CORPS REGULATORY PROGRAM UPDATES AND INITIATIVES

Tennessee Association of Environmental Professionals

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Chief, Regulatory Branch
Nashville District

10 November 2015


Temporary Stream Crossing near 19th century bridge

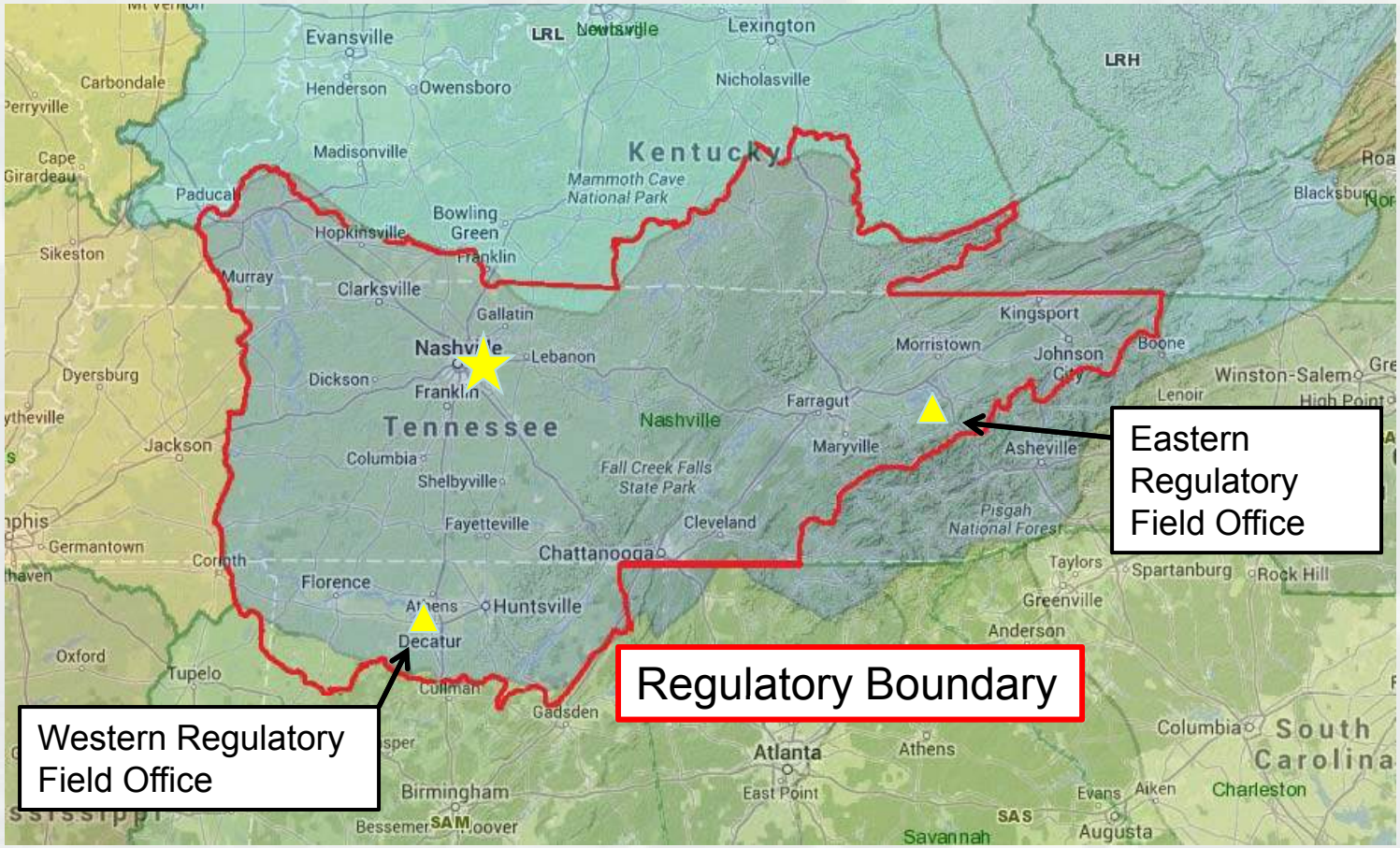

Mill Creek HDD Hydraulic Fracture Clean-up

US Army Corps of Engineers
BUILDING STRONG®

Regulatory Mission

- Provide strong protection of the Nation's aquatic resources
- Enhance the efficiency of the regulatory program
- Ensure fair and reasonable decisions

Nashville District Boundaries



Permitting Authority and Jurisdictional Areas

1) Is this area regulated by the Corps?

2) Is this activity regulated by the Corps?

Regulatory Authorities

- ***Section 10 Rivers & Harbors Act of 1899***
  - Regulate all structures or work in, over or under navigable waters of the U.S.
- ***Section 9 Rivers and Harbors Act of 1899***
  - Regulate dams and dikes across navigable waters (Corps authority for permits); bridges over navigable waters (USCG authority for permits)
- ***Section 404 Clean Water Act***
  - Regulate discharge of dredged or fill material in waters of the U.S., including wetlands
- ***Section 103 of the Marine Protection, Research and Sanctuaries Act***
  - Regulate transport of dredged material for the purpose dumping in the ocean
- ***Outer Continental Shelf Lands Act – Section 4(e)***
  - Prevent artificial islands, installations, and other devices from obstructing navigation on the outer Continental Shelf.

