

Corps of Engineers

Regulatory 101

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U.S. Army Corps of Engineers

Mobile District, North Branch



US Army Corps of Engineers
BUILDING STRONG®

12/16/2010

Mission Statement

- ...to protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions.....



Regulatory Goals

- 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



Balance

- Public interest –
 - ▶ Not for or against a project
- Environment vs. Development
- Fair, reasonable, timely service to the public



Regulatory Statutory Authorities

- Section 10 of the Rivers and Harbors Act of 1899
 - ▶ Navigable waters of the United States
 - ▶ “those waters 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 for use to transport interstate or foreign commerce “
- Section 404 of the Clean Water Act
 - ▶ Waters of the United States
- Marine Protection Research and Sanctuaries Act – Section 103
- The type of work proposed and the method used to complete the work determine whether or not a permit is required from the Corps to conduct the work.



Implementing Regulations

- 1) **33 CFR PART 320 - GENERAL REGULATORY POLICIES**
- 2) 33 CFR Part 321- Permits for Dams and Dikes in Navigable Waters of the United States
- 3) 33 CFR 322 - Permits for Structures or Work in or Affecting Navigable
- 4) 33 CFR Part 323 Permits for Discharges of Dredged or Fill Material Into Waters of the United States
- 5) 33 CFR Part 324 Permits for Ocean Dumping of Dredged Material Marine Protection Research and Sanctuaries Act of 1972 - Section 302
- 6) **33 CFR PART 325 -PROCESSING OF DEPARTMENT OF THE ARMY PERMITS**
- 7) **33 CFR PART 326 –ENFORCEMENT**
- 8) 33 CFR PART 327—PUBLIC HEARINGS
- 9) **33 CFR Part 328 - Definition of Waters of the United States**
- 10) **33 CFR Part 329 - Definition of Navigable Waters of the US**
- 11) **33 CFR Part 330 - NATIONWIDE PERMIT PROGRAM**
- 12) 33 CFR PART 331 -ADMINISTRATIVE APPEAL PROCESS
- 13) **33 CFR PART 332 - COMPENSATORY MITIGATION FOR LOSSES OF AQUATIC RESOURCES**



Compliance with other Federal Laws

- Native American Graves Protection and Repatriation Act
- Clean Water Act - Section 401
- Clean Water Act - Section 402
- Coastal Zone Management Act of 1972
- Endangered Species Act
- Marine Mammal Protection Act
- National Environmental Policy Act
- National Historic Preservation Act
- Wild & Scenic Rivers Act
- Marine Protection Research and Sanctuaries Act of 1972 - Section 302
- Fish and Wildlife Coordination Act



Factors in Permit Evaluation

- Conservation
- Economics
- Aesthetics
- Wetlands
- Historic Properties
- Flood Hazards
- Floodplain Issues
- Land Use
- Navigation
- Recreation
- Energy Needs
- Prime and Unique Farmland
- Safety
- Water Quality
- Fish and Wildlife Values
- Shore Erosion and Accretion
- Water Supply and Conservation
- Food and Fiber Production
- Property Rights
- Environmental Concerns
- Welfare of the People
- Mineral Needs
- Endangered Species

And of course, compliance with the 404(b)(1) Guidelines



JURISDICTION

Section 10 Rivers & Harbors Act

- ***“Navigable waters”***
 - ▶ all waters subject to **ebb and flow of the tide**;
- and/or -
 - ▶ those that are used, or have been used in the past, to transport **interstate commerce**
 - Determined by navigability studies
 - Federal courts



