

# Regulatory Guidance Letter 90-08

## **SUBJECT: Applicability of Section 404 to Pilings**

**DATE: 14 December 1990**

**EXPIRES: 31 December 1993**

---

1. The purpose of this Regulatory Guidance Letter (RGL) is to provide additional guidance on the applicability of section 404 to certain categories of projects constructed with pilings in waters of the United States. This RGL represents a clarification and revision to RGL 88-14, which addresses this same subject. Therefore, effective on the date of this RGL, RGL 88-14 is rescinded.
2. For some years, the Army Corps of Engineers, as a matter of policy, has taken the position that pilings do not ordinarily constitute fill material and that the placement of pilings do not ordinarily constitute a discharge of fill material under the Clean Water Act (CWA; see RGL 88-14). Under RGL 88-14, however, the Corps recognized that "in the situation where piles are used in a manner essentially equivalent to fill material in effect, purpose and function they should be treated as fill material under the section 404 program." Historically, pilings were generally used for traditional pile-supported structures such as docks and bridges where the effect, purpose, and function of the pilings were not to replace an aquatic area with dry land or to change the bottom elevation of a water body. More recently, however, circumstances have changed, with pilings being used as a substitute for fill material. That is, there is increasing reliance on construction methods involving the use of pilings in place of fill, often at additional cost, in order to avoid regulation under the CWA Section 404. The intent of this RGL is to clarify the application of requirements in the existing Corps regulations to these new circumstances involving the use of pilings in waters of the United States.
3. The Corps regulatory definitions of "fill material" and "discharge of fill material" (33 CFR 323.2 (e) and (f)) are clearly broad enough to capture the placement of pilings in waters of the United States as a discharge that could be regulated in certain specific circumstances. Projects involving pilings meet the definition of "fill" when they have the physical effect or functional use and effect of fill; that is, pilings may be regulated when they constitute the equivalent "of replacing an aquatic area with dry land or changing the bottom elevation of a water body." As was explained in RGL 88-14, pilings may have this function or effect when they are placed so as to facilitate sedimentation, or are placed so densely that they in effect displace a substantial percentage of the water in the project area. In addition, pilings have the physical effect or functional use of fill, and will be regulated as fill, in circumstances where a structure is placed on top of the pilings in such a manner as to constitute the functional equivalent of fill; or where pilings are placed for the same basic purpose as fill; or where pilings have essentially the same effects as fill (i.e., replaces an aquatic area with dry land or changes the bottom elevation of a water body). Similarly, the placement of pilings in waters of the United States may, in certain

specific circumstances, be regulated as a "discharge of fill material" under the current regulations.

4. Therefore, based on current regulations, the placement of pilings in waters of the United States will require authorization under section 404 when such placement is used in a manner essentially equivalent to a discharge of fill material in physical effect or functional use and effect. Examples include, but are not limited to, the following activities in waters of the United States:

- a. **PHYSICAL EFFECT OF FILL:** Projects that in effect replace an aquatic area or change the bottom elevation of a water body as a result of the placement of pilings that are so closely spaced that sedimentation rates are increased or the pilings themselves essentially replace the bottom will be regulated under CWA Section 404. This circumstance would include pilings placed in waters of the United States for dams, dikes, other structures utilizing densely spaced pilings, or as a foundation for large structures.
- b. **FUNCTIONAL USE AND EFFECT OF FILL:** Construction projects will be regulated under CWA Section 404 where pilings serve essentially the same functional use as a solid fill foundation, and where the project would result in essentially the same effects as fill (e.g., alter flow or circulation of the waters, bring the area into a new, non-aquatic use, or significantly alter or eliminate aquatic functions and values). Regulated activities include the placement of pilings to facilitate the construction of office and industrial developments, parking structures, restaurants, stores, hotels, multi-family housing projects, and similar structures in waters of the United States.

5. Placement of pilings in waters of the United States will, as in the past, not be regulated under section 404 in circumstances involving linear projects such as bridges, elevated walkways, or power line structures, since pile-supported structures have traditionally been used in these circumstances to cross waters of the United States, and have not substantially harmed or eliminated aquatic functions and values. Similarly, placement of pilings will not be regulated under section 404 in circumstances that involve structures that have traditionally been constructed on pilings; examples are piers, boathouses, wharves, marinas, lighthouses, and individual houses built on stilts solely to reduce the potential of flooding (e.g., beach houses where road access is on uplands, but the house may be located in a low area necessitating construction on stilts).

6. We believe that it is appropriate to regulate projects placed on pilings, as provided for in paragraph 4. above, because of the effect the projects have on the aquatic environment and because they are essentially equivalent to solid-fill supported projects in purpose, effect, and/or function. Moreover, we have noted an increasing incidence of cases where large-scale construction projects originally, and typically, designed to be built on fill material have been re-designed for pile supports solely for the purpose of evading section 404 regulation.

7. For any proposed pile-supported project where the proponent has relied on earlier Corps guidance to conclude reasonably that a project is not covered by section 404, and has committed substantial resources to the degree that it would be unreasonable and inequitable for the Corps to assert section 404 jurisdiction based on this RGL, the District should not assert section 404 jurisdiction. In cases where a project proponent has been provided a specific answer by the Corps, in writing, that a pile-supported structure will not require a section 404 permit, the District will not require a section 404 permit.

8. As with all determinations regarding whether a proposed activity requires a section 404 permit, the Corps is solely responsible for the decision.

9. This guidance expires 31 December 1993 unless sooner revised or rescinded.

FOR THE COMMANDER:

PATRICK J. KELLY  
Major General, USA  
Director of Civil Works