



NAVIGATING THE U.S. ARMY CORPS OF ENGINEERS PERMIT PROGRAM

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OVERVIEW/AGENDA

- Jurisdiction
- Public Interest Review
- 404(b)(1) Guidelines
- Permit Processing
- Mitigation
- Administrative Appeals
- Practical Considerations
- Questions



JURISDICTION

- Section 10 of the Rivers and Harbors Act of 1899 – Regulates structures and work in Navigable Waters of the United States
- Section 404 of the Clean Water Act – Regulates the discharge of dredged and/or fill material into waters of the United States
- Section 103 of the Marine Protection, Research, and Sanctuaries Act – Regulates the ocean disposal of dredged material.



- Navigable Waters of the United States
 - Subject to ebb and flow of the tide, and/or
 - presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
- Structures and/or work in or affecting navigable waters of the United States.
 - Dredging
 - Docks, piers, boat lifts
- Navigability Determinations

SECTION 10 RIVERS AND HARBORS ACT



SECTION 404 OF THE CLEAN WATER ACT – ACTIVITY JURISDICTION

- Regulates the Discharge of Dredged and/or Fill Material
- Discharge
- Dredged Material
 - Any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States.
 - Incidental fallback - Any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States
- Fill Material – material placed in waters of the United States where the material has the effect of:
 - Replacing any portion of a water of the United States with dry land; or
 - Changing the bottom elevation of any portion of a water of the United States.



- Florida follows pre-2015 regulatory regime.
- Waters of the United States – Definition
 - All waters which are currently used, or 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;
 - All interstate waters including interstate wetlands;
 - All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - Which are used or could be used for industrial purposes by industries in interstate commerce;
 - All impoundments of waters otherwise defined as waters of the United States under this definition;
 - Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
 - The territorial sea;
 - Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section.

SECTION 404 OF THE CLEAN WATER ACT – GEOGRAPHIC JURISDICTION



U.S. SUPREME COURT DECISIONS - *SACKETT AND RAPANOS*

- In *Rapanos*, the plurality found that Clean Water Act jurisdiction includes “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers and lakes.’”
- Includes traditionally navigable waters. Also includes their relatively permanent non-navigable tributaries.
- Court also noted that it may include “streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought” as well as “seasonal rivers, which contain continuous flow during some months of the year but not flow during dry months.”



U.S. SUPREME COURT DECISIONS - SACKETT AND RAPANOS

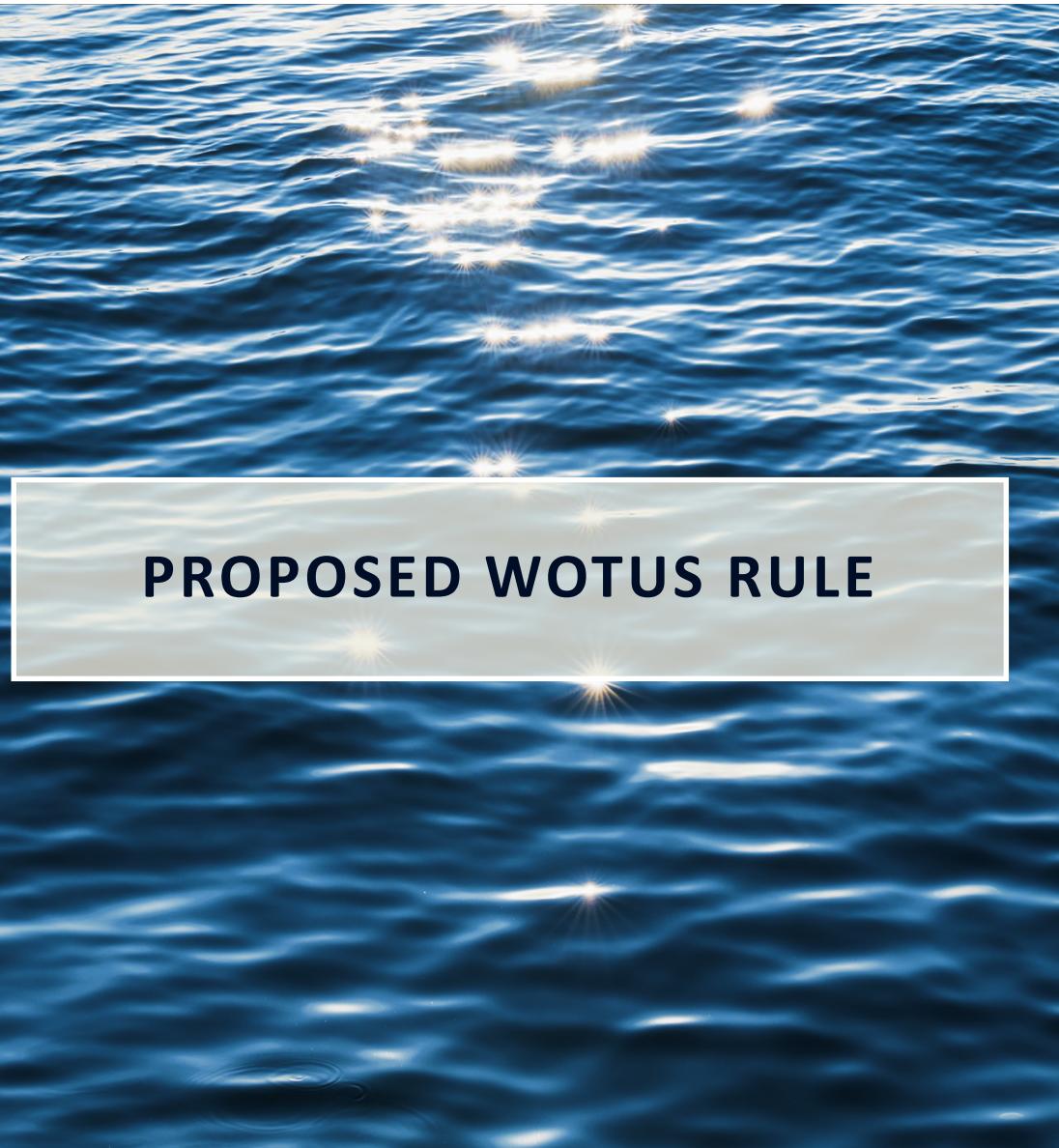
- *Sackett* Court's majority opinion adopted and expanded upon the “*Scalia test*” from *Rapanos*, and provided the following test to determine when the Corps can assert jurisdiction over an adjacent wetland under CWA:
 - The adjacent body of water constitutes “waters of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters).
 - The wetland must have a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins. Clean Water Act jurisdiction only covers those wetlands that are “as a practical matter indistinguishable from waters of the United States.”



