CHAPTER 2
OVERVIEW OF REGULATORY PROGRAM

2.1 Regulatory Program Background

The scope of the U.S. Army Corps of Engineers (Corps) regulatory program has increased since the 1970s. After decades of regulating work in navigable waters pursuant to the Rivers and Harbors Act of 1899, in the 1970s the Corps became responsible for regulating certain activities pursuant to Section 404 of the Federal Water Pollution Control Act, which was later designated as the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act.

Passage of the National Environmental Policy Act (NEPA), development of the Clean Water Act Section 404(b)(1) guidelines, and various court decisions have resulted in numerous changes in the policy, practice and procedures for evaluating regulated activities. To comply with judicial decisions, the Corps uses a broad definition of waters of the United States. For the purposes of the Corps regulatory program, waters of the United States are defined at 33 CFR Part 328 (Federal Register 1986). Waters of the United States include: navigable[1] and interstate waters, tributaries to navigable and interstate waters, wetlands adjacent to navigable and interstate waters and their tributaries, and other waters such as isolated lakes, wetlands, and prairie potholes that are not part of a tributary system to interstate waters or to navigable waters, but the degradation or destruction of which could affect interstate commerce.

As the jurisdictional scope of the Corps regulatory program expanded, the Corps developed new administrative approaches for evaluating proposed activities. Two administrative approaches were introduced in 1975 (Federal Register 1975): "regulation by rule" and general permits.[2] These tools were necessary to make the program manageable from a workload perspective while ensuring protection of the aquatic environment.

The "regulation by rule" approach allowed the public to comply with the law without having to notify the Corps. For example, minor bulkheads and fills that are located in non-navigable waters were authorized provided they met the terms and conditions of the rule.

The general permit approach allowed the Corps to authorize categories of activities that were substantially similar in nature and resulted in minimal adverse environmental effects individually and cumulatively. General permits were developed to authorize minor activities, with little or no paperwork. General permit activities do not require case-by-case public notices and may or may not require notification to the Corps. The public interest review and

[1] See 33 CFR Part 326 (Federal Register 1986) for the definition of navigable waters of the United States.
[2] The 1977 amendments to the Federal Water Pollution Control Act included Section 404(e), provided statutory authority for the Corps to issue general permits, including nationwide permits, for activities that have minimal adverse environmental effects and are similar in nature.

Section 404(b)(1) analysis is accomplished for each category of work and is not required for each activity.

In 1977 (Federal Register 1977), the Corps introduced the first nationwide permits, which are general permits that authorize certain categories of activities on a national basis. There were seven nationwide permits for Section 10 activities at 33 CFR 322.4 and five nationwide permits for Section 404 activities at 33 CFR 323.4. These nationwide permits did not require notification to the Corps. In addition, the 1977 regulations included best management general conditions for all Section 404 activities and identified exempt activities.

The regulatory approach developed in 1977 resembles today's program. For example, many of the categories of activities authorized in 1977 are reflected in the current nationwide permit categories (e.g., aids to navigation, structures in artificial canals, repair and maintenance, utility line crossings, bank stabilization, minor road crossings, etc.).

Several procedures, including the public interest review, the Section 404(b)(1) guidelines analysis, and the district engineer's authority to assert discretionary authority and to develop regional conditions were part of the regulatory program in the 1970s and 1980s. However, numerous improvements were made to the regulatory program throughout the 1980s and 1990s.

The Section 404(b)(1) guidelines, initially developed in 1975 and modified in December 1980 (40 CFR Part 230, Federal Register 1980), continue to be the primary environmental criteria used to evaluate activities resulting in discharges of dredge or fill material into waters of the United States. Under the Section 404(b)(1) guidelines, a discharge is not authorized if there are practicable alternatives with less adverse effects on the aquatic environment. In addition, appropriate steps must be taken to minimize potential adverse effects and mitigate for unavoidable impacts.

In 1982, the Corps combined the nationwide permits and placed them in a separate part of the Corps regulations at 33 CFR Part 330. The Corps also issued several new nationwide permits, to bring the total number of nationwide permits to 25. The nationwide permits continued to be primarily non-reporting, but provisions were added to allow division engineers to require reporting on a regional basis. The major changes in 1982 involved reducing permit processing times. Applicants were also required to receive a Section 401 Water Quality Certification from the state for the Federal permit to be valid. Although the 1982 regulations included a definition of headwaters and isolated waters, nationwide permit 26 had not been issued.

In 1984, the Corps reissued four nationwide permits and issued one new nationwide permit, nationwide permit 26. Nationwide permit 26 authorized discharges of dredged or fill materials into headwaters and isolated waters, provided the work did not result in the loss or substantial modification of 10 acres or more of waters of the United States.

The 1986 regulations established notification procedures and agency coordination requirements for nationwide permit 26. An important policy was also incorporated into the 1986 program rules. While earlier regulations stated that a permit application must be denied if it is contrary to the public interest, the 1986 rules further stated that no Section 404 permit could be issued unless the activity complied with the Section 404(b)(1) guidelines.

In 1991, additional activities were authorized under the nationwide permit program. Twenty-six nationwide permits were reissued, and 10 new nationwide permits were issued. The best management practices were incorporated into the nationwide permit conditions to provide further protection to regulated resources and increase the enforceability of those conditions. The basis for asserting discretionary authority was broadened to include all of the public interest review factors.

Many of the policies and procedures developed in the 1970s, 1980s, and 1990s continue to be in effect in some form or another in today's program. For example, the public interest review, non-reporting activities and, reporting activities, regional general permits, discretionary authority, national general conditions, regional general conditions, and permit specific conditions are used to achieve program goals, including efficiency and protection of the aquatic environment.

Since 1993, the Corps has given closer scrutiny to the nationwide permits, especially nationwide permit 26. In 1996, the acreage limit for nationwide permit 26 was reduced from ten acres to three acres with a reporting requirement for impacts of greater than one-third of an acre in wetlands. In addition, nationwide permit 26 was modified to prohibit filling or excavating more than 500 linear feet of stream bed.[3]

In 2000, the Corps replaced nationwide permit 26 with five new nationwide permits and six modified nationwide permits, and added two new general conditions (Federal Register 2000a). The purpose of these changes was to improve environmental protection and ensure compliance with Section 404(e) of the Clean Water Act, which states that nationwide permits can only authorize activities that are similar in nature with minimal adverse effects on the aquatic environment.

