

USACE Regulatory Program in Montana

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US Army Corps of Engineers
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Montana Regulatory Program

USACE – Omaha District

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2 PMs in Missoula

3 PMs + State Manager in Helena



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The United States Army Corps of Engineers (Corps)

Serving the Armed Forces and the Nation
in peace and in war.

“One Team – Relevant, Ready, Responsive and
Reliable.”



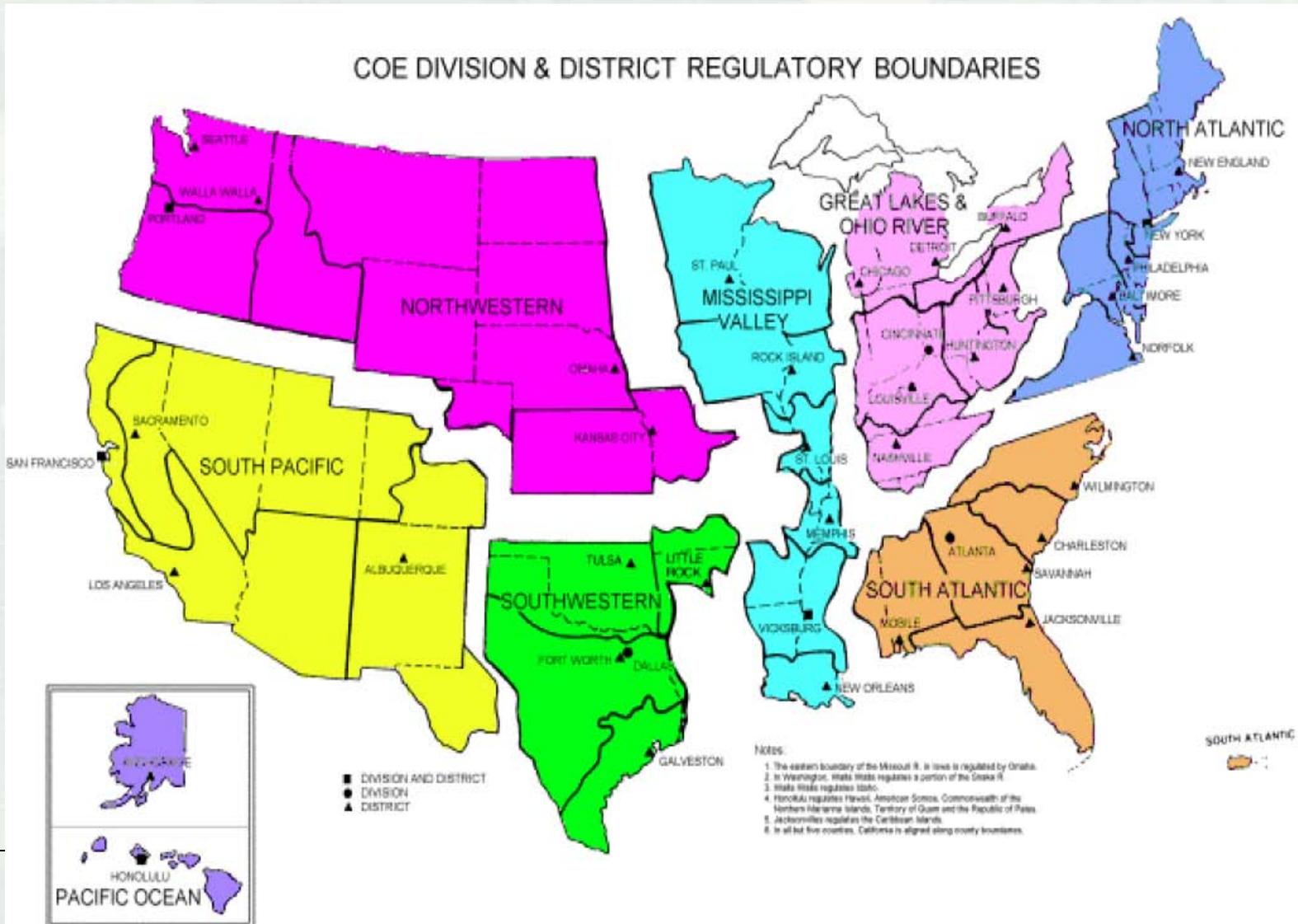
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The United States Army Corps of Engineers

- 650 Military and 34,600 Civilian Team Members
- Engineers, biologists, geologists, hydrologists, natural resource managers, & other professionals
- Meeting the demands of the changing times and requirements as a vital part of America's Army.



Corps: 8 Divisions with 41 Districts



“Spectrum of Operations”



Corps Regulatory Goals under Section 404:

- **Restore and maintain the chemical, physical, and biological integrity of our nations waters.**

- **Balance the need for environmental protection of the nation's waters with the public's need to impact the waters.**



National Regulatory and Permitting Overview

Regulatory program balances aquatic resource protection with proposed development and infrastructure construction.