Morrison Bridge – Portland, OR – 1888: SCOTUS case leads to passage of RHA of 1890

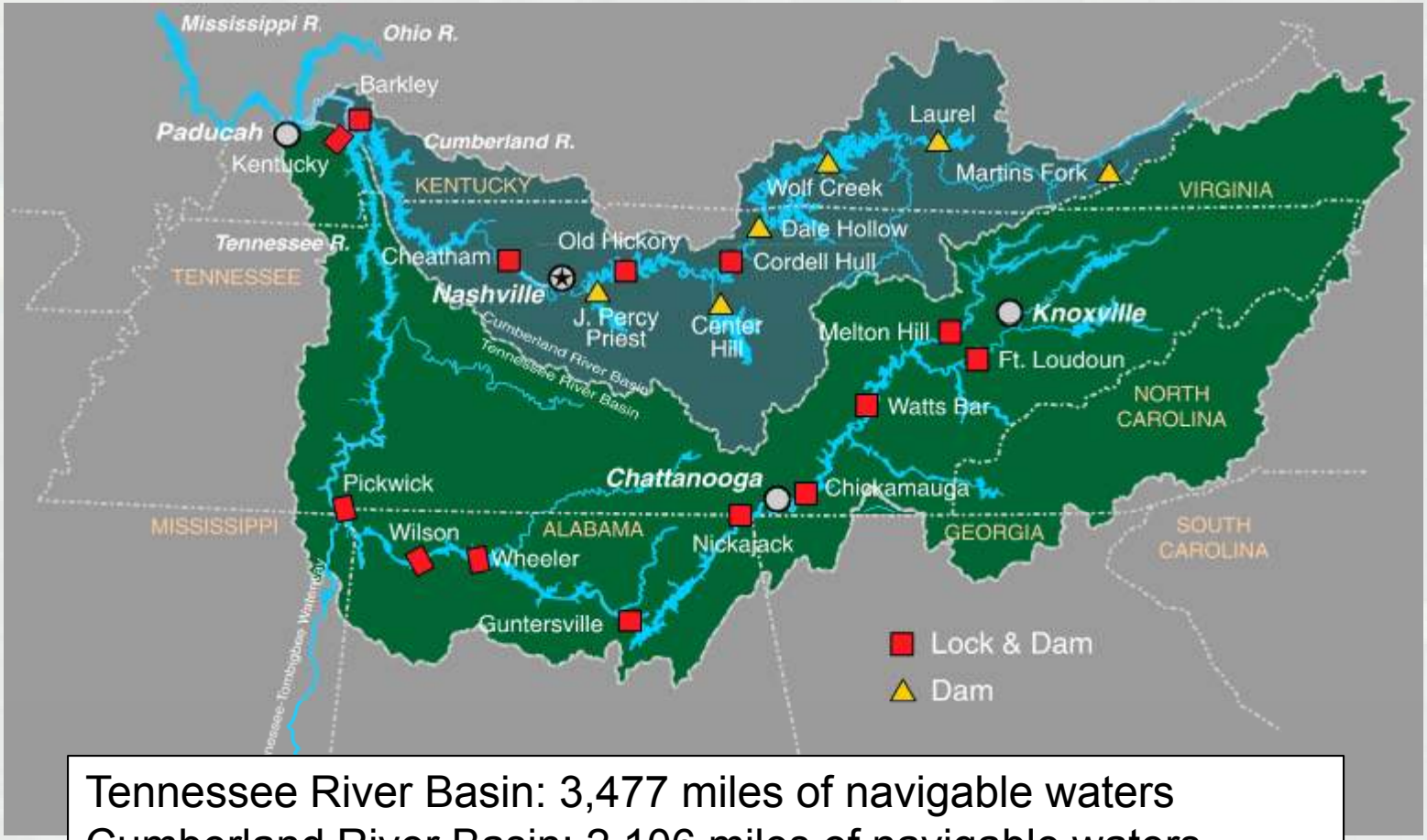
Navigable Waters of the U.S. for Section 10 Jurisdiction

Definitions - **33 CFR 329**

Navigable waters: waters subject to the ebb and flow of the tide; connection to transportation of interstate commerce

Interstate commerce: defined as has had, presently has, or potential for interstate commerce

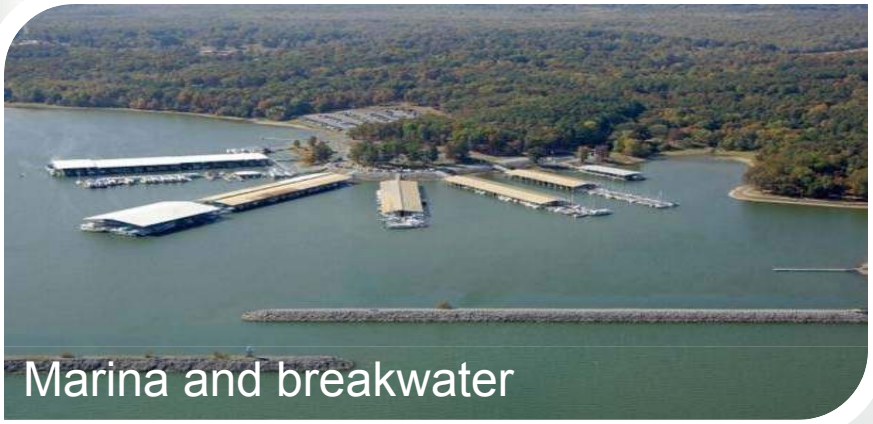
Navigable Waters



Tennessee River Basin: 3,477 miles of navigable waters
Cumberland River Basin: 2,106 miles of navigable waters
Conasauga River Basin: ~ 11 miles of navigable waters

What needs a permit?

