

WILMINGTON DISTRICT US ARMY CORPS OF ENGINEERS REGULATORY DIVISION



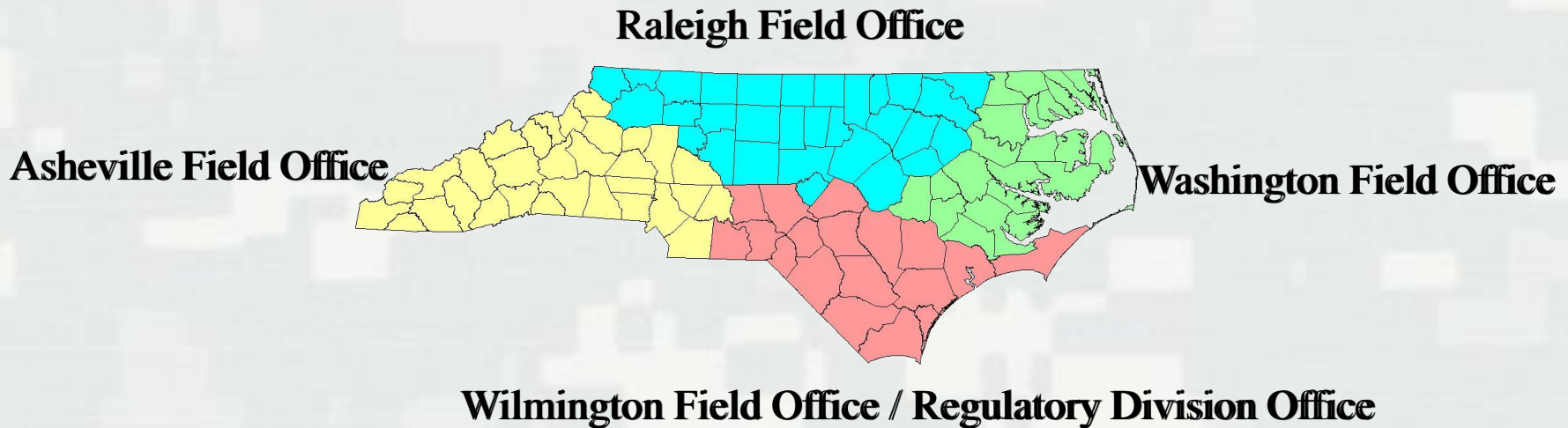
US Army Corps of Engineers
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Wilmington
District

Organization

The Wilmington District Regulatory Division consists of 4 field offices in Wilmington, Washington, Raleigh and Asheville. The Regulatory Division has approximately 51 employees and an annual budget of \$7.1M.



Authorities

- **Rivers and Harbors Act of 1899**

- Section 10 of the Rivers and Harbors Act of 1899 gives the authority to the Corps to ensure that there are no obstructions to the navigable waters of the United States. Regulated activities include construction of piers, jetties, and weirs; dredging projects; and other such projects

- Clean Water Act (1972)** – Purpose is to restore and maintain the chemical, physical, and biological integrity of the Nations waters.

- Regulated activities include discharges of dredged or fill material into waters, including streams and wetlands, of the United States.



Permit Types

- ▶ Individual or Standard Permit - Requires 30-day Public Notice and opportunity for public comment
 - Coordination with the review agencies
 - Typically for impacts greater than 0.5 ac of wetlands or 300lf of stream
- ▶ Nationwide and General Permits
 - Re-Issued by Congress every 5 years
 - A total of 52 activity specific permits
 - Primarily limited to impacts <0.5 ac. of wetlands and <300 lf of stream
- **Mitigation can be required in either case**



Other Program Requirements

The Regulatory Division, in making permit decisions, must not only follow the procedures of the Rivers and Harbors Act and the Clean Water Act but must also ensure compliance with many other Laws including:

- Section 103 of the MPRSA
- Section 401, Clean Water Act
- Section 7, Endangered Species Act
- Coastal Zone Management Act
- National Environmental Policy Act (NEPA)
- Fish and Wildlife Coordination Act
- Section 106, National Historic Preservation Act



Mitigation

- Three options available to the public
 - ▶ Permittee Responsible, Banks, In-Lieu-Fee program
 - ▶ Corps does not dictate the source – applicants make proposal and Corps determines if it is adequate to offset permitted adverse impacts
 - ▶ Determined on a permit by permit basis – most impacts require some form of compensatory mitigation



Mitigation

- Basic Requirements
 - ▶ Not actually cause more harm to the environment!
 - ▶ Typically performed during or prior to the regulated activity (ILF may be an exception)
 - ▶ Must be preserved in perpetuity
 - ▶ Must be In-Kind unless otherwise approved
 - ▶ Must be performed within the same 8-HUC unless otherwise approved



Mitigation

- The cost of compensatory mitigation credits is determined by the sponsor of a mitigation bank or in-lieu fee program.
- Section 332.8(o)(5)(ii) [§ 230.98(o)(5)(ii)] requires in-lieu fee programs to use full cost accounting methods, so that the cost per unit credit includes the expected costs associated with the restoration, establishment, enhancement, and/or preservation of aquatic resources in the service area.
- This provision is intended to ensure that in-lieu fee programs develop realistic price schedules, while still leaving determination of credit prices to the program sponsor, rather than the Corps.