Jurisdiction

Section 404

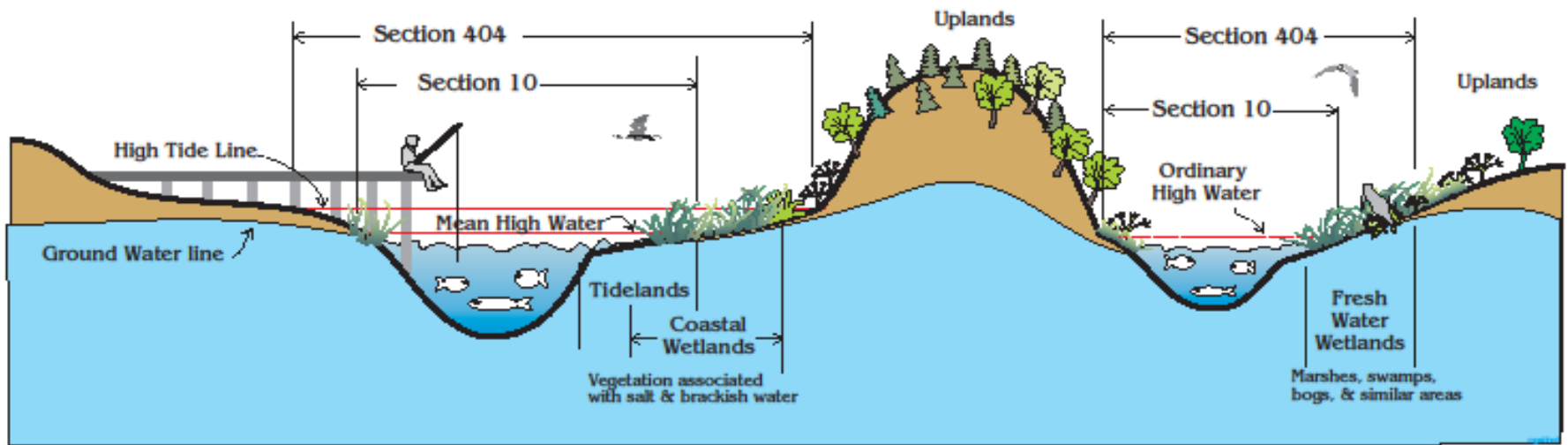
- ***“Waters of the United States”*** includes:
 1. All waters currently used or were used in the past of may be susceptible to use in interstate or foreign commerce;
 2. Interstate waters and wetlands;
 3. All other waters (such as streams, mudflats, wetlands, lakes) where degradation could affect interstate or foreign commerce
 4. Impoundments of waters otherwise defined as waters of the U.S.
 5. Tributaries of waters identified in 1 – 4 on previous slide;
 6. Territorial seas;
 7. Wetlands adjacent to waters identified in 1 – 6.