- Section 10 – structures and/or work in or affecting navigable waters of the United States


Marina and breakwater


Dredging

Riprap

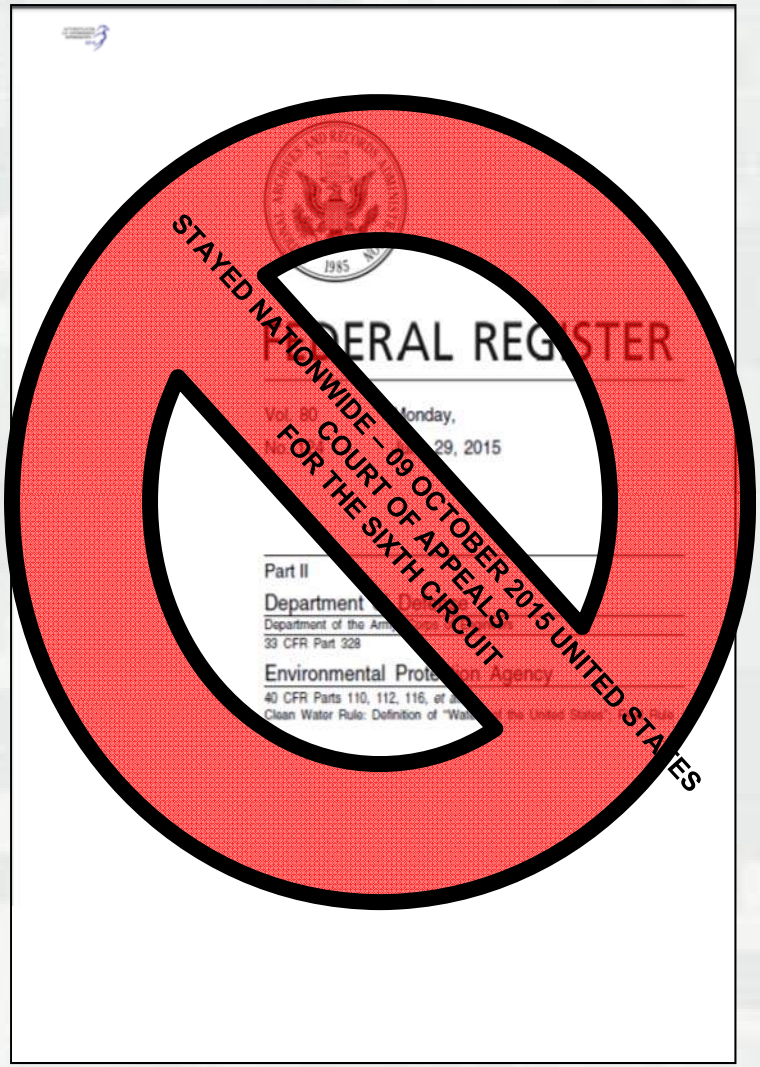
Temporary Recreational Structure

Waters of the U.S. Jurisdiction Under Clean Water Act (33 CFR 328) (1986 Regulations)

1. Waters currently used, used in past, or susceptible for use in interstate or foreign commerce, including waters subject to ebb and flow of the tide
2. Interstate waters and wetlands
3. Intrastate waters where destruction or degradation could affect interstate or foreign commerce (HQ approval required)
   - ► Waters used for recreation or other purposes
   - ► Waters with fish or shellfish sold in interstate or foreign commerce
   - ► Waters used for industrial purposes
4. Impoundments of waters of the U.S.
5. Tributaries to waters in categories 1 – 4
6. Territorial seas (3 miles from shore)
7. Wetlands adjacent to waters of the U.S.

2003 and 2008 Guidance

New Clean Water Rule – Effective 28 August 2015



(a)(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(a)(2) All interstate waters, including interstate wetlands;

(a)(3) The territorial seas;

(a)(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(a)(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

