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A Primer on the Section 404 Permitting Process

Sharon Mattox, Ted Bosquez, & Brandon Tuck

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Introduction and Overview

- **Statutes**
- **Legal Analysis**
- **Types of Authorization**
- **The Individual Permit Application**
- **The Permit Application Process**
- **Practical Considerations**

Statutes

- **Statutory Framework**
  - Rivers and Harbors Act of 1899
  - 1972 Amendments to the Federal Water Pollution Control Act (Clean Water Act)

- **Rivers and Harbors Act of 1899**
  - Regulates all work affecting the course, capacity, or condition of navigable waters including the construction of structures, dredging, filling, and conducting other activities that may obstruct navigation.
  - Navigable waters subject to the Rivers and Harbors Act are limited to those that are, have been, or could with reasonable modifications be used for commercial transport and those waters subject to ebb and flow of the tide.

Statutes

- **When do I Need a Section 10 Permit from USACE under the Rivers and Harbor Act?**
  - A Section 10 permit is required for any work on property owned by the Port of Houston that will be done in any tidally influenced area including adjacent wetlands.

Statutes

- **Clean Water Act (CWA)**
  - CWA prohibits the discharge of "any pollutant" into waters of the United States from a point source unless it is authorized by a permit.
    - Section 401 (water quality certification)
    - Section 402 (traditional pollutants)
    - Section 404 (dredged or fill materials)
  - CWA also regulates nonpoint source (NPS) discharges.
    - Non-point source pollution (referred to as "runoff" or "stormwater") comes from many diffuse sources, and is caused by rainfall / snowmelt moving over and through the ground.

Statutes

- **Section 404 of the CWA**

  – USACE must issue a Section 404 permit before any point source discharge of dredged or fill material into waters of the United States occurs.

    - Congress selected USACE to handle Section 404 permits because of its long-established role under the Rivers and Harbors Act of 1899.

  – EPA retains a major role in Section 404 permitting process. EPA retains ultimate determination on jurisdiction and may veto a USACE permit decision.

  – USACE must also coordinate with other federal and state agencies.

Statutes

- **Section 401 of the CWA**
  - The state may certify that a discharge will not violate state water quality standards prior to the issuance of a Section 404 permit.
    - Supreme Court ruled states may impose any permit conditions considered necessary.

Statutes

– The Texas Commission on Environmental Quality (TCEQ) administers the Section 401 certification program in Texas except with respect to oil and gas exploration, which is the responsibility of the Railroad Commission of Texas.
  - Tier I (Small Project)
  - Tier II (Large Project)
  - Nation-Wide & Regional General Permit Certifications

Legal Analysis

- **How do I Know if a Section 404 Permit is Required?**
  - Is there a jurisdictional act?
    - Am I planning to discharge dredged or fill material?
  - Is there a jurisdictional area?
    - Am I planning actions within a water of the United States?

Legal Analysis

- **What is the Discharge of Dredged or Fill Material?**
  - "Discharge of Fill Material" - broad category covering activities involving earthmoving or discharges including:
    - (a) placement of fill to build any structure (b) causeway / road fills; (c) levees; (d) shore protection devices like riprap, breakwaters, and seawalls; (e) most mechanical land clearing; or (f) temporary stockpiling of soil from construction of a drainage ditch.
  - "Discharge of Dredged Material" – the addition of dredged material, including any redeposit of dredged material other than incidental fallback, into waters of the United States.
    - *Incidental Fallback* – considerable litigation whether the discharge of "de-minimis" dredged material requires a permit.

Legal Analysis

- **What is the Jurisdictional Area?**
  - Section 404 requires a permit for the discharge of dredged or fill material into "navigable waters"
    - "Navigable waters" is defined as "waters of the United States, including the territorial seas"

Legal Analysis

- **What Water Bodies Fall Within the Definition of "*Waters of the United States*"?**
  - (1) waters currently, formerly, or susceptible to use in interstate commerce
  - (2) interstate waters, including interstate wetlands
  - (3) intrastate waters, including lakes, streams, wetlands, sloughs, prairie potholes, etc., the use, degradation, or destruction of which could affect interstate commerce
  - (4) all impoundments of waters otherwise defined as Waters of the United States
  - (5) tributaries of waters defined in (1)-(4) above
  - (6) territorial seas
  - (7) wetlands "adjacent" to waters in (1)-(6) above

Legal Analysis

- **What is a Wetland?**
  - Wetlands are a subset of “waters of the United States.” The regulatory definition for a wetland under the Clean Water Act is:
    - “areas that are inundated or saturated by surface or groundwater 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. Wetlands generally include swamps, marshes, bogs and similar areas."

