

U.S. Army Corps of Engineers Water Resources Regulatory Program

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Regulatory Program Goals

- To provide strong protection of the Nation's aquatic environment, including wetlands.
- To enhance the efficiency of the Corps administration of its regulatory program.
- To ensure that the Corps provides the regulated public with fair and reasonable decisions.



Regulatory Program Overview

- Regulatory Authorities
- Jurisdictional Determination
- No Jurisdiction or Permit Type
- Pre-application Meetings
- Alternatives Analysis
- Avoid, Minimize, Mitigate

Section 10 of the Rivers and Harbors Act of 1899

- Applies to Navigable Waters - waters that are currently, historically and could in the future represent opportunity for interstate commerce **(33 CFR 329.4)**
- All activities and structures within, above, or beneath navigable waters are regulated

Section 10 of the Rivers and Harbors Act of 1899

- Limits of jurisdiction for navigable waters
 - Upstream limit of interstate commerce
 - Ordinary high water mark, in the absence of adjacent wetlands
 - Beyond the ordinary high water mark, to the limit of the adjacent wetlands

Section 9 of the Rivers and Harbors Act of 1899

- Pertains to bridges and causeways, the authority for which was transferred to the USCG (33 CFR 320.2)
- Fill associated with bridges requires a Section 404 permit from the Corps

Section 404 of the Clean Water Act of 1977

- Applies to 'waters of the United States' (**33 CFR 328.3**)
- Discharges of dredged or fill material are regulated
- Goal - to preserve the physical, chemical and biological integrity of U.S. waters

'Waters of the U.S.'

- Navigable Waters
 - e.g. Genesee River, Niagara River, Barge Canal, Seneca and Cayuga Lakes
- All Interstate Waters
 - Great Lakes
- Tributaries
 - All tributaries
- Adjacent wetlands

'Waters of the U.S.'

- Limits of jurisdiction for waters of the U.S.
 - Ordinary high water mark, in the absence of adjacent wetlands
 - Wetland/upland boundary

Wetland Definition

“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.”

Wetland Delineation

- Performed in accordance with 1987 Federal Wetland Delineation Manual
- Three criteria:
 - **hydrophytic vegetation**
 - **hydric soils**
 - **hydrology**

Preliminary Wetland Delineation

- Determines presence or absence of wetlands
- Based on resource review
 - Soil maps
 - USFWS National Wetland Inventory Maps
 - NYSDEC FWW Maps
 - Aerial Photography
 - GIS data

Formal Wetland Delineation

- Defines boundaries of wetlands based on 1987 Manual
- Includes data collected under preliminary wetland delineation plus detailed site data on soils, vegetation, and hydrology

A Department of the Army Permit is Required :

- For activities which involve a discharge of dredged or fill material into a water of the United States (Sec. 404, Clean Water Act).
- For any structure or work that takes place in, under, or over a navigable water, or wetlands adjacent to navigable waters (Sec. 10, Rivers and Harbors Act).

Other Approval Mandated by Law:

- 401 Water Quality Certification by the New York State Department of Environmental Conservation (NYSDEC)
- Coastal Zone Management Program Consistency by the New York State Department of State (NYSDOS)

Department of the Army Permits Include:

- Standard Permits
 - Letter of Permission (LOP)
 - Individual Permit (IP)
- General Permits
 - Regional Permits (RP)
 - Nationwide Permits (NWP)

Letters of Permission

- Authorize minor activities that exceed limits of general permits
- Non-controversial
- Require 15 day coordination with resource agencies and adjacent property owners

Individual Permits

- Full public interest review
- Public notice (15-30 days)
- Determination of compliance with USEPA Section 404(b)(1) Guidelines
- Preparation of Environmental assessment (EA) and statement of findings (SOF)
- Results in permit issuance or denial

Nationwide Permits (NWP)

- A type of general permit used to authorize specific types of activities
- Minimal impact to aquatic environment
- Expedite permit review process
- Valid for 5 years
- 50 different NWPs
- 28 general conditions
- Regional conditions developed by District/state agencies
- Mitigation may be required