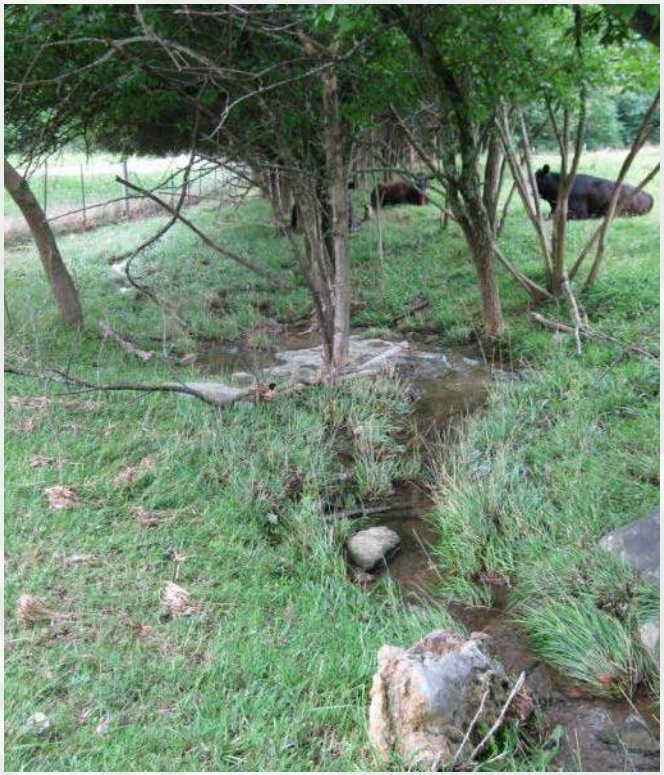
(a)(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(a)(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.

(a)(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section..

Rivers and Streams

Tennessee River



Unnamed ephemeral stream

Definitions – OHWM 33 CFR 328.3(e)

Ordinary High Water Mark (OHWM)

the shoreward limit of jurisdiction for all non-tidal waters. The OHWM is a line on the shore established by the normal fluctuations in the water level and is determined in the field through observance of a clear, natural line impressed on the bank, changes in the character of soil, destruction of terrestrial vegetation, etc.

Physical characteristics : Regulatory Guidance Letter (RGL) 05-05

- Natural line on bank
- Shelving
- Changes in soil
- Destruction of terr. veg.
- Presence of litter, debris
- Wracking
- Veg. matted down, bent, absent
- Sediment sorting
- Leaf litter disturbed or washed away
- Scour
- Deposition
- Multiple observed flows
- Bed and banks
- Water staining
- Change in plant comm.

RGL 05-05

"If physical evidence alone will be used for the determination, districts should generally try to identify **two** or more characteristics, unless there is particularly strong evidence of **one**."

Stream Types

Definitions: 2012 NWP permit FR 10184

1. Ephemeral – flows during and for short duration after precipitation events, located above the water table year –round
2. Intermittent – flows during certain times of the year, surface and ground water contribution
3. Perennial – flows year-round during a normal precipitation year, groundwater is primary source of hydrology with some surface water contribution

Waters of the U.S. v. Waters of the State of Tennessee

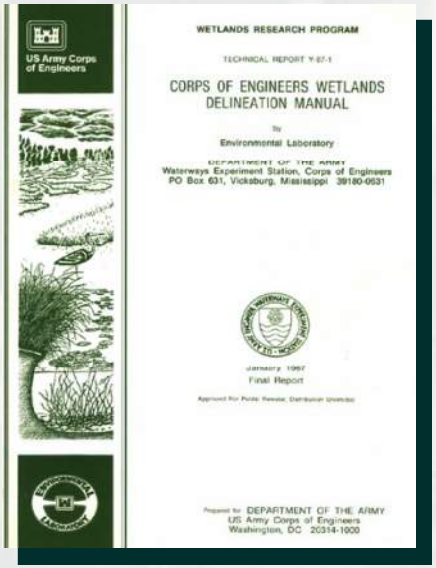
TDEC Jurisdiction	Streams	WWC	Groundwater
USACE Jurisdiction	Perennial	Intermittent	Ephemeral
USACE Mitigation Required	Perennial	Intermittent	Ephemeral
TDEC Mitigation Required	Streams		

- Corps Outreach at QHP trainings
  - Corps has provide 9 trainings since 2014

Wetlands

- Hydrology
- Hydrophytic Vegetation
- Hydric Soils

"Areas that are inundated or saturated by surface or ground water 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

- 1987 Wetland Delineation Manual
- Regional Supplements

Jurisdictional Determinations

Approved JDs

- Official Corps determination that jurisdictional "waters of the United States," or "navigable waters of the United States," or both, are either present or absent on a particular site.
- An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the CWA/RHA.
- Appealable

Preliminary JDs

- non-binding ". . . written indications that there may be waters of the United States, including wetlands, on a parcel or indications of the approximate location(s) of waters of the United States or wetlands on a parcel.
- Preliminary JDs are advisory in nature and may not be appealed."
- Voluntarily waive or set aside questions regarding CWA/RHA jurisdiction over a particular site
- Not appealable

What needs a permit?

- 404 – Discharge of dredge or fill material into a <u>water of the U.S.</u>

Types of Permits

- Individual Permits
  - Standard Permits (SP)
    - Project-specific evaluation and authorization
    - Process involves public notice, public comment period, hearings
  - Letters of Permission (LOP)
    - Less controversial than SPs
    - Minor impacts, coordinate with agencies/neighbors (no public notice)
- General Permits
  - Nationwide Permits
  - Regional General Permits
    - Similar activities resulting in minimal effects; valid for 5 years

Public Interest Review Factors

- Conservation
- Economics
- Aesthetics
- General Environmental Concerns
- Wetlands
- Historic Properties
- Fish and Wildlife Values
- Flood Hazards
- Floodplain Values
- Land Use
- Navigation
- Shore Erosion and Accretion
- Recreation
- Water Supply and Conservation
- Water Quality
- Energy Needs
- Safety
- Food and Fiber Production
- Mineral Needs
- Property Ownership

