



## FDM 20-50-1 Permits

March 16, 2018

### 1.1 Introduction

In addition to the environmental documents and reports required and outlined in other sections of this chapter, federal and state laws also require the issuance of special permits for projects affecting certain environmental resources. Early planning and coordination with the Wisconsin Department of Natural Resources (WDNR), the U.S. Army Corps of Engineers (USACE), the U.S. Coast Guard (USCG) and the U.S. Fish and Wildlife Service (USFWS), regarding permit requirements are essential to avoid unnecessary delays.

## FDM 20-50-5 Federal Water Resource Permits

August 15, 2019

Federal permits are required for projects affecting waters of the United States and associated special aquatic sites, including wetlands. Waters of the U.S. are under the jurisdiction of the USACE and Environmental Protection Agency (EPA). Following the *Rapanos v. United States* (2006) and *Carabell v. United States* (2006) Supreme Court decisions, the definition of waters of the United States was clarified to include the following:

- Traditionally navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waterways that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally
- Wetlands adjacent to such tributaries that have a continuous surface connection

Additionally, the USACE and EPA use their discretion based on fact-specific analysis to determine whether the following areas are under their jurisdiction:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to, but not directly abutting a relatively permanent non-navigable tributary

EPA and USACE will generally not have jurisdiction over the following areas:

- Swales or erosion control features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)

Traditionally navigable waters are defined as waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high-water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce (33 CFR 322.2).

<http://www.gpo.gov/fdsys/pkg/CFR-2011-title33-vol3/xml/CFR-2011-title33-vol3-sec322-2.xml>

A list of traditionally navigable waters of the United States within Wisconsin may be found at the St. Paul District USACE website.

<http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/navigable%20waters%20wi.pdf>

See USACE and EPA guidance documents for additional information regarding waters of the U.S.

[http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/rapanos\\_guide\\_memo.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_guide_memo.pdf)

The permits discussed in detail below include Section 404 of the Clean Water Act, and Section 9 and Section 10 of the Rivers and Harbors Act of 1899. Before a Section 404 permit is granted, a Section 401 Water Quality Certification (WQC) must be granted by the authorized state agency (i.e. WDNR) or tribe if the proposed activity will result in the discharge of dredged or fill material in waters of the U.S. Although a federal requirement, Section 401 WQC is delegated to the State DNR and certain tribes in Wisconsin and discussed in more detail in FDM 20-50-20. For guidance on which areas are under the jurisdiction of the USACE see:

<http://www.mvp.usace.army.mil/Missions/Regulatory/Delineation.aspx>

Activities occurring in various classes of waters of the U.S. require different permits. For example, activities that propose to discharge dredged or fill materials into non-navigable waters of the U.S. may require a Section 404 permit. Alternately, activities that propose to discharge dredged or fill material into navigable waters of the U.S. may require both a Section 10 and Section 404 permit. Projects that propose to excavate material from a

navigable water of the U.S., but will not discharge materials into the same water, may only require a Section 10 permit. Additionally, some activities are considered to have minimum environmental impacts and may only require a Section 404 general permit or a letter of permission. This information is summarized in Table 5.1 below.

**Table 5.1 Permit Applicability**

Water Category	Activity	
	Excavate from Waters	Fill into Waters
Navigable Waters of U.S.	Section 10	Section 10/404
Waters of the U. S. (non-navigable)	-----	Section 404

**5.1 Section 404 Permits**

Section 404 of the Clean Water Act requires permit authorization from the USACE for the discharge of dredged or fill material into waters of the United States, including wetlands which are often considered waters of the United States. Discharge of dredged material means the addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the U.S. (40 CFR Part 323.2).

<http://www.nap.usace.army.mil/Portals/39/docs/regulatory/regs/33cfr323.pdf>

Discharge of fill material is defined as the placement of any material, including rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining activities, or materials used to create any structure or infrastructure, into waters of the United States for the purpose of converting an aquatic site to dry land or raising the bottom elevation of a water body (40 CFR Part 232.2).

<https://www.gpo.gov/fdsys/pkg/CFR-2013-title40-vol26/pdf/CFR-2013-title40-vol26-sec232-2.pdf>

A 404 Permit is required regardless of whether the project area is located on public or private property, regardless of funding source, and regardless of the type of environmental action. Permits discussed in detail in the following sections, include general permits, letters of permission, and other individual permits.