Each year, across the United States:

- \$200 Billion worth of projects are reviewed
- 100,000 jurisdictional determinations are done
- 90,000 Individual and Nationwide Permit authorizations
- Requested impacts: 17,500 acres
- Avoided impacts: 3,600 acres
- Compensatory Mitigation: 38,700 acres



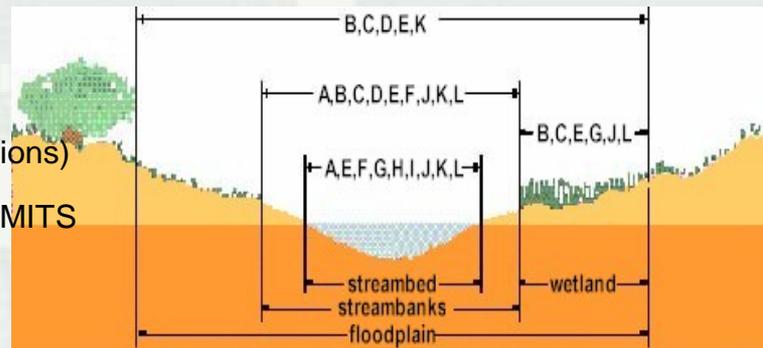
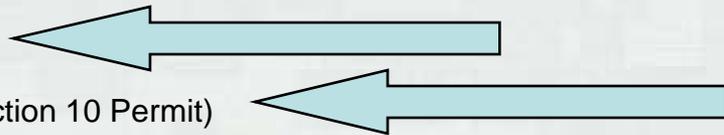
USACE Montana Regulatory and Permitting Overview (2011)

738 Nationwide Permits
152 Pre-Application Consultations
21 Individual Permits
213 No Permit Required
46 Modifications
160 Site Inspections
and
25 documented unauthorized/non-compliance



A GUIDE TO STREAM PERMITTING IN MONTANA

- A. MONTANA NATURAL STREAMBED AND LAND PRESERVATION ACT (310)
- B. MONTANA STREAM PROTECTION ACT (SPA 124 Permit)
- C. MONTANA FLOODPLAIN AND FLOODWAY MANAGEMENT ACT
- D. FEDERAL CLEAN WATER ACT (404 Permit) ←
- E. FEDERAL RIVERS AND HARBORS ACT (Section 10 Permit) ←
- F. SHORT-TERM WATER QUALITY STANDARD FOR TURBIDITY
- G. MONTANA LAND-USE LICENSE OR EASEMENT ON NAVIGABLE WATERS
- H. MONTANA WATER USE ACT
- I. MONTANA WATER USE ACT (Water Reservations)
- J. STORMWATER DISCHARGE GENERAL PERMITS
- K. STREAMSIDE MANAGEMENT ZONE LAW
- L. OTHER LAWS THAT MAY APPLY



Corps' Regulatory Authorities:

- **Section 10** - Rivers & Harbors Act (1899)
 - ▶ **Navigable** Waters (Yellowstone, Missouri, Kootenai in Montana; different than State Navigable waters)
 - ▶ Course, condition, capacity and location
 - ▶ Most work (docks, ramps, jetties, bridges, riprap, dredging, etc.)
 - ▶ Corps and US Coast Guard

- **Section 404** - Clean Water Act (1972)
 - ▶ All waters of the U.S. (including wetlands and tributaries)
 - ▶ Discharge of dredged or fill material
 - ▶ Corps and US Environmental Protection Agency



Related Laws

- National Environmental Policy Act (NEPA), 422 U.S.C 4321-4347
- National Historic Preservation Act, 16 U.S.C. 470
- Endangered Species Act (ESA), 16 U.S.C. 1531 et seq.
- Fish and Wildlife Coordination Act, 16 U.S.C. 742a et seq.
- Wild and Scenic Rivers Act, 16 U.S.C. 1278 et seq.
- Sections 401 & 402 of the CWA, 33 U.S.C. 1341 (MT DEQ, EPA, Tribes)
- Others: State and Local Floodplain Management Laws, Conservation Districts / 310 law, Local laws, Tribal Regulations