CWA 404(b)(1) Guidelines

- Substantive Environmental Criteria
  - No discharge shall be permitted if there is a practicable alternative that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences (40 CFR 320.10)
  - LEDPA – Least Environmentally Damaging Practicable Alternative
    - Practicable in terms of cost, logistics & existing technology
  - FOCUS of our Guidelines analysis is impacts to aquatic resources/special aquatic sites

Permit Denial

- Project IS contrary to the public interest
- Project does NOT comply with the 404(b)(1) Guidelines, if applicable
  - Practicable Alternative Exists
  - Violates Water Quality Standards
  - Results in Significant Degradation
  - Impacts to aquatic resources not minimized to the extent practicable
- Insufficient information to make a reasonable judgment.

Mitigation: Overview

1. Sequence of avoid, minimize, compensate (33 CFR 320.4(r)
2. Replace lost functions
3. Must be related to project impacts
4. Corps determines type and amount of compensatory mitigation
5. May be required to meet 404(b)(1) Guidelines or as a result of a public interest review (reduces the overall project impacts to less than significant). (33 CFR 325.4(a))

Mitigation: Overview

- 2008 Final Mitigation Rule
  - Published 10 April 2008 and effective 9 June 2008
- Final Rule replaces:
  - Replaces certain provisions of the 1990 MOA
    - Applies to SP's and GP's (1990 MOA only SP's)
    - Amount, type, and location of compensatory mitigation (including the on-site preference)
    - Use of preservation
    - Replaces 1995 mitigation banking guidance
    - Replaces 2000 in-lieu fee guidance
    - RGL 02-02

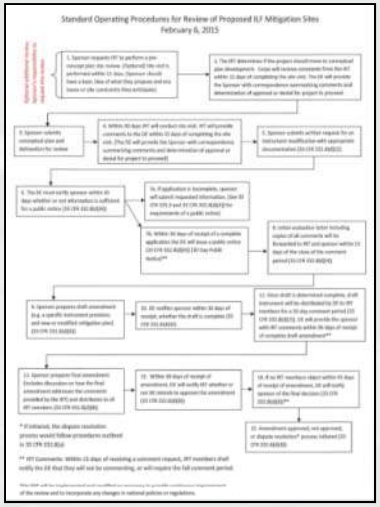
Preference Hierarchy for Mitigation

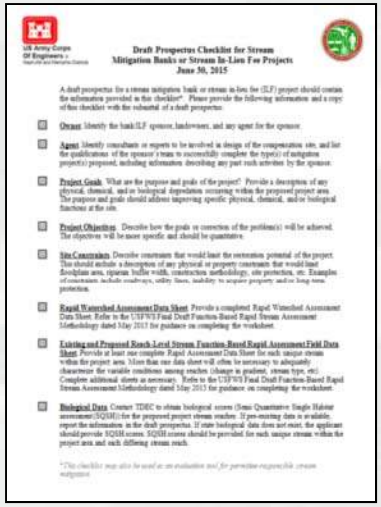
(33 CFR 332.3(b))

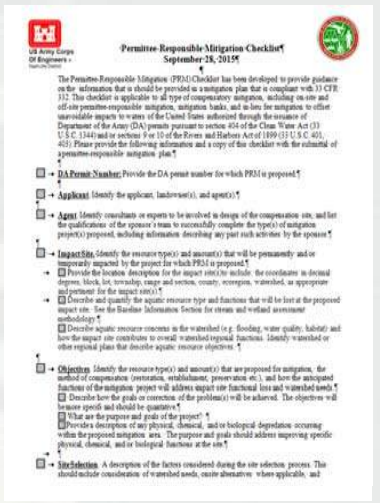
1. Mitigation bank credits
2. In-lieu fee program credits
3. Permittee-responsible mitigation under a watershed approach
4. On-site and/or in-kind permittee-responsible mitigation
5. Off-site and/or out-of-kind permittee-responsible mitigation

Regulatory Initiatives

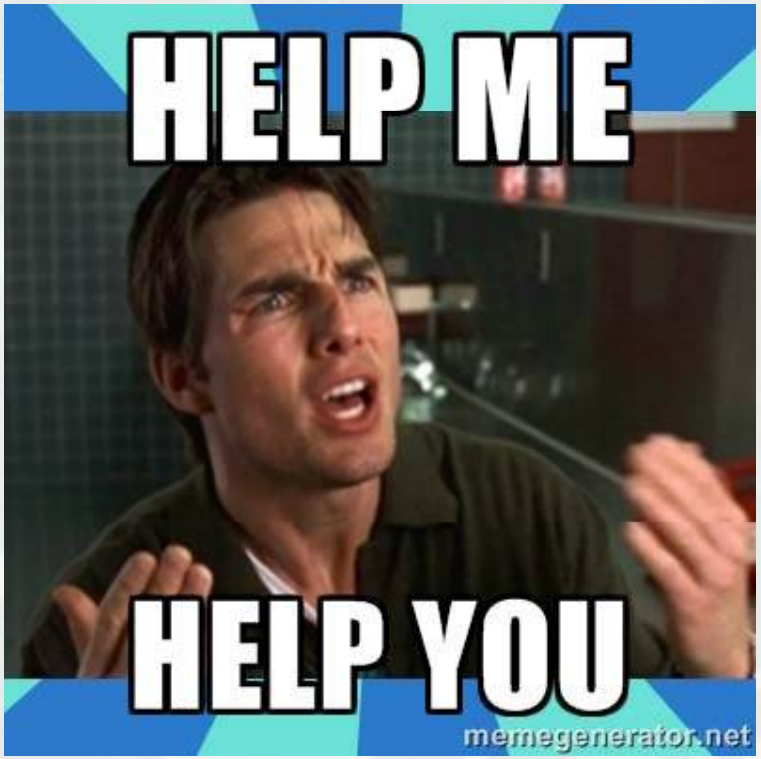
- Development of Guidance Documents
  - Flow Chart for review of Proposed ILF Mitigation Sites – Finalized February 6, 2015
  - Draft Prospectus Checklist for Stream Mitigation Banks or ILF Projects – Finalized June 30, 2015
  - Permittee-Responsible Mitigation Checklist – Soon…