Pre-Application Meetings

- Conduct pre-application meeting during planning stages
 - Save time and money
- Encourage joint pre-application meetings
 - JPPM – Joint Permit Processing Meetings held 2nd Tuesday of the Month
- For potentially complex/controversial, not minor projects

Pre-Application Meetings

- Purpose
 - Impact reduction
 - Need to know the “jurisdictional boundaries”
 - Discuss alternative alignment/design layout
 - Streamline permitting
 - Program education
 - Applicant assistance

Pre-Application Meetings

- Possible Attendees
 - Applicant and/or consultant
 - Other Corps personnel (in/out of Reg)
 - Resource/permitting agencies
 - Town/local gov't officials
 - Technical experts
 - Potential objectors/supporters

Pre-Application Meetings

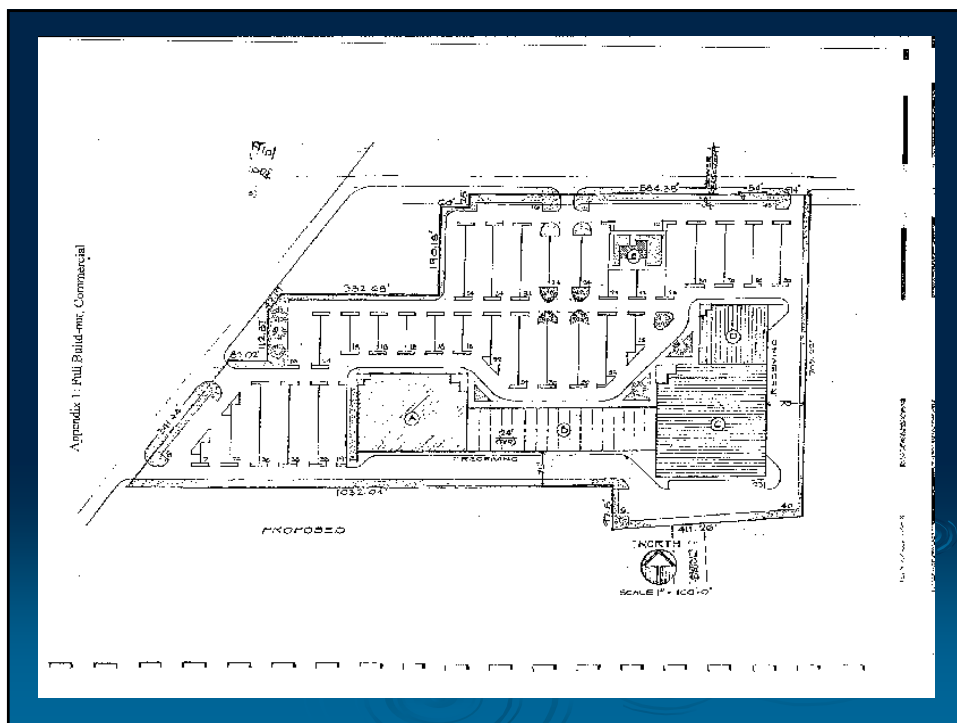
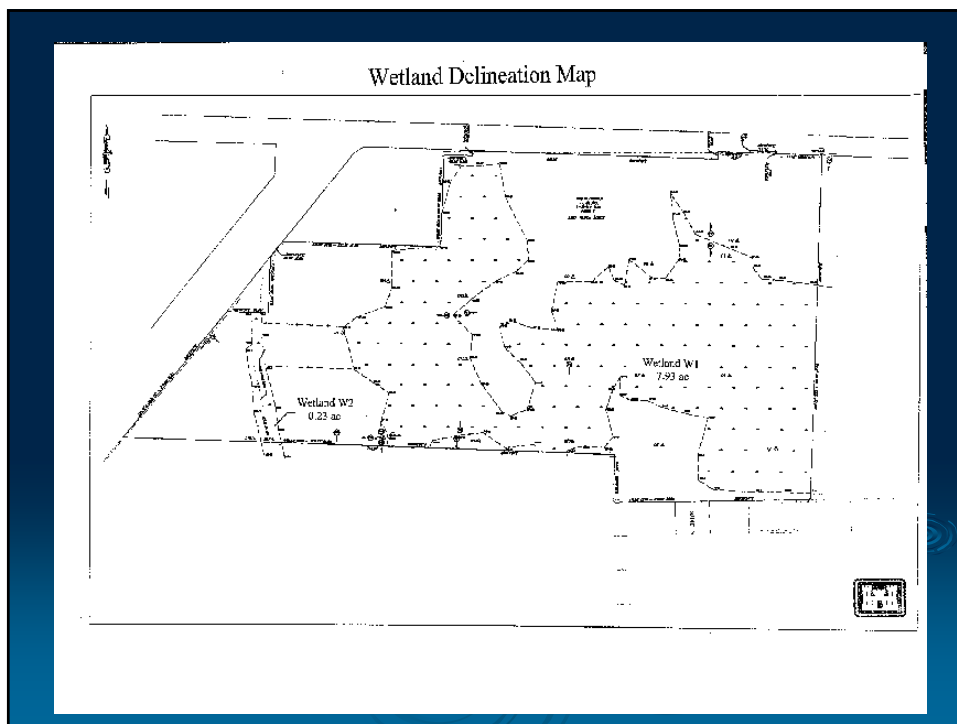
- Preparation for Meeting
 - Request information from applicant in advance of meeting
 - Wetland boundary overlain on proposed design
 - Alternative designs evaluated
 - Summary of alternative sites evaluated
 - Gather available resource data

