Overview of Clean Water Act
Section 404 Permitting

John A. Kolanz
jkolanz@nocoattorneys.com
970-663-7300
Historical Perspective

• 1802 -- U.S. Army Corps of Engineers Created – build forts.
• 1824 – Corps authority expanded to promote navigation through river and harbor improvements.
• 1886 -- Corps authorized to prevent dumping of materials that may impede navigation into harbors of New York City.
• 1890 – Corps authority extended to all of the nation's harbors.
• 1899 -- Congress enacted the Rivers and Harbors Act, broadening the Corps' authority to reach all of the nation's navigable waters and their tributaries.
Clean Water Act 1972

- Congress passed the modern-day Clean Water Act in 1972 to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. (Substantively amended in 1977 and 1987.)
Discharge Prohibition

• The CWA prohibits the *discharge of a pollutant* by any person except in compliance with a permit.

• The Act defines “discharge of a pollutant” as “any *addition of any pollutant to navigable waters* from any *point source*.”
Addition

• The Act does not define this term. EPA’s position is that “addition” occurs only if the point source itself physically introduces a pollutant into the water from the outside world.

“Discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”
Pollutant

• Means “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”

“Discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”
Navigable Waters

Means “waters of the United States.”

- Broadly construed
- Hotly contested issue
- On June 29, 2015, EPA and the Corps published a rule clarifying the meaning of this term.

“Discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”
Point Source

• A discernible, confined and discrete conveyance, including ... any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, CAFO, or vessel. ... This term does not include agricultural storm water discharges and return flows from irrigated agriculture.

“Discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”
Clean Water Act Permitting

CWA Section 402 -- primarily administered by EPA or authorized states. Regulates effluent discharges through the National Pollutant Discharge Elimination System (“NPDES”) program.
CWA Permitting

- CWA Section 404 -- primarily administered by the Corps with oversight by EPA. Regulates the discharge of dredged or fill material.
Section 404 Permitting Program

• Point Source

• Pollutant – Fill, which is material placed in jurisdictional waters that has the effect of:
  • Replacing any portion of water of the United States with dry land; or
  • Changing the bottom elevation of any portion of the water of the United States.
    • Examples: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in waters the United States. The term does not include trash or garbage.

• Addition

“Discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”
Section 404 Permitting Program

Navigable Waters

• Very broadly defined to carry out Act’s goals
• New Waters of the United States Rule issued in June 2015
  • Waters are jurisdictional if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditionally navigable waters, interstate waters, or the territorial seas.
  • Impoundments, tributaries, and waters adjacent to otherwise jurisdictional waters are also jurisdictional by rule.
  • Other waters may be deemed to have a significant nexus on a case-specific basis.

“Discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”
Waters of the United States Rulemaking

• Legal and political challenges to the rule

• Currently stayed nationwide

• Determine jurisdiction under existing rule and associated policies
Waters of the United States Rulemaking

• Bright Line Approach

• Impact will differ across the country

• Could actually shrink jurisdiction over-all in Colorado
Waters of the United States Rulemaking

• Irrigation Ditches

• Gravel Pits

• Artificially Irrigated Areas
Section 404(f) Permitting Exemptions

• Potentially Relevant Permitting Exemptions

  • The maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures.

  • The construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance of drainage ditches.

  • The construction or maintenance of farm or forest roads.
Section 404(f) Permitting Exemptions

Points of Caution

• The Corps, with the support of the courts, construes these exemptions narrowly.

• All exemptions are subject to a “recapture provision,” which the Corps construes broadly.

• Colorado Corps offices interpret the irrigation ditch exemptions as agricultural exemptions.
General Permits

• Includes Nationwide and Regional General Permits

• A permit-by-rule to authorize activities that are similar in nature and cause only minimal adverse effects

• Issued for a five-year term

• Most widely used are Nationwide Permits (NWPs).
Characteristics of NWPs

- Most NWPs are activity-specific
- Most NWPs require Pre-Construction Notification
- NWPs are subject to Specific Conditions
- NWPs are currently subject to 31 General Conditions
- NWPs can require mitigation
- NWPs (General Condition 30) require signed Compliance Certification
NWPs Additional Considerations

