

# CLEAN WATER ACT SECTION 404 PERMITTING CHECKLIST

For Section 404 permits, the public comments on permit application, not on the draft permit. Advocates should address as many potential flaws in the application as possible with supporting evidence attached to ensure a sufficiently broad and robust record for any subsequent litigation. Some issues probably cannot be fully addressed until after the permit issues.

Keep in mind that a 2023 U.S. Supreme Court decision significantly restricts what qualifies as a “water of the United States” subject to Section 404. Comments on similar projects, wetland delineation guides, and other documents may have been drafted before the U.S. Supreme Court curtailed the Corps’ jurisdiction.

Notes	Army Corps Section 404 Permitting Process	Guide
	<b>1st Stage: Gather Information &amp; Develop Relationships</b>	
	<ul style="list-style-type: none"> <li><input type="checkbox"/> Identify the Corps district overseeing the project</li> <li><input type="checkbox"/> Develop relationships the local Corps district staff</li> <li><input type="checkbox"/> Develop relationships with staff from other agencies, e.g., the regional EPA and FWS offices, that may be able to influence the Corps’ decision               <ul style="list-style-type: none"> <li><input type="checkbox"/> Share your concerns about the project. Attach supporting evidence where possible.</li> <li><input type="checkbox"/> If the project’s harm may be significant, suggest that EPA and FWS exercise their authority under Clean Water Act Section 404(q) or 404(c) to oversee the permitting process. EPA also may veto Corps permits</li> </ul> </li> </ul>	<p>p. 104</p> <p>pp. 105-106</p>
	<ul style="list-style-type: none"> <li><input type="checkbox"/> Explore the district’s website to learn where information is posted about the project</li> <li><input type="checkbox"/> Learn as much about the project as possible:               <ul style="list-style-type: none"> <li><input type="checkbox"/> Review the district website;</li> <li><input type="checkbox"/> Search for information about the project online;</li> <li><input type="checkbox"/> Ask district staff and staff of other agencies for information;</li> <li><input type="checkbox"/> Discuss the project with local allies;</li> <li><input type="checkbox"/> Read newspaper articles about the project or the applicant;</li> <li><input type="checkbox"/> Submit public records requests under FOIA</li> </ul> </li> <li><input type="checkbox"/> Learn as much as possible about the area and specific site where the project would be located:               <ul style="list-style-type: none"> <li><input type="checkbox"/> Review the district website;</li> <li><input type="checkbox"/> Review comments on similar projects nearby;</li> <li><input type="checkbox"/> Ask district staff and staff of other agencies for information about the area/project site;</li> <li><input type="checkbox"/> Discuss the project with local allies;</li> <li><input type="checkbox"/> Research scientific articles about the area;</li> <li><input type="checkbox"/> Consult university and federal/state/local agency websites</li> <li><input type="checkbox"/> Submit public records requests under FOIA</li> </ul> </li> </ul>	<p>p. 111</p>