Information on Section 404 permits specific to WisDOT transportation projects can be found by clicking the following link:

<https://wisconsin.gov/Pages/doing-bus/eng-consultants/cns/it-rsrcs/environment/wetland-waters.aspx>

**5.1.1 Discharges Not Requiring Permits**

In general, any discharge from any of the following activities is not prohibited by, or otherwise subject to, regulation under Section 404.

<https://www.gpo.gov/fdsys/pkg/CFR-2013-title40-vol26/pdf/CFR-2013-title40-vol26-sec232-2.pdf>

- Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for production of wood, fiber, and forest products, or upland soil and water conservation practices;
- Maintenance, including emergency reconstruction of recently damaged parts, or currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
- Construction or maintenance of farm or stock ponds or irrigation ditches, or maintenance of drainage ditches;
- Construction of temporary sedimentation basins on a construction site which does not include placement of fill into navigable waters;
- Construction or maintenance of farm or forest roads and temporary roads for moving mining equipment;
- And discharge of materials into waters that are not under the jurisdiction of the USACE may not require federal permits (Rapanos v. U.S. and Carabell v. U.S. Guidance).

[http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/rapanos\\_guide\\_memo.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_guide_memo.pdf)

The WisDOT team, including the REC, BTS-EPDS, or ESS, should contact the USACE and obtain official confirmation that the exemption for maintenance activities applies to the project before commencing construction activities.

For more information on discharges not requiring permits, see 33 CFR 323.4.

<http://www.nap.usace.army.mil/Portals/39/docs/regulatory/regs/33cfr323.pdf>

### 5.1.2 General Permits

Discharges of dredged or fill materials into waters of the U.S. may be authorized by USACE district engineers on a national or regional basis and for a specified period of time (usually 5 years). If a discharge of dredged or fill material is not exempted by Part 323.4 or permitted by a nationwide or regional general permit (33 CFR Part 330), an individually processed 404 Permit will be required.

The USACE authorizes general permits after consultation with the WDNR and EPA. A nationwide general permit (NWP) is a type of permit issued throughout the country for activities that are substantially similar in nature and cause minimal individual and cumulative adverse impacts. These permits are issued to expedite permit processing. Regional general permits are used for the same purpose but apply to specific geographic regions.

### 5.1.3 Regional General Permits

Regional general permits (GPs) apply to all waters of the United States in Wisconsin and areas within the exterior boundaries of Indian Reservations.

Regional general permits typically take about 60 days to process but should be applied for approximately 6 months prior to PS&E to avoid delays.

In 2018, the USACE St. Paul District issued seven new regional general permits for Wisconsin and Minnesota, including an RGP specific to transportation projects, called the transportation regional general permit (TRGP). The TRGP includes five categories of activities: minor maintenance - linear transportation, modification - linear transportation, new construction - linear transportation, non-linear transportation projects and transportation surveying. Each category identifies eligible activities, activity restrictions and requirements for submitting pre-construction notification to the USACE. The RGP also includes a series of exclusions, restricting the use of the RGP for certain activities or categories of waterways. Details are available on the St. Paul District's website: <https://www.mvp.usace.army.mil/missions/regulatory/rgp/>

A pre-construction notification (PCN), also referred to as a permit application, may be required based on the type of activity, location or anticipated impacts. Certain activities, described in the TRGP, do not require submittal of a PCN to the USACE. For projects that do not require PCN submittal to the USACE, the project team must clearly document compliance with the permit terms and conditions by including a memo in the project file describing the project details, location and justification for why a PCN was not required. Projects that do not require PCN submittal may require compensatory mitigation and coordination with the Corps regarding mitigation. This is typically accomplished by submitting the completed wetland impact tracking form (WITF) to the Corps request mailbox. Contact the appropriate REC or BTS-ESS for additional guidance on determining if a PCN is required, documentation necessary for projects that do not require a PCN to the USACE, and guidance on completing and submitting the wetland impact tracking form to the USACE.

