

# 4. Clean Water Act Section 404 Permit (4 Stages: Jurisdictional Determination, Application, Post-Comment, Post-Permit)

Note that for section 404 permits, the public doesn't get to comment on the draft permit—only the application for a permit—meaning that some issues probably can't be fully addressed until after the permits issue.

Notes	Army Corps Section 404 Permitting Process	Guide
	<ul style="list-style-type: none"> <li><input type="checkbox"/> Sign up through FERC to get automatic updates for the project and easy access to background information about the project</li> <li> <b>FERC Observation Checklist (#2)</b></li> </ul>	<b>FERC Observation Checklist</b>
	<ul style="list-style-type: none"> <li><input type="checkbox"/> Identify the Corps district overseeing the project</li> </ul>	pp. 157–158
	<ul style="list-style-type: none"> <li><input type="checkbox"/>  Explore that district's website to learn where information is posted about the project and review any project information posted on the Corps' website, the FERC docket, the applicant's website, and online generally</li> <li><input type="checkbox"/> Use the <b>Guide's flowchart</b> to orient based on this information</li> <li><input type="checkbox"/>  Identify allies that have worked with this district before to get tips on how the district operates</li> </ul>	pp. 187–190 <b>(flowchart)</b>
	<ul style="list-style-type: none"> <li><input type="checkbox"/>  Begin identifying experts who could opine on topics like:             <ul style="list-style-type: none"> <li><input type="checkbox"/> Wetlands delineation;</li> <li><input type="checkbox"/> Ecological economics;</li> <li><input type="checkbox"/> General economics;</li> <li><input type="checkbox"/> 404(b)(1) Guidelines</li> </ul> </li> </ul>	pp. 184, 186
	<ul style="list-style-type: none"> <li><input type="checkbox"/>  If you don't already have a relationship with your EPA regional or FWS office, start building one and begin sharing any concerns about the project with them so that these agencies have enough time to understand the project and exercise their discretionary authority under CWA 404(q) or 404(c) to oversee and even veto Corps permits (only EPA has 404(c) veto power)</li> </ul>	pp. 209–216, App. 50, 52

 Read or watch for (passive task)  Active task  On-going task  Write and file  Go to Checklist

Notes	1st Stage: Jurisdictional Determination	pp. 162–165, 191–196
	<ul style="list-style-type: none"> <li> Watch for a jurisdictional determination (JD) to be published on the district’s or the Corps headquarters’ websites (only if the applicant opts for an Approved JD, not a Preliminary JD)</li> </ul>	p. 196
	<ul style="list-style-type: none"> <li><input type="checkbox"/> If it seems like a JD should have already issued (e.g., if the Notice of Application has issued), contact the district Corps office to ask for the JD (a FOIA may be required)</li> <li><input type="checkbox"/> Consult with an expert and an experienced attorney to determine if the jurisdictional determination was made correctly and if / how the determination should be litigated</li> </ul>	pp. 195–196, 216–221 App. 37–44 (FOIA)
Notes	2nd Stage: Application	Guide
	<ul style="list-style-type: none"> <li> Watch for a Notice of Application for a Permit (search both the district’s website and the Headquarters’ website)</li> </ul>	pp. 197–202
	<ul style="list-style-type: none"> <li><input type="checkbox"/> Track the deadlines for Corps permits (e.g., section 404, section 10) set by the Notice of Application</li> <li><input type="checkbox"/>  Track any additional deadlines, e.g., if it is a joint notice for a coastal use permit or a Clean Water Act Section 401 certification</li> <li> <b>401 Checklist (#5)</b></li> </ul>	pp. 201–202, 222–224  pp. 191–192, 204–206, 216
	<ul style="list-style-type: none"> <li> Review the documents attached to the Notice and any NEPA or project documents available from the Corps, FERC, or generally online to decide if calling the district office or making a FOIA request is necessary to uncover additional information about the project (there will be no draft Corps permit and likely no mitigation plan available during the comment period)</li> </ul>	pp. 197–198, 204–208, App. 37–44 (FOIA)
	<ul style="list-style-type: none"> <li><input type="checkbox"/>  If you FOIA the district and do not receive a letter acknowledging receipt of your request or 20 days has elapsed, contact the district office directly</li> </ul>	pp. 205–208, App. 37–44
	<ul style="list-style-type: none"> <li><input type="checkbox"/>  Continue sharing any concerns about the project and the permitting process with your regional EPA/FWS offices so that they can include those concerns and along with the required legal language in comments to the Corps</li> <li><input type="checkbox"/> Make sure EPA is prepared to submit the follow-up letter required under 404(c) explaining why it disagrees with the Corps (due 25 days after the comment period closes)</li> </ul>	pp. 209–216, App. 50, 52

