

CORPS REGULATORY PROGRAM

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Nashville District

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Temporary Stream Crossing near
19th century bridge



US Army Corps of Engineers
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Mill Creek HDD Hydraulic Fracture Clean-up

Topics

- Corps Regulatory Overview
- Waters of the United States
- Compensatory Mitigation
- Nationwide Permit Reissuance

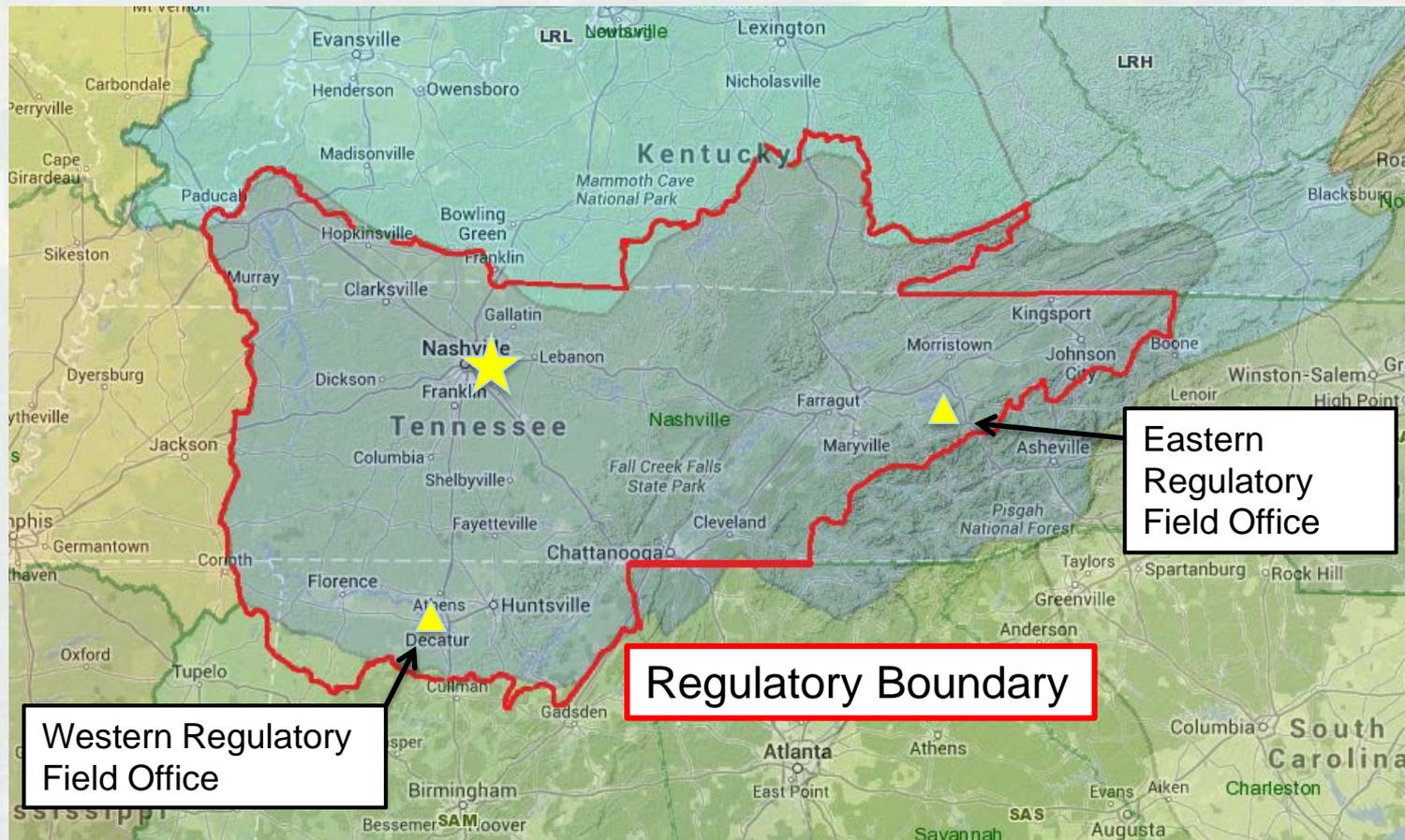


Regulatory Mission

- Provide strong protection of the Nation's aquatic resources and navigation capacity while allowing reasonable development
- 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