Jurisdiction



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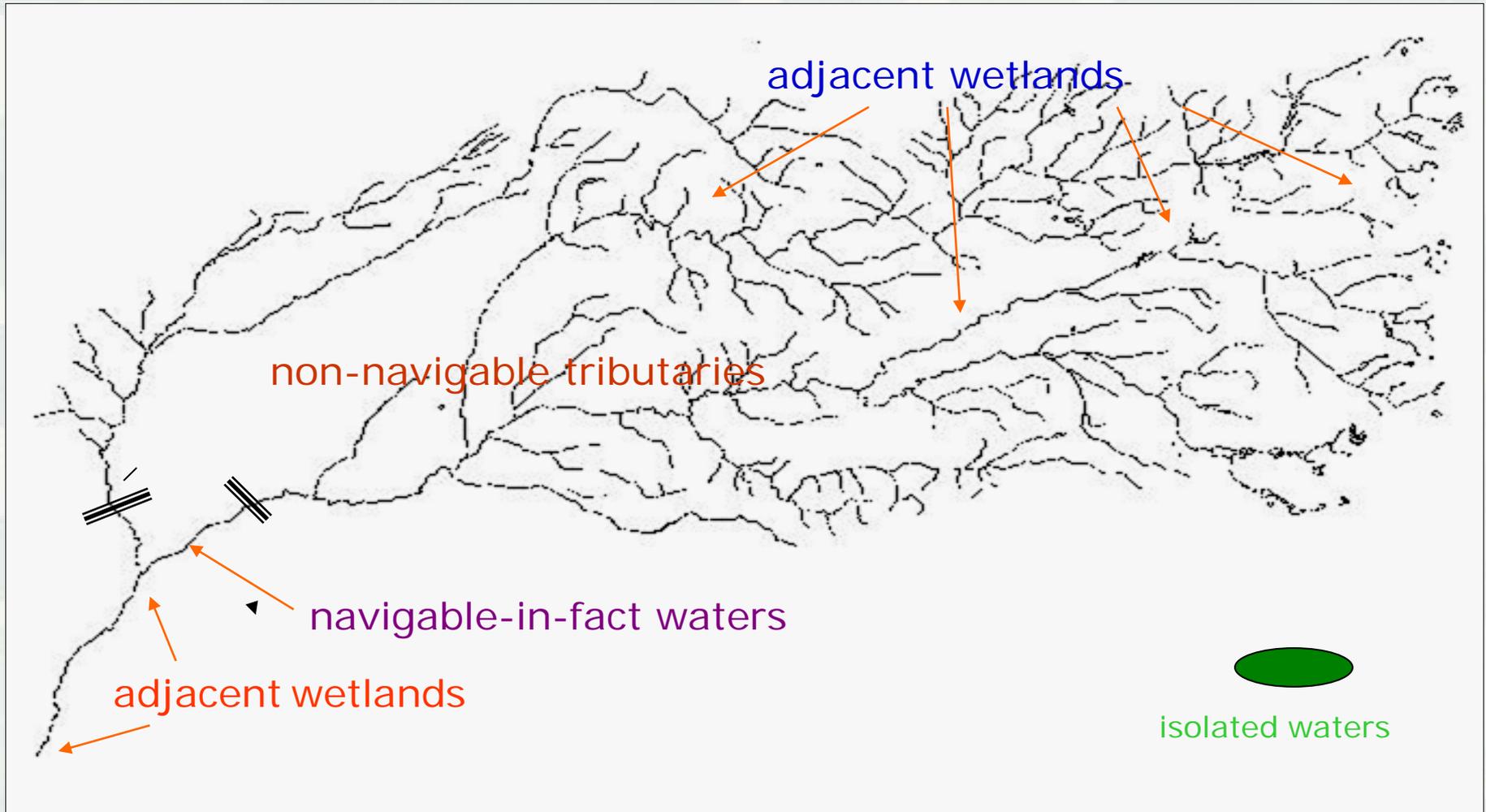
What Types of Aquatic Resources Does the Corps Regulate?

- Streams:
 - ▶ Perennial, Intermittent or Ephemeral
- Rivers:
 - ▶ Navigable and Tributaries
- Lakes & Ponds:
 - ▶ Natural or Man-made
- Wetlands:
 - ▶ Adjacent to Lakes, Rivers and Streams
- Ditches and Canals:
 - ▶ Depending on where they terminate

In Summary: “Waters of the United States”



Corps' Jurisdiction: "Waters of the United States"



What Activities does the Corps Regulate?



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Section 404: Placement of Dredged or Fill Material

- **Fill Material is** rock, soil, vegetation, concrete, steel, etc.
- Re-deposit of dredged material is regulated.
- **Driven piles are not** considered fill, and are not regulated under Section 404; Section 10 still applies.
- **Waste materials** such as broken asphalt, bridge or building demolition debris, garbage, car bodies, tires, or other debris **is not fill material**; it is waste material.
- Use of broken concrete may be OK if it conforms with State, Local, & Federal regulatory agency specifications.



This is not allowable fill material.

This debris pile used to be a 78-ft long timber bridge, but was disposed of in an ephemeral tributary. It was eventually removed.



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Riprap may be allowable fill material.



Big STRONG®

Levees may be allowable fill material.



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Fabric, soil lifts, woody vegetation may be allowable fill material. (before)



Fabric, soil lifts, woody vegetation may be allowable fill material. (after)



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Examples of Regulated Activities: Bank Stabilization (Barbs and vegetation)



Examples of Regulated Activities: Temporary Cofferd Dams & Stockpiles



03/14/2006



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Examples of Regulated Activities: Stream Restoration - Libby Creek



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Examples of Regulated Activities: Fill for Building Pads



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Section 10:

Any work on, over, or under the waterway

- **Not just fill placement**
- **Includes boring under or spanning.**
- **Includes**
 - ▶ **Yellowstone River**
 - ▶ **Missouri River**
 - ▶ **Kootenai River**
 - ▶ **All Reservoirs or impoundments of those rivers.**



Examples of Regulated Activities: Section 10 Water – Docks & Sheet Pile



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Examples of Regulated Activities: Section 10 Water – Aerial Utility Line