2.2 Statutory Authorities

2.2.1 Section 10

Section 10 of the Rivers and Harbors Act gives the Corps the authority to regulate any work in, over, or under navigable waters that could affect the course, location, condition, or capacity of those waters. The primary purpose of Section 10 is to protect navigation. Examples of activities regulated under Section 10 include piers, bulkheads, revetments, power transmission

[3] The 500 linear foot limit applied to perennial and many intermittent streams per draft 1996 Q&A number 30.

lines, and aids to navigation. Essentially any activity or work that affects the navigable capacity of navigable waters of the United States requires a Section 10 permit.

2.2.2 Section 404

The Corps regulates discharges of dredge or fill material into waters of the United States pursuant to Section 404 of the Clean Water Act. This permitting authority applies to all waters of the United States including navigable waters and wetlands. The selection of disposal sites for dredged or fill material is done in accordance with the Section 404(b)(1) guidelines, which were developed by the U.S. Environmental Protection Agency (see 40 CFR Part 230).

2.2.3 Section 103

Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, requires all activities involving the transportation of dredged material for the purpose of disposal in the ocean to be evaluated under standard permit procedures. The standard permit procedures include an environmental evaluation to ensure that the disposal of dredged material will not unreasonably degrade or endanger human health, welfare, or amenities; the marine environment; ecological systems; or economic potentialities. Section 103 activities are not discussed in detail in this report because nationwide permits cannot be issued to authorize these activities. In Fiscal Year 1998, the Corps issued 16 permits pursuant to Section 103.

2.3 Categories of Waters Regulated Under the Corps Program

2.3.1 Navigable Waters of the United States

Navigable waters of the United States are defined as those waters that are subject to the ebb and flow of the tide, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. When determining whether a waterbody is navigable one must consider the following:

- Past, present, or potential presence of interstate or foreign commerce;
- Physical capabilities for use by commerce; and
- Defined geographic limits of the waterbody.

For tidal waters, the shoreward limit of navigable waters of the United States is the mean high water shoreline. For non-tidal rivers and lakes, the landward limit of navigable waters of the United States is the ordinary high water mark.

2.3.2 Waters of the United States

Waters of the United States can be divided into three categories: territorial seas, tidal waters, and non-tidal waters. Navigable waters of the United States, which are defined in the previous section, are considered waters of the United States. Other waters of the United States include: all interstate waters including interstate wetlands; all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce; all impoundments of waters otherwise defined as waters of the United States under the definition; tributaries to navigable waters, interstate waters, and impoundments of waters of the United States; the territorial seas; and wetlands adjacent to waters, other than waters that are themselves wetlands.

The landward limit of tidal waters of the United States is the high tide line. In non-tidal waters where adjacent wetlands are absent, jurisdiction extends to the ordinary high water mark. In non-tidal waters where adjacent wetlands are present, jurisdiction extends beyond the ordinary high water mark to the limit of adjacent wetlands. When a water of the United States consists only of a non-tidal wetland, jurisdiction extends to the limit of the wetland.

Section 10 applies to activities located in navigable waters of the United States. Section 404 jurisdiction applies to all waters of the United States, including navigable waters.

2.3.3 Definition of Wetlands

Wetlands were defined in the 1977 as "those areas that are inundated or saturated by surface or groundwater at frequency and duration sufficient to support and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."[4] This definition remains unchanged and appears in the Corps regulations at 33 CFR 328.3(b) (Federal Register 1986) and in U.S. Environmental Protection Agency (U.S. EPA) regulations at 40 CFR 230.3(t) (Federal Register 1980).

2.3.4 Wetland Delineation Manual

The Corps uses the 1987 Corps of Engineers Wetlands Delineation Manual to determine whether an area is a wetland under Section 404 of the Clean Water Act. The Federal manual provides technical methods and guidelines for determining the presence of a wetland. A three parameter approach is used to identify wetlands, requiring evidence of wetland hydrology,

[4] Federal Register Vol. 42, No. 138, Tuesday July 19, 1977, p. 37128 and U.S. Army Corps of Engineers, Environmental Laboratory, WRP Technical Report Y-87-1, Corps of Engineers Wetlands Delineation Manual, p. 13.

hydrophytic vegetation and hydric soils in order for a wetland to be regulated by the Corps under Section 404.[5]

The Federal manual is not a classification system. However, the technical manual includes most but not all of the wetlands described by the U.S. Fish and Wildlife Service (U.S. FWS) Cowardin classification system and identified on their National Wetland Inventory maps. The U.S. FWS classification system and National Wetland Inventory maps include most special aquatic sites that are in the purview of Section 404.[6]

The Corps uses existing information and field verified information to determine the presence of jurisdictional wetlands for the purposes of regulating activities under Section 404. Often applications for proposed activities involving discharges of dredged or fill material in wetlands include wetland delineations. For nationwide permits 14, 18, 21, 26, 29, 34, and 38, the Corps requires wetland delineations to be submitted with pre-construction notifications. Often environmental consultants perform this service for permit applicants. In other cases the Corps may provide this service, but often this service cannot be provided expeditiously.

2.4 Wetland Policy

Corps wetland policy was developed in the early 1970s and continues to be an important part of the regulatory program today. The Corps recognizes that wetlands are environmentally vital areas and that they constitute productive and valuable public resources. The regulations discourage unnecessary alteration of these areas. Since the 1970s, the Corps has worked within an ecosystem context and considered cumulative effects of proposed activities on aquatic resources.

