



Chapter 5: Permitting and Regulatory Compliance



Prior to construction, projects that have the potential to impact existing physical and ecological conditions, federally managed fish and invertebrates, or protected species under the Endangered Species Act are subject to regulatory review by federal, state, or local natural resource agencies. Even beneficial barrier removal projects intended to increase tidal circulation patterns are required to undergo regulatory review to ensure the project serves the public interest while balancing a diverse set of physical, ecological, and socioeconomic criteria. Project teams should account for permitting costs and time when planning and implementing tidal hydrology restoration projects.

This chapter provides background information on specific legislation, and provides recommendations to help navigate the regulatory compliance process. Specific topics covered in these pages include:

- General introduction to federal legislation regulating tidal hydrology restoration;
- Coordination between state and federal regulatory agencies; and
- Considerations for successfully navigating the review and permitting process.

Additional permitting resources and summary recommendations can be found in the *Toolkit* (page 184).

An Introduction to Federal and State Authorization

The **permitting process** (*Figure 1*, opposite) requires coordination across state and federal agencies, as well as interaction between agencies and the people applying for a permit. Permitting processes and regulations vary by state and permitting issue. In general, the five permitting issues for tidal hydrology restoration projects are:

- Community development (i.e., coastal zone compliance);
- Water quality;
- Threatened and endangered species;
- Fish and wildlife; and
- Wetlands.

The permitting process is framed by federal legislation; however, oversight is generally conducted at both the state and national levels. Consequently, most permitting issues have more than one agency that provides regulatory review. For example, restoration and protection of, or impacts to, wetlands are subject to several federal and state authorizations, and therefore are regulated by several agencies. To help simplify regulation and streamline the permitting process for the applicant, federal

Useful Acronyms

| | |
|--------------|---|
| ACHP | Advisory Council on Historic Preservation |
| CWA | Clean Water Act |
| CZMA | Coastal Zone Management Act |
| EA | Environmental Assessment |
| EFH | Essential Fish Habitat |
| EIS | Environmental Impact Statement |
| EPA | Environmental Protection Agency |
| ESA | Endangered Species Act |
| FMC | Fisheries Management Councils |
| JPA | Joint Permit Application |
| NEPA | National Environmental Policy Act |
| NHPA | National Historic Preservation Act |
| NMFS | National Marine Fisheries Service |
| NOAA | National Oceanic and Atmospheric Administration |
| NWP | Nationwide Permit |
| RHA | Rivers and Harbor Act |
| SHPO | State Historic Preservation Office |
| USACE | United States Army Corps of Engineers |
| USFWS | United States Fish & Wildlife Service |



The use of sediment curtains to control turbidity was one of the best management practices employed to meet permitting requirements during construction of the Fort DeSoto Park Hydrology Restoration Project.

