Galveston District
Regulatory Program
Regulatory Program Goals

• Protect the Nation’s overall aquatic environment

• Make fair and reasonable decisions for the regulated public

• Continually enhance the efficiency of the program
Regulatory Program Purposes

- Protect Navigation
- Maintain the physical, chemical and biological integrity of the Nation's waters (Clean Water Act)
Laws that the Corps of Engineers Administers

- Rivers and Harbors Act (1899) – Section 10
Laws that the Corps of Engineers Administers

- Rivers and Harbors Act (1899) – Section 10
  - Regulates all work and/or structures placed in/or affecting navigable waters of the United States
What is Regulated?

Section 10 Rivers and Harbors Act

- Structures in Navigable Waters
  - Such as piers, docks, boathouses, pilings, oil rigs, pipelines, jetties, power transmission line, permanently moored vessel

- Work in Navigable Waters
  - Dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water
Laws that the Corps of Engineers Administers

- Rivers and Harbors Act (1899) – Section 10
  - Regulates all work and/or structures placed in/or affecting navigable waters of the United States

- Clean Water Act (1974) – Section 404
Laws that the Corps of Engineers Administers

- **Rivers and Harbors Act (1899) – Section 10**
  - Regulates all work and/or structures placed in/or affecting navigable waters of the United States

- **Clean Water Act (1974) – Section 404**
  - Regulates the discharge of dredged or fill material into waters of the United States, including adjacent wetlands.
What is Regulated?

Section 404 Clean Water Act

- Discharge of Dredged or Fill Material into waters of the U.S.
  - Such as road fills, poured concrete, backfill, beach nourishment, levees, breakwaters, rip-rap, dams, dikes, artificial islands, certain piling-supported structures, bulkheads, and boat ramps.
What is Regulated?
Section 404 Clean Water Act

• Definition of Fill Material (May 9, 2002)
  – The term fill material means material placed in waters of the United States where the material has the **effect** of:
    • {i} Replacing any portion of a water of the United States with dry land; or
    • {ii} Changing the bottom elevation of any portion of a water of the United States
Geographic Jurisdiction
Section 10 Rivers and Harbors Act

- all **navigable** waters of the U.S.
  - subject to ebb and flow of the daily tide
  - presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce

- extends seaward to include all ocean waters within a zone three nautical miles from the coast line (the "territorial seas")
Geographic Jurisdiction

Section 404 Clean Water Act

• “Navigable waters of the United States, including the territorial seas” plus…

• Their tributaries and adjacent wetlands and isolated waters where the use, degradation or destruction of such waters could affect interstate or foreign commerce.
Physical Extent of Jurisdiction

Corps of Engineers Regulatory Jurisdiction

Tidal Waters

- Section 404
  - High Tide Line
  - Mean High Water
  - Ground Water Line

- Section 10
  - Tideland
  - Coastal Wetlands

Fresh Waters

- Section 10
  - Ordinary High Water
  - Uplands

- Section 404
  - Fresh Water Wetlands

Section 103
- Ocean Discharge of Dredged Material
  - Typical examples of regulated activities
  - Ocean discharges of dredged material

Section 404
- Disposal of Dredged or Fill Material
  - All filling activities, utility lines, outfall structures, road crossings, beach nourishment, riprap, jetties, some excavation activities, etc.

Section 10
- All Structures and Work
  - Dredging, marinas, piers, wharves, floats, intake / outtake pipes, piling, bulkhead, ramps, fills, overland transmission lines, etc.

One Corps Serving The Army and the Nation
Physical Extent of Jurisdiction

EXTENT OF FLOOD PLAIN

ORDINARY HIGH WATER MARK

NORMAL WATER SURFACE

RIVER CHANNEL

ORDINARY HIGH WATER MARK

THE LINE ON THE SHORE ESTABLISHED BY THE FLUCTUATIONS OF WATER AND INDICATED BY CERTAIN PHYSICAL CHARACTERISTICS.
Definition of "Wetlands"

Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances, do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

— Jointly defined by USACE (Federal Register 1982) and EPA (Federal Register 1980)
What Makes A Wetland?

Water

Wetlands

Plants

Soils
Adjacent Vs. Isolated Wetlands

- Not all wetlands are subject to Corps jurisdiction. The U.S. Supreme Court ruled in 2001 in the S.W.A.N.C.C. case that the Corps could not take jurisdiction solely on the migratory bird rule.
- Wetlands must be Neighboring, Bordering, or Contiguous with a water of the United States.
- Rapanos v. United States
How Do I know if I Have Jurisdictional Waters?
How Do I Know If I Have Jurisdictional Waters?