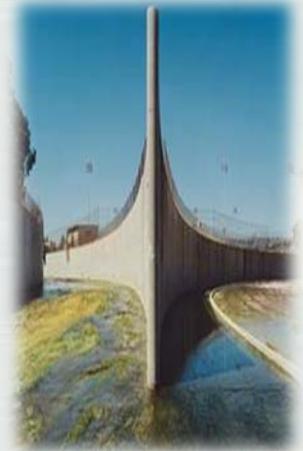
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Navigable Waters of the U.S. for Section 10 Jurisdiction

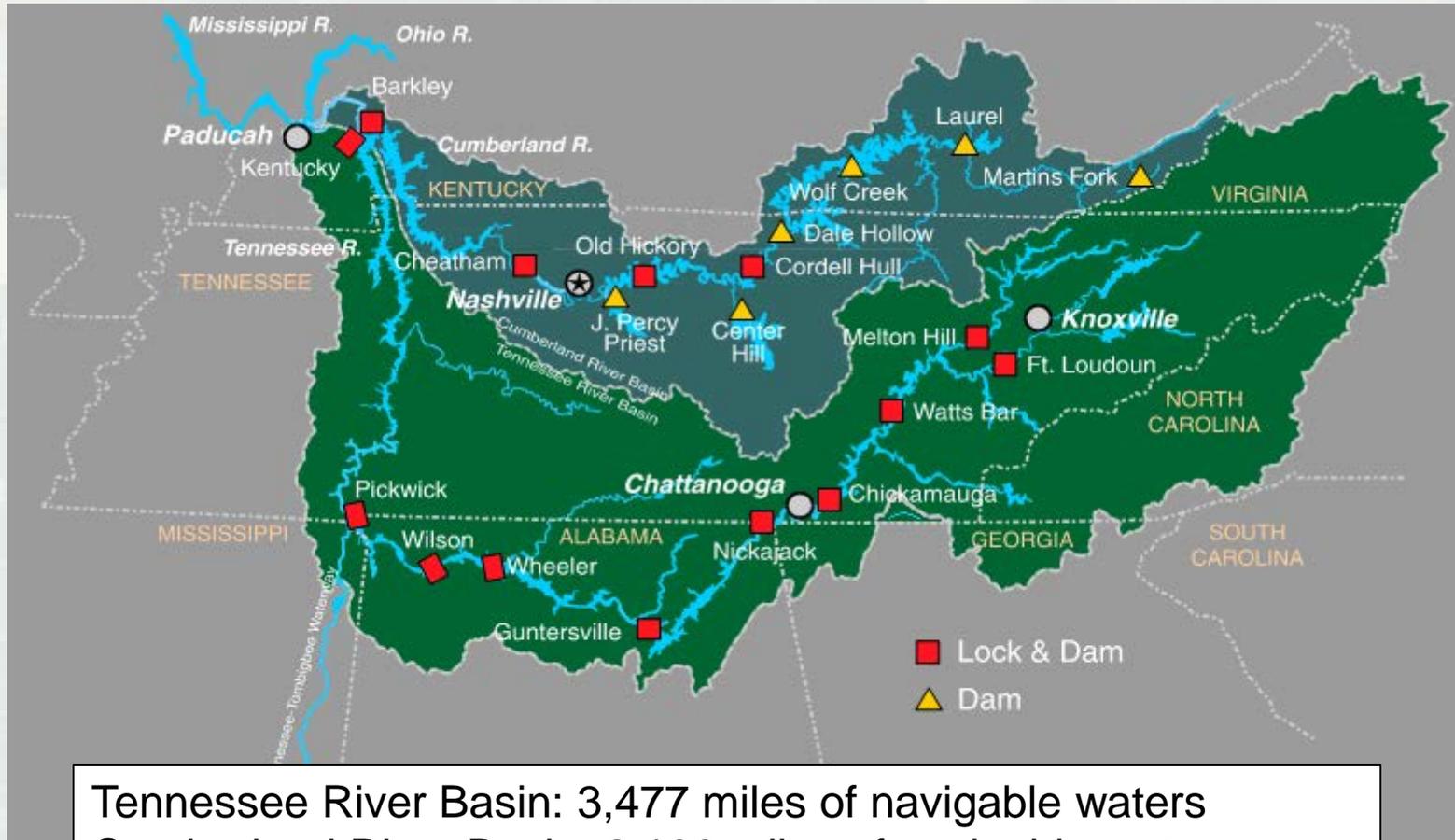
Definitions - 33 CFR 329

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

Interstate commerce: have had, presently have, or have 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



Waters of the U.S.