WOTUS POST-SACKETT AGENCY ACTIONS

- Court's ruling in *Sackett* significantly narrowed scope of WOTUS. Following the *Sackett* decision, the Corps and EPA issued a final rule to amend the 2023 WOTUS Rule and conform the definition of WOTUS to the decision in *Sackett*.
- Final rule, the 2023 Conforming Rule, was published in the *Federal Register* on September 8, 2023, and went into effect the same day. Note: FL follows the pre-2015 definition interpreted consistent with *Sackett*.
- In March 2025, the Corps and EPA issued a guidance memorandum concerning the term “continuous surface connection” which rescinds the preamble language in the January 2023 WOTUS rule that wetlands have a continuous surface connection “if the wetlands are connected to these waters by a discrete feature like a non-jurisdictional ditch, swale, pipe or culvert.”
- The agencies published a proposed updated WOTUS definition on November 17, 2025.





- Explains that ephemeral waters (i.e., those with surface water flowing or standing only in direct response to precipitation) are not relatively permanent and therefore are not jurisdictional.
- Defines “relatively permanent” to mean “standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season.”
- Provides a new definition of “tributary” and states that jurisdictional tributaries must connect to traditional navigable waters either directly or through other features (e.g., a culvert) that convey permanent flow.



PROPOSED WOTUS RULE

- Adds a definition for “continuous surface connection” that requires wetlands to have “surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water” creating a two-part test that requires (i) abutment of a jurisdictional water, and (ii) surface water at least in the wet season. EPA and USACE note that, under this proposed definition, “culverts do not inherently sever the continuous surface connection when the culvert serves to extend the relatively permanent water.”
- Agencies seeking comments on this approach, as well as approach that would require perennial surface waters be present.





- Proposes a change to the ditch exclusion, which would exclude from the definition of WOTUS all ditches, including roadside ditches, that are constructed or excavated entirely in dry land, even if those ditches have relatively permanent flow and connect to jurisdictional waters.
- This would not include ditches which are subject to the ebb and flow of the tide or ditches that are navigable-in-fact. For example, certain canals would still be jurisdictional.





PUBLIC INTEREST REVIEW – 33 C.F.R. § 320.4

- Based on evaluation of impacts and its intended use on the public interest.
- Balancing test. Evaluation of the reasonably expected benefits with the foreseeable detriments. Requires careful weighing of all relevant factors.
- Mitigation may be required as a condition to authorization to address adverse impacts identified in public interest review. See 33 C.F.R. 320.4(r).
- Permit will be granted unless determination is made that project is contrary to the public interest.
 - All projects that do not satisfy the 404(b)(1) Guidelines are contrary to the public interest.
 - Decision reflects the national concern for both protection and utilization of important resources.