	<ul style="list-style-type: none"> <li>□ Review information about other similar projects in the area. Consider: <ul style="list-style-type: none"> <li>□ What types of mitigation measures, if any, did the Corps require?</li> <li>□ What were allies' key concerns? How did they address such concerns?</li> </ul> </li> </ul>	
	<ul style="list-style-type: none"> <li>□ Identify allies that have worked with the district before to get tips on how to best engage with district staff and on how the district operates</li> <li>□ Collaborate with allies to pool resources and develop a shared advocacy plan</li> </ul>	p. 124
	<ul style="list-style-type: none"> <li>□ Begin identifying experts who could opine on topics, e.g.: <ul style="list-style-type: none"> <li>□ Wetlands delineation;</li> <li>□ Ecological economics;</li> <li>□ General economics;</li> <li>□ 404(b)(1) guidelines</li> </ul> </li> </ul>	p. 125
<b>2nd Stage: Jurisdictional Determination</b>		
	<ul style="list-style-type: none"> <li>□ Watch for a jurisdictional determination (JD) to be published on the Corps district or headquarters websites. <ul style="list-style-type: none"> <li>□ A notice might only be published if the applicant opts for an "approved JD" rather than a "preliminary JD"</li> </ul> </li> </ul>	pp. 124-125
	<ul style="list-style-type: none"> <li>□ If it seems like a JD should have already issued (e.g., if the notice of complete application has issued), contact the district Corps office to ask for the JD. <ul style="list-style-type: none"> <li>□ If the district is not forthcoming, you may need to file a FOIA request.</li> </ul> </li> </ul>	pp. 125-126
	<ul style="list-style-type: none"> <li>□ Consult with an expert and an experienced attorney to determine if the JD was made correctly and if/how the determination should be litigated</li> </ul>	pp. 128-131
<b>3rd Stage: Permit Application</b>		
	<p><b>Search for the notice of a complete permit application</b></p> <ul style="list-style-type: none"> <li>□ Watch for a Notice of Application for a Permit</li> <li>□ Search both the district's and the headquarters' websites</li> </ul>	p. 124
	<p><b>Track &amp; calendar all deadlines</b></p> <ul style="list-style-type: none"> <li>□ Track the deadlines for the Corps permits, including deadlines for submitting comments and requesting a hearing set by the Notice of Application <ul style="list-style-type: none"> <li>□ Deadlines may include those for Section 404 and Section 10 permits</li> </ul> </li> <li>□ Track any additional deadlines, e.g., if it is a joint notice for a coastal use permit or a Clean Water Act Section 401 certification</li> </ul>	P. 124, but also see the Section 401 Water Quality Certifications Checklist
	<p><b>Review documents &amp; obtain missing information</b></p>	pp. 124-126

	<ul style="list-style-type: none"> <li>□ Review the documents attached to the notice and any NEPA or project documents available from the Corps or other agencies.</li> <li>□ Determine if documents are missing such that there are notable gaps in the information needed to review the permit application(s). <ul style="list-style-type: none"> <li>□ If so, reach out to the district staff to obtain the documents.</li> <li>□ If district staff is not forthcoming, submit a FOIA request to the district office</li> </ul> </li> <li>□ If you submit a formal public records request and do not receive a letter acknowledging receipt of your request within 20 days, contact the district office about the status of the public records request</li> </ul>	
	<p><b>Engage with EPA and FWS</b></p> <ul style="list-style-type: none"> <li>□ Continue sharing concerns about the project and the permitting process – along with supporting evidence – with regional EPA and FWS staff so those agencies can include those concerns in comments on the permit application(s)</li> <li>□ Make sure EPA is prepared to submit the follow-up letter required under Section 404(c) explaining why it disagrees with the Corps. <ul style="list-style-type: none"> <li>• The letter is due 25 days after the comment period closes</li> </ul> </li> </ul>	<p>P.124</p>
	<p><b>Request a public hearing &amp; organize participation</b></p> <ul style="list-style-type: none"> <li>□ Organize like-minded organizations, local residents, and political allies to request a public hearing by the time set in the Notice of Application <ul style="list-style-type: none"> <li>□ The deadline to request a public hearing is usually during the comment period</li> </ul> </li> <li>□ In the public hearing request, emphasize the significant public opposition and the harm that the project would cause to the environment and communities <ul style="list-style-type: none"> <li>□ Request that allies submit their own similar requests.</li> </ul> </li> <li>□ In the (unlikely) event that a hearing is granted: <ul style="list-style-type: none"> <li>□ Track the deadlines in the Notice of the Hearing, including additional time to submit comments following the hearing;</li> <li>□ Mobilize interested parties to attend the hearing;</li> <li>□ Request that the Corps provide interpretation services, especially if advocates anticipate language may be a barrier for some participants;</li> </ul> </li> </ul>	<p>pp.127-128</p>