Photo credit: NOAA

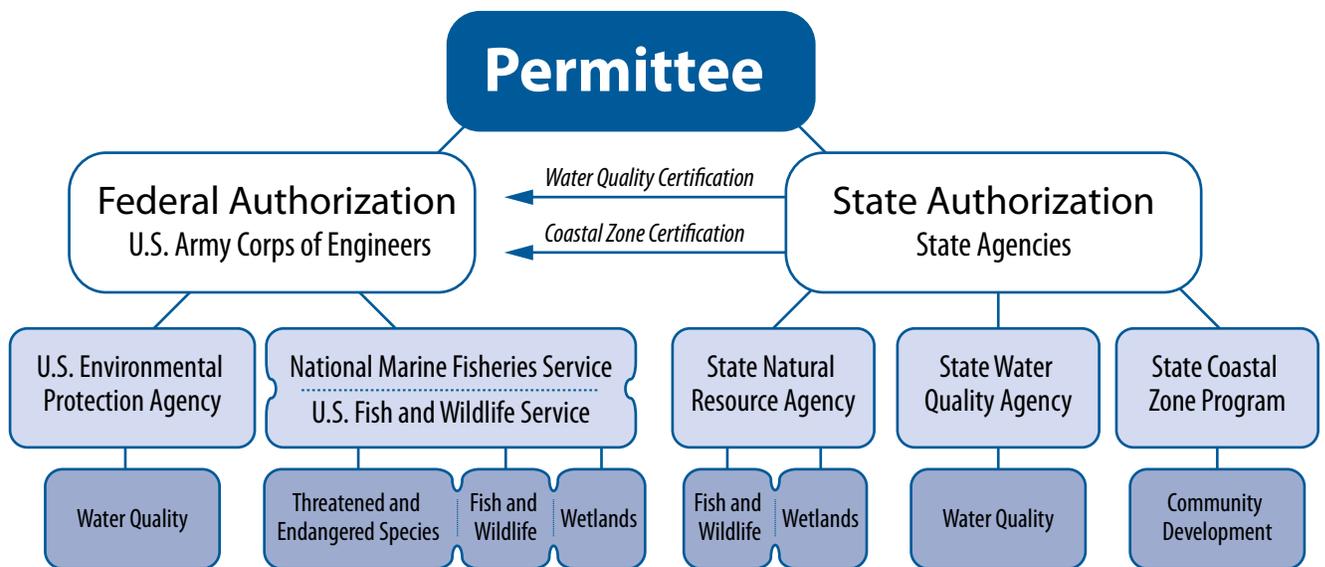


Figure 1. Federal and state permitting.

Simplification of federal and state authorities related to specific resource issues. State regulatory agencies primarily handle coastal zone compliance and water quality issues; federal regulatory agencies handle authorization related to threatened and endangered species; and both state and federal regulators handle authorization related to fish, wildlife, and wetlands.



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and state agencies have developed procedures where the submission of a single permit application triggers reviews by multiple state and federal agencies, referred to as a Joint Permit Application (JPA). In order to navigate the permitting process efficiently, the project team should be familiar with the laws that dictate the regulatory process, and the role each agency plays. Below is a list of the major federal legislation typically affecting tidal hydrology restoration projects.



*A list of federal policies, websites, and legislative citations is available in the **Toolkit** (page 185).*

Rivers and Harbors Act and the Clean Water Act. Cornerstones of the hydrology restoration federal permitting process are the Rivers and Harbors Act (RHA) and the Clean Water Act (CWA). Compliance with these acts requires authorization from the Secretary of the Army, acting through the U.S. Army Corps of Engineers (USACE). Under the RHA, authorization is required for the construction of any structure in or over navigable waters of the United States. Under Section 404 of the CWA, authorization is required for discharge of dredged or fill material into any waters of the United States, including wetlands. In almost all cases, USACE addresses both authorizations by issuing a single permit (for example, via Nationwide Permit 27, see sidebar, opposite). However, before a permit is issued, in most cases, USACE coordinates with other federal and state agencies that have mandates to provide oversight and key contributions in their respective areas of expertise. Some of the more relevant acts that mandate the oversight roles of these federal and state agencies are described below.

Magnuson-Stevens Fishery Conservation and Management Act. This act mandates NOAA's National Marine Fisheries Service (NMFS), regional fishery management councils (FMCs), and other federal agencies to identify and protect important marine and anadromous fish habitat, known as "essential fish habitat" (EFH). Federal or state action agencies that fund, permit, or carry out activities that may adversely affect EFH are

required to consult with NOAA regarding the potential impacts of their actions on EFH, and respond in writing to any NOAA or FMC EFH conservation recommendations. Where appropriate, NOAA uses existing interagency coordination processes to fulfill EFH consultations with action agencies.

Endangered Species Act. The Endangered Species Act (ESA) intends to protect species threatened with extinction and the critical habitat upon which they rely. The U.S. Fish & Wildlife Service (USFWS) administers ESA review for freshwater and terrestrial species, while NMFS administers review for marine species. Both agencies may be involved for species that migrate between habitats or spend portions of their life cycle in water and on land. Under Section 7 of ESA, federal agencies such as USACE cannot issue a permit for activities that adversely affect threatened or endangered species or their critical habitat.