CORPS OF ENGINEERS REGULATORY JURISDICTION

Tidal Waters

Fresh Waters



Section 103
Ocean Discharge of Dredged Material

Typical examples of regulated activities

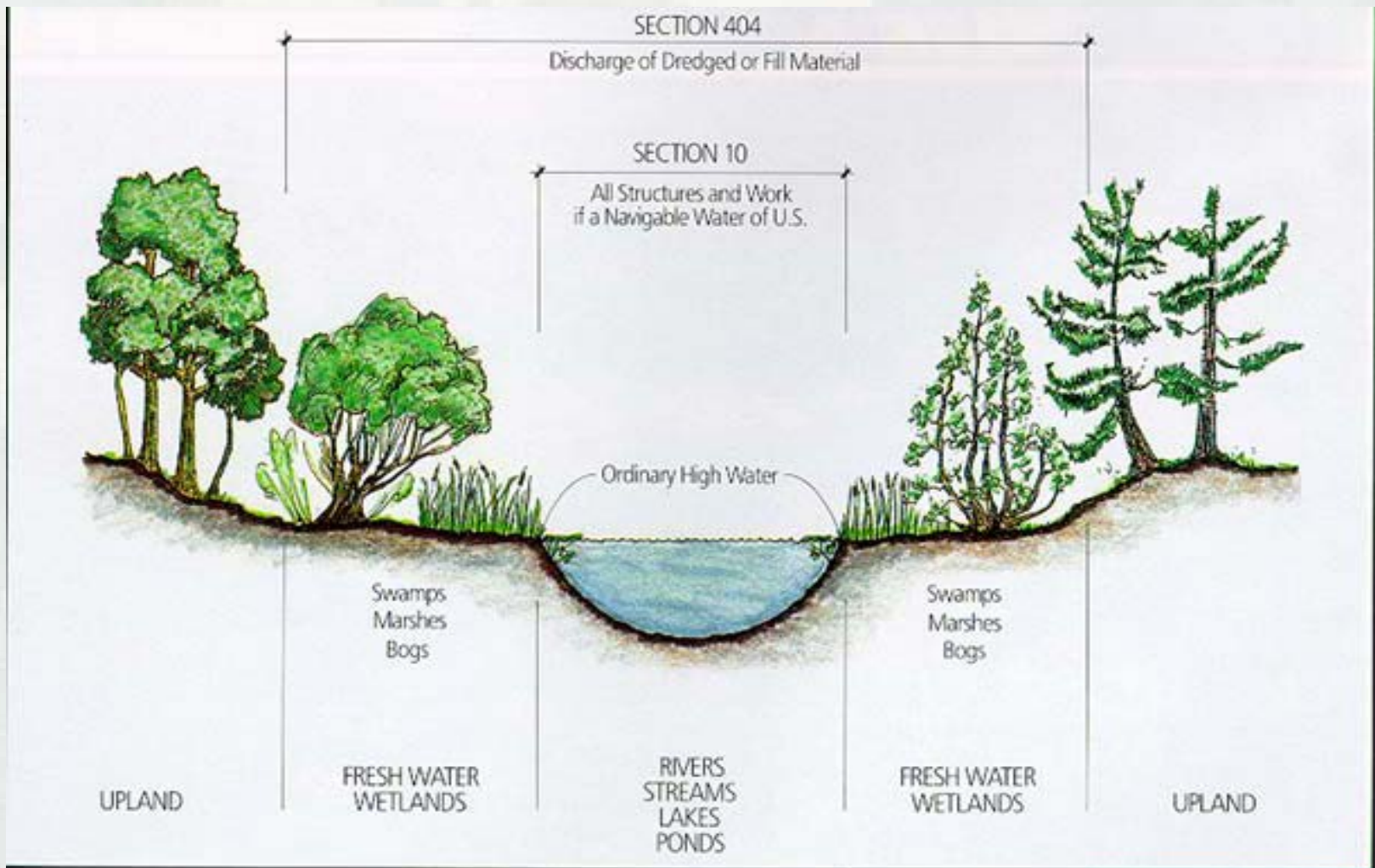
Ocean discharges of dredged material

Section 404
Discharge of Dredged or Fill Material
Regulated Waters Definition: 33 CFR 328.3(a)

All filling activities, utility lines, outfall structures, road crossings, beach nourishment, riprap, jetties, some excavation activities, etc.

Section 10
All Structures and Work
Regulated Waters Definition: 33 CFR 329.4

Dredging, marinas, piers, wharves, floats / docks, intake / withdrawal pipes, pilings, bulkheads, ramps, fills, overhead transmission lines, etc. that occur within, over, under, or affecting the waterbody.



Corps of Engineers Regulatory Jurisdiction in **FRESH WATERS**



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Wetlands

- Wetlands are those areas that are inundated or saturated by surface or groundwater at a 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. (33 CFR 328.3)



Delineation of Wetland Boundary

- 3 physical characteristics must be present:
 - ▶ **Hydrophytic Vegetation**
 - ▶ **Hydric Soils**
 - ▶ **Wetland Hydrology**



Two Supplements to the 1987 delineation manual are used in Alabama

ERDC/EL TR-10-20

Environmental Laboratory



US Army Corps
of Engineers®
Engineer Research and
Development Center

Wetlands Regulatory Assistance Program

Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)

U.S. Army Corps of Engineers

November 2010



Approved for public release; distribution is unlimited.