Jurisdiction Under Clean Water Act (33 CFR 328(a)) (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.



Court decisions

- **Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers**, involved statutory and constitutional challenges to the assertion of CWA jurisdiction over isolated, non-navigable, intrastate waters used as habitat by migratory birds.
- **Rapanos v. U.S. & Carabell v. U.S.** – Decision provided two standards for determining whether water bodies that are not TNWs including wetlands adjacent to those non-TNWs, are subject to CWA jurisdiction:
 1. If the water body is relatively permanent, or if the water body is a wetland that directly abuts a RPW
 2. If a water body, in combination with all wetlands adjacent to that water body, has a significant nexus with TNWs



Jurisdictional Determinations (Current Practice)

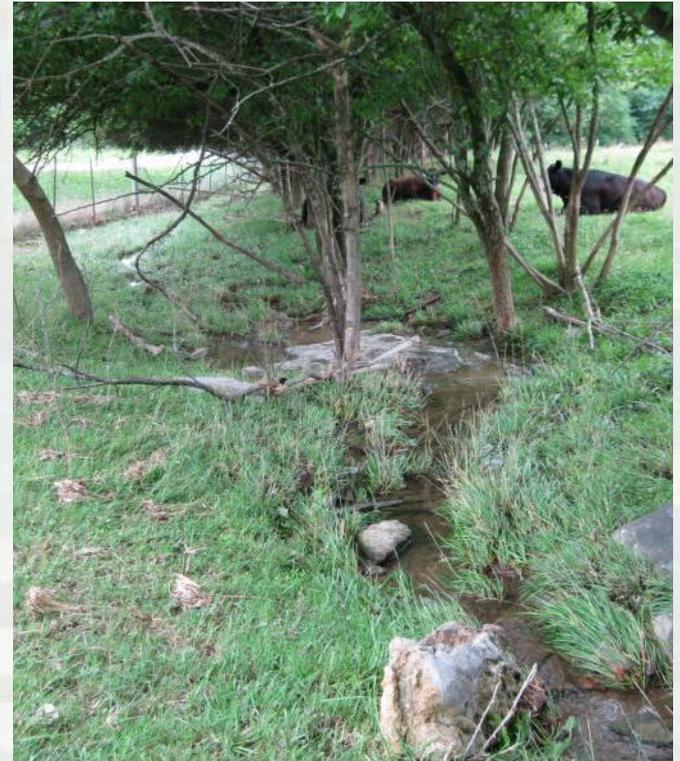
- **March 2000 Regulation (Final Rule for Appeal Process):** Definitions for JD, PJD, and AJD appear in regulation. Introduces concept of AJD determination (presence/absence) and AJD delineation (defines boundaries).
- **Rapanos Guidance; 2007/2008 Coordination Memos:** Introduced new AJD form and further standardized the JD process (including coordination).
 - ▶ Included 9 month public comment period.
 - ▶ 66,047 Comments received; revised guidance (2008).
 - ▶ DOJ, DOT, CEQ, OMB, and DOI reviewed 2007/2008 Guidance.
- **RGL 08-02:** Further defined difference between PJD and AJD and introduced PJD form.



Rivers and Streams



Tennessee River



Unnamed ephemeral stream



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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.



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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**.”



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OHWL Indicators

- Natural line on bank
- Changes in soil
- Presence of litter, debris
- Veg. matted down, bent, absent
- Sediment sorting
- Leaf litter disturbed or washed away
- Multiple observed flows
- Bed and banks



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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