Notes	2nd Stage: Application	Guide
	<ul style="list-style-type: none"> <li><input type="checkbox"/> Organize citizen and political allies to request a public hearing by the time set by the Notice of Application (typically during the comment period). In the (unlikely) event a hearing is granted:</li> <li><input type="checkbox"/> Track the deadlines that the notice of the hearing sets, including the extra comment period that will follow a hearing</li> <li><input type="checkbox"/> Mobilize interested parties to attend the hearing</li> <li><input type="checkbox"/> Request interpreters of the Corps</li> <li><input type="checkbox"/> Connect with allies and inquire if they want help preparing sample comments to read out-loud at the hearing</li> <li><input type="checkbox"/> Mobilize media to attend, if desired</li> <li><input type="checkbox"/> Attend and give oral comments in the hearing</li> <li><input type="checkbox"/> Review the transcripts from the hearing to identify other allies and other areas of concern about the project. Make sure your oral comments were included.</li> <li> Draft and submit comments to rebut any arguments or points raised in the hearing</li> </ul>	<p>pp. 202–204</p>
	<ul style="list-style-type: none"> <li> Read the comments filed by other groups, individuals, and agencies to identify allies, concerns, or arguments to address</li> <li> Draft and submit comments on all topics and permits requested to the Corps within the comment period set by the Notice of Application, including evidence and expert opinion</li> <li><input type="checkbox"/> Submit a copy of all comments to FERC at the same time</li> <li> <b>FERC Participation Checklist (Application Stage)</b></li> <li><input type="checkbox"/> Submit a copy of any CWA 401 and/or coastal use comments to the appropriate state agency (should be identified on the Notice)</li> <li> <b>401 Checklist #5</b></li> </ul>	<p>pp. 169–186, 209, 215–216, 221–224, App. 36, 45–49, 51, 58</p> <p>pp. 92–94, 201–202</p> <p><b>401 Checklist</b> App. 56–58</p>

 Read or watch for (passive task)
  Active task
  On-going task
  Write and file
  Go to Checklist

Notes	3rd Stage: Post-Comment Period	Guide
	<ul style="list-style-type: none"> <li> Continue to publicize your concerns to keep public and political eyes on the project while the Corps considers the application</li> </ul>	pp. 202–203, 211, 215–217
	<ul style="list-style-type: none"> <li> If EPA/FWS is concerned about the project, review the 404(q) process and EPA's 404(c) veto to ensure that the agencies comply with the legal requirements in expressing concerns to the Corps</li> </ul>	
	<ul style="list-style-type: none"> <li><input type="checkbox"/> Work with EPA/FWS to ensure it has submitted the follow-up letter required by 404(c) explaining why it disagrees with the Corps (typically due 25 days after the comment period closes)</li> <li> Stay in touch with EPA/FWS and the Corps to track the draft permit's progress, which is not usually publicly available (check with allies experienced with your district)</li> <li><input type="checkbox"/> Remind EPA/FWS that once the Corps issues its draft permit and notice of intent to proceed, EPA/FWS has 15 calendar days to notify the district that it will elevate its concerns to the Assistant Secretary, which pauses the permitting process</li> <li>  Monitor the district's website and FERC docket for the final permit (check with allies experienced with the district)</li> </ul>	pp. 209–216
Notes	4th Stage: Post-Permit Issuance	Guide
	<ul style="list-style-type: none"> <li> Read the final issued permit and supporting documents</li> <li><input type="checkbox"/> Talk to attorneys, allies, and experts about the permit's flaws</li> <li> Read all filed comments to identify other appealable issues</li> <li><input type="checkbox"/> With attorney help, narrow the issues to raise on appeal</li> </ul>	pp. 221–222
	<ul style="list-style-type: none"> <li> Watch for a possible administrative appeal of the issued permit by the applicant (advocates have no administrative appeal rights)</li> </ul>	pp. 216–221
	<ul style="list-style-type: none"> <li> With the help of experienced attorneys, file suit in the federal Circuit Court where the project is located after any administrative appeal concludes—or, if no appeal was filed—60 days after the Corps issued the applicant a Notice of Appeal Process form</li> </ul>	pp. 221–222, App. 53–55