



**US Army Corps  
of Engineers**

Omaha District

OMAHA DISTRICT  
REGULATORY GUIDANCE LETTER

OGL 10-01

October 25, 2010

**SUBJECT:** Stockpiling of Material above the Ordinary High Water Mark

**PURPOSE:** To provide guidance for all Omaha District, Regulatory Branch personnel. This RGL rescinds the guidance provided in RGL NWO 96-11, dated June 17, 1997. Potential issues that may result from implementation of this guidance in Colorado where administration of the regulatory program is shared with other Districts should be reported to the NWO Regulatory Branch Chief for resolution.

**BACKGROUND:** On numerous occasions we have been asked by the general public whether or not a permit is required to stockpile material on the high bank above the ordinary high water mark or for burying material adjacent or behind the bank line of a stream or lake. Structures or work located above the ordinary high water line of a navigable water are subject to regulation under Section 10 of the Rivers and Harbors Act of 1899 if the structure or work is likely to affect the course, location, or condition of the waterbody in such a manner as to impact its navigable capacity (33 CFR Part 322.3(a)).

**POLICY:** The extent of the Corps' regulatory authority over the stockpiling or trenching of material or the placement of a structure above the ordinary high water mark of a Section 10 navigable water depends on whether or not the material has an impact on the water's navigable capacity.

The placement of material or a structure along a bank line or so close to the bank line that it may likely be swept into the water, changes the bank line condition, impacts the water's navigable capacity and thus requires authorization under Section 10.

Stockpiled material placed close enough that it is possible for it to be washed into the navigable water either by ordinary high water events, natural erosion, storms or floods and could impede or obstruct navigation is regulated under Section 10. Site specific information is required to determine if the placement of material or structures is a regulated activity. One item to be considered is slope stability at the site. A stable slope for unconsolidated or disturbed materials typically ranges from 1 to 2 times the bank height as measured from the lowest channel bed elevation to the top of the bank. Generally, any material placed closer than 2 times the bank height will be considered likely to be swept into the water and result in an obstruction to navigation. Section 10 authorization must be requested prior to stockpiling material, trenching material, or constructing a structure within the zone of 2 times the bank height. Material that is placed in this zone without prior authorization will be considered to have altered or modified the course, location, condition, or capacity of the navigable water, or is reasonably expected to. A

case-by-case determination will be made whether or not to authorize the placement of the material or structure within this zone.

If Section 10 authorization was not requested and received prior to the placement of material or a structure within the zone of 2 times the bank height, a violation of Section 10 has occurred. The procedure for resolving the violation will depend on the individual situation. If the material has not launched into the water, a determination will be made whether or not to allow the responsible party to apply for an after-the-fact permit or require removal of the material. If the material has launched, the enforcement action will be commensurate with the extent to which the material has altered or modified the course, location, condition, or capacity of the navigable water. Options available include (1) ordering removal of the material, (2) requiring modification of the configuration or location, or (3) allowing the material to remain as is. If the material poses a risk to navigation or human use of the navigable water, it will likely be ordered to be removed from the water or relocated to along the bank line. If the material is allowed to remain in place, compensatory mitigation may be required to offset any resulting adverse environmental effects. If the material is a prohibited fill material, the responsible party will most likely be ordered to remove the material.

If it is decided to allow the material to remain, but require modification of the configuration or location, this can either be ordered as an interim protective measure under an enforcement action or the responsible party can be required to apply for an after-the-fact permit. In some situations, the material may meet the terms and conditions of a Nationwide Permit. However, neither Nationwide Permit 3 nor the maintenance exemption at 33 CFR Part 323.4(a)(2) would apply because there was no previously authorized or currently serviceable structure or fill.


If the material is stockpiled or placed in a trench more than 2 times the bank height back away from the bank line and based on site specific information it is not immediately foreseeable that it will be washed into the navigable water, then the material will be considered to not likely affect the course, location, condition, or navigable capacity of the water as placed, and no authorization under Section 10 is required for the placement of the material.

If it is determined the activity is not regulated, the responsible party will be informed that if the bank should erode to the point that the material is launched into the water, the Corps has authority to require removal of the material if it poses or will likely pose a navigational hazard. The Corps may also require modification of the configuration or location, or allow the material to remain as is.

If the material is determined to be solid waste as defined in the MOA Between the EPA and the Corps Concerning Regulation of Discharges of Solid Waste under the Clean Water Act, the discharge is subject to regulation under Section 402 of the Clean Water Act which is administered by either EPA or the applicable State agency.

Non-Section 10 Navigable Waters (Section 404 only waters) - Under Section 404 of the Clean Water Act, the Corps has no authority to regulate the stockpiling of material above the ordinary high water mark or the placement of material in a trench far enough back from the bank line so as not to cause bank failure during construction. However, should the material launch into the water, the Corps may have authority to order removal of the material or to require modification of the configuration or location. Information is needed to determine who placed the material, where the material was originally placed, how the material was placed, and when. The specific information should be provided to the District Enforcement Coordinator and a determination will be made whether or not an enforcement action will be pursued.

FOR THE COMMANDER:

  
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Chief, Regulatory Branch  
Operations Division