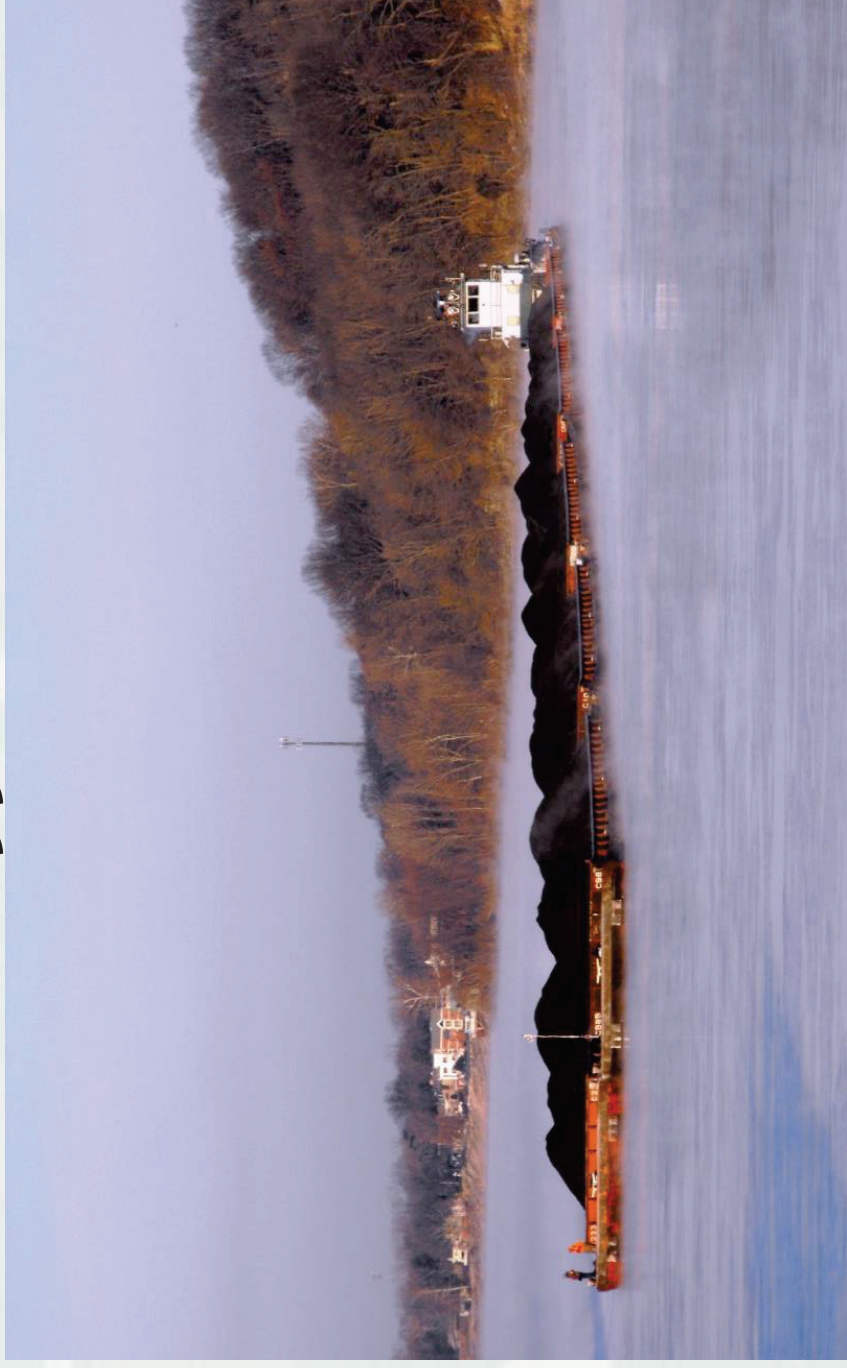


Corps Regulatory Program Section 10 of the Rivers and Harbors Act of 1899



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1 December 2015



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Outline

- **History**
- **Organization**
- **Regulatory Authorities**
- **Review Process**

