

## **Memorandum**

DATE: January 14, 2021  
FROM: Christine Schwake  
RE: Rationale for Section 401 Water Quality Certification of Regional Permit 42 (RP 42)

The Rock Island District Corps of Engineers (Corps) has proposed a new regional permit (RP 42) to authorize work associated with the discharge of dredged and/or fill material for construction of recreational ponds up to 10 acres in size under the jurisdiction of the Rock Island District in the State of Iowa. A recreational pond, as defined by RP 42, is a pond whose primary purpose is recreation and is created either by the construction of an earthen dam with an outlet or through the excavation of a shallow area that allows water to continually flow. RP 42 is for individuals or land owners to construct private recreational ponds for which no federal or state assistance is received. RP 42 is not intended to be used for storm water detention basins, storm water ponds, waste disposal or water treatment ponds, aquaculture, or irrigation. Agricultural ponds for livestock watering are not covered by RP 42. See Attachment 1.

### **Receiving Streams**

RP 42 authorizes discharges “to waters of the United States within the State of Iowa.” The term “waters of the United States” is defined in 40 CFR §120.2. Receiving streams include all surface water classifications defined in 567 IAC 61.3.

### **Antidegradation**

#### Pollutants of Concern

The projects authorized by RP 42 do not use chemicals. Thus, the pollutants present in the discharge from such projects are substances present in runoff, or the result of a spill or leak. The DNR has identified the following pollutant of concern in discharges from RP 42 projects and the potential impacts on water quality:

#### *Increased Turbidity/Total Suspended Solids*

The turbidity of water is related to the amount of suspended solids contained in the water. Suspended solids decrease the clarity of water, reduce light penetration, and can impair the photosynthetic activity of aquatic plants. Suspended solids can be aesthetically displeasing and can reduce the recreational value of a water body. If suspended solids screen out light and impair growth of aquatic plants, dissolved oxygen levels can decrease. Suspended solids can be harmful to fish and other aquatic life by causing abrasive injuries and clogging gills and respiratory passages.

Increases in turbidity/total suspended solids from projects authorized by RP 42 will generally be temporary and limited. To address turbidity/total suspended solids, projects authorized under RP 42 will control runoff to water bodies using a variety of best management practices (BMPs).

#### Best Management Practices in Permit and Certification Conditions

##### *Permit-Based*

The Corps has BMP-based conditions for RP 42. See Attachment 1 for the draft RP 42 which includes BMP-based conditions. Pre-construction notification is required for activities authorized by this regional permit. This allows the Corps to review every project to ensure that adverse impacts to the aquatic environment are no more than minimal.

Further, projects with construction activity that disturbs one or more acres requires a storm water NPDES permit from the DNR. For projects that require storm water NPDES permits, Storm Water Pollution Prevention Plans (SWPPPs) are developed, which typically include BMP-based conditions.

#### *Certification-Based*

The DNR has added BMP-based conditions to the RP 42 via certification. See draft RP 42 certification.

The combined listed BMPs, when adhered to by the permittee, protect Iowa's water quality by controlling erosion and sediment runoff to prevent pollution from reaching the nearby water bodies. Antidegradation requirements will be considered to be met if all appropriate and reasonable BMPs required by permit and certification are applied and maintained. See, 567 IAC 61.2(2); Iowa Antidegradation Implementation Procedure § 6.3.

#### Temporary and Limited Degradation

The State adopted Iowa Antidegradation Implementation Procedure (2010 and 2016) states that "A regulated activity shall not be considered to result in degradation, if the activity will result in only temporary and limited degradation of water quality as defined in the glossary and as further described in Sections 1.2 and 2.4." The effects can be regarded as temporary and limited following a review of all of the following factors, if applicable:

1. Length of time during which water quality will be lowered:

The length of time where there might be a lowering of water quality is relatively short for construction of ponds authorized under RP 42 (these projects can generally be completed in less than 6 months).

2. Percent change in ambient conditions:

The only significant change that could be reasonably expected to occur would be for the presence of sediment in the nearby waterbody, if heavy rainfall occurs or BMPs fail (e.g., if silt fences fill up).

3. Pollutants affected:

Turbidity, total suspended solids.

