

CONFLUENCE

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Water Supply Planning: 404 Permitting*

By Nathan Vassar

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**This article is the tenth in an ongoing series of water supply planning and implementation articles to be published in Confluence that address simple, smart ideas for consideration and use by water suppliers in their comprehensive water supply planning efforts.*

The federal overlay to water rights permitting and planning can be substantial, as many water suppliers can attest. As we have described in recent articles, when federally jurisdictional waters are implicated in a project, authorization from the U.S. Corps of Engineers (“USACE”) is required. Today’s focus highlights factors that water suppliers should consider when there is a likelihood that section 404 of the Clean Water Act may be triggered.

Section 404 permitting can take the form of either a nationwide permit for certain activities, or a more searching process for an individual permit. USACE is the federal agency charged with reviewing applications and issuing 404 permits. When certain projects require a nationwide permit, the authorization process is relatively straightforward, as a permittee must demonstrate that the project in question meets the particular nationwide permit. Such nationwide permits cover a variety of activities, including maintenance of certain flood control facilities, bank stabilization, and work on outfall structures.

When an individual 404 permit is required, however, an applicant should be prepared for a number of permitting hurdles, and should prepare accordingly. First of all, the time frame for an individual permit can extend for multiple years, driven by extensive evaluations, including USACE coordination with its sister agencies in the federal government, and its consideration of input from state agencies as well. The time component is also directly impacted by important environmental laws and technical analysis, such as the NEPA process.

There are a number of critical constituencies involved in an individual 404 application effort. In addition to the state/federal agency involvement mentioned above, there are ongoing public interactions as well as coordination discussions with recognized tribal interests. Although some of these interactions are driven by the specific content of public and agency comments offered during comment periods, existing state and federal statutory and regulatory structures mandate a thorough review that includes a variety of stakeholders and analysis. Accordingly, the 404 application process looks to

provisions outside of the Clean Water Act itself to analyze impacts from a proposed project. Such laws include, among others, the Endangered Species Act, NEPA (as provided above), National Historic Preservation Act, along with state Antiquities Codes and other applicable state statutory/regulatory structures.

Water supply planners looking to undertake significant water supply projects requiring 404 authorization should always evaluate alternatives. Even independent of a NEPA-driven alternatives analysis, a prudent approach to water supply planning includes consideration of a suite of options to extend supplies and provide for supplemental water. Our series to date has highlighted a number of those alternative options, including the important analysis of reuse and conservation efforts.

If it is believed that an individual 404 application is warranted, developing the groundwork for the application is important. Such effort includes appropriate resources analysis, projected needs over a planning horizon time period, and a fatal flaws analysis, identifying potential hurdles or road blocks that may arise down the road. Although a 404 application effort is rarely without surprises and contingencies, successful applicants are typically those who have undertaken significant front-end work so that they are better prepared when such issues emerge during the permitting process. That planning effort includes both a legal and technical component, and may involve a variety of tasks from an analysis of existing water supply contracts to a comparison of modeling results under USACE’s preferred model, RiverWare.

As our series continues, we will highlight certain aspects of the ancillary laws beyond CWA Section 404 that can come into focus during water rights applications, or even under state-funding programs that voluntarily include the involvement of species/cultural-protection laws. Such articles will highlight the importance of remaining abreast of policy developments in order to affect influence even before a project triggers such regulatory/policy-driven application.



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