- Federal permits that create specific obligations and potential enforcement for noncompliance
- CWA penalties can be very significant
- Corps Discretionary Authority
- Can cost considerable time and money
- Create a federal nexus
General Permits Relevant to Flood Recovery and Stream Restoration

NWP 3 -- Maintenance

NWP 13 -- Bank Stabilization

NWP 18 -- Minor Discharges

NWP 27 -- Aquatic Habitat Restoration, Establishment, and Enhancement Activities
General Permits Relevant to Flood Recovery and Stream Restoration

NWP 31 -- Maintenance of Existing Flood Control Facilities

NWP 37 -- Emergency Watershed Protection and Rehabilitation

NWP 45 -- Repair of Uplands Damaged by Discrete Events
General Permits Relevant to Flood Recovery and Stream Restoration

RGP 96-07 -- Flood-related Activities in Colorado (expires July 31, 2016)

RGP 12 -- Aquatic Habitat Improvement for Stream Channels in Colorado
Individual Permits

• Often time-consuming and expensive

• NEPA

• CWA Section 404(b)(1) Guidelines (LEDPA)

• CWA Section 401 Water Quality Certification
Endangered Species Act ("ESA")

Enacted in 1973 to address the alarming rate of extinctions caused generally by human alteration of natural ecosystems and hunting pressure

Considered by many to be the most powerful environmental law

“The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”

“One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies “to insure that actions authorize funded, or carried out by them do not jeopardize the continued existence” of an endangered species or ‘result in the destruction or modification of habitat of such species. ...’ This language admits of no exception.”

Take Prohibition

• Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct.

• Harm” includes significant habitat modification or degradation where it actually kills or injures wildlife.

• “Harass” is an intentional or negligent act or omission that creates the likelihood of injuring wildlife by annoying it to such an extent that it significantly disrupts normal behavioral patterns, including breeding, feeding, or sheltering.
Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical ... .
Section 7 Consultation

Informal Consultation – generally focuses on whether Formal Consultation is required

Biological Assessment – evaluates potential effects of the action on listed or proposed species and designated or proposed critical habitat. A “likely to adversely affect” finding triggers Formal Consultation.
Section 7 Consultation

Biological Opinion – States the opinion of the Service regarding whether or not the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.
Platte River Recovery Implementation Program ("PRRIP")

Created to provide a programmatic response to impacts to "Target Species" and their designated critical habitat in Nebraska (Whooping Crane, Piping Plover, Interior Least tern, and Pallid Sturgeon)
Platte River Recovery Implementation Program

- Cooperative Agreement – signed by Colorado, Nebraska, Wyoming, and Department of the Interior in 1997
- Governance Committee formed to lead negotiations, which led to Final Program Document in 2006
- First Increment of Program began in 2007 and runs through 2019
- Provides ESA compliance for existing and most new water related activities through-out the Platte River Basin upstream of the Loup River confluence
Platte River Recovery Implementation Program

• Streamlined consultation process for South Platte water related activities

• Template Biological Assessment and Request for Formal Section 7 Consultation

• Must describe water sources but need not quantify depletions

• Certificate of SPWRAP membership
South Platte Water Related Activities Program ("SPWRAP")

- Formed by Colorado water users to facilitate compliance with the PRRIP
- Reasonable membership dues
- Special membership category
- USFWS has 0.1 AF/year de minimis exception
SPWRAP -- Additional Considerations

• Memberships are ongoing and dues can increase

• Will charge back assessments to 2007 with interest

• Potential reinitiation of consultation if Program fails
National Historic Preservation Act Section 106 Consultation

- NHPA Section 106 requires the head of any federal agency, prior to authorizing an “undertaking,” to account for the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register, and afford the Advisory Council on Historic Preservation reasonable opportunity to comment on the undertaking.

- Must consult unless project has no potential to cause effects.

- Area of Potential Effects

- Goal of consultation is to avoid, minimize, or mitigate the effects of the project.
Conclusion

• Recognize activities that create potential permitting obligations.

• Are the elements (Discharge Prohibition) there?

• Identify legal options, rights, and obligations (including ESA and NHPA Consultation requirements), as well as your timeline.

• Develop strategy for moving forward.

• Know what you want and the basis for getting there before you approach the Corps.