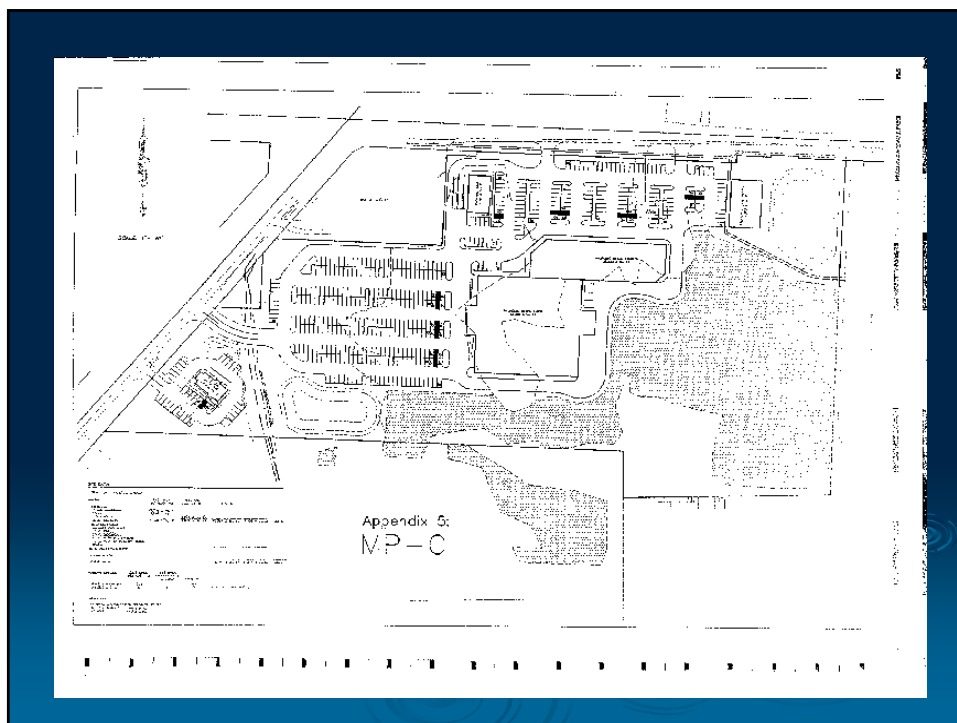
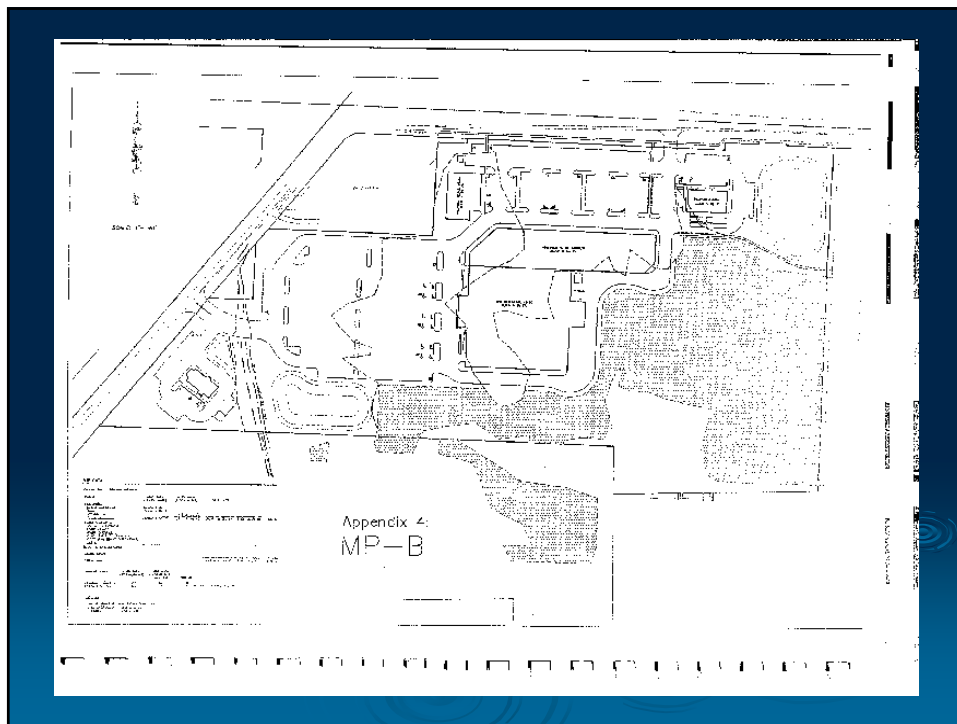
USEPA Oversight