### 5.1.4 Letters of Permission

Letters of permission are abbreviated individual permits, and as such, require application to and response from the USACE. Projects that cannot be authorized by the previously described general permits or a letter of permission must be individually processed. Letter of permission permit applications typically take at least 90 days to process, but should be applied for at least 9 months before PS&E to avoid delays. A full description of current LOP can be found on the USACE, St. Paul District permitting website.

<http://www.mvp.usace.army.mil/Missions/Regulatory/Permitting-Process-Procedures/>

Proposed activities that will occur within the exterior boundaries of Indian Reservations in Wisconsin, that are not eligible for general permits, may be eligible for current letters of permission.

The USACE retains discretionary authority to require individual permit review for any activity meeting letter of permission criteria. If a letter of permission authorization is needed, authorization may be granted after completing the Water Resource Application for USACE 404 Permit and WDNR 401 WQC;

<http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/>

and sending to the USACE St. Paul District office and WDNR. Information on Section 404 permits specific to WisDOT transportation projects can be found by clicking the following link:

<https://wisconsindot.gov/Pages/doing-bus/eng-consultants/cnslt-rsrcs/environment/wetland-waters.aspx>

### 5.1.5 Individual Permits

If an activity is not covered by an exemption, general permit, or letter of permission, it will likely require an individual Section 404 Permit. Individual permits will require more time to process and typically receive higher scrutiny than general permits or letters of permission. Individually processed permits typically take 120 days to process but should be submitted to the USACE and WDNR at least 12 months before PS&E if possible to avoid delays.

Several actions need to be taken by the WisDOT permit applicant before beginning a construction project covered by an individual permit. Below is a list of steps to be taken when an individual permit is needed.

- A pre-application meeting with a WDNR Liaison and the appropriate USACE project manager should take place before applying for an individual permit. Some items that should be discussed during this meeting include the purpose, need and scope of the proposed project, preliminary scope of considered alternatives, application requirements (e.g., wetland delineation, practicable alternatives analysis, and mitigation requirements), expected project schedule, and approximate wetland impacts, if known. See the WDNR website for additional details.

[http://dnr.wi.gov/topic/waterways/construction/wetland\\_IP/wetland\\_pre\\_application\\_checklist.pdf](http://dnr.wi.gov/topic/waterways/construction/wetland_IP/wetland_pre_application_checklist.pdf)

- Prepare the Water Resource Application for USACE 404 Permit and WDNR 401 WQC.

<http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/>

- Send the completed application with all required materials to the appropriate WDNR Transportation Liaison and USACE project manager.
- Provide additional information and documents as requested by WDNR and USACE.

Refer to the individual permit process flow chart (Figure 1.1) for additional details on the permitting process. Contact the appropriate WDNR liaison, REC, LPMC or BTS-ESS for more guidance on individual permits within the state of Wisconsin.