ERDC/EL TR-12-9

Environmental Laboratory



US Army Corps
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Engineer Research and
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Wetlands Regulatory Assistance Program

Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region (Version 2.0)

U.S. Army Corps of Engineers

April 2012



Approved for public release; distribution is unlimited.



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Wetlands: Some are easy...



... others can be quite difficult



Streams/Tributaries



Perennial



Ephemeral



Intermittent



What We Regulate – Types of Activities

The type of work proposed and the method used to complete the work determines whether or not a permit is required from the Corps.

Rivers and Harbors Act:

- work in, over, or under
- *work* (e.g., dredging or disposal of dredged material, temporary work pads, filling, etc)
- *structures* (e.g., piers, marinas, breakwaters, transmission lines, etc)



Clean Water Act:
- discharges of *dredged*
and *fill* material



Work Involving a Discharge in 404 Waters

Examples:

- Disposal of dredged material
- Placement of fill for roads (including temporary access roads), building foundations, site prep, etc.
- Construction of dams & dikes
- Bank stabilization
- Buried utility lines, pipes, culverts
- Mechanized land clearing
- Ditching/channelization



Section 404 Activities



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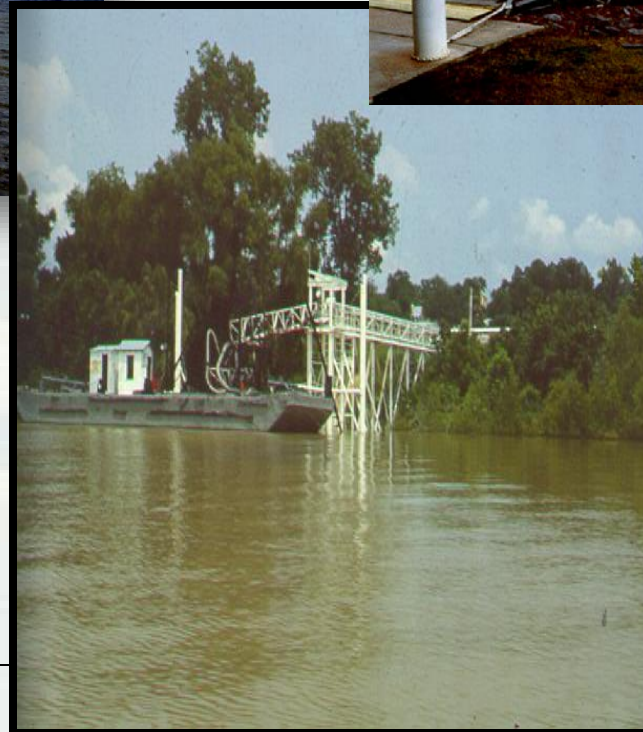
Activities Needing a Section 10 Permit

Examples:

- Boat Ramps/Slips
- Docks/Piers
- Bulkheads
- Utility lines (over and under)
- Intake and outfall structures
- Dredging/filling



Section 10 Activities



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Types of Permits

- Individual Permits
 - ▶ Standard Permits (SPs) and Letters of Permission (LOPs)
- General Permits
 - Nationwide Permits (NWP), Regional General Permits (RGP) and Programmatic General Permit (PGP)
 - Purpose
 - Lessen time and resources for case-specific evaluations of activities with minimal adverse impacts
 - Approach
 - Provide a set of “pre-approved permits” for categories of activities that are similar in nature and that would result in minimal adverse impacts



“The Big Four”

- **Section 106 National Preservation Act**
(Cultural Resources/Historic properties)
- **Section 7 of the Threatened and Endangered Species Act**
- **ADEM: Water Quality Determination & Coastal Zone Determination**
- **Compensatory Mitigation** (for unavoidable impacts to waters)



General Permits

■ Nationwide Permits (NWP)

- Proposed and issued by HQ at National level
 - Full NEPA Review
 - Public Notice in Federal Register
 - Full 404(b)(1) evaluation (CWA)
- Issued for categories of activities similar in nature (e.g. roads, utility lines, etc.)
- Include 3 Types of Conditions
 - **Special Conditions** to define the category of activity and allowed limits of impacts to Waters of the US.
 - **General Conditions** to insure protection of other Public Interest factors
 - **Regional Conditions** to address specific local issues and important resources
- Issued on 5-year cycles