*An example template used for ESA consultation is available in the **Toolkit** (page 186).*

Coastal Zone Management Act. The Coastal Zone Management Act (CZMA) requires that any federal action inside or outside of the coastal zone that affects any land or water use or natural resources of the coastal zone shall be consistent, to the maximum extent practicable, with the enforceable policies of approved state management programs. It states that no federal license or permit may be granted without giving the state the opportunity to concur that the project is consistent with the state's coastal policies. State coastal zone agencies provide their certification either through interagency coordination processes, the federal permitting agency or, in some instances, directly to applicants or other state agencies representing public interest in the project.

State agencies also play additional roles beyond those established by the CZMA. For example, for a project to be authorized under the CWA, it must receive a water quality certification indicating the project will not contravene established water quality standards. These standards are set by the



states and the certification is provided to USACE by the state water quality agency, all with oversight from the U.S. Environmental Protection Agency (EPA).

National Historic Preservation Act.

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires federal agencies to take into account the effects of their undertakings on historic properties. Consultations with the State Historic Preservation Office (SHPO) are usually initiated through the interagency coordination process and assist in determining a project's impact on properties included in or meeting the criteria for the National Register of Historic Places. The historic preservation review process mandated by Section 106 is outlined in regulations issued by the Advisory Council on Historic Preservation (ACHP). Where tidal hydrology restoration projects take place in areas of human settlement, there exists the possibility of impacts upon historic properties or artifacts.

National Environmental Policy Act. The National Environmental Policy Act (NEPA) requires agencies to consider environmental impacts of proposed federal actions, including the issuance of permits. The analysis must include reasonable alternatives to the action. NEPA review may require the preparation of an environmental assessment (EA) to determine whether an environmental impact statement (EIS) is required. Federal agencies require EISs for actions that may have a significant impact on the environment. An EIS documents existing conditions, proposed actions and alternatives, and the impacts that may result from implementation of alternatives, including those on natural, cultural, and historic resources. EISs must go through formal, detailed public review and comment. Generally, USACE will administer NEPA analysis for a tidal hydrology restoration project. In most cases, USACE's normal coordination of the permit will satisfy NEPA's requirements so an EIS will not be necessary.



*An example checklist used to guide the analysis of environmental impacts under NEPA is available in the **Toolkit** (page 190).*

The Role of the U.S. Army Corps of Engineers

Any individual, firm, or agency engaged in an activity (including restoration) that involves jurisdictional navigable U.S. waters or wetlands must obtain a permit from USACE and/or the appropriate state regulatory agency. USACE supplies general permits for "minor" activities, but typically an individual, project-specific permit is required for barrier removal as part of a tidal hydrologic restoration project. The process for a general permit may take three to four months, while individual permits may require up to 12 months for completion.

What is Nationwide Permit 27?

Certain restoration actions may qualify for USACE's Nationwide Permits (NWP). These "umbrella" permits streamline review and are defined for regionally specific actions. Using an NWP allows applicants to forgo many elements of a detailed analysis typically required for individual permits. An additional benefit is the abbreviated time required for USACE project review.

NWP 27, which serves as a CWA and RHA permit, covers activities resulting in "net increases in aquatic resource function and services"; however, multiple conditions must be met to apply. Pre-construction coordination with USACE is required, as differences may exist depending on regional conditions.

Activities authorized by NWP 27 include but are not limited to:

- Removal of accumulated sediments;
- Installation, removal, and maintenance of small water control structures, dikes, and berms;
- Removal of existing drainage structures;
- Installation of current deflectors;
- Enhancement, restoration, or establishment of riffle and pool stream structure;
- Placement of in-stream habitat structures; modifications of streambed/banks to restore/establish stream meanders;
- Backfilling of artificial channels and drainage ditches;
- Construction of small nesting islands;
- Construction of open water areas;
- Construction of oyster habitat over unvegetated bottom in tidal waters;
- Shellfish seeding; and
- Activities needed to reestablish vegetation, including plowing or disking for seed bed preparation and planting of appropriate species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.



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Building Successful Relationships with Permitting Agencies

Developing positive working relationships with permitting agency staff eases the overall permitting process, reduces miscommunication, and can increase efficiencies. Establishing a local contact within appropriate regulatory agencies can also help the team determine the appropriate permits required and the recommended process for completing permit applications. Additionally, many regional offices have applications and example permits available online.