Legal Analysis

- In more common terms, wetlands are areas where the frequent and prolonged presence of water at or near the soil surface drives the natural system meaning the kind of soils that form the plants that grow, and the fish and/or wildlife communities that use the habitat.

- The USACE Wetlands Delineation Manual organizes the environmental characteristics of a potential wetland into three categories:

  Hydrology

  Vegetation

  Soils

- The manual contains criteria for each category. If an area meets all three criteria, the area is considered a wetland.

Legal Analysis

- **When are Isolated / Intrastate Wetlands Jurisdictional?**
  - USACE / EPA historically relied on the use of isolated wetlands by migratory birds to determine whether to assert jurisdiction over an isolated wetland.
  - Supreme Court invalidated the Migratory Bird Rule in *Solid Waste Agency Northern Cook County v. United States* ("SWANCC") (2001).
    - CWA did not support jurisdiction over isolated, intrastate wetlands whose only connection to interstate commerce is use by migratory birds.
  - In 2003, the agencies issued Advanced Notice of Proposed Rulemaking, but withdrew it. The regulated community turned to an increasingly bewildering array of case law.

Legal Analysis

- **Supreme Court Ruling in *Rapanos* (2006)**
  - Supreme Court issued a divided opinion in which no single opinion received a majority of the votes.
    - *Plurality Opinion*: voted to vacate and remand the cases back based on their test for determining "waters of the United States."
    - *Kennedy Opinion*: concurred in vacating and remanding but disagreed with the Plurality Test for determining "waters of the United States" and developed his own test.
    - *Dissenting Opinion*: voted to affirm.

Legal Analysis

- **The Plurality Opinion:**
  - "*Waters of the United States*" includes "only those *relatively permanent*, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes."
  - As for "*adjacent wetlands*" -- "only those wetlands with a *continuous surface connection* to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."

Legal Analysis

- **The Kennedy Opinion:**
  - Agreed to remand the cases but disagreed that "waters of the United States" must have *permanent flow* arguing the term could include "*impermanent streams*."
  - "*Adjacent*" wetlands must possess a "*significant nexus*" to navigable waters to be jurisdictional, meaning the wetlands "either alone or in combination with similarly situated lands in the region, *significantly affect the chemical, physical, and biological integrity* of other covered waters more readily understood as 'navigable'"

Legal Analysis

- **How Can I Tell Whether Wetlands May Be Present in the Project Area?**

  – No one can be sure if an area contains wetlands without gathering detailed information about the site and inspecting the property.

  – If the site has one of these conditions, wetlands may be present:

    - the area often has standing water;
    - the area is a low spot that holds water for several days after a heavy rain;
    - the water table in the area is not far below the ground surface;
    - the area is located near a river, pond, or bayou;
    - the area has different plants in comparison to nearby higher areas; or
    - the area is relatively large and undeveloped.

  – Do not assume the lack of standing water means the area does not contain wetlands.

Legal Analysis

- **What Should I Do If I Believe the Project Site May Contain Wetlands?**
  - If your research or examination of the area suggests the possible presence of wetlands, you will want to consult a wetlands professional.
  - You will want a thorough wetland delineation study undertaken to adequately define the wetlands in accordance with state and federal criteria.
  - Once the wetland areas have been graphically identified, you will want to locate, layout and design your project features such that impacts to the wetland areas are either avoided or minimized.
  - If the project will impact wetland areas, a USACE permit will needed.

Types of Authorization

- **General Permits**
  - General Permits are issued when categories of very similar activities are minor in scope with minimal projected impacts. General Permits reduce the amount of paperwork and time required to start a project.
    - Permit applications may not be required for activities authorized by a general permit (the rules vary from permit to permit).
    - General Permits are valid only if the conditions applicable to the permits are met otherwise an individual permit will be required.
    - Two Types: Regional General Permits / Nationwide General Permits
  - Consult state water quality certification requirements for General Permits to determine whether individual water quality certification must be sought.