Its simple, Just **Ask!!!!**

- Request in writing a Jurisdictional Determination from the Corps of Engineers.
- Usually take between 90 and 120 days
- Valid for 5 Years
- They are free
How Do I Know If I Have Jurisdictional Waters?

Send the request to:

U.S. Army Corps of Engineers
Attn: John Davidson
CESWG-PE-RC
P.O. Box 1229
Galveston, Texas 77553-1229
Delineations vs. Determinations

- A determination is qualitative in that it only provides an answer to the question of is there a jurisdictional area within the project area.
Jurisdictional Determinations and Waters of the U.S. Delineations

Delineations vs. Determinations

• A **determination** is qualitative in that it only provides an answer if there is a jurisdictional area within the project area.

• A **delineation** is quantitative in that it provides boundaries and acreage measurements for each individual type of water of the United States present in the project area.
Jurisdictional Determinations

What is the minimum necessary information required for the Corps to make a jurisdictional determination?
What is the minimum necessary information required for the Corps to make a jurisdictional determination?

- Letter requesting the Corps make a jurisdictional determination.
- A general area map showing location of the project area.
- Site specific map showing project boundaries.
- Property owners permission if the person requesting the JD is not the property owner.
General Location Map--Example

US Army Corps of Engineers
Site Specific Map Example
If you have wetland on your property what can you do with them?

- You can always leave them alone. Apply to the county to have your taxes adjusted.
- You can mow them, as long as you don’t disturb the surface of the soil.
- You can apply for a Department of the Army permit to fill them in.
Permit Evaluation
Types of Corps Regulatory Permits
Types of Permits

- Nationwide Permits (10, 404)
- Regional General Permits (10, 404)
- Letters of Permission (10 only)
- Individual Permits (10, 404)
**Types of Permits**

**Nationwide Permits (NWPs)**

- general permits issued on a nationwide basis to authorize minor activities
- used throughout the United States; established to reduce the regulatory reporting burden for specific activities that have no more than minimal impacts
- thresholds for the impacts and the types of activities established as national policy.
- Some activities authorized by NWPs require pre-construction notification (PCN); necessitated to ensure that activities authorized by these NWPs have minimal individual and cumulative adverse impacts.
Regional General Permits (GPs)

- type of general permit specific to the District; associated conditions are established by the District.
- Regional permits are issued by the District Engineer for a general category of activities when
  1. the activities are similar in nature and cause minimal environmental impact (both individually and cumulatively), and
  2. the regional permit reduces duplication of regulatory control by State and Federal agencies.
Types of Permits

Individual permits (IPs)

- generally reserved for projects with potential for substantial environmental impacts.
- requires a full public interest review, including public notices and coordination with involved agencies, interested parties and the general public.
- Another type of individual permit used for very minor impacts and in special circumstances is the Letter of Permission (LOP).
Additional Information that must be submitted to make a decision

Not required for application to be considered complete, but necessary to make final decision

- Wetland Delineation (in most cases)
- Alternatives (Alternative Analysis)
- Mitigation Plan
Tips That Will Help Smooth the Permit Process

Important Points

- Pre-Application Meetings (JEM)
- Delineations conducted and verified prior to permit submittal
- Good plan view and cross section drawings
- Alternatives—discussion of alternatives provided with the application
- Mitigation—avoidance, minimization and then compensatory mitigation—Provide with the application
Compliance and Enforcement Activities Fall Into Two Main Groups
Compliance and Enforcement Activities Fall Into Two Main Groups

- Unauthorized Activities
Compliance and Enforcement Activities Fall Into Two Main Groups

- Unauthorized Activities
- Permit Compliance
Unauthorized Activities

These are activities that are undertaken that impact a water of the United States without a valid Department of the Army Permit.
Unauthorized Activities

These are activities that are undertaken that impact a water of the United States without a valid Department of the Army Permit.

• No Corps involvement at all
• Could have had a JD done, but never obtained a permit.
• Working with an expired permit
• Additional work on a project that is not part of the permit
Unauthorized Activities
Unauthenticated Activities

Who is held responsible?

- The property owner
- The person or contractor doing the work
Your Department of the Army permit is a contract between you and the Federal government. Basically it states that you are allowed to impact the aquatic environment in a specific way and in return you agree to perform specific activities as compensation for those impacts.
Compliance & Enforcement

- For permitted activities the Corps has the sole responsibility for permit compliance.