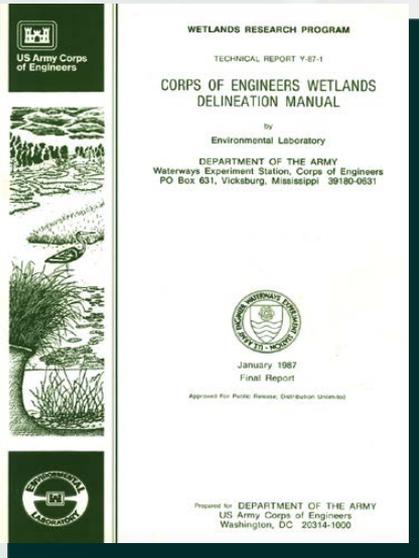


Wetlands

- Hydrology
- Hydrophytic Vegetation
- Hydric Soils

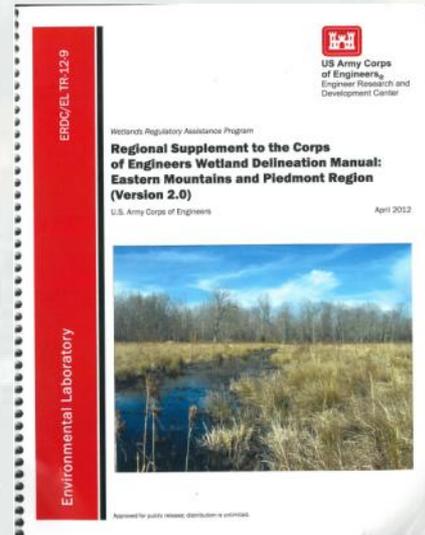
“Areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”





Wetlands

- 1987 Wetland Delineation Manual
- Regional Supplements



Jurisdictional Determinations:

PJD vs. AJD

Preliminary JD	Approved JD
<ul style="list-style-type: none"> • Indication that a feature may be jurisdictional (404 or 404/10) 	<ul style="list-style-type: none"> • Definitive determination that a feature is, or is not jurisdictional
<ul style="list-style-type: none"> • Used by applicant to expedite JD process 	<ul style="list-style-type: none"> • Used to resolve jurisdiction issues
<ul style="list-style-type: none"> • All features, including those that would otherwise not be jurisdictional, are treated as jurisdictional. 	<ul style="list-style-type: none"> • Jurisdiction asserted only on features identified as WoUS/Navigable WoUS
<ul style="list-style-type: none"> • No EPA coordination 	<ul style="list-style-type: none"> • EPA coordination in certain circumstances
<ul style="list-style-type: none"> • Are not posted on district web site 	<ul style="list-style-type: none"> • Must be posted on web site for life of AJD
<ul style="list-style-type: none"> • Do not expire (but applicant/project specific) 	<ul style="list-style-type: none"> • Typically expire after 5 years
<ul style="list-style-type: none"> • Are not appealable 	<ul style="list-style-type: none"> • Are immediately appealable



Request for a Jurisdictional Determination Worksheet

Appendix I
Nashville District Request for a Jurisdictional Determination Worksheet

February 2016

This format can be used when you want to determine if areas on your property fall under regulatory requirements of the U.S. Army Corps of Engineers (USACE). Please supply the following information and supporting documents described below. This worksheet can be filled out online and then printed. **It must be signed by the property owner** to be considered a formal request. We require original signatures; faxes are not acceptable. Submitting this request authorizes the USACE to field inspect the property site, if necessary, to help in the determination process. The USACE may also request a delineation of water resources on a property to be submitted. The printed worksheet and supporting documents should be mailed to:

U.S. Army Corps of Engineers
Nashville District 3701 Bell Road
Nashville, TN 37214
Phone: (615) 369-7500

1. Property Owner Contact Information:

Name:			
Mailing address:			
Work phone:	Home phone:	Email:	Fax:

2. Owner Representative Contact Information:

Name:			
Mailing address:			
Work phone:	Home phone:	Email:	Fax:

3. Subject Property Information
Address (street address, city, county):

Waterbody(s):

1/4 Section:	Section:	Township:	Range:
Latitude & Longitude in decimal degrees (NAD83):			

The subject property is: (check as many as applicable)

cleared (if checked, how long?) wooded pasture agricultural field

The water resources on the subject property include: (check as many as applicable)

<input type="checkbox"/> Streams	How many?	Estimated lengths
<input type="checkbox"/> Ponds	How many?	Estimated acres
<input type="checkbox"/> Wetlands	How many?	Estimated acres
<input type="checkbox"/> Other Water Resources (ditches, swales, etc.)		How many?