Types of Authorization

- **Galveston District Regional General Permits (RPs)**
  - The Galveston District offers twelve RPs authorizing a range of activities including:
    - Construction of Commercial Piers
    - Construction of Boat Slips
    - Placement of Aerial Lines / Cables over Navigable Waters
    - Construction of Artificial Wave Barriers for Shoreline Erosion Protection
    - Types of Maintenance Dredging
    - Directional Drilling of Pipelines under Navigable Waters
  - The Galveston District also offers eight additional RPs authorizing oil field development activities along the Texas coast.

Types of Authorization

- **Nationwide General Permits (NWPs)**
  - NWPs authorize activities that are similar in nature and would cause only minimal individual and cumulative environmental impacts.
  - NWPs require re-authorization every five years. The new NWPs became effective on March 19, 2012.

Types of Authorization

- Authorization under many NWPs is contingent upon submittal of a pre-construction notification (PCN) to USACE.
- Some NWPs do not require a PCN.
  - In this situation, you may request confirmation from USACE that an activity complies with the terms and conditions of the permit.
  - Even if USACE confirmation is not sought, it is important to document the reasons why the project is authorized under the NWP.

Types of Authorization

- **NWPs to Consider**

NWP 1. Aids to Navigation
NWP 2. Structures in Artificial Canals
NWP 3. Maintenance Activities
NWP 5. Scientific Measurement Devices
NWP 6. Survey Activities
NWP 7. Outfall Structures
NWP 9. Structures in Anchorage Areas
NWP 10. Mooring Buoys
NWP 12. Utility Line Discharges
NWP 13. Bank Stabilization
NWP 14. Linear Transportation Projects
NWP 15. USCG Approved Bridges
NWP 18. Minor Discharges
NWP 19. Minor Dredging
NWP 22. Removal of Vessels
NWP 25. Structural Discharges (bridge pilings)
NWP 28. Modifications of Existing Marinas
NWP 36. Boat Ramps
NWP 39. Commercial & Institutional Developments
NWP 41. Reshaping Existing Drainage Ditches
NWP 42 Recreational Facilities
NWP 43. Stormwater Management Facilities

Types of Authorization

- **Letters of Permission (LOPs)**
  - This is a form of individual permit issued through an abbreviated process that includes coordination with federal and state fish and wildlife agencies and a public interest evaluation, but does not require public notice.
    - LOPs include general conditions and case-specific conditions to protect natural and cultural resources.
  - LOPs can be issued only in cases where the District Engineer has previously approved similar activities under the LOP procedures and the proposed work is minor and does not have significant impacts.
  - LOPs require the submittal of an application to the USACE, but LOPs reduce administrative procedures and expedite permit decisions.

Types of Authorization

- **Individual Permits**
  - If a project does not meet the requirements of a general permit and cannot be authorized by a LOP, an individual permit is required.
  - USACE evaluation of each permit application involves a thorough review of the potential environmental and socioeconomic effects of the proposed activity. TCEQ must conduct its Section 401 state water quality certification.

The Individual Permit Application

- **What Should be Submitted with the Individual Permit Application?**
  - Application Form
  - Project Description and Drawings
  - Project Purpose and Need
  - Jurisdictional Determination
  - Threatened & Endangered Species Assessment
  - Cultural Resources Evaluation
  - Environmental Assessment / Alternatives Analysis
  - Project Mitigation Plan
  - State Water Quality Certification

The Individual Permit Application

- **Application Form**
  - The permit applicant is required to complete and submit an ENG Form 4345. Be sure to review the application instructions prior to submitting to USACE.
- **Project Description and Drawings**
  - USACE requires the permit applicant to provide a complete description of the proposed project including drawings / sketches / plans necessary for distribution for public comment.
  - Consult the USACE Checklist for Individual Permits for specific instructions on the level of detail required for the project description and drawings.

The Individual Permit Application

- **Project Purpose and Need**
  - The statement will drive the Alternatives Analysis process as it will enable the applicant to respond to a "No-Action" alternative and establish which alternatives are reasonable / practicable.
  - The statement should justify why the project impacts are acceptable. To this end, consider the following suggestions:
    - The statement should be as comprehensive and specific as possible.
    - The statement may evolve as more is learned about the project. Be prepared to revisit and update the statement.
    - The statement should limit the range of alternatives that may be considered reasonable / practicable.

The Individual Permit Application

- **Delineations and Determinations**
  - A "wetland determination" (also known as a wetland "assessment," "identification," or "study") is a quick and inexpensive method to determine the presence / absence of wetlands on a project site. It allows the property owner to make informed decisions on land use limitations and develop initial layout plans.
  - A "wetland delineation" is a comprehensive assessment of the hydrology, soils, and vegetation within the project area to define wetland locations, boundaries, and quality. If the project will impact these wetlands, the wetland delineation must be submitted to USACE for verification.
  - A "jurisdictional determination" is the USACE process evaluating whether the wetlands within a project area are jurisdictional under the Clean Water Act.