12/02/2003

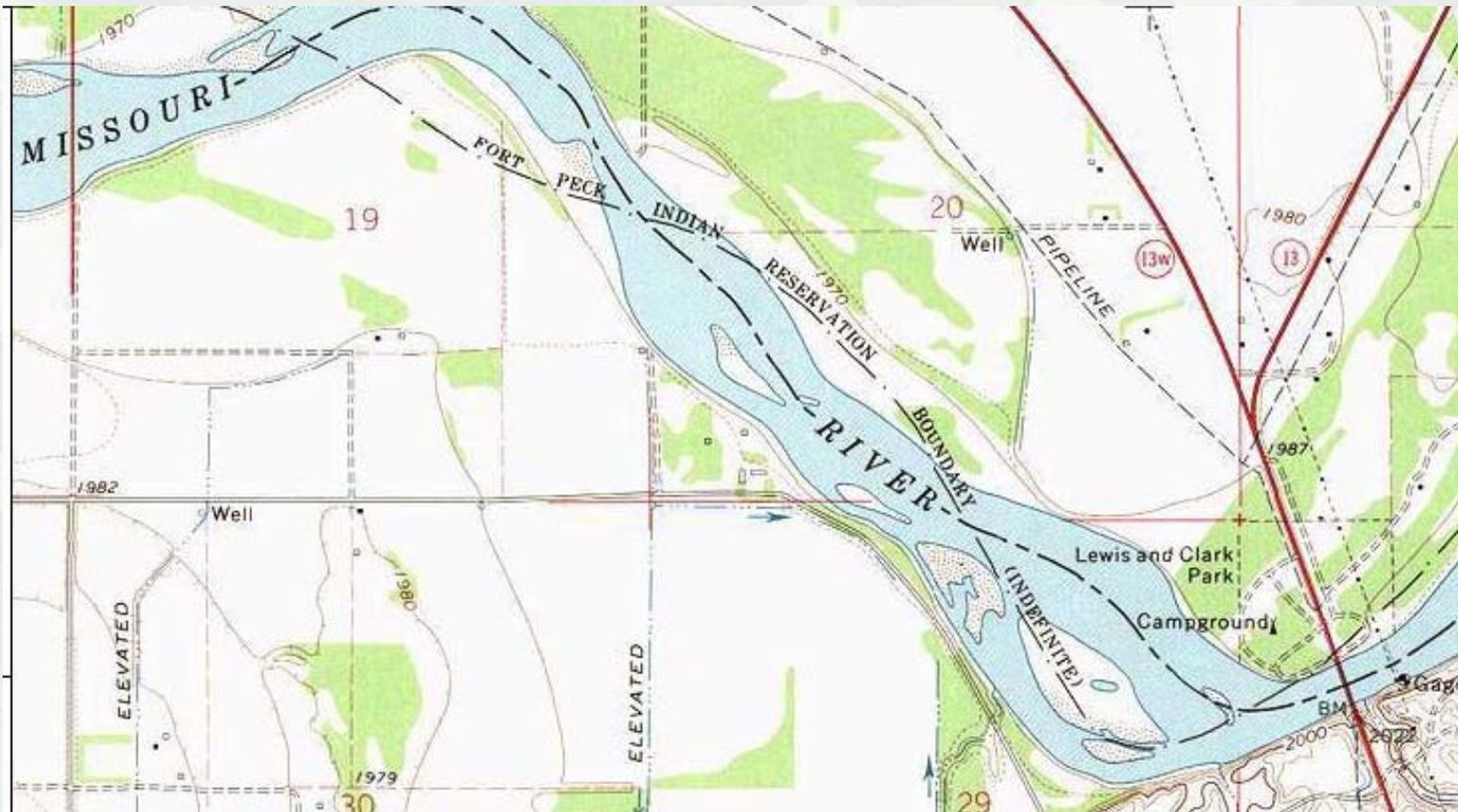


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Examples of Regulated Activities: Section 10 Water – Ferry



Examples of Regulated Activities: Section 10 Water – Pipelines, Bridges, Power lines, Gage Stations



Things Beyond Corps Authorities:

- **Other Agencies' Permits**
- **Zoning**
- **Setbacks**
- **Uplands (“Non-Aquatic”)**
- **Congress**
- **Courts**
- **Weather**



The Corps' Regulatory Program:

- **Not a Project Advocate**
- **Not a Project Opponent**
- **Not a source of Technical Assistance**
- **Not a Funding Source**

So, what do we do?



The Corps' Regulatory Program:

- **The Corps balances:**
 - ▶ **Public and private needs;**
 - ▶ **Reasonably foreseeable benefits and detriments;**
 - ▶ **Practicable alternative locations and methods;**
 - ▶ **Essential values of the Nation's aquatic ecosystems;**
 - ▶ **Property rights of citizens who want to use their land.**

- **No permit is granted if contrary to the public interest.**



Public Interest Factors

33 CFR 320.4

Balancing process to determine if the proposed work is in the public interest

- **Public and Private Needs**
- **Alternatives**
- **Extent, nature, and permanence of impacts**



Public Interest Factors include:

- ▶ **Conservation**
- ▶ **Economics**
- ▶ **Aesthetics**
- ▶ **Wetlands**
- ▶ **Cultural values**
- ▶ **Navigation**
- ▶ **Fish and wildlife**
- ▶ **Water supply**
- ▶ **Water quality**
- ▶ **The needs & welfare of the people**



**Also: 40 CFR 230
Section 404(b)(1)
Guidelines**

40 CFR 230.10 Restrictions on Discharge:

The Corps can only permit the
“least environmentally damaging practicable
alternative”

while considering purpose and the cost,
logistics, and technology available to the
Applicant.



What does not require a Corps' Permit under Section 404?