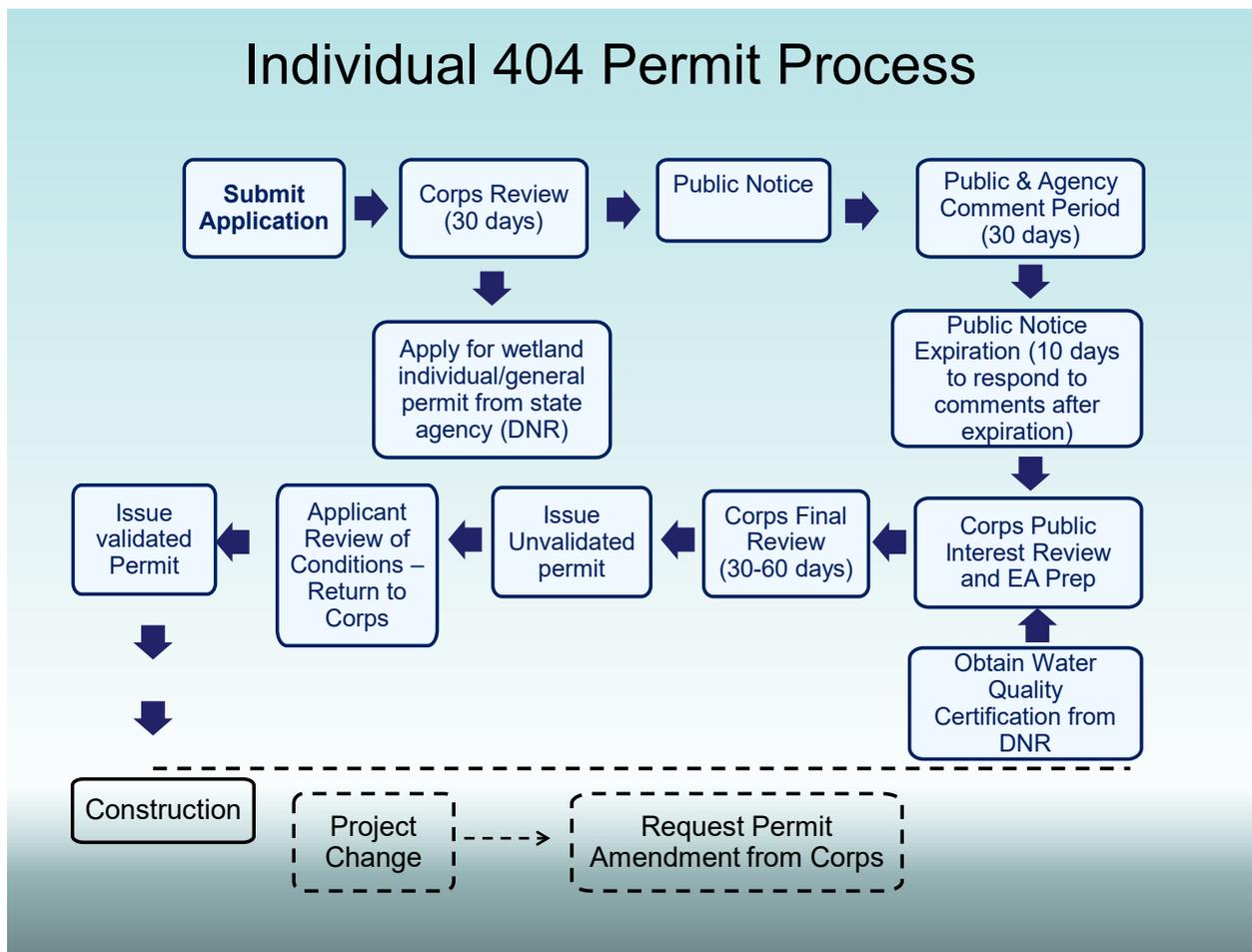


Figure 1.1 Individual 404 Permit Flowchart

### 5.1.6 Application for Section 404 Permits and Section 401 Water Quality Certification

The 404 permit process is closely tied to 401 WQC. The 404 permit is not valid without 401 WQC. Also, when a 404 permit applies to a project, the 401 WQC is not valid without the 404 permit. For a more detailed discussion of 401 WQC see FDM 20-50-15. Early coordination with the WDNR and the USACE is recommended whenever a wetland, floodplain, stream, river, or water body is likely to be impacted by the discharge of dredged or fill material.

The scope of the project is coordinated with the local WDNR liaison and may be coordinated with the appropriate USACE project manager early in the planning or design process to avoid delays near project completion. Coordination with WDNR is done through the established liaison process, as outlined in the Cooperative Agreement between WDNR and WisDOT. Involve your REC, LPMC or BTS-EPDS or ESS liaison as appropriate for WDNR and USACE coordination on all wetland issues.

The WDNR can grant, waive, or deny a Section 401 WQC. The Section 401 WQC process is usually initiated in conjunction with the Section 404 permitting process by submitting the Water Resource Application for USACE 404 Permit and WDNR 401 WQC to the appropriate WDNR liaison and the regulatory branch of the USACE St. Paul District.

<https://www.mvp.usace.army.mil/Missions/Regulatory/District-Boundaries-Contact/>  
<http://dnr.wi.gov/topic/Sectors/documents/transportation.html>

The WDNR may assist in coordinating the certification with the USACE during the Section 404 permit process.

The amount of time it takes the USACE to review a routine Section 404 Permit application is variable. Larger projects and individual permits will require closer coordination with the WDNR liaison and USACE and can take longer to process. If the project is controversial or involves major impacts to wetlands or water bodies, coordinate closely with the WDNR and the USACE by requesting pre-application consultation, a meeting or a field review on the project. Close and early coordination will assist in reducing potential delays. Coordinate with the REC, LPMC or BTS-EPDS/ESS for assistance with agency coordination.