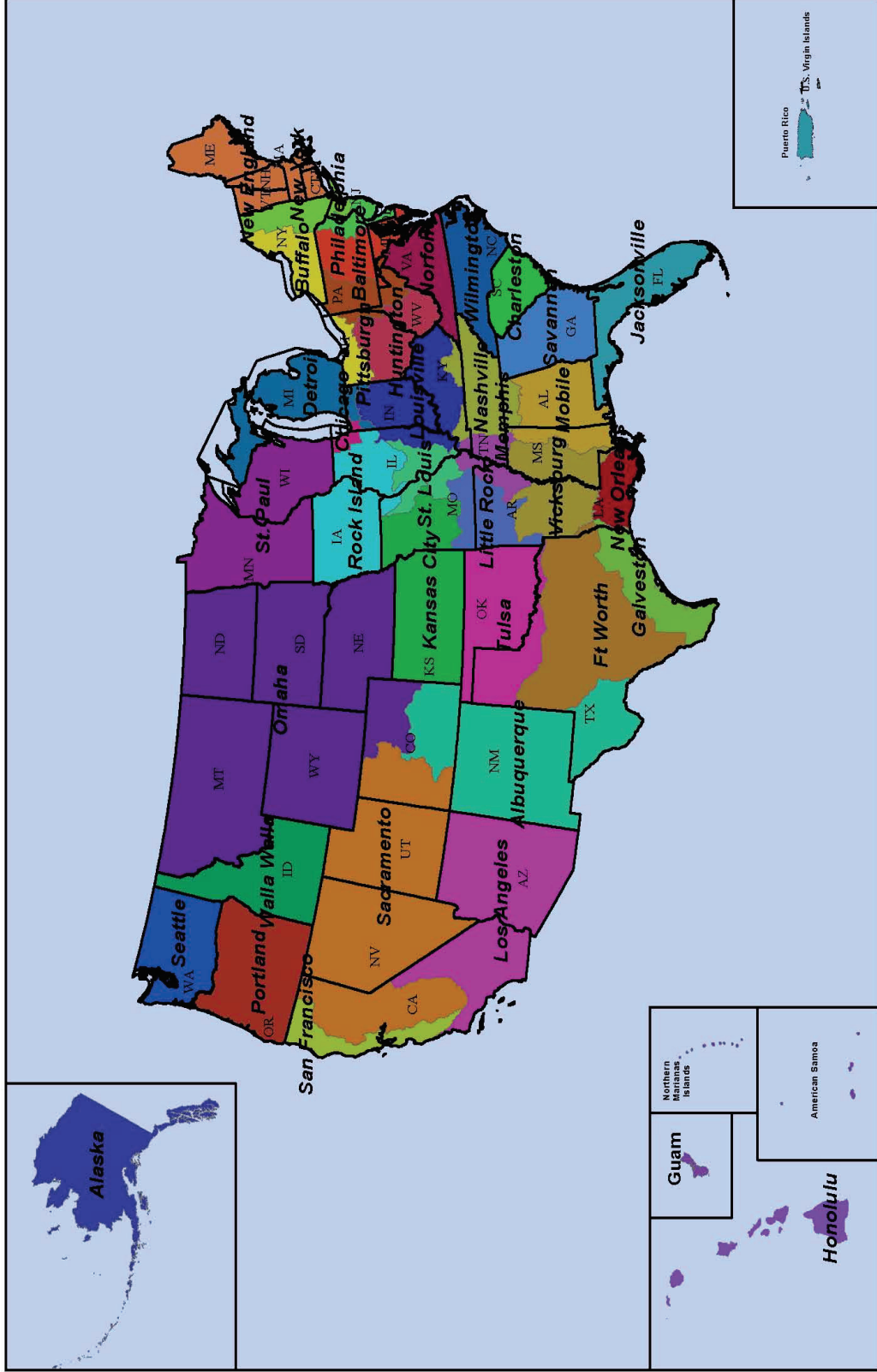


History of the Corps

- 16 June 1775 – Continental Congress organized an Army with a chief engineer and two assistants
- Separate Corps of Engineers established in 1802
- Early years consisted primarily of fortifications and coastal defenses
- Beginning in 1820s – river surveys; construction of navigation structures, lighthouses, & canals; dredging and snagging to improve navigation
- Multiple “Rivers and Harbors Acts” in 1870s – 1890s for development of waterways
- “Regulatory” provisions in 1890 Act



Who We Are: 38 Districts, 8 Divisions, 1 HQ



Organization

- **Districts: Regulatory Chief**
- **Divisions: Regulatory Program Manager & Review Officer**
- **Headquarters**
 - **Chief: Jennifer Moyer**
 - **Deputy Chief: Myrna Lopez**
 - **Program Managers:**
 - **Lauren Diaz, Stacey Jensen, Amy Klein, Desiree Morningstar, Karen Mulligan, and David Olson**



Regulatory Authorities

Structures/work/dredging:
Section 10 Rivers and Harbors Act



Discharge of dredged and fill material:
Section 404 Clean Water Act



Transport of dredged material to
the ocean for disposal:
Section 103 Ocean Dumping Act



Section 10

Rivers and Harbors Act of 1899

That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited . . . and it shall not be lawful to build . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity . . . unless authorized by the Secretary of War



Rivers and Harbors Act of 1899

- Section 10
 - Regulate the obstruction or alteration of navigable waters
 - Constructing structures in, over, under navigable waters
 - Excavation/dredging
 - Depositing material
 - Any other work that affects the course, location, condition, or capacity of navigable waters



Regulations

- **11 September 1946 – “first” regulatory program regulations**
- **7 December 1967 – updated the ‘46 regulations**
 - Application process
 - Public interest evaluation factors (limited)
- **10 December 1968 – further updates to 1967 regulations**
 - Section 209.120 – Corps administers certain laws enacted by Congress for protection and preservation of navigation and navigable waters
 - Section 209.260 – discussion of considerations in making navigability determinations