Service Areas

- Defined in the 2008 Mitigation Rule as “the geographic area within which impacts can be mitigated at a specific mitigation bank or an (ILF) lieu fee program, as designated in its instrument”
- The Wilmington District currently uses the 8-digit HUC as the basis for defining Service Areas for Mitigation Banks and EEP.
- Service Areas boundaries may be modified based on other factors



Service Areas

- Considerations:

- ▶ Ensure lost aquatic functions are compensated reasonably near the impacts
- ▶ Ecoregion
- ▶ Stream Temperature Regime (Cold, Cool, Warm)
- ▶ Watershed Planning – allows mitigation that is developed within a watershed to be located to best compensate for the both the needs of the watershed and the type of functions lost through issuance of permits



Service Areas

- ▶ Economics – larger service areas could result in mitigation being provided far from impact sites, especially if land prices vary considerably across the watershed.
- ▶ Site Availability – small watersheds or watersheds with limited mitigation opportunities may justify expanded service areas
- ▶ Exceptions to the 8 digit HUC can be made on a case-by-case basis.
 - Exceptions are a part of every banking instrument



NC EEP

- Has provided mitigation to the public and private sector since 2003*
 - ▶ WRP provided mitigation from 1998 to 2003
- In-Lieu Fee Instrument was approved in 2010 to comply with (new) Federal mitigation rule
 - ▶ Agreement is now between DENR and USACE, NC DOT is no longer a signatory agency



NC EEP

- Mitigation type, location, specific timeframes, and watershed approach allowed the District to make assurances that NC DOT projects would not be held up due to mitigation concerns.
 - Since its inception, no NC DOT projects have been delayed due to mitigation
- Approximately 2,000 DA permits with a compensatory mitigation requirement have been satisfied by the EEP.



NC EEP

- Important Program characteristics
 - ▶ Advance mitigation for NC DOT projects
 - ▶ Watershed approach (an ILF requirement)
 - ▶ Provides mitigation for the regulated public in all 54 8-digit HUCs
- We believe this is an important service to the regulated public of North Carolina



404 Program Transfer to the States

(40 CFR Part 233)

- Under Section 404(g) of the Clean Water Act, Congress gave the States/Tribes the authority to administer individual and general permit program for the discharge of dredged or fill material into waters within their jurisdiction under State law or under an interstate compact.
- EPA has final approval authority for program transfer of CWA Section 404 jurisdiction and will coordinate with the Corps, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service during the process.
- While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.



404 Program Transfer to the States

- The State must show that their program would cover all waters they are eligible to assume, that it would regulate at least the same activities, that it would provide for sufficient public participation, that it would ensure compliance with the Section 404(b)(1) guidelines, and that it would have adequate enforcement authority.
- Corps retains 404 authority in navigable waters and wetlands adjacent to those waters.
- There are only two States that currently have assumed the CWA Section 404 authority, Michigan and New Jersey.



Partnerships

- Merger Process established between USACE, NC DOT, NC DENR, and FHWA
 - ▶ Integrates NEPA and 404 requirements to facilitate transportation planning
- In-Lieu-Fee Agreement between USACE and NC DENR
 - ▶ Model program, provides advanced mitigation for most NC DOT impacts and provides compensatory mitigation to the private sector in all 54 8-digit HUCs



Civil Works Construction Cost Index System

- System Purpose is to inflate current construction cost estimates into the future or to inflate past construction estimates to present day or future costs.
- Indexes are found in Appendix A of Engineer Manual (EM) 1110-2-1304.
- Past Indexes are based on historical data.
- Future or projected indexes are based on current annual Office of Management & Budget (OMB) inflation factors.
 - ▶ Future factors are revised semi-annually by OMB and in the EM.
 - ▶ Reliability of future factors becomes less with length of forecast.



Civil Works Construction Cost Index System

- Actual material, equipment and labor costs are used in developing the historical Indexes
- Cost data is obtained from Federal Government Agencies and civilian organizations that track construction related costs – see the EM for detailed discussion



Conclusions

- The Wilmington District is proud of the relationship it has with NC DOT and NC DENR
- Regardless of state assumption, the Corps will always retain permit authority in tidal waters, navigable waters, and wetlands adjacent to those waters
- The committee should carefully consider any recommendation(s) that could potentially conflict with the Corps statutory requirements under the Clean Water Act





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