When WisDOT is conducting the preliminary engineering for a local unit of government, WisDOT may submit an application on the applicant's behalf. For all WisDOT supervised projects, the state project identification number should be present on exhibits and the heading of the transmittal letter. If WisDOT is not doing the preliminary engineering or supervising the project, the local unit of government or their consultant is responsible for preparing and submitting the application. If the project does not fall under the Cooperative Agreement between WDNR and WisDOT, additional coordination and application material may be needed.

### 5.1.7 Guidelines for 404 Permits Application

A complete 404 permit application consists of the application form, exhibits and drawings, information on compensatory mitigation via WisDOT's wetland impact tracking (WITF), and attachments. Water Resource Application for USACE 404 Permit and WDNR 401 WQC:

<http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/>

Specific guidance for Section 404 permits applications for WisDOT transportation projects can be found at the following link:

<https://wisconsin.gov/Pages/doing-bus/eng-consultants/cnslt-rsrces/environment/wetland-waters.aspx>

### 5.1.8 Application Submittal

The permit application should be addressed and sent to the USACE St. Paul District request mailbox for Wisconsin ([USACE Requests WI@usace.army.mil](mailto:USACE_Requests_WI@usace.army.mil); for additional information, refer to the link provided below) and WDNR liaison responsible for the county in which the project is primarily located. Upon receipt of the request, USACE will notify the application of the assigned USACE project manager via email.

The appropriate transportation liaison for each county is available on the WDNR website.

<http://dnr.wi.gov/topic/Sectors/documents/transportation/Liaisons.pdf>

### 5.1.9 Section 404 Permit Process Stages

1. Submit completed application.
2. The USACE reviews the application and determines 404 jurisdiction and completeness of information. The USACE may also request Section 401 WQC from WDNR. The WDNR should make a preliminary determination at this time or defer to a time later in the process.
3. For Individual Permits and Letters of Permission, a Public Notice is written and issued by the USACE for a period of 30 days. During this period, the public is invited to comment on the permit application.

An opportunity for a public hearing is stated. The purpose of the public hearing is to obtain additional information to complete the public interest review. Usually the information is complete before the Public Notice is issued and hearings are seldom held.

4. During the public notice period for Individual Permits, EPA and USFWS may comment to the USACE on the permit application as defined in the Public Notice. If there is no comment, there is no action from those agencies. Any written comment(s) that indicates an adverse concern from EPA or USFWS will be sent to WisDOT for response. Response to EPA and USFWS comment is directed to the USACE. Written response to comments from other entities will depend on how that comment may influence the permit. The USACE should be consulted on the necessity to respond in writing.
5. For Individual Permits, the public notice period will have a set expiration date. (Note: This date may be extended by EPA or USFWS if an adequate reason is given.) The WisDOT contact or authorized agent responsible for monitoring the application should contact the USACE project manager following the expiration date to determine if the public notice expiration date has been extended, if any public comments were received, and request an update on the status of the application.
6. For Individual Permits, the USACE conducts an internal public interest review based on public comment and prepares an environmental assessment.
7. For Individual Permits, USACE returns the signed, validated permit and instructions. This concludes the permit process. The entire process may take anywhere from 60 to 120 days or longer, depending on if the application is for a general permit, letter of permission, or individual permit.

Note the permit expiration date; this expiration date may differ depending on which type of permit is obtained. The validity of the permit usually does not exceed five years and may be less than five years depending on when the permit was issued. If a project has not been started or completed before the permit expiration date, the permit may be extended provided the project has not changed with respect to the discharge of fill in the waters of the U.S. The extension can be accomplished by requesting an extension in writing from the USACE Project Manager assigned to the project, stating the circumstances and indicating if there are changes to the project. The USACE 404 permit identification number must be cited for the USACE to retrieve the project file. For more information on the permit process stages, see the permit process flow chart in Figure 1.1.

#### **5.1.10 Distribution of Copies after Application Approval**

Copies of the public notice, validated permit, and the engineer's packet for construction must be placed in the Region project file.