Standard Operating Procedures for Review of Proposed ILF Mitigation Sites
February 6, 2015


Draft Prospectus Checklist for Stream Mitigation Banks or Stream In-Lieu Fee Projects
June 30, 2015


Permittee-Responsible Mitigation Checklist
September 28, 2015

Tips for Speedy Permit Review

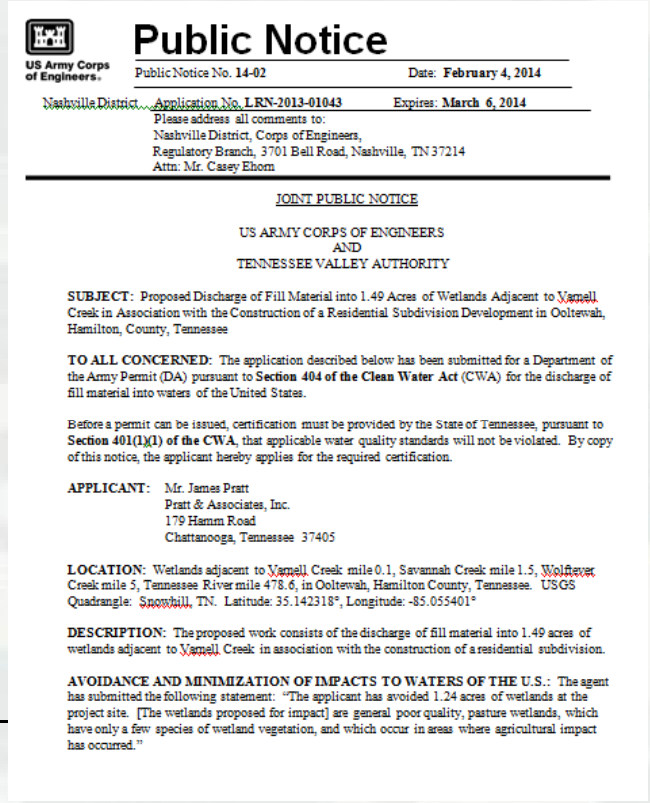


Pre-Application meeting always recommended……

Complete Application for an Individual Permit

An application is complete when:

- Sufficient information is received to prepare the Public Notice (PN)
- The evaluation clock begins with a complete application



Public Notice

US Army Corps of Engineers

Public Notice No. 14-02 Date: **February 4, 2014**

Nashville District Application No. LRN-2013-01043 Expires: **March 6, 2014**

Please address all comments to:
Nashville District, Corps of Engineers,
Regulatory Branch, 3701 Bell Road, Nashville, TN 37214
Attn: Mr. Casey Ehorn

JOINT PUBLIC NOTICE

US ARMY CORPS OF ENGINEERS
AND
TENNESSEE VALLEY AUTHORITY

SUBJECT: Proposed Discharge of Fill Material into 1.49 Acres of Wetlands Adjacent to Varnell Creek in Association with the Construction of a Residential Subdivision Development in Ooltewah, Hamilton, County, Tennessee

TO ALL CONCERNED: The application described below has been submitted for a Department of the Army Permit (DA) pursuant to **Section 404 of the Clean Water Act** (CWA) for the discharge of fill material into waters of the United States.

Before a permit can be issued, certification must be provided by the State of Tennessee, pursuant to **Section 401(1)(1) of the CWA**, that applicable water quality standards will not be violated. By copy of this notice, the applicant hereby applies for the required certification.

APPLICANT: Mr. James Pratt
Pratt & Associates, Inc.
179 Hamm Road
Chattanooga, Tennessee 37405

LOCATION: Wetlands adjacent to Varnell Creek mile 0.1, Savannah Creek mile 1.5, Wolftever Creek mile 5, Tennessee River mile 478.6, in Ooltewah, Hamilton County, Tennessee. USGS Quadrangle: Snowhill, TN. Latitude: 35.142318°, Longitude: -85.055401°

DESCRIPTION: The proposed work consists of the discharge of fill material into 1.49 acres of wetlands adjacent to Varnell Creek in association with the construction of a residential subdivision.