4. Likelihood for long term water quality benefits to the water body:

Ponds authorized by RP 42 can provide some water quality benefits by collecting sediments and pollutants and providing a basin for storm water runoff. The ponds create habitat and water for fish and wildlife. Ponds can prevent soil erosion by eliminating gullies. Ponds can be used as

a water supply for emergencies (e.g., fire suppression). RPs incentivize project proponents to minimize impacts to jurisdictional waters and wetlands (to qualify for RPs) through a quicker permit process compared with the standard individual permit process.

5. Degree to which achieving the applicable Water Quality Standards during the proposed activity will be at risk:

The use of BMPs installed prior to construction, maintained during construction, and maintained until the site has returned to pre-construction conditions should greatly increase the degree to which a project achieves the applicable water quality standards.

6. Potential for any residual long term effects on existing uses:

The BMP conditions in RP 42 and certification include but are not limited to reseeding disturbed areas, properly disposing of construction debris/temporary structures/temporary fills, and conducting construction during low or no flow conditions. These projects should not contribute to any ongoing impacts to water quality.

For the above discussed reasons, the DNR makes the following finding:

This review concludes that water quality degradation due to activities authorized using RP 42 will be temporary and limited.



# PUBLIC NOTICE

US Army Corps  
of Engineers  
Rock Island District

Applicant: U.S. Army Corps of Engineers

Date: June 11, 2020

Expires: July 10, 2020

CEMVR-OD-P-2020-786

Section 404

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**Joint Public Notice  
US Army Corps of Engineers  
Iowa Department of Natural Resources**

**New Regional General Permit 42  
Recreational Ponds up to 10-Acres in Size in Waters of the U.S.  
In the State of Iowa**

- 1. Applicant:** The U.S. Army Corps of Engineers, Rock Island District, with regulatory jurisdiction in Iowa is pursuing the development of this regional permit.
- 2. Project Location:** The proposed regional general permit (RGP) will authorize work associated with the discharge of dredged and/or fill material into all waters of the United States (WUS), including wetlands, under the jurisdiction of the Rock Island District (District) located within the State of Iowa, excluding tribal lands.
- 3. Project Description:**
  - Activities required for the construction of recreational ponds up to 10-acres in size, which result in a total loss of up to 2.0 acre of WUS, including the loss of up to 1,000 linear feet of jurisdictional stream bed. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the activity cannot exceed 2.0 acre combined, which includes no more than 1,000 linear feet of stream bed loss. To qualify for this RGP, the pond's primary purpose shall be recreation such as fishing, non-motorized boating or other passive recreational uses. This RGP is not intended to be used for storm water detention basins, storm water ponds, waste disposal or water treatment ponds, aquaculture or irrigation. This permit shall not be used for aesthetic features that are part of a residential development.
  - The project must be a single and complete project. If this is part of a larger project requiring a DA Permit (i.e., housing or commercial development) this permit shall not apply. The maximum impact limitations will be applied on a cumulative basis for activities that are part of a larger common plan of development or sale.
  - This RGP is for individuals or land owners to construct private recreational ponds for which no federal or state assistance is received. This would include assistance from the United States Department of Agriculture – Natural Resources Conservation Service, United States Fish and Wildlife Service, the Department of Housing and Urban Development, the Iowa Department of Natural Resources or The Iowa Department of Agriculture and Land Stewardship.

D. A recreational pond, as defined by this permit is a pond whose primary purpose is recreation and is created either by the construction of an earthen dam or through the excavation of a shallow area. The primary purpose of these ponds are to provide private recreational use for the permittee.

#### 4. **Permit Conditions:**

##### A. **General Conditions:**

- 1) The permittee must notify the District Engineer (DE), Rock Island District, for authorization of this Regional General Permit (RGP). The notification must include detailed drawings and sufficient information to determine if the proposed work conforms to the criteria and conditions of the RP, as well as a mitigation plan (see Section D), if unavoidable stream or wetland impacts will occur as a part of the project. Department of the Army (DA) permit application (ENG Form 4345) should be used for this purpose and is available to download at the Rock Island District Corps Regulatory (District) webpage.
- 2) The time limit for submittals ends 60 days prior to the expiration of the RP, unless the RP is modified, reissued or revoked. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before that date is reached. If you commence or are under contract to commence this activity before the date the RP is modified or revoked, you will have twelve months from this date to complete your activity under the present terms and conditions of this RP.
- 3) If the project impacts an Outstanding Iowa Water (OIW), an individual 401 Water Quality Certification (WQC) must be obtained and permittee shall not begin work on the activity until a 401 is issued by the State or waived by the DE, and you have received notification from this office to proceed.
- 4) You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party. If you sell the property associated by this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.
- 5) If you discover any previously unknown historic or archaeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.
- 6) You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

- 7) This activity shall be designed to pass expected flows and will not result in a net loss of water from the downstream land owners.
- 8) This activity shall not result in the inundation of any upstream land owners' property.
- 9) Outfall structures and overflow spillways shall be designed to prevent erosion during high flow events.
- 10) The permittee is responsible for obtaining all other required state and local permits.