Today's wetland policy is articulated in terms of the national goal of no overall net loss of wetlands. The 1990 Memorandum of Agreement for mitigation (U.S. EPA and Department of the Army, 1990) states that a goal of the Section 404 program is to contribute to the national goal of no overall net loss of the Nation's remaining wetland base. This 1990 Memorandum of Agreement also recognizes that no net loss of wetland functions and values may not be achieved on a permit-by-permit basis. The nationwide permit program helps contribute to compliance with the no overall net loss goal. Since 1993, the Corps has tracked wetland impacts in its database and improvements continue to be made in the way wetland impact data is collected by the Corps. Specifically, the Corps began collecting additional data for nationwide permits in 1997.

[5] The Federal manual does not provide information on identifying other special aquatic sites that are regulated under the Clean Water Act (i.e., sanctuaries and refuges, mudflats, vegetated shallows, coral reefs, and riffle and pool complexes).

[6] Many district offices use National Wetland Inventory maps to determine whether or not a wetland is present and then, if necessary, conduct site visits to verify the presence of all three wetland parameters. Most of the wetlands identified on the U.S. FWS National Wetland Inventory maps are regulated by the Corps.

2.5 Regulatory Program Goals

Administering the regulatory program in a fair, flexible, and effective manner while ensuring the protection of aquatic resources has been a goal of the program since the early 1990s. The following regulatory program goals were established in 1991 and remain the program goals today:

- To provide strong protection of the Nation's aquatic environment, including wetlands.
- To enhance the efficiency of the Corps administration of its regulatory program.
- To ensure that the Corps provides the regulated public with fair and reasonable decisions.

During its evaluation of a proposed activity, the Corps seeks to use the most efficient permitting strategy to meet the program goals. General permits, including regional general permits, nationwide permits and programmatic general permits, are an important aspect of the Corps regulatory program. There are several advantages to general permits. They authorize minor activities with little paperwork and delay while ensuring protection of the aquatic environment. General permits also free up resources so that Corps staff can focus on activities that have the potential to have more than minimal adverse environmental effects. They serve as an incentive for applicants to avoid and minimize impacts to meet the Federal terms and conditions and, as a result, receive Federal authorizations faster. Regional general permits may also streamline the review processes for state and local agencies.

2.6 Regulatory Program Permitting Strategies – Types of Permits

2.6.1 Individual Permits

An individual permit is a permit that is issued following an individual evaluation of the proposed activity and a determination that the activity is not contrary to the public interest. Standard permits and letters of permission are types of individual permits.

2.6.1.1 Standard Permits

A standard permit has been processed through the public interest review procedures, including public notice and evaluation of comments. Standard permits are usually required for projects considered large in scope or involving activities that may result in more than minimal adverse effects on the aquatic environment. Often, activities that occur in tidal waters and navigable waters are evaluated under the standard permit process and require individual Section 401 certification and coastal zone management consistency determinations.

Standard permit evaluation procedures are used to evaluate proposed activities under Section 10, Section 404, and Section 103 statutory authorities. The standard permit process involves

the issuance of a public notice, consideration of comments received in response to the public notice, and a public interest review. The public interest review is a balanced approach for evaluating the positive and negative effects of the proposed activity on public interest factors, which are listed at 33 CFR 320.4(a) (Federal Register 1986). Examples of public interest factors are environmental values, navigation, and economics.

2.6.1.2 Letters of Permission

Letters of permission are issued through an abbreviated procedure that involves coordination with Federal and state resource agencies and a public interest evaluation, but a public notice is not issued for each activity. For a Section 10 letter of permission, the proposed work is minor, does not have significant effects on environmental values, and is not controversial. Under Section 404, a letter of permission may be developed for specific activities, after consultation with the Federal and state resource agencies. A public notice to solicit comments on the proposed Section 404 letter of permission activities and associated procedures is required. Section 401 water quality certifications and, if appropriate, coastal zone management consistency determinations may be obtained on a generic or individual basis for Section 404 letters of permission.

2.6.2 General Permits

General permits are a type of authorization that is issued on a nationwide or regional basis for a category or categories of activities. Activities that are authorized under general permits must be substantially similar in nature and cause only minimal individual or cumulative adverse effects on the aquatic environment.

2.6.2.1 Nationwide Permits

Nationwide permits are a type of general permit that authorize certain specified activities nationwide. Some nationwide permit activities do not require notification to the Corps. All terms and conditions of the nationwide permits must be met in order for an activity to be authorized by nationwide permit.

In addition to the national limits, terms and conditions of the nationwide permits, the Corps regulations at 33 CFR 330.4(e) and 330.5 (Federal Register 1991) allow division and district engineers to impose additional conditions on nationwide permits on a regional basis. For example, in response to the 1991 nationwide permit package, the St. Paul district further conditioned the nationwide permits to maximize the effectiveness of the regulatory program and further reduce the potential environmental effects. In 1996, several districts added regional conditions to the nationwide permits to protect aquatic resources within their region. Modifications to the nationwide permits are coordinated with the state or Tribal 401 certifying agency and public notices are used to inform the public of the regional conditions.

2.6.2.2 Regional General Permits

Regional general permits may be issued by a district or division engineer for a category or categories of activities after public notice and evaluation of comments. For activities authorized by regional general permits, notification to the Corps may be required but procedures vary from district to district. For example, districts may require a case-by-case reporting and acknowledgement system.

2.6.2.3 Programmatic General Permits

Programmatic general permits are a type of general permit based on an existing state, local or other Federal agency program and are designed to avoid duplication. For example, the New England District has developed programmatic general permits for each of the New England states.

2.7 Regulatory Program Project Evaluation

2.7.1 Pre-Application Process

Applicants are encouraged to discuss proposed activities that may have significant effects on the human or aquatic environment with the Corps prior to submitting an application for a permit. The pre-application process may be used to determine the extent of Federal authority, including the presence of jurisdictional waters, and make recommendations for avoidance, minimization and mitigation of project impacts. Pre-application meetings often result in avoidance and minimization of impacts to aquatic resources. Pre-application meetings may also be used to make applicants aware of the requirements of other Federal laws, including the requirements of the National Historic Preservation Act and Endangered Species Act.

2.7.2 Application

For all activities that require notification to the Corps, applicants may use the standard application form. In many cases individual Corps district offices have developed joint permit application forms with state regulatory agencies to indicate the information necessary to process applications for both Federal and state permits. In many instances the information provided through a joint permit application exceeds the information required by Corps regulations.