Activities that do not require 404 permits:

- Excavation or dredging only
- Driving across a stream
- Incidental fallback
- Placement of driven piling
 - ▶ Fence posts, utility poles, boardwalks, bridge and dock piling
- Exempt Activities (see next slide)



Exemptions

33 CFR Part 323.4(a)(1) – (6)

(Exempt = No Section 404 Permit needed)

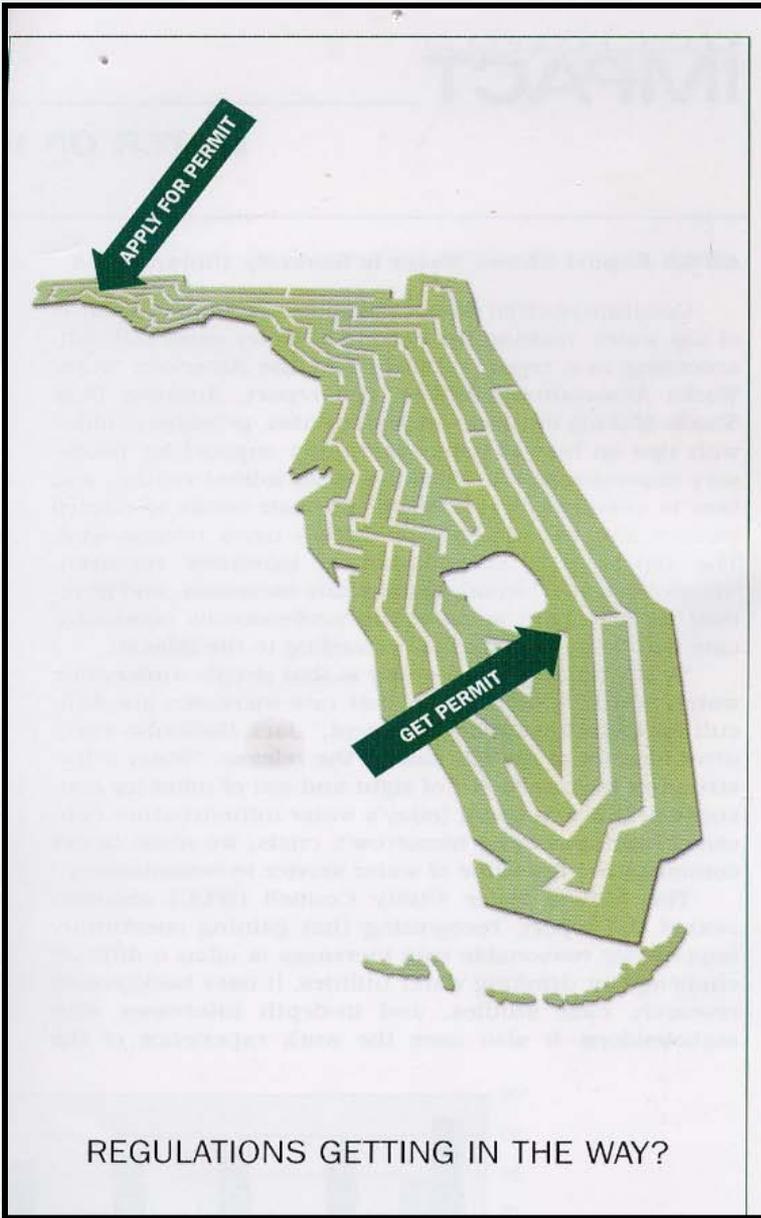
1. Normal farming activities such as plowing, seeding and cultivation; on-going operations
2. Maintenance of authorized fills
3. Farm/stock ponds, irrigation diversions
4. Temporary sediment basins
5. State approved program under Section 208
6. Construction of farm and forest roads, temporary mining access roads (with BMPs)



Permits



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Is it hard to get a permit?

Not really.



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Permit Applications Must Contain:

- Location, Project Description, and Dimensions
- Project Purpose
- Name of Waterway
- Delineation of Wetlands
- Avoidance/Minimization/Compensation
- Signatures



Possible Permit Conditions

- T&E Restrictions
- Timing Restrictions
- Plant Species
- Construction Methods
- Structure Removal requirements
- Mitigation Requirements
- Monitoring and Performance



Mitigation



Federal Register

Thursday,
April 10, 2008

Part II

**Department of
Defense**

Department of the Army, Corps of
Engineers
33 CFR Parts 325 and 332

**Environmental
Protection Agency**

40 CFR Part 230
Compensatory Mitigation for Losses of
Aquatic Resources; Final Rule



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“Mitigation”

33 CFR 320 and 33 CFR 332

- Mitigation in all forms must occur throughout the application and review process.
- Mitigation includes **avoiding** impacts to the extent practicable.
- Unavoidable impacts must be **minimized**.
- **Compensation** may be necessary for unavoidable impacts.
- Compensation may occur on-site or off-site, but must be within the watershed.



332.3 – General compensatory mitigation requirements

- General considerations
 - ▶ Assess likelihood for ecological success and sustainability
 - ▶ Consider location of impact site to compensation site
 - ▶ Costs (practicability)
 - ▶ Consider what is “environmentally preferable”
- First consider restoration
 - ▶ Higher likelihood of success
 - ▶ Reduce impacts to ecologically important uplands
- Compensatory mitigation projects may be sited on public or private land.