*Local contact information for USACE offices and state permitting agencies in the Southeast U.S. can be found in the **Toolkit** (page 195-197).*

Coordinate early with USACE staff, as the process for securing permits varies by jurisdiction and project type. USACE and state regulatory staff are often divided between geographic areas or application type, so multiple agencies may be involved in project review. Due to the complexities of interacting with multiple regulatory agencies, time and experience are needed to master this stage of restoration planning.

Below are some tips to ease the permitting process once the team has contacted the local permitting agency and USACE office:

- Provide background information, including a detailed project description and site location prior to any formal meetings;
- Plan site visits and face-to-face meetings far in advance;
- Prepare visual aids such as PowerPoint presentations or digital maps to help communicate project details;
- Be prepared to discuss the types of permits needed through each agency, and whether supplemental information is required; and
- Provide electronic files whenever possible to ease transferability and review.

Joint Agency Meetings

Participating in a Joint Agency Meeting is recommended as an option to streamline communication between a project proponent and the many permitting agencies. These meetings allow the details of a project to be vetted by regulators in an informal setting before project plans are submitted for permits. Meetings are often held monthly and are arranged by USACE or relevant state agencies.

Aside from establishing clear lines of communication with regulatory agencies, the project team can further expedite the regulatory process by keeping permitting issues in mind throughout all stages of the restoration project planning process. A project team that anticipates opportunities and challenges with permitting early in the development of the project is likely to save time and resources. Here are some variables to consider early in project development to expedite the permitting process:

- Align restoration projects within larger regional efforts, such as a larger watershed management plan that has been developed in conjunction with the USACE.
- Determine if easements, liens, covenants, water-rights issues, cultural resources, or other parcel aspects may restrict site availability.
- Solicit public input and support early in the project design process.
- Participate in joint inter-agency meetings that involve permitting processes and collective reviews of local or regional permit requests.

Table 5a (opposite) summarizes the various permitting requirements of various tidal hydrology restoration projects in the Southeast U.S.



Table 5a. Example project permitting summary

| Example Project | Federal Permitting | State Permitting | ESA/ NEPA issues | Notes |
|---|--------------------------|--|--|---|
| Bahia Grande <i>Texas</i> | USACE NWP 27 | Environmental Assessment (EA) required due to archaeological issues | None | A contractor was hired to draft the EA to expedite the process. See the Bahia Grande Project Portfolio on page 92. |
| Hopedale <i>Louisiana</i> | USACE CWA Section 404 | Coastal Use and Water Quality permits | None | See the Hopedale Project Portfolio on page 98. |
| Fort DeSoto <i>Florida</i> | USACE NWP 27 | FL's Environmental Resource Permit (ERP) process coordinates state and USACE permits; SWFWMD permit | Manatee habitat | Permit to include "stop-work" order with manatee sightings. See the Fort DeSoto Project Portfolio on page 110. |
| Don Pedro <i>Florida</i> | USACE NWP 27 | Southwest Florida Watershed Management District (SWFWMD) required significant technical and engineering data | None | The SWFWMD permit was submitted with letter requesting Nationwide Permit 27 approval; permit was issued within days See the Don Pedro Project Portfolio on page 122. |
| Clam Bayou <i>Florida</i> | USACE NWP 27 | FL's Standard General Permit | Manatee habitat | Designed permits to provide movement for manatees See the Clam Bayou Project Portfolio on page 128. |
| Wildcat Cove <i>Florida</i> | USACE NWP 27 | FL's Standard General Permit | None | The permitting process only took 90 days due to team's familiarity with permitting staff (compared to a typical six-month processing time) See the Wildcat Cove Project Portfolio on page 140. |
| Sandpiper Pond <i>South Carolina</i> | USACE CWA Section 404 | SC's Department of Health and Environmental Control coordinated state permits | Project area once contained threatened species (seabeach amaranth) | Permit stipulates that no work is to occur during sea turtle nesting season. See the Sandpiper Pond Project Portfolio on page 146. |
| North River Farms <i>North Carolina</i> | USACE CWA Section 404 | Coastal Area Management Act permit (through NC's Department of Environment and Natural Resources – DENR) | None | An Erosion Control Plan was required through the DENR's Land Quality division See the North River Farms Project Portfolio on page 152. |