AVOIDANCE AND MINIMIZATION OF IMPACTS TO WATERS OF THE U.S.: The agent has submitted the following statement: "The applicant has avoided 1.24 acres of wetlands at the project site. [The wetlands proposed for impact] are general poor quality, pasture wetlands, which have only a few species of wetland vegetation, and which occur in areas where agricultural impact has occurred."

Complete Application for an Individual Permit

Information necessary to prepare a PN includes:

- Description of proposed activity
  - Location (lat/long, section, township, range, waterway, city, county)
  - Purpose and need
  - Scheduling
  - Names and address of adjoining property owners
  - Location and dimensions of adjacent structures
  - List of other authorizations
  - Signature of applicant
- Related activities (associated upland impacts, staging areas, temporary impacts)
- For discharges of dredged or fill material
  - Statement describing avoidance and minimization measures
  - Statement regarding compensatory mitigation

Complete Application for an Individual Permit

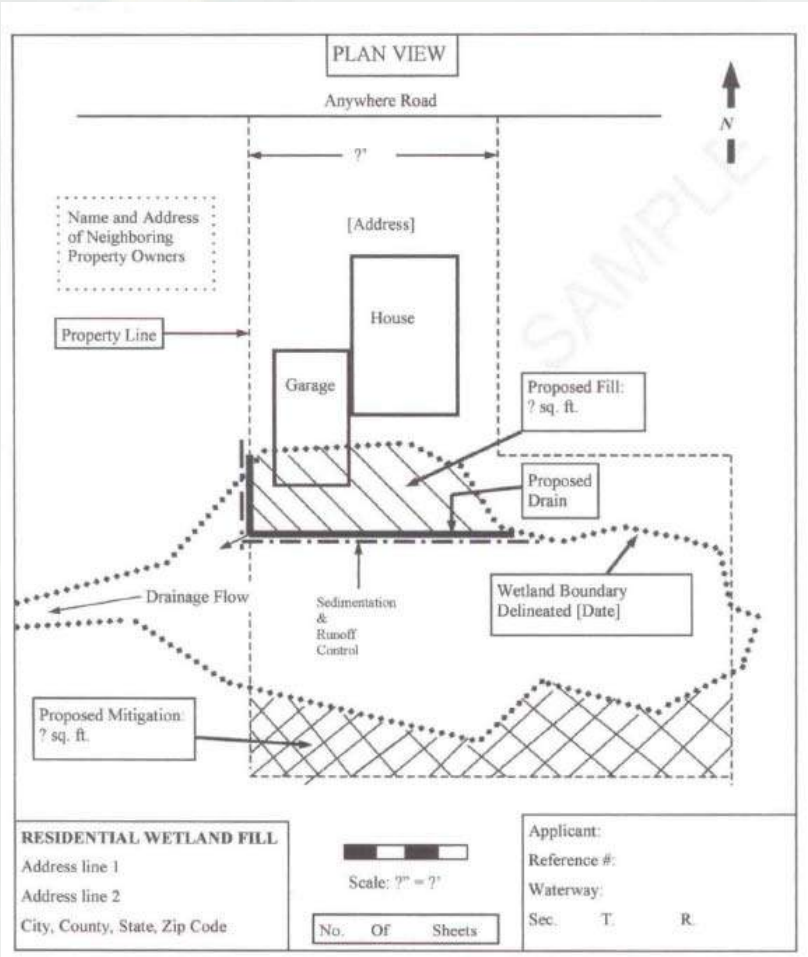
What is missing?

- ESA information?
- Historic properties information?
- Alternatives analysis 404(b)(1)?
- Sediment suitability determination?
- Detailed compensatory mitigation plan?

None of this is needed for a complete application but is needed to make a permit decision.