#### **5.2 Section 9 Permits and Application**

Section 9 of the Rivers and Harbors Act identifies that construction of a new bridge or causeway or the reconstruction or modification of an existing bridge or causeway or construction of a temporary bridge or causeway across navigable waters of the U.S. without congressional approval. Administration of Section 9 has been delegated to the U.S. Coastguard. In Wisconsin, navigable waters of the U.S. are waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high-water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce (33 CFR 322.2).

<http://www.gpo.gov/fdsys/pkg/CFR-2011-title33-vol3/xml/CFR-2011-title33-vol3-sec322-2.xml>

If the Coast Guard has jurisdiction over the waterway where the bridge or causeway is to be constructed, a Section 9 permit will be required for the structure. Attendant features requiring excavation of and fill into commercially navigable waters will require coordination with the USACE and possible application for a Section 10, Section 404 individual or general permit.

To determine if a section of the waterway is under Coast Guard jurisdiction, contact the Coast Guard at either one of the two Coast Guard districts within Wisconsin. As a rule, waterways that enter Lake Michigan and Lake Superior are in the 9th district in Cleveland and those that enter the Mississippi River are in the 8th district in St. Louis.

For minor exceptions, the applicant will be referred by one district to the other. For information on current USCS contacts refer to region environmental coordinator.

Section 9 waterways are within Section 10 jurisdiction. The list of Navigable Waters of the United States within Wisconsin can be used as a guideline when contacting the Coast Guard on their jurisdiction.

<http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/navigable%20waters%20wi.pdf>

The information needed for a Coast Guard Section 9 permit is found in the Bridge Permit Application Guide on the U.S. Coast Guard website.

<https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Marine-Transportation-Systems-CG-5PW/Office-of-Bridge-Programs/Bridge-Permit-Application-Process/>

### 5.3 Section 10 Permits

Section 10 of the Rivers and Harbors Act states that any work in or affecting navigable waters of the United States (commercially navigable waters) requires a permit from the USACE. Such work includes dredging, channelization, excavation, filling, construction of piers, breakwaters, bulkheads, revetments, power transmission lines, aids to navigation, and sewer outfalls over commercially navigable waters.

If a Section 10 Permit is needed for the discharge of dredged or fill material, a Section 404 Permit, and a Section 401 WQC from the WDNR (FDM 20-50-15) would also be required. Both permit applications are submitted to the USACE simultaneously as a Section 10/404 application and can be found on the USACE St. Paul District website.

<http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/>

Individual inquiries on a project basis should be made to the USACE project manager assigned to the project or to the general request mailbox ([usace\\_requests\\_wi@usace.army.mil](mailto:usace_requests_wi@usace.army.mil)) if a USACE contact has not been assigned.

A Section 401 WQC from the WDNR is required for a joint Section 10/404 Permit. Refer to the procedures for a Section 404 application earlier in this chapter.

If a Section 10 Permit is needed for excavation in navigable waters of the United States and there is no discharge of fill, a Section 404 permit would not be required. A Section 10 permit application would be submitted using the same procedure as the Section 10/404 permit application.

Waters covered by Section 10 of the 1899 Rivers and Harbors Act within Wisconsin can be found at the USACE, St. Paul District website.

<http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/navigable%20waters%20wi.pdf>

## FDM 20-50-10 Other Federal Permits

March 16, 2018

### 10.1 Migratory Bird Treaty Act of 1918

The Migratory Bird Treaty Act (MBTA) of 1918 protects all migratory birds, including their nests and eggs, as identified in 50 CFR 10.13. In Wisconsin, the cliff swallow, barn swallow and eastern phoebe are migratory birds that commonly nest on bridges. Construction or maintenance operations on bridges occupied by these species may come into conflict with the MBTA. Other migratory birds, such as rough-winged and bank swallows, nest in burrows formed in surface face cuts or cliff faces, which may be found on borrow sites associated with WisDOT projects.

During the environmental documentation phase of preliminary design, bridges or other structures, or cliff or bluff faces that have the potential to serve as a surface or nesting habitat for migratory birds should be evaluated to determine occupancy or use by migratory birds. Documented or assumed occupancy or use of a structure or area by migratory birds should be described in the environmental document. Prior to the bridge replacement or destruction, the bridge should be investigated for the presence of nesting migratory birds. Arrangements, such as removal of inactive nests in the early spring, fall or winter, and/or preventing birds from creating active nests, such as scrapping off or hosing off inactive nests, or netting during the inactive season, may be required.