2.7.2.1 Standard Permits and Letters of Permission

For standard permits, 33 CFR 325.1(d) (Federal Register 1986) identifies the information necessary for a complete application. The application must include: a description of the proposed activity; drawings necessary for public notice (detailed engineering plans are not required); the project location; the purpose and need of the project; scheduling of the project; names and addresses of adjacent property owners; locations and dimensions of adjacent

structures; and a list of necessary authorizations, including all approvals or denials already received. If the activity involves dredging, the application must include a description of the type and composition of the material to be dredged, the method of dredging, and plans for disposal of the dredged material. If the proposed activity impacts wetlands, applicants are encouraged to include a delineation along with the application.

For the purposes of Section 404, the source of fill material, quantity and type of the material must be provided on the application. In addition, the application must include the purpose of the discharge. Other information necessary to evaluate the proposed activity in light of the public interest review factors and the Section 404(b)(1) guidelines may also be required during the evaluation process.

2.7.2.2 Nationwide Permits and Regional General Permits

Applicants may use the individual permit application form, a joint permit application form, or a letter to notify the Corps if the terms and conditions of the applicable nationwide permits, including any regional conditions, require such notification. For the 1996 nationwide permits, general condition 13 lists which nationwide permits require notification to the district engineer.

Information required as part of the pre-construction notification, which used to be called the pre-discharge notification, includes: the name, address and telephone number of the applicant; location of the proposed activity; a brief description of the proposed project; the direct and indirect environmental effects of the proposed activity; other permits received in the past for the proposed activity or for a related activity; and, for nationwide permits 14, 18, 21, 26, 29, 34, and 38, a wetland delineation.

Notification requirements for regional general permits vary among districts but are typically similar to the information required for nationwide permits and standard permits.

2.7.3 Evaluation of Proposed Activities

Figures 2.7-1 and 2.7-2 depict general outlines of the standard permit and nationwide permit evaluation processes. Evaluation procedures for standard permits and letters of permission are found at 33 CFR Part 325 (Federal Register 1986). For activities authorized by nationwide permits, evaluation procedures are found at 33 CFR Part 330 (Federal Register 1991). A project-specific public notice, public interest review, off-site alternatives analysis, and, if the activity involves discharges of dredged or fill material into waters of the United States, a project-specific Section 404(b)(1) analysis are required for standard permit applications, but not for nationwide permit verification requests.

Site visits, agency coordination, and on-site alternatives analysis are conducted for all types of permits as necessary. The level of analysis for all activities is commensurate with the level and severity of the anticipated environmental impacts. For example, projects with minimal

