



The Protection and Permission Mission

Written by: [Jan Tegler](#) on March 29, 2011Categories: [Army Corps of Engineers](#), [Environment](#), [Land Forces](#)Tags: [Issues](#), [Programs](#)Comments: [No Comments](#)**Share this Story**

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USACE's Regulatory Program protects waters of the United States, including navigable waters and federally delineated wetlands, like this one in central Florida. Photo courtesy of the U.S. Army Corps of Engineers

Meg Gaffney-Smith and the 1,300 U.S. Army Corps of Engineers (USACE) regulators she oversees nationwide as the USACE Regulatory Program chief have a tough job on their hands. Every day, in every district across the nation, they perform a balancing act, protecting America's navigable rivers, streams, and wetlands while simultaneously allowing, often with conditions, reasonable economic development in and around these resources. They are stewards of the nation's aquatic ecosystem and arbiters for public and private interests, both environmental and economic.

Working under the authorities of the [Clean Water Act](#) and the [Rivers and Harbors Act](#), USACE regulators evaluate the environmental impacts of proposed development projects that involve work or a discharge of dredged material into waters of the United States and U.S. territories. USACE regulators weigh the benefits and detriments of any proposal, taking into account the views of federal, tribal, state, and local agencies, interest groups, and the general public. They are communicators, facilitators, and frequently, diplomats.

Decision-making on the diversity of project proposals evaluated each year, and the required compensatory mitigation for unavoidable impacts to aquatic resources, is driven by a watershed approach. Why? Because current scientific thinking is that doing what is best for a watershed is sound ecologically, and cost effective. USACE collaborates with local, state, [tribal](#), and federal agencies to gather the best available data and make informed decisions based on the needs within an affected watershed.

Once all relevant factors have been considered, USACE may grant or deny permission for projects to proceed, deciding whether to issue a permit for activities as diverse as construction and dredging, commercial and residential development, ecosystem restoration, navigation projects, transportation projects, and energy projects. In short, the primary task of the USACE [Regulatory Program](#) is the protection and permission mission. It's an undertaking with a scope best-understood numerically.

Each year, USACE regulators process between 60,000 and 80,000 permit applications, running the gamut from people applying for minor discharges under the general permit and nationwide permitting programs to applications that involve more complex projects, requiring public notice and processing through an individual permit review.

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"One of our mantras is, 'We're neither a project proponent nor opponent,'" said Gaffney-Smith. "Our responsibility is to be fair and to communicate the rationale behind our decisions. That can be pretty tough especially when you're looking at energy projects or proposals coming into a community that will support the tax base. Or maybe there's a small land owner's proposal to construct a crossing or a house in or near wetlands. One of the most important things we can do is make sure we communicate early and often so that people understand the importance of protecting a resource while allowing development.

"It's a balancing act," she continued. "We don't authorize every project. We first consider whether or not proposed impacts to these valuable resources can be avoided and minimized, then we consider the unavoidable environmental impacts of a project, evaluate the project to ensure compliance with Army regulations, the Clean Water Act guidelines, and to make sure that it is not contrary to the public interest. When we issue or deny permits, we make some people happy and others angry. That's part of the job."

In an effort to make the permitting process more efficient and user-friendly, USACE has significantly streamlined application forms and the requirements for permitting. Currently, general permits that the program employs to authorize minor activities are available nationwide, allowing decisions to be made in less than 60 days. Decisions on individual permits for more complex project proposals that carry a greater amount of impact to the aquatic resources take longer to process.

According to Gaffney-Smith, some applications involving complex energy, water supply, commercial, residential, or industrial development can take as much as a year or longer to fully evaluate and make informed and balanced decisions. Nevertheless, USACE has made substantial improvements in communicating to the public what is required to initiate the permit process and navigate the evaluation.

"We've changed our approach to public interaction," she said. "We used to take a lot of phone calls to answer questions. Today we use a tool that's available on the Internet that will allow people to access what we refer to as an avatar. It walks the public through the application process, using our individual standard permit application form. It highlights the various requirements and describes the information required. We launched the *avatar* in many of our districts in the Mississippi Valley Division and South Atlantic Division. It's also on the USACE Headquarters Web page."



A USACE inspector from Wilmington District's Regulatory Office, Onslow County, N.C., discusses details about the Corps' policies on a permit site with applicants. Photo courtesy of the U.S. Army Corps of Engineers, Bud Davis

While this new tool requires less manpower to aid permit applicants, the process of reviewing applications is still handled by individual project managers. Assigned to various geographic areas (typically several counties in a watershed), project managers build relationships with local- and state-planning entities and regulators in that area. This allows interaction with local regulators and planners early on when they're developing land-use plans and are beginning to identify what might be critical areas to avoid or areas that have high-value aquatic resources. Multiple project managers may be assigned to more complex projects.

"If it's a very large or complex project that requires a site visit to meet with the applicant to learn about what they're proposing and meet with other federal and state agencies, we may send several regulators so that we can walk the site," Gaffney-Smith said. "That way we verify the scope of federal jurisdiction and have an understanding of the resources present. This process usually results in a written jurisdictional determination so that applicants can begin to estimate the size of unavoidable impacts. We often talk with applicants about the importance of the resources and the process and regulations we apply in our evaluations. It helps when they understand why we do what we do. If there are areas of expertise that our regulators don't have, for example, if we need an engineer to look at a design or to run some models to ensure a proposed project won't create other problems upstream or downstream, we reach out and bring in the needed technical expertise into our evaluation process. We have a lot of those technical experts in our other USACE organizations at the district level."