**PUBLIC
INTEREST
REVIEW
FACTORS – 33
C.F.R. § 320.4**

- **Factors to Consider:**

- 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
- Considerations of Property Ownership
- The needs and welfare of the people



CWA 404(B)(1) GUIDELINES

- The Guidelines mandate that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” 40 C.F.R. 230.10(a).
- The Guidelines also bar the Corps from permitting “discharges or dredged or fill material...which will cause or contribute to significant degradation of the water of the United States.” 40 C.F.R. 230.10(c).



SECTION 404(B)(1) GUIDELINES

Alternatives are considered “practicable” when they are “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose.”

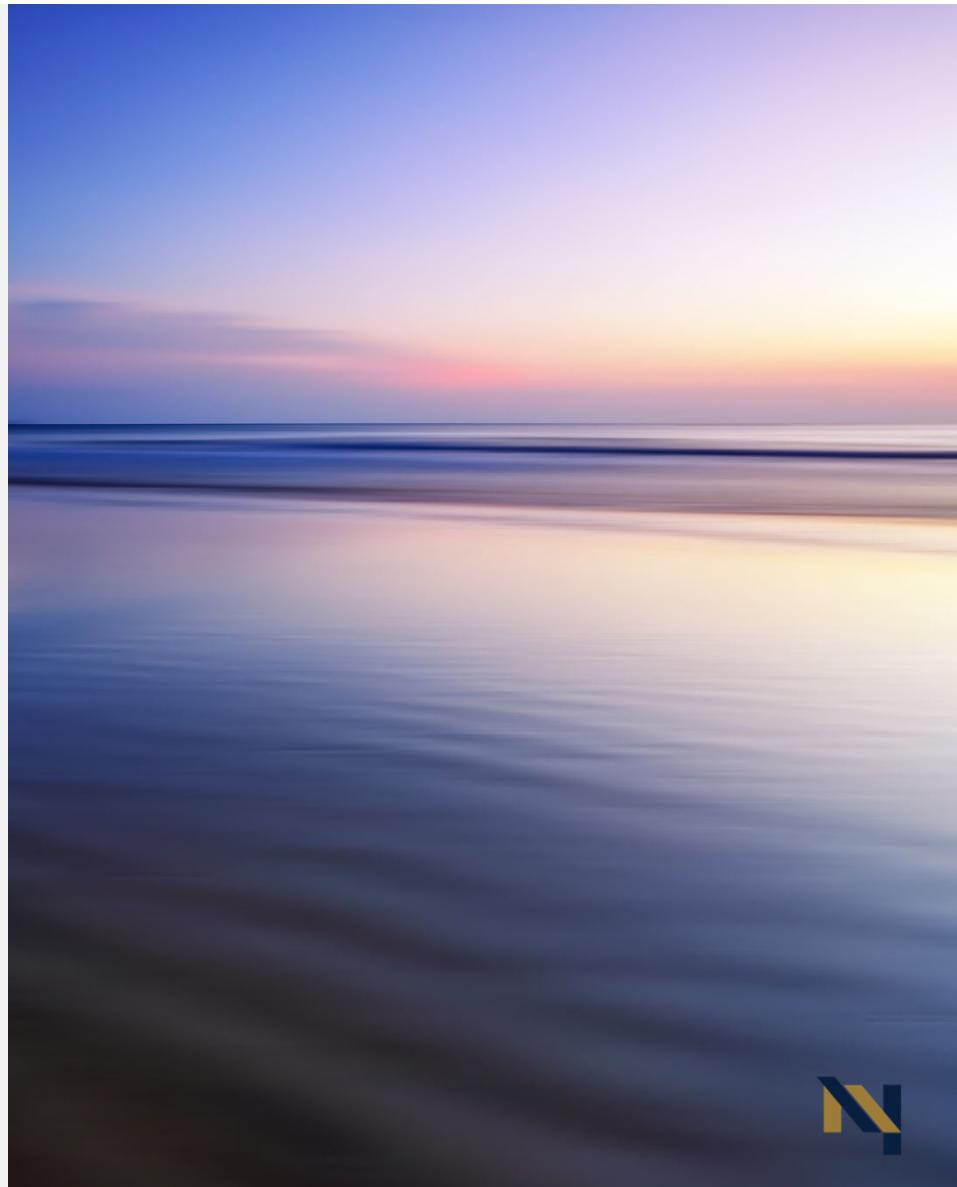
Where a project “is not water dependent” there is a presumption that there are “practicable alternatives that do not involve special aquatic sites” and that “have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.” The applicant bears the burden of rebutting this presumption.