The Individual Permit Application

- **Jurisdictional Determinations (JDs)**
  - Preliminary JDs
    - If a preliminary JD is used for permitting, all wetlands and waters are assumed to be jurisdictional. For purposes of mitigation, all waters treated as jurisdictional.
    - Allows party to move forward without waiting for approval of jurisdictional delineation.
  - Approved JDs
    - JD is formally approved, but may be appealed. Approved JDs are valid for five years (unless new information is identified).
    - The process takes longer and may only make sense to wait for approval if mitigation costs for all waters would be too costly.

The Individual Permit Application

- **Selected Materials**
  - USACE JD Form Instructional Guidebook
    - Provides standards and level of documentation required to support a JD for a particular water body. Also, provides examples of covered waters.
  - Regional Supplement to Wetlands Delineation Manual: Atlantic and Gulf Coast Plain Region
    - Provides guidance tailored to regional soil, vegetation, and hydrology.

The Individual Permit Application

- **Threatened & Endangered Species Assessment**
  - Section 7 of the ESA directs all federal agencies to conserve threatened and endangered species and consult with USFWS to ensure agency actions do not jeopardize listed species or destroy or adversely modify critical habitat.
    - EPA / USACE require the permit applicant to make a determination whether there will be impacts to threatened and endangered species.
  - If impacts are identified, formal consultation is required. USFWS will prepare a biological opinion.
    - The biological opinion contains the determination whether or not the proposed action would likely to jeopardize the species or adversely modify its critical habitat.
  - If an adverse determination is made, the biological opinion must identify any reasonable alternatives that could allow the project to move forward.

The Individual Permit Application

- **Cultural Resources Evaluation**
  - Section 106 of the NHPA requires all federal agencies take into account how each of its undertakings could affect historic and/or prehistoric properties either listed in, or eligible for, the National Register of Historic Places (NRHP) on either federal, public, or private lands.
    - USACE must initiate the review process and confer with the State Historic Preservation Officer (SHPO).
    - If the review identifies cultural resources, antiquities permits are required before the project can proceed.
  - In addition to NHPA, other federal laws related to cultural resources and antiquities may come into play (e.g., American Indian Religious Freedom Act).

The Individual Permit Application

- **Environmental Assessment / Alternative Analysis**
  - NEPA requires all federal agencies to give proper consideration to the environment prior to undertaking any major federal action that could significantly affect the environment.
    - CEQ adopted regulations binding federal agencies to implement NEPA requirements.
  - Two Stages of Analysis:
    - Preparation of an Environmental Assessment (EA) / Finding of No Significant Impact (FONSI)
    - Preparation of an Environmental Impact Statement (EIS)

The Individual Permit Application

- **Preparation of an EA / FONSI**
  - If the proposed action does not fit within a Categorical Exclusion, the agency must prepare an EA.
  - The EA is a concise document providing sufficient information to determine whether the proposed project will have significant effects on the environment and require an EIS.
    - If the EA does not identify a significant impact, the agency will prepare a FONSI. The FONSI will identify the reason why the project will not have a significant impact on the environment. After adequate Public Notice, the agency may proceed with the action based on the FONSI.

The Individual Permit Application

- **Preparation of an EIS**
  - EIS must be prepared if the proposed action will have significant impacts on the human environment. This is not a desirable outcome from a time / cost perspective.

The Individual Permit Application

- **What Information Must We Provide to Support the EA?**
  - Purpose and Need for the Project
  - Analysis of Project Alternatives
    - On-Site Alternatives, Off-Site Alternatives, and No Action Alternative
    - Preferred Alternative Description
  - Environmental Impacts
    - Qualitative and Quantitative Data
  - Cumulative Impacts Analysis
    - Area of Influence / Past, Present, and Reasonably Foreseeable Projects
  - Mitigation Measures for the Proposed Project
    - Overview of the Features of the Mitigation Plan
  - List of the Agencies / Officials / Individuals Consulted
    - Modifications / Adjustments Arising from the Consultations