Destruction of active nests is a violation under the Act. The USFWS may permit incidental destruction of nests during the non-nesting season, which is usually between August 30 and May 1. Coordinate with USFWS through the REC, LPMC or BTS-ESS as appropriate.

If nests are present, set up the project schedule to avoid impact to nests, or include contract special provisions for the county or contractor to net the bridge to deter birds from nesting or as a last resort, obtain a depredation permit. All effort should be made in project planning, timing and construction site preparation to avoid conditions requiring the need for depredation permits. Designers should only apply for a USFWS depredation permit when public safety is involved and methods to prevent nesting cannot be implemented.

For greatest efficiency, the application for the permit should be initiated with the U.S. Department of Agriculture-Wildlife Services (USDA-WS). The project team should contact the appropriate USDA-WS district office.

[http://www.aphis.usda.gov/wps/wcm/connect/8e353103-e8ee-4d3b-8cbf-db421e5d9822/distmap+3-13-2012\\_1533.jpg?MOD=AJPERES](http://www.aphis.usda.gov/wps/wcm/connect/8e353103-e8ee-4d3b-8cbf-db421e5d9822/distmap+3-13-2012_1533.jpg?MOD=AJPERES)

Request an application form and the information sheet that will provide guidance in completing the application. Return the completed application to the USDA-WS office. The USDA-WS will do an on-site evaluation for

USFWS and then submit the application with the evaluation to USFWS for permit review.

USFWS Division of Migratory Birds will review the permit application and either issue or deny the permit. They may also apply specific conditions to the permit after coordination with the applicant. Contact your REC, LPMC, BTS-EPDS liaison or BTS-ESS Ecologist (608) 266-1017 (for specific guidance).

## 10.2 The Bald and Golden Eagle Protection Act of 1940

The Bald and Golden Eagle Protection Act (16 U.S.C. 668-668c), enacted in 1940, and amended several times since then, prohibits anyone, without a permit issued by the Secretary of the Interior, from "taking" bald eagles, including their parts, nests, or eggs. The Act provides criminal penalties for persons who "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or any manner, any bald eagle ... [or any golden eagle], alive or dead, or any part, nest, or egg thereof." The Act defines "take" as "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb."

"Disturb" means: "to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior."

In addition to immediate impacts, this definition also covers impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagle's return, such alterations agitate or bother an eagle to a degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, and causes injury, death or nest abandonment.

If any nest sites are present within a project area coordinate immediately with your REC, LPMC, BTS-EPDS liaison or BTS-ESS Ecologist. For guidance on the law and necessary permits see:

<https://www.fws.gov/midwest/midwestbird/eaglepermits/index.html>

## FDM 20-50-15 Tribal Permits

March 16, 2018

Each tribe within the state has its own set of permit requirements on tribal owned property. They vary widely in the range of applicability to transportation projects. For the most current information on permits required on tribal owned lands coordinate closely with the Region Tribal Liaison.

<https://wisconsin.gov/Documents/doing-bus/civil-rights/tribalaffairs/tribal-liaison-map.pdf>

Some tribes have EPA approval to administer their own water quality standards (WQS) program, part of that approval is the authority over 401 certifications which a requirement of the clean water act. FDM 20-50-20 that follows outlines the 401 certification requirements and submittal process. A list of tribes with WQS program authority can be found at the link below. The list includes all federally recognized tribes with delegated authority and is not specific to Wisconsin.

<https://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards-and-contacts>

## FDM 20-50-20 State Permits

March 16, 2018

### 20.1 WDNR 401 Water Quality Certification/Final WDNR Concurrence

The 401 certification is a requirement of the Clean Water Act. Any 401 certification requires DNR to certify that the proposed discharge of dredged or fill materials into waters of the United States will not have a significant effect on the quality of the water.

The 401 certification must be obtained before the 404 permit will be issued by the USACE. It is necessary, however, to get a sense of whether WDNR will grant, waive, or deny 401 certification during the environmental process of the project. WDNR should be consulted on 401 certification throughout the development of a project. Contact the REC or TSS-ESS staff for guidance on WDNR consultations.