Project Drawings

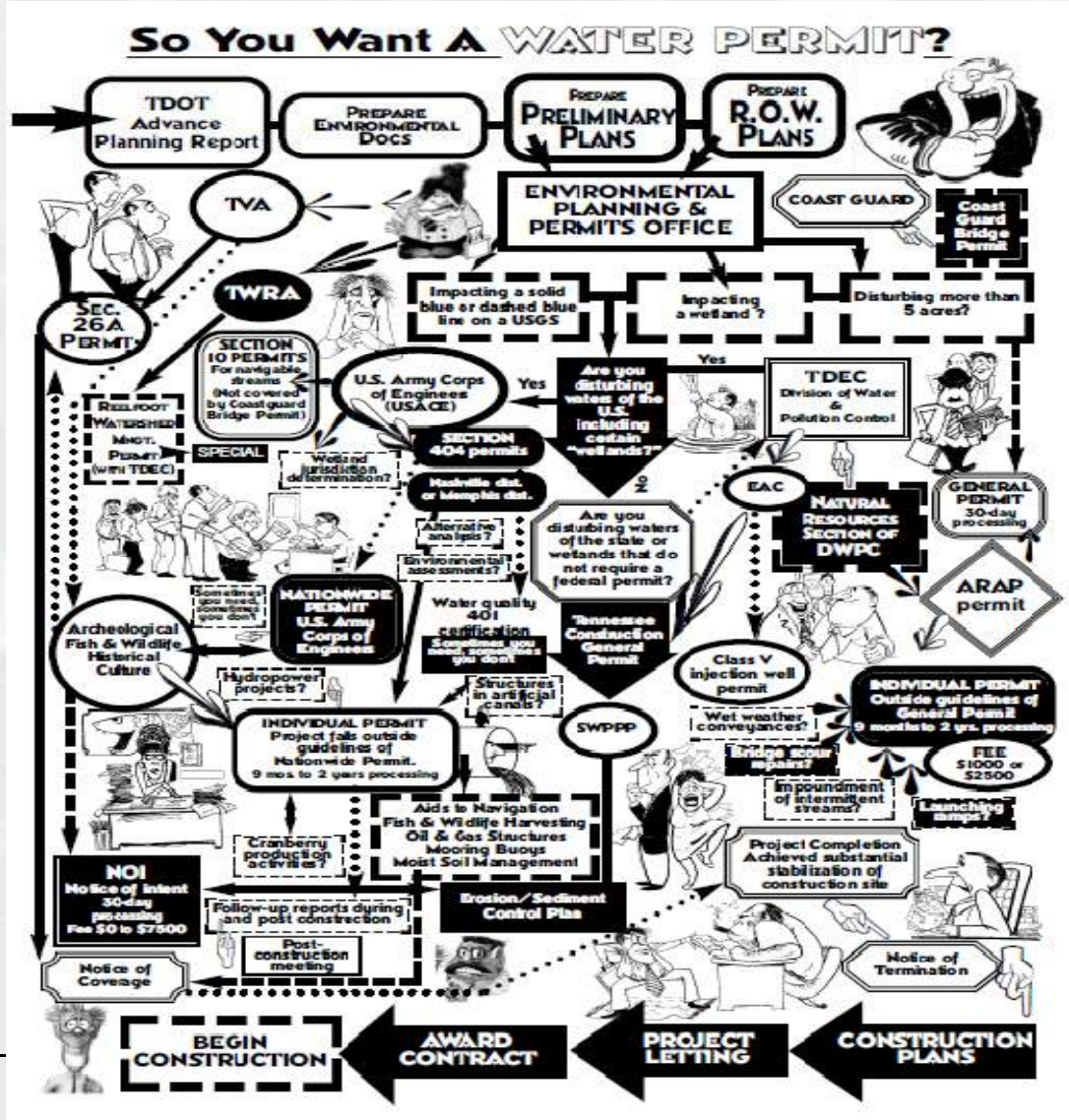
- Focus on aquatic resource impacts (cross hatch impact areas).
- Legible on 8 ½”x 11” paper in black and white (use additional match lines if needed for legibility).
- Identify all staging/construction access areas.
- Provide dimensions of fill/excavation areas and structures.



Common Pitfalls to Avoid

- Incomplete project description (purpose, permanent/temporary impacts, scheduling, BMPs).
- Drawings do not clearly indicate project boundaries, the location and area of all aquatic resources, and the location/area of all aquatic resource impacts (fill, excavation, structures).
- Avoidance, minimization, and compensatory mitigation measures discussion not provided or insufficient to complete review.
- Application submittal close to project deadline.

Questions?


So You Want A WATER PERMIT?
TDOT Advance Planning Report
Prepare Environmental Docs
Prepare Preliminary Plans
Prepare R.O.W. Plans
TVA
ENVIRONMENTAL PLANNING & PERMITS OFFICE
COAST GUARD
Coast Guard Bridge Permit
TWRA
SEC. 26A PERMIT
Impacting a solid blue or dashed blue line on a USGS
Impacting a wetland?
Disturbing more than 5 acres?
SECTION 10 PERMITS For navigable streams (Not covered by Coastguard Bridge Permit)
U.S. Army Corps of Engineers (USACE)
Yes
Are you disturbing waters of the U.S. including certain "wetlands?"
Yes
TDEC Division of Water & Pollution Control
Reelfoot Watershed
SPECIAL
SECTION 404 permits
Wetland jurisdiction determination?
Nashville dist. or Memphis dist.
EAC
NATURAL RESOURCES SECTION OF DWPC
GENERAL PERMIT 30-day processing
Alternative analysis?
Environmental assessments?
Are you disturbing waters of the state or wetlands that do not require a federal permit?
ARAP permit
Archeological Fish & Wildlife Historical Culture
NATIONWIDE PERMIT U.S. Army Corps of Engineers
Water quality 401 certification
Tennessee Construction General Permit
Class V injection well permit
Hydropower projects?
Structures in artificial canals?
SWPPP
Wet weather conveyances?
INDIVIDUAL PERMIT Outside guidelines of General Permit 9 months to 2 yrs. processing
INDIVIDUAL PERMIT Project falls outside guidelines of Nationwide Permit. 9 mos. to 2 years processing
FEE $1000 or $2500
Impoundment of intermittent streams?
Aids to Navigation Fish & Wildlife Harvesting Oil & Gas Structures Mooring Buoys Moist Soil Management
Cranberry production activities?
NOI Notice of Intent 30-day processing Fee $0 to $7500
Project Completion Achieved substantial stabilization of construction site
Follow-up reports during and post construction
Erosion/Sediment Control Plan
Post-construction meeting
Notice of Coverage
Notice of Termination
BEGIN CONSTRUCTION
AWARD CONTRACT
PROJECT LETTING
CONSTRUCTION PLANS