**B. Special Conditions:**

- 1) Riprap, if used, shall be clean native fieldstone, clean quarry rock, or appropriately graded clean broken concrete with all reinforcing rods and/or wire cut flush with the surface of the concrete. It shall be the permittee's responsibility to maintain the riprap such that any reinforcement material that becomes exposed in the future is removed. The concrete pieces shall be appropriately graded and no piece shall be larger than 3 feet across the longest flat surface. No riprap shall be placed at a distance greater than 4 feet horizontally from the toe of the bank. Asphalt, broken concrete containing asphalt, petroleum based material, liquid concrete, and items such as car bodies are specifically excluded from this authorization.
- 2) This regional permit also authorizes temporary structures, fill, and work necessary to construct the authorized project. Temporary impacts must be the minimum necessary to achieve project objectives.
  - a. All temporary structures and fill will be removed entirely no later than 30 days after they are no longer needed for construction activities.
  - b. Temporary fill materials, cleared vegetative materials, construction debris, and other fill not necessary for meeting the project purpose, must be disposed of at an upland area or licensed landfill as appropriate. The discharge location must be provided to the Corps as part of the application packet.
  - c. Temporary fills must consist of materials that will not be eroded by expected high flows. If materials might erode they must be removed prior to high flow events.
  - d. Areas affected temporarily must be returned to pre-construction contours, and must be re-vegetated with native vegetation if not armored.
- 3) Measures must be taken for heavy equipment usage in wetland areas to minimize soil disturbance and compaction.
- 4) Any spoil material excavated, dredged, or otherwise produced, must not be returned to the waterway or wetlands but must be deposited in a self-contained area in compliance with all state statutes. Any backfilling must be done with clean material and placed in a manner to prevent violation of applicable water quality standards.
- 5) Construction of the activity shall be conducted during low or no flow conditions.

- 6) The permittee must provide a signed certification documenting completion of the authorized activity and any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the District Engineer. The Corps will provide the permittee the certification document with the RGP 33 verification letter. The certification document will include:
  - i. A statement that the authorized work was done in accordance with the RGP 42 authorization, including any general, regional, or activity-specific conditions.
  - ii. A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits.
  - iii. The signature of the permittee certifying the completion of the work and mitigation.

**C. Temporary Impacts/Restoration Requirements:**

- 1) The permittee is required to restore all temporarily impacted wetlands within the project area to the standards stated in the Rock Island District (MVR) Regulatory Branch Mitigation and Monitoring Guidelines.
- 2) If jurisdictional wetlands and/or streams will be excavated within the permit area, the permittee will side-cast and stockpile the topsoil (top 10-12 inches), if practicable and/or if site conditions allow, that is being removed during the initial construction, in order to re-establish the topsoil once construction is complete. The soil must be returned to its original contours and a re-established topsoil is shall be present prior to the re-planting of vegetation. This ensures that the organic/hydric soils that were present prior to construction are returned to their natural condition and can provide for a fertile habitat to re-plant vegetation and increase the survival rate of any new habitat.

**D. Mitigation**

- 1) If the permanent loss of wetland exceeds 0.10 acres or for stream losses greater than 300 linear feet, compensatory mitigation is required and must follow the regulations published in the Federal Register dated April 10, 2008, under 33 CFR Parts 332 and 40 CFR Part 230 – Subpart J entitled “Compensatory Mitigation for Losses of Aquatic Resources,” and any such Corps regulation/guidance that would supplement these mitigation requirements such as the Rock Island District Mitigation and Monitoring Guidelines.
- 2) The amount of mitigation required will be determined during review for authorization under this permit as per the mitigation rule requirements. Mitigation must be adequate to offset unavoidable impacts or losses to regulated WOUS. For all permanent stream losses greater than 300 feet completion of the Iowa Stream Mitigation Method (ISMM) is required to determine adequate compensatory stream mitigation. The Corps has the final approval in determining the appropriate and practicable mitigation necessary. The discharge of fill material into WOUS prior to Corps approval of the mitigation plan is prohibited.