	<ul style="list-style-type: none"> <li><input type="checkbox"/> Collaborate with allies and ask if they want help preparing sample comments to read out-loud at the hearing;</li> <li><input type="checkbox"/> Mobilize media to attend if desired;</li> <li><input type="checkbox"/> Attend and give oral comments at the hearing;</li> <li><input type="checkbox"/> Review the transcripts from the hearing to identify other allies and other areas of concern about the project. Ensure that your oral comments are included in the transcript;</li> <li><input type="checkbox"/> After the hearing, draft and submit comments to rebut any arguments or points raised during the hearing</li> </ul>	
	<p><b>Draft &amp; submit written comments with evidence attached</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Read comments filed by other groups, individuals, and agencies to identify allies, concerns, or arguments to address</li> <li><input type="checkbox"/> To obtain comments, ask the Corps district office for everything that has been filed or ask like-minded groups if they will share their comments with you</li> <li><input type="checkbox"/> Draft and submit comments on all topics and permits at issue by the deadline established in the notice <ul style="list-style-type: none"> <li><input type="checkbox"/> Attach all supporting evidence and expert reports to your comments</li> </ul> </li> <li><input type="checkbox"/> If you are engaging on the Section 401 state certification process or a coastal use permit, provide your comments on the Corps permit(s) with supporting evidence attached to the appropriate state/tribal agencies</li> </ul>	<p>PP. 128-131, but also see the Section 401 Water Quality Certifications Checklist</p>
<b>4th Stage: Post-Comment Period</b>		
	<p><b>Continue to engage with the public &amp; politicians</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Continue to publicize your concerns to maintain public and political attention on the project while the Corps considers the application</li> </ul>	<p>pp. 124-125</p>
	<p><b>Continue to engage with EPA &amp; FWS</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> If EPA/FWS has expressed concerns about the project, ensure that they follow the necessary steps to exercise their oversight authority or, in the case of EPA, veto power over the project. Ensure that the agencies have complied with all necessary legal steps to do so</li> <li><input type="checkbox"/> Ensure EPA/FWS submits the follow-up letter required by Section 404(c) explaining why the agency disagrees with the Corps. Typically, this letter is due shortly after the comment period closes</li> <li><input type="checkbox"/> Stay in touch with the Corps and EPA/FWS to track the draft permit's progress. Usually this information</li> </ul>	<p>pp. 120-123</p>

	<p>is not readily available to the public, e.g., the status is generally not posted on an agency website</p> <ul style="list-style-type: none"> <li>□ Remind EPA/FWS that once the Corps issues the draft permit and notice of intent to proceed, EPA/FWS will have 15 days to notify the district that it will elevate concerns to agency headquarters, which pauses the permitting process</li> </ul>	
	<p><b>Track the issuance of the final permit</b></p> <ul style="list-style-type: none"> <li>□ Monitor the district’s website for the final permit</li> <li>□ Ask allies experienced with the district about how long it usually takes the Corps to issue the final permit and how to best find out about the district’s final decision</li> </ul>	124-131
<b>5th Stage: Post-Comment Period</b>		
	<p><b>Identify flaws with the final permit to raise in litigation</b></p> <ul style="list-style-type: none"> <li>□ Review the final permit and supporting documents</li> <li>□ Discuss the permits flaws with attorneys, allies, and experts</li> <li>□ Review all filed comments to identify other flaws</li> <li>□ Identify potential issues that could be addressed through litigation. Work with an attorney to narrow the issues that will be appealed to court. <ul style="list-style-type: none"> <li>□ Check that all litigation issues have sufficient support in the record</li> </ul> </li> </ul>	p. 119-120
	<p><b>Watch for an administrative appeal</b></p> <ul style="list-style-type: none"> <li>□ Keep in touch with the district office and monitor the district’s website to see if the applicant files an administrative appeal challenging the final permit <ul style="list-style-type: none"> <li>□ Only the permit applicant may file an administrative appeal</li> </ul> </li> </ul>	p. 119-120
	<p><b>File a lawsuit</b></p> <ul style="list-style-type: none"> <li>□ With the help of an experienced attorney, file a lawsuit in federal court challenging the final permit <ul style="list-style-type: none"> <li>□ If an administrative appeal was filed, file the lawsuit after the administrative appeal concludes</li> <li>□ If no administrative appeal was filed, file the lawsuit 60 days after the Corps issued the applicant a Notice of Appeal Process form</li> </ul> </li> </ul>	p. 119-120