

## UNDERSTANDING PERMITS

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### SECTION 404 OF THE CLEAN WATER ACT: CORPS OF ENGINEERS

SECTION 404

In addition to the requirements of GAR 100003, all land-disturbing activities must comply with Section 404 of the Clean Water Act. Section 404 prohibits the discharge of dredged or fill material into waters of the United States without a permit from the U.S. Army Corps of Engineers or in violation of a permit from the Corps of Engineers. 33 U.S.C. § 1344; 33 C.F.R. § 323.2(e)(1); 40 C.F.R. § 232.2. The continued presence of illegally discharged fill materials in the waters of the U.S. constitutes continuing violations of the Clean Water Act. As of June 10, 2002, the Corps defines fill as “material [that] has the effect of ... changing the bottom elevation of any portion of a water of the United States.” 33 C.F.R. § 323.2(e). The Environmental Protection Agency has historically used this definition of fill. 40 C.F.R. § 232.2.

A discharger of fill material into waters of the United States can either obtain an individual Section 404 permit or comply with the terms of an applicable Nationwide Permit, (“NWP”), which is a type of “general” permit. An activity is authorized by a NWP only when all terms and conditions of the NWP are satisfied. 33 C.F.R. § 330.4(a). All Nationwide Permits require appropriate erosion and sediment controls to be used and maintained. 67 Fed.Reg. 2020, 2089 (Jan. 15, 2002).

Even where an individual 404 permit or pre-construction notification is not required, there must be adequate erosion and sediment control as if a permit had been issued. Green Book, at 6-3. Moreover, the BMPs cannot be any less stringent than those practices contained in the Green Book, O.C.G.A. § 12-7-6 (b), and failure to properly “design, install, or maintain” BMPs is a violation of the permit. O.C.G.A. § 12-7-6 (a)(3).

CONT'D



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**SECTION 404 OF THE CLEAN WATER ACT: CORPS OF ENGINEERS CONT'D**

The Most Common Nationwide Permit is NWP 39. Here is a brief overview of this permit.

**Nationwide Permit 39 (NWP 39):  
Residential, Commercial, and Institutional Developments**

- *Applicability:* The permit applies to the construction of or expansion of residential, commercial, and institutional buildings foundations and building pads, and attendant features
  - Attendant features include roads, parking lots, garages, yards, utility lines, stormwater management facilities, recreational facilities (e.g. parks & golf courses)
  - Residential developments include single and multiple
- The construction or expansion must be “necessary” for the use and maintenance of the structures
- *Requirements*
  - The discharge does not cause a loss of greater than 1/2 of acre of non-tidal waters; and
  - The discharge does not cause the loss of greater than 300 linear feet of streambed
  - This requirement can be waived in writing for intermittent streams if
    - All terms of the NWP are met and
    - Any adverse impacts of the project on the aquatic environment are minimal – both individually and cumulatively
- The permittee must submit a Pre-Construction Notification (PCN) to the Corps of Engineers if:
  - The discharge causes the loss of greater than 1/10 of an acre,
  - The discharges causes the loss of any open waters (perennial and intermittent) below the high water mark,
  - The discharge causes the loss of greater than 300 linear feet, or
  - NWP is used in conjunction with any other NWP and total permanent loss is greater than 1/10 of an acre
- The PCN must include
  - avoidance/minimization measures
  - wetlands delineation for “special aquatic sites”
- Mitigation will normally be required and the permitted is required to avoid and minimize discharges into the water to the maximum extent practicable. No work shall cause more than minimal changes to the flow characteristics of the stream.
- The permittee must maintain vegetated buffers to the extent practicable – this is part of mitigation and determined on a case by case basis.
- If loss of water is less than 1/10 of an acre, the developer must submit a report within 30 days
- If it is a subdivision – the total loss cannot be greater than ½ acre – including individual lots.

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### SPECIAL THANKS TO

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