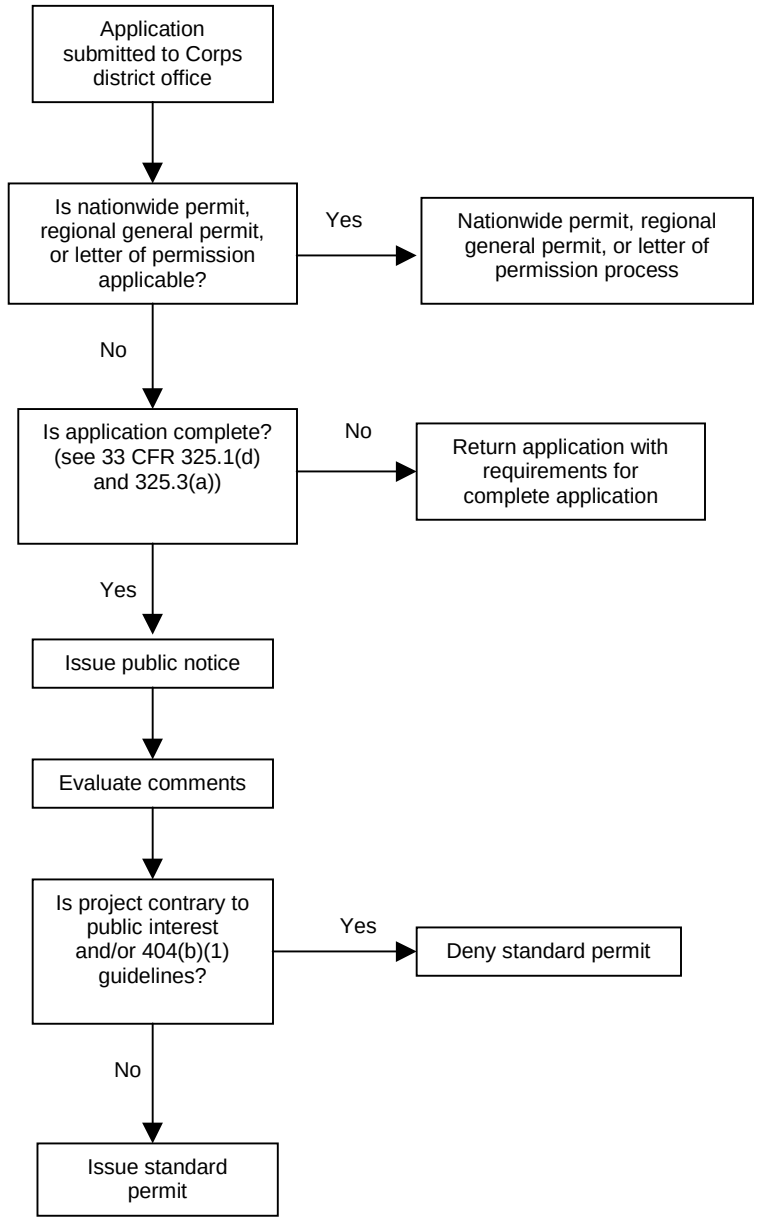

Figure 2.7-1 General Outline of the Standard Permit Process

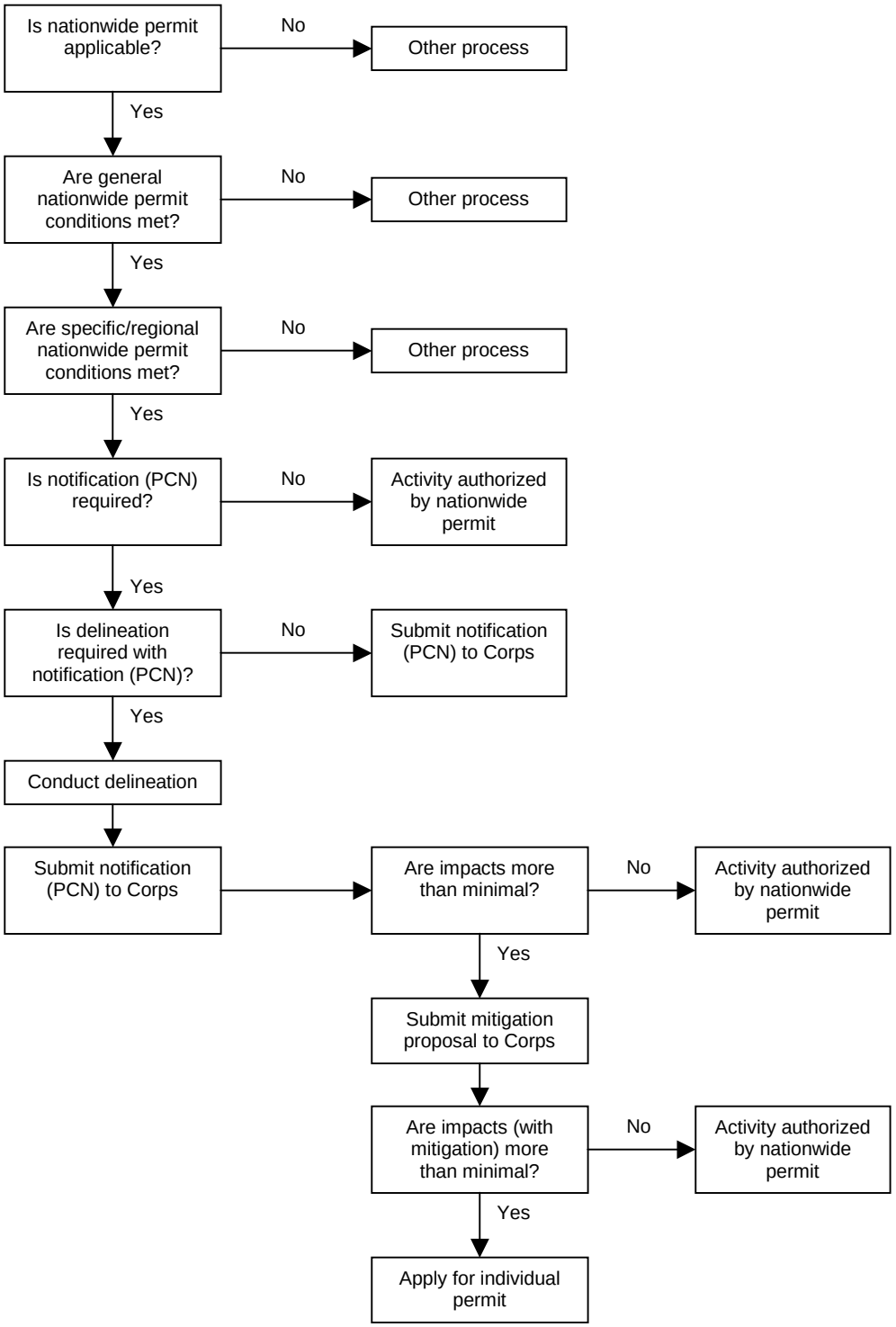

Figure 2.7-2 General Outline of the Nationwide Permit Process

adverse effects that meet the terms and conditions of a nationwide permit or other general permit will undergo less rigorous analysis than a project evaluated under the standard permit process. Standard permits are used to authorize activities with more than minimal adverse effects on the aquatic environment, provided those activities comply with the Section 404(b)(1) guidelines and are not contrary to the public interest.

2.7.4 Public Notice

Public notices are issued by the Corps to solicit comments for projects under the individual permit process. Public notices are also published to solicit comments on the proposed issuance of nationwide permits, regional general permits, and programmatic general permits. However, there are no case-by-case public notices for activities authorized by nationwide permits or regional general permits. All public notices for individual permit activities and proposed general permits allow the public to request public hearings.[7]

2.7.4.1 Standard Permits and Letters of Permission

All standard permit applications require publication and distribution of a public notice within 15 days of receipt of a complete application. The public notice is distributed to Federal, state, and local agencies, Tribes, and interested members of the public, including adjacent property owners. A public notice should provide sufficient information about the proposed activity that will afford the public the opportunity to provide meaningful comments. Section 2.7.2.1 describes the information needed for a complete standard permit application. In addition, the public notice should identify all of the relevant public interest review factors and Section 404(b)(1) guidelines criteria that will be evaluated. Information regarding the presence of known cultural resources and Federally-listed endangered and threatened species and the anticipated effects on these resources should be provided. The public notice will also identify other authorizations (e.g., Section 401 water quality certification, coastal zone consistency determination, etc.) that will be required. Information regarding alternatives that were considered and any proposed mitigation may be presented in the public notice, but this information is not required.

The public notice comment period should be at least 15 days, but no more than 30 days. If the proposed work is substantially modified at a later time, the Corps will normally issue a second public notice to solicit comments on the modified proposal. For example, a second public notice will normally be issued if the impacts are greater than originally proposed, or if the project is substantially modified.

Letters of permission for Section 10 activities do not require a public notice. However, these activities are coordinated with other agencies, including U.S. EPA, U.S. FWS, National Marine Fisheries Service, State Historic Preservation Officer, and state department of natural resources. Adjacent property owners are also notified of the proposed work and given the opportunity to comment.

[7] Factors to consider when determining whether or not a public hearing is necessary may be found in the U.S. Army Corps of Engineers Standard Operating Procedures for the Regulatory Program (Corps 1999).