## 5. Agency Review

A. Department of the Army, Corps of Engineers. The Department of the Army application is being processed under the provisions of Section 404 of the Clean Water Act (33 U.S.C. 1344).

B. State of Iowa. The project plans have been submitted to the Iowa Department of Natural Resources for state certification of the proposed work in accordance with Section 401 of the Clean Water Act. The certification, if issued, will express the Department's opinion that the proposed activity will comply with Iowa's water quality standards (Chapter 61 IAC). The applicant has also applied for authorization of work in the floodplain pursuant to Chapter 455B of the Iowa Code and other applicable state permits. Written comments concerning possible impacts to waters of Iowa should be addressed to: Iowa Department of Natural Resources, 502 E. 9<sup>th</sup> Street, Des Moines, Iowa 50319. A copy of the comments should be provided to the Corps of Engineers office (see paragraph 11. of this public notice for address).

## 6. Historical/Archaeological:

A. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). In cases where the DE determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places (National Register), the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) are met.

B. Non-federal permittee's must submit information to the DE if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register, including previously unidentified properties. For such activities, the information must state which historic properties may be affected by the proposed work and include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), as appropriate, and the National Register (see 33 CFR 330.4(g)). The DE shall make a reasonable and good faith effort to ensure that appropriate identification efforts are carried out, which may include background research, consultation, history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the DE shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties which the activity may have the potential to cause effects, and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the DE either that the activity has no potential to cause effects, or that consultation under Section 106 of the NHPA has been completed.

C. The DE will notify the prospective permittee within 45 days of receipt of a complete application whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA Section 106 consultation is required the non-Federal applicant cannot begin work until Section 106 consultation is completed.

D. Permittee's should be aware that section 110k of the NHPA (16 U.S.C. 16 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, explaining the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

## 6. Endangered Species:

A. No activity is authorized under this regional permit which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under Section 7 of the Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under this regional permit which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed to address the effects of the proposed activity on a listed species or critical habitat.

B. Non-federal permittees must provide the Corps with the appropriate documentation to demonstrate compliance with the ESA. If the authorized activity may have the potential to effect any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in designated critical habitat, permittee shall not begin work on the activity until notified by the DE that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The DE will determine whether the proposed activity "may affect" or will have "no effect" on listed species and designated critical habitat.

C. Authorization of an activity by this regional general permit does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.,) from the U.S. Fish and Wildlife Service (USFWS), both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the USFWS webpage.

**7. Dredge/Fill Material Guidelines:** The evaluation of the impact of the proposed activity on the public interest will also include application of the guidelines promulgated by the Administrator of the United States Environmental Protection Agency under authority of Section 404(b) of the Clean Water Act (40 CFR Part 230).

8. **Public Interest Review:** The decision whether to issue the Corps permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food production and, in general, the needs and welfare of the people.

9. **Who Should Reply:** The Corps of Engineers is soliciting comments from the public; Federal, state, and local agencies and officials; Indian Tribes; and other interested parties in order to consider and evaluate the impacts of this proposed activity. Any comments received will be considered by the Corps of Engineers to determine whether to issue, modify, condition or deny a permit for this proposal. To make this decision, comments are used to assess impacts on endangered species, historic properties, water quality, general environmental effects, and the other public interest factors listed above. Comments are used in the preparation of an Environmental Assessment and/or an Environmental Impact Statement pursuant to the National Environmental Policy Act. Comments are also used to determine the need for a public hearing and to determine the overall public interest of the proposed activity. These statements should be submitted on or before the expiration date specified at the top of page 1. These statements should bear upon the adequacy of plans and suitability of locations and should, if appropriate, suggest any changes considered desirable.

10. **Public Hearing Requests:** Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing. A request may be denied if substantive reasons for holding a hearing are not provided.

11. **Reply to the Corps.** Comments concerning the Corps permit should be addressed to the District Engineer, US Army Corps of Engineers, Rock Island District, ATTN: OD-P (Al Frohlich), Clock Tower Building - Post Office Box 2004, Rock Island, Illinois 61204-2004. For additional information contact **Mr. Albert Frohlich (309-794-5859)** or email: [Albert.J.Frohlich@usace.army.mil](mailto:Albert.J.Frohlich@usace.army.mil).

*matthew a zehr*

Attach  
Plan

Mr. Matthew A. Zehr  
Chief, Iowa Section  
Regulatory Branch

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