The Individual Permit Application

- **Practical Considerations on How to Support the EA Process**
  - Prepare a Strong Purpose & Need Statement
  - Quality of Consultants
  - Critical Analysis of Alternatives in Relation to Project Purpose & Need
    - Cost Considerations are a Factor, But Not Necessarily Determinative
  - Detail and Specificity of Data
    - Support Materials and Establishing the Record
  - Close (and Early) Coordination with USACE and Relevant Agencies
    - Listen to the “Advice” of USACE and Relevant Agencies
    - Prepare a Draft EA / FONSI to Assist USACE Regulatory Staff

The Individual Permit Application

- **Project Mitigation Plan**
  - Basic Components of a Mitigation Plan

Objectives Site	Selection Criteria
Site Protection Instruments	Baseline Information
Credit Determination Methodology	Mitigation Work Plan
Ecological Performance Standard	Maintenance Plan
Monitoring Requirements	Long-Term Management Plans
Adaptive Management Plan	Financial Assurances

  - The Compensatory Mitigation Rule governs compensatory mitigation and established USACE / EPA mitigation preferences.

    Mitigation Banks → In-Lieu Fees → Permittee Responsible Mitigation

  - The Compensatory Mitigation Rule takes a watershed approach and requires detailed mitigation plans with more technical data demands.

The Individual Permit Application

- **State Water Quality Certification**
  - TCEQ administers the water quality certification program in Texas. RCT responsible for water quality certifications associated with oil and gas exploration projects.
    - Tier I (Small Project) vs. Tier II (Large Project) vs. Nation-Wide Permit Certifications
  - TCEQ may impose any permit conditions considered necessary.
  - TCEQ provides a list of Best Management Practices for permit applicants to incorporate into their projects.

The Permit Application Process

- The general phases of processing an Individual Permit Application include:
  - Pre-Application Consultation
  - Submission of the Individual Permit Application
  - Issuance of the USACE Public Notice
  - Public Comment Period
  - Review of the Public Comments
  - USACE Application Evaluation and Decision
  - Appeal Process

The Permit Application Process

- **Pre-Application Consultation**
  - Pre-application consultation is optional, but provides an applicant the opportunity to address concerns prior to submission of the application.
    - Consultation may be formal or informal depending on the nature of the proposed project and the degree of project controversy.
  - It is helpful to have project information available to share with USACE and resource agencies including:
    - efforts to avoid / minimize impacts
    - on-site / off-site alternatives
    - consideration of design changes
    - overlays, photos, diagrams, and project documentation
    - analysis of impacts to jurisdictional areas
    - mitigation alternatives

The Permit Application Process

- **Submission of the Individual Permit Application**
  - Upon receipt of a permit application, USACE acknowledges receipt of the application and identifies the application identification number to be used in all future correspondence regarding the application.

- **Issuance of USACE Public Notice**
  - USACE determines whether the application is complete. If the application is complete, USACE will issue the Public Notice within one month.
    - Applicant may provide USACE with a draft Public Notice.
  - USACE issues a Public Notice to inform interested parties of the proposed project and solicit comments / information to be used in their evaluation.

The Permit Application Process

- **Public Comment Period**
  - Individual Permits typically involve a 30-day public comment period. The public comment period may be extended. USACE may also issue additional Public Notices (e.g., project significantly modified after initial Public Notice).
  - USACE will consider all comments received in its review of the permit application. The comments are made part of the administrative record.

- **Review of the Public Comments**
  - Comments may be received from state and federal agencies as well as the public. USACE will review the comments and provide the applicant the opportunity to respond.
  - USACE will likely request additional information from the applicant. Applicant generally provided 30 days to submit its response.
    - Must adequately respond to agency comments.

The Permit Application Process

- **USACE Application Evaluation and Decision**
  - USACE will issue Individual Permit if: (1) the proposed project is not contrary to the public interest and (2) satisfies Section 404(b)(1) Guidelines requirements.
  - In addition, if the project requires permits or approvals from other Federal, Tribal, state, or local agencies, then the relevant approvals must be secured.

