discharged. Certain exemptions are provided by statutory language for certain farming and forestry activities.

The Corps issues two types of Clean Water Act Section 404 permits. An individual permit authorizes specific activities on a case-by-case basis. In contrast, a nationwide permit ("NWP") is a general permit that provides standing permission for all activities that fit the description of the permit. Such permits provide for preauthorized permission for activities that conform to the standards of the NWP (certain NWPs do require some type of authorization from or notice to the Corps prior to starting work).

Unlike most federal environmental programs, few states have sought delegation of the Section 404 Clean Water Act permitting program. However, in the previous Arkansas General Assembly legislation was enacted that gave the Arkansas Department of Energy & Environment – Division of Environmental Quality ("DEQ") the authorization to potentially seek such delegation.

DEQ has set up an agency taskforce to determine whether delegation should be obtained.

John's Presentation first addressed the need to understand "What's on the Property." He noted the need for field determinations which are generally described as stream and wetland delineation.

The method to obtain such delineations would include either a private consulting firm or the Corps undertaking that task. The pros and cons of each were noted.

The process involved in a delineation was discussed, referencing:

- Aerial with Property Boundary
- U.S. Fish and Wildlife Service National Wetland Inventory
- U.S. Department of Agriculture Soils Map
- Land Resource Regions and Major Land Resource Areas

The Wetland Determination Data Form was examined along with the three wetland criteria that are necessary to determine jurisdiction which include:

- Wetland hydrology
- Hydrophytic vegetation
- Hydric soils

Each of these three criteria were addressed in some detail.

The discussion also included the types of potential jurisdictional streams:

- Perennial stream – having flowing water year-round during a typical year
- Intermittent stream – have flowing water during certain times of the year, when groundwater provides water for stream flow (may not have flowing water during dry periods)
- Ephemeral stream – have flowing water only during and for a short duration after precipitation in a typical year

Stream features were noted to include:

- Flow and sinuosity
- Defined bed and bank
- Riffle, run, pool complexes
- Sediment sorting
- Aquatic micro & macroinvertebrates
- Presence of fish, crayfish, frogs, etc.
- Nexus, or hydraulic connection to jurisdictional waters

The wetland and stream delineation tasks were discussed, which include:

- Site visit with maps
- GPS jurisdictional waters of the United States

- Collect upland and wetland data points
- Take photographs
- Develop report summarizing findings with map indicating locations of waters of the United States
- Deliver report to client and Corps requesting approved jurisdictional determination
- Permit applicant to develop site plan based on waters of the United States avoidance and minimization if applicable

The NWP and individual permit process was discussed including timelines and requirements.

The Corps districts with jurisdiction in Arkansas are noted to include:

- Little Rock District
- Memphis District
- Vicksburg District

The information that may be required by the Corps as part of the permit application process was discussed.

John also addressed additional permits that sometimes might be triggered by a project such as:

- Section 10 Permit – Corps permit affecting course, location, condition, or capacity of navigable waters
- Section 408 Permit – Corps permit affecting civil works projects (dams, levees, etc.)
- Flowage easement – Corps Real Estate Division for perpetual rights of flood zones
- DEQ short term activity authorization (STAA)
- FEMA floodplain development permit

The different types of wetland and stream mitigation that will be required are identified to include:

- On-site mitigation
- Wetland mitigation banks

Equally important, the process for determining the amount of mitigation required by a certain project was also addressed. This includes wetland restoration enhancement mitigation credit calculations along with stream restoration mitigation credit calculations.

Finally, John discussed a case study involving a Batesville project that addressed intermediate and ephemeral streams and jurisdictional wetlands.

A copy of the *Presentation* which includes photographs can be downloaded here.