Letters of permission for Section 404 activities may be developed at the district level. A public notice is required to announce the types of activities and the procedures for reviewing activities that will be authorized by the Section 404 letter of permission. Categories of activities and associated review procedures are typically developed in cooperation with Federal and state agencies prior to issuance of the public notice.

2.7.4.2 Nationwide Permit Public Notices

The Chief of Engineers publishes in the Federal Register a notice for the issuance, modification to, or reissuance of nationwide permits. At the same time, district engineers notify the public of the availability of the Federal Register notice and may propose regional conditions that will apply to the nationwide permits within the district. The public may respond to both these public notices.

2.7.4.3 Proposed Regional or Programmatic General Permits and Modifications to Existing General Permits

District offices are also required to publish and distribute public notices for proposed regional or programmatic general permits and for significant modifications to existing regional or programmatic general permits.

These public notices must include a clear description of the proposal; a statement that indicates that the proposal complies with the requirements for issuing general permits; the evaluation factors used to make a decision; and a statement that the proposed general permit is in the public interest and complies with the Section 404(b)(1) guidelines, as appropriate.

2.7.5 Public Interest Review and Section 404(b)(1) Guidelines Analysis

The decision to issue or deny a permit is based on a public interest review. The regulations for the public interest review are found at 33 CFR 320.4 (Federal Register 1986). The public interest review involves an analysis of the foreseeable impacts that the proposed work would have on public interest factors, such as navigation, general environmental concerns, and needs and welfare of the people. The benefits of the proposed work, including its intended uses, must be weighed against its detriments to determine if the project is in the public interest. This review is conducted for every proposed activity under the standard permit and letter of permission procedures.

For nationwide permits and regional general permits, the public interest review is conducted for each nationwide permit activity category when the general permits are developed. After the general permit is issued, individual activities are authorized if those activities comply with the terms and conditions of the general permit. A general permit may require notification to the district engineer prior to commencement of construction, so that the proposed activity can be reviewed to ensure that it qualifies for authorization under the general permit. For those activities that do not require notification, individuals may request that the district engineer

provide written verification that their proposed activities comply with the terms and conditions of the general permit.

If an activity is not contrary to the public interest a permit may be issued. The following factors are considered (if they are relevant) for all proposed activities, including activities that are covered under regional and nationwide permits:

Conservation	Economics
Aesthetics	General Environmental Concerns
Wetlands	Cultural Values
Fish and Wildlife Values	Flood hazards
Floodplain values	Land Use
Navigation	Shore erosion and Accretion
Recreation	Water Supply and Conservation
Water Quality	Energy Needs
Safety	Food and Fiber production
Mineral Needs	Considerations in Property Ownership
Needs and Welfare of the People	

For Section 404 activities, a Section 404(b)(1) guidelines analysis is conducted concurrently with the public interest review. The Section 404(b)(1) guidelines were developed by U.S. EPA in conjunction with the Secretary of the Army to evaluate proposed discharges of dredged or fill material into waters of the United States, including jurisdictional wetlands. The regulations for implementing the Section 404(b)(1) guidelines are found at 40 CFR Part 230. Compliance with the Section 404(b)(1) guidelines involves an evaluation of alternatives and an evaluation of the adverse effects that the proposed activity will have on the physical, chemical and biological characteristics of the aquatic environment. No permit may be issued if the work is contrary to the public interest or if it does not comply with the Section 404(b)(1) guidelines.[8]

The Section 404(b)(1) guidelines require a determination that the project is the least environmentally damaging practicable alternative, that the project will not cause or contribute to the violation of applicable state or Federal laws (e.g., state water quality standards, Endangered Species Act), that the project will not result in significant degradation of waters of the United States, and that any appropriate and practicable steps have been taken to minimize adverse impacts on aquatic resources.

Upland alternatives are assumed to be available and are presumed to have less adverse impacts, unless the permit applicant can clearly demonstrate otherwise. When applying the Section 404(b)(1) guidelines, the Corps will take into consideration avoidance, minimization, and, if necessary, compensatory mitigation. This process is known as "sequencing." Avoidance ensures that the least environmentally damaging practicable alternative is considered. Minimization ensures that all appropriate and practicable steps will be taken to minimize project impacts.

[8] A permit will be denied if it does not comply with the Section 404(b)(1) guidelines, unless the economic impact on navigation and anchorage necessitates permit issuance pursuant to Section 404(b)(2) of the Clean Water Act.

Compensatory mitigation is considered only after avoidance and minimization have been accomplished and is required for unavoidable impacts.[9] The intensity of the analysis under the Section 404(b)(1) guidelines should reflect the severity of the environmental impacts associated with the proposed activity. For activities authorized by general permits, including nationwide permits, compensatory mitigation may be required to ensure minimal adverse effects.

Regulatory program regulations recommend that the public interest review and the Section 404(b)(1) guidelines analysis be conducted simultaneously. The regulations also require that when a project is determined to be contrary to the public interest or that it does not comply with the Section 404(b)(1) guidelines, a permit will not be issued.

Section 10 letter of permission activities are evaluated to ensure that the proposed activities are not contrary to the public interest, and will not substantially affect navigation. Section 404 letter of permission activities are evaluated to determine if the proposed activities are not contrary to the public interest or the Section 404(b)(1) guidelines.

2.7.5.1 Alternatives Evaluation

Alternatives evaluated should address the requirements of NEPA and the Section 404(b)(1) guidelines. Under NEPA, only those alternatives that are reasonable need be considered in detail. Similarly, under the Section 404(b)(1) guidelines, only practicable alternatives are to be considered. According to the Section 404(b)(1) guidelines (40 CFR 230.10(a)(2), Federal Register 1980), "an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."

Evaluation of alternatives is appropriate for proposed activities under the individual permit process. Categories of activities authorized by nationwide permits and regional general permits need not go through a formal off-site alternatives analysis because by definition these activities do not have a significant effect on the human environment. Compliance with NEPA and the Section 404(b)(1) guidelines is accomplished during the issuance process for these permits. However, further avoidance and minimization measures, such as on-site alternatives, are often accomplished for many nationwide permit activities. In addition, many permit applicants will design their projects to minimize impacts and qualify for authorization under the terms and conditions of the nationwide permit, thereby receiving authorization more quickly. If necessary, discretionary authority may be asserted by the district engineer to require standard permit review for nationwide permit activities that may have more than minimal adverse effects on the aquatic environment.