332.3 – Compensatory Mitigation Requirements

- Established a Hierarchy*:
 - ▶ Credit purchase from established bank.
 - ▶ Credit purchase from an In-Lieu Fee Program
 - ▶ Permittee-responsible mitigation under watershed approach
 - ▶ Permittee-responsible mitigation on-site & in-kind
 - ▶ Permittee-responsible mitigation off-site & out-of-kind

*Any method used must replace lost functions and services

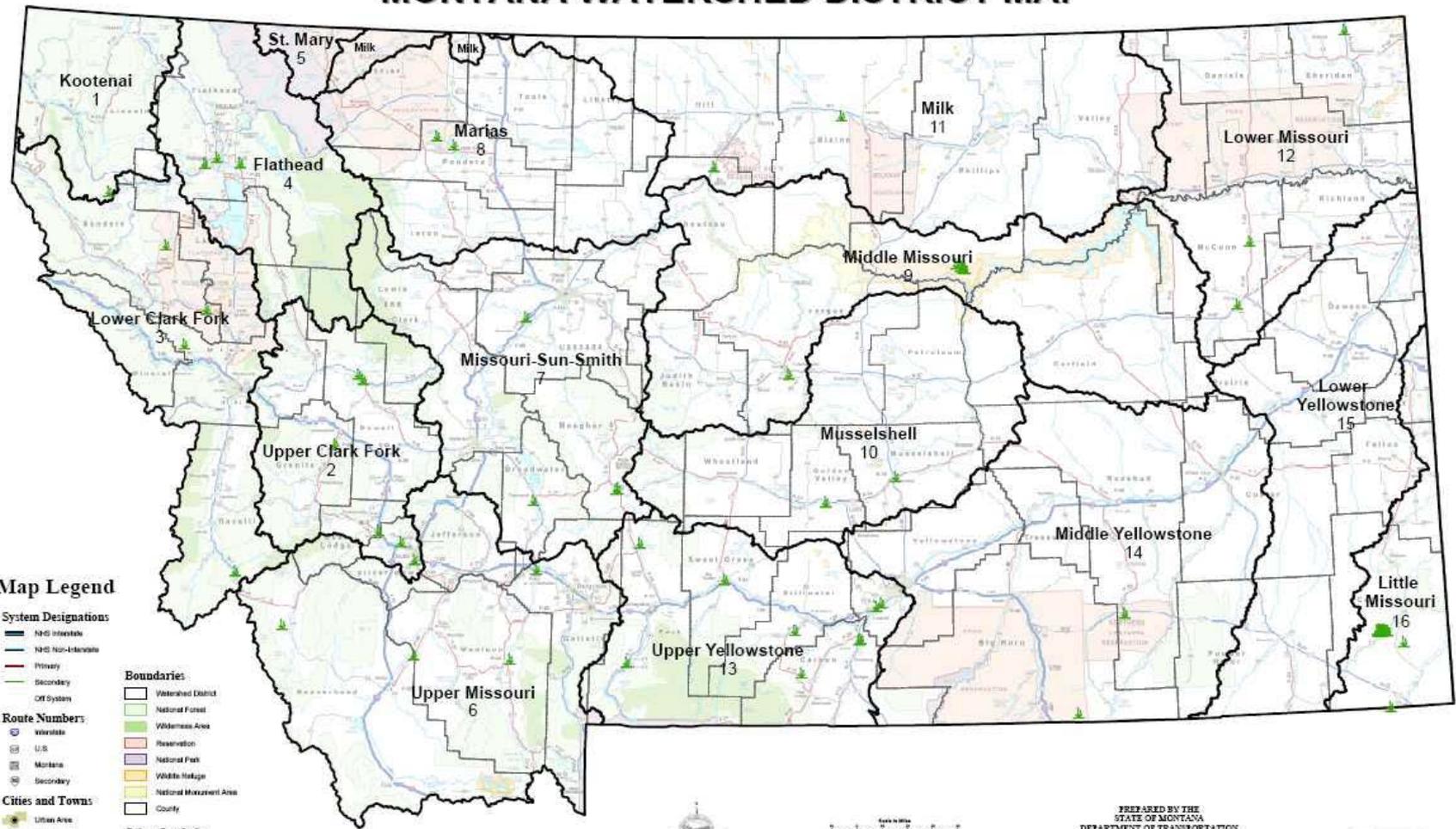


332.3 – Compensatory Mitigation Requirements

- 12 step program – Plan is needed before issuance.
 1. Objectives
 2. Site Selection
 3. Site Protection
 4. Baseline Information
 5. Determination of Credits
 6. Mitigation Work Plan
 7. Maintenance Plan
 8. Performance Standards
 9. Monitoring Requirements
 10. Long-Term Management Plan
 11. Adaptive Management Plan
 12. Financial Assurances



MONTANA WATERSHED DISTRICT MAP



Map Legend

System Designations

- I-90 Interstate
- I-15 Non-Interstate
- Primary
- Secondary
- Off System

Route Numbers

- Interstate
- U.S.
- Montana
- Secondary

Cities and Towns

- Urban Area
- State Capital
- Incorporated City

Boundaries

- Watershed District
- National Forest
- Wilderness Area
- Reservation
- National Park
- Wildlife Refuge
- National Monument Area
- County