The 401 submittal, to be sent to the WDNR liaison for the county of your proposed project, will also serve as part of your request for Final Concurrence for the proposed project. All WisDOT projects require Final WDNR Concurrence, regardless of funding source or whether there are wetland impacts. If there are no wetland impacts, work with the REC, LPMC or BTS-EPDS to determine what is needed for a Final Concurrence submittal.

### Final Concurrence Request - No Wetland Impacts

Submittal at a minimum should include:

- Completed DNR/DOT Project Review form

<https://wisconsindot.gov/Pages/doing-bus/eng-consultants/cnslt-rsrcs/environment/formsandtools.aspx>

- On the DNR/DOT Project Review Form, under the category “Type of Review Requested,” check “Final Concurrence.”
- If there are no wetland impacts, state that there are no impacts.
- Describe any waterway crossings that have been coordinated with WDNR
- Describe any stormwater management features being implemented as a part of the project
- Include discussions of any erosion control measures unique to the project
- If there are any issues that require special provisions (i.e. adherence to in-stream disturbance or migratory bird protection dates) or notes in the plan, identify them and state how they are addressed in the plan.
- Project Location Map
- Plan and Profile

### **Section 401 Water Quality Certification Request - Wetland Impacts**

Submittal is identical to what is submitted to COE for the 404 permit application (FDM 20-50-5). Since the submittal materials are identical, when the 404 permit application is submitted to the USACE include WDNR on that submittal as a Courtesy Copy (CC).

When you receive the final concurrence letter from your liaison, the letter will include a statement that it also serves as the 401 Water Quality Certification.

### **Filing of Approved Section 404 Permits/Section 401 Water Quality Certification/Final Concurrence Letter**

The Wetland Impact Tracking Form (WITF)

<https://wisconsindot.gov/Pages/doing-bus/eng-consultants/cnslt-rsrcs/environment/formsandtools.aspx>

and Permit/Water Quality Certification packet (401/404) is needed for end of the year WisDOT mitigation bank debiting and annual reporting to WDNR and USACE.

Once the approved 404 permit and 401 Water Quality Certification are received, submit a packet to the REC responsible for tracking wetland mitigation for your Region. The packet will contain:

- Completed WITF
- Plan and Profile with cross hatched area calling out permanent impacts and temporary impacts
- Signed 404 permit from USACE (include entire letter and sheet(s) showing wetland impacts)
- Approved 401 WQC from WDNR (contained in the Final Concurrence letter for the project – attach entire letter)

### **20.2 WisDOT Exemptions from WDNR Permits**

In recognition of the WDNR and WisDOT’s responsibilities to protect and enhance the state’s natural resources and furnish the public with a safe, economical and efficient transportation system, a Cooperative Agreement between WDNR and WisDOT was developed to facilitate streamlined coordination.

<http://dnr.wi.gov/topic/sectors/documents/dnrdotcooperativeagreement.pdf>

This agreement serves to provide basic guidance and policy direction for liaison procedures for coordination of transportation projects. In that spirit and, more specifically, because of 30.2022 Wisconsin Statutes,

<https://docs.legis.wisconsin.gov/statutes/statutes/30/III/2022/2>

WisDOT activities in connection with highway, bridge, or other transportation project design, location, construction, reconstruction, maintenance, and repair are not subject to the prohibitions or permit approval requirements established under the following Wisconsin Statutes:

- Chapter 29.601 - Noxious Substances
- Chapter 30.11 - Establishment of Bulkhead Lines
- Chapter 30.12 - Structures and Deposits in Navigable Waters
- Chapter 30.123 - Bridges and Culverts
- Chapter 30.19 - Enlargement and Protection of Waterways
- Chapter 30.195 - Changing of Stream Courses
- Chapter 30.20 - Removal of Material from Beds of Navigable Waters
- Chapter 59.692 - Zoning of Shorelands on Navigable Waters

- Chapter 61.351 - Zoning of Wetlands in Shorelands
- Chapter 62.231 - Zoning of Wetlands in Shorelands
- Chapter 87.30 - Floodplain Zoning
- Chapter 281 - Water and Sewage
- Chapter 285 - Air Pollution
- Chapter 289 - Solid Waste Facilities
- Chapter 299 - General Environmental Provisions