2017 Nationwide Permits

- 1) Aids to Navigation
- 2) Structures in Artificial Canals
- 3) Maintenance & Repair
- 4) Fish & Wildlife Harvesting, Enhancement & Attraction Devices and Activities
- 5) Scientific Measurement Devices
- 6) Survey Activities
- 7) Outfall Structures and Maintenance
- 8) Oil & Gas Structures
- 9) Structures in Fleeting and Anchorage Areas
- 10) Mooring Buoys
- 11) Temporary Recreational Structures
- 12) Utility Line Activities
- 13) Bank Stabilization
- 14) Linear Transportation Projects
- 15) U.S. Coast Guard Approved Bridges
- 16) Return Water from Upland Contained Disposal Areas
- 17) Hydropower Projects
- 18) Minor Discharges
- 19) Minor Dredging
- 20) Oil Spill Clean Up
- 21) Surface Coal Mining Activities
- 22) Removal of Vessels
- 23) Approved Categorical Exclusions
- 24) State Administered Section 404 Programs
- 25) Structural Discharges
- 26) [Reserved]
- 27) Aquatic Habitat Restoration Activities
- 28) Modifications of Existing Marinas
- 29) Residential Developments
- 30) Moist Soil Management for Wildlife
- 31) Maintenance of Existing Flood Control Facilities
- 32) Completed Enforcement Actions
- 33) Temporary Construction, Access and Dewatering
- 34) Cranberry Production Activities
- 35) Maintenance Dredging of Existing Basins
- 36) Boat Ramps
- 37) Emergency Watershed Protection and Rehabilitation
- 38) Cleanup of Hazardous and Toxic Waste
- 39) Commercial and Institutional Developments
- 40) Agricultural Activities
- 41) Reshaping Existing Drainage Ditches
- 42) Recreational Facilities
- 43) Storm water Management Facilities
- 44) Mining Activities
- 45) Repair of Uplands Damaged by Discrete Events
- 46) Discharges in Ditches
- 47) Pipeline Safety Program Repairs
- 48) Existing Commercial Aquaculture Activities
- 49) Coal Remining Activities
- 50) Underground Coal Mining Activities
- 51) Land-Based Renewable Energy Generation Facilities
- 52) Water-Based Renewable Energy Generation Pilot Projects
53. Removal of Low-Head Dams
54. Living Shorelines



2017 NWP Changes

- 2 new NWPs
 - ▶ NWP 53 (removal of low-head dam)
 - ▶ NWP 54 (living shorelines)
- 1 new General Condition (Section 408)
- 5 new Definitions
 - ▶ Ecological reference
 - ▶ Navigable waters
 - ▶ Protected tribal resources
 - ▶ Tribal lands
 - ▶ Tribal rights