- On all other unauthorized activities the Corps and the Environmental Protection Agency (EPA) share responsibility. The Corps can elevate the case to the EPA or the EPA can request a specific case.
Major types of Permit Non-compliance

- Going beyond the scope of the permit
  - You can always do less
- Altering the plans without a permit modification
- Failure to do the agreed upon mitigation
- Failure to monitor the mitigation
- Altering the mitigation plan without a permit modification
Permit Compliance

PLAN VIEW

FISHING PIER 14892(08)

LAVACA BAY

CHANNEL CENTERLINE
MATAGORBA BAY

> 2500'

PROPOSED PIER HEAD

15'

30'

10'

450'

HEMTIDELINE

DROPOFFLINE

ALAMO BEACH
PORT LAVACA, TX

35'

35'

NATURAL ELEV. 14' M.S.L.

ALAMO BEACH
PORT LAVACA, TX

200'

CENTERLINE LEG ST.

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Permit Compliance

PLAN VIEW

FISHING PIER 14397(05)

Channel Centerline
Matagorda Bay.

LAVACA BAY.

PROPOSED PIER HEAD

LANDING

2500'

STAIR

15'

PROPOSED PIER HEAD

HIGH TIDE LINE

DROP AFT LINE

ALAMO BEACH
PORT LAVACA, TX.

ANCHOR
PORT LAVACA, TX.

NATURAL ELEV. 14' m S.L.

CENTERLINE 1500'

One Corps Serving The Army and the Nation
Compliance & Enforcement

Tools available to achieve compliance for violations concerning unauthorized activities

- Cease & Desist Orders

One Corps Serving The Army and the Nation
Compliance & Enforcement

Tools available to achieve compliance for violations concerning unauthorized activities

• Cease & Desist Orders
• Voluntary Restoration
Compliance & Enforcement

Tools available to achieve compliance for violations concerning unauthorized activities

- Cease & Desist Orders
- Voluntary Restoration
- Voluntary Settlement Agreement
Compliance & Enforcement

Tools available to achieve compliance for violations concerning unauthorized activities

- Cease & Desist Orders
- Voluntary Restoration
- Voluntary Settlement Agreement
- Upon review, allowing violator to apply for an “After-the-fact” permit (permit decision may or may not be favorable)
Tools available to achieve compliance for violations concerning unauthorized activities

- Cease & Desist Orders
- Voluntary Restoration
- Voluntary Settlement Agreement
- Upon review, allowing violator to apply for an “After-the-fact” permit (permit decision may or may not be favorable)
- Cases referred to Department of Justice
Tools available to achieve compliance for violations concerning unauthorized activities

- Cease & Desist Orders
- Voluntary Restoration
- Voluntary Settlement Agreement
- Upon review, allowing violator to apply for an “After-the-fact” permit (permit decision may or may not be favorable)
- Cases referred to Department of Justice
- Cases referred to Environmental Protection Agency (usually a fine involved)
Compliance & Enforcement

Tools available to achieve compliance for violations concerning Department of the Army permits

- Everything under violations concerning unauthorized activities (except for referring it to the EPA) and...
Compliance & Enforcement

Tools available to achieve compliance for violations concerning Department of the Army permits

- Everything under violations concerning unauthorized activities (except for referring it to the EPA) and...
- Revocation of your permit
Compliance & Enforcement

Tools available to achieve compliance for violations concerning Department of the Army permits

- Everything under violations concerning unauthorized activities (except for referring it to the EPA) and...
- Revocation of your permit
- Increased mitigation
Tools available to achieve compliance for violations concerning Department of the Army permits

- Everything under violations concerning unauthorized activities (except for referring it to the EPA) and...
- Revocation of your permit
- Increased mitigation
- Administrative Penalty $27,500.00 dollars a day for Section 404 violations and $11,000.00 dollars a day for Section 10.
Indirect Costs Associated with a Violation

- Lost time on a project
- Contractor costs while they are not working
- Interest on loans
- Bad publicity & Public Opinion
Other Points to Ponder

- Under the 2000 EPA penalty matrix an entity that has had as much as a single Jurisdictional Determination is considered to have knowledge of the 404 Program and therefore to be a flagrant violator.
- Criminal prosecution is also possible for flagrant violators.
- In the absence of governmental enforcement the Clean Water Act allows citizens or citizens groups to pursue enforcement through litigation.