Other Symbols

- Constructed Wetland



PREPARED BY THE
STATE OF MONTANA
DEPARTMENT OF TRANSPORTATION
ROAD INVENTORY AND MAPPING SECTION
Created March 2010 using ArcGIS 9.3 using ArcMap 9.3.100.100
MAD 1987 State Plane Montana FIPS 5000
Lambert Conformal Conic



Example: Avoidance & Minimization



Elevated Path over Aquatic Area



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“Compensatory Mitigation”

- Offsets unavoidable impacts: replaces lost function & area
- Considers temporal and spatial impacts
- Accounting can be based on ratios or on functional changes
- Can include restoration, establishment, enhancements, preservation, and/or buffers
- Can include projects, mitigation banks, or in-lieu fee where those programs exist
- Must be permanent
- Must be proposed and a mitigation plan or project approved **BEFORE** permits can be issued.



Wetland Mitigation

Compensatory mitigation:
minimum 1:1 ratio

for wetland losses exceeding 0.10 acre.



Montana Wetland Mitigation Ratios

A In-Kind, established and Viable	<i>Compensatory Mitigation Type</i>	B NOT In-Kind, NOT Established, or NOT Viable
1:1	Restoration (Re-establishment) ¹	1.5:1
1.5:1 ⁺	Restoration (Rehabilitation) ¹	2:1 ⁺
1:1	Creation (Establishment)	2:1
3:1 ⁺	Enhancement ²	4:1 ⁺
4:1 ⁺	Preservation (Protection) ³	4:1 ⁺
5:1	Upland Buffer ⁴	5:1



Wetland Mitigation

Can also use a functional assessment method to calculate debits and credits (MDT Method, HGM, etc)



Example: Impacts and Wetland Mitigation
Sept 2009 through Sept 2010
Montana Regulatory Program

- Total: 93.08 acres permanent wetland fill permitted
- 11.75 acres across 534 locations did not require mitigation (impacts < 0.1 acre)
- **81.33** acres required compensatory mitigation (work at or above 0.1 acre)
- 11.77 acres fill avoidance
- An additional 6.07 acres fill minimization
- 241 acres temporary wetland fills (pipelines, construction access, etc)
- **271.76** acres compensatory mitigation required
- Overall: **3.34:1** mitigation ratio for last 12 months



Stream Mitigation in Montana

- Required on a project-specific basis, but anything over 300 ft long may require mitigation.
- Montana Stream Mitigation Procedure - May 2010 (MTSMP)
- Different than wetland mitigation



MT SMP

- Montana Stream Mitigation Procedure
 - ▶ Accounting procedure for stream impacts
 - ▶ Originally developed by USACE-ERDC Lab
 - ▶ Adapted by Corps Montana Program
 - ▶ Draft 2005, Final May 2010
 - ▶ Matrix evaluation
 - ▶ For most stream projects >300 ft

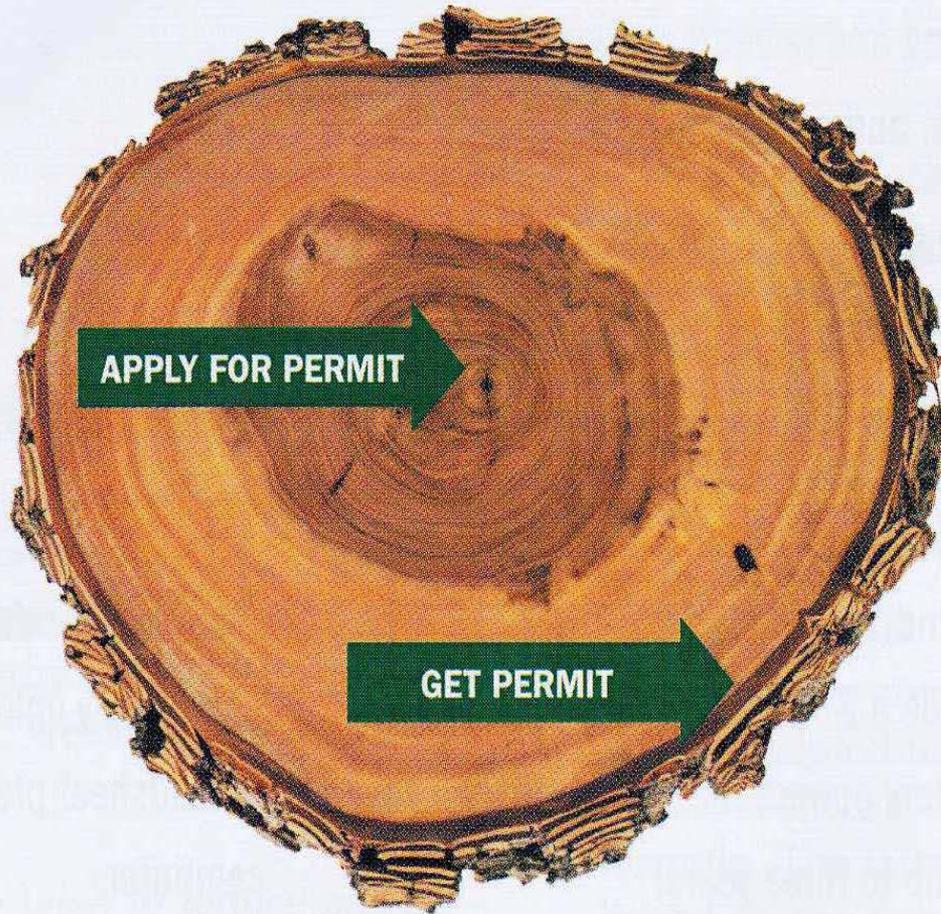


Permit Review Timelines



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How long
does it take
to get a
permit?