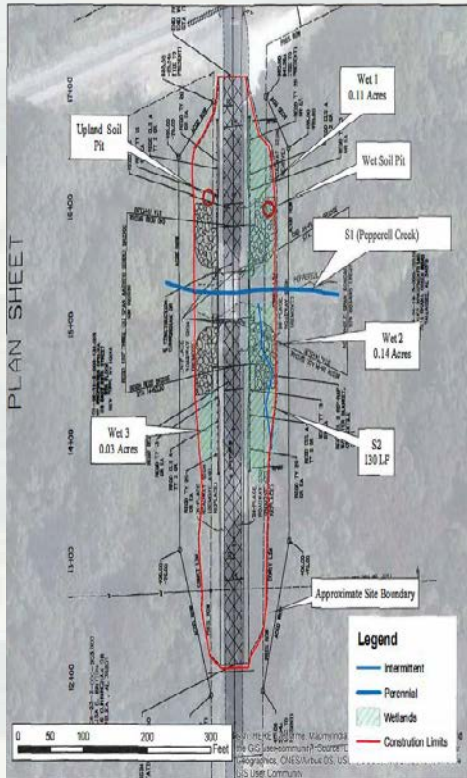
Nationwide Permits

General Conditions

- 1) Navigation
- 2) Aquatic Life Movements
- 3) Spawning Areas
- 4) Migratory Bird Breeding
- 5) Shellfish Beds
- 6) Suitable Material
- 7) Water Supply Intakes
- 8) Adjacent Effects from Impoundments
- 9) Management of Waters Flows
- 10) Fills Within 100-Year Floodplains
- 11) Equipment
- 12) **Soil Erosion and Sediment Controls**
- 13) **Removal of Temporary Fills**
- 14) Proper Maintenance
- 15) Single and Complete Project
- 16) Wild and Scenic Rivers
- 17) Tribal Rights
- 18) **Endangered Species**
- 19) Migratory Birds and Bald and Golden Eagles
- 20) **Historic Properties**
- 21) Discovery of Previously Unknown Remains and Artifacts
- 22) Designated Critical Resource Waters
- 23) **Mitigation**
- 24) Safety of Impoundment Structures
- 25) Water Quality
- 26) Coastal Zone Management
- 27) Regional Case-by-Case Conditions
- 28) **Use of Multiple Nationwide Permits**
- 29) Transfer of Nationwide Permit Verifications
- 30) **Compliance Certifications**
- 31) Activities Affecting Structures or Works Built by the United States
- 32) **Pre-Construction Notification**



Nationwide Permit 14: Linear Transportation Projects(10/404)



Authorization for discharges into WOUS for crossings of WOUS associated with construction, expansion, modification, or improvement of linear transportation projects:

- Includes roads, highways, railways, trails, airport runways, and taxiways in WOUS.
- Limit of 1/2 acre WOUS in non-tidal waters and 1/3 acre WOUS in tidal waters
- cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.



Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) the loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands.

NWP 14_NOTES

Note 1: For linear transportation projects crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Linear transportation projects must comply with 33 CFR 330.6(d).

Note 2: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Note 3: For NWP 14 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to 13 ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23)



Regional General Permits

- Proposed and issued by Districts
 - Full NEPA Review
 - Public Notice in Federal Register
 - Full 404(b)(1) evaluation (CWA)
- Issued for categories of activities similar in nature (e.g. roads, utility lines, etc.)
- Include “Special Conditions” and “General Conditions” to insure adverse impacts do not exceed minimal levels
- Issued on 5-year cycles
- Clean Water Act Section 401 water quality certification (WQC) is requested for each RGP every five years
- Conditions of the WQCs are incorporated as conditions of the RGPs



List of 2016 AL General Permits

- ALGP-01 Excavated Boat Slips
- ALGP-02 Maintenance Dredging
- ALGP-03 New Work Channel Dredging
- **ALGP-04 Debris Removal**
- **ALGP-05 Piers, Pile-Supported Structures, and Dolphins**
- **ALGP-07 Boat Ramps and Marine Ways**
- ALGP-10 Living Shorelines
- **ALGP-11 Shoreline and Bank Stabilization and Protection**
- ALGP-13 Filling of Previously Dredged Areas
- ALGP-24 Piers and Pile-Supported Structures in Weeks Bay



Programmatic General Permits

- Similar to Regional General Permits
- Alabama PGPs are for minor activities and structures within Alabama Power Lakes within the Coosa, Tallapoosa, and Warrior River Basins.
- APCO assumes responsibility for reviewing applications and verifying it complies with the corresponding PGP.



Individual Permits

- Definition:
 - ▶ Required for activities which may cause more than minimal adverse effects to the aquatic environment;
 - ▶ Exceeds terms and conditions of a General Permit.