Components of a Complete Waters of the U.S. Delineation Report – Appendix I – Nashville District Request for a Jurisdictional Determination Worksheet

-2-

Is the property in an incorporated area? Yes or No
If it is in an incorporated area, please provide the name of the city/town

Is the property subject to a conservation easement or deed restriction? Yes or No

Was the property used as mitigation for a previously permitted project by the USACE? Yes or No

Is the property adjacent a project previously permitted by the USACE? Yes or No or Unknown

For the previous 3 questions, where answered Yes, please explain and provide the name of the project, permit number, permittee name, or permitted property address, if available:

MAPS: Please provide a map or plat (aerial photo, city or county map, soil survey photo, USGS Quad map, etc.) that accurately identifies the physical boundaries of the property. If the property is farmland, it may be necessary for you to contact the Natural Resources Conservation Service for a wetland delineation before you can request a jurisdictional determination.

If you are considering doing work on the property, please identify on a map or in a separate drawing the footprint, location, type of potential work, and water resources. This information will assist us in the determination process and reduce unnecessary delays of processing subsequent permits, if required.

OPTIONAL DOCUMENTATION: Photographs can greatly assist in the review process and often make a field visit unnecessary. We must see complete coverage of the property and/or the water resource in question, including the grass and trees.

If the property and/or the water resource in question are to be surveyed or delineated, we suggest waiting for the survey or delineation to be completed and include a copy with your request. Any other data you can include may help, such as land use or cropping history for the past five years, drainage improvements, etc.

PROCEDURE: We will review all available data within our office and attempt to provide a quick, accurate response to your request. Many determinations require a field site visit, which always takes more time to complete.

Signature of Owner _____ Date _____

Disclaimer: The information requirement for a jurisdictional determination as presented in this worksheet is not an exhaustive list. The U.S. Army Corps of Engineers may request additional information not described in this request worksheet.

Components of a Complete Waters of the U.S. Delineation Report – Appendix I – Nashville District Request for a Jurisdictional Determination Worksheet

*Soon to be published on Regulatory webpage.



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))



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



Mitigation Banking in the Nashville District

12 Active Public Banks

Tennessee - 8

6 Wetland, 1 Stream,
1 Wetland/Stream

Alabama - 3

1 Wetland
2 Wetland/Stream

Kentucky – 1 (Wetland)



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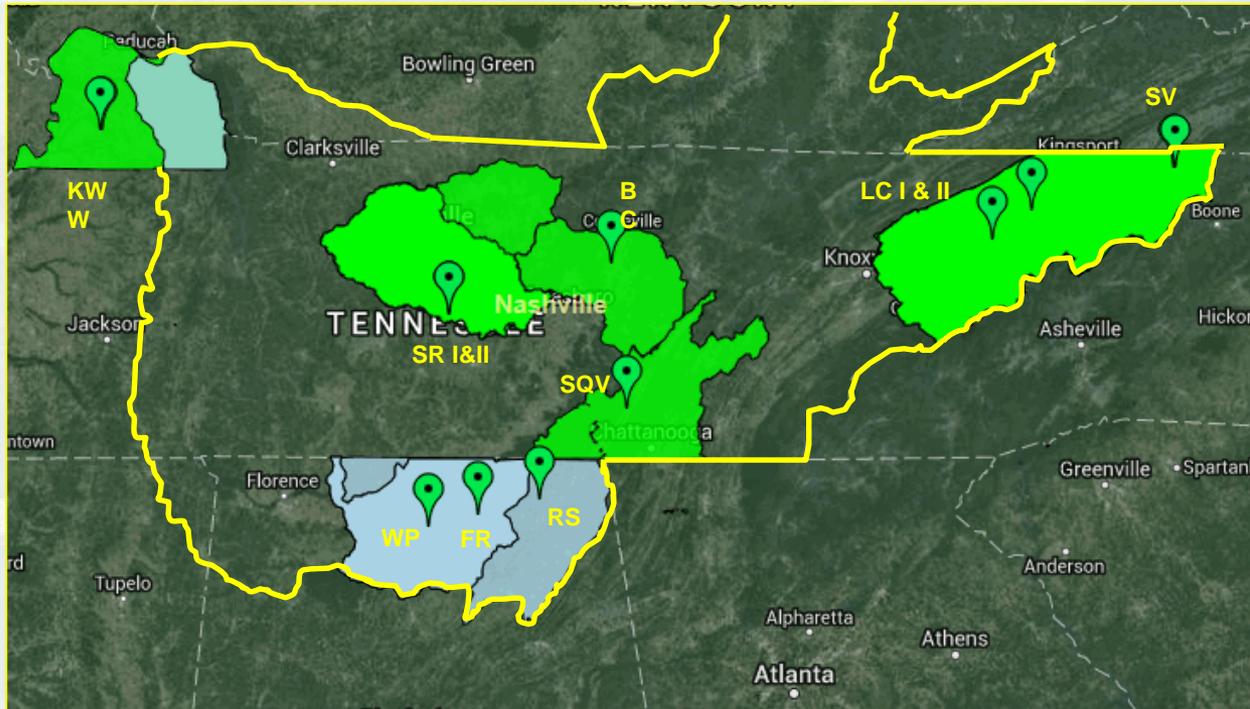
Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS)