Ultimately, the Corps may only permit the least environmentally damaging practicable alternative (LEDPA).



SECTION 404(B)(1) GUIDELINES

- Basic Project Purpose. Two Step Process:
 - Corps defines basic project purpose
 - Determines whether project is “water dependent.” Water dependent = requires access or proximity to, or a location on, water in order to fulfill basic purpose.
- Corps identifies overall project purpose. This is used to determine range of alternatives and whether alternative is practicable.





General Permits:
Nationwide Permits,
Regional General Permits,
State Programmatic
General Permit



Individual Permits:
Standard Individual Permit
and Letter of Permission

USACE PERMIT TYPES



NATIONWIDE PERMITS



Issued at the national level; apply across the U.S. Each division issues regional conditions.



Cover common activities (e.g., minor discharges, utility lines, bank stabilization).



Requires compliance with general conditions and regional conditions; some require a pre-construction notification.



Valid for 5 years. New round of reissued NWPs coming soon.





GENERAL PERMITS

- Regional General Permits (RGPs): Issued by Corps Districts for specific activities common within their geographic region.
- Programmatic General Permits: Work in conjunction with another agency's regulatory program (state, local). Designed to minimize duplication when a parallel permitting process already exists.



STANDARD INDIVIDUAL PERMITS

- Required for activities with more than minimal impacts or that do not qualify for a general permit.
- Require public notice, agency coordination, environmental review (NEPA, ESA, NHPA) and development of project specific decision documents.



LETTERS OF PERMISSION



A streamlined form of individual permit.



Section 404: (1) district proposes categories of activities potentially subject to LOP procedures, (2) issues public notice seeking comments, and (3) receives a 401 WQC and CZMA concurrence (programmatic or individual).



Section 10: used for activities that are minor, non-controversial, and with negligible impacts.



Does not require a full public notice - only coordination with federal and state agencies and affected tribes.





STANDARD INDIVIDUAL PERMIT PROCEDURES

- Pre-application meeting: applicant may request a pre-app meeting to discuss scope, data needs, likely requirements. (Optional but recommended).
- Submit application using ENG form.
- Initial completeness review. District reviews for completeness. If incomplete, district will request additional info.
- Corps logs the application in and assigns permit number.
- Public notice and solicitation of comments.
- Interagency coordination/consultations.
- Technical review and evaluation.
- Public interest review.
- Mitigation and development of permit conditions.
- Drafting decision document. Higher level reviews.
- Decision, proffered permit, public notice.



COMPENSATORY MITIGATION

- 33 C.F.R. Part 332 establishes the general framework for compensatory mitigation requirements to offset unavoidable impacts to aquatic resources.
- Establishes sequencing: avoid > minimize > compensate. Compensation used only for unavoidable impacts.
- Provides requirements for a mitigation plan.
- Establishes hierarchy of mitigation preferences:
 - Mitigation Banks
 - In-Lieu Fee Programs
 - Permittee-Responsible Mitigation
 - On-site/in-kind preferred over off-site/out-of-kind



- Objectives: specific ecological goals and functions being replaced
- Site-selection
- Baseline information
- Functional Lift
- Work Plan
- Performance standards
- Site protection: real estate instrument to ensure long-term protection
- Financial assurances: bonds, LOCs, endowment
- Monitoring requirements
- Long-term management plan
- Adaptive management





Appealable Decisions: (1) Permit denials, (2) Proffered permits, and (3) approved jurisdictional determinations.



Filing an appeal: Use Request for Appeal (RFA) form. Appeals must be filed within 60 days to Division.



Requirements for a Valid Appeal: (1) Decision must be appealable, (2) appeal must be timely, (3) basis for appeal.



May request administrative hearing (rare).

ADMINISTRATIVE APPEALS





ADMIN APPEAL PROCESS

- Review Office (RO) does an initial review.
- District submits administrative record.
- Appeal meeting and site visit.
- RO recommendation.
- Division Engineer decision.
- Decision may be to uphold the district's decision or remand for further evaluation in accordance with Division Engineer's decision.



PRACTICAL CONSIDERATIONS

- Focus on jurisdiction
- Use pre-application meetings strategically
- Help build the administrative record
- After jurisdiction, mitigation
- Assist the Corps with interagency consultation/coordination
- Build relationships with Corps counsel

THANK YOU!

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