

The National Association of Home Builders (NAHB) submits the following recommendations regarding U.S. Army Corps of Engineers (Corps) regulatory barriers facing residential construction and the infrastructure project upon which all communities rely.

The Corps' Nationwide Permit Program must be Reformed

- The Clean Water Act Section 404(e) “general” permitting program was designed by Congress to create a streamlined process for authorizing minimal impact discharges of dredge and fill material to “waters of the U.S.” General permits known as "nationwide permits" (NWP) for activities including utility lines, residential construction, and stream bank stabilization are critical to expediting home building projects as well as the infrastructure projects on which communities rely.
- Over time, however, the Corps has made the NWP increasingly restrictive and complex. Since 1977, NWP have become more specific with smaller and smaller acreage and linear foot limits and subject to longer permit review timeframes and greater conditions. At the end of the day, fewer and fewer projects qualify for the expedited NWP and instead must go through a rigorous, expensive, and time consuming “individual permit” process.
- Communities and the infrastructure projects they rely on would benefit greatly from a less restrictive Corps NWP program.

The Corps must Stop Expanding CWA Jurisdiction Using Supplements to the 1987 Wetland Delineation Manual

- To identify and delineate wetlands, the Corps published the “1987 Corps of Engineers Wetlands Delineation Manual” (the 1987 Manual). The 1987 Manual describes technical guidelines and methods to determine whether and area is a wetland for purposes of CWA Section 404 and subject to federal permitting. Specifically, the 1987 Manual requires positive evidence of three parameters to identify a wetland:
 - 1) hydrophytic vegetation,
 - 2) hydric soils, and
 - 3) wetland hydrology
- Over time, however, the Corps has made a practice of “supplementing” the national 1987 Manual with regional variations. These “regional supplements” relax the three-parameter test needed to determine that an area is a jurisdictional wetland and expand the Corps’ regulatory authority unlawfully. As more and more features become jurisdictional, more home building projects and the infrastructure projects that support them - including roads, bridges, and levees – will face increased costs and delays.
- To avoid this undesirable outcome, the Corps must eliminate the regional supplements and assert jurisdiction only in instances where wetland plants, soils, and hydrology are present.

The Corps must Stop Hindering States from Assuming CWA Section 404 Permitting Authority

- Section 404(g) of the CWA authorizes states to assume authority to administer the 404 “dredge and fill” program in some but not all navigable waters and adjacent wetlands. Section 404(g)(1) describes the waters over which the Corps must retain administrative authority even after program assumption by a state.
- Only two states, Michigan and New Jersey, have been approved to assume the Section 404 program. While other states have explored assumption, those efforts have not borne fruit in part due to uncertainty over the scope of assumable waters and wetlands.
- Unfortunately, the Corps has sought to retain far too many waters under Federal authority thereby contradicting the intent of Congress under 404(g). The Corps’ overly expansive interpretation of waters and wetlands to be retained under Corps authority leaves little, if any, waters for states to assume 404 permitting authority over.
- The Corps must stop acting as a roadblock to states that wish to administer the CWA 404 permitting program for certain waters within their borders. In giving authority to the states as envisioned by Congress, red tape in Washington will be cut and permit costs and delays for home building projects and related infrastructure projects will decrease.

Corps Headquarters should Assert Centralized Control and Oversight over its Regulatory Program

- Home builders and the infrastructure projects on which they rely require permitting programs that are predictable, timely, and consistent. Unfortunately, due in part to the absence of strong oversight and central guidance from Corps Headquarters on important regulatory interpretations, there has been inconsistency among Corps districts as they implement the CWA Section 404 program. These inconsistencies create uncertainty for both regulators and project proponents and make it difficult for Corps staff to administer the program. The results are increased project delays and costs.
- To reduce regulatory confusion stemming from district-by-district interpretations of regulations and guidance, Corps Headquarters must establish clear lines of authority to direct the implementation of key regulations and policies.

The Corps must have Authority to Run its CWA Section 404 Program without EPA Interference

- The CWA gives the Corps, not EPA, the primary authority to issue Section 404 “dredge and fill” permits and make decisions regarding the scope of federal jurisdiction. Over time, however, EPA has asserted undue influence on the Corps’ 404 permitting process, creating inconsistency, delay, and uncertainty for regulators and project proponents alike.

- To minimize EPA interference in the Corps' implementation of the CWA Section 404 program and expedite both home building and infrastructure projects:

1. The Corps should Rescind the Civiletti Memorandum

- In 1979, U.S. Attorney General Benjamin Civiletti signed a memorandum giving EPA the final word on CWA Section 404 decisions. Regrettably, Civiletti's position is not supported by the legislative history or the text of the Act. Additionally, the Civiletti Memo makes little sense given the Corps' expertise in administering the day-to-day operation of the 404 program.
- EPA does not have the Corps' 404 experience and does not make jurisdictional determinations nor issue permits. Yet, the Civiletti Memo allows EPA to delay, block, or second-guess the Corps' expertise in managing the 404 program. This creates regulatory delay, inconsistency, and uncertainty.
- The Corps should rescind the Civiletti Memo to confirm that the Corps has ultimate administrative authority to operate the 404 program, issue permits, and make jurisdictional determinations under the CWA.

2. The Corps and EPA should Rescind the Section 404(q) Memorandum of Agreement (MOA)

- In 1992, the Corps and EPA entered into a CWA Section 404(q) MOA, which establishes timeframes and a process for resolving issues and reviewing permits under Section 404. The MOA requires EPA to notify the Corps if EPA believes permitted activities may result in substantial and unacceptable impacts to "aquatic resources of national importance" (ARNIs).
- Although ARNIs are supposed to be of national importance, EPA often declares a resource an ARNI so that it may slow or block a permit.
- The 404(q) EPA review process is convoluted and can add months to the 404 permitting process. As such, it runs contrary to the very purpose of CWA Section 404(q), which is to minimize delays in issuing permits.
- The Corps should coordinate with EPA to rescind the MOA to eliminate EPA's undue influence on the 404 permitting process

3. The Corps should Work with EPA to Limit EPA's Involvement in National Environmental Policy Act (NEPA) Environmental Impact Statements

- Under current EPA policy, when the Corps (or any other federal agency) issues a Draft Environmental Impact Statement ("DEIS") in connection with a project, EPA reviews the DEIS and "rates" the environmental impacts of the proposal and the adequacy of the DEIS.
- EPA review of Corps NEPA reviews often causes significant project delays and duplication. What's more, it is nonsensical that EPA should rate and review DEISs and yet it has no experience or expertise writing DEISs.
- The Corps should work with EPA to review its policy to limit EPA's involvement in other agencies' NEPA reviews.

The Corps should Work with U.S. Fish & Wildlife and National Marine Fisheries Service to Reduce Endangered Species Act (ESA) Delays to CWA Section 404 Permits

- Completing the required ESA Section 7 Consultation process for CWA Section 404 permits that may impact endangered species or designated critical habitat can impose significant permitting delays to both infrastructure and home building projects.
- Although ESA regulations have a non-binding timeframe of 135 days for completing the formal consultation process, federal agencies tasked with administering the ESA - the U.S. Fish & Wildlife Service and National Marine Fisheries Service - routinely fail to complete their review within these timeframes. As a result, Corps 404 permits are often delayed for months or even years.
- The Corps should coordinate with Fish & Wildlife and National Marine Fisheries Service to expedite the ESA Section 7 Consultation process and, in turn, underlying projects.