[9] The 1990 Memorandum of Agreement between the U.S. Environmental Protection Agency and the Corps of Engineers provides further guidance on implementing the guidelines with respect to mitigation for standard permits (U.S. Environmental Protection Agency-U.S. Department of Army 1990).

The Corps is responsible for evaluating the direct and indirect effects of proposed activities. The scope of analysis for assessing direct and indirect effects includes all waters of the United States and any additional non-waters where the Corps determines there is adequate Federal control and responsibility to include it in the permit area. The permit area is defined as the area that requires a Corps permit plus any upland areas in the immediate vicinity. In some cases, the permit area may also be extended to upland areas that would not be impacted "but for" the Federal permit (e.g., indirect impacts). The Corps regulations defining the scope of analysis for the purposes of NEPA are found in Appendix B of 33 CFR Part 325 (Federal Register 1988). The Corps regulations defining the scope of analysis for the purposes of Section 106 of the National Historic Preservation Act are found in Appendix C of 33 CFR Part 325 (Federal Register 1990).

Permit area and scope of analysis must be considered for individual, general and nationwide permit activities. However, scope of analysis and permit area can be a source of contention between the Corps and the resource agencies. Often historic resources and endangered species issues lie outside the scope of analysis for Section 10 or Section 404 permits.

To ensure that all regulated activities are reviewed for individual and cumulative effects, all projects must be single and complete. However, during their review, Corps project managers should consider the overall effects associated with all permit decisions. In addition, each activity must have independent utility and any subsequent permit decisions need to address overall adverse effects. Issuance of an authorization for a particular project does not guarantee that permits will be issued for subsequent related projects.

2.7.6 Agency Coordination

Agency coordination may occur early during the project review. In some instances, agencies become involved in pre-application meetings and site visits. Other times agency coordination is initiated when the public notice or agency coordination notice is received by the agency. For all standard permits, agencies receive a copy of the public notice. Only certain nationwide permit activities are coordinated with agencies. Those activities are listed in nationwide permit general condition 13. However, regional conditions may be imposed on nationwide permits to require coordination with the Federal and state agencies. For example, the district engineer may coordinate pre-construction notifications of certain nationwide permit activities that may affect Federally-listed endangered or threatened species with either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service.

Under the 1996 nationwide permit program, any comments concerning the proposed activities' compliance with the terms and conditions of the nationwide permits and the need for mitigation to reduce the adverse environmental effects are to be considered. Often recommendations for further minimization and or mitigation are accomplished. In the 1996 nationwide permits, coordination with Federal and state agencies was required for nationwide permits 14, 21, 26 (if the activity impacted 1 to 3 acres of headwaters and isolated wetlands), 29, 33, 37, and 38. Under the 1996 pre-construction notification requirements, agencies had five calendar days to

notify the district that comments were forthcoming and an additional ten days to provide those comments in writing.

For nationwide permits 5, 7, 12, 13, 17, 18, 27, 31, and 34, optional agency coordination could be accomplished if either the regional administrator or regional director of the U.S. EPA, U.S. FWS or National Marine Fisheries Service formally requested it.

2.7.7 Duration of Permits

Individual permits are in effect until they automatically expire or are modified, suspended, or revoked. Permits for structures or other activities of a permanent nature are usually in effect for an infinite duration. However, permits for temporary structures have definite expiration dates. Permits for construction activities have specific time limits for completing the authorized work. The time period for completing the construction work is based on the scope and nature of the activity. If the authorized work has not been completed by the time limit specified in the permit, the district engineer may grant an extension of time, unless such a time extension would be contrary to the public interest.

General permits are in effect for no more than five years. After the five year period, a general permit may be reissued after the procedures described above for the issuance of a general permit have been followed.

2.7.8 Modification, Suspension, or Revocation of Permits

The district engineer may reevaluate the circumstances and conditions of any individual permit and initiate action to modify, suspend, or revoke the permit, if such action is warranted by the public interest. For regional general permits, the reevaluation may cover individual activities, categories of activities, or geographic areas.

Division engineers may use discretionary authority to modify, suspend, or revoke nationwide permit authorizations for any specific geographic area, class of activities, or class of waters. Division engineers may also add regional conditions to nationwide permits. These actions require the issuance of a public notice, evaluation of comments received in response to the public notice, and the preparation of decision documents. After the modification, suspension, or revocation of nationwide permits, another public notice is issued to provide notification of the action to affected parties.

District engineers may use discretionary authority to modify, suspend, or revoke a nationwide permit authorization for a particular activity. District engineers may also add special conditions to nationwide permit authorizations to ensure that the authorized activities result in minimal adverse effects on the aquatic environment. Examples of factors that are considered by district engineers include: changes in circumstances since the nationwide permit was issued or the activity was verified as qualifying for authorization under the nationwide permit, cumulative adverse environmental effects resulting from activities occurring under the nationwide permit,

the extent of the permittee's compliance with the terms and conditions of the nationwide permit, and concerns for the environment, including public interest factors.

2.7.9 Authority to Issue or Deny Permits

District engineers are authorized to issue or deny permits in accordance with Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, as long as a particular permit application has not been referred to a higher authority. In cases where the permit application has been referred to a higher authority, the permit decision will be made by either the division engineer or the Chief of Engineers, as appropriate.

If the district engineer decides to deny the permit, the applicant will be advised in writing of the reasons for denial. Denial of a permit can occur in two ways: denial with prejudice or denial without prejudice. A permit is denied with prejudice when the proposed work is contrary to the public interest or, if applicable, the Section 404(b)(1) guidelines. Denial without prejudice means that the permit applicant can reinstate processing of the permit application if subsequent approval is received from the appropriate Federal, state, or local agency that previously denied authorization.