Types of Individual Permits

- **Standard Permits**
 - **Public notice describing specific project**
 - **Activities with more than minimal impacts**
 - **Comments received from agencies & public**
 - **Decision Document of evaluation process**

- **Letters of Permission – Typically for Section 10**
 - **Minor activities (structures and dredging)**
 - **No public notice**
 - **Agency coordination required (15 day review period)**



Standard Permits

Key Points of Process:

- Requires complete project description and adjacent property owners
- Public Notice describing project issued for 30 days
 - PN goes to Tribes, State and Federal Resource Agencies, adjacent property owners, other interested parties
- Water Quality needs to be issued by ADEM before 404 authorization can be issued
 - If WQC is denied, project authorization is denied without prejudice



The P&N statement will:

- Clearly demonstrate “need”
- Identify problem that needs correction
- Form the basis of the “no action” comparison (existing conditions...)
- Drive the alternatives analysis (location restriction, etc)
- Support selection of preferred alternative



Alternatives and Sequencing

- *Sequencing*: Required steps that must be taken to ensure that activities have the least adverse impact to aquatic resources

- *Alternatives*:
 - ▶ Off-site alternatives
 - ▶ On-site alternatives and configurations

- The range of alternatives is determined by the purpose and need.

- **TIP**: Compare aquatic resource impacts for each alternative.

- If your preferred alternative does NOT have the least aquatic resource impact, you will need to:
 - ▶ demonstrate how the other alternatives are not practicable, OR;
 - ▶ reduce the impacts of your alternative to be the LEDPA, OR;
 - ▶ adopt the LEDPA alternative



Compensatory Mitigation

Compensatory mitigation is used to offset the **adverse impacts** associated with a permitted project.

The Corps of Engineers is responsible for determining the appropriate form and amount of compensatory mitigation required.

Acceptable methods of compensatory mitigation include **restoration, creation, enhancement and preservation.**

Mitigation Banks are currently the favored approach to compensatory mitigation.

Mitigation requirements based upon impacted wetland quality/quantity



Sequencing

- **Compensatory mitigation** is actually the third step in a sequence of actions that must be followed to offset impacts to aquatic resources. The 1990 Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the Department of Army establishes a three-part process, known as the mitigation sequence to help guide mitigation decisions and determine the type and level of mitigation required under Clean Water Act Section 404 regulations.
- Step 1. **Avoid** - Adverse impacts to aquatic resources are to be avoided and no discharge shall be permitted if there is a practicable alternative with less adverse impact.
- Step 2. **Minimize** - If impacts cannot be avoided, appropriate and practicable steps to minimize adverse impacts must be taken.
- Step 3. **Compensate** - Appropriate and practicable **compensatory mitigation** is required for *unavoidable* adverse impacts which remain. The amount and quality of compensatory mitigation may not substitute for avoiding and minimizing impacts.



Mitigation Hierarchy

- Preferred compensatory mitigation hierarchy:
 - ▶ First - Mitigation banks
 - ▶ Second - In-lieu fee programs
 - ▶ Third - Permittee-responsible mitigation under a watershed approach
 - ▶ Fourth - Permittee-responsible mitigation through on site and in kind
 - ▶ Fifth - Permittee-responsible mitigation through off-site and/or out-of-kind mitigation
- This is still a “soft” preference. Corps able to choose what is most ecologically beneficial to the aquatic resources in a watershed.
- Applicant proposes and Corps determines acceptability



Pitfalls....

- **Failure to be responsive – applicants must be timely and candid to move process along, otherwise, time schedules (e.g. request to advertise, etc) could be delayed!**
- **Alternatives analysis – non-water dependent projects will need one (404(b)(1) Guidelines)**
- **Mitigation – loss of waters of the U.S. requires mitigation**
- **Potential to harm your neighbors – applicant must show their work won't harm adjacent property owners**
- **Failure to submit required information to make a permit decision**

