

## What to Do When the Corps of Engineers Turns You Down

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***“Therefore, the Corps finds that the project, as currently proposed, cannot be permitted under Section 404 of the Clean Water Act.”***

These are words every federal environmental permit applicant dreads. But when the U.S. Army Corps of Engineers conveys those words, it should rarely come as a surprise, particularly for complex permitting. By the end of any permit process, especially a complicated application such as a multistate pipeline, port improvement or large land development, the applicant has invariably been informed multiple times verbally and in writing that the application falls short of federal requirements.

It may surprise some who have had contentious relationships with the Corps of Engineers over project permits, but Corps professionals take no delight in pointing out deficiencies within an application. Their sole task is to protect the nation’s aquatic resources and navigation capacity, while allowing reasonable development through balanced decisions. Inherent to assessing “reasonable development” is a keen awareness of the project’s potential to create jobs, benefit energy security, or strengthen the U.S. economy.

But the law is the law. Regulations stemming from that law must be met. Otherwise, Corps approvals risk being overturned during judicial review leading to additional delays and lost revenue.

So, what do you do when the Corps tells you your project’s permit application is in jeopardy of disapproval? We’ve compiled a menu of strategies to consider that will best position your project for rescue.

### **First, carefully evaluate if litigation is warranted.**

For many applicants, litigation is a default response. Our experience shows litigation is rarely the best option.

If you litigate, that lawsuit not only supersedes your project’s previous schedule, but it also removes your project from Corps regulatory staff control. That means your project will slow down further as Corps officials turn the matter over to government attorneys who typically require weeks to investigate and prepare a defense.

Many of today’s district and division commanders served in Iraq and Afghanistan, where they faced improvised explosive devices (IEDs) and hostile gunfire. Trust us, they won’t quake in their boots when an executive says, “We’ll sue.” Litigation may be appropriate but probably not immediately.

When possible, avoid publicly venting your frustration. Complaining is rarely constructive and overworked Corps staff have heard it all before. Being perceived as castigating the Corps to apply pressure is usually counterproductive. Remember, any process shortcut is grounds for a legal challenge; if that happens, you have lost control of your schedule and your cost. It is more productive to facilitate the process, which includes regular collaborative communication with officials. The agency will appreciate your assistance.

**Manage expectations on elected official or political appointee involvement.** Despite what you may see on

TV dramas, government officials cannot “order” agencies to approve a permit that doesn’t meet legal standards. The Corps makes decisions based on its interpretation of federal law and well-established regulations and procedures.

The two of us have about 75 combined years of experience in the Corps of Engineers, and we cannot recall any instance in which an elected official or political appointee instructed the Corps to overturn a permitting decision.

Case in point: When one of us (Michael Walsh) was the Corps’ Deputy Commander for Civil and Emergency Operations, a senior U.S. Senator asked to meet regarding a Section 404 wetland permit for an industrial park.

According to the Corps’ regulatory review, the park’s design would have harmed adjacent wetlands. Corps district officials tried persuading the applicant to make a design change to avoid or significantly minimize wetland impact. The applicant declined.

While preparing for the meeting, Corps staff located an abandoned area about 10 miles away. The Corps’ analysis suggested this area was suitable for the applicant and the applicant agreed.

The U.S. Senator was rightfully seeking to ensure the state’s constituents were being treated properly. The meeting was a straightforward discussion of the process and strictly informative. The senator expressed concern about the project, but also acknowledged the challenge of impacting wetlands.

To his credit, the senator never tried to strong-arm the Corps into approving the project. The constituents’ interests were served, and the Corps upheld federal standards. In short, it was nothing like what you may see on TV.

**Communicate effectively.** Develop a process for timely, effective communication with the Corps and stay in touch throughout the process. Timely communication may avoid process-related delays. For example, another federal agency, state officials or even a property owner could file comments that require your response. By staying in regular contact with overworked staff, you are likely to find out about this earlier.

**Take a new and brutally hard look at your options.** The anecdote involving the U.S. Senator reinforces this approach. The applicant could have saved more than a year delay by spending more time with Corps staff during the pre-application process. At a minimum, the applicant should focus on a careful review of nearby geography.

Based on our experience, the pre-application process is vital in gauging your permit’s likelihood of success. In the industrial park scenario, the applicant could have purchased the nearby abandoned area months earlier, avoiding wetlands impact and saving both time and money.

**Additionally, avoid, minimize or mitigate impact on Waters of the United States (WOTUS),** in that order. Projects involving water are especially complicated. Applicants must understand affected areas legally considered WOTUS. Your best choice is to modify your design to avoid water impact and thus negate the need for a permit.

If you must impact WOTUS, then focus on minimizing or mitigating the impact. For mitigation, prepare a plan and understand your options, including mitigation banking (basically, purchasing “mitigation credits”), in-lieu fees and permittee responsible mitigation. If the impact is substantial and requires mitigation, it would be wise to seek outside help to understand your options.

Thinking through your choices in advance will help you develop a realistic schedule and cost estimate, improve processing time, and likely reduce conflict during the public comment period.

**Use regional or national permits.** If possible, design your project so your application can be issued within the parameters of a regional or nationwide permit. By definition, projects that qualify for regional or national permits have minimal or even beneficial environmental impact and can usually be issued within a shorter time period.

**Assist the agencies.** The head of the Corps’ Regulatory Program recently told an industry group that since 2014, the number of regulators at the Corps has dropped from 1,400 to 1,100, even as her department’s program obligations have increased in complexity, especially when mitigation is required. In our experience, most permit applicants don’t appreciate that they can use their own resources in some circumstances to decrease agency workload. Federal legislation allows for applicants, in many circumstances, to use their resources to help with processing public comments, drafting Environmental Impact Statements and even supplementing federal staff.

In conclusion, most permit applications involving projects that impact WOTUS are processed within a reasonable time frame, especially when designed to avoid or minimize WOTUS impact. If a project has significant impact and requires an individual permit, the review process will expand as will opportunities for delay. An applicant can take many steps to help agencies process its application efficiently. We suggest you take advantage of them.

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