<https://ribits.usace.army.mil>

Due to the high demand for compensatory mitigation credits, and changes in bank and in-lieu fee credit availability please check RIBITS or contact the Corps for up-to-date credit availability within existing banks and ILF programs.



Active Service Areas for Wetland Mitigation Banks in LRN



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Service Areas for Approved Stream Mitigation Banks in LRN



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Development of Mitigation Guidance Documents

- Standard Operating Procedures for review of Proposed ILF Mitigation Sites
- Draft Prospectus Guidance for Stream Mitigation Banks or ILF Projects
- Draft Prospectus Guidance for Wetland Mitigation Banks or ILF Projects
- Permittee-Responsible Mitigation Guidance
- Performance Standards and Monitoring for Stream and Wetland Compensatory Mitigation
- Mitigation Banking Instrument Template



June 2016 Corps/EPA/TDEC Mitigation Workshop

- Public Notice
 - Announcement of Stream and Wetland Compensatory Mitigation Credit Availability in the Nashville District
 - Upcoming regulatory workshop
 - Potential topics include:
 - TDEC and Corps regulatory authority
 - Jurisdictional determinations
 - 2004 Stream Mitigation Guidelines for the State of Tennessee
 - 2008 Mitigation Rule
 - Compensatory mitigation guidance



2017 Nationwide Permit Reauthorization



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What are Nationwide Permits?

- General permits issued by Corps Headquarters to authorize activities across the country
 - ▶ Categories of activities with no more than minimal individual and cumulative adverse environmental effects
 - ▶ Reissuance process every 5 years
 - ▶ Rulemaking activity, with interagency review under EO 12866
- Authorize ~35,000 activities per year (reported) plus ~30,000 non-reporting activities
- Current nationwide permits issued on February 13, 2012
 - ▶ 50 nationwide permits
 - 31 general conditions



Regional Tailoring of Nationwide Permit Program

- Division engineers have the authority to modify, suspend, or revoke Nationwide Permits within a region
 - ▶ Corps district, state, county, or other geographic area
 - ▶ Regional conditions to further restrict use of Nationwide Permits
 - ▶ Prohibit use of one or more Nationwide Permits in a region
- District engineers have the authority to modify, suspend or revoke Nationwide Permits on a activity-specific basis
 - ▶ Regional conditions restricting use of Nationwide Permit
 - ▶ Prohibit the use of a Nationwide Permit to authorize a specific activity



Examples of Regional Conditions

- Restricting the types of waters of the United States in which the NWP may be used (e.g., fens, bogs)
- Revoking certain NWPs in a watershed or other type of geographic area (e.g., a state or county).
- Modify pre-construction notification (PCN) requirements to NWPs to require notification for all activities or lowering PCN thresholds.
- Reducing NWP acreage limits in certain types of waters, or in specific geographic regions.
- Restricting activities authorized by NWPs to certain times of the year in a particular waterbody, to minimize the adverse effects of those activities on fish or shellfish spawning, or other ecologically cyclical events



Current Status

- 2012 NWP's expire on March 18, 2017
- Rulemaking process to issue NWP's
 - ▶ Approximately one-year process
- Draft proposed NWP's under interagency review process managed by the Office of Management and Budget
 - ▶ Executive Order 12866, Regulatory Planning and Review
 - ▶ Agency Headquarters review draft and provide their views before proposed rule is released to all interested parties for comment



2017 NWP Reauthorization Schedule

- December 2015 – Draft proposed NWPs submitted to OMB for interagency review
- April 2016 – Publish proposed NWPs in Federal Register
 - ▶ 60-day public comment period
 - ▶ 45-day district public notices to solicit comments on regional conditions for 2017 NWPs
 - Districts make initial request for water quality certification
- June to August 2016 – Corps reviews comments and prepares draft final NWPs
 - ▶ Districts continue consulting on regional conditions
- September 2016 – Corps submits draft final NWPs to OMB for interagency review