Regulators cooperate closely with applicants on permits in what amounts to a three-step or "triangle" process. Their first concern is to work with applicants to avoid impacts to aquatic resources. The second step is minimizing the impact to resources. Lastly, if those effects cannot be minimized, effort is made to mitigate for the impacts.

"We require applicants to demonstrate that they've avoided or minimized impacts to resources," said Gaffney-Smith. "If they can't avoid or minimize the effects, then we require compensatory mitigation."

That gives applicants options. A private land owner might perform compensatory mitigation by restoring a wetland or restoring a stream on their property. Or a permittee might opt to make a contribution to a program administered by a non-governmental organization, such as [The Nature Conservancy](#), through an in-lieu fee program. In this case, The Nature Conservancy, or other entity, other than the applicant, would identify and construct a project that would compensate for authorized impacts and contribute to the overall health of a watershed. An applicant can also elect to purchase credits from an approved mitigation bank strategically located within a watershed to improve water quality and the functions of the aquatic resources USACE strives to

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protect.

In the 2009 edition of this publication, Gaffney-Smith wrote about the issue of jurisdictional determinations (JDs). Each year, USACE regulators are called on to make thousands of determinations about which waters fall under USACE jurisdiction as defined by the Clean Water Act. Supreme Court rulings on JD cases over the last decade have complicated the determination process and in 2010 the challenge of identifying the jurisdictional status of waters on a given property is still time-consuming.

"It comes up on a daily basis at the district level," Gaffney-Smith said. "Every permit decision also carries with it a jurisdictional determination. Clarifying the extent of jurisdiction and understanding what we regulate is the first step in the process. One of the things we continue to rely on is the use of preliminary JDs where land owners can make a conscious decision to set aside the question of jurisdiction given the uncertainty brought about by past Supreme Court decisions. We're continuing to express support for legislation and giving thought to the potential for future guidance with respect to the Clean Water Act jurisdiction in the absence of legislation."

Compliance remains a vital part of the regulatory mission as well, ensuring that permittees take the actions needed to protect water resources as stipulated by their permits. As Gaffney-Smith observed, the Regulatory Program must have a presence along with other enforcement agencies to make sure that it's not easier to break the law than it is to get through the permit process itself.

"Often we work with our state partners when there's an issue involving an unauthorized activity or alleged unauthorized activity. Frequently, people discharge fill or construct something without knowing there was any rule or requirement in place to follow. In cases where there's not a flagrant violation, we work with that person to either restore the area or process an application after the fact to make sure their project complies. In the case of flagrant violators, we'll often refer them to the [Environmental Protection Agency](#). They have greater authority for enforcement. We'll help the Environmental Protection Agency with the field work and investigation. If you don't have a strong compliance and enforcement program, then you'll have a weak permit program."

Gaffney-Smith is excited with the program's advances from 2009 through 2010. She cites progress on the environmental review of surface coal mining, a mining activity that typically results in discharge material being placed in mountain streams or wetlands and therefore falls under the Regulatory Program; disaster response to the April 2010 Gulf oil spill; and the efficiencies gained from the nationwide permitting process. In 2009, the Regulatory Program also received \$25 million in [American Recovery and Reinvestment Act](#) funds, which resulted in the hiring of additional temporary staff and greater latitude in addressing activities related to compliance with watershed plans and aquatic resource inventories.

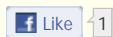
"The past year has been one of incredible accomplishments and challenges," Gaffney-Smith said. "We are currently working on the development of the nationwide permit program, which is to be reissued in 2012. Eighty percent or more of the actions we take are through the nationwide permit program and affect a huge part of the nation's economy. We have strengthened our approach for evaluating surface coal mining. We did so by suspending the use of a nationwide permit covering surface coal mining activities in the Appalachian region and now requiring applicants to use an individual permit for these kinds of activities. And we've been instrumental in working with the U.S. Coast Guard in responding to the challenges associated with the Gulf oil spill."

In addition, USACE is continuing to develop scientific tools to aid in making sound permitting decisions, including technical documents like the regional supplements to the [Wetland Delineation](#) manual and a recently published guidebook for ephemeral and intermittent streams in Appalachia. The Corps is getting ready to publish for public comment the National Wetland Plant List to improve the science behind the vegetation parameter of the manuals. USACE is putting the final touches on a cumulative impact strategy document and the development of an analytical tool to help regulators with their decisions. These programmatic initiatives are based on sound science and the analytical tools, which will allow the Army Corps of Engineers to continue to protect the nation's aquatic resources.

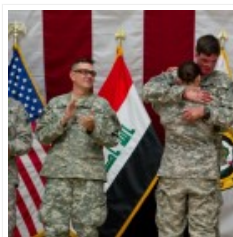
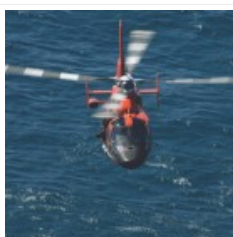
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