2.7.10 Administrative Appeal Process

In March 1999, the Corps issued a new regulation at 33 CFR Part 331 which established an administrative appeal process for the permit denials and declined individual permits (Federal Register 1999). In 2000, the administrative appeal process was expanded to include jurisdictional determinations (Federal Register 2000b). This new process provides opportunities for permit applicants and landowners to contest certain decisions made by district engineers, without challenging those decisions in Federal Court. Administrative appeals are reviewed at Corps division offices. General permit authorizations, including nationwide permit authorizations, are not subject to the administrative appeal process.

2.8 Regulatory Program Data

The Corps data tracking and reporting system has two components, the Regulatory Analysis and Management System (RAMS) database and the Quarterly Permit Data System (QPDS). Data are entered by Corps districts into RAMS on a daily basis, as permit applications are received and processed. The QPDS is used to compile data on a quarterly and annual basis for reporting to Corps headquarters.

Corps districts are responsible for entering permit data into the RAMS database. RAMS has been used for data collection efforts for the Corps regulatory program since 1990. Early data elements included workload information (applications received, withdrawn, denied, and authorized by permit type), as well as enforcement data. Since 1993, RAMS has been used to collect wetland impact information, by wetland type (i.e., tidal or non-tidal) and permit type (i.e.,

general or individual permits), for both permit decisions and enforcement actions (i.e., unauthorized activities and permit violations). RAMS is used to track the acreage of wetland impacts requested, permitted, and mitigated. The wetland data requirements enable the Corps to report the impact of the Corps program on the Nation's wetland resources in support of the national goal of no net loss of wetlands.

There are two versions of RAMS: RAMS and RAMSII. The differences between RAMS and RAMSII are the database structure and the screen structure. RAMS uses a number of separate tables in an Informix database. RAMS II uses a normalized database structure, is database independent, and can run with Oracle or Informix. RAMS uses numbers screens and menus, RAMS II has just one screen and four subparts. Other differences between RAMS and RAMS II involve the use of codes and pop-up menu choices. For the purposes of this discussion, all references to RAMS also include RAMSII.

It is important to note that not all Corps districts utilize RAMS. Norfolk, Chicago, and Alaska districts use databases other than RAMS to collect the permit and enforcement information required by Corps headquarters. However, these three districts must collect the same basic regulatory data as the districts that use RAMS, but they may also collect additional information that is useful for managing their programs.

Data are entered in various screens and data fields related for all permit actions. Basic information is entered for all permit types including applicant name, processing dates (e.g. the date of receipt of the application, the date the application is determined to be complete, and the date of permit authorization). In addition, RAMS sessions or screens are set up to enable the regulatory project manager to enter data related to a specific project by permit type.

Since 1988, Corps districts have compiled data into QPDS on a quarterly basis so that regulatory data can be reported in Corps division offices and headquarters in a uniform format. To generate the quarterly QPDS reports, most districts compile the required data from RAMS and then check the compiled data for accuracy. Part III of the Standard Operating Procedures for the Corps regulatory program (U.S. Army Corps of Engineers 1999) describes the reporting requirements and definitions for QPDS. Data categories required for QPDS are evaluation workload, evaluation days, other workload items, staffing, and enforcement workload. At the end of each quarter of a fiscal year, Corps districts compile QPDS reports and submit those reports to their respective division offices. The division offices then forward those QPDS reports to Corps headquarters.

As a result of the districts' ability to modify their databases to collect regionally important information, the type and nature of the data entered varies to some degree from district to district. However, the data required for QPDS reports are the same for all districts, because that data must be reported to Corps headquarters in a uniform format to provide nationwide data for the Corps regulatory program. Refer to Appendices B.4 and C for further discussion on variations in RAMS data entry.

2.8.1 Nationwide Permit Data Collection

With the reauthorization of the nationwide permits in 1996 and to assist in the development of replacement nationwide permits for nationwide permit 26, the Corps revised and expanded its data collection and reporting requirements. Additional nationwide permit data requirements include: the specific nationwide permit number being used to authorize the activity (RAMS allows multiple nationwide permit entries to be entered); the final nationwide permit decision (e.g. verified, asserted discretionary authority, denied without prejudice, withdrawn.); the type and location of system being impacted; endangered species determination, species and critical habitat information; the type or purpose of the proposed activity (e.g. commercial, non-commercial, governmental). In addition, information was collected in RAMS specifically for the purpose of developing replacements for nationwide permit 26. This information includes the type of activity, which is selected from a prepared list.

For every nationwide permit authorization the United States Geological Survey hydrologic watershed unit, the location of the impact in the watershed (e.g. above or below headwaters), and the system being impacted (e.g. marine, estuarine, riverine, lacustrine and palustrine) is entered. Further subclasses could be entered if districts opted to do so. Finally, the number of acres or linear feet of impact (filled, flooded, drained, and excavated) requested and verified is entered.

Mitigation data in RAMS may be entered in both the wetland impact screen as well as in the nationwide permit only fields in accordance with the 1997 data requirements. Compensatory mitigation is entered by permit type and system (e.g., individual permit/general permit/tidal/non-tidal). All mitigation data must be entered in acres. For nationwide permits only, the method for providing the mitigation is also entered in RAMS (e.g., permittee, mitigation bank, other).

2.8.2 Future Data Collection Improvements

Corps headquarters is developing a new data collection and reporting system to replace RAMS and QPDS, to improve data collection and analysis. The new system has two components. One component, the Operations Management Business Information Link (OMBIL), is a data warehousing system that is designed with executive level managers in mind. It will only contain regulatory summary data that is used to evaluate trends and overall status. It will also draw data from other Corps data management systems for display and comparison with regulatory process data, e.g., to show labor hours spent on different permit types. This system basically will replace the QPDS reports.

A second component, the OMBIL Regulatory Module (ORM) is an automated information system that Corps regulatory project managers will be using in their day to day work on regulatory actions. This module will replace RAMS, RAMSII, and all other district proprietary database systems. This module will provide the basic regulatory business process data that will be summarized in the OMBIL data warehouse. This system is expected to be more user-friendly for the project managers and result in more reliable information as well as providing information not previously collected.