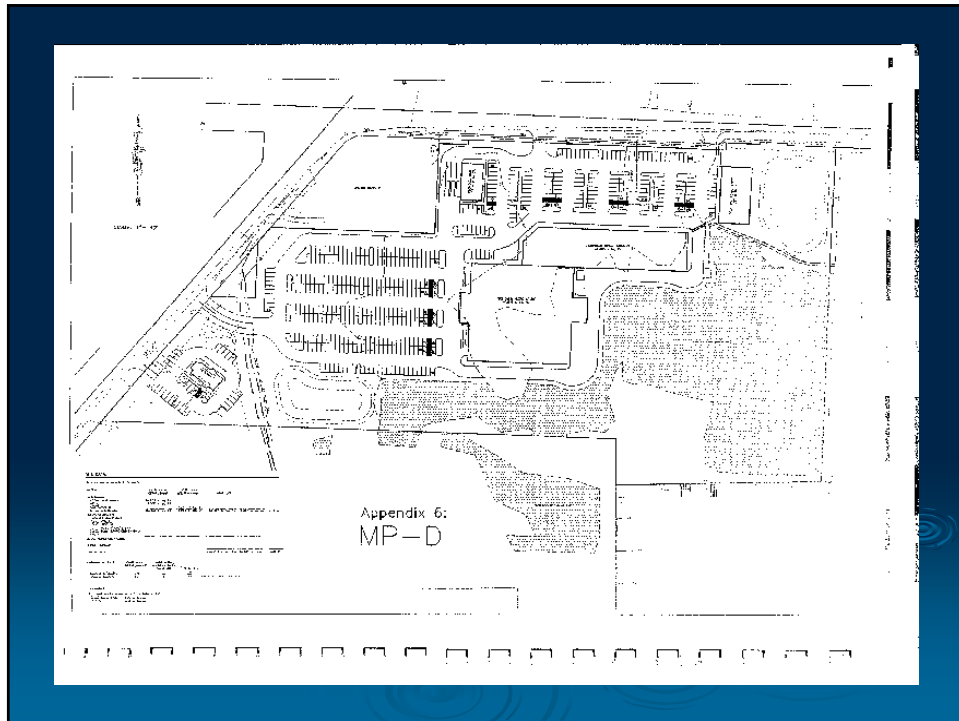
- Issued Section 404(b)(1) Guidelines to ensure the regulatory program is attempting to fulfill its goals
 - ➔ **least environmentally damaging practicable alternative**
 - ➔ **water dependent**
 - ➔ **avoid, minimize, mitigation**