Regulations (con't)

- 9 September 1972 – Definition of Navigable Waters
 - Modified Corps regulations by including a more complete discussion and legal analysis of the interpretation of the definition of navigable waters of the United States
 - Title 33 Part 209.260
 - (a) defines the term “navigable waters of the United States” and prescribes “policy, practice, and procedure to be used in determining the extent of the jurisdiction of the Corps”
 - (b) ultimately dependent on judicial interpretations . . . however, the(se) policies and criteria are in close conformance with the tests used by the Federal courts . . .
 - (c) general definition – navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce



Regulations (con't)

- **9 September 1972 – Definition of Navigable Waters**
 - Numerous other principles also listed in 209.260 such as:
 - Types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation
 - It is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor, and not the time, extent or manner of that use
 - The presence of recreational craft may indicate that a water body is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time
 - A water body which was navigable in its natural or improved state, or which was susceptible of reasonable improvement retains its character as “navigable in law” even though it is not presently used for commerce




Regulations (con't)


- The character of a river will, at some point along its length, change from navigable to nonnavigable
- A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. The question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established
- **Established procedures for making navigability determinations**
 - Report of findings prepared by the District Engineer
 - Opinion of District Counsel will be included
 - Determination will be made by the Chief of Engineers
 - Determinations will be made whenever a question arises regarding the navigability of a water body



Regulations (con't)

- **3 April 1974 – Corps published final regulations which implemented the new regulatory permit program required by Section 404 of the Federal Water Pollution Control Act Amendments of 1972**
 - Limited 404 jurisdiction to navigable waters of the U.S.
 - Litigation challenging scope filed by NRDC, NWF, and state of Florida
 - 27 March 1975 DC District Court ruled against Corps
- **6 May 1975 – Corps proposes new regulations to comply with court decision**
 - Proposed four alternative permitting schemes
 - Definition of navigable waters of the U.S. was same for all schemes and included past, present, & future use 

Regulations (con't)

- 25 July 1975 – Corps published interim final regulations implementing Section 10, 404, and 103 programs (and granting additional 90 comment period)
 - Recognizes that 404 jurisdiction is being expanded into areas never before regulated by federal permitting
 - “In view of manpower and budgetary constraints it is necessary that this program be phased in over a two year period.”
 - Established Phase I, Phase II, and Phase III schedule for incrementally expanding Section 404 jurisdiction beyond navigable waters (Title 33 Part 209.120 (e)(2)(i)(a, b, and c)
 - ❖ Requirements effective immediately in Phase I waters  (i.e. navigable waters of the U.S.)

Regulations (con't)

- 19 July 1977 – Corps published final consolidated regulations for the regulatory program implementing Section 10, 404, and 103 programs
 - Revoked old Part 209.120 and related sections and structured new regulations as 33 CFR Parts 320 – 330.
 - ❖ Continued past, present, or future use in definition of navigable waters of the U.S. (329.4)
 - ❖ Added definition of “adjacent” for wetlands to mean bordering, contiguous, or neighboring (323.2(d))
 - ❖ Began to refer to 404 jurisdiction as applicable to “waters of the U.S.” instead of using the term “navigable waters” to avoid confusion. “Feel it will assist in distinguishing between the Section 404 program and the types of waters subject to permit programs administered under Section 10 of the 1899 Act.” (Preamble – page #37127 middle column)



Regulations (con't)

- 13 November 1986 – consolidated and completed several rulemaking activities
 - Current regulations (with the addition of Part 331 on Administrative Appeals and Part 332 on Compensatory Mitigation)



Navigable Waters Determinations

- Most districts have completed studies to determine which streams should be regulated as navigable waters of the U.S. under Section 10
- District lists are typically published on district regulatory program website (29 of 38 districts have links to their lists)



Comparison of Authorities

Section 10

Rivers & Harbors Act

- Limited scope of jurisdictional waters
 - Navigable waters of the U.S.
- Extensive scope of activities regulated
 - All activities in, over, under, or thru navigable waters
 - e.g. dredging, pipelines, docks, shore protection, tunnels, aerial powerlines, breakwaters

Section 404

Clean Water Act

- Extensive scope of jurisdictional waters
 - All waters of the U.S.
- Limited scope of activities regulated
 - Discharge of dredged material or placement of fill
 - e.g. site development fills, causeways or road fills, riprap, boat ramps, bedding and backfill for utility lines



The Individual Permit Evaluation

- Public Notice
- National Environmental Policy Act Documentation
- Public Interest Review
- Clean Water Act Section 404(b)(1) Guidelines*
- Compliance with Other Laws and Regulations
(Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act, etc.)

* If applicable (i.e. discharge of fill)



Public Interest Review

- The decision whether to issue a permit will be based on an evaluation of the probable impacts of the proposed activity and its intended use on the public interest
- 21 Public Interest Review Factors
- Balance benefits against detriments to public
- Corps will issue the permit unless determined to be “contrary to the public interest”
- District Engineer is the decision maker



Questions?