REGULATIONS GETTING IN THE WAY?



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Types of Corps' Permits

- **Nationwide Permits**
 - ▶ (30-60 days, no-cost)
- **Regional General Permits**
 - ▶ (30-60 days, no-cost)
- **Letters of Permission**
 - ▶ (30-60 days, no-cost)
- **Individual Permits**
 - ▶ (120+ days, \$0 to \$100)



What if....

- Unauthorized fill?
- Non-Compliance with permit?
- Exceeded permit limits?
- Mitigation not successful?



What if you don't get a permit, or do not comply with permit terms?

- Possible: complete restoration of the site
- Possible: after-the-fact permitting/mitigation
- Possible: referral to US EPA for Civil and/or Criminal enforcement actions
- Possible: fines or administrative penalties
- Possible: Federal Prison
- ???



Unauthorized Fill



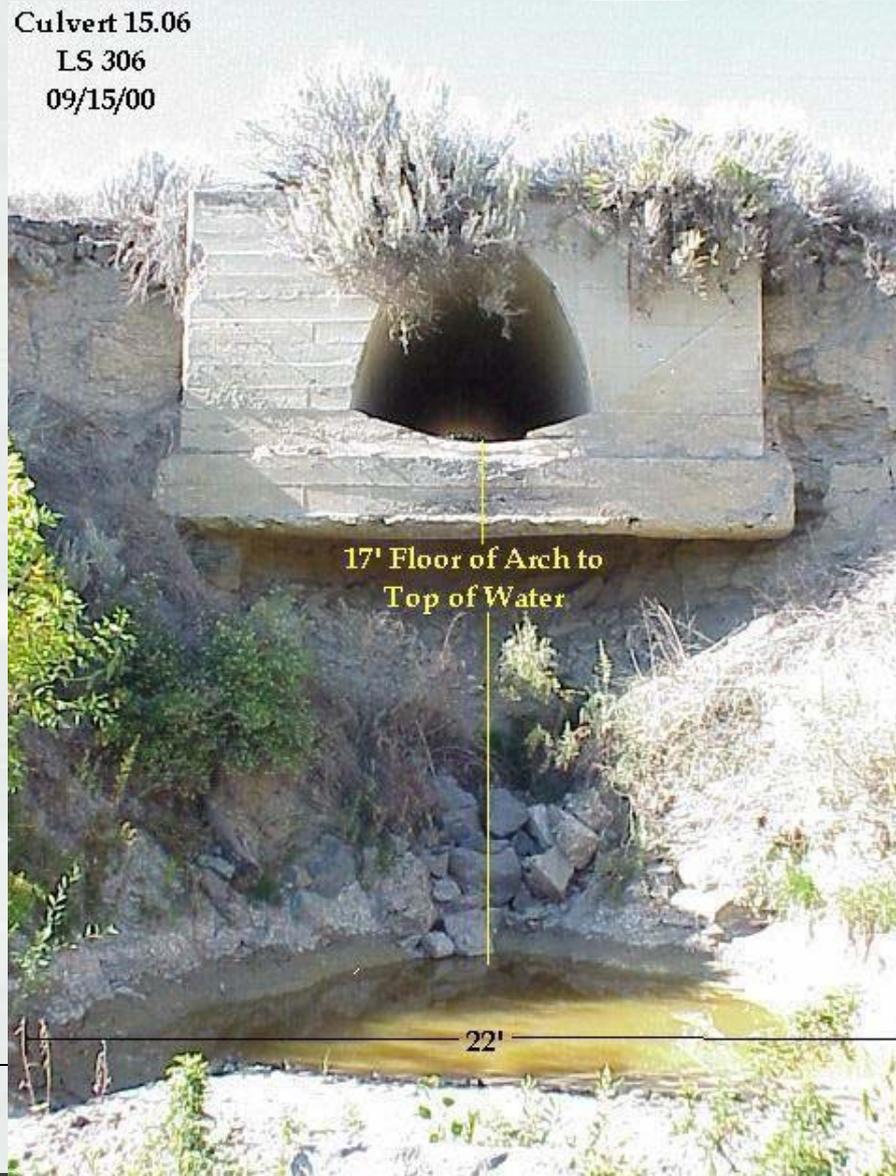
Unauthorized Fill



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If recently permitted, would not be in compliance with permit conditions

Culvert 15.06
LS 306
09/15/00



17' Floor of Arch to
Top of Water

22'



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Parting Thoughts

- **“Environmental” issues are another set of design considerations, not an afterthought**
- **Goal is to restore and maintain the chemical, physical, and biological integrity of our nations waters.**
- **Balance the need for environmental protection of the nation’s waters with the need to impact the waters.**



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