Alternatives Analysis

- **Off-site**
 - Define basic and overall project purpose
 - Identify critical site criteria and apply equally to all sites
- **On-site**
 - Continue evaluation of avoid-minimize
 - Seek variances
 - Do's & Don'ts for stormwater basins







Discussion Topics

- **How are Federally regulated wetlands and State regulated wetlands similar/different?**
- **Are there any maps that confirm presence/absence of all wetlands in New York State (or any other State?!!)**
- **What do you know about the National Wetland Inventory (NWI) maps?**
- **How does USACE jurisdiction fit into your site plan review?**

Discussion Topics

- **What are the benefits to local government when the USACE is involved early in the review process?**
 - Knowing results of the wetland delineation with regard to size, location, and jurisdictional determination of all wetlands and streams (ephemeral, intermittent, perennial).
 - Knowledge that Clean Water Act 404(b)(1) Guidelines require that an application requesting the placement of fill in a jurisdictional water of the United States must reflect the Least Environmentally Damaging Practicable Alternative..... AND

- **The review process requires avoidance and minimization of impacts which may require the applicant to modify/change the original plan.**

THEREFORE

The Site Plan that received preliminary or final approval by the Planning Board, may not (and likely will not be) the site plan accepted by the USACE (and/or the NYSDEC, and/or the NYSDOS).

Further, the PB or ZBA may “condition” their approval contingent upon approval by the above agencies..... BUT

You run the risk of assuming that the plan you approved is the plan that gets built.

WHAT TO DO?

- **You could:**
 - **Hold final approval until all permits from all agencies have been issued/authorized.**
 - **Request documentation that a wetland delineation has been conducted and request a copy of the report that summarizes findings.**
 - **Request USACE attendance at pre-application meetings.**

- **USACE involvement can reduce the cost of plan design and redesign.**
- **Reduces redundancy of review time by the Planning Board and ZBA.**
- **Helps keep within timely deadlines when USACE coordination is done in advance – instead of at the “11th hour” when bids are due out.**

Who has authority to determine if wetlands are present/absent on a property?

- **Code Enforcement Officer?**
- **Village/County Engineers?**
- **Village/Town/County Clerk?**
- **NYS Department of Environmental Conservation?**
- **County Soil and Water Conservation District?**
- **Cooperative Extension?**
- **FEMA?**

How Should You Advise a Potential Applicant **if:**

- **A proposed project does not require a permit from the Village/Town, but the project is located in a wetland or has streams flowing through the property?**
- **A proposed project does not require site plan review by the Planning board, but the property has wetlands and/or streams?**
- **A proposed project does not require site plan review by the Planning board, but it is not known if the property has wetlands and/or streams?**

To Ensure Thorough Project Review – Ask the Applicant About:

- Drainage
- Buffer/Green Space – How might “saving the trees” save you headaches and money?
- NYSDEC involvement (site plan may show stormwater management ponds in wetlands or streams – know that approval of such placement is not likely by either the USACE or NYSDEC).
- Potential on-site mitigation (creation, restoration, enhancement of wetlands and streams).

What Happens When the Trees Are Cleared? (Think Drainage)