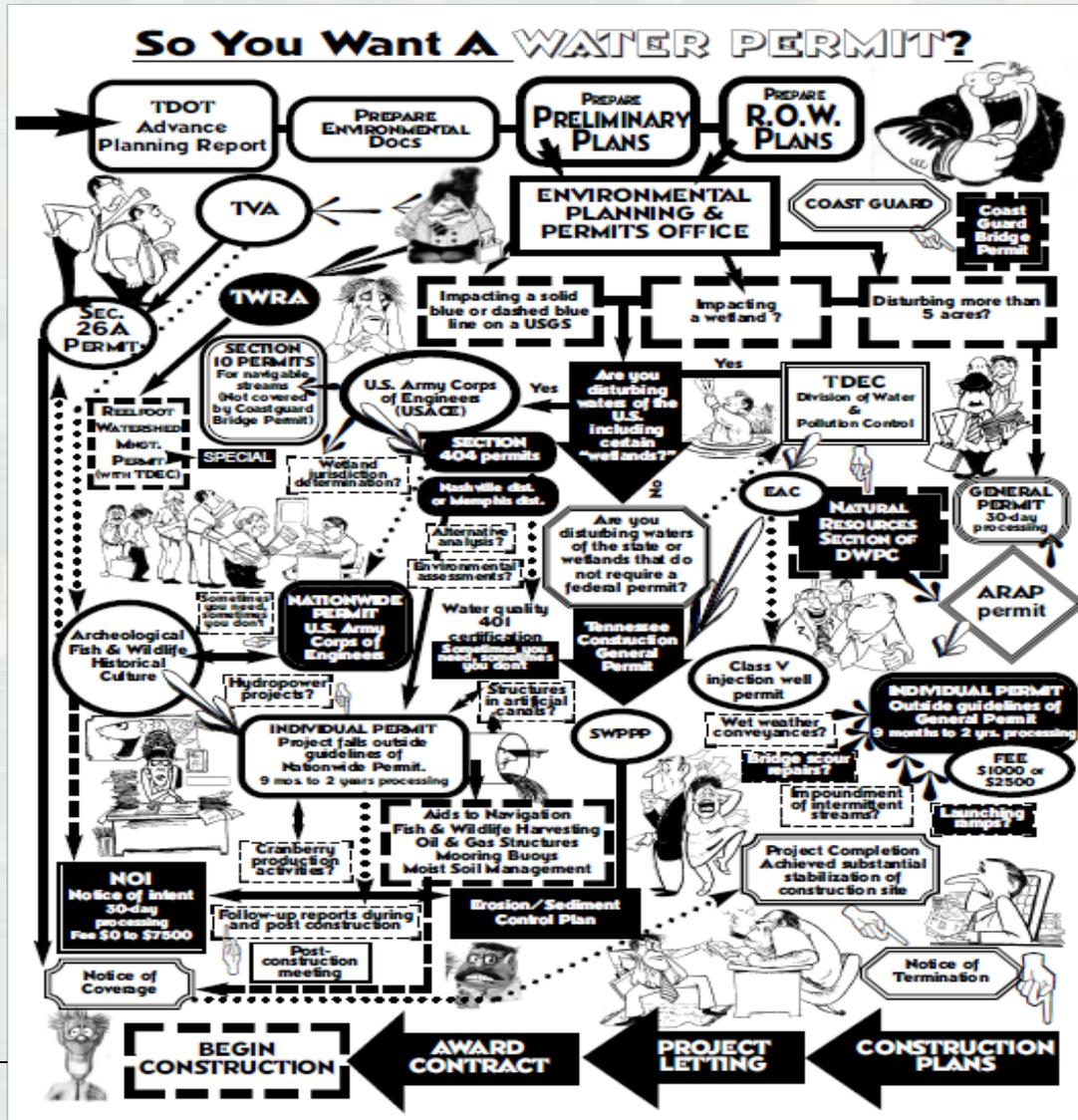


2017 NWP Reauthorization Schedule

- December 2016 – Corps publishes final NWPs in Federal Register, to begin:
 - ▶ Final water quality certification
 - ▶ Final Coastal Zone Management Act consistency determinations
 - ▶ Districts and divisions finalizing their regional conditions
- March 18, 2017 – 2012 NWPs expire
- March 19, 2017 – NWPs go into effect



Questions?



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