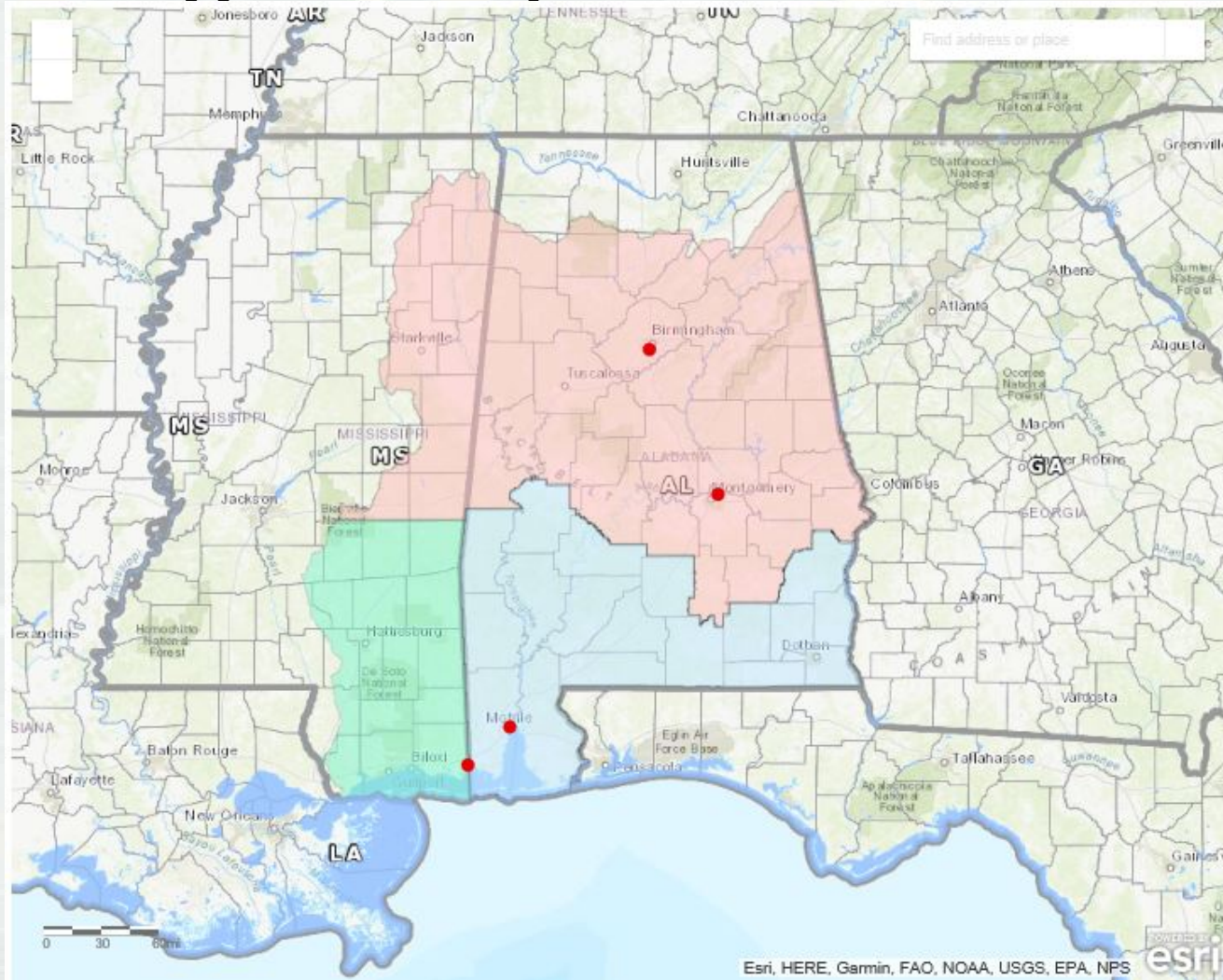


What to do to make the process go smoother....

- Pre-application meeting
- Where possible, minimize project impacts to waters of the U.S. in the design.
- Describe the project purpose and include reasons other sites with less impacts to aquatic resources are not available.
- **Apply for the permit well in advance of construction date.**
- Be responsive when we need more information.



Regulatory Service Area



Contact Info

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Questions?