Endangered Species Act	*USFWS Consultation / Biological Opinion*
National Historic Preservation Act	*SHPO Consultation / Antiquities Permits*
Fishery Conversation and Management Act	*Essential Fish Habitat Consultations*
Section 401 of the CWA	*TCEQ Water Quality Certifications*
Coastal Zone Management Act	*CZM Consistency Determinations*

The Permit Application Process

- **Public Interest Evaluation**

  – USACE will evaluate impacts associated with the proposed project, including cumulative impacts, on the public interest. The public interest factors include:

Conservation	Flood Plain Values	Water Supply & Quality
Navigation	Aesthetics	Needs & Welfare of People
General Environment	Energy Needs	Shore Erosion & Accretion
Wetlands	Cultural Values	Food & Fiber Production
Fish & Wildlife Values	Safety	Land Use
Mineral Needs	Flood Hazards	Economics
Property Ownership	Recreation	

  – The public interest evaluation will involve the balancing of the public interest factors many of which may be in conflict. USACE will consider:

    Benefits vs. Detriments
    Extent and Permanence of Benefits and Detriments
    Public vs. Private Need

The Permit Application Process

- **Section 404(b)(1) Guidelines**
  - The Guidelines are used to evaluate discharges of dredged or fill material into Waters of the United States (including jurisdictional wetlands).
  - No discharge of dredged or fill material will be permitted if there is a:
    - "*practicable* alternative to the proposed discharge which would have *less adverse impact on the aquatic ecosystem*, so long as the alternative *does not have other significant adverse environmental consequences.*"
  - This is the basis of the "alternatives analysis" conducted by USACE.

The Permit Application Process

- The Guidelines establish a presumption that there are practicable alternatives for discharges to special aquatic sites (incl. wetlands) when the project is not "water dependent."
  - The burden rests on USACE / applicant to rebut the presumption.
- The project is not "water dependent" if does not require access or proximity to or siting within the wetlands to fulfill the "basic project purpose."
- The "basic project purpose" concept is used to determine whether the project is water dependent.
  - "Basic project purpose" differs from "overall project purpose" as used in the alternatives analysis.
- USACE guidance on water dependency can be useful, but concept may be blurry on the periphery.

  Dams, Marinas, Mooring Facilities, and Docks – Provide Water Access

  Residential Development – Provide Housing / Shelter

The Permit Application Process

- The USACE may only issue a permit for the least environmentally damaging practicable alternative.
  - Practicability involves a consideration of the cost, existing technology, and logistics of the alternatives in light of the "overall project purpose."
  - Must evaluate on-site and off-site alternatives.
- The project purpose definition is key in determining whether the project is "water-dependent" or practicable alternatives exist.
- The Section 404(b)(1) Guidelines also establish a "mitigation sequence" used by USACE to ensure the environmental impacts of permitted actions are acceptable.
  - Under this framework, there is a three-step sequence for mitigating potential adverse impacts associated with a proposed project: avoid, minimize, and compensate impacts.

The Permit Application Process

- **Permit Application Decision**
  - USACE will use all information included in the Record for the permit application to determine whether or not to issue a permit.
  - Timing Expectations
    - If an EA / FONSI is permissible, USACE will make a decision on the application in 12 to 18 months.
    - If an EIS is required, the process will take considerably longer (3+ years).
  - If a permit is granted, USACE will identify special conditions in the permit.
  - The permit will be sent to the applicant for a signature, indicating acceptance of the conditions of the permit.
    - The permit is not valid until signed by the applicant and USACE. Also, do not fail to pay the permit fee ($100).

The Permit Application Process

- **Appeal Process**
  - Applicants may request an administrative appeal of the special conditions of an Individual Permit or denial of the application.
  - To initiate the administrative appeal, the applicant must submit a “Request for Appeal” form to USACE within 60 days of the permit decision date. Appeals are reviewed at the USACE division offices.
  - The administrative appeal ruling is eligible for judicial review before a Federal district court.

Practical Considerations

- **Advice on Navigating the USACE Permitting Process**
  - Account for the need for permitting early in the design, planning, scheduling, and budgeting of the project.
    - Weigh the advantages / disadvantages of a preliminary vs. approved JD.
    - Avoidance – can the project be modified to avoid / minimize impacts?
    - Recognize the process will require time and money.
  - Hire a strong consultant with experience and technical competency.
  - Manage expectations - understand the process / regulatory requirements.
    - Monitor the process so you know early if there is a problem.
  - Engage in close (and early) coordination with USACE.
    - Listen to the “advice” of USACE and relevant agencies.
    - Provide support documentation / data to establish a strong record.

Question and Answer

- For further information regarding the Section 404 permitting program, please contact Vinson & Elkins attorneys Sharon Mattox (smattox@velaw.com), Ted Bosquez (tbosquez@velaw.com) or Brandon Tuck (btuck@velaw.com).

- Visit our website to learn more about our environmental practice (www.velaw.com).